Italy found liable for change in renewable energy policy in intra-EU arbitration

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Awards | April 23, 2019 | Shyam Balakrishnan

Greentech Energy Systems A/S & Ors. v. The Italian Republic, SCC Arbitration V (2015/095)

On December 23, 2018, an SCC tribunal rendered an award holding Italy liable for violation of the FET standard under ECT Article 10(1) and awarding the three claimants (two incorporated in Luxembourg and the third in Denmark) damages of approximately USD 15 million.

Background and claims

The claimants, who had invested in 134 photovoltaic (PV) power plants, alleged that Italy had, at the time of the making of the investment, promised them certain financial incentives to induce the investment. They asserted that this investment was made with the expectation that the financial incentives prescribed through legislation, decrees and contract would remain unchanged.

Principal among these incentives was the *Conto Energia* decree, which provided for incentive tariff premiums (higher than market price) for a period of 20 years starting from the date on which each PV plant entered into an agreement with *Gestore dei Servizi Energetici* (GSE), a state-owned enterprise, and connected to the power grid.

Beginning in 2012, Italy implemented a series of measures, including Law Decree No. 91/2014 of June 24, 2014 (the *Spalma-incentivi* Decree), which diminished the value of the incentives offered to the claimants. Alleging that the measure harmed the claimants and their respective investments, they asserted that Italy breached the FET standard, the impairment clause and the umbrella clause under ECT Article 10(1) and sought damages, in addition to other declaratory relief.

Italy, in resisting the claim, objected to the jurisdiction of the tribunal on several grounds, in particular the intra-EU ISDS objection. On the merits, it argued that its right to regulate permitted the changes to the incentive structure and that its measures were reasonable and proportionate. The tribunal, however, remained unconvinced.

Intra-EU objections: Achmea to Italy's rescue? Not quite

On Italy's objection to the tribunal's jurisdiction, the amicus curiae brief by the European Commission and the *Achmea* decision, the tribunal made several important observations.

First, it observed that the ECT did not exclude intra-EU disputes from the outset. Referring to the decisions in *RREEF Infrastructure v. Spain* and *Eiser v. Spain*, it noted that the ECT did not contain an implied "disconnection clause." The tribunal found that the EU would have inserted an express exclusion if it had intended to exclude intra-EU disputes from the purview of the ECT.

Next, addressing the issue of the alleged modification of the ECT in light of the Lisbon Treaty, the tribunal noted that Italy could not rely on VCLT Article 30 (titled "Application of Successive Treaties Relating to the Same Subject-Matter") as it had failed to demonstrate that that the ECT and the Lisbon Treaty were in fact "successive treaties relating to the same subject-matter" (para. 346).

Vis-à-vis the argument that TFEU Article 344 would preclude the tribunal's jurisdiction, the tribunal observed that the article provided that EU member states "undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein." The tribunal concluded that Article 344 related to disputes involving EU member states or EU institutions, and not investor–state disputes. Accordingly, the tribunal felt that none of the above arguments were persuasive.

Lastly, the tribunal examined the *Achmea* decision and examined whether the CJEU judgment would have a bearing on its jurisdiction. The tribunal was, however, unconvinced and dismissed the objection on three grounds.

First, distinguishing the CJEU's decision, the tribunal observed that it derived its jurisdiction from ECT Article 26 and not an intra-EU BIT. In doing so, the tribunal endorsed the view of the *Eiser* and *Novenergia II* tribunals.

Second, the tribunal rejected Italy's contention that the applicable law provision in ECT Article 26(6) would warrant the application of EU law to the present dispute. It noted that the provision, which states that an investor–state arbitral tribunal "shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law," could not be stretched to include EU law. The tribunal noted that its mandate was confined to examine Italy's alleged breaches of the ECT and international law but not of EU law.

Third, the tribunal concluded that the *Achmea* decision was confined to agreements between EU member states and left open the possibility of dispute resolution under multilateral agreements that were not "intra-EU" per se. Accordingly, referring to the *Masdar v. Spain* decision, the tribunal concluded that the *Achmea* decision had "no preclusive effect" as to its jurisdiction (para. 395).

FET and legitimate expectations

To examine the alleged breach of FET, the tribunal first assessed whether the claimants, at the time of the making of their investment, had been led to believe that the incentive tariffs would remain the same. It observed that, when the claimants invested in the PV

facilities, there was sufficient evidence in the *Conto Energia* Decrees, in agreements with GSE and in correspondence with GSE that the rate of return would have remained constant for a period of 20 years. The tribunal thus took the view that Italy's modification of the rate of return by the *Spalma-incentivi* Decree breached the investors' expectations and the FET standard.

Italy's right to regulate

Addressing Italy's objections that the *Spalma-incentivi* Decree was within its right to regulate, the tribunal observed that "the repeated and precise assurances to specific investors amounted to guarantees that the tariffs would remain fixed" (para. 450). It rejected Italy's argument that the object of its decree was to compensate the service provider and reduce costs borne by consumers. This policy reason, according to the tribunal, did not meet the threshold of *force majeure* that would allow Italy to deviate from its binding commitments. The tribunal concluded that the "specificity of the assurances Italy offered (*Conto Energia* decrees, statements and conduct of Italian officials, and individual GSE letters and GSE Agreements)" had the hallmarks of a stabilization clause and that Italy had waived its right to modify its commitments.

The umbrella clause

Italy asserted that the clause could not encompass statutory commitments that were not made to a specific investor. The tribunal, however, considered the term "obligations" in the clause to include legislative instruments that could be understood as commitments made to investors. It found that the relevant question was not whether commitments made under the *Conto Energia* Decree or the GSE letters or agreements would, in isolation, be covered by the ECT's umbrella clause, but whether Italy had breached the umbrella clause given that the investors had the benefits of all these "obligations." With this characterization, the tribunal found that Italy's actions violated the umbrella clause as well.

Damages and costs

Having found that Italy breached its FET obligation, the tribunal awarded the claimants EUR 11.9 million in damages plus compounded interest. Italy was also ordered to pay the claimants' arbitration costs and other reasonable costs in the amount of EUR 478,000 and EUR 1,408,268.

Dissent

Giorgio Sacerdoti disagreed with the majority's findings on the merits. The arbitrator took the view that the *Spalma-incentivi* Decree was reasonably foreseeable and did not undermine investor expectations. He observed that measures taken by Italy were "reasonable and proportionate as to their aims and results; transparent as to their enactment; balanced and limited as to their impact on the operators" (dissent, para. 49).

Accordingly, he observed that Italy had not violated the FET standard. In a similar vein, he also found that there was no violation of the impairment provision and the umbrella clause.

Notes: The tribunal was composed of William W. Park (president appointed upon jointly by the co-arbitrators, U.S. national), David R. Haigh (claimant's appointee, Canadian national) and Giorgio Sacerdoti (respondent's appointee, Italian national). The award is available at https://www.italaw.com/sites/default/files/case-documents/italaw10291.pdf and the dissenting opinion of Giorgio Sacerdoti is available at https://www.italaw.com/sites/default/files/case-documents/italaw10292.pdf

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