INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

Arbitrating Energy Disputes: Hot Topics

International Arbitration, Energy and Environmental Commissions

Munich 2016 – Working Session […]

National Report of Italy

Daria Capotorto

Agnoli e Giuggioli
via Gabrio Serbelloni, 14, Milan
20122, Italy
Telephone number
+39 02 76390244

Email address

milano@agnoli-giuggioli.it

General Reporters:

Catrice Gayer, HEUKING KÜHN LÜER WOJTEK, Düsseldorf, Germany
Marc Krestin, LINKLATERS LLP, Amsterdam, The Netherlands
Pablo Cubel, CUATRECASAS, GONÇALVES PEREIRA, Valencia, Spain
Lucy Gordon, MME LEGAL AG, Zurich, Switzerland

February 11, 2016

1. ARBITRATING LONG-TERM CONTRACTS IN THE ENERGY SECTOR

1.1 In your jurisdiction: Is arbitration a widely accepted and used dispute resolution method in the energy sector when long-term contracts are in dispute? Do you see arbitration clauses in the agreements executed in the development of power plants? Do you normally include arbitration clauses in EPC and O&M Contracts? Do banks accept introducing arbitration clauses in credit agreements with the SPV and in the security package? What are the reasons for choosing arbitration as a preferred dispute resolution method over proceedings before state courts?[1]

1.2 Do parties choose ad hoc or rather institutional arbitration for disputes regarding the revision of long-term contracts? What are the reasons?

1.3 Expertise and Multiple Appointment of Arbitrators

1.3.1 Do arbitrators have the necessary legal, technical and economic expertise to decide on the revision of long-term contracts? Should technical experts be appointed as arbitrators in order to bring the required know-how to the panel?

1.3.2 Multiple appointments of arbitrators: The number of arbitrators having the necessary legal, economic and commercial expertise for these kinds of disputes might be limited in certain jurisdictions. Accordingly, the potential arbitrators are drawn from a smaller or specialized pool of arbitrators. However, Part II, Article 3.1.5 IBA Guidelines on Conflicts of Interest in International Arbitration 2014 ("IBA Guidelines 2014") states: The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties, or an affiliate of one of the parties" Further, Part II, Article 3.1.3 IBA Guidelines 2014 states that "The arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties." Both provisions are listed in the Orange List of the IBA Guidelines 2014. A potential arbitrator has to disclose any circumstances constituting these two grounds. Have these grounds been used by recalcitrant parties to object to the appointment of an arbitrator?

---

[1] Maximum flexibility? That parties can choose arbitrators experienced in the energy sector? That they can choose the venue? That they can agree on confidentiality and privacy? That it is easier to enforce an award in the international context than judgments in foreign jurisdictions? The neutrality of the arbitration proceedings? Any other considerations?

1.3.3 Does the nationality of arbitrators play a more important role in arbitrations regarding the revision of long-term contracts than in other commercial arbitrations?

1.4 Do parties to long-term contracts favor a settlement over an award in which the arbitral tribunal decides on the revision of the price formulae or even ascertains a new price formula? If so, for which reasons?

1.5 "Price Review Clause" or Price Re-Opener Clauses"

1.5.1 Were (and are) price formulae usually indexed directly or indirectly to alternative competing fuels, e.g. oil, coal products? What are the (historical) reasons for this indexation?

1.5.2 What is the difference between a "Price Review Clause" or a "Price Re-Opener Clause" in contrast to a "loyalty"-or "hardship-clause"? In your jurisdiction: Is the "Price Review Clause" a provision specialis in contrast to a general hardship clause?

1.6 "Trigger events"/Significant Change of Circumstances

1.6.1 Please give examples of a simple[2] and of more complex[3] trigger mechanism.

1.6.2 Does any definition of the term "significantly" exist in your jurisdiction? If not, how is the term interpreted if the curial law is that of your jurisdiction?

1.6.3 Please list facts/circumstances that a claimant has to adduce evidence for in order to prove that the circumstances have significantly changed[4]:

2 E.g. that the parties agree that the passage of a certain timeframe will automatically trigger the price review.

3 E.g. that the claimant has to prove firstly the occurrence of circumstances beyond the control of either party and secondly that the circumstance results in a significant change to the energy market of the buyer compared to a specified date.

4 E.g. the growing liberalization, the liquidity and transparency in Europe, too much contracted/committed supply; excess of supply of natural gas; that the price of alternative completing fuels, such as oil or other oil products to which the price formulae are usually indexed, has changed etc.

1.6.4 Whether the requirement of a significant change of circumstances if fulfilled is a question of law and fact: Do you agree with this statement if the curial law is the substantive law of your jurisdiction and/or if the place of arbitration is in your jurisdiction?

1.6.5 According to Articles 5 and 6 of the IBA Rules on the Taking of Evidence in International Arbitration dated 29 May 2010 ("**IBA Rules**") a party may rely on a "Party-Appointed Expert" or the arbitral tribunal may appoint an independent "Tribunal-Appointed Expert". What is the preference in your jurisdiction: Do counsel, parties and arbitrators rather favor Party-Appointed Experts or Tribunal-Appointed Experts?

1.6.6 Is the use/appointment of consultants by the arbitral tribunal regarding the "translation" of a decision into a new price formula possible/desirable?

1.7 If the "Price Review Clause" or the "Price Re-Opener Clause" does not require a trigger event: Under what requirements can a party also request revision/review of the price formula if the curial law is the substantive law of your jurisdiction?

1.8 Confidentiality

1.8.1 Does a claimant have to substantiate sensitive business secrets in order to prove that the price formula needs adapting? For example, does a claimant have to submit the prices that its customers pay? Does a claimant have to submit what kind of prices the respondent charges to its customers?

