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Encavis AG and Others v. Italy, Yet Another Award in the Italian Renewable Energy Saga

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On March 11, 2024, an ICSID arbitral tribunal (Juan Ferna?ndez-Armesto (President), Wendy Miles, Alexis Mourre), rendered an award in *Encavis AG and Others v. Italy*. The controversy follows some other 14 disputes initiated by EU investors against the Italian State under the Energy Charter Treaty ("ECT") (some of these discussed here) and falls into the stream of post-*Achmea* cases involving EU investors and Member States (recently discussed here).

Factual Background

The proceeding at hand features all usual ingredients of intra-EU disputes based on the ECT: it faces some EU investors, the German company *Encavis AG* and its 58 controlled companies organized under the laws of Italy, on the one hand, and an EU Member State, the Italian Republic, on the other; it relates to measures adopted by a State in the energy sector; and it involves the EU Commission as *amicus curiae*.

The facts at stake are the following. Claimants, which owned over 70 photovoltaic plants in Italy, argued that some of the measures adopted by the Italian Government, modifying the original support scheme for the renewable sector, negatively impacted their investments. More precisely, Claimants complained about Italy's decision to reduce tariff rates for solar plants by about 8% (Law Decree No 91/2014 of 24 June 2014, so-called "*Spalma-incentivi* decree") and the decision to end the minimum granted price ("MGP scheme") (together "Disputed Measures"). According to Claimants, the Disputed Measures impacted their investment in breach of Art. 10(1) of the ECT, including the fair and equitable treatment ("FET") standard.

The tariff rates scheme had been the main mechanism employed by the Italian State to stimulate investment in the photovoltaic sector. It granted eligible photovoltaic power plants price-based market incentives. In addition, Italy provided a complementary support scheme, the MGP scheme, which allowed photovoltaic plants with less than 1 MW capacity to sell energy to the State-owned company (*Gestore dei Servizi Energetici* ("GSE")) in excess of the market price. The tariff rates and MGP schemes applied to Claimants' plants and were expressly established in an agreement signed by each investor and the GSE (so-called "*Convenzione*", plural "*Convenzioni*").

Jurisdiction

The Respondent challenged the tribunal's jurisdiction on three grounds: (i) Claimants could not be considered as "Investor[s] of another Contracting Party" in accordance with Art. 26(1) of the ECT, being citizens of an EU member State and being the Respondent an EU Member State itself; (ii) Claimants were barred from seeking the arbitral tribunal's determination because each *Convenzione* contains an exclusive jurisdiction clause for the Court of Rome and the application of the fork-in-the-road clause; (iii) Italy did not validly consent to arbitrate disputes regarding the ECT with investors of another Member State. The tribunal dismissed all Respondent's preliminary objections, confirming its jurisdiction to hear the case.

With specific reference to the third objection, Italy's argument – supported by the EU Commission – revolved around the decision of the Court of Justice of the EU ("CJEU") in *Republic of Moldova v. Komstroy LLC* (discussed here), subsequently upheld by the arbitral tribunal in *Green Power v. Spain* (see previous coverage on the Blog). In *Komstroy*, with an *obiter dictum,* the CJEU stated the inapplicability of Art. 26(2)(c) of the ECT to disputes between a Member State and an investor of another Member State because of its inconsistency with the autonomy and primacy of EU law. The *Encavis* tribunal, however, established that the *Komstroy* and *Green Power* decisions were inapposite to it. The tribunal observed that *Green Power* remains "an outlier in an otherwise consistent approach in prior awards that have dismissed similar intra-EU objections" and that, in any case, it could not apply to *Encavis* arbitration because its context was different. Indeed, *Green Power* was governed by the Stockholm Chamber of Commerce Arbitration Rules and Swedish (and EU) law applied as the *lex arbitri*; while *Encavis* is governed by the ICSID Convention and Rules and neither domestic nor EU law apply as the *lex arbitri*. Although the *Encavis* tribunal, like most previous tribunals, decided to dismiss intra-EU objections, the possibility remains that arguments concerning the autonomy and primacy of EU law (re)emerge at the enforcement stage. This is exactly what occurred in *CEF Energia v. Italy*, where a Swedish court (the Svea Court of Appeal) and a US court (the United States District Court for the District of Columbia) decided to stay the enforcement of the award, following Italy's pressing arguments that the arbitration tribunal lacked jurisdiction because the ECT's arbitration provision is invalid under EU law. Ultimately, with a decision dated 27 May 2024, the Swedish court decided to set aside the award rendered in the case *CEF Energia,* as incompatible with the foundations of the EU and Swedish legal systems.

Merits

On the merits, the tribunal's analysis focused on Art. 10(1) of the ECT. Firstly, the tribunal inquired whether Italy had failed to *provide stable and transparent conditions* towards Claimants' investments; secondly, it discussed whether Italy had breached the ECT's *non-impairment* requirement; thirdly, the tribunal assessed the Disputed Measures under *the FET standard*, thus investigating whether the State frustrated investors' legitimate expectations concerning the maintenance of the tariff scheme. Finally, the tribunal dealt with the *umbrella clause* established by the last sentence of Art. 10(1) of the ECT. The tribunal found no breach of Art. 10(1) of the ECT.

