INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

ESKOSOL S.P.A. IN LIQUIDAZIONE

Claimant

and

ITALIAN REPUBLIC

Respondent

ICSID Case No. ARB/15/50

AWARD

Members of the Tribunal
Ms. Jean E. Kalicki, President
Prof. Brigitte Stern, Arbitrator
Prof. Dr. Guido Santiago Tawil, Arbitrator

Secretary of the Tribunal
Mr. Francisco Abriani

Date of Dispatch: 4 September 2020

REPRESENTATION OF THE PARTIES

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and
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Representing the Italian Republic:

Avv. Carlo Sica
Avv. Gabriella Palmieri
Avv. Giacomo Aiello
Avv. Pietro Garofoli
Avv. Andrea Giordano
Avv. Laura Delbono
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Via dei Portoghesi, 12
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Italy
and
Prof. Avv. Maria Chiara Malaguti
External Counsel to the Legal Service of the Ministry of Foreign Affairs
Piazzale della Farnesina
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TABLE OF CONTENTS

I. INTRODUCTION AND PARTIES ... 1

II. PROCEDURAL HISTORY ... 2

III. ITALY'S SUSPENSION REQUEST ... 14

IV. PARTIES' CLAIMS AND REQUESTS FOR RELIEF ... 15

V. FACTUAL BACKGROUND ... 17

- A. The Regulatory Framework Prior to the Challenged Measures ... 17
- B. Eskosol's Investment ... 28
- C. Construction and Funding of the Eskosol Plants ... 31
- D. The Romani Decree ... 34
- E. Conto Energia IV ... 42
- F. The Eskosol Project after the Romani Decree and Conto Energia IV ... 45
- G. Eskosol's Business Plan ... 47

VI. JURISDICTION AND ADMISSIBILITY ... 51

- A. Jurisdiction *Ratione Personae* ... 53
  - 1. Nationality Requirement under Article 25(2)(b) of the ICSID Convention ... 53
    - a. Italy's position ... 53
    - b. Eskosol's position ... 58
  - 2. The Notion of "Foreign Control" under the ECT ... 61
    - a. Italy's position ... 61
    - b. Eskosol's position ... 63
  - 3. Tribunal's Analysis ... 65
- B. Admissibility Objection ... 72
  - 1. *Res Judicata* and Duplication of Proceedings Generally ... 72
    - a. Italy's position ... 72
    - b. Eskosol's position ... 75
  - 2. Abuse of Rights ... 76
    - a. Italy's position ... 76
    - b. Eskosol's position ... 77
  - 3. Tribunal's Analysis ... 78

VII. LIABILITY ... 82

- A. Relevance of the *Blusun* Award to Liability Issues ... 83

1. Eskosol's Position 83
2. Italy's Position 84
3. Tribunal's Analysis 85
B. Fair and Equitable Treatment 86
1. Eskosol's Position 86
a. Italy's violation of Eskosol's legitimate expectations 86
b. Italy's failure to provide a stable and predictable legal framework 97
c. Italy's failure to act transparently 98
d. Italy's inconsistent conduct 99
e. Italy's arbitrary and unreasonable conduct 100
f. Italy's disproportionate conduct 101
2. Italy's Position 101
a. The notion of legitimate expectations 102
b. The causal link 105
c. Eskosol's failure to qualify for the FiT incentives 114
d. The lack of any promise that regulations would not change 115
e. The predictability and reasonableness of the Romani Decree and Conto Energia IV 118
f. Other aspects of Eskosol's FET claim 120
3. Tribunal's Analysis 123
a. Introductory Points 123
b. Alleged Arbitrary and Unreasonable Conduct 125
c. Alleged Disproportionate and Non-Transparent Conduct 138
d. Alleged Violation of Legitimate Expectations Regarding Stability and Consistency 145
C. Umbrella clause 158
1. Eskosol's Position 158
2. Italy's Position 160
3. Tribunal's Analysis 161
D. Expropriation 162
1. Eskosol's Position 162
2. Italy's Position 163
3. Tribunal's Analysis 165
E. Constant Protection and Security 167

1. Eskosol's Position 167
2. Italy's Position 168
3. Tribunal's Analysis 168
F. Impairment by Unreasonable or Discriminatory Measures 170
1. Eskosol's Position 170
2. Italy's Position 171
3. Tribunal's Analysis 171
G. Conclusion on Liability 172
VIII. COSTS 172
A. Eskosol's Cost Submission 172
B. Italy's Cost Submission 173
C. The Tribunal's Decision on Costs 173
IX. AWARD 174

TABLE OF ABBREVIATIONS/DEFINED TERMS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
Blusun	Blusun S.A.
Blusun case	*Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic* (ICSID Case No. ARB/14/3)
C-[#]	Claimant's Exhibit
Cl. PHB	Claimant's Post Hearing Brief dated 21 December 2018
Cl. Rejoinder	Claimant's Rejoinder on Jurisdiction dated 15 June 2018
CL-[#]	Claimant's Legal Authority
Commission	European Commission
Commission's Application	European Commission's Application for Leave to Intervene as a Non-Disputing Party dated 16 January 2017
Conto Energia I	Italy's Ministerial Decree of 28 July 2005
Conto Energia II	Italy's Ministerial Decree of 19 February 2007
Conto Energia III	Italy's Ministerial Decree of 6 August 2010, published in the Official Gazette on 24 August 2010
Conto Energia IV	Italy's Ministerial Decree of 5 May 2011, published in the Official Gazette on 12 May 2011
Counter-Memorial	Respondent's Counter-Memorial on the Merits dated 27 October 2017
Decision on Rule 41(5) Objection	Tribunal's Decision on Respondent's Application Under Rule 41(5) dated 20 March 2017

Decision on Termination	Tribunal's Decision on Italy's Request for Immediate Termination and Italy's Jurisdictional Objection Based on Inapplicability of the Energy Charter Treaty to Intra-EU Disputes dated 7 May 2019
ECT	Energy Charter Treaty
EPC Contract	Turnkey Contract for the Construction of a Photovoltaic Project of a 120 MW Solar Plant, between Eskosol and Siemens dated 29 December 2010
Eskosol or the Claimant	Eskosol S.p.A. in liquidazione
FiT	Feed-in tariff
Hearing	Hearing Jurisdiction and the Merits held from 24-26 September 2018
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Italy or the Respondent	The Italian Republic
Joint Chronology	The joint chronology submitted by the Parties on 31 July 2018
Memorial	Claimant's Memorial on the Merits dated 9 May 2017
Memorial on Jurisdiction	Respondent's Memorial on Jurisdiction dated 7 July 2017
Parties	Claimant and Respondent, collectively
PV	Photovoltaic
R-[#]	Respondent's Exhibit
Renewables Directive	Directive 2009/28/EC on the promotion of the use of energy from renewable sources, adopted on 23 April 2009

Reply	Claimant's Reply on the Merits dated 2 March 2018
Request for Arbitration	Claimant's Request for Arbitration dated 9 December 2015
Request for Bifurcation	Respondent's Requests for Bifurcation and Suspension dated 7 July 2017
Request for Provisional Measures	Respondent's Request for Provisional Measures under ICSID Arbitration Rule 39(1) dated 18 January 2017
Request for Termination	Respondent's request for an award declaring immediate termination of the arbitral proceedings dated 4 February 2019
Resp. PHB	Respondent's Post Hearing Brief dated 21 December 2018
Resp. Rejoinder	Respondent's Rejoinder on the Merits dated 25 May 2018
RL-[#]	Respondent's Legal Authority
Romani Decree	Italy's Legislative Decree No 28 dated 3 March 2011 and effective from 29 March 2011
Rule 41(5) Objection	Respondent's Article 41(5) Objection for Manifest Lack of Legal Merits dated 18 November 2016
Salva Alcoa Act	Italy's Law No. 129 of 13 August 2010
2001 Directive	Directive 2001/77/EC on the promotion of electricity produced from renewable energy sources in the internal electricity market, adopted on 27 September 2001
Tr. Day [#] [Speaker(s)] [page:line]	Transcript of the Hearing
Tribunal	Arbitral tribunal constituted on 19 October 2016
UniCredit	UniCredit S.p.A.

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre") on the basis of the 1994 Energy Charter Treaty (the "ECT"), to which the Italian Republic has been a party since 16 April 1998, and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the "ICSID Convention").

2. The Claimant is Eskosol S.p.A. in liquidazione ("Eskosol" or the "Claimant"), a company incorporated under the laws of the Italian Republic, with an 80% shareholding by Blusun S.A. ("Blusun"), a company incorporated under the laws of the Kingdom of Belgium.

3. The Respondent is the Italian Republic ("Italy" or the "Respondent").

4. The Claimant and the Respondent are collectively referred to as the "Parties." The Parties' representatives and their addresses are listed above on page (i).

5. The dispute relates, in general terms, to certain changes that Italy enacted in 2011 to a program of incentives that it previously had put in place to encourage the building of additional photovoltaic ("PV") solar facilities in the country. The Claimant alleges that the investment it had made towards constructing a substantial PV project in Italy, in the expectation of qualifying for the incentive program while that program remained in effect, was rendered unviable as a result of the changes Italy enacted in 2011. The Claimant contends that Italy bears international responsibility under the ECT in these circumstances, which Italy rejects on the merits. Italy also contends that, as a threshold matter, the Claimant may not pursue its ECT claims because it already was in liquidation proceedings in Italy when it commenced this suit, and because its majority shareholder already had brought an ECT claim involving related events, although not on behalf of the Claimant or involving the Claimant's receiver in those proceedings. The Tribunal turns to these various jurisdictional and merits issues after addressing certain preliminary matters below.

II. PROCEDURAL HISTORY

6. On 11 December 2015, ICSID received a request for arbitration dated 9 December 2015 from Eskosol against Italy (the "Request for Arbitration").

7. On 22 December 2015, the Secretary-General of ICSID registered the Request for Arbitration in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

8. By letter of 14 March 2016, the Claimant requested that, in the absence of an agreement between the Parties, the Tribunal be constituted in accordance with the formula set forth in Article 37(2)(b) of the ICSID Convention.

9. On 15 March 2016, following appointment by the Claimant, ICSID notified the Parties that Prof. Guido Santiago Tawil had accepted his appointment as arbitrator.

10. On 6 April 2016, following appointment by the Respondent, ICSID notified the Parties that Prof. Pierre-Marie Dupuy had accepted his appointment as arbitrator. Prof. Dupuy subsequently withdrew his acceptance on 25 June 2016, and was replaced by Prof. Brigitte Stern, who accepted her appointment on 1 August 2016.

11. By letter of 1 June 2016, the Claimant requested that the Chairman of the ICSID Administrative Council appoint the President in accordance with Article 38 of the ICSID Convention and ICSID Arbitration Rule 4(1). By letter of 21 June 2016, ICSID invited the Parties to consider a list of five candidates in view of finding a mutually acceptable President by ballot prior to commencing the requested Article 38 appointment. By letter of 25 June 2016, ICSID notified the Parties that, in light of Prof. Dupuy's resignation, the ballot procedure was suspended.

12. By email of 12 August 2016, the Claimant notified ICSID that the Parties had agreed to a new method for appointment of the President, specifically:

a. The co-arbitrators shall have until September 12 to agree on at least one name for presiding arbitrator (the "President") that would be acceptable to both of them. Each Party may have *ex parte* communications with the co-arbitrator it appointed solely for the purpose of discussing the appointment of the President.

b. If the co-arbitrators cannot reach agreement by the above-mentioned deadline, either Party shall be free to resort to Article 38 of the ICSID Convention for the purpose of the appointment of the President of the Tribunal.

c. If the co-arbitrators agree on one or more names, the Parties shall have two weeks as of the date on which such agreement is communicated to them to approve the proposed name or agree on a President if the co-arbitrators were able to agree on two or more names. If this two-week time-window expires with no such confirmation or agreement, as applicable, either Party will be free to resort to Article 38 of the ICSID Convention to appoint the President.

d. While the above mechanism is underway, the Parties agree that ICSID should not resume the ballot procedure it suspended as a result of Prof. Dupuy withdrawing his acceptance to serve as Italy's co-arbitrator.

13. By letter of 15 September 2016, ICSID informed the Parties that, pursuant to their agreed-upon method, it had contacted the candidate for President proposed by the co-arbitrators; however, the candidate did not have availability to accept his appointment.

14. By letter of 20 September 2016, the Claimant again requested that the Chairman of the Administrative Council proceed to appoint the President under Article 38. By letter of 1 October 2016, ICSID transmitted a new ballot to the Parties.

15. By letter of 12 October 2016, ICSID informed the Parties that the ballot was successful, and that Ms. Jean Kalicki had been selected as President. In accordance with ICSID Arbitration Rule 5(2), ICSID proceeded to seek Ms. Kalicki's acceptance.

16. On 19 October 2016, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "Arbitration Rules"), notified the Parties that

all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Mr. Francisco Abriani, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

17. The Tribunal is composed of Ms. Jean Kalicki, a national of the United States of America, President, appointed by agreement of the Parties; Prof. Guido Santiago Tawil, a national of Argentina and Portugal, appointed by the Claimant; and Prof. Brigitte Stern, a national of France, appointed by the Respondent.

18. On 18 November 2016, the Respondent filed an objection under ICSID Arbitration Rule 41(5), asking that the proceedings be dismissed for manifest lack of legal merit (the "Rule 41(5) Objection").

19. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties on 2 December 2016, by teleconference.

20. On 23 December 2016, the Claimant filed its response to the Rule 41(5) Objection.

21. Following the first session, on 4 January 2017, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters. Procedural Order No. 1 provided, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural language would be English, and that the place of proceedings would be Paris, France. Procedural Order No. 1 also set out the agreed schedule for the proceedings, including a hearing in Paris on 8 February 2017, for oral arguments on the Rule 41(5) Objection.

22. On 13 January 2017, the Respondent submitted its reply to the Claimant's response to the Rule 41(5) Objection.

23. On 16 January 2017, the European Commission (the "Commission") filed an Application for Leave to Intervene as a Non-Disputing Party (the "Commission's Application") pursuant to ICSID Arbitration Rule 37. By letter of 17 January 2017, the Tribunal invited the Parties to submit their observations on the Commission's Application by 3 February 2017.

24. On 18 January 2017, the Respondent filed a Request for Provisional Measures under ICSID Arbitration Rule 39(1) (the "Request for Provisional Measures"), seeking, *inter alia*, an order on security for costs. By letter of 23 January 2017, the Tribunal asked the Parties to revert by 30 January 2017, with a proposed schedule for briefings on the Respondent's Request for Provisional Measures.

25. On 1 February 2017, the Claimant submitted its rejoinder to the Respondent's Rule 41(5) Objection.

26. On 3 February 2017, as anticipated in the Tribunal's letter of 17 January 2017, the Parties filed their respective observations on the Commission's Application.

27. A hearing on the Respondent's Rule 41(5) Objection was held in Paris on 8 February 2017. The following persons were present at the Hearing:

Tribunal:

Ms. Jean Kalicki	President
Professor Guido Santiago Tawil	Arbitrator
Professor Brigitte Stern	Arbitrator

ICSID Secretariat:

Mr. Francisco Abriani	Secretary of the Tribunal

For the Claimant:

Mr. Ricardo E. Ugarte	Winston & Strawn LLP
Mr. Marco Pocci	Winston & Strawn
Mr. Alejandro I Garcia	Winston & Strawn London LLP
Mr. Stefano Scotti	Winston & Strawn London LLP
Ms. Janet Hyun Jeong Kim	Winston & Strawn Paris LLP
Mr. Giuseppe Spagnolo	Spagnolo & Partners

For the Respondent:

Mr. Giacomo Aiello	Avvocatura dello Stato
Ms. Maria Chiara Malaguti	Ministero degli Affari Esteri e della Cooperazione Internazionale (consultant)

Court Reporter:

Ms. Claire Hill	The Court Reporter

28. On 10 February 2017, the Tribunal issued Procedural Order No. 2, whereby it granted the Commission permission to file a written submission as a non-disputing party in this arbitration.

29. On 3 March 2017, the Claimant filed its response to the Respondent's Request for Provisional Measures.

30. On 6 March 2017, the European Commission submitted its *Amicus Curiae* Brief with accompanying documentation.

31. On 20 March 2017, the Tribunal issued its Decision on Respondent's Application Under Rule 41(5), in which it denied Italy's Rule 41(5) Objection and reserved its decision on costs for a later stage in the proceedings.

32. On 12 April 2017, the Tribunal issued Procedural Order No. 3, denying the Respondent's Request for Provisional Measures and deferring the question of costs to later in the proceedings.

33. By emails of 24 April 2017, the Parties informed the Centre that they had agreed to an extension until 9 May 2017 for the Claimant to file its Memorial on the Merits (the "Memorial"). By email of the same date, ICSID confirmed that the Tribunal accepted the extension upon consent.

34. On 9 May 2017, the Claimant filed its Memorial, along with accompanying exhibits, the witness statements of Messrs. Antonio Magli ("Magli I") and Roberto Scognamiglio ("Scognamiglio I"), and the expert report of Dr. Martin Stickel of Fichtner Management Consulting ("Stickel I").

35. On 7 July 2017, the Respondent filed its Memorial on Jurisdiction and Requests for Bifurcation and Suspension (the "Memorial on Jurisdiction"), along with supporting documentation.

36. On 28 July 2017, the Claimant filed its Response to the Request for Bifurcation with accompanying documentation.

37. On 1 August 2017, the Tribunal issued Procedural Order No. 4, dismissing the Respondent's Request for Bifurcation. On 15 September 2017, the Tribunal issued Procedural Order No. 5, providing the detailed reasoning for its decision in Procedural Order No. 4.

38. Also on 15 September 2017, the Tribunal issued Procedural Order No. 6, in which it provided the detailed reasoning for its decision in Procedural Order No. 2 on the Commission's Application.

39. On 27 October 2017, the Respondent filed its Counter-Memorial on the Merits (the "Counter-Memorial") and supporting documentation, including the expert reports of Profs. Elena Maria Fumagalli and Stefano Pedrini ("Fumagalli/Pedrini"), and of Profs. Maurizio Delfanti and Mario Motta ("Delfanti/Motta I").

40. By email of 13 December 2017, the Parties informed the Tribunal that they had agreed to the following amended schedule for the remainder of the proceedings: 2 March 2018, for the Claimant's Reply on the Merits; 25 May 2018, for the Respondent's Rejoinder on the Merits; 15 June 2018, for the Claimant's Rejoinder on Jurisdiction; and 20 June 2018, for exchanges of notices regarding witnesses for the Hearing.

41. Following exchanges between the Parties, by letter of 14 December 2017, the Tribunal issued its rulings on the Parties' document requests.

42. By further letter of 14 December 2017, the Tribunal informed the Parties that it was agreeable to their proposed amendments to the schedule, subject to the pre-hearing conference call being rescheduled to either 2 or 3 July 2018, rather than the original date of 25 June 2018. By letter of 19 December 2017, ICSID informed the Parties that the pre-hearing call would take place on 3 July 2018.

43. By letter of 10 January 2018, the Tribunal noted that the Hearing originally had been scheduled for 24-28 September 2018, but asked the Parties whether the final day might be released, based on the small number of witnesses involved and in light of a possible conflict for one of the Tribunal members. By email of 11 January 2018, the Respondent confirmed that it had no objection to the proposed change. By email of 15 January 2018, the Claimant confirmed its agreement to the change.

44. On 2 March 2018, the Claimant filed its Reply on the Merits (the "Reply"), along with accompanying documentation, including the second witness statements of Messrs. Scognamiglio ("Scognamiglio II") and Magli ("Magli II"), and the Complementary Expert Report of Dr. Martin Stickel and Dr. Alberto Longhi of Fichtner Management Consulting ("Stickel/Longhi").

45. By letter of 12 March 2018, the Tribunal invited the Parties to submit a joint chronology of events by 20 July 2018.

46. On 25 May 2018, the Respondent filed a Rejoinder on the Merits ("Resp. Rejoinder"), along with accompanying documentation, including the witness statement of Eng. Daniele Bacchiocchi ("Bacchiocchi") and the second expert reports of Profs. Fumagalli and Pedrini ("Fumagalli/Pedrini II"), and Profs. Delfanti and Motta ("Delfanti/Motta II").

47. On 15 June 2018, the Claimant filed a Rejoinder on Jurisdiction ("Cl. Rejoinder").

48. On 3 July 2018, the Tribunal held a pre-hearing conference call with the Parties.

49. On 5 July 2018, the Tribunal issued Procedural Order No. 7, in which it provided certain directions for the upcoming hearing.

50. On 31 July 2018, the Parties submitted a joint chronology of events (the "Joint Chronology").

51. A hearing on jurisdiction and the merits was held in Paris from 24-26 September 2018 (the "Hearing"). The following persons were present at the Hearing:

Tribunal:

Ms. Jean Kalicki	President
Professor Guido Santiago Tawil	Arbitrator
Professor Brigitte Stern	Arbitrator

ICSID Secretariat:

Mr. Francisco Abriani	Secretary of the Tribunal

For the Claimant:

Counsel:

Mr. Ricardo Ugarte	Winston & Strawn London LLP
Mr. Marco Pocci	Winston & Strawn LLP
Mr. Stefano Scotti	Winston & Strawn London LLP

Mr. Daniel Meagher	Winston & Strawn London LLP
Ms. Rana Sebaly	Winston & Strawn Middle East LLP
Mr. Giuseppe Spagnolo	Spagnolo & Partners
Parties:	
Mr. Teodoro Contardi	Receiver for Eskosol S.p.A.

For the Respondent:

Counsel:	
Avv. Pietro Garofoli	Avvocatura dello Stato
Avv. Andrea Giordano	Avvocatura dello Stato
Prof. Maria Chiara Malaguti	MAECI
Ms. Annalisa Signorelli	Avvocatura dello Stato, trainee
Parties:	
Avv. Cosimo Danilo Raimondi	GSE
Avv. Paolo Berisio	GSE
Ing. Luca Miraglia	GSE
Dott. Valerio Venturi	GSE

Court Reporter:

Mr. Trevor McGowan	The Court Reporter

Interpreters:

Ms. Monica Robiglio
Mr. Paolo Cortucci
Ms. Daniela Ascoli

52. During the Hearing, the following persons were examined:

On behalf of the Claimant:

Witnesses:	
Mr. Antonio Magli	Milano S.p.A.
Mr. Roberto Scognamiglio	Canadian Solar UK Projects Ltd.
Experts:	
Mr. Martin Stickel	Fichtner GmbH & Co KG
Mr. Alberto Longhi	Fichtner Italia S.r.l.
Mr. Tino Mahler	Fichtner Management Consulting AG

On behalf of the Respondent:

Witness:	
Eng. Daniele Bacchiocchi	GSE
Experts:	
Prof. Maurizio Delfanti	Politecnico di Milano
Prof. Mario Motta	Politecnico di Milano
Prof.ssa Elena Maria Fumagalli	Politecnico di Milano
Prof. Stefano Pedrini	Politecnico di Torino

53. By email of 3 October 2018, the Commission offered, should the Tribunal find it useful, to update its written submission in light of the judgment issued by the European Court of Justice in Case C-284/16, *Achmea v. Slovak Republic*.

54. By email of 9 October 2018, the Tribunal invited the Parties' comments on the Commission's offer of 3 October 2018 by 15 October 2018.

55. By letters of 15 October 2018, the Parties provided their comments on the Commission's offer, with the Claimant requesting that the Tribunal reject the offer and the Respondent asking that the Tribunal allow it.

56. By letter of 18 October 2018, the Tribunal granted the Commission the opportunity to supplement its submission with a brief of no more than 15 pages, to be filed by 31 October 2018.

57. On 26 October 2018, the Commission filed its Updated *Amicus Curiae* Brief with accompanying documentation.

58. By emails of 2 November 2018, the Parties informed the Tribunal that they had agreed to an adjustment of the schedule for the filing of Post-Hearing Briefs to 14 December 2018, and for the filing of cost submissions to 21 December 2018. By email of 5 November 2018, the Tribunal confirmed its agreement to the Parties' agreed schedule.

59. Following exchanges regarding corrections to the transcripts for the Hearing, by letter of 5 November 2018, the Tribunal informed the Parties that it would seek the assistance of Ms. Daniela Ascoli, one of the interpreters at the Hearing, in determining certain disputed passages.

60. By email of 20 November 2018, the Claimant requested the Tribunal's permission to enter an additional legal authority into the record. By email of the same date, the Tribunal asked the Respondent for its comments on the Claimant's request.

61. On 3 December 2018, the Tribunal issued its decision on the disputed passages of the transcripts.

62. By email of 10 December 2018, the Claimant reiterated its request of 20 November 2018, and amended the request to include an additional legal authority.

63. By emails of 10 December 2018, the Parties requested that the deadline for submitting the Post-Hearing Briefs be extended until 21 December 2018. By email of the same date, the Tribunal confirmed its agreement to the extension.

64. By email of 16 December 2018, the Tribunal gave the Respondent until 18 December 2018, to object to the Claimant's application of 20 November 2018. By email of 17 December 2018, the Respondent confirmed that it had no objection to the Claimant's request. By email of 17 December 2018, the Tribunal confirmed that the requested documents could be submitted into the record.

65. On 17 December 2018, the Claimant submitted legal authorities CL-194 and CL-195 into the record.

66. By email of 19 December 2018, the Parties requested an extension until 11 January 2019 to file their submissions on costs. By email of the same date, the Tribunal confirmed its agreement to the request.

67. The Parties filed simultaneous Post-Hearing Briefs on 21 December 2018 ("Cl. PHB" and "Resp. PHB," respectively).

68. The Parties filed their respective statements of costs on 11 January 2019.

69. By letter of 14 January 2019, the Tribunal asked that (i) the Claimant confirm that the ATE policy referenced in Procedural Order No. 3 remained in effect and (ii) the Respondent provide a further explanation of its breakdown of costs.

70. By email of 15 January 2019, the Claimant confirmed that the ATE policy remained in effect under the same terms.

71. On 18 January 2019, the Respondent filed an updated statement of costs.

72. On 4 February 2019, the Respondent filed a request for an award declaring the termination of the arbitral proceedings (the "Request for Termination").

73. By email of 6 February 2019, the Tribunal invited the Claimant to respond to the Request for Termination by 18 February 2019.

74. On 18 February 2019, the Claimant filed its Response to the Request for Termination.

75. On 19 February 2019, the Respondent requested leave to respond to the Claimant's Response to the Request for Termination.

76. By email of 21 February 2019, the Tribunal granted the Respondent's request for a brief reply to Claimant's letter of 18 February 2019, to be submitted by no later than 26 February 2019. Should the Claimant wish to offer any brief points in sur-rebuttal, it was to do so by 1 March 2019, following which the Tribunal would treat the briefing on Respondent's Request for Termination as complete.

77. By letter of 16 February 2019, the Respondent submitted its reply to the Claimant's Response to the Request for Termination.

78. By letter of 1 March 2019, the Claimant submitted its response to the Respondent's 26 February 2019 submission.

79. On 7 May 2019, the Tribunal issued its Decision on Italy's Request for Immediate Termination and Italy's Jurisdictional Objection Based on Inapplicability of the Energy Charter Treaty to Intra-EU Disputes (the "Decision on Termination") in which it rejected Italy's requests.

80. By letter of 18 June 2019, the Respondent requested that the Tribunal suspend the proceedings. By email of 21 June 2019, the Tribunal invited the Claimant to respond to the Respondent's request by 1 July 2019.

81. By letter of 1 July 2019, the Claimant provided its comments on the Respondent's letter of 18 June 2019.

82. By email of 1 July 2019, the Office of Economic Interests of the Belgian Government forwarded the Centre a copy of the "Declaration of the Representatives of the Governments of the Member States of 15 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union." The Centre duly transmitted this document to the Tribunal and the Parties.

83. By email of 1 August 2019, Mr. Marco Pocci informed the Centre that he would continue to represent the Claimant from his new firm, Stephenson Harwood LLP, Hong Kong. He subsequently provided a power of attorney to that effect on 14 August 2019.

84. By email of 7 November 2019, the Respondent provided certain updates to its list of counsel for this proceeding.

85. By email of 6 December 2019, the Respondent requested leave to submit two additional legal authorities into the record, reflecting awards recently issued in arbitrations against Spain. By email of the same date, the Tribunal asked the Claimant for its comments on the Respondent's request. By letter of 15 December 2019, the Claimant objected to the Respondent's request. On 17 December 2019, the Tribunal denied the request, "taking into account both the stage of these proceedings and the nature of the legal authorities at issue."

86. By email of 30 March 2020, the Respondent requested leave to submit a new legal authority, reflecting an award recently issued in an arbitration against Italy. By email of the same date, the Tribunal asked the Claimant for its comments on the Respondent's request. By letter of 6 April 2020, the Claimant objected to the Respondent's request. On 8 April 2020, the Tribunal denied the request "in light of the stage of these proceedings, and in recognition in any event that the Tribunal resolves issues in this case based on its independent analysis, not based on the rulings of other tribunals."

87. On 16 April 2020, the Respondent requested leave to submit a new legal authority, reflecting a decision on annulment recently rendered in an ICSID arbitration brought by Blusun against

Italy (the "*Blusun* case"),[1] for which the earlier award already was part of the record. By email of the same date, the Tribunal asked the Claimant for its comments on the Respondent's request. By letter of 23 April 2020, the Claimant objected to the Respondent's request. By letter of 18 May 2020, the Tribunal denied the request, "on grounds of insufficient materiality and in light of the current stage of the proceedings."

88. The proceeding was closed on 25 August 2020.

III. ITALY'S SUSPENSION REQUEST

89. As noted above, six weeks after the Tribunal rendered its Decision on Termination, which denied Italy's jurisdictional objection based on the inapplicability of the ECT to intra-EU disputes, Italy requested that the Tribunal nonetheless suspend these proceedings, on account of a matter then pending before the CJEU. Specifically, Italy mentioned two referral orders issued in May 2018 by the Italian Administrative Court of Lazio, asking the CJEU to consider whether the effects of the "Spalma Incentivi Decree" (Legislative Decree No. 91/2014) are contrary to certain provisions of EU law and/or to Article 10 of the ECT. Italy's contention was that a suspension of this arbitration would "[g]iv[e] room to the [CJEU]" to address "the same ECT standards," and therefore promote consistency and legal certainty.[2]

90. In response, Eskosol noted *inter alia* that neither it, nor any of the special purpose vehicles ("SPVs") it owned, were party to the local proceedings that had given rise to the referred cases, nor did the Spalma Incentivi Decree have any relevance to this case. Eskosol also observed that this Tribunal "is an international investment tribunal empanelled under a different legal order and pursuant to its own duties," as explained in the Decision on Termination, and therefore that a suspension of these proceedings would be unwarranted even apart from the lack of any overlap as to parties or measures at issue in the two cases.

91. The Tribunal saw no basis for a suspension of its work. At the time the request was filed, the Tribunal had just issued a lengthy and detailed decision explaining its independent duty to

[1] *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3.

[2] Respondent's letter of 18 June 2019.

decide this ECT dispute, regardless of the CJEU's role as the final arbiter of EU law. It is not clear why Italy waited until after that decision was rendered to inform the Tribunal that a year earlier, an Italian court apparently had referred questions about a different Italian measure to the CJEU, raising in that context certain issues regarding the ECT. Be that as it may, the pendency of such questions before the CJEU in no way altered the Tribunal's decision regarding its responsibility to proceed to resolve the issues entrusted to it. The Tribunal therefore determined to press ahead in its preparation of this Award, addressing the suspension request in the context of this Award rather than in yet another interim decision.

IV. PARTIES' CLAIMS AND REQUESTS FOR RELIEF

92. The Claimant's request for relief, as stated in its Post-Hearing Brief, is as follows:

> Eskosol respectfully requests that the Tribunal:
>
> (i) Declare that Italy has breached its obligations towards Eskosol's Investments and Eskosol itself under the ECT and/or international law;
>
> (ii) Declare that Italy's actions and omissions, as described in Eskosol's submissions, are unfair and inequitable; unreasonable; have failed to protect Eskosol's Investments; have failed to observe its obligations with Eskosol or Eskosol's Investments under the "umbrella clause" in the ECT; and have effectively expropriated Eskosol's Investments without prompt, adequate and effective compensation;
>
> (iii) Award Eskosol compensation for all damages, including loss of profits, caused by Italy's breaches of the ECT and/or international law towards Eskosol or Eskosol's Investments, in an amount of at least EUR 196,717,000 for its lost profits claim; and alternatively award Eskosol its sunk costs in an amount of at least EUR 37.9 million.
>
> (iv) Award Eskosol pre-award interest in an amount of at least EUR 18,825,558 as of 30 November 2018 for its lost profits claim, or alternatively award Eskosol pre-award interest in an amount of at least EUR 3,630,808 as of 30 November 2018 for its sunk cost damages.
>
> (v) Order Italy to pay to Eskosol all the costs of these proceedings, with interest on any relevant sum applied on the same basis as pre-award interest, including Eskosol's counsel fees and disbursements, the fees of the Tribunal and those of the Centre (such costs and interest calculations to be provided by the Claimant by way of Schedule of Costs, currently anticipated to be submitted on 11 January 2019);

(vi) Award Eskosol post-award interest to be applied to the total amount ordered by the Tribunal and any portion thereof remaining unpaid by the Italy in the future, such interest to be compounded quarterly, and which rate of interest shall be based on the Italian Consumer Price Index (Nic), as published by The Italian National Institute of Statistics on the website: http://dati.istat.it/?lang=en# (Section: Prices / Nic – Monthly.[3]

93. Italy's request for relief, as expressed in its Memorial on Jurisdiction and in its Counter-Memorial on the Merits (which in turn were incorporated by reference in the prayer for relief included in the Respondent's Rejoinder),[4] is as follows:

> The Respondent respectfully requests that the Tribunal, after having bifurcated the proceedings so that to judge exclusively on the objections on jurisdiction and admissibility:
>
> 1. Rejects Eskosol's request for arbitration for lack of jurisdiction and/or inadmissibility;
>
> 2. order the Claimant to pay all the costs of these proceedings.[5]

94. In its Counter-Memorial on the Merits, the Respondent requested as follows:

> [S]hould the Tribunal uphold its own jurisdiction on the claim and consider it admissible, the Respondent requests the Tribunal to:
>
> (a) declare, on the merits, that all the claims of the Claimant under Article 10(1) and [A]rticle 13 of the ECT are unfounded, for lack of a causal link between the challenged Respondent's conduct and the outcomes of the Project; and that, in any case, the Respondent's conduct does not constitute a violation of such rules.
>
> b) In this context, declare the requests for damages not supported by sufficient evidence of injury.
>
> c) In the unfortunate event that the Tribunal were to uphold one of the claims of the Claimant and award some form of compensation to the Claimant, declare the appropriateness of the calculations of the damages and the interest proposed by the Respondent.
>
> d) In any event, exclude from any amount of compensation the part of contributory fault attributable to the conduct of the Claimant, whose responsibility in the negative outcomes of the Project exceeds that in any way attributable to the Respondent.

[3] Cl. PHB, ¶ 218.

[4] Resp. Rejoinder, ¶ 386.

[5] Memorial on Jurisdiction, ¶ 291.

e) Ordering 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 Centre, in accordance with Article 61(2) of the ICSID Convention.[6]

95. In its Post-Hearing Brief, the Respondent requested as follows:

> Together with its reiterated plea to declare its behaviors not to violate any of the claimed provisions of the ECT, Respondent thus requests to be relieved from all costs and expenses of this procedure.[7]

V. FACTUAL BACKGROUND

96. The Tribunal summarizes below certain relevant facts that are either agreed or that the Tribunal has found to be proven by the evidence. These include background facts regarding the regulatory framework applicable to solar energy projects in Italy, Eskosol's investment in Italy, and the measures Italy adopted in 2011 about which Eskosol complains in these proceedings. The Tribunal emphasizes nonetheless that it does not purport to set out all facts considered for purposes of this Award, and the absence of reference to particular facts or assertions, or to the evidence supporting any particular fact or assertion, should not be taken as an indication that the Tribunal did not consider those matters. The Tribunal has carefully considered all evidence and arguments submitted to it in the course of these proceedings.

A. THE REGULATORY FRAMEWORK PRIOR TO THE CHALLENGED MEASURES

97. On 27 September 2001, the European Commission issued Directive 2001/77/EC on the promotion of electricity produced from renewable energy sources in the internal electricity market (the "2001 Directive").[8] The purpose of the 2001 Directive was "to promote an increase in the contribution of renewable energy sources of electricity production in the internal market for electricity and to create a basis for a future Community framework thereof."[9] Among other things, this Directive set national indicative targets for each Member

[6] Counter-Memorial, ¶ 435.

[7] Resp. PHB, ¶ 181.

[8] Joint Chronology, p. 1; 2001 Directive, C-12.

[9] 2001 Directive, C-12, Art. 1.

States' contribution of electricity produced from renewable energy sources to gross electricity consumption by 2010. Italy's indicative target under the Directive was 25%.[10]

98. Under the 2001 Directive, Member States were under an obligation periodically to publish a report setting national indicative targets for future consumption of electricity produced from renewable energy sources, taking into account the target set in the Directive, and outlining the measures taken or planned.[11] On the basis of those Member State reports, the Commission in turn would assess to what extent the Member States had made progress towards achieving their national targets, and whether the national targets were compatible with a "global indicative target" of 12% of gross national energy consumption and with a 22.1% indicative share of electricity produced from renewable energy sources in total Community electricity consumption by 2010.[12] If the Commission's report concluded that the national indicative targets were likely to be inconsistent with the global indicative target for reasons that were "unjustified and/or do not relate to new scientific evidence," the Commission was to propose "national targets, including possible mandatory targets, in the appropriate form."[13]

99. The 2001 Directive also required the Commission to evaluate mechanisms used in Member States to support producers of renewable energy, including "assess[ing] the success, including cost-effectiveness, of the support systems … in promoting the consumption of electricity produced from renewable energy sources in conformity with the national indicative targets referred to in Article 3(2)."[14] If necessary, the Commission was to propose a "Community framework with regard to support schemes" for renewable energy, with any such proposal to:

   a. Contribute to the achievement of the national indicative targets;

   b. Be compatible with the principles of the internal electricity market;

   c. Take into account the characteristics of the different sources of renewable energy, together with the different technologies, and geographical differences;

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[10] 2001 Directive, C-12, Art. 3 and Annex.

[11] 2001 Directive, C-12, Art. 3(2) and 3(3).

[12] 2001 Directive, C-12, Art. 3(4).

[13] 2001 Directive, C-12, Art. 3(4) *in fine*.

[14] 2001 Directive, C-12, Art. 4(2).

d. Promote the use of renewable energy sources in an effective way, and be simple and, at the same time, as efficient as possible, particularly in terms of cost;

e. Include sufficient transitional periods for national support systems of at least seven years and maintain investor confidence.[15]

100. On 29 December 2003, Italy enacted Legislative Decree No. 387 on the implementation of the 2001 Directive.[16] Article 7 of this legislative decree established that, within six months of its enactment,

> the Minister of Production, in concert with the Minister of the Environment and Protection of Land and Sea, in agreement with the Unified Conference, will implement one or more decrees setting forth the criteria aimed at incentivizing the production of electric energy from solar sources. … without any cost to the State budget and observing current European Community Law ….[17]

These criteria, in turn:

> sh[ould] establish the methodology to determine the amount of incentives. For energy produced by means of photovoltaic conversion from solar sources, [the criteria should] provide for a specific incentivising tariff, of a decreasing nature and having a duration that ensures a fair return on the investment and operating costs.[18]

101. On 18 April 2005, Italy enacted Law No. 62, concerning the implementation by Italy of obligations arising from its EU membership. This law was aimed, *inter alia*, at completing the process of liberalization of the energy sector, in order to implement the EU Directive 2003/54/CE concerning common rules for the domestic electricity market. Among the principles to be followed in the implementation of EU policy was:

> [to] develop the use of renewable energy sources and co-generation through market instruments, providing a reorganization of the current legislative framework and a differentiation based on types of power plants and introducing incentivising mechanisms based on tender aimed at incentiviz[ing] the most advanced technologies which are far from trade competitiveness, remaining understood that all existing incentives for assimilated energies, at the end of the relevant deadline, will stop.[19]

[15] 2001 Directive, C-12, Art. 4(2).

[16] Joint Chronology, p. 1; Legislative Decree No. 387, CL-94.

[17] Legislative Decree No. 387, CL-94, Art. 7(1) and (2).

[18] Legislative Decree No. 387, CL-94, Art. 7(2)(d).

[19] Law No. 62, CL-95, Art. 15(f).

102. On 28 July 2005, Italy enacted a Ministerial Decree containing what is known as "Conto Energia I," establishing incentives for investment in Italy's solar PV sector.[20] Conto Energia I established a mechanism consisting of pre-determined incentivizing tariffs to be paid to PV plants having a nominal capacity lower than 100 kW, on the basis of the amount of electricity injected into the grid, with the understanding that the tariffs recognized by the decree would apply up to a "[m]aximum aggregate limit," *i.e.*, "until the total aggregate power of all power plants that secure the same incentivizing tariffs reaches 100 MW."[21] This aggregate limit on power plants entitled to secure the special tariffs was in turn related to the "aggregate national target of capacity from photovoltaic plants to be installed [by] 2015," which was 300 MW.[22] The level of the tariffs a *particular* new or renovated power plant would receive depended on its nominal capacity and on the date of the plant's application for the tariffs,[23] with the understanding that the application was predicated on the plant's being "connected to the grid" and having "entered into operation following 30 September 2005."[24] For plants with a nominal capacity higher than 50 kW but lower than 100 kW, a rate of 0.490 euro/kWh was established for plants whose application was submitted during 2005 or 2006, while those plants whose applications were submitted after 2006 would have a tariff reduced by 2% for each year after 2006, "it being understood that such incentivising tariff will be paid for twenty years."[25]

103. On 6 February 2006, Italy adopted a decree amending Conto Energia I "in light of the gained experience," and in particular "the high interest for photovoltaic conversion" which had led to applications already exceeding the maximum aggregate limit previously set at 100 MW.[26] The amendment raised the national aggregate target of PV power to be installed by 2015 to

[20] Joint Chronology, p. 1; Conto Energia I, CL-96.
[21] Conto Energia I, CL-96, Art. 12(1).
[22] Conto Energia I, CL-96, Art. 11.
[23] Conto Energia I, CL-96, Arts. 5 and 6.
[24] Conto Energia I, CL-96, Art. 4(1).
[25] Conto Energia I, CL-96, Art. 6(3).
[26] Decree of 6 February 2006, CL-97.

1,000 MW, and increased the "aggregate limit of plants that can secure the incentivising tariffs" under Conto Energia I from 100 MW to 500 MW.[27]

104. On 19 February 2007, Italy enacted a Ministerial Decree containing "Conto Energia II."[28] This decree "[c]onsider[ed] that the first results [of Conto Energia I and its amendment] have shown a remarkable managerial complexity of the system and an excessive imbalance in favour of the construction of large plants," and "consider[ed] it appropriate to approve new measures aimed at correcting the incentive mechanism by introducing a simplified, stable and lasting scheme of access to the incentives."[29] In order to qualify under Conto Energia II, PV plants must not already have benefited from the prior regime, "must be connected to the grid," "must have entered into operation," and must submit an application for the relevant incentive rate within 60 days of entry into operation, following which they would be notified of the approved tariffs.[30]

105. The electric power produced by PV plants built in compliance with the decree, and which came into operation between the effective date of Conto Energia II and 31 December 2008, "has a right to an incentivising tariff … identified on the basis of [a] table" set forth in the decree, "valid for a period of twenty years from the date of entry into operation."[31] As with Conto Energia I, the level of the tariffs again differed depending on when the plants entered into operation, with plants entering into operation before 31 December 2008 receiving a rate set out in Article 6(1), and those entering into operation during 2009 and 2010 receiving tariffs reduced by 2% for each calendar year after 2008.[32]

106. As with Conto Energia I, Conto Energia II linked the incentive program to an objective of installing a "national target for nominal cumulative photovoltaic power," now stated to be 3,000 MW by 2016.[33] Conto Energia II also fixed a ceiling for the "maximum cumulative

[27] Decree of 6 February 2006, CL-97, Arts. 1, 2(1); Joint Chronology, p. 1.
[28] Joint Chronology, p. 1; Conto Energia II, CL-98.
[29] Conto Energia II, CL-98.
[30] Conto Energia II, CL-98, Arts. 4(1), 4(3), 4(6), 4(7), 5(4), 5(5).
[31] Conto Energia II, CL-98, Art. 6(1).
[32] Conto Energia II, CL-98, Art. 6(2).
[33] Conto Energia II, CL-98, Art. 12.

electric power of all power plants that, in accordance with this decree, can obtain the incentivizing tariffs," with the ceiling now set at 1,200 MW.[34] The decree also stated as follows:

> In addition to the power plants that contribute to the achievement of cumulative electric power referred to in paragraph 1, all power plants entering into operation within fourteen months after the date, to be communicated by the operator on its website, on which the limit of power of 1,200 MW referred to in paragraph 1 is reached, have a right to the incentivizing tariffs mentioned in Article 6 and the bonus mentioned in Article 7. The above-mentioned period of fourteen months is extended to twenty-four months only for those plants owned by public entities.[35]

In order that the public be able to track the progress towards achieving both the national target and the incentive ceiling of 1,200 MW established under Conto Energia II, regular updates were to be published showing the accumulated power of plants that had entered into operation under Conto Energia I and II.[36] Within six months of the 1,200 MW incentive ceiling being reached, a new decree would be adopted setting out further measures for achieving the national target.[37]

107. In general, Conto Energia II envisioned that further decrees would be issued every two years from 2009, setting out the tariffs for plants entering into operation for years after 2010, with those new tariff levels taking into account, *inter alia*, "the price trends of energy products and components for photovoltaic plants," as well as the results of prior incentive programs, including the amount of PV energy brought online and the volume of incentives thus far extended.[38] However, in the event that new decrees were not put in place, then the tariffs fixed by Conto Energia II for power plants coming into operation in 2010 "shall continue to apply for the years beyond 2010."[39]

108. On 23 April 2009, the European Parliament and the Council adopted Directive 2009/28/EC on the promotion of the use of energy from renewable sources (the "Renewables Directive"),

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[34] Conto Energia II, CL-98, Art. 13(1).

[35] Conto Energia II, CL-98, Art. 13(2).

[36] Conto Energia II, CL-98, Art. 13(3).

[37] Conto Energia II, CL-98, Art. 13(4).

[38] Conto Energia II, CL-98, Arts. 6(3), 14(1), 14(2).

