

**In the matter of the Energy Charter Treaty  
And in the matter of an arbitration seated in Stockholm, Sweden**

**SCC Arbitration V (2015/158)**

**CEF Energia B.V.**

**v.**

**The Italian Republic**

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**Award**

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**Tribunal**

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## **Definitions**

1. This award uses the following definitions (and further definitions are noted as necessary in the body of the Award):

*AAEG*: Authority for Electrical Energy and Gas (*Autorità per l'Energia Elettrica e il Gas*)

*Claimant*: CEF Energia B.V., Hoogoorddreef 15, 1101 BA, Amsterdam, The Netherlands

*Respondent*: Repubblica Italiana, Avvocatura Generale dello Stato, Via dei Portoghesi n. 12, 00186 Roma, Italy

*Parties*: Collectively Claimant and Respondent

*SCC Rules*: The Rules of Arbitration of the Arbitration Institute of the Stockholm Chamber of Commerce in force as from 2010

*SCC*: The Arbitration Institute of the Stockholm Chamber of Commerce

*Tribunal*: Prof. Dr. Klaus Sachs, appointed by Claimant (he submitted his confirmation of appointment to the SCC on 11 November 2015), Prof. Giorgio Sacerdoti, appointed by Respondent (he submitted his confirmation of appointment to the SCC on 12 February 2016), and Mr. Klaus Reichert, S.C., appointed by Messrs. Sachs and Sacerdoti as Presiding Arbitrator (he submitted his confirmation of appointment to the SCC on 1 April 2016)

*ECT*: the Energy Charter Treaty

*CJEU*: Court of Justice of the European Union

*Achmea*: Judgment, dated 6 March 2018, of the CJEU in Case C 284/16, *Slowakische Republik (Slovak Republic) v Achmea BV*

*Commission:* the European Commission

*Commission's Communication:* the Communication from the Commission to the European Parliament and the Council: Protection of intra-EU investment (COM(2018) 547/2) of 19 July 2018

*Blusun:* *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016

*GSE:* Gestore dei Servizi Energetici GSE S.p.A.

*ENEA:* Italian National Agency for New Technologies, Energy and Sustainable Economic Development

*PV:* Photovoltaic (electricity producers)

## **Introduction**

2. Incentive schemes put in place by Respondent to encourage investment in renewable energy supply lie at the heart of this arbitration. Claimant owns, in whole or in majority part, three Italian companies which operate photovoltaic plants in Italy, and alleges that certain changes Respondent made (directly and indirectly) to such incentive schemes engaged international responsibility as a matter of the ECT. Claimant further alleges that such international responsibility gives rise to the right on its part to compensation with the object of putting it into the position its investments would have been in had the changes to the incentive schemes not taken place. Apart from jurisdictional objections, Respondent also argues that the measures it took do not engage international responsibility on its part, and, further, Claimant's investments remained profitable notwithstanding the changes which were made to the incentive schemes. The Tribunal, if it has the jurisdiction to do so, resolves these disputes by this award.

### Procedural History

3. The following paragraphs set out the main steps which have occurred in this arbitration. This is not intended to be a comprehensive account of every occurrence in this arbitration.
4. On 20 November 2015, Claimant filed its Request for Arbitration (“RfA”) stating, at paragraph 2 thereof, that it was doing so pursuant to Article 26(4)(c) of the ECT and Article 2 of the SCC Rules.
5. On 18 January 2016, Respondent filed its Answer (“Answer”).
6. On 26 January 2016, Claimant wrote a letter in reply to Respondent’s Answer.
7. On 6 April 2016, the SCC referred this case to the Tribunal.
8. Following consultation with the Parties the Tribunal issued Procedural Order No. 1 on 14 June 2016 which, amongst other matters, established a timetable for the case.
9. On 14 October 2016, Claimant filed its Statement of Claim (“SoC”) together with accompanying exhibits, a witness statement of Scott Lawrence, expert reports from Antonio D’Atena, Richard Edwards, and a joint expert report from Drs. Boaz Moselle and Dora Grunwald.
10. On 9 January 2017, the Commission applied for leave to intervene as a non-disputing party. Following invitations to comment on this application, Claimant filed its response on 24 January 2017 and Respondent filed its position on 1 February 2017.
11. On 24 March 2017, Respondent filed its Statement of Defence (“SoD”) with accompanying exhibits, witness statements from Luca Miraglia and Daniele Bacchiocchi, an expert opinion of Giacomo Rojas Elgueta, an economic report of GRIF, and a financial report of GRIF.

12. On 31 March 2017, Claimant filed its objections to Respondent's requests for bifurcation and suspension.
13. On 7 April 2017, the Tribunal issued Procedural Order No. 2, which made the following rulings:

***Bifurcation and Suspension***

14. *Taking into account its present appreciation of the case, noting that this is a question of procedure, the Tribunal rules on bifurcation and suspension in the following paragraph.*
15. *Having considered the parties' respective submissions, the Tribunal refuses the Respondent's requests for bifurcation and/or suspension. The Tribunal will consider all matters raised in this arbitration at the one time in accordance with the procedural calendar as established in Procedural Order No. 1.*
16. *The parties are to note that the Tribunal's decision is one of procedure, taking into account the present circumstances of the case, and is not to be viewed or construed in any way by either side as indicating any position on any determinative matter or issue.*

***EU Commission Application***

17. *Taking into account its present appreciation of the case, noting that this is a question of procedure, the Tribunal rules on the EU Commission Application in the following paragraph.*
18. *Having considered the parties' respective submissions, the Tribunal permits the participation of the EU Commission on the following basis:*
  - (i) *The participation of the EU Commission in this arbitration is limited to one written submission (attaching only legal authorities, and no evidentiary materials) with no oral presentation or attendance at the hearing;*
  - (ii) *The EU Commission's written submission is to be submitted to the Tribunal, for subsequent circulation*

*to the parties, by no later than 1 June 2017;*

- (iii) The parties may make such written observations on the EU Commission's filing as they see fit thereafter in their respective substantive submissions due, respectively, on 26 July 2017 and 15 November 2017;*
- (iv) The EU Commission will have no access to the evidentiary record in this case; and*
- (v) The Tribunal will inform the EU Commission of its decision immediately after this Procedural Order is issued to the parties, but only to the extent of what has been decided.*

19. The Commission filed its written submission on 1 June 2017 ("Commission Submissions"). Claimant made written observations on 3 August 2017.
20. On 3 August 2017, Claimant filed its Reply ("Reply") together with accompanying exhibits, a second witness statement of Scott Lawrence, a second expert reports from Richard Edwards, and a second joint expert report from Drs. Boaz Moselle and Dora Grunwald.
21. On 20 November 2017, Respondent filed its Rejoinder ("Rejoinder") with accompanying exhibits, second witness statements from Luca Miraglia and Daniele Bacchiocchi, a second expert opinion of Giacomo Rojas Elgueta, and a second report of GRIF.
22. On 15 December 2017, Claimant indicated that it intended to cross-examine Mr. Daniele Bacchiocchi, Mr. Luca Miraglia, Professor Giacomo Rojas Elgueta, Professors Cesare Pozzi, Giuseppe Melis, Umberto Monarca, Ernesto Cassetta, and Davide Quaglione of GRIF

23. On 18 December 2017, Respondent indicated that it intended to cross-examine Mr. Scott Lawrence, Mr. Richard Edwards, Dr. Boaz Moselle and Dr. Dora Grunwald of FTI, and Prof. Antonio D'Atena.
24. On 9 February 2018, the Parties indicated to the Tribunal that they had agreed to add fourteen documents to the record of the case.
25. Following correspondence with, and assistance of the Tribunal, and having agreed to dispense with the necessity of a pre-hearing conference call, on 13 February 2018 the Parties agreed their hearing schedule.
26. On 19, 20, 21, and 22 February 2018, the hearing took place in Paris in accordance with the agreed hearing schedule. The Parties submitted both opening and closing PowerPoint presentations. Each day the Parties confirmed, by email, the list of their participants. Finally, on 21 February 2018, the Tribunal gave the Parties a list of questions for the purposes of the following day's oral closing submissions.
27. At the conclusion of the hearing the following exchange took place<sup>1</sup>:

*7 THE PRESIDENT: Now, here's a question that I personally  
8 like to ask. We established -- and you very kindly  
9 established between yourselves -- the timetable for this  
10 case in Procedural Order No. 1. I just want to have it  
11 confirmed that the parties followed that timetable, with  
12 the various adjustments along the way; but the timetable  
13 of proceedings that you established, that you followed  
14 it, and we've got here today in accordance with that  
15 timetable.  
16 MR SMITH: So confirmed from the Claimant.  
17 MR AIELLO: The same for us*

28. On 25 February 2018, the Tribunal wrote to the Parties as follows:

*The Tribunal again thanks Counsel and the Parties for their kind co-operation, efficiency, and courtesy during our hearing.*

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<sup>1</sup> Transcript, Day 4, p. 239



*Having considered the matter, the Tribunal invites the following written observations:*

*(a) on the consequences, if any, of the outcome of the forthcoming ECJ judgment [Achmea] – we suggest that this be done and exchanged within 14 days of the judgment.*

*(b) At the same time as the Claimant makes its observations on the forthcoming ECJ judgment, it should also set out its position on the passages of the Clifford Chance Due Diligence Report which were relied upon during the closing submissions of the Respondent.*

*Upon receipt of these written observations, the Tribunal may issue further invitations (depending on their contents).*

29. On 21 March 2018, the Parties submitted their post-hearing briefs.

30. On 23 March 2018, the Tribunal wrote to the Parties as follows:

*The Tribunal has reviewed the recent submissions and, first, refers to paragraph 10 of the brief of the Respondent, in particular:*

*The consequence of that incompatibility with EU law is that the offer for arbitration becomes inapplicable.*

*We invite the Respondent to elaborate on this submission, including on how and when this happened.*

*Secondly, upon receipt of this further elaboration from the Respondent, we would then invite the parties to reply generally to the submission of the other.*

31. On 6 April 2014, the Parties indicated to the Tribunal that they had agreed a timetable for the subsequent submissions as follows:

*- Respondent shall articulate on its sentence "the consequences of that incompatibility with EU law is that...", as requested, by Friday 13 April.*

*- Both Parties shall then reply generally to the submission of the other by Friday 4 May.*

32. On 13 April 2018, the Respondent filed its further Note on the consequences of *Achmea*.

33. On 4 May 2018, the Parties filed their respective further submissions.

34. On 1 June 2018, the Claimant applied to have admitted to the record of this arbitration the award rendered on 16 May 2018 in *Masdar Solar & Wind Cooperatief U.A. v. Spain* (“*Masdar*”) along with a proposal that each side be permitted to make a submission on that award. The claim in *Masdar* was brought against Spain pursuant to the ECT.
35. On 15 June 2018, the Parties confirmed that they had agreed to simultaneous submissions on *Masdar* to be filed on 6 July 2018. The Parties also confirmed that they would file costs submissions on 6 July 2018 with a subsequent opportunity for comment on 13 July 2018.
36. On 26 June 2018, the SCC extended the deadline for rendering this award to 28 September 2018.
37. On 6 July 2018, the Claimant filed its costs submissions. On the same day, the Parties each filed submissions on *Masdar* with the SCC for subsequent exchange.
38. On 11 July 2018, the Tribunal indicated to the Parties that the cut-off date for any further observations on or provision of new awards (if arising) for the record of this arbitration was 20 July 2018.
39. On 20 July 2018, the Parties each submitted comments on the awards *Antin Infrastructures et alt. v. Kingdom of Spain* (15 June 2018)(“*Antin*”) and *Antaris GmbH & Michael Goede v The Czech Republic* (2 May 2018)(“*Antaris*”).
40. On 24 July 2018, the Respondent applied to introduce to the record of this arbitration the Commission’s Communication on the protection of intra-EU investments of 19 July 2018. This was followed on 26 July 2018, by Claimant’s objection to the Respondent’s application.
41. On 29 July 2018, the Tribunal wrote to the Parties as follows:

*The EU communication is admitted to the record.*

*The Tribunal understands the record of this arbitration to be now closed and complete.*

42. On 3 August 2018, the Respondent wrote to the Tribunal to request permission to submit press articles concerning a putative sale by the Claimant of certain of its investments.

43. On 7 August 2018, the Tribunal wrote to the Parties as follows:

*The Respondent's letter suggests that there may be matters which might be required to be brought to our attention concerning the quantum of the claims.*

*We have considered the matter and we do not wish to have such press reports on the evidential record of the case. Our preference is that we ask the parties to now liaise on this putative issue, without copying us, and if, in that process it emerges that there are matters which we do need to see then we ask that these be brought to our attention as soon as possible. Please note that the Tribunal has deliberated, the award is in preparation, and, therefore, what we are now proposing is not a reopening of the case but confined only to the possibility of something of importance for the purposes of the quantum of the claims being brought to our attention.*

44. On 10 September 2018, the Respondent applied to reopen the proceedings pursuant to Article 34 of the SCC Rules.

45. On 19 September 2018, the Claimant submitted its opposition to the Respondent's application to reopen the proceedings.

46. On 21 September 2018, the SCC extended the deadline for rendering this award to 28 December 2018.

47. On 10 October 2018, the Respondent submitted its reply to the Claimant's opposition to the application to reopen the proceedings.

48. By Procedural Order No. 3 of 15 October 2018, the Tribunal refused the Respondent's application to reopen the proceedings.

49. On 17 December 2018, the SCC extended the deadline for rendering this award to 21 January 2019.

**Prayers for Relief advanced by the Parties – Sequence of Issues**

50. The Tribunal now records the Prayers for Relief, in their latest iteration, advanced by the Parties in this case.

51. At paragraph 446 of the Reply the following relief is sought:

- *a declaration that the Tribunal has jurisdiction over this dispute;*
- *a declaration that Italy has violated the Energy Charter Treaty and international law with respect to Claimant's investments;*
- *compensation to Claimant for all damages it has suffered, as set forth in Claimant's submissions and as may be further developed and quantified in the course of this proceeding;*
- *all costs of this proceeding, including (but not limited to) Claimant's attorneys' fees and expenses, the fees and expenses of Claimant's experts, and the fees and expenses of the Tribunal and the SCC;*
- *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*
- *any other relief the Tribunal deems just and proper.*

52. At paragraphs 480-483 of the Rejoinder the following relief is sought:

*480. In the light of the above, the Respondent reiterates its requests to the Tribunal to:*

- *Decline jurisdiction to decide, as the ECT does not cover intra-EU disputes.*
- *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 Conventions bans this Tribunal from judging under the umbrella clause.*

*- In a further alternative, decline admissibility of protection of the Claimant's alleged interests since these are barred from seeking relief, as they did not seek amicable solution for a number of claims.*

*481. 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 Claimant's investment.*

*- the Respondent did not violate Article 10(1) ECT, fourth sentence, either, since it always adopted reasonable and non-discriminatory measures to affect Claimant's 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.*

*482. In the unfortunate event that the Tribunal were to recognize legitimacy to one of the Claimant's grieves:*

*- Declare that damages were not adequately proved.*

*- In addition, declare that both the methods for calculation and calculation itself of damages proposed by the Claimant are inappropriate and erroneous.*

*- Order the Claimant to pay the expenses incurred by the Italian Republic in connection with these proceedings, including professional fees and disbursements, and to pay the fees and expenses of the Members of the Tribunal and the charges for the use of the facilities of the SSC, in accordance with Articles 43 and 44 of SCC 2010 Arbitration Rules.*

*483. The Respondent reserves the right to amend and modify its evaluations on relief and to refine its position in the course of the arbitration.*

53. It is immediately apparent from the respective Prayers for Relief advanced by the Parties that a threshold issue of jurisdiction arises in this case, namely, whether or not the ECT can give rise to an "intra-

EU” arbitration. By the phrase “intra-EU” arbitration the Tribunal means the issue as to whether the Tribunal lacks jurisdiction because either Article 26 ECT is inapplicable to disputes between an investor from a EU member State and another EU member State, or because EU law subsequent to the ECT has deprived tribunals established under Article 26 ECT from their jurisdiction to hear such disputes. If the answer to that threshold issue is that the Tribunal lacks jurisdiction then there is no need for further analysis and the case ends. Thus, the Tribunal will analyze that issue first. It is uncontroversial to say that this issue does not require an examination of the underlying facts of this case, but rather it is a matter of legal analysis as to whether or not on 20 November 2015 (the date of the RfA) there was a valid offer on the part of Respondent to arbitrate disputes arising from the ECT.

54. If, on the other hand, the “intra EU” issue is resolved against Respondent, then there would also remain for analysis the other jurisdictional and admissibility objections advanced by it. These are articulated, in outline, in Respondent’s alternative jurisdictional prayers for relief recorded above. In the Tribunal’s view, given their nature they fall for consideration not isolated from the facts but as part of the overall analysis of the merits of the case.
55. Thus, if the Tribunal goes beyond the threshold issue of “intra-EU” jurisdiction, it will engage in an analysis of the facts, the merits on liability (at which time Respondent’s other jurisdictional and admissibility objections will be analyzed), and, ultimately, if necessary, the merits on quantum.
56. The Tribunal considers, in its procedural appreciation of the file of this case, to be the most efficient way to arrange this award.

## **Jurisdiction – Intra EU**

### *Introduction – the relevant provision in the ECT*

57. The Tribunal, first, notes the following provision in the ECT (in relevant extract):

*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 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).*

*(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:*

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

.....

*(6) A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.*

58. The overarching question concerning jurisdiction is whether or not, on the date of the RfA (20 November 2015), Article 26 of the ECT was in force as regards Respondent. Claimant says yes, and Respondent says no (as indeed does the Commission). If it was in force as regards Respondent, the RfA consummated an international agreement to arbitrate by which the Tribunal was established to decide the issues in dispute. If it was not in force on that date, the case comes to an end as the Tribunal would have no jurisdiction. The Tribunal now proceeds to resolve that issue.
59. By way of introductory observation to the intra-EU jurisdictional analysis, the Tribunal will arrange this issue broadly into two parts. First, there is the position advocated by Respondent (and also advocated by the Commission) from the outset to the effect, in general, that as a matter of treaty interpretation the ECT was not intended to cover intra-EU disputes (namely, a dispute between an investor from a member state and another member state); or, treaties between member states subsequent to the ECT have had the effect of superseding it. This is the main thrust of Respondent's (and the Commission's) position on jurisdiction. Secondly, a narrower question, but one to which great importance was attached by Respondent, took centre-stage after the hearing, namely the consequences, if any, of *Achmea*.

#### *Jurisdiction challenge pre-Achmea*

60. Prior to *Achmea* Respondent's jurisdictional objection was articulated thus in summary (para. 10, SoD):



*....the ECT does not cover intra-European Union ("EU", or the "Union") disputes: this was not the intention of the signing parties, nor such interpretation would be compatible with a combined reading of the ECT and the EU Treaties as currently in force. Lack of jurisdiction under this ground would require dismissal of the dispute in its entirety.*

61. The views, in broadly similar terms, but to an identical outcome, contained in the Commission Submissions were summarised as follows (para. 8):

*This brief is organised into four sections. After the present introduction (Section 1.), the Commission will show, first, that the interpretation of Article 26 ECT leads to the conclusion that the offer for entering into arbitration made by Italy is limited to investors from contracting parties other than EU Member States and did not create any international obligations between EU Member States inter se (Section 2.). It will, then, second, set out that if Article 26 ECT were to be interpreted in the opposite manner, i.e. as entailing an offer also to EU investors, that that would constitute a violation of the Treaty on Functioning of European Union ("TFEU") and that there would be conflict between two international treaties which both are part of the law applicable by your Tribunal, namely the ECT and the TFEU. Said conflict would have to be resolved, in any case, in favour of the TFEU, either via interpretation on the basis of context ("harmonious interpretation" or "systemic integration") or via the applicable rules of conflict of laws (Section 3.) On the basis of these assessments, the Commission will, finally, suggest a course of action to your Tribunal that involves three options for proceeding with the present dispute: First, declare that your Tribunal lacks the competence to hear the case. Second, suspend the proceeding pending the preliminary ruling of the ECJ in *Achmea v Slovakia*, which is expected to decide on the compatibility of intra-EU Investor-State Dispute Settlement ("ISDS") with Union law Third and finally, should your Tribunal consider that it is competent to hear the case, which would make it necessary to analyse the compliance of Italy's measures with State aid rules, in particular for assessing whether the claimants had legitimate expectations, find a solution that respects the*

*exclusive competence of the Commission in that regard.  
(Section 4.).*

62. In passing the Tribunal notes that the second of the proposals suggested by the Commission has been overtaken by events, namely that the CJEU has rendered its decision in *Achmea*. However, as discussed below the CJEU did not decide, as a matter of EU Law, on *the compatibility of intra-EU Investor-State Dispute Settlement ("ISDS") with Union law*, rather the outcome of that case was narrowly articulated by that court, and specific to its circumstances. Awaiting the outcome of *Achmea* would not have been of any assistance.
63. In the Rejoinder, and during the course of the hearing, Respondent placed particular emphasis on the award in *Blusun* as regards the merits of the case. However, Claimant also invoked *Blusun* in the Reply in support of its case as regards jurisdiction. While many other tribunals have opined on the intra-EU "issue", considering that Respondent has particularly approbated *Blusun* in this case, the Tribunal, therefore, sets out the pertinent part of the reasoning in relation to intra-EU jurisdiction and the ECT as articulated by that tribunal:

*B. EU Law and the inter se issue*

*(a) Admissibility of the inter se argument*

277. ....