In the last decade, Art. 10(1) of the ECT attracted significant attention, especially in the context of the so-called "renewable energy saga" (see, for example, here and here). One of the main questions concerns whether the five sentences of Art. 10(1) of the ECT embody as many commitments towards foreign investors. Some tribunals, such as *Plama v. Bulgaria*, *AMTO v. Ukraine* and

Electrabel v. Hungary, have sustained that the various sentences of Art. 10(1) correspond to separate, albeit overlapping, obligations of the State; some others, for example *Petrobart v. Kyrgyz Republic*, have subsumed them under the FET standard. The *Encavis* award offers yet another opportunity to discuss the matter. In *Encavis*, the tribunal endorsed the former approach as it distinguishes four obligations of the State under Art. 10(1); its analysis, however, confirms the difficulty of making an assessment separate from the FET standard (on this matter see also *SunReserve v. Italy, RREEF v. Spain*). This is especially true for the obligation to "encourage and create stable, equitable, favourable and transparent conditions" (first sentence of Art. 10(1)). Indeed, to assess whether the Disputed Measures amounted to legitimate regulation or a violation of the stable conditions requirement, the *Encavis* tribunal used criteria elaborated by previous tribunals in relation to the interpretation and application of the FET standard and the protection of the investor's legitimate expectations, *i.e.* public interest, proportionality, no radical change (see *Silver Ridge v. Italy*, *Antaris v. Czech Republic*, *Eiser v. Spain*). The tribunal concluded that in the case at hand there was no breach of the stable condition requirement, as the Disputed Measures were implemented in the "public interest … with the purpose of strengthening competitiveness and sustainability", they were proportionate and transparent, and they did not entail any radical change in the incentive schemes granted to the investor.

Another interesting aspect concerns the nature and implications of the *Convenzioni*. This is an issue that the *Encavis* tribunal addressed in relation to both the umbrella clause and, subsequently, the legitimate expectations of the investors. With reference to the umbrella clause, in line with *Silver Ridge v. Italy*, the *Encavis* tribunal held that *Convenzioni* are "accessory contracts", whose purpose is simply to restate a specific incentive tariff already established by existing legislative and regulatory measures. Consequently, they cannot be considered as an obligation "entered into" by the State "with an Investor or an Investment" for the purpose of the last sentence of Art. 10(1) of the ECT. Further, because of their accessory nature, *Convenzioni* are incapable of generating any legitimate expectation that "the existing regulatory framework would remain frozen for 20 years and not be subject to reasonable changes, adopted in the public interest" (see also *Belenergia v. Italy*). These conclusions are in line with some awards concerning the repealing of solar incentives by Spain (see *OperaFund v. Spain*), but contrast with some previous decisions involving the Disputed Measures. For example, in *Greentech v. Italy*, a majority of the tribunal found that the umbrella clause may also encompass legislative and regulatory instruments and that, taken as a whole, the *Convenzioni*, the decrees, and the letters confirming the incentive rates amounted to obligations "entered into with" in accordance with Art. 10(1) of the ECT. The *Greentech* and *CEF Energia v. Italy* tribunals also recognized that *Convenzioni*, together with the ministerial decrees granting the incentives and the confirmation letters, were apt to generate legitimate expectations on the side of the investors.

Concluding Remarks

So far, the application of the ECT to the Italian *Spalma-incentivi* decree has been considered in six arbitral awards. In three awards the arbitral tribunals found for the investor (*Greentech*, *CEF Energia*, and *ESPF*), in the others they found for the Italian Republic (*Belenergia*, *SunReserve*, and *Silver Ridge*). In all cases, tribunals rejected the jurisdictional objections made by the State. The *Encavis* tribunal follows the decisions in *Belenergia*, *SunReserve* and *Silver Ridge*, deciding in favour of the State. In doing so, the tribunal makes an in-depth analysis of the reasoning developed by previous arbitrators and further refines arguments emerged in past proceedings, such as the

accessory nature of *Convenzioni*. This approach helps avoid inconsistencies, although it is not fully successful, as investors subject to the same measures have obtained conflicting solutions. In addition, in two cases the enforcement of awards has been suspended by domestic courts (see here, here and here) based on Italy's arguments on jurisdiction and inconsistencies with EU law.

Another case, *CIC Renewable Energies v. Italy*, concerning Italian legal reforms affecting the renewable energy sector is still pending before an arbitral tribunal having the same chair (Klaus Reichert) of *CEF Energia*. One can only wait to see which ones, among the previous decisions, the tribunal in *CIC Renewable Energies* will find more convincing and, most importantly, what will happen at the enforcement stage. The enforcement of intra-EU awards increasingly depends on each country's judiciary – as clearly shown by the suspension of the enforcement of the *Greentech* award, the suspension of the enforcement and then the annulment of the *CEF Energia* award (see here, here and here), as well as the recent decision by the Swiss Federal Tribunal in *EDF v. Spain* – giving rise to uncertainties. This risks making investor-State arbitration not worth it; after all, "arbitration is only as good as your ability to enforce the award".

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