[39] Conto Energia II, CL-98, Art. 6(3).

which replaced the 2001 Directive and imposed mandatory targets on EU Member States for expansion of renewable energy by the year 2000.[40] In Italy's case, the target imposed for 2020 was that 17% of gross final consumption of energy should be from renewable sources.[41]

109. Recognizing that Member States had different renewable energy potentials and operated different support schemes to encourage the growth of renewable energy, the Renewables Directive provided that "[f]or the proper functioning of national support schemes it is vital that Member States can control the effect and costs of their national support schemes according to their different potentials."[42] Consequently, it established that "[i]n order to achieve the targets … each Member State shall promote and encourage energy efficiency and energy savings."[43] Moreover, the Renewables Directive provided that the national renewable energy action plans should "tak[e] into account the effects of other policy measures relating to energy efficiency on final consumption of energy."[44]

110. On 21 January 2010, Italy's Undersecretary for Economic Development, Mr. Stefano Saglia, reportedly declared that "the Government's strategy on energy envisages a stable system of incentives that will lead to an increase in energy production from renewable sources."[45] On 3-4 May 2010, Undersecretary Saglia attended the 2010 Verona PV Summit and reportedly declared that the Government intended "to enact by the next meeting of the State-Regions Conference guidelines for the construction of renewable energy plants and the new photovoltaic energy bill, in order to give certainty to the entire sector. … The government wishes to confirm its commitment to the development of PV energy in Italy hoping to create investment opportunities, employment and development of a national pipeline, although foreign investments are certainly welcome."[46] Reports on the same 2010 Summit noted that the new Conto Energia III was going to "aim at a target of installed capacity of 3,000 MW in the next three years, but with the availability to take advantage of the tariffs for further 14

[40] Joint Chronology, p. 1; Renewables Directive, C-23, Art. 3.
[41] Renewables Directive, C-23, Annex I.
[42] Renewables Directive, C-23, recital 25.
[43] Renewables Directive, C-23, Art. 3(1).
[44] Renewables Directive, C-23, Art. 4.
[45] Future of Renewable Energy in Italy, luxenergia net, 21 January 2010, C-25.
[46] National Press agencies Review of the 2010 Italian PV Summit, C-27.

months after the target is achieved."[47] Mr. Saglia also reportedly declared that the objective was to "simplify, but also give [ ] certainty of rules."[48]

111. In the Claimant's view, these and other statements by the Italian Government were intended to give assurances to investors in order to encourage investments in Italy's PV sector.[49]

112. In June 2010, Italy's Ministry of Economic Development issued the "National Renewable Action Plan," reporting on Italy's plan to fulfill its obligations under the Renewables Directive.[50] The National Action Plan described Italy's use of a "feed-in tariff" ("FiT") incentive scheme for encouraging the growth of PV power plants, and reported that "[t]he current incentive schemes have proved capable of supporting constant growth in the sector, guaranteeing a sufficient degree of predictability in the return on investment, despite frequent changes to the regulatory framework, and aiding the financial viability of the projects."[51] The Plan stated that "[n]evertheless, the strong growth predictions, and in particular the specific targets for the electricity sector, call for a long-term vision and, as well as rationalizing the current incentives based on trends in the cost of the various technologies, the ability to promote benefits in a wider production and employment context, using an approach of gradual reduction in charges …."[52] The Plan reported that there would therefore be "regular reviews" of various factors, including specifically of the FiT for solar energy, "in order to take into account the expected reduction in component and plant costs and to expand the production base whilst limiting and regulating the economic impact on the electricity sector."[53]

113. The National Action Plan further advised that "[r]egarding the current situation, some corrections are expected to be introduced to the existing framework … in order to avoid a

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[47] National Press agencies Review of the 2010 Italian PV Summit, C-27.

[48] National Press agencies Review of the 2010 Italian PV Summit, C-27.

[49] Memorial, ¶¶ 46-47; *see also New Conto Energia: expected news and GSE's point of view*, Enernew.it, 12 May 2010, C-28, and *Saglia: No Backward Steps. Green Economy from Theory to Practice*, Vita.com, 25 June 2010, C-30.

[50] Joint Chronology, p. 2; National Renewable Action Plan, C-29. There is a discrepancy in the record as to the precise date of issuance of this document, with the Joint Chronology and the Memorial referencing 11 June 2010, but C-29 itself referencing 30 June 2010. In the Tribunal's view, nothing in the case turns on resolving this issue.

[51] National Renewable Action Plan, C-29, p. 7.

[52] National Renewable Action Plan, C-29, pp. 7-8.

[53] National Renewable Action Plan, C-29, p. 8.

parallel increase in production and in incentive costs."[54] These include a review of the FiT for solar plants "in order to avoid excessive or insufficient remuneration," and a "planned and progressive reduction of incentives (for example through adjustment according to the production costs of each technology," with "advance planning of reductions in tariffs" and "application of new values only to those plants which come into operation at least one year after the introduction" of the new values.[55] More generally, the Plan described Italy's incentive scheme as follows:

> The feed-in tariff is a support scheme which guarantees constant remuneration at current currency values for the electricity produced by plants for a set period of time (20 years for photovoltaic plants, 25 years for solar thermal plants). Moreover, the scheme is subject to regular adjustments which take into account the trends in the prices of energy products and components for photovoltaic plants as well as the results of monitoring and promoting technology used to create the plants, with the intention of limiting the medium- and long-term costs to the community. In any case, the incentive tariff paid when the plant becomes operation[al] remains fixed for the whole entitlement period.[56]

114. The Plan referred to an upcoming new decree currently awaiting signatures (*i.e.,* the future Conto Energia III), which would set the national target at 8000 MW of PV capacity to be installed by 2020,[57] and make various other changes, including a "scheduled decrease" of FiTs during 2011 and a further 6% annual reduction in 2012 and 2013.[58] The third FiT decree "sets a maximum cap of 3000 MW for the capacity which is eligible for the incentive …. Once these capacity limits have been reached, the tariff will nonetheless be provided for a further 14 months (24 months for public bodies)."[59] Access to these tariffs is "allowed on the condition that the photovoltaic plants comply with the requirements of the third 'Feed-In Tariff',"[60] with the tariffs then "paid for a period of 20 years starting from the date on which the plant becomes operational."[61]

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[54] National Renewable Action Plan, C-29, p. 107.
[55] National Renewable Action Plan, C-29, p. 107.
[56] National Renewable Action Plan, C-29, p. 112.
[57] National Renewable Action Plan, C-29, pp. 108-109.
[58] National Renewable Action Plan, C-29, p. 112.
[59] National Renewable Action Plan, C-29, pp. 114, 115.
[60] National Renewable Action Plan, C-29, p. 115.
[61] National Renewable Action Plan, C-29, pp. 117-118.

115. On 7 July 2010, the Ministry of Economic Development issued a press release stating as follows:

> The new Conto Energia for electricity produced by photovoltaic plants starting from 2011 operates a reduction of the incentives, which will have an impact on energy consumers. Thanks to the reduction on system charges, the electricity bills will be less expensive. The decree recognizes on energy produced a fixed and guaranteed incentive tariff for 20 years when the system enters into service in which anyone can secure (individuals, companies, public bodies, condominiums). For plants that will commence operations in 2012 and 2013 the incentives will be reduced by 6%. For subsequent years, it will be issued a new decree.[62]

116. On 6 August 2010, Italy issued a Ministerial Decree containing "Conto Energia III," which was intended to apply to PV plants that entered into operation after 31 December 2010,[63] and which would enter into effect upon its official publication. In the interim, however – on 13 August 2010 – Italy adopted Law No. 129 (the "Salva Alcoa Act"), "providing for urgent measures on energy matters."[64] The Salva Alcoa Act provided as follows:

> The incentivising tariffs referred to in Article 6 of [Conto Energia II] … will be granted to producers that will complete the construction of the relevant power plants within the 31st of December 2010, and will communicate the completion of works to the relevant authorities and Gestore dei Servizi Elettrici – GSE S.p.A. within the above mentioned deadline, and whose plants enter into operation within the 30th of June 2011.[65]

The basic effect of the Salva Alcoa Act was to enable certain additional PV plants, which would be fully constructed by the end of 2010 but not yet entered into operation, to still qualify for the benefits of Conto Energia II – rather than the terms of the new Conto Energia III – so long as these plants entered into operation during the first six months of 2011.

117. On 24 August 2010, Conto Energia III entered into effect with its official publication.[66] As indicated in the recitals, this Decree acknowledged the evolution of photovoltaic technology and the reduction of costs, and considered that in light of the basic tariff principle of "fair remuneration of costs," tariff levels therefore should be progressively decreased:

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[62] Press release of the Ministry of Economic Development, 12 July 2010, C-31.

[63] Joint Chronology, p. 2; Conto Energia III, CL-99, Art. 8(1).

[64] Salva Alcoa Act, C-32.

[65] Salva Alcoa Act, C-32; Joint Chronology, p 2.

[66] Conto Energia III, CL-99; Joint Chronology, p.2.

> Having considered the evolution of the photovoltaic technology achieved after the date of entry into force of ministerial decree 19 February 2007, and in particular the reduction of the costs of equipment and photovoltaic systems;
>
> Deemed to intervene in order to adjourn the incentivizing tariffs in light of the positive reduction of the cost of the photovoltaic technology, and in order to respect the principle of fair remuneration of costs, established by article 7 of the legislative decree no. 387 of 2003 and to encourage the innovation and further decrease of costs;
>
> Deemed that the above mentioned reduction of the incentivizing tariffs has to be implemented through a progressive decrease which, on the one hand, will result in a progressive alignment towards the current costs of technology and that, on the other, will maintain stability and certainty in the market …[67]

118. This new scheme in Conto Energia III provided that "the national target of photovoltaic cumulative rated power to be installed is 8,000 MW by 2020,"[68] and "[t]he capacity of cumulative electric power of photovoltaic power plants that can receive the incentive rates provided for in Title II [which covers Articles 7 to 10] of this decree is 3,000 MW."[69] Progress towards this ceiling would be published and continually updated,[70] and once the ceiling of 3,000 MW capacity of total incentivized power was reached, power plants that entered into operation within the next 14 months would still "have the right to the incentivising tariffs."[71]

119. Conto Energia III provided that plants entering into operation during 2011 would have "the right to" tariffs set forth in a table which reflected a three-step decrease in rates during the course of that year; plants entering into operation in 2012 and 2013 would have "the right to" tariffs that were further reduced by 6% per year.[72] A new decree would update rates for plants that entered into operation after 31 December 2013, failing which the gradual reduction established for plants entering into operation in 2012 and 2013 would continue to apply.[73] As with Conto Energia II, once a plant entered into operation and thus became entitled to tariffs

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[67] Conto Energia III, CL-99, p. 2.

[68] Conto Energia III, CL-99, Art. 3(1).

[69] Conto Energia III, CL-99, Art. 3(2).

[70] Conto Energia III, CL-99, Art. 3(5).

[71] Conto Energia III, CL-99, Art. 3(6); *see also* GSE, *Guide to Conto Energia III*, January 2011, C-34, ¶ 3.

[72] Conto Energia III, CL-99, Art. 8(2).

[73] Conto Energia III, CL-99, Art. 8(3).

at a certain level, those tariffs were "granted for a period of 20 years running from the day on which the power plant enters into operation."[74]

120. Conto Energia III included a number of requirements to qualify for the incentivizing tariffs, the most critical of which was that the relevant PV plants should enter into operation.[75] This meant that the plants must be connected to the grid in accordance with the requirements set forth in Article 2(c) of the decree, by the deadlines established in the decree.[76] To be granted the relevant incentivizing tariffs, the owner had to submit an application to the system operator within 90 days from entry into operation of the plant, with the operator having 120 days to decide on the application.[77] If the incentivizing tariff was granted, then an incentivizing tariff agreement would be signed, specifying the tariff applicable to the relevant plant for 20 years.[78]

B. ESKOSOL'S INVESTMENT

121. On 21 December 2009, Eskosol was established as an Italian "società a responsabilità limitata" by Blusun, a Belgian company which then owned 50% of Eskosol's equity, and four Italian nationals (Messrs. Roberto Scognamiglio, Vittorio Sisto, Luigi Dante and Gilberto Braha), each of whom owned 12.5% of equity.[79] Blusun, in turn, is owned by Mr. Jean-Pierre Lecorcier, a French national, and Mr. Michael Stein, a German national.

122. Between 18 May and 26 July 2010, Eskosol acquired a 100% shareholding in 12 SPVs, which in turn held land rights for the construction of PV plants in Italy's Southern Apulia region.[80] Its plan was to bring into operation a portfolio of 120 PV power plants with an aggregate power of 120 MW, with each of the plants having a nominal capacity of "just below" 1 MW. The 1 MW capacity cap was important to Eskosol's business plan, which sought to take advantage both of simplified permitting procedures and higher tariff levels available for small

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[74] Conto Energia III, CL-99, Art. 8(4). *See also* GSE, *Guide to Conto Energia III,* January 2011, C-34 (confirming the 20-year duration of the incentivizing tariff).

[75] Conto Energia III, CL-99, Art. 7(2).

[76] Conto Energia III, CL-99, Art. 2(c).

[77] Conto Energia III, CL-99, Art. 4(1) and (2).

[78] *See, e.g.*, Redacted Incentivising Tariff Agreement, 6 August 2010, C-36.

[79] Eskosol Deed of Incorporation, Deed No. 224, Notary Repertory no. 1522, 21 December 2009, C-37.

[80] Table Summarizing the acquisition of the 12 SPVs by Eskosol in mid-2010, C-87; Table Summarizing the Land Agreements between SPVs and landowners, C-92.

PV plants. At the same time, Eskosol's plan was to unite these 120 separate 1 MW plants into a single project for purposes of outside financing, with construction on the power plants beginning after this financing was arranged.

123. According to Mr. Scognamiglio, the investors "estimated that constructing these 120 power plants would require an investment in the region of €380 million to €400 million," and "[t]he idea was to finance 80% of the costs of [the] project by way of bank loans (as was normal in the PV industry in Italy)."[81] This investment involved the construction of two medium- to high-voltage substations, which were necessary for the connection of the future plants to the electricity grid.[82] The permit to build the substations had been obtained on 30 November 2009,[83] a contract for the construction of the substations had been signed with Società Interconnessioni Brindisi ("SIB") on 24 February 2010, and construction on the substations began in April 2010,[84] shortly before the transactions in which Eskosol acquired its interest in the 12 SPVs.

124. Mr. Scognamiglio has testified that Eskosol was established as an "operating company in Italy that would acquire the 12 SPVs … and complete the power plants and other needed works."[85] He stated that "the plan was to buy the 12 SPVs at some point in 2010 and connect the power plants to the public electricity grid during 2011, to obtain the benefits of a new Conto Energia, that is, Conto Energia III. … More specifically, around September/October 2009, it was clear that Italy was going to issue new legislation," and that "the specific provisions of Conto Energia III – eventually issued on 6 August 2010 – were generally known during the first months of 2010 …"[86]

125. Mr. Scognamiglio testified that during 2010, including in May of that year, he met with Italy's Undersecretary for Economic Development, Mr. Stefano Saglia, "to discuss the Eskosol

[81] Scognamiglio I, ¶ 18.

[82] Magli I, ¶ 16.

[83] Authorisation for the Construction and Operation of Primary Cabins and Related Works from Province of Brindisi to Nico Energia, 30 November 2009, C-43; Joint Chronology, p. 1.

[84] Joint Chronology, p. 2; Magli I, ¶ 26; Construction Contract between Società Interconnessioni Brindisi S r.l. and Ansaldo Sistemi Industriali S.p.A, 24 February 2010, C-42; Notification of Commencement of Work, 3 April 2010, C-46.

[85] Scognamiglio I, ¶ 19.

[86] Scognamiglio I, ¶¶ 20-21.

Project." He stated that during these meetings, Undersecretary Saglia "made it very clear to me that Italy was committed to keeping a stable environment for the investment in the solar PV sector and that it would not follow Spain's example. He also said to me that Eskosol should have no concerns in respect of its planned investment in Italy."[87]

126. On 10 July 2010, the law firm Watson, Farley & Williams produced at Eskosol's request a "Due Diligence Report for the 121 MW Puglia Project," which advised on the regulatory framework applicable to PV plants in Italy under Conto Energia III as well as on the permits and authorizations thus far obtained by the 12 SPVs.[88]

127. On 25 November 2010, Eskosol's counsel wrote a letter to the GSE as follows:

> With regard to the Project, we do believe – and we would like to receive your confirmation – that if the Project have [sic] the features described below and files a request to be granted the incentives under the so called Conto Energia between January and September 2011, you will accept the relevant request:
>
> - The relevant permits are completely legitimate and effective, and their effect has not been challenged or suspended; being understood that the construction in respect of the DIAs filed during the period August/September 2008 will be completed within 36 months from the relevant filing.
>
> - The relevant permit are [sic] not vitiated or suspended, and will not be suspended at the time application for incentives, by the Municipality through an action in self-defence ("autotutela") or by the competent administrative Court.
>
> - In addition, the power plants meet all the requirements (also technical), further to the construction permits, as envisaged to have access to by the Conto Energia.[89]

128. On 26 November 2010, Nico Energia signed, on behalf of itself and the other SPVs owned by Eskosol, two agreements with the operators of the electricity grid, ENEL and Terna-Rete Elettrica Nazionale S.p.A. ("Terna"), for the provisional connection of the two substations to

[87] Scognamiglio I, ¶ 24.

[88] Watson, Farley & Williams: Preliminary Due Diligence Report relating to 121 MW Puglia Project, 23 July 2010, C-40, pp. 63-399.

[89] Letter from Watson, Farley & Williams to GSE, 25 November 2010, C-94.

the main electricity grid.[90] The construction of the substations was completed in mid-December 2010.[91]

129. On 3 December 2010, in response to a letter addressed by Claimant's legal counsel, the GSE stated as follows:

> If the [Eskosol] power plants …, that is the power plants authorized during the period August/September 2008, meet all the requirements, also technical as set forth by applicable law, including the resolutions issued by the Italian Regulatory Authority for Electricity and Gas ("AEEG"), and save for the case in which the competent Administrative Body should hold a different interpretation of Article 1 quarter of Law Decree 105/2010 converted, with amendments, into Law 129/10, we believe that it is possible to secure access to the incentives set forth in the so-called Conto Energia, pursuant to the applicable provisions of law.[92]

130. On 17 December 2010, Eskosol increased its corporate capital from €10,000 to €7,500,000,[93] in connection with Blusun increasing its equity share to 80%, with Messrs. Sisto and Scognamiglio each retaining a 10% interest.[94] On 29 December 2010, Eskosol was converted into a joint-stock company (an "S.p.A.").[95]

C. CONSTRUCTION AND FUNDING OF THE ESKOSOL PLANTS

131. Up until this point, the two substations had been built to enable the eventual connection of the future PV plants to the electricity grid, but no construction had yet begun on any of the contemplated 120 PV plants, for which Eskosol first needed to arrange outside financing and to conclude an appropriate construction contract.

132. On 9 November 2010, the WestLB, a German bank, sent a letter to Mr. Stein, one of Blusun's shareholders, expressing interest in the financing of up to €40 million of the Eskosol project.

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[90] Joint Chronology, p. 2; Tripartite Agreement Concerning Maffei Substation, 26 November 2010, C-47 and Tripartite Agreement Concerning Torre Mozza Substation, 26 November 2010, C-48.

[91] Magli I, ¶ 26; Joint Chronology, p. 2.

[92] Letter from GSE to Watson, Farley & Williams, 3 December 2010, C-35.

[93] Eskosol S r.l. Deed of Capital Increase, Deed No. 77.974, 17 December 2010, C-49; Joint Chronology, p. 2.

[94] Eskosol S r.l. Deed of Capital Increase, Deed No. 77.974, 17 December 2010, C-49.

[95] Eskosol S.p.A. Deed of Company Transformation, Deed No. 11621, 29 December 2010, C-50.

The letter, which was based on the assumption that the project would qualify for the incentivizing tariffs under Conto Energia III, clarified that:

> this letter is not intended to be, and shall not constitute, an offer of financing or a commitment or undertaking by WestLB to provide or negotiate the terms of any credit facility in connection with the Project. Any commitment or undertaking by WestLB to arrange or provide a portion of the financing would be subject to, inter alia, satisfactory documentation, internal credit approval and satisfactory due diligence, and subject to such terms and conditions as WestLB may specify in its absolute discretion.[96]

133. On 29 December 2010, Eskosol signed an engineering, construction and procurement contract with Siemens for the construction and commissioning of the Eskosol plants (the "EPC Contract").[97] Eskosol was to procure the solar panels.[98]

134. The EPC Contract provided that the Eskosol plants would be completed and become operable in three different stages: a first cluster of 30 MW entering into operation by 30 April 2011, a second cluster of 60 MW entering into operation by 31 August 2011, and a third cluster of 30 MW entering into operation by 15 November 2011.[99] As noted in the EPC Contract, the purpose of these deadlines was for those PV plants to become eligible for the corresponding subsidies for the relevant periods.[100] For that reason, the EPC Contract foresaw a penalty in the event that Eskosol was unable to secure the subsidies as a result of a delay by Siemens.[101]

135. According to Mr. Magli, on 20 January 2011, Eskosol issued the first Notice to Proceed under the EPC Contract to Siemens.[102] However, on the same day, Eskosol and Siemens signed a side letter to the EPC Contract, agreeing that:

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[96] Letter to Mr. Stein from WestLB, 9 November 2010, C-53, pp. 2 and 6.

[97] Construction contract between Eskosol, S.p.A. and Siemens S.p.A., 29 December 2010, C-21; Joint Chronology, p. 3.

[98] Scognamiglio I, ¶ 43.

[99] Construction contract between Eskosol, S.p.A. and Siemens S.p.A., 29 December 2010, C-21, pp. 4-5; Joint Chronology, p. 3.

[100] Construction contract between Eskosol, S.p.A. and Siemens S.p.A., 29 December 2010, C-21, p. 4.

[101] Construction contract between Eskosol, S.p.A. and Siemens S.p.A., 29 December 2010, C-21, Art. 14.3.

[102] Magli I, ¶ 33; Joint Chronology, p. 3. Mr. Magli stated that he no longer has a copy of this document.

> the "Notice to proceed" for the First Group of Plants will be issued on January 25, 2011 and that the date for the down-payment and the Bank guarantee shall be extended to February 28, 2011.[103]

136. According to a presentation dated January 2011 by EOS, a consultancy company, Eskosol's Project required a €400 million investment, 80% of which would be financed with debt and 20% with equity. This presentation assumed that, should the Eskosol plants qualify for the incentivizing tariffs under Conto Energia III, the project would generate annual revenues in the amount of €65 million.[104] According to an Italian business magazine, the Eskosol project would create the biggest PV power plant in Europe.[105]

137. On 31 January 2011, UniCredit S.p.A. ("UniCredit") sent Eskosol a draft term sheet for an 18-year loan to finance the construction of the Eskosol PV plants.[106] The term sheet was subject *inter alia* to the delivery of project documents, the completion of financial, technical and legal due diligence, and an assessment of market conditions.[107]

138. On 8 February 2011, Eskosol, through its lawyers, sent a letter to UniCredit "confirm[ing its] interest in conferring to UniCredit S.p.A. … an exclusive mandate … to act as arranger and underwriter in connection with the financing of the development and construction of photovoltaic projects in Italy with an aggregate nominal capacity equal to 120 MW."[108]

139. On 25 February 2011, three days before its first payment to Siemens was due under the side letter to the EPC Contract, Eskosol sent a letter to Siemens "informing [it that] some financial issues arose, due also to the uncertainty created by the last communications of GSE, about the subsidies ('Conto Energia') and the subsequent Government decree scheme in approval phase," and "ask[ing] for a modification of the payments terms and guaranties contractually defined."[109]

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[103] Side letter to EPC Contract between Siemens and Eskosol, 20 January 2011, R-35, at 4.

[104] Second EOS Consulting Presentation, C-38, pp. 10-11.

[105] Luisa Leone, *There is a New Sun King*, Milano Finanza, 22 January 2011, C-41.

[106] Joint Chronology, p.3.

[107] Unicredit Letter and Term Sheet, 8 February 2011, C-54, p. 3.

[108] Unicredit Letter and Term Sheet, 8 February 2011, C-54, p. 1.

[109] Letter from Siemens to Eskosol, 7 March 2011, C-77, p. 1. Claimant notes that it does not have a copy of the letter sent by Eskosol to Siemens.

140. On 7 March 2011, Siemens sent a letter to Eskosol stating in relevant part as follows:

> Following your request please find a proposal that should grant you the required support on the project, giving also the opportunity to finalize the maximum number of sites by end of May 2011.
>
> An acceptable financial schedule might be the following:
>
> 1. Full payment of the amount already invoiced by Siemens as down payment by March 31st 2011 (EUR 4.653.000,00 VAT included). As an alternative payment of 20% of the already invoiced amount (see above) and residual amount covered by bank guarantees to be delivered by March 31st, 2011.
>
> 2. Starting of works for the first 30 MW of plants between April 1st – 15th 2011 (latest), with bank guarantees (in a value of 30% of the overall contractual amount) to be delivered at latest by April 15th 2011 and payment of the residual amount of down payment (EUR 3.597.000,00 VAT included). The following milestones invoicing should be paid according contractual terms [sic].
>
> 3. After receiving the relevant Notice to Proceed, starting of works for 60 MW of plants by May 15th 2011, with the attached down payment and bank guarantees (as contractually defined)[.]
>
> 4. After receiving of the relevant Notice to Proceed, starting of works for the missing 30 MW by the July 15th 2011, with the attached down payment and bank guarantee (as contractually defined)[.]
>
> In accordance with the contractual provisions … the EPC Contract has to be considered suspended by the Contractor at the receiving of this letter.
>
> The acceptance from your side of the above mentioned financial schedule and its fulfillment has to be considered as condition precedent to restart the EPC Contract.[110]

141. Eskosol did not subsequently make any payment to Siemens pursuant to the EPC Contract.

D. The Romani Decree

142. On 30 November 2010, the Italian Council of Ministers issued the first draft of the decree on the implementation of European Directive 2009/28/CE (later to be adopted with changes, and known as the "Romani Decree"). This draft noted among its "[g]eneral principles" an intent to "reduc[e] the specific support costs charged to consumers," while "safeguarding the investments made and the proportionality to the objectives … with the purpose of taking into

[110] Letter from Siemens to Eskosol, 7 March 2011, C-77, pp. 1 and 2.

account the market mechanisms and development of … technologies."[111] The Claimant has not suggested, however, that the first draft of the decree contained major modifications to Conto Energia III.

143. On 24 January 2011, the GSE published a Guide to Conto Energia III, with the purpose of "providing all operators interested in realising photovoltaic power plants an easy and comprehensive reference work on the regulatory framework and on the procedure to have access to the incentivising tariff and in relation to relevant premiums, from the phase of application to the phase of payment of the incentives, as provided [by] the new ministerial decree 6/08/2010."[112]

144. At a Senate hearing held on 25 January 2011, the GSE noted that "the growth of photovoltaic power plants has been too rapid."[113] The GSE highlighted as follows:

- The aggregate nominal capacity of plants realized, even if not connected to the grid, at the end of 2010 may have reached approx. 7,000 MW based on 200,000 plants;
- Once into operation, the above mentioned plants will accrue burdens over the A3 fee equal to 3 billion euro, each year for 20 years;
- To the end of 2011 it will be reached the target of 8,000 MW, nine years in arrears, set forth by the National Plan;
- We suggest to consider a reduction on the capacity to be incentivised, by providing new targets for photovoltaic power plants for 2020 as well as a reduction of the incentivising tariffs for power plants which will enter into operation in next coming years, by reducing the incentives set forth by DM 6.8.2010 for the years 2012 and 2013.[114]

145. According to the Claimant, "[t]he assertions made by GSE on 25 January 2011 before the Italian Senate ('the 8,000 MW target that the National Action Plan … set for the year 2020 for photovoltaic plants, might be reached towards the end of 2011') and other Italian agencies on the 'excessive' growth of the PV sector, were incorrect. In fact, by February 2011, only

[111] First Draft of Romani Decree, 30 November 2010, C-55; Joint Chronology, p. 2.

[112] GSE, *Guide to Conto Energia III*, January 2011, C-34; Joint Chronology, p. 3.

[113] GSE document entitled "Hearing of 25/1/2011 – Comments of GSE on the Scheme of Law Decree Implementing Directive 2009/28/CE," 25 January 2011, C-82.

[114] GSE document entitled "Hearing of 25/1/2011 – Comments of GSE on the Scheme of Law Decree Implementing Directive 2009/28/CE," 25 January 2011, C-82.

approximately 3,730 MW of PV capacity under Conto Energia I, II and III had been connected to the grid."[115] Indeed, according to another document from the GSE, the installed capacity of PV plants that entered into operation under Conto Energia III in 2011 was 1,552 MW.[116]

146. However, according to the International Energy Agency, while the 2020 target of PV installed capacity under Conto Energia III was 8 GW (*i.e.*, 8,000 MW), the installed capacity by the end of 2011 reached about 13 GW.[117]

147. The Respondent emphasizes that, in addition to the dramatic and rapid increase of PV installed capacity in 2011 (with a corresponding sharp increase in public spending on incentives), there was also a significant decrease in the costs associated with PV plants, resulting in unexpectedly high profitability levels for plant operators compared to those in earlier years.[118] The Claimant has not disputed that the cost of PV technology significantly declined in this period.

148. On 7 February 2011, an Italian newspaper reported that the Italian Government had warned, in the report on market conditions sent to the Italian Parliament, of the risks of reaching the national photovoltaic target for 2020 years ahead of schedule in 2013, and the ensuing excessive costs to be borne by Italian consumers.[119]

149. On 17 February 2011, the Italian Senate approved a second draft of the decree on the implementation of European Directive 2009/28/CE.[120] The Claimant has not suggested that this second draft contained major changes regarding Conto Energia III.

150. On 28 February 2011, Italy's Minister for Economic Development, Mr. Paolo Romani, reportedly stated that the Government needed to stop the incentive-based mechanism for

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[115] Memorial, ¶ 322.

[116] GSE, Table of In-Service Plants, 31 December 2014, C-59.

[117] International Energy Agency, "Energy Policies of IEA countries, Italy, 2016 Review," R-47, pp. 86-87.

[118] Counter-Memorial, ¶¶ 145-148; Rejoinder, ¶¶ 284-285 (citing Bacchiocchi).

[119] *5.7 billion to be paid by end consumers*, LaRepubblica.it, 7 February 2011, C-57 (noting that "[t]here is a possible overcharging of 5.7 billion for end consumers, due to the incentivizing tariffs for renewables").

[120] Second Draft Romani Decree, C-61; *see also* Joint Chronology, p. 3.

promoting renewable energies, because such incentives had "cost the Italian people 20 billion euros between 2000 and 2010."[121]

151. On the same date, the Italian Government published a third draft of the decree on the implementation of European Directive 2009/28/CE.[122] This draft included the following new provision:

> Article 7 of legislative decree no. 387/03 will be in force until 1 January 2014; if the specific objective for the solar photovoltaic sector, set at 8,000 MW by 2020 as part of the National Action Plan referred in article 3, is reached ahead of time, according to article 3 of decree of economic development 6 August 2010, published on [sic] the Official Gazette no. 197 of 24 August 2010, the grant of incentives for further production of energy from solar PV sources shall be suspended until a decree issued by the Minister for Economic Development (to be made in consultation with the Minister for Environment and Sea Protection, after consulting the Unified Conference) sets out the new policy objectives and the relevant modalities, also in light of the provisions of article 33, paragraph 5-bis. The previous provision shall not apply to plants referred in Title III and IV of the same Decree 6 August 2010.[123]

152. According to the Claimant, this provision "effectively dispensed with the 14-month guaranteed access period envisaged in Conto Energia III."[124] The Respondent disagrees with this characterization, noting that the 14-month grace period mentioned in Conto Energia III referred to a time after 3,000 MW of capacity had received the Conto Energia III incentives (which the Respondent contends had not been triggered), rather than to a time after the total national PV target of 8,000 MW had been met, which is what the new Romani Decree provision addresses.[125]

153. In any event, the third draft of the decree gave rise to significant criticism, including by one of the rapporteurs of EU Directive 28/2009/EC, Mr. Claude Turmes, who noted that this constituted a "gift made to the nuclear lobby" and that it was "likely to cause the demise of

[121] "Romani Decree: The Law that Damages Investors of Renewable Energy in Italy," 28 February 2011, C-60a.

[122] Third Draft of Romani Decree, C-62; Joint Chronology, p. 3.

[123] Third Draft of Romani Decree, C-62, Art. 23(11)(d).

[124] Memorial, ¶ 148.

[125] Resp. PHB, ¶¶ 86-87, 100.

hundreds of businesses and [the loss of] thousands of jobs, starting with the photovoltaic sector."[126] Mr. Turmes suggested that the Government:

> must eliminate the suspension of incentives in [Conto Energia III] when 8,000 MW are reached and guarantee the continuity of the market … A feasible option consists of adjusting the tariffs for [solar] photovoltaic [energy], and renewable [energy] in general, permanently (and not every 2 or 3 years) in light of different parameters such as Europe-wide costs trends of individual technologies, the price of kWh in respect of electricity and gas in respect of thermal.[127]

154. On 3 March 2011, the Italian Government adopted Legislative Decree No. 28 (also known as the "Romani Decree"), which was the final version of its decree on the implementation of European Directive 2009/28/CE.[128] The stated purpose of the Romani Decree was to "define [] the tools, mechanisms, incentives and institutional, financial and legal framework, necessary to achieve the objectives until 2020 in matters of the overall share of energy from renewable sources."[129] The Romani Decree noted that the production of renewable energy was to be encouraged on the basis of certain general criteria, including "ensuring a fair return on investment and operating costs."[130]

155. The Romani Decree provided that the incentivizing tariff established by Conto Energia III would apply to the production of electricity generated by solar PV power plants that entered into operation by 31 May 2011.[131] The electricity generated by solar PV plants that enter into operation *after* 31 May 2011 would be "governed by a decree from the Minister for Economic Development to be adopted … [by] 30 April 2011."[132] Without anticipating the precise conditions and levels of the tariffs to be offered under the new decree, the Romani Decree provided that they would be based upon the following principles:

> a) determination of a maximum annual cumulative electric power from photovoltaic plants that can get the incentive rates;

[126] "Europe criticizes the decree that stops renewables," 2 March 2011, C-83a, p. 1.

[127] "Europe criticizes the decree that stops renewables," 2 March 2011, C-83a, p. 1.

[128] Romani Decree, C-75; Joint Chronology, p. 4.

[129] Romani Decree, C-75, Art. 1.

[130] Romani Decree, C-75, Art. 24(1), (2)(a).

[131] Romani Decree, C-75, Art. 25(9).

[132] Romani Decree, C-75, Art. 25(10).

b) the incentivising tariff is to be determined taking into account the reduction in the costs of the technology and power plants and those to the incentives applied by other Members States of the European Union;

c) determination of incentive rates and differentiated quotas according to the nature of the ground area;

d) application of provisions of Article 7 of Legislative Decree of 29 December 2003 no. 387, if [they] are compatible with this paragraph.[133]

156. Thus, the Romani Decree anticipated the early end of Conto Energia III and the coming into force instead of a new and different Conto Energia IV. It also eliminated the grace period that Conto Energia III had extended, for plants entering into operation within 14 months after a ceiling of 3,000 MW capacity of total incentivized power had been reached.

157. Separately, the Romani Decree set out new restrictions regarding the availability of incentivizing tariffs for PV plants built on small parcels of agricultural land, albeit subject to a transitional mechanism before the new rules would come into effect. Prior to the Romani Decree, PV plants were eligible for the tariffs so long as they occupied no more than 50% of the agricultural parcel of land on which they were built. In January of 2011, however, the GSE acknowledged the importance of "protect[ing] agricultural land" and "preventing the excessive diffusion of large photovoltaic power stations which take up large areas of land," by directing incentives "mostly to the photovoltaic plant built into roofs and structures."[134] The ensuing Romani Decree therefore provided that beginning one year from its entry into force (*i.e.*, by 31 March 2012), tariffs under the forthcoming Conto IV regime would be available to plants built on agricultural land only if they occupied no more than 10% of the parcel available to the applicant and had capacity between 200 kW and 1 MW.[135]

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[133] Romani Decree, C-75, Art. 25(10).

[134] Hearing of 25/1/2011 – Comments of GSE on the Scheme of Law Decree Implementing Directive 2009/28/CE, C-82(a), p. 1.

[135] Romani Decree, C-75, Article 10 provides in relevant part as follows:

> 1. After one year from the date of entry into force of the present decree, renewable energy power plants will only be able to secure the State incentives if they meet the requirements and technical specifications set out in Annex 2. This is subject to any different starting date provided in Annex 2.
>
> …

158. The Romani Decree was criticized by some associations and politicians. These included the Association of Foreign Banks in Italy, which noted that it "place[d] many of the projects already financed and set to be disbursed at risk of default."[136] It also included politicians from southern Italy, who noted that it "endanger[ed] thousands of jobs" and endangered investments underway.[137]

159. The Romani Decree was also criticized at the sessions held by the Italian Parliament on 14 and 15 March 2011, with some members of Parliament noting, *inter alia*, that the Romani Decree created a legal vacuum with respect to power plants entering into operation after 31 May 2011, that the time needed for plants to connect to the grid ranged between 70 and 150 days, that some banks had announced the suspension of foreseen funding, and that some companies were at risk of losing their investments.[138] Other members of the Italian Parliament noted, *inter alia*: (i) the risk that postponing the determination of the new incentivizing tariffs would lead to the blocking of investments underway; (ii) that the change undermined the rights of investors that had not factored in unexpected changes to the legal framework; (ii) that the Romani Decree "change[d], retrospectively, the rules, setting tight deadlines which are incompatible with the realization of the capacity already authorized"; and (iv) that given

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> 4. As of the date of entry into force of this decree, solar photovoltaic power plants with modules placed on land in agricultural areas, may access the State incentives provided that, in addition to the requirements set out in Annex 2:
>
> a) the nominal power of each power plant is not greater than 1 MW and, in respect of parcels of land that belong to the same owner, the power plants are situated at a distance of no less than two kilometres;
>
> b) no more than 10 per cent of the surface of the agricultural parcel of land that is available to the applicant is earmarked for the construction of the power plants.

[136] Giorgio Lonardi, Energy and infrastructure, the wrath of foreign banks, La Repubblica, C-67.

[137] *Energy, renewable decree: The Region writes to Minister Romani*, Rinnovabili.it, 10 March 2011, C-69; *see also* Valerio Gualerzi, *Sit-in protests before the Ministry*, La Repubblica, 28 March 2011, C-64.

[138] Deputy D. Piffari's Motion 1-00594, 14 March 2011, C-70, which reads as follows:

> [Pursuant to the Romani Decree] the "rewards" of Conto Energia III on photovoltaic [energy generation], which were meant to last at least from 2011 to 2013, will apply only to power plants connected to the grid by 31 May 2011. After that, the new incentives will apply. As a result, we are witnessing a sort of a legal vacuum that concerns all the power plants that connect to the grid after 31 May 2011; today, indeed, the time needed for a small PV power plant to connect [to the national grid] is around 70 working days, a period which is around 150 working days for more complex structures. It is completely unclear whether those who have approved projects, financed or in progress, would be able to be profitable after 31 May 2011. This is why it has been said that this cut is "retroactive" and unconstitutional; banks have already announced the suspension of foreseen funding and many companies have suddenly found themselves at risk of losing their investments, a circumstance that affects thousands of jobs and prevents the creation of new job opportunities (it has been reported today that, at present, in Italy, one of each three new jobs created relates to the green economy[.]

the absence of legislation for the period after 31 May 2011, those who had already obtained permits to realize and commission photovoltaic plants were at risk of not being able to have access to the credit market or to do so only under onerous terms.[139]

160. On 15 April 2011, the Vice-President of the European Commission in Charge of Energy, Mr. Günther Oettinger, wrote a letter to Minister Romani noting the following:

> The changes regarding incentives for renewable energy that affect directly or indirectly the on-going investments concern the investors, whether national or international. The consequences of such amendments arouse my concern.
>
> With Directive 2009/28/CE, the European Union has undertaken to increase the percentage of renewable energy, by establishing national mandatory fixed thresholds to be reached within 2020. Thanks to this strategy we could mitigate the climate change, improve the energy procurement and promote the industrial development.
>
> Italy is required to reach the quota of 17% of the gross final consumption of electricity from renewable energy within 2020. As set forth in National Action Plan for the renewable energy, in order to meet such requirement it is envisaged a significant increase of the internal production as well as the import from abroad, pursuant to the cooperation mechanism established by the above mentioned Directive. Therefore, it appears crucial that the Italian Government establishes a clear, stable and predictable incentives system, aimed at guaranteeing the development of renewables, without the risk that the necessary investment being postponed and become more expensive, preventing the achievement of the above mentioned target.
>
> In the recent Communication "Renewable Energy: Progressing towards the 2020 target," the Commission has highlighted the problems arising out from the recent reforms, recognizing the need to support the development of the technology and to provide incentives proportionate to the decreasing costs of the renewable investments. The amendments which modify the financial return of the existing projects may violate the national and European general principles and, above all, may jeopardize the stability of the investments in the industry, with potential repercussions on the economic upturn.
>
> Therefore I would like to kindly invite you to make all efforts in order to implement Directive 2009/28/CE in a stable and predictable manner and to be prudent when considering legislative measures that may have repercussions on the investments already made. My offices will be happy to further discuss the subject matter and assist you.[140]

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[139] Deputy D. Franceschini's Motion 1-00590, 14 March 2011, C-71; Deputy L. Sardelli's Motion 1-00598, 15 March 2011, C-72; Deputy C. Monte's Motion 1-00599, 15 March 2011, C-73; and Deputy M. Libe's Motion 1-00600, 16 March 2011, C-74.

[140] Letter from Günther Oettinger, EU Commissioner for Energy, to Minister Romani, 15 April 2011, C-76.

E. CONTO ENERGIA IV

161. On 12 May 2011, the Italian Government enacted Decree of 5 May 2011 (also known as "Conto Energia IV").[141]

162. According to the recitals of the decree, in issuing Conto Energia IV, the Government took into consideration, *inter alia*, the following:

> … that the promotion of the production of electricity through photovoltaic plants entering into operation after the 31st of May 2011 has to be implemented by means of a gradual reduction of the tariffs which, on one hand, will tend to align the public aid with the relevant cost of the technology in line with the politics adopted by the main European states and, on the other, will ensure stability and certainty of the market;
>
> … that, based on the evolution of technology costs, the grid parity, that is the economic convenience of the energy generated through photovoltaic compared to other sources, will be met in [a] few years, which will result in incentives not [being] needed;
>
> … [that incentives should] allow[] investors and the industry to grow through the years, with a less impact on electricity bills;
>
> … that, on the basis of existing provisions for photovoltaic and data support on the investments made and in progress, the burden of the system's costs the electricity sector [sic] should reach, by 2011, around 3.5 billion annually."[142]

163. On this basis, Conto Energia IV established a gradual reduction of the incentivizing tariffs available for photovoltaic plants entering into operation after 31 May 2011, with plants entering into operation in June 2011 receiving a higher incentive than those entering into operation in March 2012.[143] The reduction in the tariffs offered under Conto Energia IV has been represented in the Claimant's Memorial as follows:[144]

Incentivising tariff depending on month when the power plant enters into operation
Capacity of the power plant 200<P≤1000 kWh

	Jun '11	Jul '11	Aug '11	Sep '11	Oct '11	Nov '11	Dec '11	Jan-March '12
	€/kWh	€/kWh	€/kWh	€/kWh	€/kWh	€/kWh	€/kWh	€/kWh
III CE	0.303	0.303	0.303	0.266	0.266	0.266	0.266	0.251

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[141] Conto Energia IV, CL-100; Joint Chronology, p. 4.

[142] Conto Energia IV, CL-100, p. 3.

[143] Conto Energia IV, CL-100, Arts. 4 and 12(1), and Annex 5.

[144] Memorial, p. 62.

IV CE	0.291	0.276	0.263	0.245	0.233	0.210	0.189	0.172
Difference	0.012	0.027	0.04	0.021	0.033	0.056	0.077	0.079
			Percentage reduction (compared to Conto Energia III)					
%	3.9	8.9	13.2	7.8	12.4	21	28.9	31.4

164. Conto Energia IV continued to provide that any particular tariff level, applicable to a given plant based on the date of its entry into operation, would remain constant for that plant for 20 years.[145]

165. Article 6 of Conto Energia IV established the following conditions to access the incentivizing tariffs:

> 2. The large plants that will enter into operations by August 31, 2011 will have directly access incentive rates, subject to the duty to notify GSE the entry into operation within 15 days after that date.
>
> 3. For the years 2011 and 2012, large plants that do not fall in those referred to in paragraph 2 access to incentive rates if the following additional conditions occur:
>
> a) the plant is listed in the register under Article 8, in such a position as to match the specific cost limits defined for each reference period referred to in Article 4, paragraph 2. The cost limit for 2011 includes the costs related to the incentives granted in favour of the large plants that have come into operation by 31 August 2011. If the whole cost of incentive for large plants that have come into operation by 31 August 2011 and of the cost of the incentives granted in favour of the plants enrolled in the register referred to in Article 8 for the year 2011 exceeds the limit estimated for the same period, the excess leads to a reduction by the same amount of the cost limit for the second half of 2012;
>
> b) the certification of completion of the plant is received by GSE within seven months after the date of publication of the list referred to in Article 8, paragraph 3; this period is extended to nine months a new mechanism for plants whose capacity exceeds 1 MW.
>
> 4. In all cases, the applicable incentivizing tariff is the one in force on the date when the plant entered into operation.[146]

166. One of the main changes under Conto Energia IV was that "large plants" (such as Eskosol's) had to enroll in a registry kept by the GSE. The registry established certain "priority criteria,"

[145] Conto Energia IV, CL-100, Art. 12(2).