*(b) The applicable law*

*278. The Parties in effect agree that the applicable law in determining this issue is international law, and specifically the relevant provisions of the VCLT. The Tribunal agrees, but would observe that this does not exclude any relevant rule of EU law, which would fall to be applied either as part of international law or as part of the law of Italy. The Tribunal evidently cannot exercise the special jurisdictional*

*powers vested in the European courts, but it can and where relevant should apply European law as such.*

*(c) The original scope of the ECT*

*279. As a matter of international law, the first question is whether the ECT applied to relations inter se of EU Member States as at the date of its conclusion (December 1994) in accordance with Articles 31-33 of the VCLT.*

*280. On its face there is nothing in the text of the ECT that carves out or excludes issues arising between EU Member States. (1) The preamble to the ECT records that it intends to place the commitments contained in [the European Energy Charter] on a secure and binding international legal basis. This implies that the scope of the (non-binding) European Energy Charter of 17 December 1991 was replicated in binding form in the ECT. There is no indication of any inter se exclusion in the Charter, which refers to a 'new desire for a European-wide and global co-operation based on mutual respect and confidence', and further refers to the 'support from the European Community, particularly through completion of its internal energy market' (Preamble, paras. 6, 14). The EC and Euratom were signatories to the Charter. This was of course before the Treaty of Maastricht, let alone the Lisbon Treaty. (2) Article 1(2) of the ECT defines 'Contracting Party' as 'a state or Regional Economic Integration Organization which has consented to be bound by this Treaty and for which the Treaty is in force. EU Member States and the EU are all Contracting Parties. Prima facie at least, a treaty applies equally between its parties. It would take an express provision or very clear understanding between the negotiating parties to achieve any other result. Thus when Great Britain was asserting 'the diplomatic unity of the British Empire', it was argued from time to time that multilateral treaties to which the Dominions were separately parties had no inter se application. The inter se doctrine was not however accepted, being unsupported by express provision or clear understanding to the contrary. (3) There is no express provision (or 'disconnection clause', to adopt recent parlance) in the ECT. (4) While the Respondent and the EC relied on the travaux préparatoires to justify reading in a disconnection clause, this is not permissible in a context in which the terms of the treaty are clear. In any case, the travaux préparatoires seem to point against implying a disconnection clause: one was proposed during the course*

of the Energy Charter Treaty negotiations, but was rejected.

281. Neither is there anything in the text to support the EC's argument that the ECT did not give rise to *inter se* obligations because the EU Member States were not competent to enter into such obligations. The mere fact that the EU is party to the ECT does not mean that the EU Member States did not have competence to enter into *inter se* obligations in the Treaty. Instead, the ECT seems to contemplate that there would be overlapping competences. The term 'regional economic integration organizations (or REIO)' is defined in Article 1(3) of the ECT to mean an 'organization constituted by states to which they have transferred competence over certain matters a number of which are governed by the ECT, including the authority to take decisions binding on them in respect of those matters. The Area of the REIO is also defined by Article 1(10) with reference to EU law. But nothing in Article 1, nor any other provision in the ECT, suggests that the EU Member States had then transferred exclusive competence for all matters of investment and dispute resolution to the EU.

282. The EC argues that the 'Member States . . . are ... presumed to be aware of the rules governing the distribution of competences in a supranational organisation they have themselves created.' But if the Member States thought they did not have competence over the *inter se* obligations in the ECT, this would have been made explicit by including a declaration of competence to set out the internal division of competence between the EC and its Member States, as has been done in many other treaties with mixed membership. Nothing in the text of the ECT supports the implication of such a declaration of competence.

283. Pursuant to Article 6 of the VCLT, every State possesses capacity to conclude treaties and is bound by those obligations pursuant to the principle of *pacta sunt servanda*. No limitation on the competence of the EU Member States was communicated at the time that the ECT was signed. Article 46 of the VCLT provides that a State may not invoke provisions of its internal law regarding competence to conclude treaties to invalidate a treaty unless it was a manifest violation of a rule of fundamental importance. While EU law operates on both an internal and international plane, a similar principle must apply. Even if, as a matter of EC law, the EC has exclusive competence over matters of internal investment, the fact is that Member

*States to the EU signed the ECT without qualification or reservation. The inter se obligations in the ECT are not somehow invalid or inapplicable because of an allocation of competence that the EC says can be inferred from a set of EU laws and regulations dealing with investment. The more likely explanation, consistent with the text of the ECT, is that, at the time the ECT was signed, the competence was a shared one.*

*284. The EC relied on its competence argument to argue that there was also no diversity of territory among the investors and the host State as required by Article 26, since both are part of the same 'Contracting Party' for its purposes. It is not necessary for the Tribunal to deal with this argument, since it has held that the European Member States remain 'Contracting Parties' and that the ECT does create inter se obligations for European Member States.*

*(d) Subsequent modification of the ECT as to inter se matters*

*285. The Respondent and the EC also argue that, even if the ECT had originally concerned inter se matters, this was modified by the fact that the Member States of the EU subsequently entered into other agreements that covered both the investment and dispute resolution aspects of the ECT. The EC states that subsequent EU treaties, such as the Treaty of Amsterdam, the Treaty of Nice, and the Treaty of Lisbon, implicitly repealed the earlier ECT under the lex posterior rule in Article 30 of the VCLT, whereby 'successive treaties relating to the same subject-matter' will prevail over the earlier to the extent that the treaties are not compatible.*

*286. Turning first to the substantive investment obligations, it is not clear how these are incompatible with the investment rights protected under European law. The EC points to the rules establishing the European internal market, with free movement of goods, persons, services and capital. It states that discriminatory measures or expropriation are not permitted under European law. But these obligations are arguably broader than those in the ECT, and are complementary to them. There is no discrimination unless the same benefits are not accorded to other EU States, but there is nothing in the ECT that requires such a result. Were a national of a European State not party to the ECT to bring international arbitration proceedings against a European host State that was a party to the ECT and had breached investment obligations*

*protected under it, that host State would have to determine whether it could, consistent with its EU obligations, decline to consent to such jurisdiction. Nothing in the ECT would prevent the host State from extending its protections beyond those States that are party to it, if this were required to meet these obligations. As the tribunal found in *Electrabel v. Hungary*, EU law can be presumed not to conflict or otherwise be inconsistent with the ECT.*

287. *The only example the EC pointed to where an inconsistency might arise between EU and investment law was the award in *Micula v. Romania*. In *Micula*, however, the tribunal concluded that EU law was not applicable to the dispute, as Romania had not yet acceded to the EU at the time the impugned measures were taken (although the EC appears to have taken the view that EU rules on state aid did apply during the accession negotiations). Any conflict thus arose not out of incompatibility of the relevant BIT with EU law, but out of a disagreement on whether EU rules applied prior to accession. After the *Micula* award was issued, the EC notified Romania that it would be in breach of the EU rules on state aid if it complied with its obligation under the award to pay damages to the investors for a breach of the fair and equitable treatment standard. In that context, any conflict related to the implications of enforcement, not to direct contradictions between the substantive rules themselves. This was also the conclusion of both the *Micula* tribunal and the *Micula ad hoc* committee.*

288. *The Respondent and the EC also argue that the dispute resolution clause, Article 26 of the ECT, is itself incompatible with Article 344 of the TFEU, which provides that '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.'*

289. *In the view of the Tribunal, there is no such incompatibility. The dispute before this Tribunal is not an inter-State dispute. It is a dispute, in the words of Article 26, 'between a Contracting Party and an Investor of another Contracting Party'. It is not necessary for this Tribunal to decide whether Article 27, which concerns inter-State disputes, would be incompatible with Article 344 of the TFEU. Even if there were such an inconsistency, this would not also void Article 26, since the later Treaty will supersede the earlier one only to the extent of any incompatibility. To find otherwise would disadvantage*

*investors, who have no ability under European law to protect their investment by suing the host State directly for breaches of the ECT. Neither does anything in European law expressly preclude investor-State arbitration under the ECT and the ICSID Convention.*

*290. As noted (paragraph 260(e) above), the Claimants also relied on the combined effect of the *lex specialis* and *lex posterior* presumptions, the ECT being both more specific than the EU legal order and subsequent to it. Having concluded that there is no incompatibility between the TFEU and the ECT, the Tribunal does not need to address this argument.*

*291. For these reasons, the Tribunal holds that the *inter se* obligations in the ECT have not subsequently been modified or superseded by later European law.*

*(e) The state of the authorities*

*292. The intra-EU issue has been canvassed in greater or lesser depth by previous investment tribunals, which have reached practically common conclusions.*

.....

*302. Despite the fact that the EC has intervened in many other intra-EU arbitrations, as far as has been publicly reported, no tribunal yet has upheld this objection to jurisdiction.*

*303. 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. These conclusions support those adopted by the Tribunal in this case.*

64. Having considered the matter, the Tribunal adopts the reasoning in *Blusun* in full. The reasoning is comprehensive and unimpeachable.

The Tribunal does not consider it necessary to add or subtract in any way from the *Blusun* reasoning.

65. The Tribunal extrapolates the following points from *Blusun* for the purposes of its present jurisdictional analysis.
66. First, the interpretation argument advanced by Respondent (and by the Commission) which is referenced as the 'disconnection clause', in shorthand parlance, does not stand up to scrutiny when the ECT is interpreted (as the *Blusun* tribunal did) in an entirely regular and ordinary manner according to the provisions of the VCLT.
67. Secondly, nothing in EU law subsequent to the ECT has the effect of superseding (insofar as Respondent is concerned) the latter.
68. By way of completeness the Tribunal also now addresses two further points on jurisdiction raised by Respondent.
69. Respondent submits that the rules on state aid, a concept forming part of EU law, lead to the conclusion that compliance with any award might transgress such rules at an enforcement stage. Therefore, such potential transgression (which might arise as a matter of EU law) denudes the Tribunal now of ECT jurisdiction.
70. This state aid point was considered, and then dismissed by the tribunal in *Blusun*. The Tribunal agrees.
71. Effectively Respondent's position is that because there might be some enforcement issue in the future, deriving from an aspect of EU law (state aid, it must be recalled, itself was the product of the sovereign choices of member states, and, in particular for this issue, something which Respondent itself created through its membership of the EU), then this must denude the Tribunal of its jurisdiction as a matter of an entirely separate treaty (the ECT).



72. The Tribunal does not see how such a proposition can have the far-reaching effect on jurisdiction which Respondent suggests. If the Tribunal were to accede to such a proposition then it would give support to a sovereign state being able to avoid an international promise to arbitrate disputes with a two-fold argument which relies on rules which such sovereign itself created and simply foreshadows putative future issues with enforcement. The Tribunal cannot give succour to this position, and it is dismissed.
73. Next, Respondent drew upon Case C-459/03 *Commission v Ireland* [2006] ECR I-4635, generally referred to as the *MOX Plant Case*. The Tribunal understands this position on the part of Respondent to be supportive of the main thrust of its case on *Achmea*, rather than providing a separate jurisdictional argument. As discussed below, *Achmea*, when analysed in detail, does not provide the Respondent (or the Commission) with legal support for the outcome sought, thus, the *MOX Plant Case* does not fill that gap. The Tribunal does understand that the *MOX Plant Case* is, in of itself, utilised as the legal proposition for bringing intra-EU treaty arbitration to an end.

#### *Achmea*

74. As the jurisdictional arguments in this arbitration evolved, particularly in the aftermath of the hearing, *Achmea* has moved centre-stage in terms of the importance and significance attached to it by Respondent (and the Commission).
75. The Commission's Communication is now quoted, in pertinent part, to illustrate the foregoing point, with emphasis added.

*In the recent preliminary ruling concerning the Achmea case, the Court of Justice confirmed that investor-State arbitration clauses in intra-EU BITs are unlawful. (p. 2)*

.....

*The Achmea judgment and its consequences*

*In the Achmea judgment the Court of Justice ruled that the investor-to-State arbitration clauses laid down in intra-EU BITs undermine the system of legal remedies provided for in the EU Treaties and thus jeopardise the autonomy, effectiveness, primacy and direct effect of Union law and the principle of mutual trust between the Member States. Recourse to such clauses undermines the preliminary ruling procedure provided for in Article 267 TFEU, and is not compatible with the principle of sincere cooperation. **This implies that all investor-State arbitration clauses in intra-EU BITs are inapplicable** and that any arbitration tribunal established on the basis of such clauses lacks jurisdiction due to the absence of a valid arbitration agreement. As a consequence, national courts are under the obligation to annul any arbitral award rendered on that basis and to refuse to enforce it. Member States that are parties to pending cases, in whatever capacity, must also draw all necessary consequences from the Achmea judgment. Moreover, pursuant to the principle of legal certainty, they are bound to formally terminate their intra-EU BITs.*

*The Achmea judgment is also relevant for the investor-State arbitration mechanism established in Article 26 of the Energy Charter Treaty as regards intra-EU relations. This provision, if interpreted correctly, does not provide for an investor-State arbitration clause applicable between investors from a Member States of the EU and another Member States of the EU. Given the primacy of Union law, that clause, if interpreted as applying intra-EU, is incompatible with EU primary law and thus inapplicable. Indeed, the reasoning of the Court in Achmea applies equally to the intra-EU application of such a clause which, just like the clauses of intra-EU BITs, opens the possibility of submitting those disputes to a body which is not part of the judicial system of the EU. The fact that the EU is also a party to the Energy Charter Treaty does not affect this conclusion: the participation of the EU in that Treaty has only created rights and obligations between the EU and third countries and has not affected the relations between the EU Member States. (pp. 3-4)*

76. Approximately one month before the Commission's Communication, the tribunal in *Masdar* arrived at a quite different conclusion as that sought by the Respondent (and the Commission). The Tribunal notes the following passages from that award:

678. Upon consideration of the Parties' respective submissions and upon analysis, the Tribunal has concluded that the Achmea Judgment has no bearing upon the present case.

679. The Achmea Judgment is of limited application – first, and specifically, to the Agreement on encouragement and reciprocal protection of investment between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic and, second, in a more general perspective, to any “provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic.” The ECT is not such a treaty. Thus, the Achmea Judgment does not take into consideration, and thus it cannot be applied to, multilateral treaties, such as the ECT, to which the EU itself is a party.

680. The conclusion of the Tribunal is in line with the Opinion of Advocate General Wathelet delivered on 19 September 2017 in Achmea. The Advocate General stated that Achmea was: “the first opportunity [for the CJEU] to express its views on the thorny question of the compatibility of **BITs concluded between member States** and in particular of the investor-State dispute settlement (‘ISDS’) mechanisms established by those BITs.” (Emphasis added). Thus, it is clear that Achmea pertains only to BITs concluded between EU Member States – as the wording of question No. (1) referred by the Bundesgerichtshof to the CJEU likewise confirms: “Does Article 344 TFEU preclude the application of a provision in a **bilateral investment protection agreement between Member States of the European Union** (a so called intra-EU BIT) [...].” (Emphasis added).

681. With specific reference to the ECT, the Advocate General made the following statement:

“That multilateral treaty on investment in the field of energy [the ECT] operates even between Member States, since it was concluded not as an agreement between the Union and its Member States, of the one part, and third countries, of the other part, but as an ordinary multilateral treaty in which all the Contracting Parties participate on an equal footing. In that sense, **the material provisions for the protection of investments provided for in that Treaty and the ISDS mechanism also operate between Member States. I note that if no EU**

*institution and no Member State sought an opinion from the Court on the compatibility of that treaty with the EU and FEU Treaties, that is because none of them had the slightest suspicion that it might be incompatible.” (Emphasis added).*

682. *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. The Tribunal respectfully adopts the Advocate General’s reasoning on this matter, and it relies in particular upon the observation in the final sentence cited above from his Opinion.*

683. *For these reasons, the Tribunal concludes that the Achmea Judgment has no bearing upon its determination of the matters in issue in this arbitration and it denies Respondent’s Application.*

77. Unsurprisingly, Claimant adopts the reasoning in *Masdar* in support of its position on jurisdiction. On the other hand, Respondent severely criticizes the tribunal in *Masdar* for the cursory manner (in its view) by which *Achmea* was analysed, and the conclusion reached in that regard. Respondent’s heading in its submissions on *Masdar* leaves no room for doubt in that regard, with emphasis added:

*The Masdar award failed to engage with the Achmea judgment and used an easy cop out strategy*

78. In light of the diametrically-opposed views of the Parties the Tribunal considers it appropriate to examine what it is *Achmea* decides, and, importantly, what it does not decide.
79. First, briefly as to the context of *Achmea*; a dispute arose between Achmea B.V., a Dutch company, and the Slovak Republic due to certain governmental changes in the market for private health insurance. An UNCITRAL tribunal was constituted pursuant to

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 (“the Achmea BIT”). Frankfurt am Main, Germany, was chosen as the legal seat of that UNCITRAL tribunal and the arbitral proceedings. The Slovak Republic raised an objection of lack of jurisdiction, namely, that, as a result of its accession to the European Union, recourse to an arbitral tribunal provided for in Article 8(2) of the Achmea BIT was incompatible with EU law. Achmea B.V. was awarded damages in the principal amount of EUR 22.1 million by that UNCITRAL Tribunal. The Slovak Republic brought an action to set aside that arbitral award before the German courts, ultimately arriving on appeal at the Bundesgerichtshof.

80. The Bundesgerichtshof decided to stay the appeal before it and ask the following questions of the CJEU for a preliminary ruling:

*(1) Does Article 344 TFEU preclude the application of a provision in a bilateral investment protection agreement between Member States of the European Union (a so-called intra-EU BIT) under which an investor of a Contracting State, in the event of a dispute concerning investments in the other Contracting State, may bring proceedings against the latter State before an arbitral tribunal where the investment protection agreement was concluded before one of the Contracting States acceded to the European Union but the arbitral proceedings are not to be brought until after that date?*

*If Question 1 is to be answered in the negative:*

*(2) Does Article 267 TFEU preclude the application of such a provision?*

*If Questions 1 and 2 are to be answered in the negative:*

*(3) Does the first paragraph of Article 18 TFEU preclude the application of such a provision under the circumstances described in Question 1?*

81. The Tribunal notes that the first question, in particular, was posed in wide terms by the Bundesgerichtshof and is not confined to the Achmea BIT.
82. Rather than answering the widely-drawn question 1 posed by the Bundesgerichtshof, the CJEU combined questions 1 and 2, but also added a qualifying phrase (emphasis added):

*31. By its first and second questions, which should be taken together, the referring court essentially asks whether 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 BIT, 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.*

83. The CJEU then set out a number of general considerations found in EU law which are now quoted in full:

*32. In order to answer those questions, it should be recalled that, according to settled case-law of the Court, an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system, observance of which is ensured by the Court. That principle is enshrined in particular in Article 344 TFEU, under which the 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 in the Treaties (Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraph 201 and the case-law cited).*

*33 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. EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States,*

*and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves. Those characteristics have given rise to a structured network of principles, rules and mutually interdependent legal relations binding the EU and its Member States reciprocally and binding its Member States to each other (see, to that effect, Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraphs 165 to 167 and the case-law cited).*

*34 EU law is thus based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the law of the EU that implements them will be respected. It is precisely in that context that the Member States are obliged, by reason inter alia of the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU, to ensure in their respective territories the application of and respect for EU law, and to take for those purposes any appropriate measure, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU (Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraphs 168 and 173 and the case-law cited).*

*35 In order to ensure that the specific characteristics and the autonomy of the EU legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law (Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraph 174).*

*36 In that context, in accordance with Article 19 TEU, it is for the national courts and tribunals and the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of the rights of individuals under that law (see, to that effect, Opinion 1/09 (Agreement creating a unified patent litigation system) of 8 March 2011, EU:C:2011:123, paragraph 68; Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraph 175; and judgment of 27 February 2018, Associação*

*Sindical dos Juizes Portugueses, C-64/16, EU:C:2018:117, paragraph 33).*

37 *In particular, the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties (Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraph 176 and the case-law cited).*

38 *The first and second questions referred for a preliminary ruling must be answered in the light of those considerations.*

84. The Tribunal notes that, having set out a number of general considerations (which are of general application in EU law), the CJEU then discusses the precise circumstances of the Achmea BIT. This analysis of the Achmea BIT is particularly important as it informs the exact rationale for the answers given by the CJEU to the Bundesgreichtshof.
85. The CJEU, first, sought to ascertain whether the disputes which a tribunal established according to Article 8 of the Achmea BIT might be called on to resolve are liable to relate to the interpretation or application of EU law (emphasis added, and this is language particularly relied upon by Respondent). In that regard it refers to Article 8(6) of the Achmea BIT (emphasis added):

6. *The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively:*

- the law in force of the Contracting Party concerned;*
- the provisions of this Agreement, and other relevant agreements between the Contracting Parties;*



- *the provisions of special agreements relating to the investment;*
- *the general principles of international law.*

86. This precise language led the CJEU to the conclusion that a tribunal established pursuant to Article 8 of the Achmea BIT may, in two respects, be called on to interpret or, indeed, to apply EU law, particularly the provisions concerning the fundamental freedoms, including freedom of establishment and free movement of capital.
87. The Tribunal notes that the use of the word “shall” in the introductory paragraph of Article 8(6) of the Achmea BIT compels the conclusion that any such tribunal was inevitably going to decide a dispute according to EU law, amongst others. The two emphasised subparagraphs recorded just above are not options, but part of the matters to which such a tribunal would mandatorily be taking into account.
88. The CJEU, secondly, analysed whether a tribunal established pursuant to Article 8 of the Achmea BIT was a court or tribunal within the meaning of Article 267 of the TFEU. The answer was readily found, namely, that it was not such a court or tribunal.
89. Thirdly, the CJEU analysed the extent of judicial review available at the seat, namely, Frankfurt am Main. It noted that paragraph 1059(2) of the Code of Civil Procedure (part of Germany’s *lex arbitri*) provides only for limited review, concerning in particular the validity of the arbitration agreement under the applicable law and the consistency with public policy of the recognition or enforcement of the arbitral award. Specifically, in relation to commercial arbitration, the CJEU has held that the requirements of efficient arbitration proceedings justify the limited review of arbitral awards by courts of EU Member States, **“provided that the fundamental provisions of EU law can be examined in the course of that review and, if necessary, be the subject of a reference to the Court for a**

**preliminary ruling”** (the Tribunal’s emphasis, and arising from the landmark 1999 decision of the CJEU in what is routinely referred to as *Eco Swiss*).

90. However, the CJEU found (for reasons which do not readily emerge from its reasoning) that the circumstances of Article 8 of the Achmea BIT do not permit a similar review of awards which attach to commercial arbitrations (in the manner mandated by *Eco Swiss*). The Tribunal infers from this, in the specific instance of dispute between Achmea B.V. and the Slovak Republic, that even if the German courts could examine the arbitral award of 7 December 2012 in light of fundamental provisions of EU law (which they can do due to *Eco Swiss*), that was not a satisfactory (for the CJEU) answer to the reformulated questions.