[146] Conto Energia IV, CL-100, Art. 6(2)-(4).

favoring plants that had entered into operation on the date of their application for registration, followed by those for which construction work was finished and those which had simply received certain authorizations. If the certificate of works completion for the plants listed in the GSE's registry was not produced by the applicable deadline, the registration of the relevant plant lapsed.[147]

167. The Respondent emphasizes that Italy's domestic courts have systematically rejected contentions that Conto Energia IV had retroactive effect. Italy cites, by way of example, the Administrative Court of Lazio, according to which "access to the incentives is not tied to the mere possession of the administrative authorization to build the plant (which is just an essential prerequisite)," but rather they are "granted upon the commissioning of the plant …, when a plant is actually built and commissioned."[148] In the court's view, the "distinction anchored to the date of commissioning of the plant is adequately justified by the characteristics of the incentive system in question," which "reflects the difference between

[147] Conto Energia IV, CL-100, Art. 8:

> 1. For the years 2011 and 2012 the person in charge of large plants must apply to [the] GSE for being listed in the appropriate register, sending the documentation described in Annex 3-A.
>
> 2. For 2011, applications must be received by GSE from 20 May to 30 June 2011. For the same year, the period for being listed in the register is re-opened, in case of additional availability under the cost limit referred to in Article 4, paragraph 2, from September 15 to September 30, 2011. For the first half of 2012, the period for registration is from 1st to 30th November 2011 and is subsequently reopened, in case of further availability within the cost limit referred to in Article 4, paragraph 2, from 1 to 31 January 2012. For the second half of 2012 the registration period goes from 1 to 28 February 2012 and is subsequently reopened, in case of further availability within the cost limit referred to in Article 4, paragraph 2 from 1 to 31 May 2012, in view of the provisions of article 6, paragraph 3, letter a) third sentence.
>
> 3. GSE prepares the list of the systems enrolled in the register and publishes it on its website within fifteen days after the closing date, according to the following priority criteria, to be applied in a hierarchical order: a) plants that have entered into operation on the submission date of the application for registration;
>
> b) plants in which the construction works were finished on the submission date of the application for registration; in this case, subject to the provisions in Article 9;
>
> c) priority based on the date of the relevant authorization;
>
> d) lower nominal capacity;
>
> e) priority based on the date of the application for being listed in the register.
>
> 4. If, for a plant enrolled in position to match the cost limits set out in Article 4, paragraph 2, the certificate of works completion has been not produced before the deadline specified in Article 6, paragraph 1, letter b), the registration of the same plant elapses. If, anyway, the plant is completed and qualifies, in a subsequent period, for the incentive rates in the manner and within the limits laid down in this decree, it is entitled to the rate in force on the date of entry into operation less 20%.

[148] The Regional Administrative Court of Lazio Judgement, R-36, as translated at Counter-Memorial, ¶ 158.

the preparation phase of the intervention on the plant and the (very complex) phase of its commissioning."[149]

168. On 29 July 2011 and 16 September 2011, the GSE published a list of plants eligible to receive feed-in tariffs subject to the timely completion of their works. The lists included 113 of the Claimant's plants.[150] Pursuant to Conto Energia IV, in order to qualify for the incentivizing tariffs, the plants had to be completed no later than seven months after the GSE's publication of the lists, *i.e.* by the end of February 2012.[151]

F. The Eskosol Project after the Romani Decree and Conto Energia IV

169. According to the Claimant's witnesses, the uncertainty created by the Romani Decree and the reduction in tariffs resulting from Conto Energia IV, which made the Eskosol project "economically unviable," prevented Eskosol from securing funding for the project,[152] and thus proceeding with the Siemens EPC Contract under which construction essentially had been predicated on Eskosol's first obtaining outside funding.

170. The same witnesses also explained that Eskosol tried to save the project by offering subcontractors the possibility of building 60 power plants, with a total capacity of 60 MW, to be paid *after* the plants were connected to the grid. Eskosol's efforts were unsuccessful. According to Mr. Magli:

> Eskosol approached local subcontractors to try to reach a deal so they would build these 60 power plants in exchange for payments after the power plants were

[149] The Regional Administrative Court of Lazio Judgement, R-36, as translated at Counter-Memorial, ¶ 158.

[150] Mr. Stein's First Witness Statement in the *Blusun* proceedings, R-49, ¶ 152; *see also* Reply, ¶ 91; Counter-Memorial, ¶ 173.

[151] Conto Energia IV, CL-100, Art. 6(3)(b).

[152] Scognamiglio I, ¶¶ 58-60 ("The enactment of the Romani Decree was a total disaster for Eskosol. It created absolute uncertainty in the market as and as a result prevented us from securing funding. In turn, this prevented us from making progress on the build out of Eskosol Project, as we had planned. … The reduction in the amount of the incentivising tariffs in Conto Energia IV, especially in respect of the tariffs for the end of 2011, was extremely detrimental to the viability of the Eskosol Project, particularly given the need to bear the significant costs of the whole infrastructure required for the Eskosol Project."); *see also* Magli I, ¶¶ 40-42 ("In our case, the Romani Decree ultimately killed the Eskosol deal with the group of lenders led by Unicredit S.p.A., as they definitely pulled out, if I am not mistaken, at the end of March 2011. To make things even worse, on 5 May 2011, Conto Energia IV was published. This new decree significantly reduced the FiT in comparison to the ones applicable under Conto Energia III and, unlike Conto Energia II and III, did not contain a grace period provision protecting on-going projects. … So even if in theory we could secure funding – which was not possible as discussed above – the Eskosol Project became economically unviable.").

> connected to the main electricity grid. Due to the lack of trust in the system, no one, including subcontractors, was willing to risk their own money and thus no agreement was possible.[153]

171. On 16 December 2011, Siemens sent a letter to Eskosol communicating its decision to terminate the EPC Contract. That letter read in relevant part as follows:

> Reference is made to our communication dated March 07th 2011 … under which … we were forced to suspend the EPC contract ….
>
> Unfortunately we have to ascertain that, in the following months, it was not possible from your side to confirm us these financial and contractual conditions or alternatives that would ensure the sustainable implementation of the EPC contract.
>
> We therefore inform you about our decision to terminate the EPC contract (suspended since last March) for reasons not attributable to us, as from the fifteenth day after receipt of this letter.[154]

172. Subsequently, the GSE sent a letter to Mr. Lecorcier communicating that "the Responsible Party didn't submit, within the provided deadline, the completion certificate," and that "this leads to the revocation of the enrollment to the 'large Plant' Register." According to the same letter from the GSE, 269 other plants with a capacity up to 1 MW had been connected to the grid and had qualified for the incentivizing tariffs.[155]

173. On 20 July 2012, Mr. Magli filed a request seeking the bankruptcy of Eskosol in respect of a debt of €2.082 million, mostly related to the sale of his rights in Nico Energia, J&P and Electra (3 of the 12 SPVs) to Eskosol.[156]

174. On 18 December 2012, Eskosol's shareholders agreed to wind up the company, and Mr. Lecorcier was appointed as Eskosol's liquidator.[157]

175. On 12 November 2013, Eskosol was declared insolvent by a Brindisi court, which appointed Mr. Teodoro Contardi as receiver.[158] According to the Claimant, Blusun and Messrs. Lecorcier and Stein thereafter failed to cooperate with Eskosol's bankruptcy proceedings.

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[153] Magli I, ¶ 43; *see also* Scognamiglio I, ¶ 61.

[154] Letter from Siemens to Eskosol, 16 December 2011, C-80.

[155] GSE, Plants under Conto Energia IV - Revocation, R-37.

[156] Magli I, ¶ 46.

[157] Copy of Eskosol's registration issued by the Italian Business Register, C-2.

[158] Copy of Eskosol's registration issued by the Italian Business Register, C-2.

They also commenced an ICSID claim against Italy under the ECT (the *Blusun* case) without informing either Mr. Contardi (Eskosol's receiver) or the judge supervising the Eskosol bankruptcy proceedings.[159]

176. In 2014, the Brindisi court recognized that Eskosol had a total debt in the amount of €14,767,115.[160] According to Dr. Stickel's Report, Eskosol's total sunk costs in relation to its planned PV projects in Italy are approximately €39.2 million.[161]

G. ESKOSOL'S BUSINESS PLAN

177. The Parties' respective positions differ with respect to the appropriateness of Eskosol's business plan.

178. According to Italy, the failure of the Eskosol project was the result of Eskosol's own entrepreneurial choices, and in particular its decision to defer any construction work on PV plants until late in the project. By contrast, Italy notes that "269 plants comparable to those of the Claimant [] (*i.e.*, below 1 MW), entered the ranking and were indeed completed within that period."[162]

179. Italy states that "Claimant's decision to prioritize the work on the grid, rather than proceeding at the time with the construction of the plants, was easily the single most important reason for missing out on the incentives available in 2010 and until June 2011."[163] It also explains that "the statement that without an STMD, no bank would finance the Project finds no correspondence in the clauses indicated by *Unicredit*'s Term Sheet, where the bank requires the STMD or the DIL for the grid connection deposited in July 2010."[164] Eskosol chose to postpone the construction of the plants "to the last possible moment, in order to cash in on the

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[159] Memorial, ¶ 187.

[160] List of Creditors for Eskosol's Bankruptcy Proceedings, Court of Brindisi, C-81.

[161] Stickel I, ¶ 23.

[162] *See, e.g.,* Counter-Memorial, ¶ 174; *see also id.,* ¶¶ 182-184; GSE, Plants under Conto Energia IV, Revocation, R-37; GSE, Overview table of results in different Conto Energia, R-38; GSE, Conto Energia- installed capacity in 2010, R-39.

[163] Counter-Memorial, ¶ 123.

[164] Resp. PHB, ¶ 43.

constantly decreasing cost of solar panels."[165] Italy also notes that Eskosol signed the EPC Contract with Siemens before arranging its outside financing. In Italy's view, "[t]he timeframe and the regulatory environment cannot be blamed for the Claimant's central failure to do the only indispensable thing: acquire enough funds to make the Project viable."[166]

180. Italy depicts Eskosol as a "developer" or "promoter," whose plan was to sell a "paper project" or, alternatively, to sell the project to final investors or to final takers after completion of the two substations, but before actually constructing the PV plants.[167] It argues that "the Claimant's hope was that the tariffs would guarantee an extra-reward on capital, such that the Project could still be appealing to an institutional investor even after deducing the profits for the promoter/developer's premium."[168] Yet no investor agreed to fund the project. The Respondent notes that Eskosol did not explain why its informal exchange with West LB was not explored further. Regarding Unicredit, Italy argues that "[a]t a critical juncture, Claimant simply failed to convince the Unicredit Syndicate, its only possible partner, to inject urgently a substantial amount of money into a speculative project that, in several respects, was over-exposed to business risks, and that was just weeks away from entering disastrous financial troubles."[169] In Italy's view, "[i]nstitutional investors … were wary and careful to monitor profitability differentials existing across countries. As the margin of profit estimated in Italy was decreasing, it could not be expected that investors would rush to fund a massive project, like that of the Claimant, which was planned during the adjustment phase, and would become operational much later in time."[170]

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[165] Counter-Memorial, ¶ 186 (citing Mr. Lecorcier's written testimony in the *Blusun* case that "as the price of the solar panels was decreasing due to technological progress, it was rational to wait for as long as possible before building the plants and purchasing the solar panels for installation in said plants in order to obtain the most competitive prices," R-51, ¶ 31).

[166] Counter-Memorial, ¶ 188.

[167] Counter-Memorial, ¶¶ 189-196, 198 (citing Mr. Stein's written testimony in the *Blusun* case that "Mr. Dante's initial idea was to sell the project to final investors who would buy a 'paper project' … Alternatively, the project could be sold to final takers after completion of the two substations … In any event Mr. Dante was hoping to sell the project to final investors rapidly. In the meantime, Mr. Dante was looking for debt investors to finance the project's development in the short- and medium-term. In this context, Mr. Lecorcier and I were the ideal partners for Oikonomia. We had funds available to invest in advancing the project to a point where it would be attractive to institutional investors," R-49, ¶¶ 43-44).

[168] Counter-Memorial, ¶ 202; *see also* Resp. PHB, ¶¶ 46-48.

[169] Counter-Memorial, ¶ 211.

[170] Counter-Memorial, ¶ 215.

181. The Claimant rejects Italy's criticism of its business plan. First, it contends that "[t]o qualify for incentives, PV plants have to be both built *and* operational; and the substations and cables had to be built and connected for Eskosol's PV plants to operate!"[171] Eskosol also suggests that ENEL required Eskosol to connect its PV plants to the public grid through two substations in the first place.[172] Having the electrical infrastructure built and authorized made commercial sense, since obtaining the permits and building that infrastructure takes much longer, and is more risky, than building the PV power plants themselves.[173] The Claimant contends that its business plan was also justified because "Claimant saved money by waiting to construct the plants until after the connection work was complete. In 2010, the price of solar panels began to decrease '*due to technological progress.*'"[174] Eskosol further notes that "obtaining the STMD from ENEL was a 'condition precedent' for securing the loan" from Unicredit.[175] Eskosol's experts also advance reasons related to savings on operation and maintenance, module warranty and module degradation, all of which would be achieved by building the PV plants only once the infrastructure was in place.[176]

182. In Eskosol's view, the fact that Mr. Bacchiocchi (Italy's witness) admitted that Eskosol's Project had the same technical features as another project which went forward (the Blasi-Casignano project) refutes Italy's position that the project was defective in its technical design, or that Eskosol exposed itself to too much risk.[177]

183. Eskosol also explains that the project needed to be large because there was no infrastructure in the region to connect the plants to the grid, and therefore the substations were required.[178]

184. Eskosol contends that the project was financially viable under Conto Energia III, citing the term sheet Eskosol received from Unicredit on 31 January 2011.[179] It notes that it hired

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[171] Reply, ¶¶ 22, 33 (emphasis in original); *see also* Cl. PHB, ¶¶ 121-123.

[172] Reply, ¶¶ 22, 25.

[173] Reply, ¶¶ 22, 34-35.

[174] Reply, ¶ 35 (citing Mr. Lecorcier's second witness statement in the *Blusun* case, ¶ 31).

[175] Reply, ¶ 37; C-54.

[176] Stickel/Longhi, ¶ 33.

[177] Cl. PHB, ¶¶ 103-108.

[178] Reply, ¶ 42; Magli II, ¶¶ 7-16.

[179] Reply, ¶ 50.

sophisticated legal and financial consultants, and retained one of the top contractors for the final leg of the project.[180] It also noted that receiving financing for 80% of the project was normal for solar PV projects,[181] and that by the time it applied for construction financing "it had eliminated nearly all regulatory risk because it had obtained nearly all necessary permits required for the infrastructure, the construction, and the connection of its PV plants."[182] Eskosol argues that Professor Delfanti (Italy's expert) contradicted Italy's position that the PV plants should have been built in parallel with the substations, and that both Parties' experts actually agree that deferring construction of the PV plants until after completion of the substations and a significant portion of the medium voltage grid could not possibly have caused the collapse of the project.[183]

185. Indeed, Eskosol argues that "no bank was likely to finalize the construction financing for the PV Plants until the underlying infrastructure was purchased, installed, tested and approved by the government."[184] In Eskosol's view, "there is ample proof that Eskosol would have obtained all necessary financing to complete its Project" under an alternative approach.[185] Moreover, Eskosol says that its shareholders, Messrs. Lecorcier and Stein, had paid €16.9 million in cash to fund the project, and that its total sunk costs were much higher. It also notes Dr. Stickel's statement at the Hearing that "bridge financing and equity investors were readily available in the market place."[186]

186. According to Eskosol, it "needed … time to complete the due diligence process required to obtain the bank financing, which it clearly had under the timelines established under CE III … However, instead of having ample time to obtain the needed financing, Eskosol had to cope with the fact that Minister Romani tore down CE III abruptly."[187] Eskosol "urge[s] the

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[180] Reply, ¶¶ 46-48.

[181] Magli II, ¶ 21; Reply, ¶ 49; Cl. PHB, ¶ 127.

[182] Reply, ¶ 51; *see also* Cl. PHB, ¶¶ 109-113.

[183] Cl. PHB, ¶¶ 114-118.

[184] Reply, ¶ 52.

[185] Reply, ¶ 55 (citing, *inter alia*, Unicredit's loan to SIB (the company in charge of building the substations); expressions of interest by different banks; Unicredit's term sheet; the EPC Contract; Eskosol's debt-service ratio; the completion of the underlying infrastructure; and the permits obtained); *see also* Cl. PHB, ¶¶ 128-130.

[186] Cl. PHB, ¶¶ 131-132.

[187] Cl. PHB, ¶ 136.

Tribunal to take note that the GSE recommended that Minister Romani make adjustments to CE III."[188]

187. Eskosol also challenges Italy's argument that other projects which qualified for the incentivizing tariffs were comparable to Eskosol's, contending that this assertion is unsupported by the evidence offered in this arbitration.[189]

VI. JURISDICTION AND ADMISSIBILITY

188. The Tribunal has addressed issues of jurisdiction and admissibility in two prior decisions in this case: its 20 March 2017 Decision on Rule 41(5) Objection, and its 7 May 2019 Decision on Termination. The latter decision conclusively resolved Italy's jurisdictional objection based on inapplicability of the ECT to intra-EU disputes. The former decision did not conclusively resolve any objections to jurisdiction or admissibility, but expressed certain preliminary views on several objections, in the course of rejecting Italy's request that the Tribunal dismiss Eskosol's claims for manifest lack of legal merit under ICSID Rule 41(5). Italy has now chosen to pursue some (but not all) of its original objections, and as to these, the Tribunal accepts that its Decision on Rule 41(5) Objection does not resolve the issues, as that Decision necessarily was preliminary in nature. The Parties have since presented further arguments on the relevant objections, as was their procedural right. The Tribunal turns in this section to their principal contentions regarding the remaining jurisdictional and admissibility objections in this case.

189. By way of background, Eskosol states that it satisfies the jurisdictional requirements under both Article 25 of the ICSID Convention and the ECT. First, it contends that this proceeding concerns a legal dispute over Italy's violation in 2011 of its obligations under the ECT and international law.[190] Second, it says that the dispute arises directly out of qualifying investments under both the ICSID Convention and Articles 1(5), 1(6) and 1(10) of the ECT, namely: (i) its land rights; (ii) its rights to the Eskosol grid; (iii) its 100% shareholding in the

[188] Cl. PHB, ¶ 137.
[189] Reply, ¶¶ 84-87.
[190] Memorial, ¶ 208.

SPVs; (iv) the entitlement to use the substations; (v) its rights under the EPC Contract; (vi) its rights under the agreements for the acquisition of the SPVs; (vii) its officers' intellectual creations for the purposes of the Eskosol project; and (viii) its entitlement to permits, authorizations and licences obtained from different Italian authorities.[191] Third, Eskosol states that it is a qualifying investor under Article 1(7) of the ECT, as the dispute involves an ICSID Member State (Italy) and a national of a juridical person "as to which there is an agreement that it be treated as a national of another ICSID Contracting State." Indeed, Eskosol notes that, by signing the ECT, Italy and Belgium (which is the state of incorporation of Blusun, the holder of 80% of the Eskosol's shares) agreed in Article 26(7) as follows:

> An Investor other than a natural person which has the nationality of a Contracting Party to the dispute on the date of the consent [to arbitration] and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contracting Party, shall for the purposes of article 25(2)(b) of the ICSID Convention be treated as a 'national of another Contracting State' …[192]

Pursuant to this provision of the ECT, Eskosol contends that it should be treated as "a national of another Contracting State" for purposes of Article 25(2)(b) of the ICISD Convention.[193]

190. Finally, Eskosol states that it sent a notice of dispute to the Italian Government in accordance with Article 26(2) of the ECT and consented to arbitration, pursuant to Article 26(3) and (4) of the ECT and Article 25(1) of the ICSID Convention, through its Request for Arbitration.[194]

191. In the wake of the Tribunal's Decision on Rule 41(5) Objection, Italy pursued two objections in addition to the intra-EU objection which the Tribunal subsequently denied. First, it advanced a jurisdictional objection based on Eskosol's alleged failure to satisfy the nationality requirements of Article 25(2)(b) of the ICSID Convention and Article 26(7) of the ECT. Second, Italy advanced an admissibility objection grounded on *res judicata* and abuse of rights allegations, based on the relationship between Eskosol's claims in this case and those

[191] Memorial, ¶¶ 202-204, 209.

[192] ECT, C-1, Art. 26(7).

[193] Memorial, ¶¶ 196, 213-216.

[194] Memorial, ¶¶ 218-220.

brought by Blusun and subsequently denied by the tribunal in the *Blusun* case. Italy's objections and Eskosol's position on these objections are summarized in turn below.

A. JURISDICTION *RATIONE PERSONAE*

192. Italy argues that "[i]n the context of ICSID arbitration, the Tribunal must be satisfied that its jurisdiction is granted both under the ICSID Convention and under the specific instrument of consent invoked by the investor."[195] It contends that Eskosol did not satisfy, at the critical times, the requirements of foreign control under Article 25(2)(b) of the ICSID Convention and Article 26(7) of the ECT, which in its view are cumulative and warrant separate analysis.[196]

1. Nationality Requirement under Article 25(2)(b) of the ICSID Convention

a. Italy's position

193. Italy argues that investors that have the nationality of the host State at the time of registration of their Request for Arbitration do not fall under the Centre's jurisdiction *ratione materiae*. Exceptionally, Article 25(2)(b) provides for the possibility that domestic companies may bring a claim against their host State, but stipulates two requirements: that "the investor must be controlled '*by foreign investors*' of the home State, and the Parties must have agreed that such control qualifies the investor for protection as if it had foreign nationality."[197] Italy notes that Article 25 does not specify the point in time at which foreign control must exist, but contends that it should be interpreted to require foreign control at the date of consent to arbitration, which is considered to be the date of registration by ICSID of the arbitration request.

194. Italy accepts that Article 26(7) of the ECT records an agreement between Italy and Belgium regarding foreign control, but contends as a matter of fact that "there was no foreign control of the Claimant at the relevant time."[198]

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[195] Memorial on Jurisdiction, ¶ 18.
[196] Memorial on Jurisdiction, ¶ 16.
[197] Memorial on Jurisdiction, ¶ 23.
[198] Memorial on Jurisdiction, ¶ 24.

195. In its view, "[i]f the parties indicated foreign control as a qualifying element, a different – and looser – notion, like foreign shareholding, will not suffice. Exceptions cannot be interpreted extensively."[199] To this effect, Italy invokes the treaty interpretive principles of Article 31 of the VCLT, which it says "includes taking into account the default treaty regime from which the exceptions derogate. The default rule (foreign citizenship is required) cannot be waived by extending the exception (foreign control) beyond its literal meaning."[200] According to Italy, "[s]ince Article 26(7) of the ECT requires '*foreign control*,' anything short of objective foreign control will not suffice to trigger the circumstances envisaged by the ECT parties." Indeed, Italy argues that "even if the agreement between the ECT parties were to require anything less stringent than actual foreign control, it could not override the specific requirement in Article 25(2)(b) ICSID. … The element of foreign control under Article 25(2)(b) must be factually demonstrated."[201]

196. Italy considers that:

> [t]he idea of formal control is a contradiction in terms in the framework of Article 25(2)(b) ICSID because the 'foreign control' element operates precisely to pierce the veil of formal nationality and reach for the reality of effective control. In short, non-objective control is just not control.[202]

197. In support of its proposition on the need for an objective test for foreign control, Italy relies on the decisions rendered in *National Gas*,[203] *TSA*,[204] and *Vacuum Salt*.[205] Italy rejects Eskosol's attempt to distinguish the *TSA* decision on the factual grounds that the claimant in that case had been controlled by an Argentinian national *all* the time. Italy says that its reliance

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[199] Memorial on Jurisdiction, ¶ 30.

[200] Memorial on Jurisdiction, ¶ 30.

[201] Memorial on Jurisdiction, ¶¶ 30-32; *see also id.*, ¶ 33.

[202] Memorial on Jurisdiction, ¶ 32.

[203] *National Gas S.A.E. v. Arab Repubic of Egypt*, ICSID Case No. ARB/11/9, Award, 3 April 2014, RL-9, ¶ 133 (quotation omitted).

[204] *TSA Spectrum de Argentina S.A. v. Argentine Republic*, Award, 19 December 2008, RL-30 ("*TSA*"), ¶¶ 147 and 153 (quotation omitted).

[205] *Vacuum Salt Products Ltd. v. Government of the Republic of Ghana*, ICSID Case No. ARB/92/1, Award, 16 February 1994, RL-10 ("*Vacuum Salt*"), ¶¶ 53-54. Italy also relies on C. Schreuer to the effect that: "The existence of foreign control is a complex question requiring the examination of several factors such as equity participation, voting rights and management. In order to obtain a reliable picture, all these aspects must be looked at in connection. There is no simple mathematical formula based upon shareholding or votes alone." (Memorial on Jurisdiction, ¶ 49, citing C. Schreuer, 12 ICSID REV.- FOR. INV'T L. J. 59, 79-80 (1997), 126).

on *TSA* is to the effect that "foreign control under Article 25(2)(b) ICSID must be real and material, objectively identifiable and not merely presumed. This point is one on the law, about the nature of control (actual rather than presumed)," and the point cannot be defeated simply by distinguishing *TSA* on the facts, "on an aspect that did not concern the nature of foreign control."[206]

198. Italy argues that Eskosol misunderstood its statement that "Article 26(7) ECT … is open-ended" and "thus contains no agreement, and can raise no presumption of foreign control, with respect to Eskosol or any other specific company."[207] Italy says that the emphasis in this quote should be on the words "with respect to Eskosol or any other specific company," given that "[i]n most … cases cited in support of the 'ownership implies control' theory, the agreement required under Article 25(2)(b) ICSID was contained in a contract, to which the individual company that was to be treated as foreign was a party. Of course, in such circumstances, the presumption that the host State had considered the control structure of the contracting company is reasonable, and its express willingness to treat that company as foreign enjoys a presumption of validity."[208]

199. According to Italy, "[t]he issue in the present case is whether Italy and Belgium, and all the parties to the ECT, have agreed at all to consider any foreign-owned company to be controlled by foreign investors by reason of foreign shareholding alone. This is clearly not the case, and there are no presumptions to rebut. The simple question is whether, in the case at hand, the local company could demonstrate … having been controlled by foreign investors at the critical time. If not, there is no agreement for the purpose of Article 25(2)(b)."[209]

200. Italy argues that while shareholding is typically a relevant factor to establish control, it is not always a reliable benchmark to be taken as conclusive in isolation. In support of this, Italy relies on *Vattenfall*, *LETCO* and *AES*, three cases where the investors appear to have provided

[206] Rejoinder, ¶ 26.

[207] Rejoinder, ¶ 28.

[208] Rejoinder, ¶ 28.

[209] Memorial on Jurisdiction, ¶ 38; *see also* Rejoinder, ¶ 29.

evidence of actual control in addition to their shareholding in the relevant companies.[210] Indeed, Italy says that "there can be ownership without control."[211]

201. Italy also relies on the award in *Guardian Fiduciary*, where the tribunal held that "the issue of control is … ultimately a matter of evidence and cannot be determined solely on the basis of an analysis of the applicable New Zealand law,"[212] and where the tribunal found no evidence that the claimant's shareholders exercised actual control.[213]

202. Italy contends that even if Eskosol could convince the Tribunal that parties in principle could derogate from the actual foreign control requirement of Article 25(2)(b) of the ICSID Convention, that would not assist Eskosol in this case, because there is no such agreement. In fact, according to Italy, the ECT imposed a stricter requirement on foreign control *ratione temporis*.[214] Italy notes that, at the time of consent,

> [t]he existence of the present proceedings, after all, is the result of the non-foreign controller (the court-appointed receiver) acting in name of the Claimant (*recte*: of its creditors) to launch arbitration. At some earlier point, the Belgian shareholders did indeed possess and exercise control over the Claimant. Indeed, one of the last relevant managerial decisions taken by them was precisely to consciously relinquish control, by triggering bankruptcy proceedings that led to receivership.[215]

203. Italy rejects Eskosol's argument that Blusun's shareholding would be devoid of meaning or content, if Eskosol were to be deemed no longer controlled by Blusun simply by virtue of its entry into receivership. In Italy's view, Blusun "is simply devoid of control."[216] It also rejects Eskosol's suggestion that Blusun still could recover control in the future. First, apart from the

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[210] Memorial on Jurisdiction, ¶¶ 40-42 (citing *Vattenfall AB et al. v. Federal Republic of Germany*, ICSID Case No. ARB/09/6, Request for Arbitration, 30 March 2009, RL-33, ¶ 63; *Liberian Eastern Timber Corporation v. Republic of* Liberia, ICSID Case No. ARB/83/2, Award, 30 March 1986, RL-34, ¶ 351 (quotation omitted); and *AES Summit Generation Limited and AES-Tisza Eromu Kft v. Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, CL-81/RL-82 ("*AES*"), ¶ 6.1.6).

[211] Memorial on Jurisdiction, ¶ 43.

[212] Memorial on Jurisdiction, ¶¶ 43-44 (citing *Guardian Fiduciary Trust Ltd. v. Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/12/31, Award, 22 September 2015, RL-35 ("*Guardian Fiduciary*"), ¶ 134).

[213] *Guardian Fiduciary*, RL-35, ¶ 135. Italy also relies on *Transglobal Green Energy, LLC et al. v. Republic of Panama*, ICSID Case No. ARB/13/28, Award, 2 June 2016, RL-36, ¶ 111, and *Veteran Petroleum Limited v. Russian Federation*, PCA Case No. 228, Interim Award on Jurisdiction and Admissibility, 30 November 2009, CL-53, ¶ 479.

[214] Memorial on Jurisdiction, ¶¶ 51-52.

[215] Memorial on Jurisdiction, ¶ 53.

[216] Memorial on Jurisdiction, ¶ 54.

likelihood of this scenario, "it cannot be argued that hypothetical acquisition of control triggers the application of Article 25(2)(b) ICSID."[217] Second, the notion that Blusun could regain control if sufficient funds could be secured by winning this proceeding to satisfy Eskosol's creditors is "conditional on a finding of jurisdiction, which in turn depends on a prior determination of foreign control. The fundamental timeline is replaced, in the Claimant's briefs, by a circular process."[218]

204. Italy also addressed the Tribunal's statement, in its Decision on Rule 41(5) Objection, to the effect that foreign control "is an issue of international law, not domestic law," and that "[i]t would not be consistent with the underlying purposes of the Convention to render an otherwise qualified foreign-owned entity suddenly ineligible to access its protections."[219] Italy agrees with the Tribunal, but clarifies that it does not argue that the construction of "foreign control" depends on Italian law; rather, it argues that "'*foreign control*,' in line with the rule of interpretation of Article 31(1) VCLT, cannot possibly mean foreign ownership *deprived* of control."[220] Italy agrees that "the interpretation of 'foreign control' is squarely a matter of international law," but states that "Italian law matters as a fact, because it determines whether Blusun held and exercised any control power at the critical time."[221] In this regard, Italy notes that "Article 42 of the Italian Bankruptcy Law is crystal clear in this regard: '*the bankruptcy order from the time it is issued deprives the bankrupt of the right to administer and dispose of the assets in his possession at the date of the decree.*'"[222] It its view, "[t]hese proceedings, launched by the receiver, are the clearest evidence that somebody is still controlling the company in liquidation."[223]

205. Italy further addresses the Tribunal's concern in the Decision on Rule 41(5) Objection that Eskosol could become "suddenly ineligible" to enforce its rights. In its view, should Eskosol

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[217] Memorial on Jurisdiction, ¶ 55.
[218] Memorial on Jurisdiction, ¶ 57.
[219] Memorial on Jurisdiction, ¶ 59; Decision on Rule 41(5) Objection, ¶ 106.
[220] Memorial on Jurisdiction, ¶ 60.
[221] Memorial on Jurisdiction, ¶ 61.
[222] Memorial on Jurisdiction, ¶ 62 (emphasis in original).
[223] Memorial on Jurisdiction, ¶ 63.

have wished to bring a claim against Italy, it could have done so since 2011, "and for a long while thereafter, until the Italian court's order in November 2013."[224]

206. Regarding the critical time to assess the existence of foreign control under Article 25(2)(b) of the ICSID Convention, Italy notes that Article 25 "does not contain an express indication of when foreign control of legal persons must exist for the Centre to have jurisdiction by virtue of a special agreement of the parties."[225] In its view, "[s]ince Article 25(2)(b) ICSID provides the Contracting States with the power to extend the Centre's jurisdiction, by replacing the criterion of nationality with that of control, it stands to reason that the lack of the replaced criterion (foreign nationality) and the replacement criterion (foreign control) be ascertained at the same critical moment, that is, the time of consent to arbitration."[226] Eskosol "lost foreign control long before it consented to arbitrate its ECT-related grievances. There is no issue of losing previously acquired arbitration rights."[227]

207. Italy also rejects the argument that a potential injustice could arise if there were a requirement of continuous nationality, for example in an expropriation case, as the investor would be deprived of its right to ICSID arbitration by the very act which it wishes to challenge in such a proceeding.[228] In its view, no such scenario arises here, for three reasons. First, the Tribunal only must require continuous ownership and control up through the time of consent, but not afterwards. Second, this is not an expropriation case. And third, approximately two and a half years passed after the challenged measures, before Eskosol lost its foreign control.[229]

b. Eskosol's position

208. Eskosol rejects Italy's argument that it no longer was subject to foreign control as required under Article 25(2)(b) of the ICSID Convention. First, Eskosol notes that Article 25(2)(b) "is silent on the definition and timing of 'foreign control' and does not even suggest, much less

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[224] Memorial on Jurisdiction, ¶ 64.

[225] Memorial on Jurisdiction, ¶ 66.

[226] Memorial on Jurisdiction, ¶ 67. Italy relies for this proposition on *Vacuum Salt*, RL-10, n. 6; Christoph Schreuer *et al.*, *The ICSID Convention: A Commentary* (2d ed. 2009), RL-17, p. 329; and *TSA*, RL-30, ¶ 160.

[227] Memorial on Jurisdiction, ¶ 72.

[228] Memorial on Jurisdiction, ¶ 74, citing *Vacuum Salt*, RL-10, n. 6.

[229] Memorial on Jurisdiction, ¶¶ 74-77.

establish, when 'foreign control' must exist."[230] It argues that "nowhere does the ICSID Convention provide support to the conclusion that 'foreign control' over the domestic corporate claimant must exist at the time of consent."[231]

209. Eskosol also notes that none of the cases Italy cites deal with the agreement on foreign control contained in the ECT. Indeed, none of these cases were faced "with a decision on the issue of whether the reference to foreign control in Article 25(2)(b) could only mean that such foreign control must exist at the time of consent to arbitration."[232] It argues, *inter alia*, that the *TSA* decision "is distinguishable because it was accepted that 'at all possible critical dates (the request of arbitration, the consent to jurisdiction, the origin of the dispute), [claimant] was controlled by an Argentinian national.'"[233] Eskosol also refers to the Tribunal's statement in its Decision on Rule 41(5) Objection that "there is no temporal element … simply a reference to the parties' agreement."[234] In its view, it is this agreement that should guide the Tribunal, and when the requirement set forth in Article 26(7) of the ECT is satisfied, "which Eskosol does, then Article 25(2) [of the ICSID Convention] is also satisfied."[235] Eskosol criticizes Italy for "mak[ing] the assertion that 'Article 26(7) ECT … is open-ended' and 'thus contains no agreement, and can raise no presumption of foreign control, with respect to Eskosol or any other specific company.'"[236]

210. According to Eskosol, in placing emphasis on the importance of the objective component of Article 25(2)(b), Italy ignores the Tribunal's finding that:

> The term "foreign control" is not defined in the ICSID Convention, and tribunals have concluded that the absence of a definition represented a deliberate choice by the drafters. In reliance on the consensual nature of the Convention, they preferred giving the parties the greatest latitude to define these terms themselves, provided that

[230] Response to Request for Bifurcation, ¶ 7.
[231] Response to Request for Bifurcation, ¶ 7.
[232] Response to Request for Bifurcation, ¶ 8.
[233] Response to Request for Bifurcation, ¶ 8, citing *TSA,* RL-30, ¶ 159.
[234] Response to Request for Bifurcation. ¶ 7.
[235] Response to Request for Bifurcation, ¶ 9.
[236] Response to Request for Bifurcation, ¶ 11.

> the criteria agreed upon by the parties are reasonable and not totally inconsistent with the purposes of the Convention.[237]

211. Eskosol agrees with the Tribunal's statement in its Decision on Rule 41(5) Objection that Italy's objection ultimately "depends on the proposition that Eskosol's entry into bankruptcy proceedings following the challenged State measures divested it of the uncontroverted foreign control it enjoyed prior to bankruptcy [.]"[238] Eskosol says that Italy places undue emphasis on the Tribunal's use of the word "sudden" in the context of asserted ineligibility to enforce its rights, "when the key point is simply that an otherwise qualified foreign-owned entity should not be divested of access to ICSID due to it being placed in bankruptcy, especially when it is alleged to be due to illegal measures adopted by the Respondent."[239]

212. Eskosol challenges Italy's position that it "freely chose to take advantage of the process of receivership, with all its legal implications." First, Eskosol's bankruptcy was the result of claims by its creditors. Second, Eskosol states that "[w]hat is sudden is that merely invoking bankruptcy proceedings to block Eskosol's jurisdiction here would allow Italy to effectively flip a switch turning off access to arbitration for 'an otherwise qualified foreign-owned entity.'"[240] This result is particularly problematic when the cause of the bankruptcy is alleged to be the State's breach of the ECT.[241] In this regard, Eskosol notes that Italy failed to address the Tribunal's conclusion, in its Decision on Rule 41(5) Objection, as follows:

> [T]his would mean that even in demonstrated cases where State conduct is partially or wholly responsible for the financial straits that led to the bankruptcy (as Eskosol alleges in this case), the State could avoid scrutiny of its acts by virtue of their own consequences, simply by invoking the predictable reality that local bankruptcy proceedings always will be supervised by local courts.[242]

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[237] Response to Request for Bifurcation, ¶¶ 12-13 (quoting Decision on Rule 41(5) Application, ¶ 101, and citing the decision in *Aguas del Tunari S.A. v. Republic of Bolivia,* ICSID Case No. ARB/02/3, Decision on Respondent's Objection to Jurisdiction, 21 October 2005, CL-26, ¶ 278, to the effect that "although there is an objective limit, a Tribunal must also remain flexible so as to accommodate the agreement of the parties as to the definition of 'foreign control.'").

[238] Response to Request for Bifurcation, ¶ 14 (citing Decision on Rule 41(5) Objection, ¶ 100).

[239] Response to Request for Bifurcation, ¶ 16.

[240] Response to Request for Bifurcation, ¶ 17.

[241] Response to Request for Bifurcation, ¶ 18.

[242] Response to Request for Bifurcation, ¶ 18 (quoting Decision on Rule 41(5) Objection, ¶ 106).

2. The Notion of "Foreign Control" under the ECT

a. Italy's position

213. Italy asserts that the ECT imposes two requirements with respect to foreign control: (i) it requires actual foreign control, as opposed to mere ownership; and (ii) foreign control must exist at the moment when the dispute arose.

214. For the proposition that the ECT requires actual foreign control, Italy relies on the ECT's Understanding with respect Article 1(6):

> For greater clarity as to whether an Investment made in the Area of one Contracting Party is controlled, directly or indirectly, by an Investor of any other Contracting Party, control of an Investment means control in fact, determined after an examination of the actual circumstances in each situation. In any such examination, all relevant factors should be considered, including the Investor's
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> (a) financial interest, including equity interest, in the Investment;
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> (b) ability to exercise substantial influence over the management and operation of the Investment; and
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> (c) ability to exercise substantial influence over the selection of members of the board of directors or any other managing body.[243]

215. According to Italy, this Understanding makes it clear that the ECT requires "control in fact," looking at the "actual circumstances" of the case and consideration of "all relevant factors."[244] Italy states that Eskosol has failed to prove these elements to establish the Tribunal's jurisdiction.[245]

216. Italy agrees with Eskosol that the expression "before a dispute arises" has to be read as meaning "immediately before" or "as of the moment" a dispute arises. The Parties disagree, however, on the meaning of "dispute."[246] Italy relies on the ICJ jurisprudence for the proposition that a dispute is "a disagreement on a point of law or fact, a conflict of legal views

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[243] ECT, C-1, p. 70.

[244] Memorial on Jurisdiction, ¶ 87.

[245] Memorial on Jurisdiction, ¶¶ 88-90.

[246] Memorial on Jurisdiction, ¶¶ 92-93.

or interests between parties" and that "[i]t must be shown that the claim of one party is positively opposed by the other."[247]

217. Italy asserts that the dispute arose on 20 July 2015, when Eskosol sent a notice of dispute to the Italian Government, which was 20 months after Eskosol, in its view, stopped being controlled by Blusun in November 2013.[248] In this regard, Italy requests the Tribunal to distinguish "between the time of the breach and the time of the dispute."[249]

218. Italy also addresses the Tribunal's question, in its Decision on Rule 41(5) Objection, as to whether there is logic to divesting "the entity of its otherwise applicable right to seek redress for grievances against the State."[250] Italy argues that Eskosol was not "divested" from its right to launch arbitration against Italy for an alleged breach of the ECT. ICSID arbitration was available to Eskosol for more than 30 months from March/May 2011 to November 2013, and Eskosol "failed to exercise its right to consent to arbitration" before it "voluntarily triggered receivership and knowingly ceased to be controlled by Belgian investors."[251]

219. Italy asserts that Eskosol tries "to replace the time of the challenged measures (in 2011) with the time in which the dispute arose." Italy notes that Eskosol "strung together five passages of its pleadings in which, allegedly, it had signaled the notion that the dispute had arisen since

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[247] Memorial on Jurisdiction, ¶ 94 (citing *Mavrommatis Palestine Concessions (Greece v. Britain)*, Permanent Court of International Justice, Judgment No. 2, Series A, No. 2, 30 August 1924, RL-39, pp. 4 ff; *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, International Court of Justice, Preliminary Objections, Judgment, 5 October 2016, RL-40; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, International Court of Justice, Preliminary Objections, Judgment, 17 March 2016, RL-41; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, International Court of Justice, First Phase, Advisory Opinion, I.C.J. Reports 1950, RL-42, p. 74; and *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, International Court of Justice, Preliminary Objections, Judgment, 21 December 1962, I.C.J. Report; 1962, RL-43, p. 319). Italy also relies on a series of ICSID decisions, including *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, RL-45 ("*Maffezini*"), ¶¶ 95-96, 98; *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008, RL-54, ¶¶ 444-445, 447; and *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the Tribunal on Objection to Jurisdiction, 17 October 2006, RL-55, ¶ 52 (quotations omitted). *See also* Rejoinder, ¶ 35.

[248] Memorial on Jurisdiction, ¶ 105; Rejoinder, ¶¶ 31-32.

[249] Memorial on Jurisdiction, ¶¶ 104-108.

[250] Memorial on Jurisdiction, ¶ 110 (citing Decision on Rule 41(5) Objection, ¶ 106).

[251] Memorial on Jurisdiction, ¶ 110.

2011."[252] In Italy's view, by stating that "[t]he Italian Government was aware, or should have known, that these measures were opposed by and would injure solar energy investors, such as Eskosol," Eskosol shows "the impossibility to satisfy the legal test for a dispute to exist."[253] Indeed, Italy notes that "[t]here is no reference to any legal claim in this sentence, whilst the existence of a legal claim amenable to a specific source of obligations (which must subsequently meet with positive opposition *by the entity whose responsibility is invoked*) is the quintessential element of a dispute."[254]

220. Italy also criticizes Eskosol's reliance on *De Levi*, arguing that, contrary to Eskosol's suggestion, paragraph 149 of this award "*did not* address the critical time of the dispute, but the critical time of the breach." Indeed, Italy points out that the footnote to the same paragraph says that "the moment when an alleged breach of the treaty occurs is not necessarily the same as the moment in which the dispute arises,"[255] and that at paragraph 167 of the same award the tribunal held that "a breach or violation does not become a 'dispute' until the injured party identifies the breach or violation and objects to it."[256] In Italy's view, "[t]he putative exchange between Mr. Scognamiglio and Government officials in which the latter allegedly reassured the former about his planned investments, in 2010, cannot … amount to evidence of a legal dispute relating to an ECT-claim about the 2011 measures, met with positive opposition by the Respondent."[257] Italy thus concludes that the dispute crystallized "only at the time of the trigger letter in 2015."[258]

b. Eskosol's position

221. Eskosol argues that "[it] was under foreign control before this dispute arose; and it remains under foreign control for purposes of ECT Article 26(7) in any event because, *inter alia*, it

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[252] Rejoinder, ¶ 33.

[253] Rejoinder, ¶ 38.

[254] Rejoinder, ¶ 38 (emphasis in the original).

[255] Rejoinder, ¶ 40 (emphasis in original), (citing *Renée Rose Levy de Levi & Gremcitel SA v. Republic of Peru*, ICSID Case No. ARB/11/17, Award, 9 January 2015, CL-24 ("*De Levi*"), n. 172).

[256] Rejoinder, ¶ 42.

[257] Rejoinder, ¶ 41.

[258] Rejoinder, ¶ 43.

remains majority-owned by Blusun and its foreign controlled status cannot be stripped away by the bankruptcy which Italy's own misconduct proximately caused."[259]

222. Eskosol says that Italy's argument that the ECT's Understanding *"rule[s] out* all possible attempts to argue that 'foreign control' exists simply by reason of foreign majority shareholding" ignores the following finding by the Tribunal in its Decision on Rule 41(5) Objection:

> The factors listed in the Understanding are each in a sense structural, deriving either from the distribution of company shares or from the distribution of powers regarding management, operation, and selection of board members, which generally are reflected in a company's foundational documents. *While the company's economic fortunes may wax and wane*, and certain exigencies may require a resort to bankruptcy protection, *there is no suggestion in the ECT Understanding that the possibility of financial misfortune was expected to outweigh a more structural analysis of control*, and render an entity *ipso facto* locally controlled, simply because of the necessary supervision of a bankruptcy court.[260]

Italy having acknowledged that "the Belgian shareholders did indeed possess and exercise control over the Claimant," Eskosol says that "Italy's argument continues to be that 'financial misfortune' somehow 'outweigh[s] a more structural analysis of control.' Not so. Under the ECT, Eskosol remains foreign controlled by its majority shareholders, regardless of the local bankruptcy court's supervision."[261]

223. Eskosol also challenges Italy's argument that the date the dispute arose is 20 July 2015, when Eskosol notified it of its allegations regarding a breach of the ECT. Eskosol says that the dispute arose in 2011, and that its position is consistent with a number of statements in the Request for Arbitration and Eskosol's pleadings on Italy's application under Rule 41(5).[262] Eskosol relies on *Maffezini* for the proposition that "there is a difference between a dispute and a claim" and that "[w]hile a dispute may have emerged, it does not necessarily have to coincide with the presentation of a formal claim."[263] In its view, it was in 2011 that Eskosol and Italy became positively opposed: the Government "was aware, or should have known,

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[259] Response to Request for Bifurcation, ¶ 20.

[260] Response to Request for Bifurcation, ¶ 21 (emphasis in original), quoting Decision on Rule 41(5) Objection, ¶ 107.

[261] Response to Request for Bifurcation, ¶ 22.

[262] Response to Request for Bifurcation, ¶¶ 23-24, 29.

[263] Response to Request for Bifurcation, ¶ 27 (quoting *Maffezini*, RL-45, ¶ 96).

that these measures were opposed by and would injure solar energy investors, such as Eskosol, after their enactment."[264] Eskosol also refers to public debate at the time of the adoption of the Romani Decree, including the statements made by financial institutions, Italian politicians and the European Commission.[265] Eskosol also refers to the concerns raised by Mr. Scognamiglio with Italian Government officials.[266]

3. Tribunal's Analysis

224. There is no dispute that as of the dates of the two State measures that are alleged to have violated Italy's ECT obligations (the Romani Decree and Conto Energia IV, in March and May 2011 respectively), Eskosol was controlled in all relevant respects by Blusun – a Belgian company that owned 80% of its shares, and that exercised the powers of control attendant to such dominant shareholding under its foundational documents. There is equally no dispute that as of the later date when Eskosol's ECT claim was registered by ICSID (22 December 2015), Eskosol was in liquidation proceedings in Italy, having been declared insolvent on 12 November 2013. As would be expected, those proceedings were supervised by an Italian court (in Brindisi), and the receiver the court appointed was an Italian national, Mr. Contardi. The question is whether the latter circumstances have jurisdictional significance for this case.

225. As the Tribunal discussed in its Decision on Rule 41(5) Objection, both the ICSID Convention and the ECT establish that, in appropriate circumstances, a company incorporated in the host State can be accepted as qualified to bring a claim against the host State, notwithstanding the normal requirement that a claimant must have the nationality of another Contracting State. As to what those circumstances are, both texts must be separately examined and satisfied.

226. Beginning with the ICSID Convention, Article 25(1) of the ICSID Convention establishes jurisdiction over "any legal dispute arising directly out of an investment, between a Contracting State … and a national of *another* Contracting State, which the parties to the

[264] Response to Request for Bifurcation, ¶ 29.

[265] Response to Request for Bifurcation, ¶¶ 29-32 (relying on *De Levi,* CL-24, ¶ 149, as follows: "In the Tribunal's view, *the critical date is the one on which the State adopts the disputed measure*, even when the measure represents the culmination of a process or sequence of events which may have started years earlier. It is not uncommon that divergences or disagreements develop over a period of time before they finally 'crystallize' in *an actual measure* affecting the investor's treaty rights.") (emphasis in Eskosol's pleading).

[266] Response to Request for Bifurcation, ¶ 33.

dispute consent in writing to submit to the Centre" (emphasis added). This principle of diversity of nationality is subject to a specific exception reflected in Article 25(2)(b), which includes within the definition of a foreign national "any juridical person which had the nationality of the Contracting State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention." The reference to a party agreement in turn requires reference to Article 26(7) of the ECT, which (as the Tribunal previously noted)[267] sets forth two requirements, separated by the conjunctive "and," for a host State company to be treated as a qualified foreign national for purposes of Article 25(2)(b) of the ICSID Convention. First, such company must have the host State nationality "on the date of [its] consent in writing" to ICSID, a requirement that was clearly satisfied by virtue of Eskosol's Italian corporate nationality. Second and independently, the company must be "controlled by" investors of another Contracting Party "before a dispute between it and that Contracting Party arises."

227. The Parties have debated extensively both the legal issue of *when* foreign control must be established to satisfy the ECT and ICSID Convention tests, and the factual issue of *whether* those tests were satisfied on the operative date(s).[268] Beginning with the temporal issue, this involves two distinct questions. First, for purposes of the ECT Article 26(7) foreign control inquiry, when can the relevant "dispute" between Eskosol and Italy be said to have arisen – the date of the challenged measures, the date Eskosol first objected to those measures, or the date when ICSID registered Eskosol's ECT claim? Second, for purposes of the ICSID Convention Article 25(2)(b) inquiry, does the reference to party agreement on foreign control

[267] Decision on Rule 41(5) Objection, ¶ 87.

[268] It is uncontroversial that the tests of both the ECT and ICSID must be satisfied, because Article 25(3)(b) of the ICSID Convention has both subjective and objective components. The subjective component looks to whether there has been an agreement to treat a local entity as a national of another Contracting State; the objective component requires a tribunal to satisfy itself that control indeed was exercised by a national of the Contracting State, because "parties do not have unlimited discretion to define as foreign-controlled an entity that objectively is not, or that objectively is controlled only by nationals of a non-Contracting State." Decision on Rule 41(5) Objection, ¶ 90 (citing authorities). Nonetheless, as the Tribunal previously noted, "[g]iven the importance of the parties' stated intentions as reflected in their agreement, … a tribunal should not conclude that foreign control objectively is lacking unless there are unusual circumstances that preclude deference to their agreement to 'treat[]' an entity as so controlled. These circumstances would require a finding that the criteria agreed by the parties are simply unreasonable, or that application of such criteria would result in an outcome that contravenes the underlying purposes of the ICSID Convention." *Id.* (citing authorities).

make the ECT critical date dispositive, or does the ICSID Convention impose an additional requirement that, whatever the control finding may be as of the date the dispute arose, foreign control must subsist at least through the date of consent to ICSID arbitration (*i.e.*, registration of the claim)?

228. The Tribunal offered certain preliminary observations on these questions in its Decision on Rule 41(5) Objection, based on the limited (expedited) briefing the Parties then had submitted. Among other things, the Tribunal agreed with Professor Schreuer that Article 25(2)(b)'s wording "is not without ambiguity" regarding the operative date for foreign control,[269] because the Article references the date of consent to arbitration as critical to the nationality determination, but does not contain an express temporal element with reference to foreign control, simply a reference to the parties' agreement.[270] The Tribunal also noted that "either interpretation of Article 25(2)(b) could have significant implications for cases involving facts different from this one,"[271] for example: (i) in cases involving corporate transactions between the date the dispute arose and the date of consent, where an exclusive focus on control as of the date of the dispute could "facilitate the buying or selling of ICSID claims … to new owners … with no element of foreign control whatsoever" by the date a claim is brought,[272] or (ii) in cases involving State nationalization or forced sales to third parties, where an exclusive focus on control as of the date of consent could enable States "to shield them[selves] from challenge for wrongdoing that directly precipitated the loss of control."[273] Finally, the Tribunal observed that because "all interpretations of arguably ambiguous treaty language have potential doctrinal consequences for future cases that should not be lightly ignored," this "counsels for caution" in how tribunals proceed with such exercises, "particularly where the issue presented appears … to be one of first impression."[274]

[269] Decision on Rule 41(5) Objection, ¶ 93 (quoting Christoph Schreuer *et al.*, *The ICSID Convention: A Commentary* (2d ed. 2009), RL-17, p. 329).

[270] Decision on Rule 41(5) Objection, ¶¶ 94-95.

[271] Decision on Rule 41(5) Objection, ¶ 96.

[272] Decision on Rule 41(5) Objection, ¶ 96.

[273] Decision on Rule 41(5) Objection, ¶ 97.

[274] Decision on Rule 41(5) Objection, ¶ 98.

229. The Tribunal reaffirms its previously expressed view about the importance of prudence, in not reaching out to decide unsettled points of law that are not strictly necessary to the resolution of the issues before it. In this case, that proves to be the situation regarding the temporal question, because the Tribunal ultimately concludes that the answer to that question is not necessary to resolve Italy's jurisdictional objection. *Arguendo*, if Eskosol were correct that the only critical date for foreign control purposes was the date of the challenged State measures, then it is undisputed that Eskosol was controlled by a Belgian company on the relevant dates, and therefore that it has jurisdiction to proceed with its claim. Correspondingly, if (*arguendo*) Italy were correct that the key date for foreign control purposes was the date ICSID registered Eskosol's claim, the Tribunal concludes that Eskosol's status as being in liquidation proceedings does not suffice to make either the Italian receiver or the Italian court the controlling entity, for purposes of determining jurisdiction to bring claims under the ECT and the ICSID Convention, and Italy has not pointed to any indicia of change in control other than the pendency of those proceedings.

230. As the Tribunal noted in its prior decision, the term "foreign control" is not defined in the ICSID Convention, and tribunals have concluded that the absence of a definition represented a deliberate choice by the drafters.[275] "In reliance on the consensual nature of the Convention, they preferred giving the parties the greatest latitude to define these terms themselves, provided that the criteria agreed upon by the parties are reasonable and not totally inconsistent with the purposes of the Convention."[276] In this case, the ECT text does not define control for purposes of determining whether a local company is "controlled" by a foreign investor pursuant to Article 26(7), but the term "controlled" also was used in the definition of "Investment" in Article 1(6), which refers to "every kind of asset, owned or controlled directly or indirectly by an Investor…." The Tribunal considers it appropriate to construe the term consistently across these two provisions. The Tribunal therefore gives due weight to the "Understanding" adopted by the ECT parties with respect to Article 1(6).[277] Moreover, the

[275] Decision on Rule 41(5) Objection, ¶ 101.

[276] *Autopista Concesionada de Venezuela C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction, 27 September 2001, RL-8 ("*Autopista*"), ¶ 97.

[277] Final Act of the European Energy Charter Conference, Section IV ("Understandings"), CL-192, ¶ 3 ("With respect to Article 1(6)").

Tribunal sees no reason, for purposes of an ICSID Convention "objective" control analysis, to adopt different criteria than those on which the ECT parties subjectively agreed. The stated criteria are "reasonable" and in no way threaten to "permit parties to use the Convention for purposes for which it was clearly not intended."[278]

231. According to the joint Understanding adopted by the ECT parties, "control of an Investment means control in fact, determined after an examination of the actual circumstances in each situation."[279] The Tribunal accepts that "control in fact" is not to be decided exclusively by reference to equity shareholding, although "equity interest" is included within the first of three "relevant factors" identified in the Understanding's non-exhaustive list of items to consider in determining control ("financial interest, including equity interest"). With respect to this factor, there has been no allegation of any intervening transaction that altered Eskosol's shareholding structure, after the date of the challenged measures and before ICSID's registration of its claim. To the contrary, the Parties agree that Blusun, a Belgian company, continues to own 80% of the Eskosol shares. Moreover, the Parties have not made any significant arguments based on the identity of Eskosol's creditors, to try to establish control-in-fact based on the allocation of any "financial interest" other than "equity interest."

232. The Understanding identifies as the second and third "relevant factors" the "ability to exercise substantial influence over the management and operation of the Investment," and the "ability to exercise substantial influence over the selection of members of the board of directors or any other managing body." The Tribunal previously noted that these factors are to a large degree "structural," deriving from the distribution of power that generally would be reflected in a company's foundational documents.[280] There has been no allegation of any change in Eskosol's foundational documents, for example regarding the distribution of voting power, the appointment of Board members and officers, and the authority of officers to take decisions on their own versus referring them to the Board.

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[278] *Vacuum Salt*, RL-10, ¶ 37 (quoting Aron Broches for the proposition that with respect to agreements on foreign control, "any stipulation … based on a reasonable criterion should be accepted" and jurisdiction should be declined "only if … to do so would permit parties to use the Convention for purposes for which it was clearly not intended").

[279] Final Act of the European Energy Charter Conference, Section IV ("Understandings"), CL-192, ¶ 3.

[280] Decision on Rule 41(5) Objection, ¶ 107.

233. Rather, as the Tribunal previously observed, "Italy's sole objection is that the bankruptcy filing itself displaced whatever mechanisms of control existed previously, so that from that date on, 'control in fact' of Eskosol manifestly resided in the hands only of its receiver and the supervising bankruptcy court. This is said to follow from Italian law regarding the powers of a bankruptcy receiver and court."[281] But the ECT parties no doubt were aware of the possibility that the "economic fortunes [of a local company] may wax and wane, and certain exigencies may require a resort to bankruptcy protection."[282] And yet, as the Tribunal previously observed, "there is no suggestion in the ECT Understanding that the possibility of financial misfortune was expected to outweigh a more structural analysis of control, and render an entity *ipso facto* locally controlled, simply because of the necessary supervision of a bankruptcy court."[283]

234. It is of course true that a bankruptcy receiver exercises significant influence over the management of a company's *assets*, under the supervision of a bankruptcy court, while the company remains in bankruptcy proceedings. However, the receiver does not exercise such authority *on his own behalf*, making him the ultimate party-in-interest to the company's fate,[284] and therefore supporting some conclusion that it is *his* nationality that properly should govern for ECT and ICSID Convention purposes. Rather, the receiver acts essentially as a trustee or agent – not as a principal – on behalf of those with dominant legal and financial interests in the company (*e.g.,* shareholders and priority creditors). The trustee administers the company in the shareholders' interests, not in his own. That agency moreover is a temporary power, not a permanent one, and it remains in place only so long as the entity remains in bankruptcy. That status could come to an end for various reasons, including (but not limited to) the possibility that an insolvent entity prevails in a legal claim and collects sufficient recovery to settle its outstanding debts.

235. In this case, Italy concedes that Eskosol's shareholders "retained certain rights, even after the opening of the receivership procedure … such as the right to reach an agreement with the

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[281] Decision on Rule 41(5) Objection, ¶ 104.

[282] Decision on Rule 41(5) Objection, ¶ 107.

[283] Decision on Rule 41(5) Objection, ¶ 107.

[284] *Cf. Guardian Fiduciary*, RL-35, ¶¶ 131, 134, 137 (finding that control was held by the beneficial owner and not the immediate legal owner of a trust, where the legal owner merely held the shares on behalf of beneficial owner).

creditors."[285] In other words, if they had the means and saw a business reason for doing so, the shareholders could choose to infuse additional capital into the company, to enable it to emerge from bankruptcy and resume operations. However likely or unlikely that might be on the facts, the shareholders' legal right to make such choices, if considered warranted and feasible from a business perspective, is an important indicia of their *residual* control, even if they have been forced by extenuating circumstances to place the company into temporary administration.

236. Finally, the determination of control for purposes of the ECT or ICSID must be conducted in a way that is consistent with, and not in violation of, the object and purpose of those treaties. Without entering into a broad exploration of the treaties' object and purpose, it is fair to say that at least one such purpose includes facilitating the neutral resolution of disputes between investors and States, regarding those States' treatment of investments made within their borders. It is a reality that a substantial number of foreign investments are made through local companies incorporated in host States, and that reality was reflected *inter alia* in both Article 25(2)(b) of the ICSID Convention and Article 26(7) of the ECT. In the Tribunal's view, it would be inconsistent with that understanding, and with the object and purpose of the treaties, to divest local companies that indisputably were owned by foreign investors from the ability to pursue potentially well-founded ECT claims, simply because of a subsequent collapse in the company's economic fortunes, particularly in circumstances where it is alleged that the collapse was attributable to the State's own wrongful conduct. Yet that would be the inevitable outcome of Italy's suggestion that any bankruptcy filing by the local company should be deemed to transfer effective control either to the receiver or to the host State's courts, since almost by definition both the receiver and the local judges overseeing his work will be nationals of the host State.

237. The Tribunal stated as much in its Decision on the Rule 41(5) Objection, as follows:

> While the Convention's drafters may have been content largely to defer to the parties to reach their own agreements regarding the facts of control, such agreements must be consistent with the underlying purpose of the Convention, including the protection in appropriate cases of foreign investment. It would not be consistent with the underlying purposes of the Convention to render an otherwise qualified foreign-owned entity suddenly

[285] Memorial on Jurisdiction, ¶ 54.

> ineligible to access its protections, simply because the entity's liabilities eventually overtake its assets enough to justify (at least temporary) supervision of its activities to protect the rights of creditors. Among other things, this would mean that even in demonstrated cases where State conduct is partially or wholly responsible for the financial straits that led to the bankruptcy (as Eskosol alleges in this case), the State could avoid scrutiny of its acts by virtue of their own consequences, simply by invoking the predictable reality that local bankruptcy proceedings always will be supervised by local courts. But even in less dramatic situations, such as where the bankruptcy is attributable largely to factors other than State action, there still is no logic to divesting the entity of its otherwise applicable right to seek redress for grievances against the State – particularly when doing so might enable it to reverse its financial fortunes enough to emerge from bankruptcy. There is certainly nothing in the ICSID Convention to suggest that implementation of the foreign control requirement for jurisdiction was intended to depend on the financial fortunes or misfortunes of the local entity.[286]

238. Since that time, the Tribunal has seen nothing in the subsequent briefing to change its view. Accordingly, Italy's jurisdictional objection on the basis of lack of foreign control is denied.

B. Admissibility Objection

1. *Res Judicata* and Duplication of Proceedings Generally

a. Italy's position

239. Italy contends that, even if the Tribunal were to find that it has jurisdiction, Eskosol's claims are inadmissible "as contrary to *res judicata* and any other principle barring duplication of proceedings."[287]

240. According to Italy, the dispute in this arbitration is substantially the same as the one in the *Blusun* case. In that case: (i) the dispute concerned Blusun's investments in Italy through Eskosol; (ii) Blusun challenged various measures, including the Romani Decree and Conto Energia IV; and (iii) as Eskosol admitted in its application under Rule 41(5) in the *Blusun* case, its claims in this arbitration "arise from the same factual matrix and adverse measures that [we]re at issue in the *Blusun* arbitration."[288]

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[286] Decision on the Rule 41(5) Objection, ¶ 106.

[287] Memorial on Jurisdiction, ¶¶ 116-117.

[288] Memorial on Jurisdiction, ¶ 119; *see also* ¶¶ 121-128.

241. Italy also argues that the following conclusions of the *Blusun* tribunal, which "are related to lack of causation, would have equally applied in the event that the claimants had based their grievances on other standards under the ECT":

> In the Tribunal's view, the Claimants have not discharged the onus of proof of establishing that the Italian state's measures were the operative cause of the Puglia Project's failure. Of far greater weight was the continued dependence on project financing, and the failure to obtain it was due both to the size of the Project and to justified concerns about the scope of DIA authorisation, on which the legality of the Project depended. That being so, the claim under Article 10(1) for loss of the Project would fail in any event.[289]

242. In Italy's view, the *Blusun* case and this proceeding concern "identical qualified interests." Italy notes the Tribunal's observation, in its Decision on Rule 41(5) Objection, that "there may be certain circumstances in which a foreign shareholder and the local company in which it holds shares have *such identical interests* that it would be abusive to permit arbitration of a given dispute by one after the other already has concluded an arbitration over the same dispute." The Tribunal indicated this could apply in a situation where "a first case were brought by the 100% shareholders of a local company and thereafter a second case was attempted by the local company that they wholly owned."[290]

243. Italy says that the Tribunal "did not imply that the above principle of identity of interest could only apply in case of wholly owned companies, since it indicates this situation as only one example of 'identical interests'."[291] According to Italy,

> if the parent company places itself in the position of being made substantively whole for the alleged harm, then the harm caused by the contested remedies is remedied. Blusun claimants requested damages for the failure of the Project, and included in the losses all harms also claimed by Eskosol.[292]

244. Italy challenges Eskosol's arguments that: (i) Blusun failed to coordinate with Eskosol in pursuing its claims in the *Blusun* case, which in turn would indicate that it did not intend to

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[289] Memorial on Jurisdiction, ¶¶ 129-130 (quoting *Blusun, S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian* Republic, ICSID Case No. ARB/14/3, Award, 27 December 2016, ¶ 394, RL-56 ("*Blusun*")).

[290] Memorial on Jurisdiction, ¶¶ 132-133 (quoting Decision on Rule 41(5) Objection, ¶¶ 166-167) (emphasis added).

[291] Memorial on Jurisdiction, ¶ 134.

[292] Memorial on Jurisdiction, ¶ 134.

share with Eskosol any proceeds of those claims; and (ii) Blusun did not represent Eskosol's significant interests.[293]

245. Regarding the first aspect of Eskosol's argument, Italy contends as follows: (i) Eskosol waited more than two years after the decision was taken to liquidate the company to initiate this proceeding, so it is difficult to argue that it bears no responsibility for Blusun proceeding with an arbitration first, and there is no evidence that Blusun impeded Eskosol from starting an arbitration earlier; (ii) the statement that Blusun had no intention of sharing any proceeds of its arbitration with Eskosol is purely speculative; and (iii) Eskosol's minority shareholders, whose interests allegedly were not represented in the *Blusun* case, in any event were not qualified investors under the ECT who would be entitled to the benefit of ECT protections.[294]

246. Regarding the second aspect of Eskosol's argument, Italy says that any harm to Eskosol from the challenged measures could have been fully repaired in the *Blusun* case, as Blusun's claimed losses in that proceeding included Eskosol's equity value as well as the capital injected into the project.[295]

247. Italy says that in the present circumstances, where Eskosol's "minority shareholders would not be entitled by any means to ECT or ICSID protection as nationals of Italy … there is no discrimination, nor deprivation of fundamental rights of anyone legitimate to claim them under the relevant foreign investment protection regime."[296]

248. Italy further rejects Eskosol's argument that not allowing it to seek redress would jeopardize its creditors. Aside from noting that the creditors are also Italian, Italy says that "they did not directly claim for damages suffered by their own investments and consequently they have no right to recover under this arbitration."[297] It adds that the claims of Eskosol's minority

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[293] Memorial on Jurisdiction, ¶ 135.

[294] Memorial on Jurisdiction, ¶¶ 136-138, 143 (relying on *Orascom TMT Investments S.a.r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award, 31 May 2017, RL-57 ("*Orascom*"), ¶¶ 488, 495) (quotation omitted)).

[295] Memorial on Jurisdiction, ¶ 144 (quoting *Orascom*, RL-57, ¶ 497 (quotation omitted)).

[296] Memorial on Jurisdiction, ¶ 145.

[297] Memorial on Jurisdiction, ¶ 147.

shareholders and its creditors could be pursued in the Italian courts under Italian law, but not through an ECT arbitration.

b. Eskosol's position

249. Eskosol rejects Italy's *res judicata* objection. It explains that *res judicata* requires identity of (i) parties, (ii) cause, and (iii) object, none of which has been established here.[298]

250. First, Eskosol argues that Blusun and Eskosol "are plainly not identical."[299] It also says that "the finding of an identity of interest depends on the circumstances at issue" and notes that, in its Decision on Respondent's Application under Rule 41(5), "[t]his Tribunal found that in the present circumstances there was no identity of interests between the Eskosol and Blusun claimants."[300] Eskosol rejects the application of a possible exception based on 100% ownership by the foreign shareholder, because "Eskosol is not wholly owned by Blusun, and … [a]t no point was Eskosol's independent corporate personality abused."[301] Nor has Eskosol acted in concert with Blusun. Indeed, it was Blusun that rejected consolidation of its ICSID case with the case Eskosol later initiated, which is why Eskosol filed an application under ICSID Arbitration Rule 37(2) to be heard as a non-disputing party in the *Blusun* case, "precisely to ensure that Blusun did not claim the damages that only Eskosol could rightfully claim."[302] Blusun opposed that application as well.

251. As to the delay in filing the Request for Arbitration, Eskosol explains that its timing was "reasonable under the circumstances," as it sent Italy a trigger letter on 20 July 2015, *i.e.*, less than a year after it went into receivership, and it needed that time to discuss the claim with the receiver, retain counsel, obtain third party funding and seek approval from the creditors' committee and the judge in charge of receivership.[303]

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[298] Response to Request for Bifurcation, ¶¶ 35-49.
[299] Response to Request for Bifurcation, ¶ 36.
[300] Response to Request for Bifurcation, ¶ 38.
[301] Response to Request for Bifurcation, ¶ 39.
[302] Response to Request for Bifurcation, ¶ 40.
[303] Response to Request for Bifurcation, ¶ 43.

252. Eskosol finally claims that neither of the other two prongs of the triple identity test are met in this proceeding. First, the two proceedings do not concern the same contested measures. While Eskosol's claims concern two contested measures (the Romani Decree and Conto Energia IV, both issued in 2011), the *Blusun* claim was based on a number of events that spanned a five-year period (2008-2012), just two of which were the Romani Decree and Conto Energia IV.[304] Also, Eskosol argues, Blusun claimed only for its reflective losses as a shareholder in Eskosol, while Eskosol is claiming for 100% of the company's losses arising out of the two contested measures at issue. Eskosol also notes that Italy offers no support for the assertion that Blusun requested damages for "all harms also claimed by Eskosol," and that under Italian law shareholders "cannot exercise the rights of the company."[305]

2. Abuse of Rights

a. Italy's position

253. Italy argues that the fact "[t]hat the Blusun proceedings resulted in a decision in favour of Respondent only proves that Italy should not serve as respondent again for a challenge of the same measures under the ECT, for alleged damages caused to the same business."[306]

254. According to Italy, "an investor controlling more than one entity by vertical integration will commit an abuse if it seeks to challenge the same measures and claim for the same harm at various levels."[307] It argues that since the *Orascom* tribunal applied this principle in the presence of multiple treaties leading to parallel protection, *a fortiori* the principle must apply when the same treaty is at stake.[308]

255. Italy also states as follows:

> [w]hether there is identity between the two claimants, concededly, is a matter of perspective. Formally, shareholders are distinct from the company. In practice, they might be inextricably linked. The rationale of *RSM* was deployed in cases of 100% ownership, but there is no principled reason why it should not apply in other cases where ownership is lower. For instance, the *Orascom* tribunal did not hinge its

[304] Response to Request for Bifurcation, ¶¶ 46-47.

[305] Response to Request for Bifurcation, ¶ 48.

[306] Rejoinder, ¶ 127.

[307] Memorial on Jurisdiction, ¶ 151 (quoting *Orascom*, RL-57, ¶¶ 540-543 (quotation omitted)).

[308] Memorial on Jurisdiction, ¶ 152.

> finding of inadmissibility on the condition of 100% ownership, but on the specific circumstances of the case, which evinced the abusive duplication of the claims even if these were based on different treaties.[309]

256. This, in Italy's view, was confirmed by Eskosol when it recalled that its application in the *Blusun* case under ICSID Arbitration Rule 37(2) was made to ensure that Blusun could not claim the damages that only Eskosol could rightfully claim. According to Italy, "Blusun *did*, in fact, claim the share of damages on which Eskosol claimed monopoly. That the case failed on the merits is irrelevant to this point."[310]

257. Italy also asserts that, should the Claimant's thesis that it has been at all times under the control of Blusun be accepted, then the investor has "abused of its right by duplicating requests for redress under the ECT by taking benefit of the possibility *in abstracto* to access arbitration separately in its own name and through its local company."[311]

258. Italy finally distinguishes this case from the situation in *CME*,[312] on the grounds that here, Italy sought (rather than refused) to consolidate proceedings.[313] Moreover, given that Eskosol waited more than two years after the start of the *Blusun* case to file its claim, the "[a]lleged lack of cooperation by Blusun should indeed be at least confronted with Eskosol's own responsibility for postponing any serious attempt to intervene in the Blusun arbitration to claim its rights."[314]

b. Eskosol's position

259. Eskosol claims that the circumstances in *Orascom*, on which Italy relies for its abuse of process objection, were unique and are not present here. In *Orascom*, the tribunal found that: "(i) 'the dispute being notified in the three notices is effectively one and the same'; and (ii) that all three notices of dispute were sent by Mr. Sawiris who owned and controlled each of the three vertically integrated companies."[315] Eskosol also notes Algeria's argument in that

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[309] Rejoinder, ¶ 129.

[310] Rejoinder, ¶ 130.

[311] Memorial on Jurisdiction, ¶ 155.

[312] *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Final Award, 14 March 2003, CL-142 ("*CME*").

[313] Memorial on Jurisdiction, ¶¶ 158-159; Rejoinder, ¶ 131.

[314] Memorial on Jurisdiction, ¶ 161.

[315] Response to Request for Bifurcation, ¶ 52.

case that "Mr. Sawiris used his group of companies to seek to maximize his chances of success by introducing several arbitration proceedings against the Respondent at different levels of the chain of companies."[316] This case, by contrast, does not involve a single person or entity seeking to maximize its chances by repeat arbitrations. To the contrary, there has been a complete lack of cooperation between Blusun and Eskosol.

260. Eskosol also rejects Italy's assertion that it "should not be penalized for the lack of coordination between Eskosol and Blusun."[317] As explained, Eskosol's delay in filing the application under Rule 37(2) in the *Blusun* case was due to the difficulties associated with representing a company in bankruptcy. Moreover, the Rule 37(2) application would not have allowed Eskosol to assert its rights in the *Blusun* case, but solely to be heard as a non-party. Regarding consolidation, Eskosol repeats that it was Blusun who rejected that possibility.[318]

261. Finally, Eskosol argues that "there can be multiple legitimate investors under an ECT claim, as Italy itself admits."[319] Blusun and Eskosol are not acting in privity nor in concert, and they do not represent the same interests. Eskosol agrees with the Tribunal's statement in its Decision on Rule 41(5) Objection that "it would not be appropriate for tribunals to preclude arbitration by qualified investors [such as Eskosol], simply because other qualified investors may have proceeded before them without their participation."[320]

3. Tribunal's Analysis

262. The Tribunal is not called upon to decide whether, as a matter of either efficiency or fairness, it would be preferable for all shareholders of an entity affected by a challenged State measure to be heard in a single forum at a single time, together with the entity that they collectively own. The Tribunal previously observed that it is "not unsympathetic to Italy's circumstances, having to face claims now that are closely related to those it already successfully vanquished in a prior proceeding."[321] But ultimately, these are system design questions that present policy

[316] Response to Request for Bifurcation, ¶ 52.
[317] Response to Request for Bifurcation, ¶ 54.
[318] Response to Request for Bifurcation, ¶¶ 54-55.
[319] Response to Request for Bifurcation, ¶ 56.
[320] Response to Request for Bifurcation, ¶ 56 (quoting Decision on Rule 41(5) Objection, ¶ 170).
[321] *See* Decision on Rule 41(5) Objection, ¶ 170.

issues, none of which are before the Tribunal. As the Tribunal also noted in its prior decision, "States have the power to create [such a system] if they so wish," but the fact remains that they have not done so in either instrument relevant to this case. Specifically, "neither the ICSID system as presently designed, nor the ECT itself, incorporate clear avenues (much less a requirement)" for such joinder or consolidation.[322]

263. In these circumstances, the issue is not whether Eskosol's claims present certain overlapping issues of law or fact with those previously presented by Blusun. Rather, the question is whether, in circumstances where Eskosol *otherwise would be permitted* to bring an ECT claim on its own behalf pursuant to ECT Article 26(7), it *should be precluded from doing so* simply because Blusun previously invoked different articles of the ECT to bring its own claims.[323] The Tribunal considered this question preliminarily in its Decision on Rule 41(5) Objection, and does so again now with the benefit of the Parties' additional briefing. In the end, however, its conclusion remains the same.

264. First, whether viewed through the lens of *res judicata,* related preclusion doctrines like collateral estoppel, or abuse of process, the fact remains that Eskosol and Blusun are not the same party, either formally or in essence. In both *RSM* and *Orascom*, tribunals were presented with situations where a local company was wholly owned by ultimate beneficial owner(s) who maneuvered to bring duplicative proceedings. In *RSM*, a corporate claimant sued first, and after losing the case it sued a second time, this time joined by the three shareholders who collectively owned 100% of RSM. The tribunal found that because the three shareholders had entire control over RSM, they effectively had acted in concert with it and had their interests represented in the first proceeding, and therefore could not proceed with the second one.[324] In

[322] Decision on Rule 41(5) Objection, ¶ 170.

[323] *See* Decision on Rule 41(5) Objection, ¶ 166 (noting that "[t]he ECT authorizes a variety of entities to proceed as qualified 'Investor[s]' under its terms," including both foreign investors who can bring claims under Article 26(1) relating to investments that they "own[] or control[] directly or indirectly," and local companies who are permitted to bring claims in their own name provided they meet the foreign control requirements of Article 26(7); "Italy itself admits that in principle, both Blusun and Eskosol could be legitimate investors under the ECT.").

[324] *RSM Production Corp. and others v. Grenada*, ICSD Case No. ARB/10/6, Award, 1 September 2010, RL-4, ¶¶ 7.1.5-7.1.6. In its Decision on Rule 41(5) Objection, the Tribunal expressed the view that "the same conclusion [as in *RSM*] would be equally logical in the reverse situation, if a first case were brought by the 100% shareholders of a local company and thereafter a second case was attempted by the local company that they wholly owned." Decision on Rule 41(5) Objection, ¶ 167.

Orascom, which involved a vertical chain of companies each ultimately owned 100% by the same individual, "the Claimant first caused one of its subsidiaries, OTH, to bring claims against Algeria. Then, it caused a different subsidiary in the chain, Weather Investments, to threaten to bring a different arbitration in relation to the same dispute. Finally … it pursued yet another investment treaty proceeding in its own name for the same investment … in relation to the same host state measures and the same harm." The Tribunal found this to be "an abuse of the system of investment protection."[325]

265. In this case, by contrast, Eskosol is not wholly owned by Blusun, and there are no facts suggesting the exercise by Blusun of some hidden hand in order to cause a second claim to be brought on its behalf. As anomalous as the situation may be, it is apparent not only that Blusun proceeded in its case without joining Eskosol as a formal party to the proceedings, "as controlling shareholders often have the power to do by following the corporate formalities necessary to obtain approval to sue on a company's behalf,"[326] but also that Blusun actively resisted any input or participation by Eskosol, when the latter sought to join the Blusun proceedings or to be heard in them as a non-party. It is also apparent that the current proceedings did not come about as a result of some deliberate maneuvering by Blusun in order to have a proverbial "second bite at the apple." Indeed, Eskosol did not present either of Blusun's owners (Mr. Lecorcier and Mr. Stein) as fact witnesses on its behalf, nor did they attend any of the Hearings as its party representatives. There was fact testimony from Eskosol's witness Mr. Scognamiglio (one of Eskosol's two minority shareholders) about a falling out between the erstwhile partners, such that "Mr. Lecorcier, at the end of 2011, stopped talking to me."[327]

266. The fact that the minority shareholders in Eskosol are Italian nationals, who would not have been qualified to pursue a proceeding in their own names, does not affect the analysis. Where an international treaty authorizes a claim to be brought by a local company, that company speaks for itself, and not as a vehicle only for the interests of whichever shareholders might have sued on their own behalf on the basis of their qualifying nationality. Similarly, the local

[325] *Orascom*, RL-57, ¶ 545.
[326] Decision on Rule 41(5) Objection, ¶ 168.
[327] Tr. Day 1 [Scognamiglio] 210:24-25.

company may seek redress for 100% of the losses it allegedly suffered from the challenged State measures, and not simply for some prorated portion of those losses reflecting the percentage of its shares that are owned by qualifying foreign nationals. If the company is successful in proving both liability and damages, the end result may well be some eventual indirect benefit to its shareholders (including both the qualified foreign shareholders and other shareholders of non-qualifying nationalities), but that does not follow automatically as a matter of economic analysis, since – depending on the company's circumstances – there may be others (such as creditors) who hold priority claims ahead of any shareholder distribution. In any event, the ultimate distribution of any recovery by a local company has no impact on the company's right under the ECT to bring a claim on its own behalf for the full extent of its losses, even if some of its shareholders may be nationals of the host State or of third countries who could not have brought ECT claims on their own behalves.

267. Finally, the Tribunal acknowledges that if any damages Eskosol recovered were sufficient to allow for distribution to shareholders after resolving priority debt obligations, Blusun itself could benefit indirectly from Eskosol's recovery, despite previously failing in its direct claim against Italy.[328] The Tribunal accepts the awkwardness of this outcome, but it is one that arises mainly because of the odd circumstances of this case, where a majority shareholder and the company in which it holds shares did not have aligned interests and did not coordinate their respective litigations, but rather acted in various respects at cross-purposes with one another. The Tribunal is confident that this situation does not arise regularly. However, the possibility of an awkward outcome in an anomalous case, that could result in some indirect benefit to a *prior litigant* who lost a prior case, is not a reason in principle to strip a *current litigant* of a right to arbitration that the ECT expressly grants it, to pursue claims on its own behalf.

268. Italy's objections to jurisdiction and admissibility are therefore denied.

[328] Since Blusun failed in its direct claim against Italy, this would not present any risk of double-recovery. The Tribunal agrees with *Orascom* that tribunals should always remain alert to prevent such an outcome, to ensure that once "the harm incurred by one entity in the chain is fully repaired in one arbitration," the other companies in the vertical chain not be permitted "to recover the same economic loss under any circumstances." *Orascom*, RL-57, ¶ 495.

VII. LIABILITY

269. Eskosol contends that the measures Italy adopted breached its obligations under Articles 10(1) and 13 of the ECT, in particular with respect to the fair and equitable treatment ("FET") standard, the umbrella clause, the obligation to provide full protection to Eskosol's investment, the prohibition on unreasonable or discriminatory measures, and the restrictions on expropriation.[329]

270. Italy rejects Eskosol's claims as unfounded both in fact and in law.[330] By way of introduction applicable to all of Eskosol's claims, Italy argues that Eskosol never even reached a point at which it might complain about changes in Italy's incentives schemes, because any investments Eskosol made were "preparatory and, necessarily, separate from the investments to which the incentive schemes apply."[331] Eskosol "had *some* investments in Italy, but never was or ever put itself close to concretely be an energy producer, let alone one who could actually benefit from the benefit schemes."[332] As such, Italy considers that while Eskosol might qualify as "a promoter" in the photovoltaic industry, it should not be confused with an ongoing energy-producing concern,[333] a distinction that Italy considers fatal at the threshold to each of Eskosol's claims.

271. The Parties' arguments with respect to these issues are addressed in turn below, with particular emphasis on the FET claim, to which they devoted most of their attention in the submissions. First, however, the Tribunal summarizes the Parties' positions on the relevance or lack of relevance of the *Blusun* award to the liability issues this Tribunal must decide, a point that the Parties have each addressed.

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[329] Memorial, ¶ 247.

[330] Counter-Memorial, ¶¶ 226-230.

[331] Counter-Memorial, ¶ 231.

[332] Counter-Memorial, ¶ 231.

[333] Counter-Memorial, ¶ 232.

A. RELEVANCE OF THE *BLUSUN* AWARD TO LIABILITY ISSUES

1. Eskosol's Position

272. Eskosol contends that the Tribunal should not be influenced by the outcome in the *Blusun* case (where all claims against Italy were rejected on the merits), since Blusun and Eskosol are not identical and do not share the same interest.[334]

273. Eskosol also observes that the claims in the two arbitrations are not identical. In its view, Blusun based its case on a number of events in addition to the Romani Decree and Conto Energia IV, and Blusun's position was that Italy had never created in the first place a stable and predictable investment climate for solar energy, which allegedly prevented financing for the project to be obtained. By contrast, Eskosol's claim is that it decided to invest in Italy in part on the basis of the stability and consistency of Italy's laws,[335] and that by adopting the Romani Decree and Conto Energia IV, Italy suddenly and drastically changed the energy laws on which Eskosol had relied to make its investment.

274. Eskosol further argues that the two cases do not concern the same losses or even the same asserted infringements of the ECT. Eskosol's losses constitute 100% of the losses arising from the challenged measures, whereas Blusun claimed only for its reflective losses deriving from its shareholding interest in Eskosol.[336] Moreover, while the *Blusun* tribunal determined that the economic impact of the reduction in FiTs under Conto Energia IV was 13%, Eskosol contends that the impact was "at least 31%, if not more." Eskosol also argues that the *Blusun* tribunal failed to give due consideration to the Romani Decree, for example by failing to appreciate the invalidity of the overcapacity arguments on which that Decree was based, and by failing to appreciate that the Decree eliminated the grace period included in Conto Energia III, which increased the overall risk of the Eskosol Project.[337]

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[334] Reply, ¶ 175.
[335] Reply, ¶ 176.
[336] Reply, ¶ 177.
[337] Reply, ¶ 177.

2. Italy's Position

275. Italy states that the *Blusun* award gives a direct answer to Eskosol's arguments:

> - Eskosol affirms that, but for the contested measures, the Project would have been realized and would have obtained incentives. The Blusun award clearly states that "(…) the Project ran a significant risk of incurring legal and administrative difficulties, even if these could be (and in the event largely were) overcome. Its success was by no means certain." (§386)
>
> - In particular, the Claimant states that the suspension of the Siemens EPC was due to the Romani Decree. The *Blusun* award responds that "on 28 February 2011, Eskosol failed to make the 20% down payment for the first tranche of panels and on 7 March 2011, Siemens suspended performance of the EPC contract, which was never reinstated (…). Eskosol's failure to pay *predated* the Romani Decree of 3 March 2011." (§390)
>
> - Moreover, according to Eskosol the contested measures would have been the cause for the Project not being financed, and there would be no possible alternative reasons for the Project to fail aside the adoption of the Romani Decree and the entry into force of Conto Energia IV. The *Blusun* award rejects such claim stating that "no commitments of project financing were, however, obtained *at this* [the time of the Romani Decree] or any time" (§100), and that "of far greater weight [to make the Project fail] was the continued dependence on project financing, and the failure to obtain it was due both to the size of the Project and to justified concerns about the scope of DIA authorisation, on which the legality of the Project depended." (§394).
>
> - On the other side, according to the Claimant, the *Conto Energia III* would have generated legitimate expectations. The *Blusun* tribunal rejects such assertion and declares that any already marginal expectations that the decree could create would be "even less powerful because European law had already lowered them: it was clear that the incentives offered were subject to modification in light, inter alia, of changing costs and improved technology" (§371).[338]

276. Italy also relies on the following findings in *Blusun* regarding the legitimacy of the Romani Decree:

> (a) The reduction in FITs was quite substantial, but was not in itself crippling or disabling. Moreover, it was a response to a genuine fiscal need, given the large take-up under the earlier Energy Accounts.
>
> (b) The reduction in incentives was proportionately less than the reduction in the cost of photovoltaic technology during 2010, and left Italian subsidy levels higher than those in Germany, France and Spain.
>
> (c) The principle of guaranteed tariffs for a 20-year period was maintained.

[338] Resp. PHB, ¶ 120 (quoting *Blusun,* RL-56, ¶¶ 371, 386, 390, 394).

> (d) So too was the criterion for qualification for FITs, viz., connection to the grid.
>
> (e) The grace period for grid connection to preserve the preexisting tariff level, viz., 12 months, was reasonable.
>
> (f) The Fourth Energy Account, applying to photovoltaic plants connected to the grid between 1 June 2011 and 31 December 2016, made some allowance for projects that could not meet the cut-off of 12 months.
>
> (g) Leaving aside questions of administration (dealt with below), the provision for a register of large plants eligible for feed-in tariffs contributed to legal security.
>
> (h) The limits on the use of agricultural land were motivated by valid rural planning concerns, although their specific impact on the Puglia Project is a matter to which the Tribunal will return (see paragraphs 403-408). For these reasons the Tribunal concludes that the Romani Decree and the Fourth Energy Account, taken overall, were not disproportionate, did not violate specific commitments made to the promotors of PV plants, and did not breach Article 10(1), first sentence, of the ECT.[339]

277. Italy sees this analysis as "objective and articulate," listing "several concurring reasons why the regulatory change, far from amounting to unfair or inequitable treatment, was a balanced and carefully designed measure."[340]

3. Tribunal's Analysis

278. The Tribunal notes the Parties' respective arguments about the similarities and differences between this case and the *Blusun* case, but sees no threshold issue, in reality, for it to decide. Italy does not contend that the *Blusun* findings are binding on this Tribunal; to the contrary, it expressly disclaims any argument on the merits that "the *Blusun* award has any binding force or superior authority."[341] Italy's argument is simply that the award "offers a compelling analysis of the legal issue at stake,"[342] an assessment with which Eskosol disagrees. The Parties thus implicitly concur that the Tribunal should take the *Blusun* award into consideration only to the extent it finds the reasoning of that case to be persuasive, a proposition that is no different than the way in which the Tribunal evaluates any other jurisprudence to which its attention has been drawn. In any event, and for the avoidance of

[339] *Blusun,* RL-56, ¶¶ 342-343; Resp. PHB, ¶ 120.

[340] Counter-Memorial, ¶ 351.

[341] Counter-Memorial, ¶ 263.

[342] Counter-Memorial, ¶ 263.

doubt, the Tribunal emphasizes that it resolves the pending issues in this claim based on its own independent analysis, and not on the basis of the decisions of other tribunals.

B. Fair and Equitable Treatment

1. Eskosol's Position

279. Invoking a "broad" or "flexible" conception of the fair and equitable treatment standard,[343] Eskosol contends that the measures Italy adopted breached the standard in six respects. In its view, Italy (i) violated Eskosol's legitimate expectations, (ii) failed to provide a stable and predictable framework for its investments, (iii) did not act transparently, (iv) behaved inconsistently, (e) acted arbitrarily and unreasonably, and (v) adopted disproportionate measures.

a. Italy's violation of Eskosol's legitimate expectations

280. Eskosol contends that the fair and equitable treatment obligation of Article 10(1) of the ECT includes the obligation not to frustrate investors' legitimate expectations.[344] Those "legitimate expectations [can arise] from representations and guarantees provided by the host state, including in its legislation and regulations."[345] In Eskosol's view, these guarantees give rise to the obligation not to frustrate legitimate expectations especially when the State "deliberately and actively [seeks] to create those expectations."[346]

281. Eskosol relies on scholarly works by Professor Dolzer to the effect that:

> The preinvestment legal order forms the framework for the positive reach of the expectation which will be protected and also the scope of considerations upon which

[343] Memorial, ¶ 250.

[344] Memorial, ¶ 252 (citing *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, CL-107 ("*Enron*"), ¶ 262).

[345] Memorial, ¶¶ 252-253 (citing *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, CL-56 ("*Saluka*"), ¶¶ 301-302; and *Técnicas Medioambientales TECMED SA v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, CL-108/RL-80 ("*Tecmed"*), ¶ 154).