91. The CJEU then articulated its conclusion, which is now recorded in full:

*56. Consequently, having regard to all the characteristics of the arbitral tribunal mentioned in Article 8 of the BIT and set out in paragraphs 39 to 55 above, it must be considered that, by concluding the BIT, the Member States parties to it established a mechanism for settling disputes between an investor and a Member State which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law.*

92. The Tribunal makes two observations which arise from this conclusion of the CJEU. The reasoning stems entirely from the specific circumstances of the Achmea BIT, and is not based on any other BIT or a wider ISDS enquiry (particularly, not the ECT); and, secondly, the recourse which might be had against the arbitral award of 7 December 2012 before the German courts, which includes (as a matter of *Eco Swiss*) an examination in light of fundamental principles of EU law, is, in the view of the CJEU, insufficient to

ensure the full effectiveness of EU law, and, further, could prevent such full effectiveness. It is unclear from the reasoning of the CJEU as to why this is the case, but, given that *Achmea* does not address the ECT, the Tribunal does not dwell any further on this point.

93. The further conclusion which the CJEU then draws is as follows:

*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, and is not therefore compatible with the principle of sincere cooperation referred to in paragraph 34 above.... In those circumstances, Article 8 of the BIT has an adverse effect on the autonomy of EU law.*

94. Having reached these conclusions, the CJEU answers the question which it reformulated (as recorded above) from the questions posed by the Bundesgerichtshof in the following manner:

*Consequently, the answer to Questions 1 and 2 is that 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 BIT, 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.*

95. The Tribunal notes that the predicate word for the answer given by the CJEU to the question it posed itself is “consequently” which, thus, plainly draws on the preceding analysis of Article 8 of the *Achmea* BIT, and not (as question 1 posed by the Bundesgerichtshof sought) a wider discussion of ISDS clauses in BITs.

96. Considering *Achmea*, thus, in full, the Tribunal draws a number of conclusions as follows:

(a) the answer given by the CJEU is confined, on a full, rather than selective analysis of the whole judgment, to the specific context of Article 8 of the Achmea BIT only;

(b) the question, of wider application to ISDS clauses, posed by the Bundesgerichtshof was not answered so, therefore, no view can be inferred as to the compatibility of such clauses with EU law insofar as the opinion of the CJEU is concerned. Had the CJEU wished to answer the widely-drawn questions posed by the Bundesgerichtshof, then presumably it would have done so;

(c) the mandatory requirement in Article 8(6) of the Achmea BIT for a tribunal constituted under that treaty to decide a dispute according, amongst others, to (i) “the law in force of the Contracting Party concerned” and (ii) “the provisions of this Agreement, and other relevant agreements between the Contracting Parties” was the treaty language which transgressed EU law;

(d) the CJEU does not go so far as to say that the Slovak Republic or the Kingdom of the Netherlands are barred from offering to enter into arbitration agreements. Rather, the Tribunal understands the position to be more correctly that the objection by Respondent (and the Commission) forming of what it says is the gravamen of *Achmea* is to the extent of the authority given to such a tribunal to decide a dispute, amongst others, according to the two EU law aspects already noted above. Put another way, it appears that EU member states may bring such arbitral tribunals into being, but, according to the position adopted by Respondent and the Commission, they are not allowed by EU law to authorise such arbitral tribunals to interpret or apply such law; and

(e) the CJEU does not make any comment on, nor does it gainsay the authority of that UNCITRAL tribunal to rule according to the general

principles of international law. Its sole concern revolves around the two parts of Article 8(6) of the Achmea BIT which it says engage the application or interpretation of EU law.

97. Drawing upon the foregoing conclusions from *Achmea* for the purposes of this case, the Tribunal agrees with the tribunal in *Masdar* that the judgment is, in of itself, of limited application (only, insofar as EU law is concerned, to the Achmea BIT) and, further, of no application as such to the ECT. Respondent's criticism of the approach taken by the tribunal in *Masdar* appears to the Tribunal as unwarranted in view of the CJEU's answers to its own reformulated questions.
98. In light of the above reasoning and conclusions concerning the lack of direct impact of *Achmea* as undermining the jurisdiction of the Tribunal, the Tribunal is not convinced that its conclusions should be modified because of the position taken by the Commission in its Communication (quoted above at para. 75). The Tribunal considers that a proper reading of the *Achmea* does not lead to the conclusion that "[T]he Achmea judgment is also relevant for the investor-State arbitration mechanism established in Article 26 of the ECT as regards intra-EU relations". Nor is the Tribunal convinced for the reasons stated above that "[T]his provision, interpreted correctly does not provide for an investor-State arbitration clause applicable between investors from a Member State of the EU and another Member State of the EU"
99. The Tribunal restates that it is called, in this dispute, to resolve the alleged breach by Respondent of Art. 10(1) ECT on the basis of principles of public international law relevant to the interpretation and application in the present case of the ECT, a multilateral treaty in force and applicable also between The Netherlands and Respondent. The Tribunal is therefore unable to read *Achmea* as supporting the

Commission's view (with all due respect to the Commission's role within the EU, the Communication is not an authoritative statement of EU law) that [*G*]iven the primacy of Union law, that clause [Article 26, ECT], if interpreted as applying intra-EU, is incompatible with EU primary law and thus inapplicable."

100. In conclusion, therefore, the Respondent's objections to jurisdiction based on *Achmea* are dismissed.

#### *Intra-EU jurisdiction conclusion*

101. Thus, the Tribunal dismisses the jurisdictional objections raised by the Respondent as regards what might be termed the intra-EU issue.

102. There are other jurisdictional and/or admissibility issues raised by Respondent but these are dealt with below in connection with the merits.

### **(A) Facts – (B) Merits & Liability (incl. concomitant Jurisdiction & Admissibility)**

#### Section A - Facts

##### Introduction

103. This part of the award is arranged as follows. First, the Tribunal will set out its understanding of the historical context of promotion of renewable energy production in Italy. Next, there will be a description of each of the five *Conto Energia* Decrees which were implemented by Respondent. This will be followed by an outline of the three Italian companies which Claimant purchased (in whole or in majority part) which operate photovoltaic plants and the agreements concerning the incentives for their respective output. Thereafter, the Tribunal records the facts surrounding the measures taken by Respondent of which Claimant makes complaint. These are all matters which the Tribunal considers, in light of the submissions received from the Parties, to be

factually uncontroversial. The Tribunal has been assisted, considerably, by the Parties in this regard in the manner that they have not engaged in needless factual disputes, but rather have dwelt upon the more important issues as to whether or not the measures taken by Respondent engage international responsibility as a matter of the ECT.

104. For the avoidance of doubt, the summary of facts (*i.e.* the historical context, the five *Conto Energia* Decrees, and the outline of the three Italian companies purchased by Claimant) which follows should not be taken as setting out material anterior findings. The summary of facts has the purpose of putting into broad context for the reader the background to this case. Analysis of material issues which might, or might not, be a trigger for the disposition of claims follow in a later part of this Award.

#### Historical Context

105. From the early 1980s onwards Respondent has promoted and encouraged the development and use of renewable energy sources. Given that Italy is a country blessed with abundant sunshine for much of the year, photovoltaic generation of electricity was clearly of considerable importance.
106. In particular, Respondent's Law No. 9 of January 9, 1991, simplified the authorization procedure for the production of energy from renewable sources. Regional governments were required to develop plans prioritizing the production of energy from renewable sources.
107. In 1992, Respondent established the first fixed feed-in tariff for renewable energy production through its CIP6/92 regulation. That regulation allowed renewable energy producers to produce electricity from renewable sources without any capacity limit and established a remuneration procedure based on kilowatt-hours of electricity

produced. The CIP6/92 regulation also provided some certainty to investors because it obligated ENEL S.p.A., Respondent's electricity company, to buy all electricity produced from renewable energy sources. By 1997, 16% of Italy's electricity was being produced from renewable energy sources.

108. Respondent continued to encourage investments in its developing renewable energy sector by enacting Legislative Decree No. 79 on March 16, 1999. Known as the *Bersani Decree*, that act encouraged electricity production from renewable energy sources by prioritizing their access to the grid. The *Bersani Decree* also obligated generators and importers of electricity from non-renewable sources beyond a certain threshold to inject a portion of electricity from renewable sources into the grid. To satisfy that obligation, the non-renewable generators or importers could purchase a corresponding amount of renewable energy from other producers, or from the GSE, or they could purchase "green certificates" from third parties.

#### *Developments leading to the "Conto Energia" Decrees*

109. On 27 September 2001, the European Parliament and the Council enacted Directive 2001/77/EC, promoting electricity produced from renewable energy sources in the internal electricity market. That directive set national targets for each member state for renewable energy production in light of the EU's stated objective of having 22.1% of total Community electricity consumption generated from renewable energy sources by 2010. Respondent was expected to produce 25% of its total electricity consumption from renewable energy sources by 2010. That directive was subsequently replaced by Directive 2009/28/EC, which aimed to achieve a 20% share of energy from renewable sources in the Community's gross final consumption of energy by 2020. It required that EU member states report on planned or existing measures put in place to meet those targets. It also



required EU member states to adopt indicative targets for the following 10 years. For Respondent, the target was for 17% of overall energy consumption to come from renewable energy sources by 2020.

110. In light of the fact that the cost of producing electricity from renewable sources was substantially higher than the cost of producing electricity from fossil fuels, in order to meet its target, Respondent considered it fit to implement measures and above-market incentives that would further develop and encourage investments in its renewable energy sector. Thus, on 29 December 2003, Respondent enacted Legislative Decree No. 387, the goal of which was to “promote a greater contribution from renewable energy sources to the production of electricity in the Italian and European markets.” Article 7 thereof, which addressed solar power, stated that Respondent would implement incentive tariffs to encourage investments in photovoltaic facilities. Accordingly, from 2005 to 2012, Respondent enacted incentive schemes for photovoltaic plants known as *Conto Energia* Decrees. The Tribunal now records Article 7 of Legislative Decree No. 387:

*Article 7 - Specific provisions for photovoltaic energy*

*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.*

111. Since Legislative Decree No. 387 did not allow the costs of incentives to be borne by the State (as provided for in Art.7(2), quoted just above) – a constant feature also of all later enactments in respect of PV incentivized tariffs, those costs were passed on to electricity consumers through electricity bills, as Claimant has explained and acknowledged. The Authority for Electrical Energy and Gas (“AEEG”) collects those fees from electricity consumers to cover the incentive tariff costs. The GSE is the state-owned company responsible for paying the incentive tariffs to electricity producers under the *Conto Energia* decrees.

#### *The Conto Energia Decrees*

##### *Conto I*

112. Respondent implemented its first incentive tariff programme for electricity generated by photovoltaic sources on 28 July 2005. The programme was designed for relatively small facilities, under 1 MW in capacity, and it highlighted the possibility of individuals and families, as well as businesses and traditional energy companies, to become producers in Italy’s electricity system.

113. *Conto I* provided that qualifying photovoltaic plants had the right (“*diritto*”) to receive a specific incentive tariff for a twenty-year period. The tariff rate was paid to the producer per kilowatt-hour of electricity it produced, on top of whatever sale price the producer also obtained for its electricity. *Conto I* established tariff rates for eligible plants authorized in 2005 and 2006 on the basis of the facility’s nominal capacity: 0.445€/kWh for plants between 1 kW and 20 kW; 0.460€/kWh for plants between 20 kW and 50 kW; and 0.490€/kWh for plants between 50 kW and 1 MW. The rates offered to eligible facilities after 2006 were slightly lower.
114. *Conto I* required anyone who wished to develop a solar facility and benefit from the incentives to submit a request for the incentive tariff, along with a commitment to obtain the necessary authorizations for the construction and operation of the plant. Once provisionally authorized to benefit from the programme, the investor then had six to twelve months (depending on the plant’s capacity) to commence construction of the facility and twelve to twenty-four months to complete construction and connect the facility to the grid. Failure to meet those deadlines would result in loss of the right to the incentive tariffs.
115. Confirmation of the right to the incentive tariffs under *Conto I* was established by a formal letter from the GSE, which communicated the specific tariff rate that it agreed to pay for a twenty-year period to the company or person that held the project rights to a photovoltaic plant (*i.e.*, the “*soggetto responsabile*”). This is reflected in Art. 7.7 of *Conto I*:

*Within 90 days following the deadlines provided for transmission of the applications under paragraph 1, the implementing body (soggetto attuatore) shall communicate the outcome under paragraphs 4 and 5 to the plant operators (soggetti responsabili) who sent the application under paragraph 1. The implementing body shall also*

*notify entitled operators, on the basis of the provisions under paragraph 5, article 5 and article 6 (2), of the amount of the incentive tariff actually awarded for a period of twenty years commencing from the date of operation of the plant.*

116. The letter served as the basis for a contract that the producer and the GSE would subsequently execute. In outline, such a contract indicated that it was effective as of the date on which the producer connected the plant to the grid and that it would terminate twenty years later. Amendments to the contract could only be made in writing by mutual agreement between the producer and the GSE.
117. Some of the pertinent provisions of a sample *Conto I* contract are now recorded by the Tribunal:

*Article 1*

*Purpose of the agreement*

*This agreement concerns the recognition by GSE to the Producer of the contribution due to electricity generated by solar power through photovoltaic conversion and incentivized pursuant to Legislative Decree 387/03, art. 7 of MAP decrees dated 28/07/2005 and 06/02/2006, A.E.E.G. resolution no. 188/05 as subsequent amended and modified by resolution 40/06 and A.E.E.G. resolution no. 28/06.*

*Article 2*

*Effective date and value of the incentive*

*For a period of twenty years as of 08/04/2009, the incentive tariff to be recognized to the photovoltaic plant concerned under this agreement is equal to 0.46 €/kWh.*

*Article 3*

*Incentives payment methods*

*The payment of the incentive tariffs shall be made by GSE according to the measures defined in art. 3-bis of A.E.E.G. resolution no. 40/06 and in conformity with the payment*

*methods regulated by such resolution. With respect to art. 3 bis of A.E.E.G. resolution no. 40/06, GIOVA SOLAR SRL is the party responsible for the survey, registration and communication to GSE of the measurements on the incentivized photovoltaic energy. GSE provides for the payment of the incentive tariffs with value date as of the last day of the month following the one in which the "Payment Date" measurements are received. In the event the "Payment Date" falls on a holiday, the payment is arranged with value date as of the following business day.*

*GSE shall arrange for the payment of the incentive tariffs by crediting the amounts to the bank account specified by the Producer in the "data registration form for the purpose of incentive tariffs payment", mentioned in the introductory section of this agreement.*

#### *Article 8*

##### *Effective date and duration of the agreement*

*This agreement is effective from 08/04/2009 and shall expire on 07/04/2029. This contract is deemed as legally terminated and having ceased to produce effects for the Parties should the Producer be faulty on the prohibitions and forfeitures defined in art. 10 of Law 575/1965 as subsequent amended and modified.*

#### *Article 9*

##### *Jurisdiction*

*For any dispute arising out of or in any way connected to the interpretation of this Agreement and the documents referred to therein, the Parties agree on the exclusive jurisdiction of the Court of Rome.*

#### *Article 10*

##### *Formalization of the agreement*

*This Agreement is signed in two original copies; the Producer and GSE shall separately send their duly signed originals. Any modification to the agreement must occur in writing.*

## *Conto II*

118. On 19 February 2007, the Ministry of Economic Development of Respondent enacted a second *Conto Energia* ("*Conto IP*") with a stated goal of implementing a simplified, stable, and durable system to access the photovoltaic incentives. One of the recitals to *Conto II* makes this intention explicit:

*It being held that it is necessary to introduce corrections to the mechanism introducing a simplified system for accessing incentives, which is both stable and lasting*

119. *Conto II* changed *Conto I* in two principal respects.
120. First, it eliminated the preliminary authorization phase that previously existed and instead required electricity producers to request the benefit of the incentive tariff upon the facility's entry into operation. This simplified the enrolment process and avoided the problem of investors being granted capacity that was never realized. It also meant that investors bore the development and construction risks of their investments, because the tariff rates decreased progressively over time and the rate granted to a given facility was established only when the facility entered into operation.
121. Secondly, *Conto II* increased the capacity thresholds for receiving incentive tariffs to include plants over 1 MW and to an aggregate installed capacity of 1,200 MW. It also established a variety of tariff rates that were based on sophisticated technical criteria of a given plant, including a facility's nominal capacity and other characteristics such as the plant's size and whether it was partially or totally integrated. As with *Conto I*, the *Conto II* rates were paid to producers per kilowatt hour of electricity produced, regardless of the sale price of the electricity that the producers also received. The *Conto II* tariffs

were slightly lower than those offered in *Conto I*. *Conto II* expressly stated, at Art. 6(1), 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.”

122. The tariff rates established in *Conto II* were available to eligible plants entering into operation in 2007 and 2008, with slightly reduced tariffs available to facilities entering into operation after 2008. The *Conto II* tariffs were available until the aggregate installed capacity of photovoltaic plants in Italy reached 1,200 MW, although facilities that connected to the grid within fourteen months of the date on which Italy reached the 1,200 MW threshold would also receive the tariffs.
123. In line with Respondent’s goal of making photovoltaic investments more competitive until the technology matured and their costs decreased, *Conto II* stated that the Ministry of Economic Development would issue a subsequent decree revising the incentive tariffs for photovoltaic plants connected to the grid after 2010, taking into account energy products and component price trends as well as technological monitoring from the ENEA. In practice, through the *Salva Alcoa* decree (Law Decree 8 July 2010, n. 105), Respondent later extended the *Conto II* incentive tariffs to plants entering into operation after 2010.
124. The implementation of *Conto II* was furthered through the “*Implementation of the Decree of the Minister of Economic Development, in consultation with the Minister for the Environment, Land and Sea February 19, 2007, for the purpose of promoting the production of electricity using photovoltaic plants*” by the AEEG, quoted in relevant part:

*Article 8.1*

*The incentive rate is recognized to the parties responsible allowed under Article 5 for twenty years from:*

*a) The date of entry into the facility, for photovoltaic systems that became operational after the date of entry into force of this measure;*

*b) The first day of the month following that in which they completed the actions needed for eligibility to tariffs, and in any case not before the first day of the month following the date of entry into force of this regulation, for photovoltaic systems came into operation in the period between 1 October 2005 and the date of entry into force of this provision and which comply with the provisions Article 4, paragraph 7 of the Ministerial Decree of 19 February 2007.*

*Article 5.2 thereof states that tariff amount is specified by GSE in the communication on the admission to the support regime; therefore, if we combine Article 5.2 with Article 8 the result is that the tariff amount as accorded by GSE is fixed for 20 years.*

125. A *Conto II* contract was, in broad terms (save for the amount of the incentive and the relevant dates) the same as that set out above for *Conto I*.

*Conto III*

126. Respondent's Ministry of Economic Development enacted reduced tariffs (in comparison with *Conto II*) in a third *Conto Energia* ("*Conto III*") on 6 August 2010. As with the previous two *Conto Energias*, *Conto III* granted qualifying photovoltaic plants the right (*diritto*) to receive a specific incentive tariff that would remain constant for a 20-year period starting from the date of the plant's connection to the grid. *Conto III* established a range of tariffs for various facilities entering into operation from 2011 through 2013 and provided that the Ministry of Economic Development would issue a subsequent decree establishing the rates for incentive tariffs offered to plants connected to the grid after 2013. The *Conto III* tariffs were available until the aggregate installed capacity of photovoltaic plants admitted to the



programme reached 3,000 MW. Plants that were connected to the grid within 14 months of the date on which Italy reached the 3,000 MW threshold would also receive the *Conto III* tariffs.

127. The implementation of *Conto III* was furthered through the “Deliberation implementing Ministerial Decree of 6 August 2010 (Third Energy Bill)”, by AEEG, quoted in relevant part:

*Article 11*

*The incentive rate and the increase if any are approved (...)*

*a) for twenty years from the date of entry into the facility, for photovoltaic systems for which the Responsible Party's submission to the GSE request on schedule in Article 4, paragraph 1, of the ministerial decree of August 6, 2010;*

*b) for twenty years, minus the period between the date of entry into operation of the plant and the date of sending communication to the GSE, for photovoltaic plants for which the Responsible Party has submitted to GSE a request later than expected from Article 4, paragraph 1, of the ministerial decree of August 6, 2010.*

128. A *Conto III* contract was, in broad terms (save for the amount of the incentive and the relevant dates) the same as that set out above for *Contos I & II*. By way of example, Art. 2 of a *Conto III* contract stated:

*The incentive tariff, constant in current currency, to be recognised to the photovoltaic plant concerned under this Agreement, is equal to 0.3030 Euro/kWh, a value recognised by GSE and notified to the Soggetto Responsabile with the communication on the admission to*

*The Romani Decree*

129. In order to implement Directive 2009/28/EC Respondent passed Law 96/2010 (“Principles and guiding criteria for the implementation of Directive 2009/28 [and other Directives]”), which provided for the

issuance of implementing Legislative Decrees, such as the “*Romani Decree*” No. 28/2011 of 3 March 2011. Among its guiding principles, Article 17 of Law 96/2010 (“Measures for conforming the national legal system to the Community’s legislation on energy and recovery of garbage”) stated at para.1(h) that “in preparing the implementing legislative decrees...the Government shall follow...also the following guiding guidelines:... (h) adjusting and strengthening the incentive system of renewable energy sources and of energy saving, without new or additional burdens for the public finance...”

130. The *Romani Decree* sought thus to balance several competing factors relevant to the photovoltaic market. On one hand, Respondent wanted to maintain (i) equitable remuneration for investors, given that photovoltaic facilities still needed above-market incentives to compete with traditional electricity producers, and (ii) the confidence of investors by ensuring a constant rate of incentives throughout a fixed time period equal to the average useful life of a facility, reinforced through a contract with the GSE. On the other hand, Respondent wanted to adjust the tariffs to account for cost reductions in photovoltaic technology and to reduce costs of electricity for consumers. The *Romani Decree* contemplated gradual regulatory monitoring and controls, while “safeguarding investments already made.”

131. The Tribunal notes, in particular, that Article 24(d), which is recorded below, of the *Romani Decree* provides for private law agreements for the assignment of applicable incentives. As noted already, each of *Contos I, II, and III* required formal contracts as the consummation of the arrangements for incentives.

132. The *Romani Decree* altered the mechanics of *Conto III* by limiting the availability of the *Conto III* tariffs to photovoltaic plants that were connected to the grid by 31 May 2011 (instead of by 31 December

2013, as originally contemplated). Plants connected after that date would receive different incentive tariffs, to be established in a future decree. Furthermore, the *Romani Decree* introduced limitations on the eligibility of plants receiving incentive tariffs, based on their size, organization, and zoning of land.