[346] Memorial, ¶ 262 (citing *Suez, InterAguas Servicios Integrales del Agua S.A., Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, CL-110 ("*Suez* Decision on Liability"), ¶ 208).

the host state is entitled to rely when it defends against subsequent claims of the foreign investor.[347]

282. Eskosol also relies on a series of arbitral awards.[348] In Eskosol's view, it was on the basis of host State laws and regulations that the *LG&E* tribunal, for example, held that Argentina frustrated the investor's legitimate expectations, as the claimants' investment was made in reliance on a law that provided a certain regulatory framework, including a long-term tariff regime, and Argentina subsequently passed a law that modified the applicable legal framework and completely altered the economics underpinning LG&E's investments.[349] Eskosol grounds its proposition also on the decisions rendered in *Enron*, *Suez* and *Micula*.[350] It further contends that it is well established under international law that statements or conduct of Government officials or state organs, including through legislation, give rise to obligations.[351]

283. Eskosol argues that it had the legitimate expectation that Italy would respect commitments previously made through the Conto Energia system, including, *inter alia*: (i) to grant investors until May 2012 to secure a right to the stabilized incentivizing tariffs provided under Conto Energia III; and (ii) to continue offering the Conto Energia III tariff levels until the end of 2013.[352] Eskosol notes that Legislative Decree No. 387 of 29 December 2003 envisaged the adoption of laws and regulations for a tariff program to promote investment in the PV sector, and that through Conto Energia I, II and III, Italy provided the right to incentivizing tariffs for 20 years, while Conto Energia II and III set out timeframes for access and the specific tariff

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[347] Memorial, ¶ 254 (citing Rudolf Dolzer, "Fair and Equitable Treatment: A Key Standard in Investment Treaties" (2005), 39 The International Lawyer, CL-105, 87 at 103); *see also* Memorial, ¶¶ 260-261 (citing Rudolf Dolzer & Christoph Schreuer, *Standards of Protection* in *Principles of International Investment Law*, CL-111, pp. 145-146; and Rudolf Dolzer, *Fair and Equitable Treatment: Today's Contours*, *Santa Clara Journal of International Law*, 2014, CL-112, pp. 7, 25).

[348] *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, CL-109 ("*LG&E*"), ¶¶ 132-139; *Saluka*, CL-56, ¶¶ 301 and 302.

[349] Memorial, ¶¶ 255-257 (citations omitted).

[350] Memorial, ¶¶ 257, 258, 263-264 (citing *Enron*, CL-107, ¶¶ 264-265; *Suez* Decision on Liability, CL-110, ¶ 80; *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Final Award, 11 December 2013, CL-113 ("*Micula*"), ¶¶ 145, 669-671.

[351] Memorial, ¶ 265 (citing W. Michael Reisman & Mahnoush H. Arsanjani, *The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes*, 19 ICSID REV. 328, 336 (2004), CL-114).

[352] Memorial, ¶ 267; Reply, ¶ 121.

to which owners of PV power plants would be entitled.[353] Eskosol says that this clarity and advance commitment were necessary for investors to secure project finance, and notes that Conto Energia II stated a purpose of providing "a simplified, stable and durable scheme of access to the incentives."[354]

284. In addition, Eskosol argues that a crucial feature of both Conto Energia II and Conto Energia III was their 14-month grace periods (which Eskosol refers to as "sunset" provisions),[355] which were triggered after a certain level of incentivized energy had been reached.[356] This, in its view, was intended to ensure that investors with ongoing projects would have a reasonable amount of time to complete their power plants to secure the incentivized tariffs.[357] In practice, Eskosol contends, this meant that it had a legitimate expectation that it would have until at least May 2012 to secure a right to the incentivizing tariff. Eskosol argues that this was the basis for its acquisition of the SPVs in 2010, and that it would have not acquired the SPVs in the absence of this legitimate expectation.[358]

285. Eskosol states that its expectation arose not only from Conto Energias II and III but also from express representations from Government officials in 2010, made both generally to the public,[359] and specifically to Eskosol through Mr. Scognamiglio and Eskosol's lawyers, directors and shareholders.[360]

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[353] Memorial, ¶¶ 269-271; *see also* Conto Energia I, CL-96, Art. 6(3); Conto Energia II, CL-98, Art. 6; Conto Energia III, CL-99, Art. 8; Reply, ¶ 121.

[354] Memorial, ¶ 270.

[355] Eskosol's witnesses by contrast use the phrase "grace period," while explaining that "Eskosol's lawyers in this arbitration refer to the grace period provision as a 'sunset' clause." Magli I, ¶ 13 & n. 5; Scognamiglio I, ¶ 11 ("grace period").

[356] Reply, ¶ 124.

[357] Memorial, ¶ 271.

[358] Memorial, ¶¶ 272, 274, 277.

[359] Memorial, ¶¶ 278-282 (quoting in particular the statement that "The Government's strategy on energy envisages a stable system of incentives that will lead to an increase in energy production from renewable sources," in *Future of renewable energy in Italy*, luxenergia.net, 21 January 2010, C-25, and also citing Agenzia Giornalistica Italia, *Energy: Saglia, New Guidelines on Conto Energia Arriving* in National Press Review of the 2010 Italian PV Summit at 3, C-27; *New Conto Energia: expected news and GSE's point of view*, Enernew.it, 12 May 2010, C-28; and Press Release of the Ministry of Economic Development, *Conto Energia and Guidelines approved. Saglia: "A step forward in renewable energy strategy,"* Eco della Città, 12 July 2010, C-31); *see also* Reply, ¶ 124; Cl. PHB, ¶ 171.

[360] Scognamiglio I, ¶ 24; Letter from the GSE to Watson, Farley & Williams, 3 December 2010, C-35, stating that GSE "believe that it is possible to secure access to the incentives set forth in the so-called Conto Energia, pursuant to the applicable provisions of law"; *see also* Reply, ¶ 124.

286. Eskosol contends that it was reasonable for it to rely on Italy's representations, given that the Government had previously fulfilled its promises in application of Conto Energia I and II.[361] In Eskosol's view, "Italy knew what it was doing – it acted to induce investment by providing an attractive, stable regulatory regime – and it cannot now seriously contend that the regulatory environment was uncertain such that Eskosol invested tens of millions of euros in the hope that the roulette wheel would land on red or on a stray, odd number."[362]

287. However, beginning in early 2011, Italy started pulling back on its position in several public statements.[363] Then, on 3 March 2011, Italy adopted the Romani Decree, which according to Eskosol, prematurely repealed the incentivizing tariffs under Conto Energia III,[364] by eliminating the sunset provision and giving PV plant owners just two months to connect to the main electricity grid to secure the right to the incentivizing tariffs set out in Conto Energia III.[365] This was not enough time for Eskosol to complete its project.

288. Eskosol argues that the enactment of Conto Energia IV in May 2011 further aggravated its position, as this did not provide the security ensured by the previous three Conto Energia. In particular, it did not contain a sunset provision and the incentivizing tariffs were remarkably reduced from Conto Energia III levels.[366] Indeed, Eskosol argues that:

> it is misleading for Italy to suggest that [the natural progression between Conto Energia II and III] can be compared to what occurred with CE III, when it was suddenly replaced 2.5 years before schedule with CE IV. That was not an expected natural progression. On the contrary, the Romani Decree and CE IV expressly violated the terms of CE III.
>
> For example, CE III was designed to last three years 2011, 2012 and 2013, as made clear by Article 8.2, but the Romani Decree cut CE III short by 2.5 years. Under CE III, Italy promised to grant 3,000 MWs worth of FiTs, but the witness evidenced confirmed that CE III was cut off when approximately 1,600 MW had been granted. Thus, for the first time ever a Conto Energia had been terminated before schedule and without the ceiling on FiTs even being reached. In addition, CE III assured that if the ceiling was reached investors would have another 14 months to receive FiTs if

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[361] Memorial, ¶¶ 277, 283.

[362] Reply, ¶ 125; *see also id.,* ¶¶ 126-128, rejecting Italy's reliance on *Philip Morris SARL v. Oriental Republic of Uruguay,* ICSID Case No. ARB/10/7, Award, 8 July 2016, RL-66 ("*Philip Morris*")).

[363] Memorial, ¶¶ 284-288.

[364] Memorial, ¶ 285.

[365] Memorial, ¶ 285.

[366] Memorial, ¶ 286.

> their plants entered into operation by then. The sunset provision of CE III provisions was thrown out by the Romani Decree entirely. This just makes clear that the Romani Decree cut short CE III in an unprecedented manner in violation of the express assurances that investors such as Eskosol had been given in CE III itself.[367]

289. Eskosol notes that the importance of the sunset provision in this arbitration is twofold: (i) first, it made Eskosol's reliance on Conto Energia III "not only reasonable, but beyond question. … With the assurance of a sunset clause of 14 months, Eskosol clearly knew that it had sufficient time to complete its project";[368] (ii) second, it is also significant for its absence in Conto Energia IV, which "fundamentally changed the assurances previously relied upon by Eskosol. Now Eskosol had to face the risk that the new ceilings imposed under CE IV could be reached quickly; and if they were it faced the risk that it would receive zero FiTs. Of course, Eskosol could never find a bank to lend its [sic] hundreds of millions of project finance funds, the repayment of which depend on the stability of FiTs on this basis."[369] Eskosol clarifies that its case rests not just on the elimination of the sunset clause but on the combined impact of the Romani Decree and Conto Energia IV.[370]

290. Eskosol also argues that the Romani Decree arbitrarily targeted agricultural projects by restricting incentive tariff eligibility under the future Conto Energia IV to PV plants which, if they were placed on agricultural land, occupied no more than 10% of the available agricultural parcel.[371]

291. Eskosol rejects Italy's argument that investors should have known that its regulations would be subject to change. In its view, the tariff structure of the Conto Energia schemes already contained a periodic, gradual decrease to reflect the anticipated reduction in costs of PV technology. By contrast, the Romani Decree was not gradual, the reduction from Conto Energia III to Conto Energia IV was unexpected and substantial, and the 10% rule on agricultural land was a surprise that unfairly affected Eskosol.[372]

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[367] Cl. PHB, ¶¶ 145-146.

[368] Cl. PHB, ¶¶ 148-149.

[369] Cl. PHB, ¶ 150.

[370] Cl. PHB, ¶ 150.

[371] Reply, ¶ 156.

[372] Reply, ¶ 131; *see also id.,* ¶ 133 (rejecting Italy's reliance on *Isolux Infrastructure Netherlands B.V. v. Kingdom of Spain*, SCC V2013/153, 17 July 2016, RL-60 ("*Isolux*")).

292. Eskosol states that the Romani Decree betrayed the very purpose of the Renewables Directive and was for that reason heavily criticized by the European Union.[373] In its view, contrary to Italy's position, the Romani Decree and Conto Energia IV were not passed to safeguard the public interest, for the following reasons: (i) the GSE's comments of 25 January 2011 on the Draft Romani Decree were based on wrong figures;[374] (ii) the Romani Decree levels did not correspond to any Renewables Directive target;[375] (iii) Italy's own actions demonstrate that there was no risk of creating a flooded market or otherwise introducing a problem for taxpayers;[376] (iv) the European authorities themselves criticized the Romani Decree as it would make it impossible for Italy to reach its 2020 target;[377] and (v) Italy submitted no evidence that the change in policy was due to public interest concerns, as it failed to produce any documents demonstrating that the Romani Decree was accompanied or motivated by any particular process or concern.[378]

293. Eskosol contends that the combined effect of these measures was that its project became economically unviable, leading to the complete loss of Eskosol's investment in Italy.[379]

i. Causal link

294. Eskosol rejects Italy's defense that there is no causal link between the measures and the demise of Eskosol's Project,[380] as well as Italy's reliance on *Plama* with respect to the non-responsibility of States for the consequences of normal business risk.[381]

295. In Eskosol's view, the Parties agree that the standard for causation is "proximate reason," namely that the losses are the "normal, foreseeable or proximate consequences of the unlawful conduct."[382] Relying on *Inmaris*, *Lemire* and *BG Group*, Eskosol argues that this is a well-

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[373] Memorial, ¶ 287.
[374] Reply, ¶ 139.
[375] Reply, ¶¶ 140-142.
[376] Reply, ¶ 143.
[377] Reply, ¶¶ 144-145.
[378] Reply, ¶¶ 147-152; Reply, n. 291.
[379] Memorial, ¶ 288.
[380] Reply, ¶¶ 68-107.
[381] *See Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, CL-119 ("*Plama*"), ¶ 130.
[382] Reply, ¶ 101.

established standard.[383] As a result, Eskosol argues, all it has to show is that the measures caused the harm incurred, not that they were the sole cause.[384] Eskosol relies on *CME* to the effect that "causation arises if the damage or disadvantage deriving from the deprivation of the legal safety of the investment is foreseeable and occurs in a normal sequence of events."[385] It notes that "Italy foresaw the gravity of the damages that investors in the solar PV sector would incur especially during the period leading up to the enactment of the Romani Decree, where there was much debate about the consequences of its enactment."[386]

296. Eskosol rejects Italy's allegation that the project failed because it was "plagued by undue business risk."[387] According to Eskosol, the fact that it was seeking 80% financing is of no consequence, as this debt-to-equity ratio is standard for these types of PV projects. Moreover, Eskosol invested €41.8 million of its own capital to this project and was planning to invest another €80 million. It also rejects Italy's allegation that Eskosol suffered from financial difficulties before the Romani Decree appeared, for which Italy relies only on the fact that the first payment to Siemens was not made. Eskosol notes that Professor Delfanti withdrew this point at the Hearing, and agreed that this payment was not missed but rather postponed, by agreement of Siemens and Eskosol, to 28 February 2011. Eskosol says that "by the time that payment was due on 28 February 2011, Italy's Conto Energia system was already starting to collapse."[388] Moreover, Eskosol notes that Unicredit "had a vested interest in completing these negotiations as it already had furnished a €6.1 million loan agreement to SIB to construct the substations, the payment back of which depended on the success of the Eskosol Project."[389]

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[383] Reply, ¶¶ 102-105 (citing *Inmaris Perestroika Sailing Maritime Services v. Ukraine*, ICSID Case No. ARB/08/8, Award, 1 March 2012, CL-151, ¶¶ 381-382; *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 28 March 2011, CL-152, ¶¶ 123, 135, 158, 451; and *BG Group Plc v. The Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007, CL-154, ¶ 428).

[384] Reply, ¶ 107; Cl. PHB, ¶ 153.

[385] Cl. PHB, ¶ 152 (citing *CME,* CL-142, ¶ 527).

[386] Cl. PHB, ¶ 152.

[387] Reply, ¶ 100.

[388] Cl. PHB, ¶ 134.

[389] Cl. PHB, ¶ 6.

297. Rather, what caused the project to fail, in Eskosol's view, was the "unfair and unanticipated increase in regulatory risk that Italy suddenly created when it altered the criteria for qualifying for FiTs just as Eskosol was securing financing."[390] In support of this proposition, Eskosol cites Mr. Stein's witness statement in the *Blusun* case, where he referred to a number of letters received between March and May 2011 from different financial institutions that declined to finance the project due to regulatory uncertainty.[391] Indeed, Eskosol notes that "until 12 May 2011, when CE IV appeared, the new FiTs were not even known."[392] It also refers to certain public statements made by Italian members of Parliament and the EU.[393]

298. Eskosol says that the project was not viable under Conto Energia IV. It recalls that, in order to qualify for these incentives, it not only would have had to register the plants by 30 June 2011 (which it did), but also to complete construction of the plants by 28 March 2012, as a result of the Romani Decree's 10% rule for plants built on agricultural land.[394] At the same time, Eskosol argues, financing to complete the construction was unavailable for several reasons. Among these reasons is that under Conto Energia IV, the Eskosol Project faced a drastic reduction in profitability (of at least 31%) relative to Conto Energia III. According to Eskosol's experts, the Equity IRR of the project would have been reduced from 21.1% under Conto Energia III to 8.9% under Conto Energia IV, even on a *ceteris paribus* basis, *i.e.,* without taking into account the regulatory uncertainty generated by the Romani Decree.[395]

299. Eskosol further argues that Conto Energia IV included a "maximum payment mechanism" and eliminated the 14-month sunset period that had existed under Conto Energia III, which undermined the bankability and feasibility of the project.[396]

300. Eskosol says that Italy "offers no evidence to substantiate its claim [that] other entrepreneurs were facing similar circumstances as Eskosol" or that Eskosol still should have been able to

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[390] Reply, ¶ 100.
[391] Reply, ¶ 71 (citing Mr. Stein's First Witness Statement in the *Blusun* proceedings, R-49, ¶ 130); Cl. PHB, ¶ 134.
[392] Cl. PHB, ¶ 154.
[393] Reply, ¶¶ 75-77.
[394] Reply, ¶ 79.
[395] Reply, ¶ 80.
[396] Reply, ¶ 82 (citing Stickel/Longhi, ¶¶ 78-83).

succeed under Conto Energia IV.[397] It challenges Italy's reliance on tables showing: (i) how much capacity was generated in total by plants of all sizes operating under each Conto Energia scheme, I, II, III, IV and V (R-38); and (ii) identifying only the quantity of energy generated under Conto Energia II by plants of different sizes located in various regions (R-39).[398] Eskosol also challenges certain data Italy provided on the bases that it was specifically generated for this arbitration, and that Italy failed to indicate the sources used to compile the data or produce the underlying material.[399]

301. In particular, Eskosol challenges Italy's reliance on pages 8-11 of R-40, arguing that it does not show that Eskosol could have been profitable because "the plant clusters discussed therein are not in any way comparable to Eskosol."[400] Eskosol argues as follows:

> it is not clear whether the plants comprising the Blasi and Casignano clusters were owned and operated by one entity. By contrast, Eskosol owned and operated 120 plants. The construction of 120 solar plants is not the same as building and financing a *single* solar plant, especially considering that none of the 120 plants in the project could be connected to the national grid without financing the required connection works, including the substations.
>
> Further, none of the Blasi and Casignano plants was apparently responsible for building the substations or the connection rings. Instead, an entity called Energia Uno financed and oversaw the construction of the connection works. This document does not explain who Energia Uno is, what financial arrangement it had with each of the 71 individual plants it helped to connect, or how it obtained the financing to construct the substations and build the grid that connected the individual plants to one another.[401]

302. Additionally, Eskosol argues that it could not have met the agricultural requirements imposed by the Romani Decree. Eskosol's business plan was for each of the projected 120 power plants to occupy 50% of the land on which they were based. This could not be altered, and the project could not be constructed in time to meet the exception provided for by the Romani Decree,

[397] Reply, ¶ 84.
[398] Reply, ¶ 84.
[399] Reply, ¶ 85.
[400] Reply, ¶ 86.
[401] Reply, ¶¶ 86-87; *see also* Cl. PHB, ¶¶ 159-161.

i.e., by the 28 March 2012 deadline, because Italy's actions made arranging financing for that construction impossible.[402]

303. In that regard, Eskosol takes issue with the requirement under Conto Energia IV to register all plants entering into operation after 31 August 2011 on a national register administered by the GSE as a precondition to receive the incentivizing tariffs. Eskosol registered the plants "to mitigate its damages" but "the approval process was lengthy and riddled with problems."[403] The list published by the GSE on 15 July 2011 included 115 of Eskosol's 120 plants, but this list was not final. There were two other lists, one on 12 August and the final one on 16 September 2011, which included 113 of Eskosol's plants. In Eskosol's view, "[n]o investor would agree to finance the Eskosol project before or during the time that GSE continued to finalize its list of plants eligible to receive incentives," and "[s]ix months was not enough time" after the list was finalized to complete construction.[404]

304. Eskosol also mentions that, in October 2011, Messrs. Scognamiglio and Sisto "approached local subcontractors to build and connect 60 power plants in exchange for payments after the plants were connected to the grid," but "no subcontractor would agree to build the 60 plants given the uncertainty in the solar market created by Italy's actions."[405] One month later, they tried to build 27 plants "with the aim of selling them to satisfy Eskosol's debts," but they received little interest from lenders.[406] A final attempt to build two plants also failed because the Italian authorities "inappropriately interfered with their construction attempt, and a stop work order was issued. By the time the court order had sorted out this issue, ruling in Blusun's favour in early March, it was too late to meet the 28 March 2012 deadline."[407]

305. Regarding Italy's contention that Eskosol could have proceeded with a scaled down Project even under Conto Energia IV – as allegedly demonstrated by funding offers Eskosol received

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[402] Reply, ¶ 88; Cl. PHB, ¶¶ 154, 157-158 (relying on Professor Delfanti's testimony).
[403] Reply, ¶ 90.
[404] Reply, ¶ 91.
[405] Reply, ¶ 92.
[406] Reply, ¶ 92.
[407] Reply, ¶ 92.

but turned down[408] – Eskosol replies that "the evidence Italy cites in support of its claim does not demonstrate that any such offers were concrete, let alone viable."[409] Eskosol points out that a letter from Engyco on which Italy in part relies did not indicate either how many plants it wished to purchase or an actual offer amount. Regarding another letter from Elyseum, Eskosol notes that this "does not contain the amount of the specific offer or any other specific terms," and was subject to conditions that made it unacceptable.[410]

ii. Eskosol's failure to qualify for the FiT incentives

306. Eskosol relies on a series of legal authorities to further argue that:

> the Treaty does not protect only the legitimate expectations of investors whose investments have been fully realized and/or who are already receiving benefits to which they claim to be entitled; instead, the legitimate expectations of the investor are tied to and inextricably linked to the moment that the investor makes an investment.[411]

307. In its view, Eskosol's legitimate expectations were based on the stability of the regulatory framework governing the solar PV sector in Italy, on which it relied. It had a legitimate expectation that it would have access to and be able to benefit from the FiTs under Conto Energia III for its full term. The fact that Italy terminated Conto Energia III before Eskosol's investment was fully realized does not mean that Eskosol lost its Treaty protections and can no longer assert a claim based on its legitimate expectations.[412] Moreover, Italy cannot claim that because Eskosol's plants never entered into operation there was no existing investment at the time Conto Energia III was terminated. There is no dispute that Eskosol had a protected investment under Articles 1(7) and 1(6) of the ECT.[413]

308. Eskosol also cites authorities to the effect that its investment must be viewed holistically, especially because "many of the investment's early stages, including obtaining the permits

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[408] Counter-Memorial, ¶ 217.

[409] Reply, ¶ 94.

[410] Reply, ¶ 95.

[411] Reply, ¶ 112 (citing *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, RL-78; *Enron*, CL-107; *LG&E*, CL-109; *Waste Management v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, CL-155; *Tecmed,* CL-108/RL-80).

[412] Reply, ¶ 113.

[413] Reply, ¶ 114.

and the connections were ‘a technical precondition for the implementation of the’ later construction works, ‘and thus had to precede it’.”[414]

b. Italy’s failure to provide a stable and predictable legal framework

309. Relying on the preamble of the ECT as well as on investment arbitration jurisprudence[415] and scholarly works,[416] Eskosol contends that the fair and equitable treatment obligation of Article 10(1) of the ECT also includes the obligation to provide a reasonably stable and predictable legal and business framework. More specifically, Eskosol argues that host States should refrain from changing regulation or policy that would adversely and substantially affect investors’ rights stemming from commitments made by the State through its laws.[417]

310. Eskosol contends that Italy had traditionally provided a stable legal and regulatory framework, and that Eskosol was positioned through its efforts and investments to secure the right to the incentivizing tariffs provided in Conto Energia III. It had all permits in place and was on target to meet the schedule set out in the EPC Contract, and it was also engaged in advance funding discussions with the Unicredit Syndicate.[418]

311. Nevertheless, in Eskosol’s view, Italy began to undermine the solar PV sector on January 25, 2011 and, through the enactment of the Romani Decree, terminated the incentivizing tariffs

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[414] Reply, ¶ 119; *see also id.*, ¶¶ 115-118 (citing *Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999, CL-157, ¶ 64; Pierre Lalive, *The First ‘World Bank’ Arbitration (Holiday Inns v. Morocco)–Some Legal Problems*, 51 British Y.B. Int’l L. 645, 680 (1980), CL-158; *Klöckner Industrie-Anlagen GmbH v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Award, 21 October 1983, CL-70, 2 ICSID Rep. 9, 65-66; *Société Ouest Africaine des Bétons Industriels (SOABI) v. Senegal*, ICSID Case No. ARB/82/1, Award, 25 February 1988, CL-159, 2 ICSID Rep. 190, ¶¶ 4.04 et seq.; *Duke Energy International Peru Investments No. 1, Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision on Jurisdiction, 1 February 2006, CL-160, ¶ 131; *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, CL-161, ¶¶ 80-81 (citations omitted)).

[415] Memorial, ¶¶ 289-293 (citing *Tecmed*, CL-108/RL-80, ¶ 154; *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, 1 July 2004, CL-116 (“*Occidental*”), ¶¶ 184-185; *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, CL-117, ¶¶ 338-340; *LG&E*, CL-109, ¶¶ 124-125; *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1 Award, 30 August 2000, CL-115/RL-73 (“*Metalclad*”), ¶ 99; *CME*, CL-142, ¶ 611 (citation omitted); *Saluka*, CL-56, ¶¶ 304-308).

[416] Memorial, ¶ 293 (citing Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* 169 (Oxford Univ. Press 2008), CL-118 (citation omitted)); *see also* Reply, ¶ 155.

[417] Memorial, ¶¶ 292-293.

[418] Memorial, ¶ 294.

set out in Conto Energia III just five months after it went into effect, on 31 May 2011.[419] Eskosol says that the key reason for Minister Romani to suddenly end Conto Energia III was the unexpected consequence of the Salva Alcoa Act, which created a huge and unexpected amount of FiTs. These consequences were unexpected and unknown until late January 2011.[420]

312. Eskosol argues that the premature termination of Conto Energia III was contrary to the stability required under international law, and that the renewable energy sector was left in the dark about what scheme, if any, would replace Conto Energia III, because the Romani Decree anticipated a reduction in the incentivized tariffs but under unknown conditions.[421] This created great uncertainty among the banks that had funded projects in the solar PV sector in Italy and put at risk the financing of new projects, as expressed by the Association of Foreign Banks in Italy and several members of Italy's Chamber of Deputies at the time.[422]

313. Eskosol argues that Conto Energia IV caused further instability by eliminating the sunset clause and slashing incentivizing tariffs "by as much as 30% in some cases in comparison to the relevant tariffs under Conto Energia III."[423]

c. Italy's failure to act transparently

314. Eskosol also contends that the fair and equitable treatment obligation of Article 10(1) of the ECT includes the obligation to act transparently,[424] as defined by the tribunals in *Metalclad* and *Tecmed*.[425]

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[419] Memorial, ¶ 295.

[420] Cl. PHB, ¶¶ 174-182.

[421] Memorial, ¶¶ 296, 299.

[422] Memorial, ¶¶ 296-298.

[423] Memorial, ¶ 299.

[424] Memorial, ¶ 301.

[425] Memorial, ¶ 301, citing *Metalclad*, CL-115/RL-73, ¶ 76:

> The Tribunal understands this ["transparency"] to include the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters.

And citing *Tecmed*, CL-108/RL-80, ¶ 154:

315. Eskosol contends that Italy's Government officials told potential investors that the then-existing Conto Energia scheme was stable and confirmed Italy's commitment to the development of PV energy in Italy in its Action Plan in June 2011 and in meetings with Mr. Scognamiglio.[426] Subsequent changes left Eskosol "without any ability to understand what, if any, incentives Eskosol would be able to secure under the forthcoming Conto Energia IV."[427] Eskosol contends that this amounted to a failure to act transparently and hence a violation of Italy's fair and equitable treatment obligations.

d. Italy's inconsistent conduct

316. Eskosol also contends, based on certain investment arbitration jurisprudence, that the fair and equitable treatment obligation of Article 10(1) of the ECT requires States to act consistently.[428]

317. According to Eskosol, it was given both public and individual assurances as to the stability of the regulatory framework in the solar PV sector.[429] However, one day after the publication of the Guide to Conto Energia III, the Government released documents arguing for the revision of the incentivizing tariffs. One month later, with the publication of the Third Draft Romani Decree, it became apparent that the support scheme would be wiped out. The Romani Decree then declared that the incentivizing tariffs under Conto Energia III would end on 31 May 2011, effectively abrogating the applicable ceiling and sunset protection mechanism.[430] This inconsistent behavior "destroyed the economic foundations" of the project, rendering project financing unlikely.[431]

> [The foreign investor] expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations.

[426] Memorial, ¶¶ 305-306 (citing National Press agencies Review of the 2010 Italian PV Summit, C-27 and National Action Plan, C-29 (incorrectly cited as CL-29 in Memorial), as well as Scognamiglio I, ¶ 24).

[427] Memorial, ¶ 308.

[428] Memorial, ¶¶ 309-311 (citing *Tecmed*, CL-108/RL-80, ¶ 154, and *Occidental,* CL-116, ¶ 184 (citations omitted)).

[429] Memorial, ¶¶ 312-313 (referring in particular to GSE, *Guide to Conto Energia III*, January 2011, C-34).

[430] Memorial, ¶¶ 314-315.

[431] Memorial, ¶ 316.

e. Italy's arbitrary and unreasonable conduct

318. Eskosol argues that the fair and equitable treatment obligation also includes a protection against arbitrary and unreasonable conduct, as defined by investment arbitration jurisprudence and the ICJ, *i.e.*, a "willful disregard of due process of law, an act which shocks or … surprises a sense of judicial propriety."[432] Eskosol also rejects Italy's reliance on *Parkerings*, which in its view imposes a prohibition on the State from acting unfairly, unreasonably or inequitably in the exercise of its legislative power.[433]

319. In Eskosol's view, Italy's revocation of the incentivizing tariff was arbitrary and unreasonable for two reasons.

320. First, the revocation "failed to pursue a legitimate objective." In the Claimant's view, Italy's statements about the alleged "excessive" growth of the PV sector were based on false assumptions.[434] Instead, according to Eskosol, the subsequent decrees were motivated by the pressure of the nuclear energy lobbies.[435]

321. Second, in Eskosol's view, the Romani Decree's requirement that PV power plants occupying more than 10% of agricultural land must be connected to the grid within one year, in order to be eligible even for the (reduced) incentivizing tariffs under the future Conto Energia IV, was itself arbitrary and unreasonable, as it lacked any reasonable justification.[436] Eskosol contends that this requirement, which was extremely damaging to its project and undermined its ability to secure funding, constituted a violation of the FET obligation in the ECT.

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[432] Memorial, ¶ 318 (citing *Elettronica Sicula SpA (ELSI) (United States of America v. Italy)*, International Court of Justice, Judgment, 20 July 1989, ICJ Reports 1989, 15, CL-120 ("*ELSI*"), ¶ 128; also relying on *Plama*, CL-119, ¶ 184 and *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, CL-127, ¶ 318.

[433] Reply, ¶ 157 (citing *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, RL-59 ("*Parkerings*"), ¶ 332, as well as *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011, CL-167; *Saluka*, CL-56, ¶ 307; *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, CL-146 ("*El Paso*"), ¶¶ 372-373; *Tecmed*, CL-108/RL-80, ¶ 122 (citations omitted)).

[434] Memorial, ¶ 322 (citing Andrea Gagliardi and Tiziana Migliati, *Photovoltaic, the great stop*, Sole 24 Ore Roma 23 March 2011, C-56, at 3 ("finding that on the basis of information provided by GSE, by February 2011, approximately 3,730 MW of capacity under Conto Energia I, II and II had been installed")).

[435] Memorial, ¶¶ 322-323.

[436] Memorial, ¶ 324.

f. Italy's disproportionate conduct

322. Eskosol further argues that the fair and equitable treatment obligation entails an analysis of the proportionality of the State conduct, and argues that the State conduct must be "reasonably related and appropriately narrow to address a legitimate State interest."[437]

323. In its view, Italy did not act proportionately because it failed to assess the effect of the legislative change on foreign investments and to balance the interest of the State with the burden imposed on foreign investment.[438] Eskosol asserts that the dismantling of Conto Energia III was "a façade to justify the Italian Government's attempt to introduce nuclear energy in Italy," and affected legitimate investors like Eskosol which had nothing to do with any abuse regarding the Salva Alcoa Act.[439] Moreover, Italy was well aware of the consequences the measures would have on the projects in the sector,[440] and of the inconsistency of the measures with its commitments to the European Union.[441]

324. Eskosol finally contends that Italy's justification for the adoption of the Romani Decree was groundless as, a few months after declaring that growth towards the previous national target of 8,000 MW had been excessive, the Government "changed course and announced a new objective of 23,000 MW of solar PV energy."[442] The measures were thus in breach of the FET standard for being disproportionate.

2. Italy's Position

325. Italy contends that the reference in the first sentence of the ECT's Article 10(1) to creating attractive "conditions for Investors … to make Investments," while helpful to the interpretation of the whole clause, is hardly autonomous from those that follow in the same

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[437] Memorial, ¶ 326 (referring to *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, CL-128, ¶ 109, and *Tecmed*, CL-108/RL-80, ¶ 122).

[438] Memorial, ¶ 328 (citing *LG&E*, CL-109, ¶ 158); *see also* Reply, ¶ 156.

[439] Memorial, ¶ 329.

[440] Memorial, ¶ 330 (citing Giorgio Lonardi, *Energy and infrastructure, the wrath of foreign Banks*, La Repubblica, 10 March 2011, C-68).

[441] Memorial, ¶¶ 331-332 (citing *Europe criticizes the decree that stops renewables*, Qualenergia.it, 2 March 2011, C-83; *Renewable Decree: the EU against the draft blocking photovoltaic*, Campera.it., and Giorgio Lonardi, *Energy and infrastructure, the wrath of foreign banks*, La Repubblica, 10 March 2011, C-68).

[442] Memorial, ¶ 333.

provision.[443] In any event, Eskosol's case rests on an alleged breach of the second sentence of Article 10(1), by alleging that Italy engaged in specific unfair or inequitable conduct. In advancing this argument, Italy explains that Eskosol targets the Romani Decree and Conto Energia IV insofar as they allegedly rolled back benefits that were available under Conto Energia III, and therefore Eskosol's claim does not go to the stability of the Italian regulatory system over the years or allege any systemic unreliability of Italian law at large, but rather concerns one principal event: the lowering of the tariffs that Eskosol hoped to receive for the planned plants.[444]

326. Italy notes the lack of definition of FET in the ECT. In its opinion, the Tribunal should interpret the standard in accordance with the standard of protection of aliens and their property under customary international law and arbitral practice.[445] More specifically, Italy argues that the FET standard "is a corollary of good faith and fairness, not an insurance policy against business mishaps."[446] Thus, the core of the analysis "is not the inconvenience of the measures perceived by the single investor, but their objective fairness assessed in light of the circumstances."[447]

a. The notion of legitimate expectations

327. Italy objects to the notion of legitimate expectations adopted by Eskosol. It states that Eskosol "takes for granted that the 'FET standard contains a prohibition against host States conduct that violates the legitimate expectations that an investor has when it makes an investment.'"[448] In Italy's view, by contrast, Article 10(1) ECT contains no such prohibition. What might constitute a breach of the FET obligation are specific instances of State conduct that are unfair or inequitable. "Among such instances, it is certainly possible that a breach result[s] from acts that destroy investor's interests that had been generated through specific State promises or

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[443] Counter-Memorial, ¶¶ 235, 239, citing *Isolux*, RL-60, ¶¶ 764-766.
[444] Counter-Memorial, ¶¶ 235-236.
[445] Counter-Memorial, ¶ 237.
[446] Counter-Memorial, ¶ 238.
[447] Counter-Memorial, ¶ 238.
[448] Counter-Memorial, ¶ 242.

representations," but no interpretation of the applicable legal test can dispense with the actual ascertainment of whether unfairness or inequity occurred.[449]

328. Italy argues that "[e]xpectations are representations of facts and rules that investors derive from the conduct of the authorities of the State. Reliance on these representations can be critical to the decision to make an investment and how to shape it. These expectations must be legitimate: not all expectations deserve protection under the ECT, but only those that have a legal backing, are specific to the investment, and are reasonable."[450]

329. According to Italy, in Eskosol's construction "the standard expands almost indefinitely to protect the expectation that certain rights will be available for acquisition, and in a particular format, in the future."[451] Yet "[n]one of the few cases in which legitimate expectations were successfully invoked found a State's obligation to guarantee that an investor could acquire certain rights that had been available at a previous time also at a later time, and under the same conditions."[452] Indeed, in all the cases Eskosol cited, "the regulatory change deteriorated the position of investors that already were subject to the State measures and counted on their continued application in the future," which is "certainly not the case [of Eskosol] which … never [qualified] under Conto Energia III."[453]

330. Italy further argues that Eskosol makes the determination of unfairness or inequity an automatic consequence of any disappointment of the expectations. In its view, however, "whether any breach of expectations is unfair and inequitable cannot be taken for granted, but is precisely what needs to be looked into to assess the State's compliance with the FET standard."[454] In consequence, Eskosol cannot say that every time that an expectation is not fully respected there is a breach of the treaty. "[W]hat matters is not just the entity of the disrespect, but also all the other factors that might point to its being fair (the circumstances,

[449] Counter-Memorial, ¶ 242.
[450] Counter-Memorial, ¶ 274; *see also* ¶ 277.
[451] Counter-Memorial, ¶ 275.
[452] Counter-Memorial, ¶ 275.
[453] Counter-Memorial, ¶ 276.
[454] Counter-Memorial, ¶ 278.

the proportionality with respect to its professed goals, the foreseeability) or not."[455] Indeed, even when a violation of an investor's legitimate expectation is found, the breach of the FET standard depends on some crucial additional findings.[456]

331. On the issue of legitimate expectations, Italy contends that the awards on which Eskosol relies are not pertinent to the facts of this case.[457] In *Saluka*, for example, "the tribunal concluded that, in the framework of the Czech Republic's open plan to align its regulations to EU standards, the regulatory change should have been anticipated: the investor was 'not justified to expect that the [host State] would not introduce a more rigid system of prudential regulation and thereby change the framework for Nomura's investment.'"[458] In fact, in *Saluka*, the only breach that the tribunal found was discrimination, of which there is no suggestion in the present case. In Italy's view, *Tecmed* does not support Eskosol's case either, as there the host State "had first granted and then refused to renew the operating license, making it factually impossible for the investor to pursue its business, not just less profitable."[459] Here Italy did not provide any specific guarantee to Eskosol, and never precluded it from implementing the project.[460] Italy also distinguishes this case from the investment cases against Argentina, which involved ongoing business concerns subject to precise State obligations contained in concession agreements signed with the investors.[461] Here, the passage from Conto Energia III to Conto Energia IV constituted "a modulation" of the profits guaranteed under the incentives regime, "not an evisceration of any operating profitable business."[462] As the *Blusun* tribunal noted, Italy had "still relatively generous levels of FiTs" after the transition from Conto Energia III to Conto Energia IV.[463]

332. Italy further challenges Eskosol's reliance on *Micula*, as in that case Romania eliminated tax incentives that lured investors to the country, whereas Italy simply adjusted the incentivized

[455] Counter-Memorial, ¶ 279.
[456] Counter-Memorial, ¶ 280 (citing *Micula*, CL-113, ¶ 726) (citation omitted).
[457] Counter-Memorial, ¶ 266.
[458] Counter-Memorial, ¶ 267.
[459] Counter-Memorial, ¶ 268.
[460] Counter-Memorial, ¶ 268.
[461] Counter-Memorial, ¶¶ 269-270.
[462] Counter-Memorial, ¶ 270.
[463] Counter-Memorial, ¶ 270 (citing *Blusun*, RL-56, ¶ 391).

tariffs available for future applicants.[464] Italy also distinguishes this case from *Eiser*, where the investor had built and operated the plants, and its plants were formally registered to receive benefits under the applicable regime.[465]

b. The causal link

333. Italy contends that there is no causal link between the measures the Government adopted and the failure of the Eskosol Project. It states that Eskosol's plan to build between 113 and 120 operative plants in Puglia was "at most very hopeful, but at least far from granted," and cites *Blusun* to the effect that the "success [of the project] was by no means certain."[466] Italy also says that the "Claimant's shareholders made a hopeful but fatal double bet: they assumed that they would find a sponsor, and that the incentives available at the time of their initial investment would be still available, in the same exact amount, some years later."[467] However, at no time did they qualify for the incentives, either under Conto Energia III or under any of those offered by the following measures. Italy adds that "[i]t is not particularly surprising that banks refused to fund such plan."[468] Indeed, Italy notes that one should not underestimate that lenders had a wide choice of less risky projects to fund, in the same years and in the same region as Eskosol's Project.[469]

334. Italy explains that "the adverse effect is an essential element of a FET breach, not just a precondition for the damage that it might have caused."[470] Therefore, Italy argues, Eskosol bears the burden of proving the existence of any alleged detrimental effect on its investment following from Italy's conduct.[471] However, Italy criticizes Eskosol for having failed to produce convincing impartial evidence to back its arguments on causation, arguing that

[464] Counter-Memorial, ¶ 271.
[465] Counter-Memorial, ¶ 273.
[466] Counter-Memorial, ¶¶ 246-247.
[467] Resp. PHB, ¶ 13.
[468] Resp. PHB, ¶ 14.
[469] Resp. PHB, ¶¶ 15 and 30.
[470] Counter-Memorial, ¶ 248.
[471] Rejoinder, ¶¶ 146-147; *see also* Resp. PHB, ¶¶ 24, 26.

Eskosol relies exclusively on partial accounts such as the views of its own directors and evidence produced by its experts specifically to support its arbitration claim.[472]

335. Italy further argues that even if (*arguendo*) Italy had promised Eskosol that the incentives would not change at all (which Italy denies), and even if the transition from Conto Energia III to Conto Energia IV *arguendo* breached that promise, Eskosol still could not have been affected by that, for two reasons.

336. First, Eskosol never qualified under any incentive scheme. Eskosol never commissioned the plants during the time that Conto Energia III had indicated for its sunset application, nor does the record demonstrate that it was clearly in position to do so, based on arrangements already put in place as of the time the Romani Decree or Conto Energia entered into effect. In fact, the only relevant indication was the *projected* schedule of works of the Siemens EPC Contract, but Eskosol did not have enough funds lined up even to make the first payment when it became due.[473]

337. Second, Eskosol has not proved that the shortened availability of Conto Energia III had any actual impact on its business plans. Italy agrees with Eskosol that "the applicable standard of causation requires the identification of the allegedly wrongful act as the 'operative' or 'proximate' cause of the losses."[474] In Italy's view, however, "there is no provable causation at all." Italy reminds the Tribunal that Eskosol's president himself explained in 2012 that the "preponderant" circumstance that led to Eskosol's failure was the unexpected unresponsiveness of the banks. In its view, Italy's acts "could have been secondary or marginally determinants of Eskosol's demise, at most."[475]

338. In Italy's view, nothing indicates that Eskosol's funding negotiation with Unicredit (which Italy sees as Eskosol's "only remotely plausible funding negotiation") was actually disrupted by the regulatory changes. The Romani Decree was adopted after Unicredit already had pulled

[472] Rejoinder, ¶¶ 136-137.

[473] Counter-Memorial, ¶¶ 252-253.

[474] Rejoinder, ¶ 244.

[475] Rejoinder, ¶ 245 (citing Report of the President regarding the Events occurred in 2011, in Shortened financial statements for the business year until 31 December 2011, FMC-C2, p. 32); *see also* Resp. PHB, ¶¶ 27-28.

out of the talks, and after Eskosol already had failed to make the first down payment to Siemens.[476] Italy rejects as not credible any suggestion that Unicredit's commitment to approve a loan to SIB for €6 million demonstrates the likelihood of its granting a loan at least 57 times larger (€340 million), in collaboration with other banks yet to be found.[477] Moreover, Italy notes that, in spite of Mr. Scognamiglio's statement that Eskosol had talked with 26 banks during the development of the Eskosol Project, no more than a preliminary term sheet by West LB can be found in the records. Moreover, this document shows that "Eskosol needed financing by January 15th 2011 and that time was too tight to permit to reasonably respect such term[s] at the stage of negotiations."[478] It also notes that, in spite of Dr. Stickel's suggestion that other funding forms such as bridge loans were available, no evidence was submitted to that end.[479]

339. Italy further contends that the ability of many other investors to take advantage of the Conto Energia IV incentives, as well as the transitional safeguards of the Romani Decree, rule out any possibility that these regulatory changes themselves determined the collapse of the Eskosol Project.[480] To the contrary, Italy notes, the *Blusun* tribunal concluded that "the Puglia Project was already in significant financial difficulty in the first months of 2011, and independently of the Romani Decree."[481]

340. Indeed, Italy highlights the following "striking" differences with respect to the causation arguments advanced by Blusun and Eskosol in the two arbitrations, which Italy suggests is indicative of the speculative nature of Eskosol's claims:

> Blusun did not make much of the Unicredit negotiation that Claimant now stressed as being the critical make-it-or-break-it juncture in its story of business failure.
>
> Blusun did not describe Decreto Romani as fatal to their industrial plan.

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[476] Counter-Memorial, ¶ 254; *see also* Resp. PHB, ¶¶ 23, 59-61.
[477] Resp. PHB, ¶ 65.
[478] Resp. PHB, ¶¶ 67-68.
[479] Resp. PHB, ¶ 76.
[480] Counter-Memorial, ¶ 255.
[481] Counter-Memorial, ¶ 256 (citing *Blusun*, RL-56, ¶ 392).

> Blusun confirmed that Conto Energia IV offered a viable business environment that in many respects improved the existing regulatory regime and could guarantee satisfactory profits.[482]

341. In Italy's telling of the story, it was Eskosol's own business decision that led to the failure of its project through a lack of necessary funding. Italy suggests that the problem was Eskosol's plan "to pack a mega project on paper, develop its supporting facilities on the ground and attract third-party investors, rather than build the batches of plants gradually."[483] Italy contends that Mr. Stein essentially admitted as much, in a report accompanying Eskosol's balance sheet for the year 2011:

> The motives and circumstances for that outcome [the project's failure leading to the company's insolvency], which is certainly not exciting, are ascribable to a negative conjuncture. A legislation in constant evolution for more than 18 months (with occasional retroactive effects) applied to a *complex and large project, which lacked a perfect alignment of all its specific components and participants* (whose goals and purposes were not always harmonious) [.]
>
> Finally, but with devastating and *preponderant* effect, we must mention *the absolute failure to provide any external financial support by the banks, which are supposed to facilitate and make projects such as Eskosol's possible.*[484]

342. Italy contends that Eskosol "cut corners" to "circumvent[] the prohibition" on using administrative shortcuts for plants of 1MW or more; "designed a bigger-than-ever solar field for an area without pre-existing infrastructures; discounted the regulatory risks that were obviously looming and sought to sell the project as a ready-to-make investment, before the plants were even built or the panels sourced."[485] Italy also notes that Eskosol had "virtually no equity, compared to the total cost of the enterprise (north of €300 million)," it planned to borrow all the necessary money, and planned to do all that in record time.[486] In Italy's view, "the destination was secure, but the journey was hazardous: Claimant chose a steep and risky all-or-nothing path to achieve a very safe place. Claimant's investment was *the project*, not the solar field."[487] Italy agrees with Eskosol that "turnkey projects are a favourite of investors,

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[482] Rejoinder, ¶ 142.

[483] Counter-Memorial, ¶¶ 258-259; Rejoinder, ¶¶ 248-249.

[484] Rejoinder, ¶¶ 151-152 (citing FMC-C2, p. 32) (emphasis by Italy).

[485] Rejoinder, ¶ 153.

[486] Rejoinder, ¶ 154.

[487] Rejoinder, ¶ 155 (emphasis in original).

given the low inherent risks. Yet they are [a] *challenge* for developers – like Claimant."[488] It contends that Eskosol "attempted to justify the functionality of the industrial plan and its financial underpinnings but systematically failed to address the elephant in the room: the scale and design of the project were Claimant's own business choices."[489] The same holds true for the financial design of the project.[490]

343. Italy also criticizes Eskosol for trying to blame ENEL for its business decisions, by referring to ENEL's request that the plants be connected to the grid through two substations, or by attributing to ENEL the original suggestion of a partnership among separate SPVs. In Italy's view, this is an attempt "to divert the Tribunal's attention from [Eskosol's] own entrepreneurial choice and somehow suggest that the design of the project is attributable to the Respondent."[491] Italy explains that: ENEL is not Italy; ENEL did not and could not "require" anything; and even assuming that ENEL had suggested or proposed any course of action, this would have been in response to Eskosol's request, with a view to accommodate Eskosol's "purely self-created needs."[492] Italy further challenges Eskosol's assertion that the project needed to be large. In its view, the size of the project was a business choice, and the fact "[t]hat a project needed to be so huge to break even and produce any profits suggests that it was financially fragile."[493] The project was not "robust" because "nobody was ready to finance it."[494]

344. Italy contends that the project simply did not attract interest from investors, unlike a "legion of investors in the same business which appeared to make better choices and achieve success."[495] Ultimately, Italy says, whether the plan was marketable "must be assessed ascertaining the response of the market."[496]

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[488] Rejoinder, ¶ 156 (emphasis in original).
[489] Rejoinder, ¶ 160; *see also* Resp. PHB, ¶ 23.
[490] Rejoinder, ¶ 161.
[491] Rejoinder, ¶¶ 166-167 (citing Reply, ¶¶ 22, 24-25, 42).
[492] Rejoinder, ¶ 169; *see also* Resp. PHB, ¶¶ 34-39.
[493] Rejoinder, ¶¶ 171-174.
[494] Rejoinder, ¶ 175.
[495] Rejoinder, ¶¶ 177, 179.
[496] Rejoinder, ¶ 178.

345. Italy criticizes, in particular, Eskosol's lack of coordination between its EPC Contract with Siemens and its negotiation of potential financing deals. Italy contends that the normal sequencing of works would have been to finalize the grid and the plants together, even if work on the grid might have been started earlier than on the plants.[497] Eskosol's odd sequencing, in which it focused exclusively on the electrical substations needed to connect to the grid before beginning any construction whatsoever of the PV plants themselves, was inevitable (in Italy's view) only because Eskosol could not finance the construction of the plants. Eskosol "could sign [the EPC Contract] for free but knew too well it could not pay for [it]."[498] Italy suggests that Eskosol needed the EPC Contract to attract financing for the project.[499]

346. Italy notes Eskosol's observation that the new regulatory framework under Conto Energia IV "would have impacted the equity/debt ratio and the relevant interest rate of the envisaged financing," but highlights that Eskosol "could not assert that the benefits in Conto Energia IV were unavailable or insufficient as such."[500] Indeed, Italy asserts that Eskosol "drew a blank on the more reasonable inference: Conto Energia IV would work for most investors, so it cannot be held to be investment-crippling as such."[501] Italy thus highlights that "the project's own idiosyncratic fragility made it vulnerable to otherwise harmless circumstances," and notes that "[Eskosol's] shareholders' admissions are more honest and concede the financial soundness of Conto Energia IV."[502] Indeed, Italy notes that Eskosol's shareholders explained that they intended to "maintain and pursue Eskosol's business under Conto Energia IV – which they praised –, and that the plan failed because of certain subsequent acts that lie outside the scope of the present dispute. [Messrs. Lecorcier and Stein considered] that the project was viable and could have obtained financing under Conto Energia IV."[503]

347. According to Italy, Siemens did not endorse Eskosol's excuse for not paying the initial installment on the EPC Contract. In its view, the EPC side letter may have meant that Eskosol

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[497] Rejoinder, ¶¶ 181-183; *see also* Resp. PHB, ¶¶ 49, 74.
[498] Rejoinder, ¶ 184.
[499] Rejoinder, ¶¶ 184-185.
[500] Rejoinder, ¶ 193.
[501] Rejoinder, ¶ 195.
[502] Rejoinder, ¶¶ 197-198.
[503] Rejoinder, ¶ 214.

technically was not in "an already certifiable situation of default," but it still "reflected [Eskosol's] lack of funds and impending troubles to find a financial sponsor (which incidentally was a contractual breach in its own right)."[504] Italy also highlights that, while Eskosol argues that "[n]ot a single lender would touch Eskosol's project after the … 'State Measures', [that] is precisely what had happened also *before* the challenged measures."[505]

348. Italy makes several additional comments regarding Eskosol's financial difficulties. First, with respect to Eskosol's remark that the 2009 economic crisis led the banking industry to adopt a restrictive policy on lending, Italy suggests that the remark may have been "aimed at shifting blame away from Claimant [but], more importantly, shifts it also away from Respondent."[506] Second, Eskosol's reference to certain lawsuits by creditors which affected its reputation with lenders "has absolutely nothing to do with Italy's actions."[507]

349. With respect to Eskosol's complaint about the Romani Decree's restriction on agricultural land, Italy makes several points.[508] It notes first that Eskosol's Memorial only mentioned this complaint in passing in a footnote, with the result that Eskosol's later accusation that "Italy does not address this issue at all in its Counter-Memorial" verges on the absurd. On the substance, Italy highlights that "the requirements relating to the use of agricultural land did not apply until 28 March 2012 (one year after the entry into force of the [Romani] Decree)."[509] It also notes that by that date it was no longer required that plants already be in operation to qualify for incentives, but only they be tested and connected to the grid. If Eskosol had had a viable project, "the construction of the plants could have been completed in time to be spared from the new regime on agricultural land."[510] Indeed, Italy observes, Eskosol itself contends that "administrative and permitting work took about 80%/90% of the total time required to complete a solar PV plant," so if that is true then the time available before March 2012 should

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[504] Rejoinder, ¶ 206.
[505] Rejoinder, ¶ 208; *see also* Resp. PHB, ¶ 73.
[506] Rejoinder, ¶ 210.
[507] Rejoinder, ¶ 212.
[508] Rejoinder, ¶¶ 213-223.
[509] Rejoinder, ¶ 216.
[510] Rejoinder, ¶ 216; *see also* Resp. PHB, ¶ 109.

have been sufficient for Eskosol to carry out the remaining 10% of the work.[511] In fact, Italy contends, the record shows Eskosol's "repeated attempts at constructing the plants in 2011, which failed for lack of financing."[512] In Italy's view, the fact that Eskosol "put efforts and money in the attempts to build the plants and accede the incentives under Conto Energia IV is enough evidence to reject the assertion … that it was impossible to do so in time."[513] Italy also points out that Eskosol "did finally decide to split construction of the plants and was thus able to find financing for smaller clusters, which it yet refused as not sufficiently interesting."[514] Italy also notes that Eskosol "hired *Capitale Système Investissement* to promote the Project under Conto Energia IV and undertake some road shows."[515]

350. Italy rejects on a number of other grounds Eskosol's argument that the Romani Decree caused the destruction of the investment. First, Italy says that Eskosol's references to the views of Italian MPs and newspaper articles are immaterial: "[a]ny predictions that the Decreto Romani would cripple the industry proved to be exaggerated, and the hard data of the legions of investments that kept benefitting from Conto Energia IV and the later schemes must supersede any contemporaneous expression of discontent."[516] In this regard, Italy refers again to the GSE documents showing the results of the different Conto Energia decrees.

351. Second, Italy defends its argument that the success of other power plants demonstrates that Eskosol's Project failed for reasons other than the regulatory changes. On this issue, Italy dismisses Eskosol's suggestion that the GSE tables Italy submitted about other plants have "authenticity issues," arguing that the GSE customarily collects information from all power plants and makes it available online so all investors can consult it.[517] Italy also rejects Eskosol's emphasis on differences in size and design of the different projects, making two points. The first is that Eskosol's argument actually confirms Italy's position, which "the tribunal in *Blusun* understood with ease," that the main determinant of Eskosol's failure was

[511] Rejoinder, ¶ 218.
[512] Rejoinder, ¶ 219.
[513] Rejoinder, ¶ 219.
[514] Resp. PHB, ¶ 105.
[515] Resp. PHB, ¶ 106.
[516] Rejoinder, ¶ 226.
[517] Rejoinder, ¶ 229.

its atypical size.[518] In Italy's view, Eskosol's suspicion that the plants in Blasi and Casignano had lower connection costs reinforces the point that Eskosol's plan was "risky, expensive, and subject to size-determinative atypical fragility, compared to industry's standards";[519] the Blasi-Casignano example is the best evidence that a significant project could have been done, in the same geographical area and at the very same point in time, despite the adoption of the Romani Decree.[520] Italy's second point is that any distinctions between Eskosol's Project and the others simply highlight Eskosol's plan to circumvent the law: while Eskosol sought to take advantage of administrative shortcuts reserved for small plants of less than 1 MW, and to receive the higher incentives reserved for these small plants, its plan in reality has always consisted of building one big complex of 120 connected plants, which entailed immense regulatory risks, as noted both by potential investors and by the *Blusun* tribunal.[521] Italy notes, in this regard, the contradictions between Eskosol's story in this proceeding and that told by the claimants in the *Blusun* case.[522]

352. Italy also suggests that Eskosol received concrete offers of funding that were turned down, suggesting that, therefore, the decision to abandon the project was better understood as a business choice rather than an act of necessity.[523]

353. In summary, relying on *Plama*, Italy argues that Eskosol's lack of success with investors "falls squarely under the category of business risk."[524] The case is thus completely different in its view from those on which Eskosol relies, such as *Inmaris* (where the host State banned the investor from using its investment altogether) and *Lemire* (where the host State made it illegal for the investor to operate its business), in both cases the State thereby having directly caused the subsequent loss of profits.[525] Unlike those cases, Italy suggests, here the Tribunal should reach the same conclusions as the *Blusun* tribunal, namely that:

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[518] Rejoinder, ¶ 232 (citing Bacchiocchi).
[519] Rejoinder, ¶ 233.
[520] Resp. PHB, ¶¶ 57-58 (citing slide 18 of Respondent's Opening Presentation).
[521] Rejoinder, ¶ 236.
[522] Rejoinder, ¶ 237.
[523] Counter-Memorial, ¶¶ 28, 217 (citing R-43 and R-44); *see also* Resp. PHB, ¶ 23.
[524] Counter-Memorial, ¶¶ 259-261 (citing *Plama,* CL-119, ¶ 30).
[525] Rejoinder, ¶¶ 250-252.

> In a context in which Blusun's failure to construct the plants or to connect them to the grid was due to its own investment decisions, notably its failure to attract adequate finance, Italy should not be required to pick up the tab for Blusun's failures.[526]

c. Eskosol's failure to qualify for the FiT incentives

354. One of Italy's core arguments is that Eskosol "cannot claim to have made the investment based on expectations regarding the persistence of a *future* opportunity to acquire some rights. The expectation that certain rights be maintained and respected is at the core of the FET standard. The expectation to acquire specific rights in the *future* is not."[527]

355. As noted above, Italy emphasizes that in this case, Eskosol never acquired rights to the Conto Energia III benefits, because it never complied with the legal requirements set by the law: "[i]t had no legitimate expectations upon which it could claim to have made its investment."[528] That distinction is important under the jurisprudence, which not only provides that "legitimate expectations must be assessed at the time of the making of the investment," but also recognizes that expectations with respect to some benefits arises only when the investor has complied with the requirements to obtain those benefits.[529] In this case, Italy argues, "at the time in which Claimant made the investment (or at no other time) Eskosol did not qualify for the benefits, nor was the receiving of the benefits imminent or even expectable with any certainty. The change in regulations affected Eskosol's putative plans but did not deteriorate its rights, nor did it frustrate any specific expectation backed by Italy's reassurance."[530] According to Italy, Eskosol was never in the position to fulfil the stipulated conditions to access a promised benefit, so this case is not about the unexpected removal or diminution of such benefits, or about a change in the requirements to access them. Rather, Eskosol "has not complied with the conditions prevailing at the time of making the investment."[531]

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[526] Counter-Memorial, ¶¶ 262-263 (quoting *Blusun*, RL-56, ¶ 407).

[527] Counter-Memorial, ¶ 281 (emphasis in original); *see also* Rejoinder, ¶¶ 262-265.

[528] Counter-Memorial, ¶ 286; Rejoinder, ¶¶ 260-261.

[529] Rejoinder, ¶ 258.

[530] Rejoinder, ¶ 258.

[531] Rejoinder, ¶ 259. Italy also distinguishes this case from *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID ARB/14/1, Award, 16 May 2018, RL-90 ("*Masdar*"), where the tribunal found a breach of legitimate expectations related to benefits that the investor already had acquired by complying with the necessary requirements (*see* Rejoinder, ¶¶ 255-256).

356. In its Rejoinder, Italy clarified that it does not suggest that because the Eskosol Project did not come to fruition, Eskosol was not a protected investor. Rather, Italy's argument is that "Claimant's investment consisted of its assets and its development plan for a solar field, minus its actual construction. It certainly did not consist of a solar field with operating plants."[532] Italy adds that:

> [t]he investment, as a whole, as a process, existed and was protected under the ECT. It never developed as Claimant intended and never qualified for some available benefits. These benefits were never discontinued, and even after their window of availability was shortened, Claimant's investment still did not qualify for them, or for any subsequent one. … To view one investment holistically means to consider all its existing parts, not also the inexistent ones.[533]

d. The lack of any promise that regulations would not change

357. In Italy's view, "[a] State's regulatory autonomy is particularly pronounced with respect to general regulatory measures, as opposed to specific acts and decisions addressing one investor."[534] It argues that, unlike the facts in certain other investor-state disputes, Italy made no promise to Eskosol that its laws would not change. In these circumstances, Italy invites the Tribunal to agree with the finding in *Blusun* that "a reasonable market expectation as to some state of affairs, justified or not, is not a basis for shifting risks to the public sector, i.e. the state budget."[535]

358. Italy argues that Conto Energia III contained no guarantee against regulatory change. The 14-month deadline included in Conto Energia III

> governed the application of the incentives, not the validity or effectiveness of the decree. As long as Conto Energia III contained a deadline for obtaining its benefits, applications for incentives needed to comply with that deadline. The tariff deadline did not freeze Italy's regulatory measure; it was not a promise that Conto Energia III could not change or be repealed until May 2012.[536]

359. Italy further contends that the "primary function of the sunset clause was … to prevent regulatory voids. It was assumed that, as it regularly happened, the regulator would pass a

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[532] Rejoinder, ¶ 263.

[533] Rejoinder, ¶ 264*; see also* Resp. PHB, ¶¶ 78-84.

[534] Counter-Memorial, ¶ 287.

[535] Counter-Memorial, ¶ 288 (citing *Blusun,* RL-56, ¶ 373); *see also* Rejoinder, ¶ 267.

[536] Counter-Memorial, ¶ 290; *see also* Rejoinder, ¶¶ 268-269, 278, 281.

new scheme every time the previous one run [sic] its course. Yet, the sunset clauses allowed the government to operate with ease, rather than having to rush with no notice to preserve the continuity of the incentives."[537] Italy further notes that Conto Energia III previously cut short the sunset period of Conto Energia II, so Eskosol could have had no legitimate expectation that the Conto Energia III sunset period could never be affected by future regulation.[538] Moreover, the extension of the incentives for some plants under the Salva Alcoa law was until 30 June 2011, still earlier than the original sunset clause.[539] In Italy's view, these prior changes to the periods over which certain provisions would apply demonstrated that the adoption of Conto Energia IV, and the disposal of the sunset provision in Conto Energia III, were neither unprecedented nor impossible to have previously contemplated.[540]

360. In its Post-Hearing Brief, Italy further explained that,

> [t]hrough [the Salva Alcoa Law] Italy then permitted to apply the tariffs of *Conto Energia II* also to plants still concluded by the end of 2010 … but connected after that date and before 30th June 2011. Indeed, many investors only needed to be connected to become operational … since delays in connections had occurred due to the extremely high request.
>
> The same logics and legislative technique between Conto Energia II and Conto Energia III applies to the transition from Conto Energia III to Conto Energia IV:
>
> - It indicated a target of 8.000 MW by 2020 and a cap of 3.000 MW maximum PV plant's power being allowed to apply for incentives;
>
> - It set a 14-month period application of the Conto for plant[s] entered into operation after the reaching of such target.
>
> For the same reasons as for Conto Energia II, the 14-month extension would have been applicable only in the absence of a new decree adopting new tariffs.
>
> The cumulative power incentivized by the end of 2010 under Conto Energia I and II was about 3.500 MW. In addition, GSE reached over 55.000 requests to access the

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[537] Rejoinder, ¶ 270.

[538] Rejoinder, ¶¶ 274-275 (explaining that the 1,200 MW ceiling under Conto Energia II was reached on 30 June 2010, and the 14-month period should have lasted until 30 August 2011, whereas Conto Energia III applied to plants commissioned on or after 1 January 2011).

[539] Rejoinder, ¶¶ 276-277.

[540] Rejoinder, ¶ 280.

> *Salva Alcoa* regime, corresponding approximately to further 3.500 MW to be installed by the end of 2010 and ready to be connected before June 2011.[541]

361. Italy contends that "nothing in Conto Energia III can be construed as Italy's promise not to change the regulatory framework governing tariff incentives. Decreto Romani and Conto Energia IV could, and did, modify some aspects of the 'regulatory framework,' never retroactively."[542] In Italy's view, Eskosol's mere reliance on the deadline to apply for Conto Energia III incentives cannot prevail over the common knowledge that incentives schemes are subject to constant revision and that laws can change. Italy invokes the *Blusun* finding that any expectations would be "even less powerful because European law had already lowered them: it was clear that the incentives offered were subject to modification in light, *inter alia*, of changing costs and improved technology."[543]

362. Italy argues in the alternative that even if this Tribunal considered Conto Energia III as signaling an intention not to change the law for a period of time, at most this would be a commitment of a general nature, as opposed to one addressed specifically to Eskosol or its investment. Italy says, quoting *Blusun*, that Eskosol's argument "has the effect of treating the law as not a general command but an individual commitment."[544]

363. The only specific interaction between Italy and Eskosol was a letter dated 3 December 2010, in which "the agency limited itself to state that it 'believe[d]' access to the incentives was possible, 'if the … plants … meet all the requirements, also technical as set forth by applicable law,' and 'pursuant to the applicable provisions of law.'"[545] Eskosol's problem is that it never met all the requirements provided by the law, which included the commissioning of the plants. The applicable provisions of law changed, but Eskosol had not met the ones previously applicable. "At no time did [Eskosol] receive specific assurance that its plants would benefit from a specific FiT scheme."[546] Moreover, Italy states that the GSE's task is to implement

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[541] Resp. PHB, ¶¶ 94-97.

[542] Counter-Memorial, ¶¶ 292-293.

[543] Counter-Memorial, ¶¶ 295-296; *see also* Rejoinder, ¶ 283.

[544] Counter-Memorial, ¶ 297 (citing *Blusun*, RL-56, ¶ 371). Italy also relies on *Philip Morris*, RL-66, ¶ 426, and UNCTAD, *Fair and Equitable Treatment*, UNCTAD Series on Issues in International Investment Agreements II (2012), p. 69 (cited in *Isolux*, RL-60, ¶ 775) (citations omitted)).

[545] Counter-Memorial, ¶ 300.

[546] Counter-Memorial, ¶ 301.

legislative and regulatory measures, but it can never give reassurance on the validity or duration of any such measures.[547]

e. The predictability and reasonableness of the Romani Decree and Conto Energia IV

364. Italy argues that Eskosol's shareholders knew that incentive tariffs were (and inevitably would continue to be) on a downward trend, and the reference in its measures to a specific cap on incentives conveyed a relatively clear message that if growth were faster than expected, Italy would have to take urgent steps to address the situation.[548] As noted by Italy,

> the regulator's plan was clear at all stages; the applicable rules would be adjusted periodically to reduce the costs for the final consumers, by introducing control mechanisms of incentive spending and by promoting the use of more cost effective technologies (i.e., with cheaper cost per unit, in particular for solar panels). …
>
> As specifically for the Romani Decree, substituting *Conto Energia III* with *Conto Energia IV*, this was adopted in the specific context of implementing a new EU directive and in a conjuncture where thresholds had been exceeded extremely quickly. This adjustment was made by providing a specific transitional scheme.[549]

365. Italy refers to the Bacchiocchi witness statement, which discusses in some detail the function, public policy rationale, gradual implementation and reasonableness of the Romani Decree and Conto Energia IV.[550] Italy also refers to the Delfanti/Motta expert reports to assert that "the reduction in incentives was proportionately less than the reduction in the cost of the photovoltaic technology during 2010, and left Italian subsidy levels higher than those in Germany, France and Spain."[551]

366. Italy contends that even if Eskosol had "somewhat mistakenly nurtured an expectation that Conto Energia III could not change until May 2012," Italy's conduct cannot be said to have unfairly or inequitably frustrated that expectation. This is because the adjustment was gradual; it was accompanied by principled reasoning tying the changes to concerns to safeguard

[547] Counter-Memorial, ¶ 302.

[548] Counter-Memorial, ¶¶ 307-308 (citing Mr. Lecorcier's written testimony in the *Blusun* case, R-50, ¶ 33; and *Isolux*, RL-60, ¶ 781 (citation omitted)); *see also* Resp. PHB, ¶¶ 17-18.

[549] Resp. PHB, ¶¶ 18-19; *see also id.*, ¶¶ 101-103,114.

[550] Rejoinder, ¶¶ 284-285 (citing Bacchiocchi).

[551] Rejoinder, ¶ 287 (quoting Delfanti/Motta I, Figure 3-7 and Section 7.82; Delfanti/Motta II, Section 1.3).

legitimate public interests; plants that were about to be completed still could benefit from the Conto Energia III incentives until May 2011; and Conto Energia IV was still available, albeit with slightly lower tariffs, for those who could not make that deadline.[552]

367. Italy argues that the Conto Energia schemes "were intended to strike a specific balance between the incentive to production and a fair remuneration of the investments. Over-remuneration was not their goal, and constant adjustment was universally anticipated."[553] As for the Romani Decree, this was motivated by the unexpectedly quick achievement of the target set in Conto Energia III. Italy indicates that the peak in the growth of subsidies was between 2010-2013, with subsidies paid by consumers to producers growing in this period from €0.9 billion to €6.7 billion.[554] Italy also states that in the period 2010-2012, the national aggregate operating power from PV plants rose from 1,906 MW to 10,796 MW (+466.42%), and by the end of 2012 it grew further to 19,862 (an additional 74.71%), for a total increase of 889.61% on a two-year basis.[555] According to Italy, the 11.4 TWh production projected for 2020 was already surpassed in 2012.[556] In fact, Conto Energia IV was the most successful Conto Energia of all in terms of plants installed and receiving the benefits.[557]

368. Italy further states that:

> In January 2011, GSE communicated to the Parliament (*Senato*) that it estimated the power plant installed at the end of 2010 having already reached the power of 7.000 MW. Those expectations were right since the threshold of 8.000 MW incentivized was reached between May and June 2011. In fact, we know that at the end of 2011, the operating power was greater than 13,000 MW.
>
> On the other side, no claim in this regard could be opposed to Italy in relation to the fact that the legislator did not wait for the achievement of the cap of 3,000 MW set by *Conto Energia III* since:
>
> as mentioned, the overall target of 8.000 Mw set by the *Conto Energia III* had already been reached;

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[552] Counter-Memorial, ¶¶ 305-306.

[553] Rejoinder, ¶ 289.

[554] Rejoinder, ¶ 290.

[555] Rejoinder, ¶¶ 294-295.

[556] Rejoinder, ¶ 296.

[557] Rejoinder, ¶ 298; *see also* Resp. PHB, ¶¶ 97-99.

> even assuming that the *Conto* would remain in force until the cap of 3.000 MW be reached, the Claimant would not have received any benefits, given that:
>
> i. having regard to the entry into operation of the *Salva Alcoa* plants to 31st May 2011, the date on which the *Conto Energia III* ceased to apply, the cumulative power incentivized and installed in 2011 (Third *Conto* + *Salva Alcoa*) was well above the limit of 3.000 MW provided by the *Conto*;
>
> ii. In any case, even under the – wrong – assumption of not considering Salva Alcoa plants, the additional 1.500 MW required to achieve the target of 3.000 MW had been installed between July and August 2011, under *Conto Energia IV*.
>
> iii. Under no perspective the Claimant could thus have been able to rely on the applicability of *Conto Energia III* tariffs until mid 2012. That such cap would have been reached by that time was clear to anyone following the publicly available data on the trend of the market.[558]

369. Italy also rejects Eskosol's suggestion that the later (higher) target of 23,000 MW in Conto Energia IV demonstrates any inconsistency in Italy's conduct. In its view, the higher target goes hand in hand with the lower incentives.[559] As for the criticism from the European Commission to which Eskosol refers, Italy contends that it was completely superseded by subsequent events, including the fact that the infringement procedure against the Romani Decree was ultimately dropped.[560]

f. Other aspects of Eskosol's FET claim

370. With respect to Eskosol's argument that Italy breached its FET obligation by failing to provide a stable and predictable legal framework, failing to act transparently or consistently, and adopting arbitrary, unreasonable and disproportionate measures, Italy challenges Eskosol's reliance on *Occidental*, *CME*, *Metalclad*, *Tecmed*, *ELSI* and *Plama* on the basis that these cases involved abusive and targeted measures against specific investors.[561] In its view, they do not assist Eskosol here, because

> the regulatory changes made by [Italy] were gradual and reasonable. These changes occurred while Italy looked after the updating of the incentive schemes to

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[558] Resp. PHB, ¶¶ 99-100.

[559] Rejoinder, ¶ 300.

[560] Rejoinder, ¶¶ 301, 303-304 (citing press release from the European Commission "certifying that Italy had fully and correctly implemented Directive 2009/28/EC").

[561] Counter-Memorial, ¶¶ 316-320 (citing *Occidental*, CL-116, ¶¶ 184, 191; *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, RL-79, ¶ 575*; Metalclad*, CL-115/RL-73, ¶¶ 97-99*; Tecmed*, CL-108/RL-80, ¶¶ 164-166*; ELSI,* CL-120; *Plama,* CL-119).

developments occurring in the photovoltaic industry, financial and technological alike. All Italian measures pursued public interests; none of them was discriminatory, disproportionate or unreasonable.[562]

371. In this context, Italy invokes the following passage from the *Blusun* award:

> In the absence of a specific commitment, the state has no obligation to grant subsidies such as feed-in tariffs, or to maintain them unchanged once granted. But if they are lawfully granted, and if it becomes necessary to modify them, this should be done in a manner which is not disproportionate to the aim of the legislative amendment, and should have due regard to the reasonable reliance interests of recipients who may have committed substantial resources on the basis of the earlier regime.[563]

372. Italy says that "it was plausible to anticipate" that the Conto Energia III incentives might be adjusted in the light of the rapid pace at which Italy was reaching its target of 8,000 MW of cumulative power from photovoltaic energy, which was expected to be achieved by 2020. According to Italy, by 2010 that objective was almost half reached, which forced the Government to anticipate the expiry of Conto Energia III. Moreover, those plants that were able to qualify within the next three months were left unaffected by the regulatory change.[564]

373. With respect to Eskosol's contentions about a state of legal uncertainty existing between 3 March 2011 (the Romani Decree) and 19 April 2011 (when the "salient aspects" of the forthcoming Conto Energia IV were announced), Italy rejects the argument that any lack of clarity violated its treaty obligations. In its view, "Italy cannot be faulted for failing to preview the content of future laws so long in advance of their application."[565] Moreover, the Romani Decree foresaw a transitional period of more than a year after its publication to alleviate the impact on a category of investors (those who already had construction permits) that would actually be disadvantaged by the change, as they no longer would meet the new requirements on the use of agricultural land.[566]

374. As to Conto Energia IV, Italy contends that it actually improved the incentives scheme in several respects, particularly in their overall transparency, by establishing a register with the

[562] Counter-Memorial, ¶ 320.

[563] *Blusun*, RL-56, ¶ 319.

[564] Counter-Memorial, ¶¶ 327, 341.

[565] Counter-Memorial, ¶ 329.

[566] Counter-Memorial, ¶ 330.

GSE recording the plants that would receive benefits.[567] Moreover, Italy argues that the lowered tariffs of Conto Energia IV were "roughly predictable" if one had projected the decreasing trend of tariff levels across the various Conto Energia decrees, and Conto Energia IV did not affect the plants that already qualified for earlier incentives, as the new levels were limited to future applicants.[568]

375. Moreover, Italy argues that in Eskosol's case, even if it *arguendo* had been able to build PV plants to the schedule in the Siemens EPC Contract – an assumption Italy suggests is speculative given Eskosol's financing difficulties – the diminution of the incentives applicable to it in consequence of Conto Energia IV would have been on average 11.75%.[569] Admittedly, a reduction in this range might make a difference for the viability of certain projects, but in Italy's view, "it would make no sense to review the objective fairness of the incentive rates, which [are] designed to guarantee reasonable profits for the competent investors, against the need of investors in unusually delicate circumstances."[570] Italy argues that it would be paradoxical if the ECT were used to reward investors whose costs are so high that their projects depend on the immutability of some "demonstrably over-rewarding scheme."[571] That was the situation of the Eskosol Project, Italy argues, citing one of Eskosol's own witness statements.[572]

376. Italy also notes that, according to Mr. Lecorcier's testimony in the *Blusun* case, "[t]he decrease in the feed-in tariffs under the Fourth Energy Account was proportional to the decrease in construction costs, which continually decreased due to the decrease in the price of solar modules and solar panels."[573] Moreover, given that by the end of 2011 plants adding up to 13,000 MW of nominal power already were operating, and many more were in the

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[567] Counter-Memorial, ¶¶ 331-332 (citing Messrs. Stein and Lecorcier's written testimony in the *Blusun* case, at R-49, ¶¶ 139-140, and R-50, ¶ 102, respectively).

[568] Counter-Memorial, ¶¶ 333-334.

[569] Counter-Memorial, ¶ 335.

[570] Counter-Memorial, ¶¶ 336-337 (citing *Eiser Infrastructure Limited et al. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, RL-62, ¶ 368).

[571] Counter-Memorial, ¶ 338.

[572] Magli I, ¶ 42 ("the Eskosol Project would not make enough money to pay back the loans" and "became economically unviable").

[573] Counter-Memorial, ¶ 339 (citing Mr. Lecorcier's written testimony in the *Blusun* case, R-51, ¶ 37).

process of building and commissioning, Italy acted timely and reasonably by changing the incentive rates applicable to future applicants, restoring the fairness of the economic model and avoiding excessive profits for the investors and unfair costs on taxpayers and final users.[574]

377. Italy further notes that almost all of Eskosol's plants were included in the lists published by the GSE in accordance with Conto Energia IV, and Mr. Lecorcier himself testified in the *Blusun* case that the project would remain profitable under the new regime.[575]

378. Finally, Italy notes that the regulatory climate at the time did not unfairly hamper other PV plants in the Puglia region where Eskosol had hoped to operate, because 1,400 plants in that region secured access to the incentives in 2010-2011 alone, and as many as 90% of the initiatives undertaken were successfully able to qualify for the incentives.[576]

3. Tribunal's Analysis[577]

a. Introductory Points

379. A significant portion of the Parties' pleadings and arguments has been focused on the issue of causation, namely whether Eskosol would have been able to obtain the necessary funding to construct and complete its ambitious project, but for the State measures challenged in this case (the Romani Decree and Conto Energia IV). Italy argued that the project was inherently risky because of Eskosol's own business choices, whereas Eskosol argued that the project had

[574] Counter-Memorial, ¶ 342.

[575] Counter-Memorial, ¶ 346 (citing Mr. Lecorcier's written testimony in the *Blusun* case, R-51, ¶ 37).

[576] Counter-Memorial, ¶ 347.

[577] The Tribunal would like to note that on the matters of liability examined in the following sections of the Award, Professor Tawil joins his co-arbitrators in their final decision but not in their analysis. In the opinion of Professor Tawil it is highly uncertain that Claimant would have met in due time the requirements to benefit from the Conto Energia III regime (see Conto Energia III, CL-99, Articles 4 (1) and 8(1) and the Tribunal´s analysis at ¶¶ 440-449) during the original time frame or in the subsequent 14-month "sunset" grace period, even if no changes would have been made to it by the Respondent. To such respect he notes that at the time of the contested measures the Project Finance was not yet in place, the plants were not under construction (notwithstanding the performance by Eskosol of other relevant works as those related to the two substations and the medium voltage grid) and, prior to the Romani Decree, Claimant had been unable to make the first payment to Siemens under the EPC contract (corresponding to the initial deposit). In such circumstances, Claimant has not been able to discharge the onus of proof that Respondent´s contested measures were the operative cause of the project's failure (*see* in similar terms *Blusun*, RL-56, ¶ 394) and no further analysis of Respondent´s actions is therefore required in the present case.

a clear path to success until Italy dramatically changed the regulatory regime on which Eskosol's business plan was based.

380. In the Tribunal's view, this debate is the proverbial "wrong end of the telescope": it is not the place to start in any resolution of this dispute. The issue of causation logically becomes relevant only if a breach of duty is first shown. If a State has not violated its treaty obligations with respect to a particular investor and investment, then it does not matter what consequences the State's non-wrongful action may have had for a particular business project. The Tribunal therefore starts with Eskosol's allegations of an ECT breach, with particular reference here to its claim that by enacting the Romani Decree and Conto Energia IV, Italy violated its duty under ECT Article 10(1) to "encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area," which "conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment."

381. As the Parties' submissions recognize, the fair and equitable treatment standard has been interpreted as involving several different elements, which may take on differing degrees of importance in different disputes, depending on the facts and the nature of the wrongs alleged. In this case, there has been no allegation that the Government's measures in question were targeted at a particular investor or investment, nor that they were intended to abuse or harass, nor that they were discriminatory. Rather, it appears as common ground that both the Romani Decree and Conto Energia IV were general enactments intended to apply to an entire industry sector. That is an important starting point for the analysis, because it eliminates various factors that can be critical in other cases to an evaluation of FET claims.

382. Nonetheless, the fact that the challenged measures were general industry-wide measures, not targeted at any investor and not intended to abuse, harass or discriminate, does not end the FET analysis. Eskosol contends that the Romani Decree and Conto Energia IV nonetheless violated Italy's obligations under ECT Article 10(1) because they allegedly violated its legitimate expectations; were inconsistent with Italy's obligations to provide a stable and consistent framework for investments; and were arbitrary, unreasonable, disproportionate and non-transparent.

383. These various contentions could be analyzed in any sequence. However, in the circumstances of this case, the Tribunal considers it appropriate to start not with the specifics of Eskosol's investment (*e.g.*, the question of its legitimate expectations), but rather at the macro-level, with Eskosol's arguments about Italy's alleged arbitrary, unreasonable, disproportionate and non-transparent acts. Only after grappling with those questions about the measures in general does it make sense to proceed to the issues involving regulatory stability, consistency and legitimate expectations, which examine whether – even if the Romani Decree and Conto Energia IV in and of themselves were not problematic under the ECT – Eskosol nonetheless might be entitled to protection against the changes they introduced to the previously applicable tariff regime. In that context, the Tribunal examines both Eskosol's general claim about Italy's duty to provide a stable and consistent framework for investments, and its claim that it had legitimate expectations to be able to benefit from the Conto Energia III regime, either because of assurances that it allegedly received from various Government sources, or in consequence of the terms of Conto Energia III itself.

b. Alleged Arbitrary and Unreasonable Conduct

384. Applying this sequence of analysis, the Tribunal begins with Eskosol's claim that the Romani Decree and Conto Energy IV were arbitrary and unreasonable.

385. To give meaning to this standard, Eskosol invokes the ICJ's definition in *ELSI*, according to which "arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. … It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety."[578] Eskosol also notes the *Plama* definition of arbitrary or unreasonable measures as "those which are not founded in reason or fact but on caprice, prejudice or personal preference."[579] Italy does not quarrel with these definitions,[580] and the Tribunal considers them appropriate as well. It equally notes the helpful definition offered in *AES*, which examines first "the existence of a rational policy," which is one "taken by a state following a logical (good sense) explanation and with the aim of addressing a public interest matter," and second whether the challenged act was itself reasonably related to the

[578] Memorial, ¶ 318 (quoting *ELSI*, CL-120, ¶ 128).
[579] Memorial, ¶ 317 (quoting *Plama*, CL-119, ¶ 184).
[580] Counter-Memorial, ¶ 318.

policy, in the sense of "an appropriate correlation between the state's public policy objective and the measure adopted to achieve it."[581] As otherwise stated by the *El Paso* tribunal, citing both *ELSI* and ordinary dictionary definitions of the word "arbitrary,"[582] "there are always several methods for dealing" with challenging circumstances in a country, but the issue of arbitrariness examines not "whether the measures taken were or were not the best," but simply whether they were "based on a reasoned scheme" that was itself reasonably connected to "the aim pursued."[583]

386. In this regard, Eskosol's first basis for claiming that the Romani Decree and Conto Energia IV were arbitrary and unreasonable is that they allegedly were adopted on a pretext, as a favor to the nuclear power industry rather than from a true concern about managing the unexpectedly rapid growth of the country's PV energy sector in response to generous incentive policies.[584] Legally, an allegation that a State acted on a pretext is close to alleging that it acted in bad faith, because the concept is that the State used legal instruments for purposes other than those for which they ostensibly were created. For obvious reasons, a party seeking to demonstrate that a State acted for ulterior motives, and thus not on the basis of its stated public policy rationale, bears the burden to so demonstrate. In this case, however, Eskosol has presented little if any cognizable evidence to support its claim. Its witness Mr. Magli alludes to "common knowledge amongst the Italian public that the change of heart in respect of the solar PV industry was due to 'political' reasons and had nothing to do with an excessive renewable energy capacity," and its witness Mr. Scognamiglio refers to what "later became known to the public" regarding "motivat[ion] by the pressure of the nuclear lobby."[585] These general allusions to "common knowledge" and "public" knowledge hardly qualify as evidence. The only other evidence Eskosol cites in support of an ostensible ulterior motive is the statement of EU official Mr. Claude Turmes that the Romani Decree "is a huge and

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[581] *AES*, CL-81/RL-82, ¶¶ 10.3.7-10.3.9; *see similarly Saluka*, CL-56, ¶ 460 (examining whether State conduct "bears a reasonable relationship to some rational policy").

[582] *El Paso*, CL-146, ¶ 319.

[583] *El Paso*, CL-146, ¶¶ 320-322, 325.

[584] Memorial, ¶¶ 322-323.

[585] Magli I, ¶ 35; Scognamiglio I, ¶ 49; *see also id.*, ¶ 50 (suggesting that the challenged measures were "significantly influenced" by the State's attempt to introduce nuclear energy, until the Fukushima nuclear disaster turned the Italian public further against construction of nuclear power plants).

unacceptable gift made to the nuclear lobby."[586] It is not clear whether Mr. Turmes meant to imply that this was the State's motivation for the measure, or simply that the nuclear industry stood to benefit from it, but in any event, Claimant presents no evidence to support Mr. Turmes' opinion or otherwise to prove pretextual conduct.

387. In any event, by the end of the Hearing, it was not clear that Eskosol even maintained its allegation about ulterior motives to assist the nuclear energy industry. After making this pretext allegation in its Memorial, Eskosol barely returned to the assertion in its Reply, alleging only that Italy's stated concern about too much incentivized energy entering the market too soon was "in fact a cover-up for *whatever its real motive may have been*."[587] Eskosol did not reference the nuclear industry allegation at all in its Post-Hearing Brief, which instead contended that "the key reason" for the early end of Conto Energia III "was to deal with the unexpected consequence of the Salva Alcoa act, [which] created a huge and unexpected amount of FiTs."[588]

388. Eskosol's second basis for alleging that Italy acted arbitrarily, in the sense that "it failed to pursue a legitimate objective,"[589] is that Italy justified the new limitations on accessing Conto Energia III incentives by referring to excessive (and excessively rapid) growth in the PV sector – for example, predicting in January 2011 that the National Action Plan's 2020 target of 8,000 MW "might be reached towards the end of 2011" – while in reality, (i) these predictions "were incorrect" (because as of February 2011, only 3,730 MW had been connected to the grid),[590] and (ii) soon afterwards, Conto Energia IV raised the objective to

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[586] *See* Memorial, ¶ 330 (quoting C-83).

[587] Reply, ¶ 146 (emphasis added). Eskosol did chide Italy in a footnote for not responding to the allegedly "abundant evidence that favoritism of the nuclear industry influenced the sudden end of Conto Energia III," but it cited no such evidence, abundant or otherwise. *Id.*, n. 291.

[588] Cl. PHB, ¶ 174; *see also id.*, ¶ 18 (stating that "witness testimony confirmed" this was "the key reason"), ¶ 183 (stating that "[a]ll the contemporary evidence" demonstrates that the new measures were "in response to the problems associated with the Salva Alcoa Act").

[589] Memorial, ¶ 321.

[590] Eskosol also cites certain April 2011 statistics as evidence that the GSE's January 2011 predictions for the year "were not accurate." Reply, ¶ 139 (citing C-111, which reported that as of 20 April 2011, total nominal capacity in operation was 4,550 MW, with another 2,400 MW expected to enter in operation by the end of June 2011).

23,000 MW by 2016, an increase which "plainly belies the earlier erroneous statements" that PV sector growth was too rapid and needed to be curbed.[591]

389. Taking these arguments in turn, the Tribunal notes (as to the former) that a putative error by regulators or legislators in predicting how quickly additional PV plants might come online during 2011 (*i.e.,* whether the 8,000 MW target was likely to be reached that year) would not itself render illegitimate a policy objective of controlling growth, or render irrational actions taken in support of that policy goal. Just as good faith errors about existing facts do not amount to arbitrary or irrational conduct, an inaccurate but good faith prediction of future events – particularly one made in a highly dynamic environment – is hardly evidence of conduct founded in caprice rather than in reason or honest belief. In this case, there is no basis to believe that the GSE's projections in January 2011, about the amount of total installed PV capacity likely to have come into operation by the end of 2011, were made in anything other than good faith. Moreover, the evidence suggests that the January 2011 predictions for the end of 2011 were *if anything on the low side*, because as it turned out, Italy's total installed PV capacity was almost 13,000 MW by the end of 2011.[592] The fact that a significant portion of the rapid growth may have resulted from the Salva Alcoa Act, which provided a window for plants coming into operation in early 2011 to still qualify for Conto Energia II FiTs (rather than Conto Energia III), does not affect the arbitrariness analysis. Whatever the reason for the trends, it was not arbitrary for Italy to acknowledge their existence, nor to consider them relevant to its assessment of the need for (or timing of) further regulatory adjustments.

390. Eskosol's second argument – that it was irrational for Italy to decry the rapid achievement of the prior 8,000 MW target, and then shortly afterwards declare a substantially increased target of 23,000 MW – deserves greater attention. The difficulty here is that Eskosol oversimplifies the policy objective that underlay all of Italy's Conto Energy schemes, including the earlier ones on which Eskosol claims to have relied. The evidence is clear that the policy goal was not simply unidimensional, to achieve a *particular volume* of PV capacity by means of

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[591] Memorial, ¶¶ 321-323; Reply, ¶ 143.

[592] *See* International Energy Agency, "Energy Policies of IEA countries, Italy, 2016 Review," R-47; Bacchiocchi, ¶ 33; Delfanti/Motta, pp. 73, 98 (referencing GSE statistics reporting a total 12,774 MW of PV power in operation at the end of 2011, of which more than 9,304 MW entered into operation in that year alone).

financial incentives. Rather, the incentive program from the outset was more nuanced, involving the interaction of at least three related policy objectives: (i) *increasing PV capacity*, (ii) doing so by means of long-term subsidies over market pricing, which would ensure sector investors an overall "*fair return*" (over the projected life of a given PV plant) on the costs they incurred in building and operating that new PV plant, but with the expectation that such *costs gradually would decrease* for new plants coming online, with the promotion of more cost-effective technologies, and (iii) *managing the burden* of these tariff subsidies on electricity consumers, since incentive payments to plant operators ultimately were to be factored in to electricity prices by way of a surcharge embedded in user accounts.

391. That these three policy objectives were interrelated from the outset is clear on the face of the prior enactments on which Eskosol claims it relies in formulating its own investment plan. For example, starting with Italy's Legislative Decree No. 387 of 29 December 2003, it was expressly mandated that the incentivizing tariffs be offered "*without any cost to the State budget*,"[593] meaning that the costs would be passed on to electricity consumers.[594] It was equally clear that tariff levels were to reflect cost expectations, with levels maintained for "a duration that ensures a *fair return* on the investment and operating costs" for plants coming into operation at a given time, but over time, with the tariffs offered to subsequent plants being of a "*decreasing nature*,"[595] presumably to reflect expected declines in solar panel costs and also the State's diminishing need to provide subsidies over market pricing to support sector growth.

392. The first two Conto Energia schemes likewise confirmed the interaction of these several policy objectives. First, Conto Energia I provided that the tariffs recognized by the decree would apply only up to a "[m]aximum aggregate limit" of power (originally 100 MW, later amended to 500 MW),[596] and made clear that this cap on anticipated subsidy obligations had

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[593] Legislative Decree No. 387, CL-94, Art. 7(1) (emphasis added).

[594] Eskosol's witnesses clearly understood that the costs of the subsidy program were to be borne by consumers. *See* Scognamiglio I, ¶ 9 ("The costs of the incentivising tariffs were to be paid by end consumers, as part of their electricity bill"). The expert witnesses explain that this was implemented by guaranteeing preferential prices exceeding market prices, with the guests of the premium distributed to end users as an "A3" surcharge on their bills/ Delfanti/Motta I, pp. 40, 46, 75.

[595] Legislative Decree No. 387, CL-94, Art. 7(2)(d) (emphasis added).

[596] Conto Energia I, CL-96, Art. 12(1); Decree of 6 February 2006, CL-97, Arts. 1, 2(1).

been calculated in the context of a particular national target of installed PV capacity by 2015 (originally 300 MW, later amended to 1,000 MW).[597] While any given power plant qualifying for incentives by entering into operation[598] was assured that its particular tariff level would be fixed for 20 years, new plants entering into operation in later years would have their 20-year fixed tariffs set at lower levels, based on the particular year in which they entered into operation.[599] In this way, the scheme anticipated a gradual reduction over time in the burden passed on to Italian consumers, since the total amount of power entitled to any subsidy was capped, and the level of that subsidy would decrease over time.