133. The Tribunal now records aspects of the *Romani Decree* (with emphasis added):

*Art. 23 – General principles*

*1. This Section provides for the new regulation of support regime dedicated to RES based energy and energy efficiency through the reorganization and improvement of current support mechanisms. The new rules provide for a general framework aimed at promoting renewable sources energy generation and energy efficiency to the extent adequate to reach the targets set forth in art. 3 hereof, by setting criteria and tools that promote effectiveness, efficiency, streamlining and overtime stability of the support regimes as well as pursue the harmonization with other tools designed for alike purposes together with the reduction of support costs charged to end-users.*

*2. Gradual intervention to safeguard investments made and proportionality to the targets are further general principles of the reorganization and improvement of support regime reform, as well as flexibility of support regimes' structure, in order to take into account market dynamics and technology evolution of renewables and energy efficiency.*

.....

*Art. 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;*

*d) the incentives are assigned by way of private law agreements between the GSE and the plant owner (soggetto responsabile), based on a sample agreement approved by the Authority of Electricity and Gas within 3 months as of the entry into force of the first of the decrees as per para 5 herein.*

#### *Conto IV*

134. On 5 May 2011, Respondent's Ministry of Economic Development enacted *Conto IV* as a matter of the *Romani Decree* requirement that it issue revised incentive tariffs for facilities connected to the grid after 31 May 2011. The rates established in *Conto IV* were based, amongst others, the goal of progressively decreasing tariffs to achieve a gradual alignment with the actual cost of the technology, while maintaining stability and certainty in the market.

135. In particular, *Conto IV* noted that, in light of the evolution of photovoltaic technology, "grid parity" would be achieved within a few years. "Grid parity" occurs when photovoltaic plants can generate power at an equal or lower cost than the price of purchasing power from the electricity grid. In Respondent's view, once producers achieved grid parity, it would no longer be necessary to incentivize the development of new facilities. At the same time, *Conto IV*

confirmed the importance of additional incentive tariffs to ensure an increase of installed capacity in the immediate future.

136. As with the previous *Conto Energia* decrees, *Conto IV* provided that those producers that connected qualifying photovoltaic plants to the grid between 31 May 2011, and 31 December 2016, had the right (*diritto*) to receive a specific incentive tariff, which would remain constant, for a twenty-year period starting from the date of the plant's connection to the grid. Respondent established different values for *Conto IV* incentive tariffs for each month of 2011, each semester of 2012, and the first semester of 2013 on the basis of a plant's nominal capacity and other technical characteristics. It also established a registry for applicants so that Respondent could monitor enrolment during each month or semester. *Conto IV* stated that a reduced tariff, to be determined at a later date, would apply to new plants connected to the grid beginning in the second semester of 2013.
137. Nevertheless, once Respondent granted a tariff value to a facility, according to the text of *Conto IV*, the incentive granted would remain constant for twenty years, as was the case with the previous *Conto* arrangements.
138. *Conto IV* also included new measures to moderate the growth of the total cost of the incentive tariff system for photovoltaic facilities, noting that the total cost would likely reach €3.5 billion euros *per annum* by 2011. Those measures included limits on the amount of incentive tariffs granted to new facilities per semester, beyond which the incentive tariffs would no longer be available for new facilities during that semester. Respondent also proposed an overall cap on the total photovoltaic capacity that could benefit from incentive tariffs and a corresponding cost threshold: *Conto IV* established a national objective for cumulative nominal installed photovoltaic capacity of 23 GW, which would correspond to a total annual cost of €6-7 billion for

all of the *Conto Energia* incentive tariffs. Respondent's Ministry of Economic Development was entitled, though not obligated, to revise the incentive tariffs for future plants when Italy reached the €6 billion threshold, "favouring in any event the further development of the sector."

139. As with the three previous *Conto Energia* decrees, under *Conto IV*, the GSE entered into contracts with producers whose plants benefited from the incentive tariffs, which confirmed the tariff rate granted to the facilities. The contracts were to remain in force for the same twenty-year period stated in the *Conto* itself.

140. The Tribunal now records the part of *Conto IV* setting out access to the incentive tariffs:

*Article 10*

*Transmission of documentation on operational date of the plant and access to incentive tariffs*

*1. Within fifteen calendar days of the operational date of the plant the plant operator (soggetto responsabile) is under an obligation to send GSE a request for the pertinent incentive tariff, complete with all documentation provided under annex 3-C. Failure to comply with the deadlines under this paragraph involves inadmissibility of the incentive tariffs for the period between the operational date and the date of communication to GSE, without prejudice to entitlement to the applicable tariff at the operational date.*

*2. For the purposes of paragraph 1, the grid managers are under an obligation to connect the plants to the electricity grid within the terms established by the Authority for electricity and gas resolution no. ARG/elt 99/08 as subsequently amended.*

*3. Following verification of compliance with the provisions of this decree, GSE will establish and guarantee payment of the tariff owed to the plant operator (soggetto responsabile) within one hundred and twenty days of the date of receipt of the application, excluding times imputable to the plant operator.*

4. *Transfer of a photovoltaic plant, or of the building or property unit on which the plant is located together with the plant itself, must be notified to GSE within 30 days of the date of registration of the transfer.*

5. *The period of entitlement to the incentive tariffs under this decree is considered net of any suspensions due to problems connected to grid safety or following catastrophic events recognised as such by the competent authorities.*

#### *Conto V*

141. By early 2012, Respondent approached the €6 billion threshold for its incentive tariffs program anticipated in *Conto IV*. Respondent also determined that as of year-end 2011, renewable electricity production capacity was 94 TWh per year, only 6 TWh short of its 2020 target of 100 TWh. Therefore, Respondent considered that it was well on its way to meeting its EU targets. Thus, in accordance with the *Conto IV* provision that it could issue new tariffs once Respondent met the €6 billion cost threshold, on 5 July 2012, its Ministry of Economic Development enacted the fifth and final *Conto Energia*. *Conto V* stated that it would enter into force 45 days after the AEEG issued a resolution announcing that the total cost of the incentive tariffs had reached €6 billion. The AEEG issued that resolution on 12 July 2012, and *Conto V* entered into force on 27 August 2012.

142. In *Conto V*, Respondent noted that technological progress and economies of scale had contributed to a rapid decrease in the cost of photovoltaic plants, and that this decrease had caused a similarly rapid increase in the number of plants being built and connected to the grid. Respondent concluded that it would need an additional €700 million per year of incentive tariffs to make photovoltaic technology competitive, but that, thereafter, new producers would no longer require incentive tariffs.

143. *Conto V* provided two different incentive regimes based on the photovoltaic plants' capacity: (i) it awarded plants up to 1 MW an "all-inclusive tariff" (that is, including both the price of the electricity and the value of the incentive with a further specific tariff for any self-consumed quantity of energy), and (ii) it awarded plants exceeding 1 MW an amount equal to the difference (if positive) between the all-inclusive tariff mentioned above and the market price ("*prezzo zonale orario*") of electricity plus the revenues deriving from the sale of the energy to the market ("*l'energia prodotta resta nella disponibilità del produttore*"). Therefore, the value of the incentive component varied depending on the market price (*i.e.* if the price of electricity rose, the incentive value decreased and *vice versa*).
144. Additionally, regardless of a plant's capacity, *Conto V* provided a bonus tariff on the electricity the operator produced and consumed, which would constitute revenue in addition to the savings that the producer had from generating its own electricity. *Conto V* also simplified access to the incentive tariffs for plants that Respondent deemed to be under-developed (*e.g.*, concentrated photovoltaic systems and plants with innovative characteristics) or whose development needed to be further incentivized given their cost (*e.g.*, very small rooftop plants). Plants falling outside these categories could access the *Conto V* incentives by applying to a registry that was capped in phases corresponding to the total cost of the incentive program. Specifically, the cap for the first registry was €140 million euros, the cap for the second registry was €120 million, and so on, until requests for *Conto V* tariffs reached €700 million.
145. *Conto V* ceased to apply on 6 July 2013. Thus, after 6 July 2013, no incentive tariffs were available to any new photovoltaic plant installed and connected to the Italian electricity grid.
146. One other aspect of *Conto V* is recorded later in this Award



concerning imposition of administrative fees.

147. The Tribunal now sets out a number of provisions in Conto V:

*Article 5  
(Incentive Tariffs)*

*4. The tariff is awarded for a period of twenty years commencing from the entry into operation of the plant and shall remain constant in current currency for the entire support period. This entitlement period is considered net of any suspensions due to problems connected to grid safety or following catastrophic events recognised as such by the competent authorities.*

*Article 6  
(Application for and disbursement of incentive tariffs)*

*1. Within fifteen calendar days as of the entry into operation date of the plant, uploaded by the grid manager onto GAUDI, the plant operator (soggetto responsabile) is under an obligation to send GSE a request for the relevant incentive tariff, by submitting a declaration in lieu of affidavit pursuant to article 47 of DPR 445, 2000, including information under annex 3-B. Failure to comply with the deadlines under this paragraph involves loss of the incentive tariffs for the period between the operational date and the date of communication to GSE, without prejudice to entitlement to the applicable tariff at the operational date.*

*2. For the purposes of paragraph 1, the grid managers are under an obligation to connect the plants to the electricity grid within the terms established by the Authority for electricity and gas resolution no. ARG/elt 99/08 as subsequently amended and to register the date of the connection with GAUDI within the deadlines established therein.*

*3. Following verification of compliance with the provisions of this decree, GSE will guarantee payment of the tariff owed to the plant operator (soggetto responsabile) within ninety days of receipt of the application under paragraph 1, excluding times imputable to the plant operator or to other parties consulted by GSE in application of law no. 183, 12 November 2011, or operators involved in the process for uploading and validating data in GAUDI. Prior to the date on which GAUDI is fully operational and interoperational with the portal for the management of incentives, established by the Authority for electricity and gas, GSE*

*will adopt transitional solutions for the acquisition of data already present in GAUDI directly from the parties applying for incentives, providing prior information to the Authority for electricity and gas and the Ministry for economic development.*

148. The Tribunal notes that the sample (submitted as an exhibit by Claimant) of a *Conto V* contract with the GSE has the following provision, with emphasis added:

*Article 17*  
*Modifying agreements and referral*

*17.1 Any modifying or supplementary agreements on the content of the present Agreement subsequent to the date on which the agreement signed by GSE is made available must be agreed in writing, under the penalty of nullity.*

*17.2 For anything not expressly defined in the present Agreement, the Parties expressly defer to the provisions in the Ministerial Decree on 5 July 2012, to the decisions referenced in the present Agreement and their subsequent modifications and supplements, to the rules on the subject of connections of plants to the grid and measurement of electricity, to the other legislation of the sector and, where applicable, to the provisions of the Civil Code.*

*17.3 GSE retains the right to unilaterally modify the clauses of the present Agreement which, as a result of any legislative and regulatory amendments, are in contrast with the existing framework. These modifications shall be communicated by GSE to the Soggetto Responsabile through the electronic portal, notwithstanding the possibility for the Soggetto Responsabile to withdraw from the present contractual relationship in conformity with the provisions of Article 13 above.*

*17.4 The Parties are aware that any statement rendered in the context of the present Agreement and/or in the context of the activities/obligations connected to its application are made pursuant to Presidential Decree of the Republic 445/00.*

*17.5 The introduction forms a substantial and essential part of the agreement.*

149. In contrast, the corresponding provision of a sample *Conto IV* contract

with the GSE states as follows:

*Article 15*

*Modifying agreements and referral*

*Any modifying or supplementary agreements on the content of the present Agreement subsequent to the date on which the agreement signed by GSE is made available must be agreed in writing, under the penalty of nullity.*

*The Parties are aware that any declaration deriving from the present Agreement and/or in the context of the activities/obligations connected to its application is made pursuant to Presidential Decree of the Republic 445/00.*

*The introduction forms an integral and essential part of the Agreement.*

150. It readily emerges from this comparison that with the *Conto V* arrangements, Respondent changed the term of the GSE contracts to allow for unilateral changes brought about by legislation. Mutual agreement to changes was no longer essential in order for certain changes to become applicable.

*Claimant's Investments*

*Megasol*

151. In January 2010, Claimant acquired Sunholding S.r.l. ("Sunholding"). Sunholding owned Megasol S.r.l., a company that held all project rights to a photovoltaic plant of approximately 13 MW located in Montalto di Castro in the Lazio region ("Megasol"). The Megasol photovoltaic plant was connected to the grid in May 2011 and received an incentive tariff of [REDACTED] under *Conto II*, as confirmed by a GSE Agreement dated 2 November 2011. Claimant's acquisition of Sunholding, therefore, pre-dated the relevant GSE Agreement.

152. The tariff recognition letter dated 12 October 2011 provided as follows.

*RE: Communication on the incentive tariff for the section N = 244595,01 having a capacity of [REDACTED] pursuant to interministerial decree 19 February 2007.*

*With reference to the photovoltaic plant named MEGASOL FV, we hereby communicate the admission to the incentive tariff under Ministerial Decree 19 February 2007, equal to [REDACTED]*

*The tariff will be recognized for a twenty-year period as of the date of entry into operation of the plant: 03/05/2011; the tariff is constant, in current currency for all the twenty-year period.*

*The plant operator [soggetto responsabile] data are the following:*

*kind of subject: legal entity  
name: MEGASOL S.R.L  
fiscal code/VAT code: 06324730966  
address: VIA GUIDO D'AREZZO, 15 20145 Comune di MILANO (MI)*

*The value of the incentive tariff has been determined based on the documentation sent together with the tariffs application form as of 15/06/2011, as well as on plant's features listed below:*

*Plant ID number: 244595,01  
Capacity of the photovoltaic plant: [REDACTED]  
Kind of intervention: NEW BUILDING  
Plant location: LOC. QUARTUCCIO, SN 01014 Comune di MONTALTO DI CASTRO (VT)  
The energy generated by the plant matches the amount of energy injected into the grid: YES  
Building integrated plant pursuant to art. 2, para 1, let. b1), b2), b3) of MD 19 February 2007: [Non-integrated - category b1]*

*For the payment of the incentive tariff, the plant operator [soggetto responsabile] is required to:*

*1. access the section "Agreements" of the web portal dedicated to incentive tariff request*

*https://applicazioni.gse.it) (through the username and password already received;*

*2. select the plant interested by the relevant agreement through the search function (it will be possible to fill in the data on the legal representative, or bank details of the plant operator if such info have not been provided when filing the incentive tariff request application);*

*3. after clicking on the button "Details" it will be possible to look at the draft of the agreement governing the contractual relationship on the incentive payment for the plant previously selected;*

*4. in case of discrepancies or should the applicant be willing to submit comments as per art. 10 of Law 7 August 1990, 241 please select the "NO" option and click on "Validate": a form for notifications will appear. Only after GSE notice on data amendments having been made or on the outcome of the reassessment, it will be possible to proceed with the acceptance declaration (point 5 below).*

*5. To accept the text of the agreement please select the "YES" button and click on the "Confirm" button. Please print and sign the Acceptance declaration and attach a copy of the ID of the plant operator (lacking thereof will prevent GSE from executing the agreement). The relevant documentation shall be sent to:*

*Gestore dei Servizi Energetici - GSE S.p.A.*

*Viale M. Pilsudski 92  
00197 - Roma*

*Please specify on the envelop "PV plants incentivation – Incentive tariff agreement Acceptance declaration – plant reference n. 244595,01".*

*6. The GSE, after executing the agreement, will make available on the web portal, section "Agreements" the electronic version of the agreement digitally signed by the legal representative of GSE.*

*.....*

*With Kind Regards.  
Photovoltaic Department Representative*

153. Certain of the terms of the *Megasol* GSE Agreement dated 2 November 2011 are set out in the following paragraphs.

154. The heading of the *Megasol* GSE Agreement is as follows:

*AGREEMENT ON PHOTOVOLTAIC TARIFFS*

*AGREEMENT NO. I08F25553007 ON THE RECOGNITION OF INCENTIVE TARIFFS FOR THE PRODUCTION OF ELECTRICITY FROM PHOTOVOLTAIC PLANTS PURSUANT TO MINISTERIAL DECREE DATED 19/02/2007 [which is Conto II] AND RESOLUTION NO. 90/07 OF THE AUTHORITY FOR ELECTRICITY AND GAS [which is quoted, in part, at para. .... above]*

155. The pertinent (in the Tribunal's appreciation) clauses of the *Megasol* GSE Agreement are as follows:

*Article 1  
Purpose of the Agreement*

*This agreement concerns the recognition by GSE to the Producer of the contribution owed to electricity produced by solar power through photovoltaic conversion and incentivised pursuant to Legislative Decree 387/03 of the Ministerial Decree dated 19/02/2007 and [AEEG] resolution no. 90/07.*

*Article 2  
Effective date and value of the incentive*

*For a period of twenty years starting from 03/05/2011, the incentive tariff to be granted to the photovoltaic plant under this Agreement is equal to [REDACTED] and is constant in current currency.*

.....

*Article 8  
Effectiveness and duration of the Agreement*

*This Agreement is effective as of 22/12/2010 and expires on 21/12/2030. This Agreement is deemed as legally terminated and ceases to produce effects for the Parties*

*should the Producer incur in one of the cases of [incentive tariff] forfeiture defined in art. 10 of Law 575/1965 and subsequent modifications and integrations, as well as upon the occurrence of the situation provided for in art. 10, paragraph 3 of AEEG resolution no. 90/07.*

*Article 9  
Jurisdiction*

*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 Forum of Rome.*

*Article 10  
Formalisation of the agreement*

*For the purposes of formalising this Agreement, the Producer is required to print through the electronic portal the related Declaration of Acceptance and send it to GSE duly signed, attaching a photocopy of a valid identification document. This Agreement is executed at the time that GSE proceeds with the acceptance of the aforementioned Declaration, making available on its electronic portal the copy for the Producer, signed by its legal representative. Subsequent to the activation of this Agreement, any agreements modifying or integrating the content of this Agreement must be agreed upon in writing otherwise being null and void. The Parties acknowledge that any declaration made under this Agreement is rendered pursuant to the Decree of the President of the Republic (D.P.R.) 445/00.*

*Phenix*

156. In December 2010, Claimant acquired a 70% controlling stake in Phenix S.r.l. ("Phenix"), a company that held all project rights to a photovoltaic plant of approximately 24 MW located in Canino in the Lazio region ("Sugarella"). The Sugarella photovoltaic plant was connected to the grid in April 2011 and was entitled to an incentive tariff of [REDACTED] under *Conto III*, as confirmed by a GSE Agreement dated 23 November 2011. Claimant's acquisition of that 70% controlling stake in Phenix, therefore, pre-dated the relevant

GSE Agreement.

157. The tariff recognition letter dated 17 November 2011 provided as follows.

*RE: Communication on the incentive tariff pursuant to ministerial decree 6 August 2010, concerning the photovoltaic plant named SUGARELLA, capacity [REDACTED], located in STRADA VICINALE DI SAN PIEROTTO, SNC 01011 Municipality of CANINO (VT) site LA SUGARELLA, ID number N = 506827.*

*With reference to the photovoltaic plant hereunder, we hereby communicate the admission to the incentive tariff under Ministerial Decree 6 August 2010 equal to [REDACTED]*

*The incentive tariff will be recognized for a period of twenty years as of the date of entry into operation of the plant: 28/04/2011; the tariff is constant, in current currency, all through the 20-year period. Such period is calculated net of plant stop due to grid stability issues or natural disasters qualified as such by the competent authorities. These events shall be notified through the web portal section "Post agreement execution notices – Out of order".*

*The data of the plant operator (soggetto responsabile) (hereinafter SR) are the following:*

*name: PHENIX RENEWABLES S.R.L.  
fiscal code/VAT code: 06367010961  
address: VIA DELLA ROTONDA , 36 00186 Comune di ROMA (RM)*

*The value of the incentive tariff has been determined according to the documentation filed together with the request for tariffs concession on 19/07/2011, as well as on the basis of the following specific information:*

*type of plant: Photovoltaic  
Power: [REDACTED]  
Plant operator (Soggetto Responsabile): legal entity  
Kind of intervention: NEW CONSTRUCTION  
Plant site category: OTHER  
Category of plant: OTHER PV PLANT  
Energy sale regime: OFF-TAKE*



*In order to activate the payment of tariffs, the plant owner [Soggetto Responsabile] is invited to:*

*1. login on the web portal <https://applicazioni.gse.it> (dedicated to incentives through the ID and password previously assigned and access section "Agreements" by clicking on "Terzo Conto Energia";*

*2. select the plant concerned through the search function;*

*3. click on the button "Details" and look at the draft of the agreement regulating the contractual relationship on tariffs payment relating to the selected plant;*

*4. should any (records) discrepancies be detected, select the button "before signing the agreement some data on the plant owner [Soggetto Responsabile] must be corrected by GSE" and click on the "Proceed" button. By this way, a notice on discrepancies or errors will be activated; only after GSE notice to SR on the corrections having been made, it will be possible to go on with sending the acceptance declaration of the agreement (point 5 below);*

*5. to accept the agreement click on "I declare I have read and accept in full all provisions regulating this agreement" and click on the "Proceed" button. Print and sign the Acceptance declaration and attach thereto a copy of SR ID in force (lacking thereof will prevent GSE from executing the agreement), upload the document. Once the uploading is completed just click on the button "Send agreement";*

*6. the GSE, after executing the agreement, will make available, in the section "Agreements" on the web portal, the document in electronic format digitally signed by the legal representative of the GSE.*

*The above is without prejudice to the right of GSE to carry out subsequent controls through documents and/or on-site inspections, as well as adopt annulment or revocation measures concerning the incentive tariffs admission letter, thereby asking back for the amounts already paid, if, according to art. 23 and 43 of Legislative decree 28/2011, the occurrence of circumstances preventing tariffs payment is ascertained, even if such conditions emerged during the examination of a plant different from the one at issue.*

*... ..*

*With Kind Regards.*

*Conto Energia Unit Representative*

158. Certain of the terms of the *Phenix* GSE Agreement dated 23 November 2011 are set out in the following paragraphs.

159. The heading of the *Phenix* GSE Agreement is as follows:

*AGREEMENT NO. I08F25553007 ON THE RECOGNITION OF INCENTIVE TARIFFS FOR THE PRODUCTION OF ELECTRICITY FROM PHOTOVOLTAIC PLANTS PURSUANT TO MINISTERIAL DECREE DATED 19/02/2007 [which is Conto II] AND RESOLUTION NO. 90/07 OF THE AUTHORITY FOR ELECTRICITY AND GAS [which is quoted, in part, at para. .... above]*

160. The pertinent (in the Tribunal's appreciation) clauses of the *Phenix* GSE Agreement are as follows:

*Article 1  
Purpose of the Agreement*

*This Agreement concerns the recognition to the Soggetto Responsabile by GSE, of the incentive tariff related to the electricity produced through photovoltaic conversion from solar power by the plant mentioned in the introduction, incentivised pursuant to art. 7 of Legislative Decree 387/03 of the Ministerial Decree dated 6 August 2010 and AEEG resolution ARG/elt 181.10*

*Article 2  
Effective date and value of the incentive  
The incentive tariff to be granted to the photovoltaic plant under this Agreement, which is constant in current currency, is equal to [REDACTED] a value recognised by GSE and disclosed to the Soggetto Responsabile with the communication of admission to the incentive tariffs.*

.....