393. Conto Energia II likewise reflected the same basic interlocking policy objectives. It again (i) sought to increase PV capacity based on a national target for cumulative installed PV power (now set at 3,000 MW by 2016),[600] (ii) by offering incentive pricing, which was still at guaranteed fixed levels for 20 years based on the date of each plant's entry into operation,[601] while (iii) making clear that FiT levels would decrease over time for each later year in which new plants entered into operation,[602] and (iv) that there was an anticipated limit on the volume of power that could benefit from the scheme (now set at 1,200 MW).[603] One departure from Conto Energia I is that the ceiling on incentivized power was now to be implemented with some flexibility in the form of a 14-month grace period triggered when the 1,200 MW figure was reached,[604] presumably so as not to abruptly disqualify plants that were close to entering into operation at that time, with a tracking mechanism introduced to facilitate awareness of progress towards achieving both the national target and the incentive ceiling of 1,200 MW.[605]

394. Finally, and again consistent with the interlocking policy objectives on which Italy's incentive scheme had been based from the outset, Conto Energia II contained a very clear reminder that FiT levels in future would be based on the regulator's understanding both of (i) evolutions in

[597] Conto Energia I, CL-96, Art. 11; Decree of 6 February 2006, CL-97, Arts. 1, 2(1).
[598] Conto Energia I, CL-96, Art. 4(1).
[599] Conto Energia I, CL-96, Art. 6(3).
[600] Conto Energia II, CL-98, Art. 12.
[601] Conto Energia II, CL-98, Art. 6(1).
[602] Conto Energia II, CL-98, Art. 6(2).
[603] Conto Energia II, CL-98, Art. 13(1).
[604] Conto Energia II, CL-98, Art. 13(2).
[605] Conto Energia II, CL-98, Art. 13(3).

PV plant cost structure (to implement the goal of a fair but not excessive return), and (ii) the cumulative burden on electricity consumers from the volume of incentives already granted. These two elements were reflected in Conto Energia II's statement that FiT levels applicable to future periods would be re-evaluated taking into account both "the price trends of energy products and components for photovoltaic plants" and the results of prior incentive programs, including the amount of PV energy brought online and the volume of incentives thus far extended.[606]

395. The National Renewable Action Plan of June 2010 further confirmed that Italy's policy scheme for PV power growth included, as key parts of its intertwined objectives, "rationalizing the current incentives based on trends in the cost of the various technologies," to avoid the scenario of excessive returns (*i.e.*, beyond what was needed to fairly recompense investment) at the expense of electricity consumers. These two elements were reflected in the Plan's report that there would be "regular reviews" of the FiT for solar energy, "in order to take into account the *expected reduction in component and plant costs* and to expand the production base whilst *limiting and regulating the economic impact on the electricity sector*."[607] The National Renewable Action Plan also referred to the need for "corrections … to the existing framework … *in order to avoid a parallel increase in production and in incentive costs*,"[608] which would include a review of FiT levels "in order to avoid *excessive or insufficient remuneration*."[609] It described Italy's program as a "support scheme" which guarantees plants "constant remuneration" for the power they produce, but "subject to regular adjustments which take into account the *trends in the prices of energy products and components* for photovoltaic plants … with the intention of *limiting the medium- and long-term costs to the community*."[610]

396. Finally, the same multi-faceted policy objectives were reflected in Conto Energia III, which entered into effect in August 2010, soon after the National Renewable Action Plan. The

[606] Conto Energia II, CL-98, Arts. 6(3), 14(1), 14(2).
[607] National Renewable Action Plan, C-29, p. 8 (emphasis added).
[608] National Renewable Action Plan, C-29, p. 107 (emphasis added).
[609] National Renewable Action Plan, C-29, p. 107.
[610] National Renewable Action Plan, C-29, p. 112 (emphasis added).

recitals expressly referenced the reduction in costs of PV technology and the importance of progressively reducing tariff levels in light of the basic tariff principle of "fair remuneration of costs."[611] Just as with prior iterations, Conto Energia III referred to an updated national target for cumulative installed PV power (now 8,000 MW by 2020);[612] offered incentive pricing based on the date of each plant's entry into operation, at decreasing levels for later plants but with any given plant still guaranteed its particular FiT for 20 years;[613] and referenced an anticipated limit on the volume of power that could benefit from the scheme (now set at 3,000 MW),[614] while continuing Conto Energia II's approach of a 14-month grace period after the ceiling was met, during which new plants entering into operation still would be entitled to receive FiTs at Conto Energia III levels.[615]

397. With Italy's policy objectives understood in this more nuanced context, it was hardly irrational for Italy's officials to worry in early 2011, when it became increasingly clear that past incentive payment levels had encouraged greater and faster PV plant investment than had been anticipated, at the same time as the market cost of solar panels had dramatically decreased. The point was not that Italy necessarily wanted to cap national PV power *overall* at 8,000 MW (which arguably would have been inconsistent with its announcing soon afterwards a new national target of 23,000 MW). Rather, the concern was about the potential consequences of continuing such rapid growth *without first adjusting the regulatory scheme*, to take into account the two other elements (fair but not excessive returns, and minimizing the burden on consumers) that always had been closely connected to PV capacity in the design of the policy scheme.

398. Italy's policymakers apparently understood that as a matter of logic, a continued explosion of new capacity qualifying for high FiT levels would have at least two consequences. First, newer plants that were constructed at substantially lower component costs than originally anticipated – but which would still receive a 20-year stream of FiTs that had been calculated

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[611] Conto Energia III, CL-99, p. 2.

[612] Conto Energia III, CL-99, Art. 3(1).

[613] Conto Energia III, CL-99, Arts. 8(2), 8(4).

[614] Conto Energia III, CL-99, Art. 3(2).

[615] Conto Energia III, CL-99, Art. 3(6); *see also* GSE, *Guide to Conto Energia III*, January 2011, C-34, ¶ 3.

on assumptions about higher component costs – would thereby obtain higher rates of return than the "fair return" which the subsidy scheme had been designed to ensure. It is undisputed that the cost of PV plant equipment decreased substantially in the relevant time period, due to technological advances and economies of scale,[616] and Eskosol's own witness confirmed that the cost of such equipment (*i.e.*, solar panels and associated materials) "was one of the most expensive parts" of such a PV plant project.[617] The effect was that overall project costs substantially decreased as well. Italy's experts reported that the price of PV plants in Italy fell by 40-50% between 2007 and 2010.[618] Set against an incentive scheme that guaranteed tariff rates at fixed levels over a 20-year period, such dramatically lower costs necessarily would mean dramatically higher rates of return. It was hardly irrational for Italy to take this into account in calibrating a program that, from the start, always had been based on a principle of regulated (not market-based) "fair returns."

399. Second, the financial burden of providing these higher-than-anticipated returns to a larger-than-anticipated volume of PV plant beneficiaries would be borne by Italian consumers, resulting in a greater burden on consumer electricity prices than originally had been expected. Indeed, the "A3" surcharge on general system charges, which was added to end user bills to finance incentives for renewable energy, had become the largest component of the system charges, with its most rapid growth in 2010-2011 due to the enormous increase in installed PV power.[619] Projections in late 2010 were that Conto Energia costs for end-users could increase five or six-fold in 2011 over their 2010 levels, which understandably called into question the sustainability of the mechanism.[620] It was not an irrational decision for Italy's

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[616] *See* Bacchiocchi, ¶¶ 11, 19; *see also* DBW-8, p. 10 (Minister Romani noting that the cost of equipment had decreased by almost 50% over one year, and "the incentive is intended to be tied to the cost of the equipment installed").

[617] Magli I, ¶ 28. It is uncontested that Eskosol itself never incurred such costs, because its project never reached the stage of plant construction.

[618] Delfanti/Motta I, pp. 27, 79 & Figure 7-11.

[619] Delfanti/Motta I, pp. 75-78 & Figures 7.7-7.9.

[620] Delfanti/Motta I, p. 113; *see also* DBW-8, p. 9 (Minister Romani expressing concern that the surcharge on the average user could grow to 80 Euros more per year, to cover a total 7 billion Euro charge needed to guarantee PV incentives).

policymakers to take this "overall societal cost" into account, as "a driver for updating" the tariff schedules earlier than originally had been contemplated.[621]

400. Putting these two factors together, Italy's decision to adjust the core elements of its incentive scheme – to recalibrate provisions regulating how many new plants could qualify, in what time periods, for subsidized tariffs at what levels – cannot be said to violate the core notion of rationality as defined in the *AES* case, namely as lacking a "logical (good sense) explanation" aimed at "addressing a public interest matter."[622] To the contrary, a policy choice to rebalance the program could be seen as entirely consonant with its original objectives, which were to encourage industry growth by ensuring builders of new PV plants a fair (but not excessive) return over costs, while managing the financial burden on electricity consumers – and trying to control the pace of subsidized growth – by providing limits to the number of plants that could qualify for preferential tariffs in particular time periods.[623]

401. Nor were the measures actually taken by Italy logically unrelated to such a public interest goal, in the *AES* sense of lacking "an appropriate correlation between the state's public policy objective and the measure adopted to achieve it."[624] To the contrary, both the Romani Decree and Conto Energia IV were expressly aimed at the stated objectives. The Romani Decree noted that one of the general criteria for encouraging renewable energy production had always been "ensuring a fair return on investment and operating costs,"[625] and explained that the forthcoming Conto Energia IV would set new FiT levels "taking into account the reduction in the costs of the technology and power plants."[626] Conto Energia IV likewise emphasized "the evolution of technology costs" as a key reason for implementing a "gradual reduction of the tariffs" for new PV plants entering into operation after 31 May 2011, and explained that this reduction would "tend to align the public aid with the relevant cost of the technology."[627]

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[621] Delfanti/Motta I, p. 75.

[622] *AES*, CL-81/RL-82, ¶¶ 10.3.7-10.3.9.

[623] *See similarly Blusun*, RL-56, ¶ 342(a) (finding that Italy's decision to reduce FiTs, through the Romani Decree and Conto Energia IV, "was a response to a genuine fiscal need, given the large take-up under the earlier Energy Accounts").

[624] *AES*, CL-81/RL-82, ¶¶ 10.3.7-10.3.9.

[625] Romani Decree, C-75, Art. 24(1), (2)(a).

[626] Romani Decree, C-75, Art. 25(10).

[627] Conto Energia IV, CL-100, p. 3.

At the same time, Conto Energia IV continued to provide that any particular tariff level for which a given plant qualified, based on the date of its entry into operation, would remain constant for that plant for 20 years.[628] And while the new scheme discontinued the grace period that Conto Energia III had provided, to enable plants in the development pipeline to benefit from its FiT levels so long as they came into operation within a defined period after the otherwise applicable incentive ceiling was reached, Conto Energia IV provided its own form of flexibility (albeit less generous) for qualifying for incentives. Under the new scheme, plants that were close enough to completion to be commissioned by 31 May 2011 could still benefit from the Conto Energia III incentives, and those which were able to be commissioned by 31 August 2011 could qualify for Conto Energia IV incentives through a "direct access" provision. As for others that were further back in development, they could sign up in advance for participation under Conto Energia IV, through a new registration process that enabled operators to enter the pipeline for incentives even before plant construction was completed.[629] While construction still would have to be completed within a specified period after registration,[630] the period apparently was long enough to enable a considerable number of power plants to qualify.[631]

402. In any event, while the new regulatory arrangement no doubt was more challenging than the past ones for would-be new PV plant operators, there was nothing in its terms that reflected *irrationality*, in the sense of unreasoned conduct that was not correlated to stated public interest goals. For these reasons, and putting aside for later analysis whether the change in regulatory regime violated any separate ECT obligations of legal stability owed to Eskosol, the Tribunal is unable to conclude that the Romani Decree or Conto Energia IV violated the prohibition on arbitrary and unreasonable conduct which is embedded in ECT Article 10(1)'s provision for fair and equitable treatment. This conclusion applies with respect to two of the challenged features of the State measures, namely (i) their lowering of FiT levels for new PV plants sooner than had been anticipated under Conto Energia III, and (ii) their cutback on the

[628] Conto Energia IV, CL-100, Art. 12(2).

[629] *See* Bacchiocchi, ¶¶ 40-42; Delfanti Motta I, p. 97.

[630] Conto Energia IV, CL-100, Art. 6(2)-(4).

[631] *See* Bacchiocchi, Table 1; Delfanti/Motta I, p. 17; Delfanti/Motta Hearing Presentation Slides, p. 6 (noting that 269 other plants below 1 MW used the registration process and ultimately were completed on time to receive the incentives).

grace period during which future new plants coming online could still access prior (higher) FiT levels.

403. This leaves only one further argument by Eskosol about alleged arbitrariness, which relates to the Romani Decree's separate regulation of the use of agricultural land for future PV plants – or more precisely, its limitation on which such uses of agricultural land would be entitled to qualify for incentive tariffs. Eskosol contends that it was arbitrary and unreasonable for the Romani Decree to limit access to future incentive tariffs, for new PV plants built on agricultural land, to those which occupied 10% or less of the relevant land parcels, while providing only a one-year grace period for plants occupying more of their respective parcels to still qualify by completing construction and connecting to the electrical grid. In Eskosol's view, this feature of the Romani Decree "lacked any reasonable justification" and was "simply another manifestation of the Italian Government's undue attempt at thwarting Italy's solar PV industry."[632]

404. The Tribunal does not agree. Reasonable minds can differ in any country about how to balance land use for agriculture versus land use for renewable energy production, and also about whether the appropriate balance is better fostered by favoring (i) a presumably smaller number of large energy production plants that occupy a sizeable proportion of their land plots, or (ii) a presumably larger number of small energy production plants that occupy a modest proportion of their land plots. Where to draw the line necessarily is a land use policy decision. In this case, there was nothing inherently irrational (in the sense of not founded on reason) about the particular choice Italy made.

405. Indeed, Conto Energia II already had expressed concern that "the first results [of Conto Energia I] have shown … an excessive imbalance in favour of the construction of large plants,"[633] which Italy's experts explain included a substantial practice (including in the Puglia region) of developers disguising large projects as smaller ones by clustering many small plants together in adjacent plots.[634] The preamble to Conto Energia II therefore

[632] Memorial, ¶ 324; *see also* Reply, ¶ 156.
[633] Conto Energia II, CL-98.
[634] Delfanti/Motta I, p. 58.

expressed a goal to "guide the diffusion process of PV technology towards applications … that allow lower usage of the territory."[635] Despite this policy preference, however, expansion of the sector during 2010 "show[ed] a clear development of the sector toward large scale plants, contrary to the spirit of Conto Energia II."[636] In this context, the Romani Decree's effort to refocus future incentives on smaller PV plants, including those which left more room on their land plots for agricultural use, was arguably consistent with the earlier stated policy goals, even though it was implemented in a different way.[637]

406. In addition, the decision to defer the effective date of the policy change, by granting a grace period of a full year during which PV plants currently in development based on prior land use parameters (no more than 50% of the land) still could qualify for incentives,[638] was also rational. Eskosol's witness Mr. Magli acknowledged that "[t]he actual construction of a PV farm is rather straightforward," and "a year to build the plants would not normally be problematic."[639] Indeed, that timetable was generally consistent with the construction schedule Siemens had anticipated in the EPC Contract.[640] In consequence, the grace period the Romani Decree provided before the new land use restrictions entered into effect would seem to have been tailored to allow completion of most PV plant projects that already were in the construction phase, or otherwise were in a position promptly to commence construction.

407. The Tribunal has no doubt that for some entrepreneurial projects that had not yet begun any plant construction, but were still at an earlier stage of development (like Eskosol's), the decision to select a one-year grace period rather than some longer period might prove fateful.[641] But the fact remains that in introducing any new policy program, a temporal line

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[635] Delfanti/Motta I, p. 58 & n.7 (quoting Decree 19/02/2007); *see also* Delfanti/Motta I, p. 111-112 (noting that "all revisions of Conto Energia contain the same ultimate strategic goals … [including] guiding the sector development towards applications that minimize the environmental impact and maximize the degree of diffusion (i.e. building integrated plants rather than large scale ground installations in agricultural areas)").

[636] Delfanti/Motta I, p. 64.

[637] *See similarly Blusun*, RL-56, ¶ 342(h) (finding that "the limits on the use of agricultural lands were motivated by valid rural planning concerns").

[638] *See* Bacchiocci, ¶ 39.

[639] Magli I, ¶ 6; Magli II, ¶ 35.

[640] *See* Delfanti/Motti II, pp. 7, 12-13.

[641] Mr. Magli admits that the impediment in Eskosol's case was not that the one-year grace period was insufficient for construction, but rather that Eskosol was not yet ready to commence construction, because its project financing was still in development and became more complicated by the new regulatory regime. *See* Magli II, ¶ 35.

(or effective date) must be drawn somewhere, and Italy's decision in this case to draw it at a one-year juncture – rather than at a hypothetically longer juncture – did not render the measure inherently arbitrary. Certainly, rationality does not require that a State phase in its new regulatory programs in such a way that every single entrepreneur, at every single stage of the development pipeline, still might be entitled to complete its project plans without adverse impact from the new regime. As the tribunal in *El Paso* remarked, the issue for arbitrariness is not "whether the measures taken were or were not the best," but simply whether they were "based on a reasoned scheme" that was itself reasonably connected to "the aim pursued."[642] The Tribunal considers that standard to have been met in this case.

c. Alleged Disproportionate and Non-Transparent Conduct

408. In addition to charging that the changes introduced by the Romani Decree and Conto Energia IV were arbitrary and unreasonable, Eskosol argues that they were disproportionate and the result of non-transparent conduct, in violation of the fair and equitable treatment obligation in ECT Article 10(1).

409. With respect to proportionality, Eskosol contends that this requires State measures to be "reasonably related and appropriately narrow to address a legitimate State interest,"[643] citing *Tecmed* also for the proposition that "[t]here must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized" by the measure in question.[644] Italy in turn references proportionality in the context of quoting the *Blusun* award, which stated as follows:

> In the absence of a specific commitment, the state has no obligation to grant subsidies such as feed-in tariffs, or to maintain them unchanged once granted. But if they are lawfully granted, and if it becomes necessary to modify them, this should be done in a manner which is not disproportionate to the aim of the legislative amendment, and should have due regard to the reasonable reliance interests of recipients who may have committed substantial resources on the basis of the earlier regime.[645]

[642] *El Paso*, CL-146, ¶¶ 320-322, 325.

[643] Memorial, ¶ 326.

[644] *Tecmed*, CL-108/RL-80, ¶ 122.

[645] Counter-Memorial, ¶ 323 (quoting *Blusun*, RL-56, ¶ 319).

410. The Tribunal accepts in principle that part of assessing compliance with the fair and equitable treatment standard is determining whether State measures were disproportionate, in the sense of imposing burdens on foreign investment that went far beyond what was reasonably necessary to achieve good faith public interest goals. In this case, however, the Tribunal does not agree with Eskosol that Italy violated its ECT obligations "because [it] failed to engage … 'in a rational decision-making process' by considering 'the effect of a measure on foreign investments and a balance of the interests of the State with any burden imposed on such investments.'"[646] To the contrary, while Italy did introduce changes to its incentive scheme through the Romani Decree and Conto Energia IV, three elements of the regulatory changes reflect that consideration was given to, and reasonable provision was made for, the interests of PV plant investors in Italy.

411. First, the State measures left completely intact the incentive tariff regime applicable to PV plants that *already had qualified* for incentives under prior Conto Energia regimes, by entering into operation while those regimes remained in effect. The measures provided that such operating plants would continue to enjoy the exact same tariff levels that had been provided under previous regimes, for the exact same periods of time (20 years from entry into operation). Consequently, this case does not present the question at issue in certain other investment treaty cases, where tariff levels were lowered for plants already in operation. Italy did not make any such changes.

412. Second, the challenged measures each included transitional mechanisms intended to provide an opportunity for investors who were *reasonably far along* in the process of developing additional PV plants to qualify for incentive tariffs. Putting aside for separate analysis the issue of Eskosol's alleged legitimate expectation to be protected against *any* early phase-out of Conto Energia III (which will be discussed *infra*), the relevant changes introduced through the Romani Decree and Conto Energia IV did not completely remove the possibility for PV plant projects still in development to qualify for participation in the State's preferential tariff program. To the contrary, the Romani Decree provided that plants entering into operation during the next three months (by the end of May 2011) – for which investors presumably

[646] Memorial, ¶ 328 (quoting *LG&E*, CL-109, ¶ 158).

already would have purchased and largely installed the relevant plant equipment – would still qualify for the tariffs provided under Conto Energia III.[647] Conto Energia IV in turn provided that plants entering into operation by March 2012 would qualify for incentives, with those doing so earlier entitled to higher tariff levels than those doing so later.[648] Those entering into operation by the end of August 2011 could qualify directly, without needing to pre-register,[649] while those unable to meet this deadline – but still projecting eventual completion by March 2012 – could register for incentives even while construction was ongoing.[650] Finally, with respect to the Romani Decree's institution of tighter limits on the diffusion of PV plants across agricultural land, the Decree provided that its new rules (limiting incentives to plants occupying no more than 10% of the parcel available) would not come into effect for a full year from its entry into force.[651] It is undisputed that many entrepreneurs were able to benefit from these various transitional mechanisms.

413. The Tribunal accepts, of course, that *not all investors* developing PV plant projects would be able to bring their projects to completion in time to qualify for these transitional mechanisms. Thus, while the new measures protected both (i) those whose plants already had entered into operation, and (ii) those whose projects were reasonably nearing completion (effectively, within a year after the Romani Decree), there was (iii) a third group of investors – whose projects could not be completed within one year – who would be impacted more significantly by the regulatory changes.[652] Nonetheless, the concept of disproportionality, as applied to general sector-wide measures taken in the public interest, with no targeting of a particular investor, does not require States to make provision for all pending projects at any point in the development pipeline. Stated otherwise, a State does not violate its general treaty obligation of proportionality simply because, when it provides a grace period before new regulations apply, *not all* investors will be able to meet the requirements of that grace period. The proportionality of a measure of general applicability must be evaluated in light of its overall

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[647] Romani Decree, C-75, Art. 25(9).

[648] Conto Energia IV, CL-100, Arts. 4 and 12(1), and Annex V.

[649] Conto Energia IV, CL-100, Art. 6(2).

[650] Conto Energia IV, CL-100, Art. 6(3).

[651] Romani Decree, C-75, Art. 10.

[652] The Tribunal leaves aside the fact that there eventually was a further Conto Energia V, which picked up where Conto Energia IV – the last measure Eskosol challenges in this case – left off.

features and impacts, and not through the narrow lens of its impact on a particular investor. In this case, the fact that Italy did provide grace period and transitional mechanisms, rather than abruptly changing its regulatory regime with no opportunity for appropriately situated investors to adapt, was itself an indicator that Italy took into account – and sought to alleviate to a reasonable degree – the potential impact of regulatory change on investors.

414. Finally, the incentives offered to investors who managed to complete their PV plants within the applicable time periods were not disproportionately reduced, when considered in the context of similar reductions that Italy had periodically introduced through prior Conto Energias, and particularly in the context of the *rationale* for the additional reductions. In this context, it bears repeating that the incentive program from the beginning had expressly predicated tariff levels on the notion of a "fair return" over PV project costs, and made clear that tariff levels periodically would be adjusted downwards as project costs themselves decreased.[653] While the adjustment was introduced in this instance earlier than originally anticipated, this was partly a consequence of a dramatic drop in PV project costs, and notably, the reduction in FiT subsidies was *proportionately less* than the corresponding drop in technology costs during 2010.[654] There has been no suggestion in this case that the tariff decreases were of a magnitude to violate the notion of a "fair return" over project costs.

415. In these circumstances, the Tribunal is unable to find a breach of ECT Article 10(1) on the basis of allegedly disproportionate conduct.

416. With respect to Eskosol's claims alleging non-transparent conduct, Eskosol relies on the *Metalclad* decision for the proposition that investors should be able to know clearly in advance "all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made … [with] no room for doubt or uncertainty."[655] Eskosol relies on *Tecmed* for a similar proposition, that States should act

[653] Indeed, the preamble to Conto Energia III had itself referenced a decision "to intervene in order to adjourn the incentivizing tariffs in light of the light of the positive reduction of the costs of the photovoltaic technology, and in order to respect the principle of fair remuneration of costs" that had been established by Legislative Decree No. 387 of 2003. CL-99, p. 2.

[654] Rejoinder, ¶ 287 (quoting Delfanti/Motta I, Figure 3-7 and Section 7.82; Delfanti/Motta II, Section 1.3); *see similarly Blusun*, RL-56, ¶ 342(b) (making the same observation about proportionality, and noting that this still left Italian subsidy levels higher than those in Germany, France and Spain).

[655] Memorial, ¶ 301 (quoting *Metalclad*, CL-115/RL-73, ¶ 76).

"totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments … to be able to plan its investment and comply with such regulations."[656] These are sweeping propositions,[657] and the Tribunal is unable to accept them in such broad terms, which would provide no room for good faith regulatory flexibility or recalibration even where a State strives to be forthcoming about its reasons for change, both through public dialogue and through clarity in its laws. The Tribunal instead sees the issue of transparency along the same lines as the *Electrabel* tribunal, which found an obligation under the ECT "to be forthcoming with information about intended changes in policy and regulations that may significantly affect investments, so that the investor can adequately plan its investment and, if needed, engage the host State in dialogue about protecting its legitimate expectations."[658]

417. With this understanding in mind, the Tribunal turns to Eskosol's particular complaints about transparency, which can be perceived as falling into two categories: one about the premature end of Conto Energia III, and the other about the specific incentive tariffs that would apply afterwards, under Conto Energia IV.

418. With respect to the former, Eskosol complains that it "had no way to foresee" that Italy would end the Conto Energia III regime early, since that ran counter to Italy's previous statements regarding the stability of the applicable legal framework.[659] The Tribunal sees this complaint as closely connected to Eskosol's legitimate expectations argument, which it addresses in the next section. In essence, if an investor has a treaty right to be protected against a particular regulatory change, then the transparency analysis adds little to the analysis, addressing perhaps only how much advance notice the investor might have been provided about the changes that would violate its rights. By contrast, if an investor has no treaty right to be protected against a particular regulatory change, then the transparency analysis cannot be specific to its circumstances (including how much advance notice of the change might have

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[656] Memorial, ¶ 302 (quoting *Tecmed*, CL-108/RL-80, ¶ 154).

[657] *See generally El Paso*, CL-146, ¶ 342 (observing that in some respects, the *Tecmed* formulation of fair and equitable treatment "looks like a programme of good governance that no State in the world is capable of guaranteeing at all times") (emphasis in the original).

[658] *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, RL-58 ("*Electrabel*"), ¶ 7.79.

[659] Memorial, ¶¶ 304-307.

been helpful for its business plans). Rather, the issue must be addressed at the more general level, including whether the State acted secretively to conceal its plans or announced those plans openly and with reasonable explanation and detail.

419. In this case, the Tribunal finds that there was no such secrecy, but rather ample public debate before the Romani Decree was issued about the possible need to change the incentives scheme. While the Romani Decree was not issued in final form until 3 March 2011, the key factors that ultimately led to the Decree were all discussed openly by policymakers for several prior months, including the veritable explosion of new plants coming online, the fact that such plants were benefitting from an environment of dramatically reduced technology costs, and the reality that allowing these developments to continue unchecked would pose a severe burden on electricity consumers to finance incentive rates that would not be needed to ensure a fair return.[660] Given this prior public debate, the Tribunal sees no transparency violation resulting from Italy's decision to end Conto Energia III early, particularly since that decision was promptly announced and also (by its terms) provided three months' advance notice before the termination of Conto Energia III would come into effect. The announcement in early March 2011 of a change that would become operative at the end of May 2011 was consistent with the obligation, recognized in *Electrabel*, for States to be "forthcoming with information about intended changes in policy and regulations" that might affect investments."[661]

420. Eskosol's second argument is that there was a gap in time between the Romani Decree's announcement that Conto Energia III would end early, and the enactment of Conto Energia IV setting out the details of the next regime, which allegedly "left Eskosol in legal limbo, without any ability to understand what, if any, incentives Eskosol would be able to secure

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[660] *See, e.g.,* GSE document entitled "Hearing of 25/1/2011 – Comments of GSE on the Scheme of Law Decree Implementing Directive 2009/28/CE," 25 January 2011, C-82 (Senate hearing on 25 January 2011, during which the GSE noted that "the growth of photovoltaic power plants has been too rapid," with the likelihood that the National Action Plan's 2020 target of 8,000 MW instead would be reached "nine years in arrears," by the end of 2011; noted that "[o]nce into operation, the above mentioned plants will accrue burdens [to consumers] over the A3 fee equal to 3 billion euro, each year for 20 years"; and proposed "a reduction on the capacity to be incentivized … as well as a reduction to incentivising tariffs for power plants which will come into operation … [for the] years 2012 and 2013"); C-60(a) (Minister Romani publicly stating in late February 2011 that incentives would have to be revisited because of the accumulated cost to Italian consumers); and Third Draft of Romani Decree, C-62, Art. 23(11)(d) (28 February 2011 publication of the third draft of the Romani Decree, which included a provision for early suspension of Conto Energia III incentives, to be replaced by a new Conto Energia IV setting out "the relevant modalities").

[661] *Electrabel*, RL-58, ¶ 7.79.

under the forthcoming Conto Energia IV."[662] This created a "state of uncertainty" which Eskosol says "amounts to a failure to act transparently," in violation of the ECT.

421. As noted above, the Romani Decree was clear that only plants entering into operation by 31 May 2011 would be able to benefit from its incentive rates. It also made clear that the incentives applicable to plants entering into operation after 31 May 2011 would be governed by a new decree to be issued soon, but in the meantime gave notice of at least two core principles that would be reflected in the new decree, namely that there would be a "maximum annual cumulative electric power from photovoltaic plants that can get the incentive rates," and that the particular tariffs would take into account "the reduction in the costs of the technology and power plants" and the reduction in "the incentives applied by other Members States of the European Union."[663] The Romani Decree anticipated that the new decree would be "adopted … by 30 April 2011."[664] As it transpired, a draft of Conto Energia IV was circulated on 19 April 2011,[665] the decree itself was issued on 5 May 2011, and it entered into force on 12 May 2011.[666]

422. In other words, the gap between the Romani Decree's announcement that incentive tariffs would be reduced for new plants entering into operation after 31 May 2011, and Conto Energia IV's final identification of precisely what the new rates would be,[667] was essentially two months, even if one does not account for the earlier release of a draft of the new decree. The Tribunal has no doubt that during those two months, investors in the process of developing new plants experienced a state of uncertainty. Nonetheless, the fact that Italy took two months to roll out the details of the new regulation, after having previously announced its general principles, is far from sufficient to amount to a violation of any ECT requirements of transparency.

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[662] Memorial, ¶ 307.

[663] Romani Decree, C-75, Art. 25(10).

[664] Romani Decree, C-75, Art. 25(10).

[665] Delfanti/Motta I, p. 108.

[666] Conto Energia IV, CL-100; Joint Chronology, p. 4.

[667] Italy suggests that the ultimate tariff levels of Conto Energia IV were "roughly predictable" based on projections from decreasing tariff levels across prior Conto Energia decrees. Counter-Memorial, ¶¶ 333-334. The Tribunal does not rely on this point for its conclusions regarding transparency, since during the two-month period, investors could not have been certain that the next reductions would be proportionately in line with the prior ones.

d. Alleged Violation of Legitimate Expectations Regarding Stability and Consistency

423. For the reasons stated above, the Tribunal does not consider that the particular changes Italy introduced to its incentive tariff scheme in 2011 constituted, in and of themselves, either arbitrary and unreasonable conduct, disproportionate conduct or non-transparent conduct, in violation of its fair and equitable treatment obligations in Article 10(1) of the ECT. However, this leaves still to be examined the separate question of whether, simply by ending Conto Energia III early and replacing it with a less beneficial scheme, Italy violated Eskosol's alleged legitimate expectations regarding stability and consistency of the legal regime. Specifically, Eskosol argues that it had a legitimate expectation that Conto Energia III would remain in effect for as long as its terms provide, and accordingly that Eskosol would have additional time to complete its planned project and try to qualify for the Conto Energia III tariff regime.

424. Eskosol alleges several different bases for such legitimate expectations, which the Tribunal examines in the following sequence: (i) that representations and assurances were made *directly to it*, by Undersecretary Saglia and by the GSE; (ii) that *public statements* by Italian officials constituted representations and assurances to the investor community more generally; and (iii) that in any event, the *specific terms of Conto Energia III* gave rise to legitimate expectations, by referring expressly to the conditions for its termination (3,000 MW of incentives) and providing for an additional 14-month grace period thereafter for new plants to obtain Conto Energia III incentives. Separately, with respect to the issue of use of agricultural land for PV plant development, Eskosol claims (iv) a general legitimate expectation that prior land use regulations would not be changed on a timetable that would render its land development plans (and related investments) inoperative. The Tribunal addresses these issues below.

i. Statements directly to Eskosol

425. With respect to the first issue – alleged representations and assurances made directly by State officials to Eskosol – the issue for determination is not really one of law, but rather one of fact. It is well established that when a "specific commitment" has been made to a particular investor regarding the legal framework applicable to its investment, changes in that

framework can give rise to a violation of the fair and equitable treatment standard, provided the investor has relied on that commitment to make investments protected by the treaty. As the *El Paso* tribunal explained, "the FET standard can be breached if there is a violation of a specific commitment," in the sense of a commitment "directly made to the investor," for example in a letter of intent or "through a specific promise in a person-to-person business meeting."[668]

426. In this case, Eskosol points to several alleged instances during which "the Italian Government made specific representations to Eskosol about the availability and guaranteed access to the incentivizing tariff scheme."[669] First, Eskosol alleges that Undersecretary Saglia gave certain oral assurances to Mr. Scognamiglio during several meetings in 2010.[670] Eskosol's sole evidence for this assertion is Mr. Scognamiglio's witness statement, which states very generally that during one meeting, Undersecretary Saglia "made it very clear to me that Italy was committed to keeping a stable environment for the investment in the solar PV sector and that it would not follow Spain's example." No date is provided for this meeting, other than that one of Mr. Scognamiglio's meetings with Undersecretary Saglia was during May of 2010.[671] No further information is provided regarding the subject of the meeting, the length or specificity of the discussion, or the context of this particular (very general) statement about a "stable environment." Eskosol presents no contemporaneous written records to document the assurances allegedly provided. Mr. Scognamiglio then refers to a second meeting with Undersecretary Saglia in mid-November 2010, shortly after Spain made significant cuts to the FiTs it offered to PV energy producers, during which "[w]e received a shake of hands from Undersecretary Saglia, and he said 'Eskosol's investment is welcome in Italy.'"[672] Again, no contemporaneous written evidence is provided to document either of the fact of the meeting, the fact of the statement by Undersecretary Saglia, or the specific context in which the (very general) oral statement was provided. In other words, the only evidence presented to the Tribunal to support Eskosol's claim that these meetings conveyed "specific representations

[668] *El Paso*, CL-146, ¶¶ 375-376, 403.
[669] Memorial, ¶ 281.
[670] Memorial, ¶ 281.
[671] Scognamiglio I, ¶ 24.
[672] Scognamiglio I, ¶ 39.

… about the availability and guaranteed access to the incentivizing tariff scheme"[673] consists of uncorroborated assertions by a single witness, of oral discussions with a single Government official, which on Eskosol's own case remained at an extremely high level of generality and which it never troubled at the time to document as particularly important to its decision to invest.

427. Eskosol's only other evidence of supposed specific representations directed to it individually is a letter from the GSE dated 3 December 2010, in which the GSE stated that "if the power plants" Eskosol planned to construct "meet all the requirements, also technical as set forth by applicable law, … we believe that it is possible to secure access to the incentives set forth in the so-called Conto Energia, pursuant to the applicable provisions of law."[674] Eskosol characterizes this letter as an assurance that Eskosol would be able to secure access to the Conto Energia III tariffs,[675] but in the Tribunal's view, the GSE's letter does not say what Eskosol reads it as saying. Rather, the letter can be seen as a fairly cautious statement that made no commitments, but rather simply opined that the GSE expected the laws in force would be applicable to those who met their requirements.[676] The GSE letter cannot be seen as a representation (much less a guarantee) that the applicable laws would not change, nor would it be reasonable for Eskosol to expect a regulatory body like the GSE even to be in a position to offer such a guarantee, when the applicable regime was based on ministerial decrees and not on regulatory discretion.

428. It is equally notable what Eskosol does not claim any Italian official ever said to it. There is no suggestion that any official ever pledged that Eskosol would receive any particular incentive tariffs for its plants.[677] Given that Eskosol had *not even begun building* any of these plants – indeed, at the time of these alleged conversations and the GSE letter, it had not even signed the EPC Contract arranging for construction to start – it is hard to imagine how any

[673] Memorial, ¶ 281.

[674] Letter from GSE to Watson, Farley & Williams, 3 December 2010, C-35.

[675] Memorial, ¶ 282.

[676] Italy characterizes the GSE letter this way: "The amount of caveats in this short declaration is almost comical: obviously, for those subjects meeting the legal requirement and observing the law, then GSE *believed* securing the benefits was 'possible.'" Counter-Memorial, ¶ 300 (emphasis in original).

[677] *See similarly Blusun*, RL-56, ¶ 380 (finding that "[a]t no stage did the Claimants obtain unconditional assurances from the central Government as to their plants' entitlement to FITs, or to the level of such FITs").

State official would have been in the position to make any such guarantees. Nor does Eskosol allege that any State official ever assured it that Italian laws would not change, at any time before Eskosol managed to complete its financing and construction work and reach a position of actually being able to enter into operation. Italy for its part denies that its officials ever "made any unilateral promise to Claimant that its laws would not change."[678]

ii. Public statements by Italian officials

429. As an alternative or additional source of its alleged legitimate expectations, Eskosol refers to certain public statements by Italian officials during 2010.

430. Specifically, Eskosol quotes statements about the forthcoming Conto Energia III that Undersecretary Saglia made at the Verona PV Summit in early May 2010, to what Eskosol characterizes as a "targeted audience" of investors.[679] The statements in question were that (i) "[i]t is the government's intention to enact … [a] new [Conto Energia] in order to give certainty to the entire sector," (ii) Conto Energia III would include "the ability to take advantage of the tariffs for further 14 months after the target [of 3,000 MW] is achieved"; and (iii) Italy's goal with the forthcoming decree was to "simplify, but also give[] certainty of rules."[680] Eskosol characterizes these statements as providing "express and specific guarantees" about an unalterable "right to a 14-month minimum guarantee period for investors to secure the right to the incentivising tariff,"[681] giving rise to a legitimate expectation that Eskosol "would have at the very least until May 2012 to build and connect" its future PV plants and secure the Conto Energia III tariffs.[682] These expectations were further reinforced, Eskosol says, by the National Action Plan's reference to the 14-month grace period expected to feature in Conto Energia III.[683] Eskosol refers to Conto Energia III as then "[f]ulfilling Italy's promises (at least temporarily)."[684]

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[678] Counter-Memorial, ¶ 288.
[679] Memorial, ¶ 47.
[680] National Press agencies Review of the 2010 Italian PV Summit, C-27.
[681] Memorial, ¶ 48.
[682] Memorial, ¶ 274.
[683] Memorial, ¶ 275.
[684] Memorial, ¶ 276.

431. By contrast, Italy refers to the Government statements prior to enactment of Conto Energia III as simply reciting (accurately) what the contents of Conto Energia III were expected to include. In its view, nothing in these statements constituted a "guarantee that the *Conto Energia III* decree would remain unchanged until mid-2012."[685]

432. As to this debate, the Tribunal begins by accepting, at the level of principle, that it is possible for State officials to generate legitimate expectations by clear commitments given to a defined category of recipients, and not just by those directed singly to one investor at a time. This was recognized by the *El Paso* tribunal, which distinguished between two types of specific commitments: "those specific as to their addressee and those specific regarding their object and purpose."[686] With respect to the latter, the tribunal reasoned as follows:

> Second, a commitment can be considered specific if its *precise object was to give a real guarantee of stability to the investor*. Usually general texts cannot contain such commitments, as there is no guarantee that they will not be modified in due course. However, a reiteration of the same type of commitment in different types of general statements could, considering the circumstances, amount to a specific behaviour of the State, the object and purpose of which is to give the investor a guarantee on which it can justifiably rely.[687]

433. At the same time, however, the Tribunal believes it is important to distinguish in the analysis, as prior tribunals have done, between (i) statements made specifically to guarantee investors that they would not be subject to "overly drastic changes," and (ii) those which are primarily "[p]olitical statements" or "general legislative statements," which at best engender reduced expectations,[688] since investors generally must assume that both politics and good faith legislation in the public interest might have to evolve to meet new challenges and unforeseen developments. While investors naturally may take into account the latter categories of statements in assessing the risks and benefits of potential investments, "it is one thing to be

[685] Counter-Memorial, ¶ 294.

[686] *El Paso*, CL-146, ¶ 375.

[687] *El Paso*, CL-146, ¶ 377.

[688] *El Paso*, CL-146, ¶¶ 378-379 (quoting *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, ¶ 278 ("*Continental Casualty*").

induced by political proposals to make an economic decision, and another thing to be able to rely on these proposals to claim legal guarantees."[689]

434. With this distinction in mind, the Tribunal reverts to the particular statements made at the Verona Summit. These were largely *statements of intention* regarding the Government's plan for Conto Energia III, including the terms that it was expected to include. (The National Action Plan's reference to the expected terms of Conto Energia were of a similar nature.) An announcement of the particular terms that a future decree is expected to include cannot be taken as a specific commitment that once enacted, those terms never could be modified, even to react in rational, proportionate ways to unexpected challenges. For such a commitment to be found, there would need to be additional statements made about the *immutability* of the legal regime, and not just its expected contents.

435. That said, the Verona Summit statements did include, in addition to the description of the Conto Energia III's expected contents, several references to the State's objective of providing "*certainty*" to potential investors. An argument could be made that these references implied, if not expressly promised, that the Conto Energia III regime would be a source of predictability for investors, and accordingly would not be altered by the State (or at least not cavalierly, or based on circumstances that potentially could be foreseen). However, even if that proposition were to be accepted *arguendo*, there remains the key question of *which* investors were being promised the referenced "certainty," and at what stage in their entrepreneurial development any such certainty about applicable rules could be expected to attach. The Tribunal is unable to accept these general statements as a specific commitment to the entire universe of potential PV plant investors, that no matter what steps they might or might not take to implement a specific PV plant project, they would enjoy an equal guarantee of "certainty" regarding the persistence of the planned Conto Energia III regime. Rather, the Tribunal sees these statements about certainty at best as addressed to a specific class of beneficiaries, namely those potential investors who would meet Conto Energia III's *own stated criteria* for entitlement to the benefits it described.

[689] *El Paso*, CL-146, ¶ 395.

436. In other words, Undersecretary Saglia's statements about the Government's goal to provide certainty to the PV power sector through the issuance of Conto Energia III cannot be divorced from what the eventual decree itself actually said, about (i) which PV plant projects would have "rights" under its terms and (ii) at what point any such rights would attach. General predictions by Government officials about a legal regime they intend to introduce cannot be read separately from the more specific terms of what they actually introduced. Yet as the Tribunal explains further in the next section, Conto Energia III by its terms described "rights" of various sorts as attaching only to PV plants that *actually entered into operation* within certain specified timetables; the decree was crystal clear that until plants qualified for benefits by entering into operation, no such "rights" would attach. Given these express terms of Conto Energia III, the Tribunal is unable to find that the general public statements made to potential investors *prior* to Conto Energia III established any broader commitments to potential investors than the terms of Conto Energia III itself provided, when it entered into effect.

iii. The specific terms of Conto Energia III

437. Eskosol's third source of alleged legitimate expectations arises from Conto Energia III itself. Eskosol contends that the fair and equitable treatment standard "protects legitimate expectations arising from representations and guarantees provided by the host State … in its legislation and regulations."[690] It posits that while "it is generally understood that the FET standard of itself does not, in general, prevent the State from altering its law," this proposition is limited by an obligation not to "significantly and unfairly alter the legal framework against which an investment was made."[691] In its view, "[l]egal and business stability and predictability protect[] investors against regulatory or policy changes that materially affect investors' rights arising from commitments of the State made through its laws."[692] Eskosol then points to Conto Energia III as the law which allegedly constituted such a commitment, by providing a clear legal framework upon which Eskosol based its business plans and made its investments.

[690] Memorial, ¶ 252.

[691] Memorial, ¶ 293.

[692] Memorial, ¶ 292.

438. By contrast, Italy argues that "an averagely diligent entrepreneur cannot presume that the legislation will not change," particularly in a heavily regulated market such as renewable energy.[693] In its view, "the safeguard against undesirable regulatory developments is the recourse to stabilisation clauses or insurance policies, not the hope that the law will retain their favourite bits (such as a policy granting access to certain advantages) until it is convenient for them."[694] To the contrary, quoting *Electrabel*, Italy says "it is well established that the host State is entitled to maintain a reasonable degree of regulatory flexibility to respond to changing circumstances in the public interest."[695] In short, Italy says, "the existence of a law cannot be mistaken for a promise that the law will not change."[696]

439. The Tribunal acknowledges that there is a healthy debate in the jurisprudence regarding this particular question, namely whether there can be a legitimate expectation of legal stability based on the content of the laws in place, absent any extrinsic representations or assurances about the immutability of those laws. Some tribunals have stated that no legitimate expectation of stability can arise in these circumstances, while others have suggested that they can. The *Masdar* tribunal characterized these as "two schools of thought" on the question of legitimate expectations.[697] Members of the Tribunal have taken positions on this question in other cases.[698]

[693] Counter-Memorial, ¶ 31.

[694] Counter-Memorial, ¶ 295.

[695] Counter-Memorial, ¶ 322 (quoting *Electrabel*, RL-58, ¶ 7.7.7).

[696] Counter-Memorial, ¶ 292.

[697] *Masdar*, RL-90, ¶¶ 490-491, 504, 511, 520-521 (ultimately deciding that regardless of "to whichever of the two schools of thought individual members of the Tribunal might adhere" with respect to legitimate expectations based on general laws, in that case there were also specific commitments made directly to the investor; "[i]t would be difficult to conceive of a more specific commitment than a Resolution … addressed specifically to each of the Operating Companies …. Because of these specific commitments, and irrespective of whether the general provisions [of law] would be sufficient (as the first school of thought would contend was the case), the Tribunal concludes that, in any event, Claimant had legitimate expectations that the benefits granted … would remain unaltered.").

[698] *Compare, e.g., El Paso*, CL-146, ¶¶ 352, 368, 372, 394 ("[T]he Tribunal cannot follow the line of cases in which fair and equitable treatment was viewed as implying the stability of the legal and business framework…. FET cannot be designed to ensure the immutability of the legal order … and play the role assumed by stabilisation clauses specifically granted to foreign investors with whom the State has signed investment agreements…. Under a FET clause, a foreign investor can expect that the rules will not be changed without justification of an economic, social or other nature," but not that the State commits "never to change its legislation whatever the circumstances …. The Tribunal however cannot consider that any rule or even clear commitment embodied in a general piece of legislation or regulation … is in itself a special commitment towards the foreign investors, as such a conclusion would again

440. In this case, however, there is no need for the Tribunal to render an abstract pronouncement on the contours of the legitimate expectations doctrine. That is because, by its terms, Conto Energia III did not purport to promise benefits with respect to any PV power plant *unless or until* that plant actually entered into operation. Article 8 of Conto Energia III, which sets forth the incentive tariffs at issue, begins with the threshold statement, "[t]he incentivising tariffs referred to in this [article] shall apply to photovoltaic power plants *that enter into operation* … after 31 December 2010."[699] The following articles contain the same proviso, namely that "plants … *that enter into operation*" before the end of 2011 would have "the right to" the tariffs set forth in a table, and those "*that enter into operation* in 2012 and 2013 [have] the right to" such tariffs further reduced by 6% a year.[700] While the language providing for a "right" may be legally significant, so too is the stated criteria for any such right attaching, namely entry into operation by a given date.

441. The same is true with respect to the grace period, or sunset clause, upon which Eskosol sets great store. As may be recalled, Conto Energia III first referred to the "national target" of PV power of 8,000 MW, and then to the "cumulative" PV power "that can receive the incentive rates provided for in … this decree," namely 3,000 MW.[701] However, the decree also stated that "[i]n case of depletion of the availability referred to [*i.e.*, the 3,000 MW], the power plants, *which enter into operation* within fourteen months after the dates, to be communicated by the operator on its website, when the achievement of the [3,000 MW ceiling] are reached, have the right to the incentivising tariffs."[702]

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immobilize the legal order and prevent any adaptation to circumstances."), *with Charanne and Construction Investments v. Spain,* SCC Case No. V 062/2012, Dissenting Opinion of Prof. Dr. Tawil, 21 January 2016, RL-63, ¶ 5 ("in my opinion, the creation of legitimate expectations in an investor is not limited solely to the existence of a 'specific commitment' … but it can also derive from, or be based on, the legal system in force at the time of the investment.").

[699] Conto Energia III, CL-99, Art. 8(1) (emphasis added).

[700] Conto Energia III, CL-99, Art. 8(2) (emphasis added).

[701] Conto Energia III, CL-99, Arts. 3(1), 3(2).

[702] Conto Energia III, CL-99, Art. 3(6) (emphasis added).

442. Finally, Conto Energia III had an overarching provision entitled "Procedures to qualify for incentivising tariffs."[703] The very first provision referred to an application to be filed "[w]ithin ninety days after the date *when the plant [has] entered into service*."[704]

443. Given these provisions, the Tribunal agrees with Italy that "incentives were linked to actual energy production."[705] Italy takes the position that "[l]egitimate expectations to *retain* those incentives" did accrue to "actual producers,"[706] with the implication that if it had tried to reduce or eliminate the tariffs *already flowing* to PV plant operators under Conto Energia III, or to shorten the time period over which such operators would enjoy the tariffs, then that indeed could have been an abrogation of legitimate expectations. But regardless of such a hypothetical, this is not what Italy ever did. To the contrary, the Romani Decree maintained for all such operators the 20-year flow of incentives at the tariff levels previously established for their plants.[707]

444. The Romani Decree also provided a roughly three month grace period, under which new plants that came into operation by 31 May 2011 would be entitled to 20 years of the Conto Energia III tariff levels.[708] Italy refers to this *second category* of plant owners, when it states that in addition to existing operators having a legitimate expectation "*to retain*" prior incentive levels, "[l]egitimate expectations to *obtain* [the Conto Energia III] incentives" could arise for others "when production was imminent." Again, however, Italy emphasizes that "Italy has

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[703] Conto Energia III, CL-99, Art. 4.

[704] Conto Energia III, CL-99, Art. 4(1) (emphasis added).

[705] Counter-Memorial, ¶ 221.

[706] Counter-Memorial, ¶ 221 (emphasis in original). Italy distinguishes some of the Spanish incentive cases on this basis. *See, e.g., id.*, ¶ 273 (distinguishing *Eiser* on the basis that "the investor in that case ... built and operated the plants" and "the investor's plants were formally registered to receive benefits under the applicable regime," whereas Eskosol "never qualified … for the benefits under Conto Energia III"), ¶ 275 (arguing that past cases concerned "the investor's expectations that their *acquired rights will be preserved* or not unfairly diminished or outright revoked," but did not stand for the proposition that "*certain rights will be available for acquisition, and in a particular format, in the future*") (emphasis in original), ¶ 276 (contending that "in all the cases cited, the … investors … already were subject to the State measures," which "is certainly not the case for Claimant"), and ¶¶ 283-286 (arguing that even the dissent in *Charanne* and *Isolux* "anchored the notion of legitimate expectations on that of acquired rights," meaning compliance with the legal requirements to obtain particular benefits, whereas Eskosol "never acquired the right to the benefits, because it never complied with the legal requirements set by the law"); *see similarly* Rejoinder, ¶¶ 255-256 (distinguishing *Masdar* as finding a breach of legitimate expectations related to benefits that the investor already had acquired by complying with the necessary requirements).

[707] *See* Counter-Memorial, ¶ 291 (noting that "[t]he benefits of … Conto Energia III … still apply today to all qualifying plants").

[708] Romani Decree, C-75, Art. 25(9).

never failed to respect these expectations,"[709] by providing a reasonable grace period for plants close to completion to conclude their finishing steps.

445. On the facts of this case, the Tribunal does not need to decide the legitimate expectations question for a potential *third category* of plant owners, namely those who succeeded in bringing new PV plants into operation only *after* 31 May 2011, but still within the dates that Conto Energia III originally had specified for its application. For such plants, a debate between the two "schools of thought" on legitimate expectations hypothetically could arise, about whether Conto Energia III gave such plant owners a legitimate expectation to be able to receive the listed tariff *upon their fulfillment of its originally stated requirements*, notwithstanding the decree's early termination. The issue in such a case would be whether the benefits that Conto Energia III described as "rights" to be provided to a plant entering into operation by a specified date could survive the State's decision to change the applicable rules, *if* the plant nonetheless proceeded to operation within those dates. Otherwise framed, the legal question in this hypothetical case would be whether the ECT requires a State, after declaring that it will provide certain "rights" to certain intended beneficiaries upon their fulfillment of certain conditions, to uphold that promise or compensate the *qualifying* beneficiaries for not doing so, even if the State acted in good faith and not arbitrarily in altering its regulatory regime.

446. Here, however, that particular scenario is not presented either. Unlike the hypothetical investor in the scenario above, Eskosol did not construct a single one of the 120 PV plants it originally had hoped to build, and therefore no such plant entered into operation – either within Conto Energia III's original projected maximum timeframe (2011-2013), or within the grace period Conto Energia III had provided in case the ceiling of 3,000 MW of additional PV capacity was hit early (*i.e.,* 14 months from when the 3,000 MW were achieved). In other words, the *stated preconditions* for any "rights" that might have attached to such plants, under Conto Energia III's own terms, did not materialize. This is therefore not a situation where an investor already has "complie[d] with all the established requirements of the current

[709] Counter-Memorial, ¶ 221 (emphasis in original).

legislation in order to be entitled to an expected and determinable benefit,"[710] only to have the State renege on promises for which the investor already demonstrably had qualified. Eskosol never complied with the stated preconditions in Conto Energia III for any rights to attach under its terms.

447. The Parties differ on the reasons Eskosol did not build any PV plants in Italy, much less bring them into operation. Eskosol's explanation is that the financing it had hoped to arrange, to permit it to proceed with construction under the EPC Contract, became more elusive after the Romani Decree and Conto Energia IV. It may be recalled that Eskosol signed the EPC Contract in order to demonstrate its *bona fides* to potential funders, but at the same time depended on obtaining outside financing to meet even its first payment obligation to Siemens under that Contract. Eskosol claims that the regulatory changes in Italy interfered with its efforts to lock down financing on terms it previously had explored with potential funders, and that by the time it might have explored alternate financing deals – either for a project of the original scope or for a smaller scale project involving fewer PV plants – there was no longer time to complete plant construction, within the one-year grace period for construction that the Romani Decree provided for plants occupying more than 10% of agricultural land plots.[711] Italy counters that Eskosol's inability to complete any plants was a consequence of the unique vulnerability of its project and its own risky business decisions, including (i) a complex design involving using many small plants to take advantage of simplified permitting procedures but treating them as a single, unprecedently large project for purposes of exploring financing, and (ii) deciding for tactical reasons to delay starting construction on any of the plants until completing the electrical connections for all 120, instead of building plants gradually in batches, in parallel with their required connections.[712]

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[710] *Charanne*, Dissenting Opinion of Prof. Dr. Tawil, RL-63, ¶¶ 9-10, 12 (referring to a regime in Spain that required PV plant investments to "be made, entered into the registry, and put into operation prior to the expiration of a deadline," and opining also that "[o]nce [an investor] made the investment, *complying with all the existing requirements of the rules governing the granting of the expected benefit*…, it does not appear to … legally acceptable [for] the receiving State to modify or eliminate them without some legal consequence") (emphasis added).

[711] *See, e.g.,* Magli II, ¶¶ 35-46.

[712] *See, e.g.*, Counter-Memorial, ¶ 222; Resp. PHB, ¶¶ 47, 53; *see also Blusun*, RL-56, ¶ 376 (explaining that "the legality of the Project … depended on … small plants of less than 1MW," but "its economic viability depended on the cumulation of those plants into a large aggregated array," but this required "substantial financing" which "[t]he Project never obtained").

448. This factual debate is interesting, but ultimately there is no need for the Tribunal to opine on the commercial wisdom of Eskosol's business plan, nor on whether some alternate plan might have enabled it to adapt more readily to the 2011 regulatory changes. The bottom line remains that nothing in Conto Energia III purported to extend any rights to would-be developers or operators of future plants, *prior* to their actual completion and commissioning. There was no provision extending rights to entrepreneurs who hoped to build PV plants within a particular time period; or to operators who were in the process of arranging financing based on such plans; or to those who held DIA permits, authorizing construction to begin whenever financing was ready; or to those who built electrical substations with the intention one day of connecting these to future PV plants. The decree by its terms spoke only of the benefits to be afforded plants that actually entered into operation, and made crystal clear that such entry into operation was the critical qualifying event for any rights to attach.

449. In other words, even if (*arguendo*) Conto Energia III could be seen as creating legitimate expectations for a defined class of beneficiaries to receive a defined type of treatment, *Eskosol simply did not fall within that defined class of beneficiaries*. Under any framing of the legitimate expectations doctrine, Eskosol therefore cannot claim an entitlement to protection against a change in the Conto Energia III legal regime, under whose own terms it never qualified in the first place.

iv. Agricultural land use regulations

450. Finally, the Tribunal sees nothing in the record that arguably could constitute a commitment, representation or assurance to Eskosol – or to a defined class of investors to which it belonged – that the agricultural land use regulations in effect prior to March 2011 would not be changed, or that the effective date of any such change would be more than a year (which was the grace period that the Romani Decree itself provided).

451. Eskosol does not allege that Italy ever made any promises to anyone to maintain, indefinitely or for any specific period of time, the availability of preferential incentive tariffs for PV plants built on up to 50% of their land parcels. Rather, its argument with respect to this issue boils down to the assertion that (i) the prior regime so provided, (ii) Eskosol presumed, without any State assurances, that the prior land use regime would remain in effect, (iii) it designed its

project plans based on this presumption, but (iv) Italy then changed the regime, while admittedly providing a one-year grace period, and (v) that grace period proved insufficient for Eskosol to complete either a project of the original planned scope or any other, smaller project. All of this may well have been true, but this was a risk that Eskosol assumed. No conduct of Italy has been alleged to induce Eskosol to rely on a purported immutability of the prior land use regime. Further, nothing in the prior land use regulations even purported to address the length of time in which such regulations would remain in effect.

452. In other words, this is not a situation where Eskosol was *affirmatively led by Italy* to expect that its prior land use regime would remain in place for a particular period of time, or would be phased out only with a grace period of a particular length. There is no evidence of a representation or assurance in either regard. Yet it is axiomatic that legitimate expectations must be based on some form of State conduct, and not simply on the investor's own subjective expectations. Absent any evidence of such conduct, the Tribunal is unable to accept that Eskosol had an objectively legitimate expectation regarding the longevity of the prior agricultural land regime, and therefore that by changing its regime with a grace period of one year, Italy contravened any such legitimate expectation in violation of Article 10(1) of the ECT.

C. UMBRELLA CLAUSE

453. The Tribunal begins its description of Eskosol's umbrella clause claim with the general observation that Eskosol devoted relatively limited briefing to it, as was the case for all of its ECT claims other than the fair and equitable treatment claim (to which it devoted substantial attention). Italy accordingly also devoted limited space in its memorials to these non-FET claims. The Tribunal summarizes below the limited arguments that the Parties presented.

1. Eskosol's Position

454. Eskosol relies on the following provision in Article 10(1) of the ECT as a provision generally referred to as an "umbrella clause":

> Each Contracting Party shall observe any obligation it has entered into with an investor of another contracting party.[713]

455. Eskosol contends that by virtue of the phrase "*any* obligations" (emphasis added), this provision must be read as extending treaty protection to commitments by host States undertaken in a variety of formats, including through their unilateral acts and through their domestic legislation and regulations.[714] Eskosol rejects Italy's suggestion that the ECT's umbrella clause is limited to specific commitments made to a particular investor (*i.e.*, by Italy to Eskosol). In its view, Article 10(1) of the ECT does not contain such a requirement, and there is general agreement in the jurisprudence (Eskosol says) that legislation alone can amount to an undertaking under the umbrella clause.[715] In any event, Eskosol contends, the series of iterations of Conto Energia did contain a specific commitment.[716]

456. According to Eskosol, Conto Energia III contained obligations that are covered by the last sentence of Article 10(1) of the ECT: it "guaranteed" investors incentivizing tariffs for 20 years "so long as they connected their PV plants to the electric grid by a specified time frame, and with the benefit of a sunset provision, and a savings clause."[717] Eskosol adds that those commitments were further reinforced by public and private statements by Government officials towards PV investors, including Eskosol itself.[718]

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[713] Memorial, ¶ 335.

[714] Memorial, ¶ 336 (citing *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v. The Government of Mongolia*, UNCITRAL, Decision on Jurisdiction, 25 July 2012, CL-121, ¶ 438 (citation omitted); *LG&E*, CL-109, ¶¶ 164-166 (citation omitted); *Enron*, CL-107, ¶ 274 (citation omitted); and *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015, CL-122, ¶ 589 (citation omitted)). Eskosol also relies on Rudolf Dolzer & Christoph Schreuer, *Standards of Protection* in *Principles of International Investment Law,* CL-111, p. 177 (citation omitted).

[715] Reply, ¶¶ 160-163 (citing *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award, 22 June 2010, CL-168, ¶ 448; Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment,* January 2009, CL-169, p. 457; *Enron*, CL-107, ¶ 274; Anthony C. Sinclair, *The Origins of the Umbrella Clause in the International Law of Investment Protection*, 20(4) Arb. Int'l 411, 411-434 (2004), CL-170, at 422; and OECD, Working Paper No. 2006/3: *Interpretation of the Umbrella Clause in Investment Agreements*, 7-9 (OECD, 2006), CL-171 (citations omitted)).

[716] Reply, ¶ 163.

[717] Memorial, ¶¶ 341-342.

[718] Memorial, ¶¶ 343-344. Eskosol refers to the National Action Plan, C-29; letter from the GSE to Watson, Farley & Williams, 3 December 2010, C-35; and *New Conto Energia: expected news and GSE's point of view*, Enernew.it, 12 May 2010, C-28.

457. According to Eskosol, Italy violated the umbrella clause in the ECT by abrogating the incentivizing tariffs and the sunset provision contained in Conto Energia III.[719] It rejects the relevance of Italy's observation that no Italian law was breached, clarifying that its claim under the umbrella clause is not based on any asserted breach of Italian law, but rather on the "*dismantling* of Italian law (i.e. Conto Energia III) that embodied Italy's undertakings vis-à-vis Claimant."[720]

2. Italy's Position

458. Italy denies any breach of the umbrella clause contained in Article 10(1) of the ECT.

459. First, Italy contends that there was no breach of Italian law susceptible of being elevated to a Treaty violation.

460. Second, Italy argues that the umbrella clause in Article 10(1) requires a commitment to have been made with respect to a specific investment or investor. "General regulatory measures with open-ended application cannot be considered to produce commitments for specific investors enforceable through an umbrella clause."[721]

461. Third, Italy argues that even if specific investors who had qualified under Conto Energia III could claim to have derived enforceable rights from it, Eskosol never did.[722] Eskosol never built any PV plant, let alone an operating plant that could acquire a right to the incentivizing tariffs.[723] In Italy's view,

> the Claimant challenged certain regulatory acts that never applied to it. It is therefore impossible that the slight modifications of the Italian incentive scheme could harm the investor, as they concerned legal entitlements that it had never acquired and that, in fact, [it] was never close to acquiring.[724]

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[719] Memorial, ¶ 345.

[720] Reply, ¶ 159 (emphasis in original).

[721] Counter-Memorial, ¶ 375; *see also Noble Ventures, Inc v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, RL-71 ("*Noble Ventures*"), ¶ 51; *Isolux,* RL-60, ¶ 772.

[722] Counter-Memorial, ¶ 376.

[723] Counter-Memorial, ¶ 377.

[724] Resp. PHB, ¶ 10.

3. Tribunal's Analysis

462. The Tribunal is unable to accept, as a general proposition, that laws of general applicability qualify under Article 10(1) of the ECT as "obligation[s] … *entered into with* an investor of another contracting party" (emphasis added). The very notion of "enter[ing] into" an obligation "with an investor" implies, as a matter of ordinary meaning, that there has been some *interaction* between the State and the investor, from which a particular obligation results. In most cases, that interaction presumably would be *direct*, such as through a contract or an investment authorization. Nonetheless, the Tribunal does not rule out, at least at the level of theory, that in rare cases a State might be shown to have entered into obligations *indirectly* with a given investor, for example by making a binding commitment to a narrow and targeted class of investors in which that investor is known to fall. Even so, such obligations would be expected to be documented in some form other than through laws of general applicability.[725]

463. In this case, there is no need to drill down further into the doctrinal debate, because as demonstrated above, Eskosol never brought itself within the group to whom (even by its own theory) a State commitment was made. Eskosol claims that Conto Energia III "embodied Italy's undertakings vis-à-vis Claimant"[726] because it supposedly "guaranteed" certain preferential tariffs to any investor "so long as they connected their PV plants to the electric grid by a specified time frame."[727] But Eskosol never connected any PV plants to the grid within any timetable, so even by Eskosol's own theory, it did not qualify for the class to whom any alleged undertakings were provided. This is sufficient, on the facts, to dispose of the umbrella clause claim under ECT Article 10(1).

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[725] *See Foresight Luxembourg Solar 1 S.À.R.L., Foresight Luxembourg Solar 2 S.À.R.L., Greentech Energy Systems A/S, GWM Renewable Energy I S.PA., GWM Renewable Energy II S.PA. v. The Kingdom of Spain,* SCC Arbitration 2015/150, Final Award, 14 November 2018, CL-195 ("*Greentech*"), ¶ 413 (considering that the obligation at issue in Article 10(1) "applies to a specific commitment rather than a general regulatory act"); *Noble Ventures*, RL-71, ¶ 51 ("The employment of the notion 'entered into' indicates that specific commitments are referred to and not general commitments, for example by way of legislative acts"); *Isolux*, RL-60, ¶ 772 (citing *Noble Ventures*); *cf. Continental Casualty*, ¶¶ 300-302, CL-138 (stating that "it should be clear that th[e] umbrella clause does not come into play when the breach complained of concerns general obligations arising from the law of the host State," and finding an umbrella clause violation *not* because of changes in Argentina's laws, which "cannot be a source of obligations that Argentina has assumed specifically with regard to the Claimant's investment company and which are protected under the BIT's umbrella clause," but rather because of *additional specific assurances* in an Offering Memorandum that was distributed to investors to induce them to make the investments at issue).

[726] Reply, ¶ 159.

[727] Memorial, ¶ 341.

D. EXPROPRIATION

1. Eskosol's Position

464. As with its umbrella clause claim, Eskosol addresses only very briefly in its submissions the allegations of expropriation in violation of Article 13(1) of the ECT. It begins with the uncontroversial observation that the provision "protects investments against indirect measures of expropriation,"[728] citing various cases for the proposition that treaty reference to "measures having effect equivalent" or "tantamount to" nationalization or expropriation address indirect rather than direct takings.[729] To determine whether such a taking has occurred, Eskosol proposes the *Metalclad* formulation about acts which have "the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be expected economic benefit of property."[730] It then proposes a "sole effects test," described by the tribunal in *Burlington* as examining whether "the investment as a whole has become unviable," in the sense that it "cannot generate a commercial return."[731]

465. Eskosol argues that the Romani Decree resulted in a "freezing of credit as banks were uncertain as to the future of the incentivising tariff scheme," and that "without funding, [Eskosol] had to stop the construction works envisaged in the EPC Contract."[732] The uncertainty was resolved by the issuance of Conto Energia IV, but this "slashed" the tariff levels to a degree that "no banks were willing to finance" the project, as Eskosol "was no longer able to obtain a commercial return," resulting in an outcome where the project "had to be abandoned."[733] In practice, Eskosol argues, Italy "neutralised and halted the Eskosol Project and its ability to carry out its business," thereby depriving Eskosol of the use and

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[728] Memorial, ¶ 347.

[729] Memorial, ¶¶ 347-348 (citing *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Interim Award, 26 June 2000, CL-126, ¶ 104; *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, CL-131, ¶ 286; *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006, CL-132, ¶ 63; *Starrett Housing Corporation, et al. v. The Islamic Republic of Iran, et al.*, Interlocutory Award at 24, 19 December 1983, 4 IUSCT R. 122, CL-123 (citation omitted); *Tecmed*, CL-108/RL-80, ¶ 114.

[730] Memorial, ¶ 348 (citing *Metalclad*, CL-115/RL-73, ¶ 103).

[731] Memorial, ¶ 349 (referring to *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, CL-124, ¶¶ 396-398); *see also* Reply, ¶¶ 167-168.

[732] Memorial, ¶ 352.

[733] Memorial, ¶ 352; Reply, ¶ 166.

enjoyment of its investment.[734] Eskosol states that "its property rights were detrimentally affected which amounted to an unlawful expropriation."[735]

2. Italy's Position

466. Italy rejects Eskosol's claim that the measures amounted to unlawful expropriation.

467. Italy first argues that Eskosol does not establish a causal link between the Government's actions and any deprivation, and that such a link does not in fact exist. Italy refers to the arguments about causation it presented in its defense to the FET claim, and states that these are equally relevant for the expropriation analysis.[736] Italy also criticizes Eskosol's expropriation arguments as "circular," since Eskosol argued that Italy's conduct was *unlawful* because of the harm Eskosol allegedly suffered, but at the same time it argues that the harm was *suffered* because the conduct was unlawful.[737] Italy says there is no "hard proof of a causal link in either direction," but at most a "temporal correlation."[738]

468. Italy also contends that Eskosol has not proven "complete impairment" of the investment as required to prove direct or indirect expropriation under Article 13 of the ECT, and that "[t]he policing of indirect expropriation … cannot stretch as far [as] covering all harmful effects that a State measure might cause to the investment," short of total deprivation.[739] Here, Eskosol's property interest in the SPVs remained unaffected, and the SPVs' interest in the lands and DIAs they acquired "did not change at any time."[740] The "Eskosol Project" as such was simply "a business plan," which Eskosol continued to try to market to potential funders "long after Conto Energia IV was passed."[741] While funders may have been skeptical of the project's viability, "the profitability of an asset is not a substitute for its property, use and enjoyment," and "[a] decrease of the former cannot be equated to a deprivation of the latter."[742] At most,

[734] Memorial, ¶ 353.
[735] Cl. PHB, ¶ 198.
[736] Counter-Memorial, ¶¶ 354-355.
[737] Counter-Memorial, ¶ 356.
[738] Counter-Memorial, ¶ 357.
[739] Counter-Memorial, ¶ 359.
[740] Counter-Memorial, ¶ 361.
[741] Counter-Memorial, ¶ 362.
[742] Counter-Memorial, ¶ 362.

Eskosol is claiming that "its future profits were expropriated," but (as Italy says the tribunal in *Blusun* found), the reason "the benefits … never came to fruition" was "because Claimant never met the requirements to receive them (banally, it never built the energy plants)."[743] Italy emphasizes that "[t]here is no automaticity in obtaining incentives," and while an investor "might expect to receive incentives once it is operational and it has respected all required conditions under legislation, it has no entitlement until that very moment" – and in this case, "Eskosol never even got close to that moment."[744] In Italy's view, "[i]t is therefore impossible to talk about expropriation or even deprivation of something that never existed."[745]

469. Finally, Italy argues that "no indirect expropriation can arise from the State's exercise of its police powers."[746] Italy quotes *Blusun* for the proposition that "the situation was not analogous, still less tantamount, to expropriation of the Project by Italy," because it simply involved the State's non-discriminatory public-interest changes to a regulatory regime, which when "combined with operational decisions made by the investors and the lack of prearranged Project financing, meant that the Project remained radically incomplete, never qualified for feed-in tariffs, and inevitably went into liquidation."[747] Italy cites *Methanex* and other cases for the proposition that "a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process," does not amount to expropriation simply because it affects a foreign investor or investment.[748] Here, the measures were clearly in the public interest, Italy says, because, they were "designed, according to a goal of effectiveness and reasonable balance of costs, to promote renewable energy production in a sustainable way," and accordingly it would be "clearly excessive" to allow Eskosol to sue "in order to make up for an estimate[d] drop in profits."[749] Italy quotes *Feldman* for the proposition that States "must be free to act in the broader public interest through [*inter alia*] the granting or

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[743] Counter-Memorial, ¶ 363 (citing *Blusun*, RL-56, ¶ 402).

[744] Resp. PHB, ¶ 23(B).

[745] Counter-Memorial, ¶ 363.

[746] Counter-Memorial, ¶ 364.

[747] Counter-Memorial, ¶ 365 (citing *Blusun*, RL-56, ¶ 401).

[748] Counter-Memorial, ¶ 366 (citing *Methanex Corporation v. United States of America*, UNCITRAL, Award, 3 August 2005, RL-69, ¶ 7; *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, RL-70 ("*Feldman*"), ¶ 103.

[749] Counter-Memorial, ¶ 368.

withdrawal of Government subsidies, reductions or increases in tariff levels … and the like."[750]

3. Tribunal's Analysis

470. The Tribunal begins with a reminder of general principles, namely that the doctrine of expropriation involves deprivation of protected rights in property. As the tribunal in *Emmis* observed, the origin of the term expropriation is the Latin word *expropriat*, from the verb *expropriare*, which contains the root *proprium* (property) as well as the prefix *ex* (out or from). In consequence, a finding of expropriation must be premised on a showing that "Claimants must have held a property right of which they have been deprived."[751] The property right or asset in question "must have vested (directly or indirectly) in the claimant for him to seek redress."[752]

471. Eskosol seems to acknowledge the required nexus between an established property right and an expropriation claim, by contending that "its property rights were detrimentally affected which amounted to an unlawful expropriation."[753] The difficulty however is identifying what specific property rights of Eskosol's allegedly were taken. There is no dispute that Eskosol retains ownership of the SPVs, which still own all of the land, assets, and contract rights that belong to them. Eskosol also retains the ability, should it wish, to build PV power plants on the land owned by its SPVs and connect them to the electrical grid. What Eskosol claims it lost, as a result of the Romani Decree and Conto Energia IV, was the prospect of doing so within a framework that would allow it to sell its power at certain prices, though the application of a special tariff regime subsidized by consumers which would support pricing above market levels, and thereby guarantee returns on its investment. In other words, Eskosol

[750] Counter-Memorial, ¶ 368 (quoting *Feldman*, RL-70, ¶ 103).

[751] *Emmis International Holding, B.V., et al. v. Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014, ¶ 159, available at http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C2000/DC4468_En.pdf; *see also id.*, ¶ 161 (explaining that "[t]he need to identify a proprietary interest that has been taken is confirmed by the definition of 'investment' in the Treaties," which refer to "assets," a term whose ordinary meaning itself involves an item of property or property rights), ¶ 162 (finding that the existence of property rights must be determined with reference to host State law, since "[p]ublic international law does not create property rights. Rather, it accords certain protections to property rights created according to municipal law").

[752] *Emmis*, ¶ 168 (citing numerous cases requiring identification of the rights duly held by a claimant as precondition to determining if those rights were taken).

[753] Cl. PHB, ¶ 198.

complains that prior to the challenged Government acts, it had the potential to use its assets in a way that would enhance their value to a particular extent – assuming it first could obtain financing to build the envisioned PV plants within a projected timeframe – but that the challenged Government acts shortened that timeframe and lowered tariffs thereafter, to such an extent that the business plan no longer would work.

472. The difficulty for an expropriation analysis is that Eskosol cannot show that it had a recognized *property right* to obtain this enhanced value of its assets, through participation in the Conto Energia III tariff regime. As discussed above, Conto Energia III was clear that only such PV plants who qualified for its benefits, by entering into operation within specified dates, would be granted stated rights. This case does not concern any plants that so qualified, and which therefore might try to invoke doctrines of vested rights to complain about deprivation of any such rights with an effect on their investment that was tantamount to expropriation.[754] At best, Eskosol might argue that it was *well positioned to eventually secure a legal right*, but nothing in the Italian legislation transformed positioning to secure a future legal right into a legal right as such.[755] And absent any *established right* that was abrogated by Government interference, the fact that Government conduct may have impacted a company business plan does not itself amount to expropriation, even if the end result ultimately is that the company was unable to survive financially.

473. For these reasons, the Tribunal comes to the same conclusion as did the *Blusun* tribunal, namely that "the situation was not analogous, still less tantamount, to expropriation of the Project by Italy."[756] The expropriation claim therefore is denied.

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[754] *See similarly Blusun*, RL-56, ¶ 402 (noting that "[t]he difficulty with [Blusun's expropriation claim] lies in its assumption that the Claimants were entitled to … the full benefit of current FITs – without complying with the conditions consistently imposed on applicants for FITs, i.e. timely completion of the solar panels and their connection to the grid"). *Cf. Emmis*, ¶ 255 (dismissing expropriation claim after finding no interference with the proprietary rights the claimants indisputably had, and no additional property right to a future benefit for which the claimants had not qualified).

[755] *See similarly Blusun*, RL-56, ¶ 407 (noting that "[t]he Claimants never lost title to the land … [and] had no right … to the enhanced value of the land on the footing that the Project would succeed").

[756] *Blusun*, RL-56, ¶ 401.

E. CONSTANT PROTECTION AND SECURITY

1. Eskosol's Position

474. Eskosol states that, by providing that "investments shall also enjoy the most constant protection and security," Article 10(1) of the ECT imposes upon States an obligation of vigilance and due diligence.[757] Citing a number of international investment law authorities, Eskosol argues that "the scope of legal protection to be afforded to an investment under the full protection and security clause extends to providing legal stability, and certainty in legal norms."[758] Contrary to Italy's position, Eskosol contends that the "legal stability" view of full protection and security is not defeated by contentions that the FET obligation also protects legal stability, since FET and full protection and security are two distinct ECT protections that must be assessed separately.[759]

475. Under this standard, Eskosol contends that Italy "was required actively to protect Eskosol's investments," which "involved, in particular, and at the very least, the application of the legal and regulatory framework that it had established specifically to ensure the viability and legal and economic protection and security of investments such as Eskosol's."[760] According to Eskosol, Italy failed to protect Eskosol by passing the Romani Decree and Conto Energia IV.[761]

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[757] Memorial, ¶¶ 354-355; *see also* ECT, C-1, Art. 10(1) (emphasis added); *American Manufacturing & Trading, Inc. v. Democratic Republic of the Congo*, ICSID Case No. ARB/93/1, Award, 21 February 1997, CL-139, ¶¶ 6.05-6.11.

[758] Memorial ¶¶ 355-358 (citing *CME*, CL-142, ¶ 613; *National Grid plc v. The Argentine Republic*, UNCITRAL, Award, 3 November 2008, CL-130 ("*National Grid*"), ¶ 189; *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, CL-106, ¶ 408; *Biwater Gauff Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, CL-87, ¶ 729; and *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, CL-129, ¶¶ 7.4.15-7.4.16; *see also* Reply, ¶ 172.

[759] Reply, ¶ 173. Eskosol also challenges Italy's reliance on *Isolux*, RL-60, contending that the claimant in that case did not properly plead a full protection and security violation.

[760] Memorial, ¶ 359.

[761] Memorial, ¶ 361.

2. Italy's Position

476. Italy rejects Eskosol's claim that it breached its full protection and security obligation.[762] It contends that Eskosol's interpretation of the standard follows a minoritarian view,[763] and that the obligation includes only protection of an investment's physical integrity. Under Eskosol's broader construction of the standard, Italy argues, the contours of full protection and security would overlap with those of the FET standard.[764]

477. Based on Italy's narrower view of the applicable standard, it rejects Eskosol's full protection and security claim "because no act attributable to Italy threatened the integrity of the investors, the investment, and their assets."[765]

3. Tribunal's Analysis

478. Given the relatively limited attention the Parties paid to this claim,[766] this is not the occasion for the Tribunal to enter into a lengthy and detailed explication of its members' respective nuanced views on the standard. It suffices to say that whatever framing the ECT's "constant security and protection" standard is given, the Tribunal does not believe Italy violated it on the facts of this case.

479. First, that conclusion is self-evident if the standard is considered to be limited to its original customary international law dimensions, of a due diligence obligation to protect the physical security of Eskosol's investment from harm by third parties. There is no allegation that any of Eskosol's property, assets or personnel were ever threatened by anyone.

480. Second, if the standard were considered to be somewhat wider, to encompass "*legal security*" in the limited sense of a State's obligation to provide investors with *access* to reasonable

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[762] Counter-Memorial, ¶¶ 370-372.

[763] Counter-Memorial, ¶ 370.

[764] Counter-Memorial, ¶ 371 (criticizing Eskosol's reliance on *National Grid* and other Argentina cases).

[765] Counter-Memorial, ¶ 372 (citing *Isolux,* RL-60, ¶ 817).

[766] *See generally* Memorial, ¶¶ 359-366 (discussing both the legal standard and the alleged breach in a total of three pages); Counter-Memorial, ¶¶ 370-372 (same in just three paragraphs); Reply, ¶¶ 363-366 (same in just four paragraphs); Rejoinder, ¶ 317 (two sentences cross-referencing prior submission); Cl. PHB, ¶¶ 192-196 (one page); Resp. PHB, ¶ 9 (one sentence).

avenues of judicial redress,[767] there equally is no violation, because Eskosol has not alleged any insufficiency in this regard.

481. Finally, even if (*arguendo*) the constant protection and security standard were to be given a broader interpretation as entailing some element of "*legal stability*" (which the Tribunal does not accept), the fact remains that even under this construction, the standard still would be one of "due diligence," embodying notions of reasonable care, and not a "strict liability" standard or an obligation of result. This conclusion is in line with the International Court of Justice's warning that the provision of constant protection and security "cannot be construed as the *giving of a warranty* that property shall never in any circumstances be occupied or disturbed,"[768] and numerous tribunals have agreed on this point.[769] Accordingly, even tribunals that might see constant protection and security as including some component of "legal stability" should accept that the obligation would not require some absolute freezing of regulatory frameworks in place, but simply that due diligence (or reasonable care) be taken to protect against *unnecessary or disproportionate* upheaval and associated harm to investments, taking into account also the rationale and urgency of a particular regulatory change. In this case, as discussed *supra*, Italy did take reasonable care to provide protection to those PV sector investors who already were fairly far along in their PV plant development plans, both by providing grace periods for them still to qualify under prior regulatory regimes (*e.g.,* three months for the Conto Energia III tariffs, one year for the agricultural land rules that would enable investors to take advantage of Conto Energia IV) and by allowing plant developers to

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[767] *See, e.g., Electrabel*, RL-58, ¶ 7.146 (finding that the ECT's constant protection and security obligation included the duty to put at the claimant's disposal "the … tools for obtaining redress"); *Parkerings*, RL-59, ¶ 360 (finding a treaty duty to for a State to "keep it judicial system available for the Claimant to bring its contractual claims" and for such claims to "be properlty examined in accordance with domestic and international law by a impartial and fair court"); see *also A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG v. Czech Republic*, PCA Case No. 2017-15, Final Award, 11 May 2020, ("*AMF*") ¶¶ 649-632, *available at* https://www.italaw.com/sites/default/files/case-documents/italaw11589.pdf (discussing cases addressing legal redress as part of the full protection and security).

[768] *ELSI*, CL-120, ¶ 108 (emphasis added).

[769] *See, e.g., El Paso*, CL-146, ¶¶ 522-523 (considering that full protection and security standard to be "no more than the traditional obligation to protect aliens under international law and … it is a residual obligation provided for in those cases in which the acts challenged may not in themselves be attributed to the Government, bot to a third party," but noting in any event that the *concept of due diligence* "does not mean that the State has to prevent each and every injury," but only to "take reasonable actions within its power to avoid injury when it is, or should be, aware that there is a risk of injury. *The precise degree of care, of what is 'reasonable' or 'due,' depends in part on the circumstances*.") (emphasis added); *Electrabel*, RL-58, ¶ 7.83 ("concur[ring] with the description" of the standard in *El Paso*); *AMF*, *supra,* ¶ 654.

begin the qualification process for Conto Energia IV at an earlier stage of development (by registering during construction rather than applying only after commissioning and entry into operation).

482. In these circumstances, the same conclusion would be warranted under *any* doctrinal approach to constant protection and security that still recognizes the central notion of "due diligence" embodied in the standard. That is because a due diligence obligation cannot be stretched to require a State to provide transitional mechanisms that would cover *all possible investors*, at any stage of their development plans whatsoever, from any possible impact of regulatory change, in circumstances (as here) where that change took the form of general sector-wide enactment that were not discriminatory, were taken in good faith, and were reasonably related to a rational public policy goal.

483. For these reasons, Eskosol's "constant protection and security" claim under Article 10(1) is denied.

F. IMPAIRMENT BY UNREASONABLE OR DISCRIMINATORY MEASURES

1. Eskosol's Position

484. Finally, Eskosol notes that Article 10(1) of the ECT provides that "no contracting Party shall in any way impair by unreasonable or discriminatory measures [the investments'] management, maintenance, use, enjoyment or disposal."[770] It contends that this is a flexible and broad standard, which should be interpreted in light of all the circumstances of the case.[771] Relying on the *National Grid* award, Eskosol also contends that the term "unreasonable" should have the same meaning as "arbitrary."[772]

485. Eskosol states that the analysis it presented regarding the FET and full protection and security standards applies equally to this standard. It argues that Italy breached its obligation of

[770] Memorial, ¶ 363; ECT, C-1, Art. 10(1).

[771] Memorial, ¶ 364 (citing *CME*, CL-142, ¶ 158).

[772] Memorial, ¶ 365 (citing *National Grid*, CL-130, ¶ 197).

reasonableness by considerably altering the rights created by the legal framework in which Eskosol invested, and by doing so "capriciously, and without any justifiable reason."[773]

2. Italy's Position

486. Italy argues that Eskosol has failed to explain why this claim should warrant separate treatment from the FET claim, given that Eskosol simply "rehashes the reasoning on reasonableness that it employed to advance the FET and FPS allegations." Italy refers the Tribunal to its arguments regarding those allegations.[774]

3. Tribunal's Analysis

487. The Tribunal again notes the brevity of the Parties' briefing on this standard,[775] as well as their mutual cross-reference for its content to other ECT standards that the Tribunal already has addressed. In particular, Eskosol does not allege discrimination, so this claim boils down to an allegation of impairment of its investment "by unreasonable … measures," and Eskosol contends that the term "unreasonable" should have the same meaning as "arbitrary" – which the Tribunal extensively addressed in connection with the FET claim. Italy agrees that the claim should be addressed under the same rubric of reasonableness considered for the FET claim.

488. In these circumstances, there is nothing further for the Tribunal to decide, beyond noting the relevance of the issues it already has decided.[776] Specifically, the Tribunal has found that the challenged measures did not violate the ECT on account of alleged arbitrariness. The equivalently framed claim for unreasonableness fails on the same basis.

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[773] Memorial, ¶ 366.

[774] Counter-Memorial, ¶¶ 378-379.

[775] *See* Memorial, ¶¶ 363-367 (presenting the claim in four paragraphs); Counter-Memorial, ¶¶ 378-379 (opposing the claim in two paragraphs, which simply cross reference arguments in other sections). Neither Party provided any additional briefing in its respective Reply or Rejoinder or Post-Hearing Brief.

[776] *See generally Greentech*, CL-195, ¶¶ 400, 403 (agreeing with the *Novoenergia* tribunal that "[u]nder the rationale of procedural economy it is generally accepted that an arbitral tribunal does not need to address claims and issues that are already implied in those that are essential to its decision," but that where applicable procedural rules require a tribunal ruling on each separate request for relief, tribunals should do so while keeping their reasons brief).

G. Conclusion on Liability

489. For the reasons stated above, the Tribunal denies Eskosol's various liability claims, including specifically its claims for breach of the obligations under Articles 10(1) and 13 of the ECT with respect to (i) the fair and equitable treatment standard, (ii) the umbrella clause, (iii) expropriation, (iv) constant protection and security, and (v) to unreasonable or discriminatory measures.[777] Because Eskosol has not succeeded on any of its liability claims, there is no need for the Tribunal to summarize or resolve the Parties' respective positions with respect to any damages. The Tribunal therefore proceeds below to the only remaining issue, which is the assessment and allocation of costs in accordance with Article 61(2) of the ICSID Convention.

VIII. COSTS

A. Eskosol's Cost Submission

490. In its submission on costs, Eskosol reiterates its request that the Tribunal issue an award granting it the relief it has requested in these proceedings, including compensation for the costs Eskosol has incurred in this matter. Eskosol submits the following claims for legal and other costs (excluding advances made to ICSID):[778]

Legal fees:	**€4,729,083**
Winston & Strawn LLP	€4,462,083
AVV Giuseppe Spagnolo	€ 267,000
Expert fees:	**€ 660,911**
Fichtner Management Consulting AG	€ 657,271
Terrin Association	€ 3,640
Translation fees:	**€ 58,665**
Other costs:	**€ 187,170**
ICSID Lodging fee:	**€ 23,305**

[777] Memorial, ¶ 247.

[778] Letter from the Claimant to the Tribunal dated 11 January 2019.

TOTAL:	**€5,659,134**

B. Italy's Cost Submission

491. Italy claims that Eskosol should bear all the costs and expenses of these proceedings. It submits the following claims for legal and other costs (excluding advances made to ICSID):[779]

Attendances:	**€ 400,000 ($ 459,132)**
Legal Fees:	**€ 500,000 ($ 573,914)**
Costs:	**€ 70,000 ($ 80,348)**
Attendance at Hearing:	**€ 20,000 ($ 22,957)**
TOTAL:	**€ 990,000 ($1,136,351)**

C. The Tribunal's Decision on Costs

492. Article 61(2) of the ICSID Convention provides:

> In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

493. This provision gives the Tribunal discretion to allocate all costs of the arbitration, including attorney's fees and other costs, between the Parties as it deems appropriate.

494. The Tribunal notes that in many ICSID cases, each party bears its own costs, while in other cases costs follow the event. In this case, however, even the latter principle would require some nuanced application. While Italy ultimately prevailed on the merits, Eskosol prevailed in relation to significant non-merits issues, including Italy's objection under Rule 41(5), its application for immediate termination, its application for suspension, and its various jurisdictional objections. Those applications and objections contributed to the overall costs of these proceedings, and indeed occasioned two prior lengthy decisions by the Tribunal, the

[779] Letter from the Respondent to the Tribunal dated 18 January 2019.

Decision on Rule 41(5) Objection and the Decision on Termination. In the Tribunal's view, it would not be appropriate to ignore those facts in considering the ultimate allocation of costs. Ultimately, considering that both Parties prevailed to some significant extent, the Tribunal concludes that each Party should bear 50% of the costs of the arbitration, and should continue to bear its own direct costs incurred in connection with the proceeding.

495. The costs of the arbitration, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount (in USD) to $ 765,634.54.[780]

496. The above costs have been paid out of the advances made by the Parties as follows:

Eskosol S.p.A. in liquidazione:	**$ 524,928**
Italian Republic:	**$ 407,740.02**

497. As a result of the Tribunal's ruling that each Party shall bear 50% of the costs of the arbitration, each Party's share of the costs of arbitration amounts to $ 382,817.27.[781]

498. Accordingly, as the Parties each have already borne 50% of the costs of the arbitration, no order of recovery of costs is due to either Party from the other.

IX. AWARD

499. For the reasons set forth above, the Tribunal decides as follows:

(1) The Respondent's request for dismissal for lack of jurisdiction and/or inadmissibility is denied.

(2) The Claimant's request for a declaration that Italy has breached its obligations under the ECT and/or international law is denied.

(3) Specifically, the Claimant's request for a declaration that Italy's actions and omissions are unfair and inequitable; unreasonable; have failed to protect Eskosol's

[780] A breakdown of these figures will be provided to the Parties by the ICSID Secretariat.

[781] The remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

Investments; have failed to observe its obligations under the “umbrella clause” in the ECT; or have effectively expropriated Eskosol’s Investments without prompt, adequate and effective compensation, are each denied.

(4) Both Parties’ requests for an award of costs are denied.

[Signed]

Guido Santiago Tawil
Arbitrator

Date: 30 August 2020

Brigitte Stern
Arbitrator

Date:

Jean Kalicki
President of the Tribunal

Date:

[Signed]

Guido Santiago Tawil
Arbitrator

Date:

Brigitte Stern
Arbitrator

Date: 30 August 2020

Jean Kalicki
President of the Tribunal

Date:

Guido Santiago Tawil
Arbitrator

Date:

Brigitte Stern
Arbitrator

Date:

[Signed]

Jean Kalicki
President of the Tribunal

Date: 29 August 2020