*Article 10  
Effective date and duration of the Agreement*

*This Agreement is effective from 28/04/2011 and expires on 27/04/2031.*

....

*Article 13  
Jurisdiction*

*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 Forum of Rome.*

*Article 14  
Formalisation of the Agreement*

*For the purposes of formalising the Agreement, the Soggetto Responsabile is required to print the relevant Declaration of Acceptance and send it to GSE through the online portal duly signed, together with a copy of a valid identification document. This Agreement is formalised at the time that GSE proceeds with the acceptance of the aforementioned Declaration, providing a copy of the agreement on its electronic portal, signed by its legal representative.*

*Article 15  
Amendments and other*

*Any agreements modifying or integrating the content of this Agreement subsequent to the date on which the agreement signed by GSE is made available must be agreed upon in writing, otherwise being null and void. The Parties acknowledge that any declaration under this Agreement in connection with the activities/obligations related to the performance thereof is made pursuant to the Decree of the President of the Republic (D.P.R.) 445/00. The introduction forms an integral and essential part of this Agreement.*

*Enersol*

161. On 30 March 2012<sup>2</sup>, Claimant acquired Enersol S.r.l., a company that held all project rights to a multi-section photovoltaic plant of

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<sup>2</sup> Para. 160 of the SoC contains a chart with the dates of acquisitions by Claimant. The date of acquisition of *Enersol* is stated to be 30 March 2012. This is accepted by Respondent on slide 62 of its Opening Presentation at the hearing. Thus, as it is common case between the Parties, the Tribunal finds that the date of acquisition of *Enersol* by Claimant is 30 March 2012.

approximately 48 MW located in Canaro in the Veneto region (“Enersol”). The Enersol photovoltaic plant was partitioned in seven sections. Section 1 of the plant was connected to the grid in April 2011, and was entitled to an incentive tariff of [REDACTED] under *Conto III*, as confirmed by a GSE Agreement dated 2 November 2011. Sections 2 and 3 of the plant were connected to the grid in July 2011, and were entitled to an incentive tariff of [REDACTED] under *Conto IV*, as confirmed by two separate GSE Agreements (one per Section) dated 2 March 2012. Sections 4 to 7 of the plant were connected to the grid in August 2011, and were entitled to an incentive tariff of [REDACTED] under *Conto IV*, as confirmed by four separate GSE Agreements (one per Section) dated 11 January 2012 (for Sections 5 and 7), 6 February 2012 (for Section 4), and 2 March 2012 (for Section 6). Thus, Claimant’s acquisition of *Enersol*, therefore, post-dated the relevant GSE Agreements.

162. The tariff recognition letters, with the subsequent GSE Agreements, in connection with *Enersol* are each recorded in turn.

Letter – Enersol Section 1 – 11 October 2011

*RE: Communication on the incentive tariff pursuant to ministerial decree 6 August 2010, concerning the photovoltaic plant named FOTOVOLTAICO ENERSOL, capacity [REDACTED] located in VIA VITTORIO EMANUELE , s.n. 45034 Municipality of CANARO (RO) site SALINE, ID number N = 512446.01.*

*With reference to the photovoltaic plant hereunder, we hereby communicate the admission to the incentive tariff under Ministerial Decree 6 August 2010 equal to [REDACTED]*

*The incentive tariff will be recognized for a period of twenty years as of the date of entry into operation of the plant: 28/04/2011; the tariff is constant, in current currency, all through the 20-year period. Such period is calculated net of plant stop due to grid stability issues or natural disasters qualified as such by the competent authorities. These events shall be notified through the web portal section “Post agreement execution notices – Out of order”.*

*The data of the plant operator (soggetto responsabile) (hereinafter SR) are the following:*

*name: ENERSOL S.R.L.*

*fiscal code/VAT code: 01381190295*

*address: VIA VITTORIO VENETO, 137 45100 Comune di ROVIGO (RO)*

*The value of the incentive tariff has been determined according to the documentation filed together with the request for tariffs concession on 17/06/2011, as well as on the basis of the following specific information:*

*type of plant: Photovoltaic*

*Power: [REDACTED]*

*Plant operator (Soggetto Responsabile): legal entity*

*Kind of intervention: NEW CONSTRUCTION*

*Plant site category: OTHER*

*Category of plant: OTHER PV PLANT*

*Energy sale regime: OFF-TAKE*

*Eligible for incentive tariff increase: NO*

*In order to activate the payment of tariffs, the plant owner [Soggetto Responsabile] is invited to:*

- 1. login on the web portal <https://applicazioni.gse.it> (dedicated to incentives through the ID and password previously assigned and access section "Agreements" by clicking on "Terzo Conto Energia";*
- 2. select the plant concerned through the search function;*
- 3. click on the button "Details" and look at the draft of the agreement regulating the contractual relationship on tariffs payment relating to the selected plant;*
- 4. should any (records) discrepancies be detected, select the button "before signing the agreement some data on the plant owner [Soggetto Responsabile] must be corrected by GSE" and click on the "Proceed" button. By this way, a notice on discrepancies or errors will be activated; only after GSE notice to SR on the corrections having been made, it will be possible to go on with sending the acceptance declaration of the agreement (point 5 below);*
- 5. to accept the agreement click on "I declare I have read and accept in full all provisions regulating this agreement" and click on the "Proceed" button. Print and sign the Acceptance declaration and attach thereto a copy of SR ID in force (lacking thereof will prevent GSE from executing the agreement), upload the document. Once the uploading is completed just click on the button "Send agreement";*
- 6. the GSE, after executing the agreement, will make available, in the section "Agreements" on the web portal, the document in electronic format digitally signed by the legal representative of the*

GSE.

GSE Agreement for Enersol Section 1 (T03N25531907) 31  
October 2011  
(relevant extract)

*Purpose of the Agreement*

*This Agreement concerns the recognition to the Soggetto Responsabile by GSE, of the incentive tariff related to the electricity produced through photovoltaic conversion from solar power by the plant mentioned in the introduction, incentivised pursuant to art. 7 of Legislative Decree 387/03 of the Ministerial Decree dated 6 August 2010 and AEEG resolution ARG/elt 181.10*

*Article 2*

*Effective date and value of the incentive*

*The incentive tariff to be granted to the photovoltaic plant under this Agreement, which is constant in current currency, is equal to [REDACTED] a value recognised by GSE and disclosed to the Soggetto Responsabile with the communication of admission to the incentive tariffs.*

*Article 10*

*Effective date and duration of the Agreement*

*This Agreement is effective from 28/04/2011 and expires on 27/04/2031.*

*Article 15*

*Amendments and other*

*Any agreements modifying or integrating the content of this Agreement subsequent to the date on which the agreement signed by GSE is made available must be agreed upon in writing, otherwise being null and void.*

Letters – Enersol Sections 2 & 3 – 20 February 2012

*RE: Communication on the incentive tariff pursuant to MD 5 May 2011 concerning the photovoltaic plant named FOTOVOLTAICO ENERSOL, with a capacity of [REDACTED], located in VIA VITTORIO EMANUELE, s.n. 45034 Municipality of CANARO (RO) site of SALINE, plant ID number N = 512446.02. [512446.03 in the context of Enersol Section 3]*

*With reference to the photovoltaic plant mentioned above, we hereby communicate the admission to the incentive tariff under Ministerial Decree 5 May 2011, equal to [REDACTED].*

*The tariff will be recognized for a twenty-year period as of the date of entry into operation of the plant: 31/07/2011; the tariff is constant in current currency for all the twenty year period. This timeframe is calculated net of any plant stops due to problems concerning grid safeguard or following natural disaster considered as such by the competent authorities. These events shall be communicated through the relevant web portal section.*

*The identification data of the plant owner (Soggetto Responsabile) are the following:*

*name: ENERSOL S.R.L.*

*fiscal code/VAT code: 01381190295*

*address: VIA VITTORIO VENETO, 137 45100 Comune di ROVIGO (RO)*

*The value of the incentive tariff has been determined according to the documentation sent together with the application for the incentive tariffs dated 05/08/2011, and on the basis of the following features:*

*Kind of plant: Big Photovoltaic Plant*

*Nominal capacity: [REDACTED]*

*Soggetto Responsabile: legal entity*

*Kind of intervention: NEW CONSTRUCTION*

*Site nature: agricultural area*

*Kind of facility installed: OTHER PV PLANT*

*Energy sale regime: Off-take*

*Additional tariff increase: -*

*In order to activate the payment of tariffs, the plant owner [Soggetto Responsabile] is invited to:*

- 1. login on the web portal (<https://applicazioni.gse.it>) dedicated to incentives through the ID and password previously assigned and access section "Agreements" by clicking on "Quarto Conto Energia";*
- 2. select the plant concerned through the search function;*
- 3. click on the button "Details" and look at the draft of the agreement regulating the contractual relationship on tariffs payment relating to the selected plant;*
- 4. should any (records) discrepancies be detected, select the button "before signing the agreement some data on the plant owner [Soggetto Responsabile] must be corrected by GSE" and click on the "Proceed" button. By this way, a notice on discrepancies or errors will be activated; only after GSE notice to SR on the corrections having been made, it will be possible to go on with sending the acceptance declaration of the agreement (point 5 below);*
- 5. to accept the agreement click on "I declare I have read and accept in full all provisions regulating this agreement" and click on the "Proceed" button. Print and sign the Acceptance*

declaration and attach thereto a copy of SR ID in force (lacking thereof will prevent GSE from executing the agreement), upload the document. Once the uploading is completed just click on the button "Send agreement";

6. the GSE, after executing the agreement, will make available, in the section "Agreements" on the web portal, the document in electronic format digitally signed by the legal representative of the GSE.

The above is without prejudice to the right of GSE to carry out subsequent controls through documents and/or on-site inspections, as well as adopt annulment or revocation measures concerning the incentive tariffs admission letter, thereby asking back for the amounts already paid, if the lack of the elements necessary for granting incentives is ascertained.

The GSE also verifies the occurring of any circumstances preventing incentives payments and adopt all consequent measures of revocation or exclusions in accordance with arts. 23 and 43 of legislative decree 28/2011.

GSE Agreements for Enersol Sections 2 & 3 (T03N236118107 & T03N236188307 respectively) 2 March 2012  
(relevant extract)

#### *Article 1*

##### *Purpose of the Agreement*

*This Agreement regards the recognition to the Soggetto Responsabile by GSE of the incentive tariff related to the electricity produced through photovoltaic conversion from solar sources from the plant mentioned in the introduction, incentivised pursuant to art. 7 of Legislative Decree 387/03 of the Ministerial Decree dated 5 May 2011.*

#### *Article 2*

##### *Value of the incentive*

*The incentive tariff, constant in regular instalments in current currency, to be recognised to the photovoltaic plant under this Agreement, is equal to [REDACTED] a value recognised by GSE and notified to the Soggetto Responsabile with the communication on admission to the incentive tariff.*

#### *Article 10*

##### *Effective date and duration of the Agreement*

*The present Agreement is effective from 31/07/2011 and expires on 30/07/2031.*

#### *Article 15*



*Modifying agreements and referral*

*Any modifying or supplementary agreements on the content of the present Agreement subsequent to the date on which the agreement signed by GSE is made available must be agreed in writing, under the penalty of nullity.*

Letters – Enersol Sections 4 (15 December 2012), 5, 6, & 7 (each on  
16 December 2012)

*RE: Communication on the incentive tariff pursuant to MD 5 May 2011 concerning the photovoltaic plant named FOTVOLTAICO ENERSOL, with a capacity of [REDACTED] located in VIA VITTORIO EMANUELE, s.n. 45034 Municipality of CANARO (RO) site of SALINE, plant ID number N = 512446.04. [512446.05 in the context of Enersol Section 5; 512446.06 in the context of Enersol Section 6; and 512446.07 in the context of Enersol Section 7]*

*With reference to the photovoltaic plant mentioned above, we hereby communicate the admission to the incentive tariff under Ministerial Decree 5 May 2011, equal to [REDACTED]*

*The tariff will be recognized for a twenty-year period as of the date of entry into operation of the plant: 31/08/2011; the tariff is constant in current currency for all the twenty year period. This timeframe is calculated net of any plant stops due to problems concerning grid safeguard or following natural disaster considered as such by the competent authorities. These events shall be communicated through the relevant web portal section.*

*The identification data of the plant owner (Soggetto Responsabile) are the following:*

*name: ENERSOL S.R.L.*

*fiscal code/VAT code: 01381190295*

*address: VIA VITTORIO VENETO, 137 45100 Comune di ROVIGO (RO)*

*The value of the incentive tariff has been determined according to the documentation sent together with the application for the incentive tariffs dated 13/09/2011, and on the basis of the following features:*

*Kind of plant: Big Photovoltaic Plant*

*Nominal capacity: [REDACTED]*

*Soggetto Responsabile: legal entity*

*Kind of intervention: NEW CONSTRUCTION*

*Site nature: agricultural area*

*Kind of facility installed: OTHER PV PLANT*

*Energy sale regime: Off-take  
Additional tariff increase: NO*

*In order to activate the payment of tariffs, the plant owner [Soggetto Responsabile] is invited to:*

- 1. login on the web portal (<https://applicazioni.gse.it>) dedicated to incentives through the ID and password previously assigned and access section "Agreements" by clicking on "Quarto Conto Energia";*
- 2. select the plant concerned through the search function;*
- 3. click on the button "Details" and look at the draft of the agreement regulating the contractual relationship on tariffs payment relating to the selected plant;*
- 4. should any (records) discrepancies be detected, select the button "before signing the agreement some data on the plant owner [Soggetto Responsabile] must be corrected by GSE" and click on the "Proceed" button. By this way, a notice on discrepancies or errors will be activated; only after GSE notice to SR on the corrections having been made, it will be possible to go on with sending the acceptance declaration of the agreement (point 5 below);*
- 5. to accept the agreement click on "I declare I have read and accept in full all provisions regulating this agreement" and click on the "Proceed" button. Print and sign the Acceptance declaration and attach thereto a copy of SR ID in force (lacking thereof will prevent GSE from executing the agreement), upload the document. Once the uploading is completed just click on the button "Send agreement";*
- 6. the GSE, after executing the agreement, will make available, in the section "Agreements" on the web portal, the document in electronic format digitally signed by the legal representative of the GSE.*

*The above is without prejudice to the right of GSE to carry out subsequent controls through documents and/or on-site inspections, as well as adopt annulment or revocation measures concerning the incentive tariffs admission letter, thereby asking back for the amounts already paid, if the lack of the elements necessary for granting incentives is ascertained.*

*The GSE also verifies the occurring of any circumstances preventing incentives payments and adopt all consequent measures of revocation or exclusions in accordance with arts. 23*

*GSE Agreements for Enersol Sections 4, 5, 6, & 7  
(respectively: T03N2229769107 of 16 February  
2012; T03N229798007 of 11 January 2012; T03N229798207 of 2  
March 2012; T03N229798307 of 11 January 2012)*

(relevant extract)

*Article 1*

*Object of the Agreement*

*This Agreement concerns the recognition to the Producer [Enersol S.r.l.] by the GSE of the incentive tariff related to the electricity produced through photovoltaic conversion from solar power by the plant mentioned in the introduction, incentivized pursuant to art. 7 of Legislative Decree No. 387/03, Ministerial Decree 5 May 2011.*

*Article 2*

*Value of the Incentives*

*The incentive tariff, constant in regular instalments in the applicable currency to be recognized to the photovoltaic plant under this Agreement, is equal to [REDACTED] a value recognized by GSE and disclosed to the Producer [Enersol S.r.l.] with the communication on the admission to the incentive tariff.*

*Article 10*

*Date and Duration of the Agreement*

*The present Agreement is effective from 31 August 2011 and expires on 30 August 2031.*

*Measures taken by Respondent*

163. The Tribunal starts its analysis first with the *Spalmaincentivi* measure taken by Respondent, which Claimant alleges to have transgressed – in breach of Article 10(1) ECT - its legitimate expectations as to the stability of the legal and economic regime of the PV electricity production in Italy into which it invested. The Tribunal will then describe the other measures. This order of analysis is justified by the fact that the *Spalmaincentivi* was the preponderant cause of the reduction to Claimant's revenues from its investments. Temporally, however, the *Spalmaincentivi* was not the first measure by which Respondent sought to "scale back", as Claimant describes Respondent's policy in this respect, the incentives it had given to PV electricity production in the furtherance of its policy objectives.

*Spalmaincentivi*

164. *Spalmaincentivi* (or "incentive spreading") is the journalistic, colloquial name of the provisions of Article 26 of Law Decree

91/2014 of 24 June 2014, which was subsequently converted with substantial relevant changes into Law 116/2014 of 11 August 2014. As all such decrees addressing urgent issues, which under the Italian Constitution, Governments may enact with force of a law, Law Decree 91/2014 had to be converted by Parliament within 60 days into a law, possibly with amendments, as happened for Law Decree 91/2014, in case it would lose any effect. The shortened name of the Decree is “Decreto Competitività” (“Competitiveness Decree”). It included a range of measures to bolster Italy’s competitiveness, including among others, as mentioned in its full title, measures for the “limitation of the costs burden on electricity tariffs”, which are found in Article 26. This purpose was considered so important that, as the Parties have recalled, Article 26 measures have been also labelled with the term “taglia-bollette” (tariff bill-cut).

165. The original text of Article 26 provided only, among other measures included in the Law Decree, to reduce the burden for electricity consumers due to advantages granted to various electricity users and producers (among the latter, notably PV producers) that the benefits of the incentive tariffs would be spread over 24 years instead of the 20 years provided in the various *Conto Energia*. According to Claimant this entailed a reduction of 17%-25% depending on the residual period of operation of a given PV plant.
  
166. As a result of the parliamentary debate, in which parliamentarians of parties favourable to the industry were active in proposing modifications that would diminish the negative impact of the original *Spalmaincentivi* on PV producers, the conversion Law 116/2014 (effective 1<sup>st</sup> January 2015) offered producers the choice between three options: (A) a 17–25% tariff cut (as originally provided in the Law Decree), paid over 24 years instead of originally promised 20 years; (B) a tariff reduction from 2015–2019, with a promise of

increased tariffs in remaining years; and (C) (which applied in default of a choice by a producer) straight 6–8% cut over 20 years, depending on the installed capacity of the plant concerned. Further, another aspect of *Spalmaincentivi* was that payment of 100% of the incentive within 60 days was changed to 90% with the 10% balance paid the subsequent year.

#### *Administrative fees and imbalance costs*

167. First, as regards administrative fees, article 10.4 of *Conto V* provided that, as of 1 January 2013, all photovoltaic producers benefiting from incentive tariffs under any *Conto* were required to pay an annual administrative fee corresponding to € 0.0005 per kWh of incentivized energy, to cover the GSE's management, verification, and control expenses.
168. Secondly, as regards imbalance costs, on 5 July 2012, the AEEG passed Resolution 281/2012/R/EFR ("Resolution 281"), which required renewable energy producers to pay imbalance costs as of 1 January 2013. The GSE, with approval of the AEEG, implemented the method by which those costs would apply to renewable energy producers at the end of 2012 with Resolution 493/2012/R/EFR ("Resolution 493").
169. Resolution 281 and Resolution 493 were challenged before the Italian administrative courts. On 9 June 2014, the *Consiglio di Stato* found in favour of the producers and held that the AEEG's resolutions were unlawful. In particular, the *Consiglio di Stato* indicated that the resolutions were discriminatory because they regulated programmable and non-programmable sources of energy in the same manner, and therefore failed to differentiate amongst different types of renewable energy sources. As a result of that judgment, in many cases, the GSE reimbursed the sums that renewable energy producers had already paid under Resolution 281 and Resolution 493.

170. On 23 October 2014, the AEEG issued Resolution No. 522/2014/R/EEL (“Resolution 522”) that, once again, imposed imbalance costs on renewable energy producers. Although certain producers challenged Resolution before the Italian courts on grounds that it should be null and void as in contrast with the principles of the previous court ruling, renewable energy producers have been paying these imbalance costs since 1 January 2015.

*Robin Hood tax*

171. In 2008, Respondent enacted a windfall profits tax on the profits of oil, gas, and other traditional energy companies, colloquially known in an amalgam of English popular legend and modern economic factors as the “Robin Hood” tax.

172. Under the heading of “Oil and gas sectors” in Law-Decree No. 112/2008 of June 25, 2008, Respondent provided that, as a result of the country’s economic situation and the social impact of the increase in energy prices, it would increase the corporate income tax rate of companies with an annual gross income of over € 25 million by 5.5 percentage points, from 27.5% to 33%.

173. In July 2009, Respondent increased the corporate income tax rate of companies subject to the Robin Hood tax to 34%. Respondent explicitly excluded producers of renewable energy from the Robin Hood tax because they had not benefited from the then price spikes in traditional energy sources.

174. In August 2011, Respondent broadened the scope of the Robin Hood tax by extending it to all energy producers, including renewable energy producers, with a gross annual income of over €10 million and taxable income of over €1 million. In the law decree’s preamble it was noted the urgency of adopting financial stabilization measures

was to guarantee the stability of Italy in the midst of an international economic crisis and unstable markets. Respondent also increased the corporate income tax rate of companies subject to the Robin Hood tax from 34% to 38%, which applied to fiscal years 2011 through 2013.

175. In June 2013, Respondent extended the scope of the Robin Hood tax by reducing the applicable income thresholds to gross annual income over €3 million and taxable income over € 300,000. This resulted in the application of the Robin Hood tax to Claimant's photovoltaic plants.
176. A constitutional challenge to the application of the Robin Hood tax to the renewable energy sector was brought and on 11 February 2015, the Italian Constitutional Court ruled the extension of the Robin Hood tax to renewable energy producers to be unconstitutional. The Court also ruled that its decision would not have retroactive effect.
177. On 28 April 2015, Respondent confirmed that renewable energy producers were required to pay the Robin Hood tax for the 2014 fiscal year.

#### *IMU/TASI charges*

178. In December 2013, Respondent classified photovoltaic plants as immovable property, thereby subjecting them to increased IMU and TASI charges. Respondent changed this in the 2016 Budget Law, reducing IMU and TASI charges by about 90%. Respondent has not refunded IMU and TASI charges paid in 2014 and 2015.

Section B - Merits – Liability (incl. concomittant Jurisdiction & Admissibility)

Introduction

179. Claimant says that the matters discussed in the foregoing section of this award (*Spalmaincentivi*, Administrative fees and imbalance costs, the *Robin Hood* tax, and the IMU/TASI charges) give rise to ECT claims in respect of each of its three investments, namely, *Megasol*, *Phenix*, and *Enersol*. Claimant summarised each head of claim, in its Opening Presentation at the hearing, as follows:

- *Italy failed to fulfill the obligations it entered into with respect to CEF's investments, which were crystallized in Tariff Confirmation Letters and Contracts.*
- *Italy violated CEF's legitimate expectations of receiving precisely the tariffs granted to its PV plants through the Conto Energia Decrees, Tariff Recognition Letters, and Contracts when Italy amended those tariffs through the enactment of various measures, including the Spalmaincentivi*
- *If Italy's case is to be believed, then it failed to provide a transparent legal framework, since under Italy's case, the Conto Energia Decrees, Tariff Recognition Letters, and Contracts did not mean what they plainly said.*
- *Italy's measures reducing the Conto Energia tariffs unreasonably impaired CEF's investments.*

180. In summary, these are: (a) Umbrella Clause claims; (b) FET claims; (c) Failure to provide transparent legal framework claims; and (d) Unreasonable impairment claims.

181. Respondent denies all liability, and, additionally, raises the exception found in Article 21 of the ECT in respect of a number of the measures (this summary is taken from its Opening Presentation at the hearing): (a) Robin Hood Tax; (b) Qualification of assets for fiscal and cadastral purposes; (c) Imbalance charges; and (d) Administrative fees.



182. The Tribunal, in its procedural appreciation of the materials before it, arranges its analysis as follows: 1. FET claims; 2. Umbrella Clause claims; 3. Failure to provide transparent legal framework claims; and 4. Unreasonable impairment claims.

FET claims

183. The Tribunal, first, records the basic contours of what constitutes fair and equitable treatment. Article 10(1) of the ECT provides as follows, in part:

*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.*

184. The Parties are in agreement with one another that protection of legitimate expectation comes within the ambit of Article 10(1) of the ECT, though as to what precisely such protection exactly means (from the plethora of prior awards cited to the Tribunal) is an area of contention. The briefings which the Tribunal received from the Parties on 20 July 2018 (commenting, *inter alia*, on *Antaris*) encapsulated such contention; but most particularly these briefings showed that each advocated a view that, regardless of how one articulates the protection of legitimate expectation, the outcome was going to be their favour.

185. In this respect the Tribunal finds it useful to recall and quote the summary made by the tribunal in *Antaris* of the protection that the FET standard grants to covered foreign investors by clauses such as Art. 10(1) ECT. The Tribunal considers that the summary of the *Antaris* award quoted hereunder is by and large a correct description of the import of the FET standard as found in Article 10 (1) ECT in

the light of the abundant case law that has developed on the issue. In referring to such summary the Tribunal is, in any case, mindful that principles have to be adapted to the specificity of each case and that in this field previous awards and decisions may properly be looked at as useful (re-)statements of the law but do not represent binding precedents. The relevant recapitulation in *Antaris* is as follows (footnotes omitted):

*360. As is usual in these cases, the Parties have adduced many published awards (in this case more than 50) on the interpretation or application of the FET ("fair and equitable treatment") standard, and the FPS ("full protection and security") and non-impairment standards. Most of them are well-known, and, although formulations of the principles differ in detail, it is only necessary to summarize the present state of international law and practice in these general propositions (several of which overlap with each other):*

*(1) There will be a breach of the FET standard where legal and business stability or the legal framework has been altered in such a way as to frustrate legitimate and reasonable expectations or guarantees of stability.*

*(2) 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.*

*(3) A claimant must establish that (a) clear and explicit (or implicit) representations were made by or attributable to the state in order to induce the investment, (b) such representations were reasonably relied upon by the Claimants, and (c) these representations were subsequently repudiated by the state.*

*(4) An expectation may arise from what are construed as specific guarantees in legislation.*

*(5) A specific representation may make a difference to the assessment of the investor's knowledge and of the reasonableness and legitimacy of its expectation, but is not indispensable to establish a claim based on legitimate expectation which is advanced under the FET standard.*

*(6) Provisions of general legislation applicable to a plurality of persons or a category of persons, do not create legitimate expectations that there will be no change in the law; and given 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.*

*(7) An expectation may be engendered by changes to general legislation, but, at least in the absence of a stabilization clause, they are not prevented by the fair and equitable treatment standard if they do not exceed the exercise of the host State's normal regulatory power in the pursuance of a public interest and do not modify the regulatory framework relied upon by the investor at the time of its investment outside the acceptable margin of change.*

*(8) The requirements of legitimate expectations and legal stability as manifestations of the FET standard do not affect the State's rights to exercise its sovereign authority to legislate and to adapt its legal system to changing circumstances.*

*(9) The host State is not required to elevate the interests of the investor above all other considerations, and the application of the FET standard allows for a balancing or weighing exercise by the State and the determination of a breach of the FET standard must be made in the light of the high measure of deference which international law generally extends to the right of national authorities to regulate matters within their own borders.*

*(10) Except where specific promises or representations are made by the State to the investor, the latter may not rely on an investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. Such expectation would be neither legitimate nor reasonable.*

*(11) Protection from arbitrary or unreasonable behaviour is subsumed under the FET standard.*

*(12) It will also fall within the obligation not to impair investments by "unreasonable ... measures" (Article 10(1), ECT) or "arbitrary ... measures (Article 2(2), Czech Republic/Germany BIT).*

*(13) The investor is entitled to expect that the State will not act in a way which is manifestly inconsistent or unreasonable (i.e. unrelated to some rational policy).*

186. Respondent also, at para. 473 of SoD, makes the point that *the protection under the FET standard may only concern those expectations of the investors that existed at the time when they made*

*the investment*. It is with this important temporal point that the Tribunal will begin its analysis of the FET claims.

187. As already noted above (paras. 152 and 153), both the tariff recognition letter and the GSE Agreement in respect of *Megasol* post-dated Claimant's investment. Also, as already noted above (paras. 157 and 158), both the tariff recognition letter and the GSE Agreement in respect of *Phenix* post-dated Claimant's investment. Further, neither plant had been, at the time of the investments, connected to the grid. Thus, at the time Claimant invested in both *Megasol* and *Phenix*, at the very best it can be said that its intention was to complete plants which would, at a point in the future, be connected to the grid, and be compliant with the necessary requirements under the applicable *Conto*. Thereafter, appropriate applications would need to be made (and the requirements of the applicable *Conto* to be satisfied), a reply in the positive received, and then a GSE Agreement consummated.

188. Claimant, in reality, at the time of the making of both the *Megasol* and *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. What is decisive is that as of those dates the protection of Claimant's investment rights had not yet crystallised.

189. As a consequence, the Tribunal finds that Claimant cannot assert an FET claim by way of protection of legitimate expectation for both *Megasol* and *Phenix* insofar as it might allege that the changes to the

later-awarded incentives engage international responsibility on the part of Respondent.

190. Conversely, no such difficulty arises in respect of *Enersol*. As noted above in footnote 2, it is common case that the date of Claimant's investment was 30 March 2012, which clearly post-dates the connections to the grid, the tariff recognition letters, and the GSE Agreements. Thus, as of 30 March 2012, Claimant's investment in *Enersol* enjoyed crystallised rights to incentives as described above.
191. Thus, the Tribunal will now analyse whether Respondent's actions transgressed the protection of legitimate expectation by the ECT insofar as *Enersol* is concerned. This is a two-stage process as a matter of international law: first, what is the origin and scope, precisely, of the legitimate expectation; secondly, how exactly has such legitimate expectation (if first established as a matter of international law) have been transgressed, if at all, in a manner prohibited by international law.
192. Before embarking into the analysis of whether or not there was a breach of any legitimate expectation attached to Claimant's investment in *Enersol*, the Tribunal must address threshold points raised by Respondent.
193. As noted in para. 181 above, Respondent raises Article 21 of the ECT in four respects. Article 21 of the ECT provides as follows:

*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.*

*(2) Article 7(3) shall apply to Taxation Measures other than those on income or on capital, except that such provision shall not apply to:*

*(a) an advantage accorded by a Contracting Party pursuant to the tax provisions of any convention, agreement or arrangement described in subparagraph (7)(a)(ii); or*

*(b) any Taxation Measure aimed at ensuring the effective collection of taxes, except where the measure of a Contracting Party arbitrarily discriminates against Energy Materials and Products originating in, or destined for the Area of another Contracting Party or arbitrarily restricts benefits accorded under Article 7(3).*

*(3) Article 10(2) and (7) shall apply to Taxation Measures of the Contracting Parties other than those on income or on capital, except that such provisions shall not apply to:*

*(a) impose most favoured nation obligations with respect to advantages accorded by a Contracting Party pursuant to the tax provisions of any convention, agreement or arrangement described in subparagraph (7)(a)(ii) or resulting from membership of any Regional Economic Integration Organization; or*

*(b) any Taxation Measure aimed at ensuring the effective collection of taxes, except where the measure arbitrarily discriminates against an Investor of another Contracting Party or arbitrarily restricts benefits accorded under the Investment provisions of this Treaty.*

*(4) Article 29(2) to (8) shall apply to Taxation Measures other than those on income or on capital.*

*(5) (a) Article 13 shall apply to taxes.*

*(b) Whenever an issue arises under Article 13, to the extent it pertains to whether a tax constitutes an expropriation or whether a tax alleged to constitute an expropriation is discriminatory, the following provisions shall apply:*

*(i) The Investor or the Contracting Party alleging expropriation shall refer the issue of whether the tax is an expropriation or whether the tax is discriminatory to the relevant Competent Tax Authority. Failing such referral by the Investor or the Contracting Party, bodies called upon to settle disputes pursuant to Article 26(2)(c) or 27(2) shall make a referral to the relevant Competent Tax Authorities;*

*(ii) The Competent Tax Authorities shall, within a period of six months of such referral, strive to resolve the issues so referred. Where non-discrimination issues are concerned, the Competent Tax Authorities shall apply the non-discrimination provisions of the relevant tax convention or, if there is no non-discrimination provision in the relevant tax convention applicable to the tax or no such tax convention is in force between the Contracting Parties concerned, they shall apply the non-discrimination principles under the Model Tax Convention on Income and Capital of the Organisation for Economic Cooperation and Development;*

*(iii) Bodies called upon to settle disputes pursuant to Article 26(2)(c) or 27(2) may take into account any conclusions arrived at by the Competent Tax Authorities regarding whether the tax is an expropriation. Such bodies shall take into account any conclusions arrived at within the six-month period prescribed in subparagraph (b)(ii) by the Competent Tax Authorities regarding whether the tax is discriminatory. Such bodies may also take into account any conclusions arrived at by the Competent Tax Authorities after the expiry of the six-month period;*

*(iv) Under no circumstances shall involvement of the Competent Tax Authorities, beyond the end of the six-month period referred to in subparagraph (b)(ii), lead to a delay of proceedings under Articles 26 and 27.*

*(6) For the avoidance of doubt, Article 14 shall not limit the right of a Contracting Party to impose or collect a tax by withholding or other means.*

*(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.*

194. Respondent says that certain of the actions it took of which Claimant makes complaint, are captured by Article 21 of the ECT. In such circumstances, if Respondent is correct, the Tribunal has no jurisdiction to decide whether or not those actions engaged international responsibility as a matter of the ECT. These arguments are now examined in turn.
195. As regards administrative fees, these arose as follows. Article 10.4 of *Conto V* provided that, as of 1 January 2013, all photovoltaic producers benefiting from incentive tariffs under any *Conto* were required to pay an annual administrative fee corresponding to € 0.0005 per kWh of incentivized energy, to cover the GSE's management, verification, and control expenses. Are these administrative fees a Taxation Measure, or are they not?
196. As Respondent points out at para. 147 of the SoD, the definition in Article 21(7) of the ECT is very wide, and includes *any provision relating to taxes of the domestic law of the Contracting Party or of a political subdivision thereof or a local authority therein*. Respondent



then develops its argument as to what is tax provision in the domestic law of Italy at paras. 149-151 of the SoD:

*149. In Italy, fiscal measures (tributi) can be broadly divided into three categories: imposta (tax), tassa (fee) and contributo (contribution), although it is not the name of the measure to actually make it a fiscal measure (as further explained). In general terms, a (administrative, judicial or industrial) fee is paid as consideration for a given service rendered by a public body. In this case, the service provided is in principle requested by the citizen. A tax corresponds to the wealth that is drawn from the citizens in relation to the production of income for the provision of general services provided by the State; therefore, this is not related to any specific service but based on the contributive capacity ("capacità contributiva") of the person. Finally, a contribution (or "onere sociale": social burden) is the compulsory levy from certain individuals, to the fact that they derive a benefit, directly or indirectly, by certain public services, even without having requested these.*

*150. In the absence of legislative measures to help defining when a specific measure is to be considered a fiscal measure (tributo), we need to be guided by case law, in particular by the Italian Constitutional Court. The Constitutional Court has stated repeatedly that, irrespective of the name given to the measure, the features that qualify a disbursement as of fiscal nature are: 1) dutifulness of the withdrawal, 2) absence of exact reciprocity between the parties, and 3) connection of the withdrawal to the public spending by linking this to an economically significant prerequisite.*

*151. In addition, the Italian Constitution imposes that tributes be established by law. All taxes, fees and contributions under Italian law thus satisfy the above conditions under Article 21(7) and consequently are "Taxation Measures" under the ECT.*

197. Claimant's Reply (para. 109) counters by referencing the official Italian language version of the ECT which only includes "imposte" in Article 21(7), rather than the wider definition advocated by Respondent encompassing "tassa" and "contributo". Claimant also invokes a number of awards stated to be in its favour (*Murphy Exploration & Production Company – International v the Republic of Ecuador*, Partial Final Award, 6 May 2016; *Occidental Petroleum Corporation, Occidental Exploration and Production Company v The*

*Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012; and *Yukos Universal Ltd. v Russian Federation*, Award, 18 July 2014).

198. The Tribunal finds Claimant's argument as to the Italian language version of the ECT to be unavailing. If it were upheld, then the different official language versions of Article 21(7) (as demonstrated in para. 120 of the Rejoinder) would give rise to radically differing results. The definition contained in Article 21(7), whether in Italian, or any other official language, is widely drawn. The Tribunal does not, therefore, have any reason to consider that definition, insofar as it applies to Italy, as being anything other than that articulated by the Italian Constitutional Court: *1) dutifulness of the withdrawal, 2) absence of exact reciprocity between the parties, and 3) connection of the withdrawal to the public spending by linking this to an economically significant prerequisite.*
199. Thus, the Tribunal considers the administrative fees to be a Taxation measure. They clearly fall within the definition articulated by the Italian Constitutional Court. The Tribunal accepts the submission of Respondent at para. 149 of the SoD that the widely-drawn meaning of a taxation measure in Italy (*tributi*) encompasses fees such as the administrative fees imposed on all photovoltaic operators by means of *Conto V*. These were *consideration for a given service rendered by a public body* and while such administrative fees might only be directed towards photovoltaic operators and not the public at large, this does not detract from their essential nature: they are imposed by Respondent (or an emanation thereof) in order to fund a service rendered in support of such photovoltaic operators. The Tribunal finds further support for its conclusion from the example given by Respondent concerning municipal garbage taxes. Although they are in principle fees for service rendered, Italian jurisprudence considers them to be taxes because they are charged on all home owners or

tenants to whom the service is provided irrespective of a precise correspondence between such service and its utilization by an individual owner or tenant.

200. In such circumstances, Claimant's claims concerning administrative fees are captured by Article 21 of the ECT.

201. Secondly, as regards imbalance costs, Respondent says, at para. 132(b) of the Rejoinder:

*Imbalance charges in turn relate to the dispatching of energy and are an instrument to cope with shocks of the dispatching system. Transmission and dispatching of energy is reserved to the State and granted in concession to Terna. Relevant legislation defines "dispatching" as the activity aimed at providing instructions for the use and the coordinated operation of production plants, the transmission grid and auxiliary services. Terna has a monopoly over such activities. In the case of transmission and dispatching activities, Terna has the duty to grant non-discriminatory access to all operators and be neutral and unbiased in offering the service. However, this does not interfere with the possibility that a specific charge be paid by way of fee. The fiscal nature of such measures is recognized by the Claimant in the first place: "[p]olicymakers have the choice either of charging imbalance costs to renewable producers or passing them on to consumers" (§173 of Statement of Claim). It states further "Italy had socialized the imbalance costs, meaning that the entire energy forecast was conducted at the national system level and the costs were passed on to endconsumers via the electricity bill." (§ 175 of Statement of Claim). Passing these costs on to consumers means to impose a general fee to final users for the implementation of the mechanism of energy reserves by Terna, indeed to "socialize" the costs of the public service. Charging them to the generality of energy producers means to equally impose a fee, to "socialize" the costs by putting a burden on producers instead of final user. What changes is the general category of persons charged with the fee, not its nature.*

202. The Tribunal considers the imbalance costs to be a Taxation measure. They clearly fall within the definition articulated by the Italian Constitutional Court and the analysis conducted above in connection with administrative fees applies *mutatis mutandis*. Whether or not the current imbalance fees are illegal as a matter of Italian law is a

municipal matter.

203. In such circumstances, Claimant's claims concerning imbalance costs are captured by Article 21 of the ECT.
204. The *Robin Hood* tax clearly falls within the definition articulated by the Italian Constitutional Court, and is, therefore, a Taxation measure. While it might well be the subject of bewilderment to Claimant that taxes which have been held by the municipal courts to be unconstitutional have not been reimbursed, that is still in the domain of a Taxation measure.
205. In such circumstances, Claimant's claims concerning the *Robin Hood* tax are captured by Article 21 of the ECT.
206. Finally, in this regard, the Tribunal also readily appreciates the IMU and TASI charges to be Taxation measures. Classifying photovoltaic plants as immovable property, thereby subjecting them to increased IMU and TASI charges, falls directly within the definition articulated by the Italian Constitutional Court. As with the *Robin Hood* tax, the non-refund of such charges paid in 2014 and 2015 may well be considered by Claimant to be irreconcilable with the 2016 Budget Law, but that is a matter of municipal law inextricably bound up with domestic fiscal measures.
207. In such circumstances, Claimant's claims concerning the IMU and TASI charges are captured by Article 21 of the ECT.
208. In conclusion, and taking into account all of the foregoing, Claimant's FET claim reposes on what was its legitimate expectation as on 30 March 2012 in respect of the *Enersol* investment, and, whether, *Spalmaincentivi* transgressed the protection of such, if any, legitimate expectation. The Tribunal will now proceed to assess that FET claim according to the following approach: first, what is the origin and

scope, precisely, of the legitimate expectation; secondly, how exactly has such legitimate expectation (if first established as a matter of international law) been transgressed in a manner prohibited by international law.

*The origin and scope of Claimant's legitimate expectation as regards Enersol*

209. As on 30 March 2012, when Claimant bought *Enersol*, what can be objectively identified as unquestionably in place and explicitly known to it?
210. First, seven sections of the photovoltaic plant had already been connected to the national electricity grid.
211. Secondly, seven tariff recognition letters had been issued by an emanation of Respondent. These letters stated (as already recorded above):

*The incentive tariff will be recognized for a period of twenty years as of the date of entry into operation of the plant: 28/04/2011; the tariff is constant, in current currency, all through the 20-year period. [Section 1]*

*The tariff will be recognized for a twenty-year period as of the date of entry into operation of the plant: 31/07/2011; the tariff is constant in current currency for all the twenty year period. [Sections 2 & 3]*

*The tariff will be recognized for a twenty-year period as of the date of entry into operation of the plant: 31/08/2011; the tariff is constant in current currency for all the twenty year period. [Sections 4, 5, 6, & 7]*

212. These letters did not simply state that the tariffs were recognised, but expressly say that in order to obtain such tariffs, the relevant GSE agreements needed to be printed and signed. This was an express and unmistakable invitation on the part of an emanation of Respondent to

sign the relevant GSE agreements as an essential prerequisite to the obtaining of the incentives.

213. Thirdly, seven GSE Agreements had been concluded between investments of Claimant and an emanation of Respondent. By way of example, as already recorded above, these GSE Agreements had the following language (example is taken from Sections 2 and 3):

*The incentive tariff, constant in regular instalments in current currency, to be recognised to the photovoltaic plant under this Agreement, is equal to [REDACTED] a value recognised by GSE and notified to the Soggetto Responsabile with the communication on admission to the incentive tariff.*

*The present Agreement is effective from 31/07/2011 and expires on 30/07/2031.*

*Any modifying or supplementary agreements on the content of the present Agreement subsequent to the date on which the agreement signed by GSE is made available must be agreed in writing, under the penalty of nullity.*

214. The language found in the sample GSE contract pursuant to *Conto V*, which expressly puts on notice any photovoltaic producer of the potential for unilateral changes brought about by legislation, is not present in any of the seven GSE Agreements applicable to *Enersol*. All of the GSE Agreements to which *Enersol* was a party had the express language that the only way change could be brought about to contractual terms was by way of mutual agreement in writing.
215. Fourthly, four *Contos* and the *Romani Decree* had been passed into law by Respondent. These, in varying respects, were the domestic legal background to the incentive schemes.
216. For the moment, the Tribunal does not take account of the plethora of advertising material (whether apparently issued by emanations of Respondent, or through promotional material issued by, amongst

others, law firms) which Claimant relies upon in its submissions as indicating reliance on the putative constancy of the incentive schemes. Much of this material might well be described as puffery, and the Tribunal prefers, at this stage, to analyse the four matters discussed just above for the purposes of Claimant's legitimate expectation as on 30 March 2012.

217. Looking at the four matters described above (in no particular order: (a) the four *Contos* and *Romani Decree*; (b) the tariff recognition letters; (c) the connections to the national grid; and (d) the GSE Agreements), a party in the shoes of Claimant would be left in no doubt but that it was to receive incentives, in constant currency, for a twenty year period, and all pursuant to private law contracts (as this was understood to be the state of Italian law at the time of the making by Claimant of its *Enersol* investments – indeed the *Romani Decree* could not have been clearer in that respect to any reasonable reader) which could not be amended save by mutual agreement. This was clearly based on the consistent legal policy of Respondent as manifested in the four *Contos* and the *Romani Decree*. No reading, no matter how indulgent, could lead anyone to consider anything other than a clear promise of twenty years of constant currency incentives pursuant to a private law contract. This is not a black letter reading, or the Tribunal holding Respondent hostage to blinkered pedantry (which would be unbecoming the dignity of a sovereign state), rather, it is the product of a careful, good faith reading of all of Respondent's unambiguous acts as set out above.

218. The critical question readily emerges from all of the foregoing is whether Claimant enjoyed a legitimate expectation protected by Article 10(1) of the ECT in respect of its *Enersol* investment as of 30 March 2012?

219. Drawing upon the principles articulated by the tribunal in *Antaris*, the Tribunal now ascertains whether a key predicate for a claim based on legitimate expectation is present in this case. As that tribunal described, *[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*, it is readily apparent to the Tribunal that both the origin and scope of the expectation of Claimant in respect of *Enersol* as on 30 March 2012 is precisely identifiable: *Enersol* was to receive incentives, in constant currency for a twenty-year period.

220. It is also important to differentiate the situation of Claimant as on 30 March 2012 in respect of *Enersol* with that of the claimant in *Blusun*. That claimant was, unlike Claimant and its investment in *Enersol*, still at a preliminary stage of its attempts to invest in the Italian photovoltaic market. That led to it falling at the first legal hurdle for causation as a matter of Article 10(1) of the ECT before that tribunal which found (para. 386) that:

*[T]o conclude, in the Tribunal's view, the Project ran a significant risk of incurring legal or administrative difficulties, even if these could be (and in the event largely were) overcome. Its success was by no means certain.*

221. This finding of the *Blusun* tribunal echoes part of the summary, already quoted above, of the tribunal in *Antaris*, but now quoted again in specific illustration of these points:

*(6) Provisions of general legislation applicable to a plurality of persons or a category of persons, do not create legitimate expectations that there will be no change in the law; and given 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.*



(7) *An expectation may be engendered by changes to general legislation, but, at least in the absence of a stabilization clause, they are not prevented by the fair and equitable treatment standard if they do not exceed the exercise of the host State's normal regulatory power in the pursuance of a public interest and do not modify the regulatory framework relied upon by the investor at the time of its investment outside the acceptable margin of change.*

(8) *The requirements of legitimate expectations and legal stability as manifestations of the FET standard do not affect the State's rights to exercise its sovereign authority to legislate and to adapt its legal system to changing circumstances.*

(9) *The host State is not required to elevate the interests of the investor above all other considerations, and the application of the FET standard allows for a balancing or weighing exercise by the State and the determination of a breach of the FET standard must be made in the light of the high measure of deference which international law generally extends to the right of national authorities to regulate matters within their own borders.*

(10) *Except where specific promises or representations are made by the State to the investor, the latter may not rely on an investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. Such expectation would be neither legitimate nor reasonable.*

222. The foregoing five points made by the tribunal in *Antaris* do not present Respondent with an answer to the position of Claimant in respect of *Enersol* as of 30 March 2012. Claimant's expectation as of that date was not simply (as was, essentially, the case with the *Blusun* claimant) relying on a general, *erga omnes*, promise found in law to putative photovoltaic producers. Quite the contrary, by 30 March 2012, Claimant's expectation was both specific as to what it was to receive by way of incentives and their exact duration, and precise in its origin (namely, from explicit acts of Respondent).

223. The next question is, according to the tribunal in *Antaris*, is whether *such representations were reasonably relied upon by the Claimants*. This is a matter which, at the very end of the hearing, included a new point being raised by Respondent in connection with a due diligence report prepared for Claimant's financiers by Clifford Chance.

224. Claimant, prior to consummating its investment in *Enersol* on 30 March 2012 undertook due diligence via the law firm of Ashurst. A Legal Due Diligence Report authored by that firm of 18 March 2012 is relied upon in Claimant's SoC. That Legal Due Diligence Report explicitly references the GSE Agreements (section 5 thereof). Further, the Tribunal has been shown by Claimant a set of slides prepared by Glennmont Partners (which is understood to be the controller of Claimant) entitled *Serenissima* which describes (p. 5) explicitly the volume and price arrangements for the *Enersol* investment.
225. The Tribunal readily, therefore, sees that Claimant relied on the circumstances of *Enersol* (described above) when deciding whether or not to invest. All of the matters set out in both the Legal Due Diligence Report and the *Serenissima* presentation carefully record the circumstances of *Enersol* and, therefore, reliance can well be understood to have been reasonable.
226. However, at the end of the hearing there was a ripple in the lagoon by reason of reliance, first raised in oral closing argument by Respondent, on a passage in an exhibit of Claimant, the due diligence report issued by Clifford Chance.
227. Respondent's point, which arose in oral closing argument at the hearing (and cannot be found anywhere in Respondent's memorials), was as follows. In a due diligence report prepared for Claimant's financiers by Clifford Chance, the following is stated:

#### *7.4 Changes in applicable legislation*

*In Italy, alternative energy incentive programmes are highly regulated and constantly evolving at the local, national and EU level. If amendments were made to the current legislation setting out the eligibility requirements for admission to, and the incentives available under, Conto Energia, any photovoltaic plant that is not*

*yet admitted to Conto Energia at the time such legislative amendments become effective may have to comply with the then-applicable requirements and be eligible only for the then-available incentives.*

*You should be aware that Italian law does not prohibit the enactment of laws with retro-active effect; although no laws with retroactive effect have been issued in the field of energy law in Italy in the past.*

*Once the grant of the incentives is secured by the execution of the agreement with the GSE, the risk of a retroactive change in incentives can be reasonably deemed low.*

228. The Clifford Chance due diligence report was included as an exhibit to Claimant's SoC, and, therefore, was entirely known to Respondent from that moment onwards. Nonetheless, it was only at the oral closing stage at the hearing that considerable emphasis was laid upon this section by Respondent as support for the proposition that Claimant was on notice that there was a risk of retrospective changes to granted incentives. As described in the procedural history section of this Award, the Tribunal thereafter received post-hearing submissions in that regard. These will now be analysed.

229. With specific reference to Claimant's FET claim, it argues in its post-hearing brief as follows:

*6. .... First, considered objectively, the language Italy cites would not warn an investor that Italy could legally retroactively revoke the rights it had guaranteed under its regulatory framework, in the GSE Tariff Confirmation Letters, and in the GSE's Contracts with the individual plant owners without providing compensation. In fact, Clifford Chance expressly recognized that a completed facility that had enrolled in the regime had rights that undeveloped projects did not have: "any photovoltaic plant that is not yet admitted to the Conto Energia at the time of such legislative amendments become effective may have to comply with the then-applicable requirements and be eligible only for the then-available incentives." That sentence clearly refers to prospective, not retroactive changes to the regulatory regime.*

7. *On the other hand, the final two sentences do reference retroactive changes, but do not lead to Italy's proposed conclusion. While Clifford Chance does state that Italian law technically does not prohibit retroactive changes, it also states that "no laws with retroactive effect have been issued in the field of energy law in Italy in the past. Further, Clifford Chance never suggested that retroactive changes stripping investors of their rights without compensation are permitted. Indeed, Clifford Chance acknowledged that "[o]nce the grant of the incentives is secured by the execution of the agreement with the GSE, the risk of a retroactive change in incentives can be reasonably deemed low." Thus, after reviewing the Clifford Chance report, CEF still had a reasonable expectation that Italy would not modify its legal regime retroactively without compensating investors, and invested in Project Enersol on the basis of that expectation. That is particularly the case in light of all the additional evidence regarding CEF's legitimate expectations in relation to its investments generally and Project Enersol in particular, such as the GSE Contracts setting forth the specific tariffs that project would receive.*

230. The Tribunal does not appreciate from any of the briefings which followed thereafter that Respondent gainsayed the foregoing position of Claimant. That does not mean, inevitably, that the Tribunal accepts what Claimant submits. It will make its own independent assessment of the consequences, if any, of what Clifford Chance says.

231. First, it is clear that Clifford Chance indicates that the risk of retrospective legislation in the energy sector is very low indeed; so low that it opines that it has never occurred in the past. Thus, as of 30 March 2012, Claimant is explicitly aware of the fact that no retrospective change in the law in the energy sector had ever occurred, up to that time, in Italy.

232. Secondly, Clifford Chance makes a clear distinction between investors which have not yet secured a precise incentive, and those that have consummated a GSE agreement, with the former plainly at greater risk of not getting what they might have expected at the time they commenced their works in the event of a change of the law. Those that have consummated a GSE agreement are, in Clifford

Chance's words, facing, reasonably, a low risk of retrospective change. That firm does not go any further in developing this point, possibly due to the fact that such an event (at that time) had never occurred in Italy in the energy sector.

233. The Tribunal, in its assessment of the international law standard of legitimate expectation, finds it difficult to see how a two-sentence articulation of a low-risk hypothetical (which had never occurred in the energy sector up to that moment) could comprehensively eviscerate the collective and explicitly-stated consequences of all of the four matters described at paras. 210-215 above for the purposes of what was Claimant's legitimate expectation on 30 March 2012. While later events (as discussed below concerning the judgment of the Constitutional Court) bore out Clifford Chance's opinion, the precise content of the legitimate expectation is measured against the conditions pertaining at the date of investment. The strictness of this temporal rule inures to Respondent's favour in respect of *Megasol* and *Phenix*.

234. In summary, the Tribunal is now in a position to answer the key question posed above at para. 218 above with "yes": did Claimant enjoy a legitimate expectation within the meaning of Article 10(1) of the ECT in respect of its *Enersol* investment as of 30 March 2012? The answer is yes, and the precise scope of that legitimate expectation is that *Enersol* was to receive incentives, in constant currency for a twenty-year period. However, that legitimate expectation does not, in the Tribunal's estimation, extend to one further aspect of Claimant's claim, namely, the change, brought about by *Spalmainincentivi* whereby payment of 100% of the incentive within 60 days was changed to 90% with the 10% balance paid the subsequent year. The Tribunal considers that Claimant has not asserted (save for a passing criticism in para. 208 of the SoC, which the Tribunal finds to be

insufficient) or proven that organs of Respondent offered explicit or implicit promises or guarantees that change of the type encompassed by the payment term change would not be made. Thus, even though Claimant considered this measure unfavorable to their investments, it has not argued or alleged any ground for an FET claim.

*Has Claimant's legitimate expectation been transgressed in a manner prohibited by the ECT?*

235. This question, which is at the heart of the issue of liability, can be formulated as follows: whether, in June / August 2014, when Respondent enacted the Law Decree No. 91/2014 converted into Law 116/2014, colloquially known "*Spalmaincentivi*", by which *Conto Energia* tariffs previously granted to existing PV plants were reduced in order to lessen the burden of electricity bills to consumers, did it breach the protection of Claimant's legitimate expectation as a matter of Article 10(1) of the ECT? By reference to the third of the three-step test postulated at para. 360(3) of the award in *Antaris*, the present question is refined further, namely, did the *Spalmaincentivi* breach the representations of Respondent which led to the legitimate expectations of Claimant in respect of *Enersol*?

236. The existence of a breach is not the automatic consequence of a finding that subsequent measures taken by the host state are in contrast with the legal regime and "assurances" of stability on which the foreign investor relied when it made its investment. To follow again *Antaris*, the reasons and justification of the state's action must also be evaluated, "*in the light of the then prevailing or reasonably to be expected changes in the economic and social conditions of the host State*" (*Antaris*, para. 360(6)). This entails evaluating whether the subsequent action by the State "*at least in the absence of a stabilization clause, ...do not exceed the exercise of host State's normal regulatory power in pursuance of a public interest and do not*

*modify the regulatory framework relied upon by the investor at the time of its investment outside the acceptable margin of change.”* (Antaris para. 360(7)) This means that the quantitative negative impact on the investment’s value and profitability must be taken into account. Finally, (Antaris para. 360(9)) *“The host State is not required to elevate the interests of the investor above all other considerations, and the application of the FET standard allows for a balancing or weighing exercise by the State and the determination of a breach of the FET standard must be made in the light of the high measure of deference which international law generally extends to the right of national authorities to regulate matters within their own borders”* (Antaris para. 360 (9)).

237. As concerns the first element of the comparative analysis, consisting in “balancing and weighing” the expectations of the Claimant as a foreign investor protected by Article 10(1) ECT, with the right of Respondent as host State to adapt its regulatory framework to changing circumstances, the Tribunal has already duly highlighted the key and specific elements of Claimant’s rights and expectation and their sources. As stated above at para. 222, “Claimant’s expectation was both specific as to what it was to receive by way of incentives and their exact duration, and precise in its origin (namely, from explicit acts of Respondent)”. Specifically, as said above in para. 217 Claimant’s expectation was based on “a clear promise of twenty years of constant currency incentives pursuant to a private law contract”.

238. On the other hand, looking at the actions by Italy which negatively affected the legitimate expectation of Claimant and their reasons, the Tribunal recalls that as an effect of the modifications of the original Law Decree 91/2014 when it was converted into Law 116/2014 the options of a cut in tariffs were offered to the PV operators. They all resulted in a photovoltaic producer not receiving the originally-

promised incentivised tariff for twenty years. Even the least damaging option (Option C), added in the conversion Law 116/2014 (the default option chosen by Claimant in respect of *Enersol*), providing for a tariff cut of 6-8% for the residual years up to the end of the 20-year contractual period, resulted in the amount of the tariff obtained by Enersol being less than the one originally granted on which Claimant had relied in making its investment.

239. As to the reasons for the issuance of the *Spalmaincentivi* the Tribunal has taken note that the Decree Law and accompanying official documents, spell out the reasons for reducing the incentives provided to the PV operators through the various *Conto Energia*. The rationale was that of reducing the burden of electricity bill to the consumers, especially small and medium enterprises, in order to stimulate economic growth and competitiveness. The Tribunal has also taken note that the tariff cut was not the only measure taken to this end as concerns electricity tariffs in the Decree Law 91/2014.

240. The Tribunal is at pains to also observe that Respondent's three *Spalmaincentivi* options are not, in of themselves, an unreasonable measure. The sustainability of the incentive system for PV producers and other valuable objective of general interests were at stake, and it can readily be appreciated that the dignity which attaches to sovereigns must be given deference, though that is not infinite when balanced against a combination of international obligations freely assumed and, further, fact-specific circumstances of the extent of commitments given to investors.

241. The Tribunal does not consider that the reasons adduced by the Respondent to justify the cut of the tariff granted for a 20-year period to the Claimant's investment in *Enersol* and the fact that the cut was



not of such a magnitude as to render the investment unprofitable, but allowed it (*arguendo*) to still generate a fair return can prevail over the legitimate expectations of Claimant that it is entitled to benefit of the originally granted and agreed incentivized tariff

242. The Tribunal finds support for this conclusion in the words of *El Paso Energy International Company v. Argentine Republic*, that the FET is linked to the objective reasonable legitimate expectations of the investors and that these have to be evaluated considering all circumstances. As discussed already in this award, there are specific circumstances attaching themselves to Claimant's investment in *Energol*: (a) the relevant *Contos* and *Romani Decree*; (b) the tariff recognition letters; (c) the connections to the national grid; and (d) the GSE Agreements. None of these could give any reasonable observer the slightest doubt but that Respondent had committed itself *vis a vis Energol* to constant currency tariffs over a twenty year period. The contrast in the apparent (at the time of the *Energol* investment) immutability and commitment of Respondent to the constancy of the tariffs with its later position can particularly be noted from the fact that a GSE contract under the *Conto V* regime clearly puts the photovoltaic producer on notice of the risk of unilateral changes to such terms.

243. It is readily apparent to the Tribunal that the greater the level of engagement as between a sovereign and an investor, such as here through Respondent's undertaking to maintain a specific incentivized tariff for 20 years, ultimately resulting in legitimate expectations which are clear in both scope and origin, the more rigorous the scrutiny must be of acts which, even if reasonable, cut across those legitimate expectations. It is an inherent aspect and quality attaching

to the dignity of a sovereign that promises made and obligations accrued by it are respectfully and carefully upheld and vindicated.

244. Having taken all of the foregoing into account, the Tribunal concludes that the three *Spalmaincentivi* options are, therefore, a breach by Respondent of Article 10(1) ECT in respect of Claimant's legitimate expectation concerning its investment in *Enersol*. Claimant was, as a matter of the *Spalmaincentivi* options, faced with three choices none of which would lead to the vindication or upholding of the legitimate expectation it had in respect of *Enersol* as on 30 March 2012.

245. Prior to making its final conclusion in respect of Claimant's FET claim as regards *Enersol*, the Tribunal also notes that Respondent argued at some length that its measures did not result in Claimant's investments becoming unprofitable. That may very well be the case, but this, in the Tribunal's view, does not provide an answer to Claimant's FET case in respect of *Enersol*. This is best encapsulated by a provision in the *Romani Decree*, namely, that *the incentive has the purpose of ensuring a fair remuneration of the investment and operating costs*. This is an entirely appropriate policy aim so that the incentives which Respondent grants to PV producers does not turn into a one-sided financial bonanza at the expense of the public purse. However, the decision as to what is a fair remuneration, while in the hands of Respondent, is made at the time the level of a particular incentive is set for a particular producer. There is no indication of any kind whatsoever in the first four *Contos*, the *Romani Decree*, the tariff recognition letters, and the GSE Agreements that, once an incentive rate is offered, and then accepted into a consummated contract, it would be subject to the vagaries of whatever might later be deemed to be a fair remuneration for the remaining lifetime of the arrangement.

246. In conclusion, and taking all of the foregoing into account, the Tribunal holds and finds that Law Decree No. 91/2014, or

*Spalmaincentivi*, Respondent breached the ECT protection of Claimant's legitimate expectation in respect of the latter's investment in *Enersol*. The consequences of this breach will be discussed later in this Award.

247. The above conclusions that the Respondent has breached the FET standard of Article 10(1) ECT by having breached the protection of the legitimate expectations of Claimant that the incentivized tariff would not be cut by a provision such as *Spalmaincentivi* reflects the views of a majority of the Tribunal (comprising Mr. Reichert and Prof. Dr. Sachs). Prof. Sacerdoti disagrees on those conclusions for the following reasons: "I believe that the weighing and balancing exercise between the expectations of Claimant in the stability of the 20-year tariff, on the one hand, and the right of Italy to change it in special circumstances in the public interest, as was done through the *Spalmaincentivi*, should lead to the conclusion that Respondent has not thereby breached Article 10(1) ECT. As to the expectations of the Claimant in the stability of the tariff granted to *Enersol*, I recognize they were properly based on a series of general and specific provisions (including the GSE Agreements) that made it reasonable to believe that the 20-year tariff incentive would not be subject to change. On the other hand, Claimant should have been aware that under Italian law (on which the due diligence reports it had obtained exclusively focused) the possibility that the State could unilaterally modify the tariff in special circumstances, for pressing reasons of public interest, provided that the negative impact would be modest, could not be ruled out. This is exactly what the Constitutional Court held in its judgment 16/2017 in relation to the *Spalmaincentivi*: "*The analysis of the rationale and of the content of the challenged provision [Article 26 of Law 116/2014] leads to exclude that the latter impacted on the long-term relationship – resulting from the agreements concluded with [GSE] - in an unreasonable, arbitrary and unpredictable way, so as to harm...the invoked principle*

[legitimate expectations]. *Indeed the regulatory change at hand is justified by a public interest, in terms of a fair balancing of the opposed interests at stake, which is meant to combine the policy of support to the production of energy from renewable sources with a better sustainability of the respective costs borne by the end consumers of electricity energy*" ( at para. 8.2). As to the tariff cut put in place by the *Spalmaincentivi*, the evidence shows in my opinion that it was a reasonable measure, taken in a transparent way, aimed at pursuing a legitimate public interest - both looking at its aims and at the economic context - and that, finally, due care was taken to protect the interests of the investors (which by the way were predominantly Italians). This is because (a) the burden of the consumers' electricity bills reducing measures ("Taglia-bollette") was spread among various categories, among which that of the beneficiaries of the PV incentivized tariffs was but one, and (b) the negative impact was limited [REDACTED] also due to the modification in the final Law 116/2014 of the initially harsher reduction. The cut has not affected the profitability of the investment (for which there is a market, cf para. 42 above), as certified by the fact that the damages that the Tribunal finds and awards to Claimant in respect of *Enersol* are just [REDACTED] of the enterprise value [REDACTED] determined by Claimant's quantum expert."

#### *Umbrella Clause claims*

248. Article 10(1) of the ECT provides as follows, in relevant part:

*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.*

249. Claimant advances, either additionally or alternatively to its FET claims, umbrella clause claims against Respondent which repose on the GSE Agreements in respect of all of its investments, *Megasol*, *Phenix*, and *Enersol*. It argues that each of the GSE Agreements

(while subject to Italian law and jurisdiction) do not admit of (as of now) any other reading or interpretation save an obligation on the part of Respondent to pay incentives, in constant currency, for twenty years, with no possibility of amendment save by mutual consent.

250. At the centre of Respondent's defence to these umbrella clause claims is Decision No. 16/2017 of the Italian Constitutional Court and its position that the GSE Agreements were, in fact, found by such Decision to be "accessory".

251. Respondent's SoD, footnote 109, submits as follows (emphasis added):

*Contracts concluded by public administrations can be divided into three broad categories. The first consists of the so-called "ordinary contracts", and are contracts that do not undergo modifications for the fact that one of the parties is a public authority. The parties act on a strictly equal footing. The second category consists of the so-called "special contracts", because contracts (private) law generally governs them, but, alongside the provisions of the civil code, other specific rules apply, which normally ascribe special powers to the government. Besides these specific provisions, however, also these contracts follow the general principles of private law. The third category comprises contracts with a "public subject matter", or "contracts of public law". Unlike the previous ones, these are connected to public measures, of which they are a necessary complement. Their scope is circumscribed by the public act and only exist in connection with such public act and the exercise of the public power. In turn, "contracts of public law" are usually divided into three further categories: "accessory contracts" to public measures, "auxiliary contracts" to public measures, and contracts "substituting" public measures. "Accessory contracts" are generally recognized as bearing distinctive features. As a general definition, it can be stated that "accessory" are those contracts governing reciprocal duties of parties that arise from a public measures. To a phase of authoritative exercise of public powers, it follows one built under the scheme of a contractual relationship: whereas the authoritative exercise of power establishes the legal situation, the contractual instrument regulates its operation. Even assuming that, because of these two sides, such a contract is "mixed" in nature, this would in fact mean that the management of the executive aspects of the relationship are regulated by private law, whereas the contract*

keeps a public nature. In particular, this would not change the fact that the particular nature of the subject matter of the contract (public interest), and its object (the management of this interest), leave intact a position of supremacy by the public power that would make it possible for the latter to unilaterally modify its conditions by modifying the authoritative act.

252. The case before the Italian Constitutional Court concerned *Spalmaincentivi*. Various photovoltaic producers sought to have the changes to the tariff regime struck down. In particular, those parties alleged that their incentives were recognized by private law agreements.

253. The Italian Constitutional Court, when considering the relevant GSE contracts described them as follows:

*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 changes may change profoundly. They are instead regulatory instruments, aimed at reaching the objecting 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.*

.....

*Setting aside the fact that such "contracts" are accessory to the provisions granting the incentives, one should recall the principle – which has been repeatedly stated by this court – that there cannot be a violation of the freedom of economic initiative when the general limited that have been put aim at promoting social welfare, as established by article 41, para. 2, of the Constitution, provided that the measures are not arbitrary and the intervention of the legislature does not pursue its aim through measures which are clearly incongruous..... Both these requirements, as already said, have been complied by the provisions reducing and rescheduling the incentives.*

254. The Tribunal is, therefore, compelled to the conclusion that the obligations which Respondent entered into with Claimant's

Investments (*i.e. Megasol, Phenix, and Enersol*) 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.

255. 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 (*"Italy failed to fulfill the obligations it entered into with respect to CEF's investments, which were crystallized in Tariff Confirmation Letters and Contracts"*). Bearing in mind the alternative prayer for relief advanced by Respondent (*"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"*), the Tribunal considers the latter proposition to be well-founded. In particular, apart from the fact that the "obligations" are municipal matters, subject to Italian law, the Tribunal does not consider the measures implemented by Respondent to transgress the ECT requirement by a signatory state to observe "any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party". The measures, of which Claimant makes complaint, were addressed to all PV producers and were, in the Tribunal's assessment, compliant with Italian law (as emerged from the decision of the Italian Constitutional Court).

Failure to provide transparent legal framework claims - Unreasonable impairment claims

256. For convenience, the Tribunal considers these two claims together.

257. The Tribunal now records, in relevant part, Article 10(1) of the ECT:

*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 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.*

258. By way of introductory comment, and consistent with its findings earlier in this award, none of the Taxation measures can be taken into account by the Tribunal when deciding whether either of these claims are successfully made by Claimant. Thus, only *Spalmaincentivi* can be considered by the Tribunal in its analysis.

259. In light of the earlier discussion of *Spalmaincentivi* and, in particular, the Tribunal's observations that the rationale for the measure was reasonable (which was not, in the specific circumstances of this case, an answer to the legitimate expectation claims), it would be entirely inconsistent to now find unreasonable impairment or a failure to provide a transparent legal framework.

Conclusion on Section B

260. It is useful at this point to summarise the conclusions which the Tribunal has reached on Section B (Merits & Liability (incl. concomitant Jurisdiction & Admissibility) Claimant has succeeded in establishing that, by *Spalmaincentivi*, Respondent breached, as a matter of Article 10(1) of the ECT, the FET protection it owed to



Claimant's legitimate expectation in respect of the latter's investment in *Enerzol*. All other allegations made by Claimant of breach by Respondent of Article 10(1) of the ECT are dismissed, either as a matter of substance, or as falling without the ambit of the ECT as Taxation measures.

261. The Tribunal will now proceed, in the next section, consider what is the consequence of the established breach of the ECT by Respondent.

### Damages & Interest

262. As a starting point, Claimant sets out its legal position as follows in the SoC:

*286. To determine the compensation that Italy owes to CEF, the Tribunal should in the first instance look to any lex specialis in the ECT and, in the absence of any lex specialis, to the rules of customary international law. The only lex specialis standard of compensation found in the ECT is in Article 13, which sets out the conditions that Italy must satisfy in order to lawfully expropriate investments held by protected investors in Italy. The ECT does not expressly provide a standard of compensation for violations of the ECT, and thus the customary international law principle of full compensation fills the lacuna.*

*287. The principle of full compensation was first established by the Permanent Court of International Justice in the seminal 1928 case of Chorzów Factory between Germany and Poland, which arose from Poland's unlawful seizure of a factory owned by a German national. According to the Permanent Court of International Justice:*

*It follows that the compensation due to the German Government is not necessarily limited to the value of the undertaking at the moment of dispossession, plus interest to the day of payment. This limitation would only be admissible if the Polish Government had had the right to expropriate. ... [S]uch a limitation might result in placing Germany and the interests protected by the Geneva Convention, on behalf of which interests the German Government is acting, in a situation more unfavourable than that in which Germany and these interests would have been if Poland had respected the said Convention. Such a*

*consequence would not only be unjust, but also and above all incompatible with the aim of [the Convention].*

*\* \* \* \**

*The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.*

263. In the SoD, Respondent's position is as follows, and seeks to differentiate the present case from that contemplated by the *Chorzow Factory* case:

*680. In the case at stake, the Tribunal should necessarily consider the general and regulatory character of Italian measures, the absence of any fraudulent intent whatsoever, the fundamental public purpose characterizing each of the measures. Accordingly, it should equitably reduce the amount of compensation (if any) from the full value of damages.*

*681. This conclusion is supported by case law. As quoted by the Claimant itself, in the Azurix Annulment Decision the Committee stated that "for breaches of BIT obligations other than the expropriation clause, the Tribunal has a discretion in determining the approach to damages". Since no expropriation is claimed by the Claimant, the Tribunal should employ its discretion precisely to take into account the reasons expressed above. Incidentally, such declaration of discretionary power is linked, in the Azurix case, to sustain that a tribunal is not compelled to use the "fair market value" in non-expropriation cases.*

*682. In sum, Italy preliminarily contends that in the event that the Tribunal were to award a compensation (quod non, as argued sub V.2), the amount of such a compensation be in any case reduced by considering the arguments exposed in this Section.*

264. At para. 418 of the Reply, Claimant disputes Respondent's position:

*Claimant does not request the full fair market value of their investments as damages in this case. They request the diminution in the fair market value of their investments caused by Italy's*

*illegal measures. The fact that the diminution in value is not total – i.e., it was around 26% – properly limits damages to the amount of the diminution; it does not mean that the injury was insignificant or that damages should be denied altogether on the ground that the injury was not substantial enough to award a higher level of damages that the Claimant does not seek.*

265. The Tribunal does not see a reason to depart from the long-established principles articulated in the *Chorzow Factory* case. The way in which Claimant presents its case, as set out just above, is consistent with those principles and it seeks compensation to “re-establish the situation which would, in all probability, have existed if that act had not been committed”.
266. The purpose of the protections found in the ECT are not, in the Tribunal’s appreciation, designed to simply preserve profitability of an investment. Indeed if an investment continued to be profitable, but less so, following measures which transgressed the protections contained in the ECT, then Respondent’s position would logically result in, potentially, no compensation being awarded. Thus, such an investor would be left with a lesser profit than would have been the case had the measures in breach of the ECT not been deployed. Such a scenario would denude the ECT protections of practical application.
267. The *Chorzow Factory* principles do not operate to reward an investor, or to make its investments more profitable than they would have been had the offending measures not been implemented. Rather, the purpose of *Chorzow Factory* is to “re-establish the situation which would, in all probability, have existed if that act had not been committed”. Specifically, the Tribunal considers the analysis is must now make is what the position would have been in respect of the Claimant’s investment in *Enersol* had the *Spalmaincentivi* not been implemented.
268. As to the amounts claimed by Claimant, in a Memorandum dated 21 February 2018, Mr Edwards set out his calculation of the loss suffered

in respect of *Enersol* as being EUR 10,300,000.00 (such loss assuming Robin Hood Tax, IMU/TASI, Administrative Fees and Imbalance Costs fall outside of the Tribunal's jurisdiction – which is the case as found earlier in this Award), excluding interest. Thus, EUR 10,300,000.00 is Claimant's remaining claim for compensation given that the Tribunal has not found the Respondent liable for any breach of the ECT in respect of either *Megasol* or *Phenix*.

269. Mr Edwards presents his calculations on the following basis, namely a comparison of the value of the *Enersol* investment as on 1 January 2015 just prior to the implementation of the *Spalmaincentivi*, with the value on the same date immediately after such implementation. He says (p. 4 of his presentation to the Tribunal dated 21 February 2018, which was a summary of his previously-expressed opinions for the purposes of the hearing) that 1 January 2015 is the date the most significant change was implemented. He describes his approach as follows (p. 5 of his presentation to the Tribunal dated 21 February 2018):

*My assessment of the Claimant's loss is the difference between the value of its investments on the Date of Assessment as they actually were (the **Actual Position**) and as they would have been had the Principal Regulatory Changes not been made (the **Counterfactual Position**).*

270. As regards the "Actual Position" and "Counterfactual Position", Mr Edwards states the following as his methodology for valuation respectively (p. 5 of his presentation to the Tribunal dated 21 February 2018):

*Market value of investments including impact of Principal Regulatory Changes on 1 January 2015 - Market value of investments absent impact of Principal Regulatory Changes on 1 January 2015 - DCF method used to value investments*

271. Respondent's Expert, GRIF, puts its position in the Rejoinder Report as follows:

3. *On use of the DCF method and calculations in the First FTI Financial Report Offering this as a supposed weakness, the FTI-FR I and the FTI-FR II repeatedly emphasise that our first two reports (GRIF Economic Report and GRIF Financial Report) do not criticise the DCF method or contest the approach used in the FTI Financial Report to calculate the Opposing Party's alleged losses.*

*An effective summary of the Opposing Party's position in this regard appears in the Claimant's Reply (paragraph 437): "In summary, GRIF's entire quantum analysis simply parrots Italy's argument on liability, disguised in the language of a quantum analysis. GRIF offers no opinion on the losses attributable to the Claims as pleaded, or indeed any criticism of FTI's calculation of those losses. Accordingly, the Tribunal should accept FTI's quantum analysis entirely."*

*That aside, it is clear that the Opposing Party's experts did not understand or else speciously ignored the terms of the issue in the case at hand, so our work completely escapes them. Our criticism of the FTI Financial Report's approach goes much deeper, as it contests its very foundation and thus the data arising from this these assumptions. In summary, and for purposes of clarity:*

*- We did not dispute the FTI Financial Report's calculations, but rather its basic assumptions and, as a consequence, the resulting data used to make these calculations.*

*- We identified the correct essential elements needed to reconstruct the objective and reasonable expectations of investors at the time the investments were made.*

*- We showed that when the correct essential elements are used, the measures adopted by the Italian Government caused no losses to the Opposing Party. Therefore, a discussion about calculation methods becomes unnecessary, including the one proposed in the FTI Financial Report. Finally, it makes even less sense to deepen potential mistakes in the calculation method proposed in the FTI Financial Report.*

272. The Tribunal's appreciation of the position of GRIF is, therefore, that it does not dispute the calculations made by Mr Edwards, but rather approaches the issue of compensation upon a different premise. The following conclusion of GRIF later in the Rejoinder Expert Report encapsulates its position:

*Considering average Italian production, the intervention through the "Spalmaincentivi" decree reduces feed-in tariffs to an extent much less than proportional to the increases in productivity that the plants are reporting, with the overall result that consumer expense is reduced without in any way negatively influencing the economic and financial plans of the plants built. In fact, investors continue to realise profits well beyond their expectations.*

273. GRIF's presentation (dated 22 February 2018) to the Tribunal at the hearing states the following, at p. 25:

*In the specific case, what happened is simply a little adjustment in order to keep a fair profit having taken into account that incentives were based on underestimated value of the solar radiation, with a consequent over incentive on the revenues side. The 8% adjustment reduces the extra-profits realised by PV plants of CEF Energy, but they are still realising more profits than those expected when the investments were made*

274. Later in the same presentation (p. 27), in a similar vein, which echoes the Respondent's case on liability:

*Italy did not impair CEF investments because Italy intervened after a period of over-incentive to restore the efficient level of the stream of revenues.*

275. The Tribunal prefers the methodology of Mr Edwards, namely, his adoption of DCF. Quite apart from the fact that the DCF method is well-established and accepted by investment arbitration tribunals over many years for the purposes of calculation of compensation, the approach of GRIF would be inconsistent with the even longer-established *Chorzow Factory* principle. The latter requires an assessment of the position as if the act, found to be a breach of the international obligation in question, had not occurred. GRIF's approach would, taken to its logical conclusion, would result in ascertaining whether the investor was nonetheless making a "fair" profit notwithstanding the measure found to be in breach, and, therefore, such "fair" be sufficient compensation. That is not the established principle found in *Chorzow Factory*.

276. Returning to the amount claimed in respect of *Enersol*, as noted above, Mr Edwards presented his calculation of the ‘actual –v- counterfactual’ position in a Memorandum dated 21 February 2018 with the assumption (which was made upon the invitation of the Tribunal during the course of the hearing) that the Robin Hood Tax, IMU/TASI, Administrative Fees and Imbalance Costs fell outside of the Tribunal’s jurisdiction. Mr Edwards’ calculations in this respect are referenced to the spreadsheet (marked Appendix 5.1b) which accompanied his reply report.
277. The Tribunal does not understand GRIF to gainsay Mr Edwards’ calculations (as discussed above, GRIF’s position was to approach the underlying methodology differently, rather than to dispute the correctness of his calculations pursuant to the DCF method). Nonetheless, the Tribunal will now examine Mr Edwards’ calculations as contained in the spreadsheet (marked Appendix 5.1b).
278. Within Mr Edwards’ spreadsheet there is a sheet which is entitled “Key assumptions”. There are seven assumptions listed with a “Yes/No” option adjacent. Changing these assumptions from Yes to No has a consequence for calculations elsewhere in the spreadsheet.
279. The Tribunal can immediately see, from the list of Key assumptions that the first four (Robin Hood tax, IMU/TASI, Administrative Fee, and Imbalance costs) must be set to “No” in order for consistency with earlier findings in this award.
280. The next Key Assumption is “Loss from IT Decrease”. This is set, by Mr Edwards to Yes. The Tribunal agrees, as this is the issue discussed above.

281. The next Key Assumption is “Loss from IT Payment Term Change” which Mr Edwards has set to Yes. In light of what the Tribunal has already decided at para. 234 above, it, therefore, is setting this Key assumption to No.
282. The final Key assumption (“Include negative free cash flow”) is already set to No by Mr Edwards and is not, therefore changed by the Tribunal.
283. Having set the Key assumptions in a manner consistent with the Tribunal’s findings, the amount of the claim in respect of *Enersol* emerges from the calculations on the sheet entitled “Summary tables”, namely, EUR 9,600,000.00.
284. To summarise, the Tribunal holds, insofar as it has the jurisdiction to do so, that the ‘actual –v- counterfactual’ position as of 1 January 2015 in respect of the Claimant’s investment in *Enersol* results in an amount of EUR 9,600,000.00 by which such investment has been lessened by the *Spamalincentivi*.
285. Turning to interest, Claimant seeks pre- and post-Award compound interest from the Tribunal at, according to para. 305 of the SoC, “based on international commercial rates”. While Claimant’s calculation, as presented by Mr Edwards, alternate between Respondent’s cost of debt and Claimant’s cost of debt, the Tribunal prefers to award interest at the following rate: annually, LIBOR plus 2%. Compound interest, therefore, at a rate of LIBOR plus 2%, annually, on EUR 9,600,000.00 from 1 January 2015, until payment in full.



### General

286. The Tribunal records that it has taken note of, and considered, all submissions and evidence put before it. It has referred in this award to those parts of the submissions and evidence it has considered necessary for the explanation of its reasoning; however, all submissions and evidence were taken account of, whether expressly referred to or not, in the formulation and articulation of the reasons and conclusions in this award.

### Costs

287. First, pursuant to Article 43 of the SCC Rules, the “Costs of the Arbitration” are: (i) the Fees of the Tribunal; (ii) the Administrative Fee; and (iii) the expenses of the Tribunal and the SCC. The Parties are jointly and severally liable to pay the Costs of the Arbitration.

288. On 20 December 2018, the SCC determined the Costs of the Arbitration as follows:

Klaus Reichert

Fee EUR 210,625.00 plus any VAT

Klaus Michael Sachs

Fee EUR 126,375.00 plus any VAT

Expenses EUR 2,173.00 plus any VAT

Per diem allowance EUR 4,000.00

Giorgio Sacerdoti

Fee EUR 126,375.00 plus any VAT

Stockholm Chamber of Commerce

Administrative fee EUR 39,800.00 plus any VAT

Expenses/reimbursement EUR 7,928.07 plus any VAT of the Tribunal's costs in the course of the proceedings

289. Claimant has prevailed in this arbitration in a number of respects: (a) the “intra EU” jurisdiction issue, which has occupied a very considerable part of the written argument before the Tribunal, both before, and then, in particular, afterwards with extensive submissions on *Achmea*; and (b) its FET claim in respect of *Enersol* resulting in an award of EUR 9,600,000.00 plus interest. On the other hand, a number of Claimant's claims did not succeed in their entirety (*Megasol* and *Phenix*), and aspects of the *Enersol* claim were captured by Article 21 of the ECT. Placing all of these factors together does still, in the Tribunal's estimation, mean that Claimant was the prevailing party but the attenuated measure of its overall success will be appropriately taken into account in the amount of costs awarded against Respondent.

290. As regards allocation of liability as between the Parties for the Costs of the Arbitration, with the background of the matters set out in para. 289 above in mind, the Tribunal considers that an amount of EUR 100,000.00 (excluding VAT) to be paid by Respondent to Claimant is appropriate.

291. Secondly, turning to the costs incurred by Claimant (as per Article 44 of the SCC Rules), the amounts sought are as follows:

Legal Fees

King & Spalding, EUR 1,153,017.00

Orrick, Herrington & Sutcliffe, EUR 500,000.00

Expert Fees & Expenses

FTI Consulting, EUR 571,700.32

Prof. Antonio D'Atena, EUR 30,628.50

Claimant's Costs & Expenses, EUR 114,780.51

292. The total sought by Claimant in respect of the costs incurred by it is EUR 2,370,126.33.

293. With the background of the matters set out in para. 289 above in mind, the Tribunal considers that an amount of EUR 900,000.00 (excluding VAT) to be paid by Respondent to Claimant is appropriate.

294. The claim for interest on such costs is dismissed.

#### Award

For the foregoing reasons, and subject to para. 247 above, the Tribunal finds, holds, declares, and awards as follows, insofar as it has the jurisdiction to do so as set out in this Award:

**1. The Tribunal has jurisdiction over all claims of Claimant except insofar as those are captured by Article 21 of the ECT, namely those concerning the following measures of Respondent impugned by Claimant: (a) Robin Hood Tax; (b) Qualification of assets for fiscal and cadastral purposes; (c) Imbalance charges; and (d) Administrative fees.**

**2. The Tribunal rejects, as unfounded as a matter of the merits, all claims of Claimant against Respondent's measures impugned by Claimant as being in breach of Article 10(1) of the ECT, except the claim that Respondent breached Article 10(1) of the ECT through the application of *Spalmaincentivi* to the incentivized tariffs in respect of Claimant's investments in *Enersol***

which is found to be in breach of Article 10(1) of the ECT, which claim the Tribunal upholds.

3. As a consequence of the breach found and held against Respondent, the Tribunal finds that Respondent caused damage to Claimant in the amount of EUR 9,600,000.00 (Euro nine million, six hundred thousand) and the Tribunal orders Respondent to pay such amount to Claimant as compensation, together with compound interest (compounded annually) from 1 January 2015 at LIBOR plus 2% thereon until full and final satisfaction of the Award.

4. The Parties are jointly and severally liable to pay the Costs of the Arbitration. The Costs of the Arbitration have been set as follows:

**Klaus Reichert**

**Fee EUR 210,625.00 plus any VAT**

**Klaus Michael Sachs**

**Fee EUR 126,375.00 plus any VAT**

**Expenses EUR 2,173.00 plus any VAT**

**Per diem allowance EUR 4,000.00**

**Giorgio Sacerdoti**

**Fee EUR 126,375.00 plus any VAT**

**Stockholm Chamber of Commerce**

**Administrative fee EUR 39,800.00 plus any VAT**

**Expenses/reimbursement EUR 7,928.07 plus any VAT  
of the Tribunal's costs in the course of the proceedings**

**As between the Parties Respondent is liable, and ordered to pay Claimant EUR 100,000.00 (excluding VAT).**

**5. Respondent is ordered to pay EUR 900,000.00 (excluding VAT) to Claimant in respect of costs.**

**6. All other extant claims within the jurisdiction of the Tribunal are dismissed.**

A party 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.

Place of Arbitration: Stockholm, Sweden

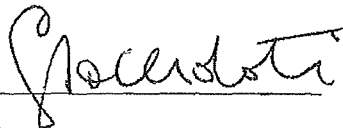
Date: 16 January 2019

Prof. Dr. Klaus Sachs:



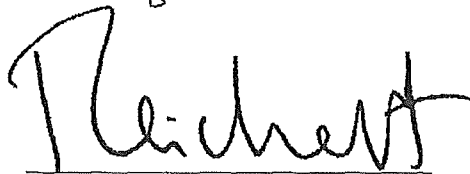
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Prof. Giorgio Sacerdoti:



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Mr. Klaus Reichert, S.C.:



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