1.8.2 Do parties usually agree on a Request to Produce phase according to Article 3 IBA Rules? If a party objects to the production of documents invoking commercial confidentiality: Do arbitral tribunals adopt arrangements to ensure a suitable confidentiality protection (Article 9(4) IBA Rules) or do they rather dismiss a party's request to produce?

1.9 Scope of arbitral tribunal's mandate to revise the price formulae

1.9.1 What are the available remedies in your jurisdiction: Does an arbitral tribunal have the power to amend the contract terms? Does an arbitral tribunal have the power to replace e.g. unreasonable contract terms? Must the arbitral tribunal's power to change/revise the price formula be specifically mentioned in the contract? If not, can

arbitrators resort to statutory provisions of the curial law? Or is the power limited to contract interpretation?

1.9.2 If an arbitral tribunal is only mandated to amend an existing price formula, how are the price formulae usually worded? What are the potential risks, but also advantages if an arbitral tribunal has only this limited mandate?

1.9.3 If an arbitral tribunal is mandated to ascertain an entirely new price formula, how is the existing price formula then worded? What are the potential risks, but also advantages if an arbitral tribunal has such a broad mandate? What are the necessary "tools" (see 1.3.1/1.76, 1.7.7 – expert arbitrators, appointed experts, consultants or the like) in order for the arbitral tribunal to draft a new price formula? What parts of the award have "res judicata effect"?

2. ARBITRATING ENERGY DISPUTES UNDER ISDS

2.1 How many BITs has your country signed and how many of them are in force?

2.2 What mechanisms of dispute resolution method does your country favor in its BITs? Do investors have the choice to sue a host state in the state courts and in arbitration? Do investors have to choose between suing the host state either in the state courts or in arbitration (fork-in-the-road provision)?

2.2.1 If investors can choose proceedings before state courts in your jurisdiction: Are there any cases in the last five years in which state courts in your jurisdiction had to decide on claims of (foreign) investors against your state?

2.2.2 If so, were the decisions in favor of the country/host state or were they in favor of the investor?

2.2.3 Has your country signed and ratified the Washington Convention on the Settlement of Investment Disputes between States and nationals of other States (1968) (the ICSID Convention)? If not, does your state intend to accede to/ratify the ICSID Convention soon?

2.3 If an investor can choose (only) arbitration as dispute resolution method:

2.3.1 If an investor can choose arbitration as dispute resolution method, are there conditions attached to it, such as a requirement to resort to state courts for a certain period of time or a requirement to attempt to arrive at amicable settlement within a certain period of time?

2.3.2 If an investor can choose not only ICSID, but also other institutional rules such as SCC, ICC or ad hoc proceedings, or between various institutions in case the ICSID Convention is not signed/ratified by your country, which advantages or disadvantages do investors take into consideration in choosing between these arbitration rules?

2.4 Is your country a member state of the ECT? If not, has your country signed, but never (or not yet) ratified the ECT? If so, has your country exempted the ECT's provisional application prior to its ratification?

2.4.1 If your country is not a member state to the ECT or has recently withdrawn from the ECT: What are the reasons?

2.4.2 According to Article 26 ECT an investor can choose arbitration either under (i) the ICSID Convention, (ii) the ICSID's Additional Facility Rules, (iii) under the arbitration rules of the SCC or (iv) ad hoc arbitration under the UNCITRAL Arbitration Rules. Do investors in your jurisdiction have any preference? If so, for what reasons?

2.4.3 Has your country declared a reservation under Article 26(3)(b(i) ECT? If the answer is in the negative: Are there cases in which an investor has sued your country in parallel before the state courts and in arbitration? Did the parallel proceedings result in conflicting decisions?]

2.5 What are the key features in relation to the concept of "Investor" and "Investment" in your country's BITs? Is a "denial of benefits" clause usual in your country's BITs?

2.6 In light of the EU position on this matter: Is your country planning on withdrawing from the BITs signed in the past? If this is the case: What are the motives for doing so?

2.7 In the context of the intra-EU treaties conflict: How is this issue affecting the commercial relationships between your State and others when it comes to choosing an effective dispute resolution mechanism?

2.7.1 What approach would you take when seeking enforcement of a favorable award resulting from an intra-EU dispute? Would you counsel to seek enforcement in the courts of an EU member state or outside the EU? Have your national courts ever ruled on this issue?

2.8 Does your country have a history of voluntary compliance with adverse investment treaty awards?

2.9 To what extent have local courts been supportive of investment treaty arbitration?

3. ARBITRATING DISPUTES IN CONNECTION WITH RENEWABLE ENERGIES (WIND, SOLAR, WATER)

3.1 Legal Framework

3.1.1 What is the legal framework for renewable energies in your jurisdiction? Can investors take advantage of certain incentives such e.g. premium tariffs, very low taxes on power generators' revenues, subsidies for renewable energy producers etc?

(a) In addition to the European legal frameworks, the nation regulation for renewable energies in Italy is very wide. Therefore, please find below some of the more important laws of this sector:

- Law no.239/2004 *sul riordino del sistema energetico*;
- Law no 99/2009 *sulla sicurezza del settore energetico*;
- Legislative Decree no. 387/2003 (*di recepimento della direttiva 2001/77/Ce*);
- Legislative Decree no. 28/2011 (di *recepimento direttiva 2009/28/Ce*);
- Legislative Decree no. 192/2005 and subsequent ammendements *sul rendimento energetico in edilizia*, modified by Law Decree 4 June 2013, n. 63, converted in Law no. 90/2013 (*di recepimento della direttiva 2010/31/Ue*);
- Legislative Decree July 4, 2014, no. 104 (*di recepimento della direttiva* 2012/27/Ue *sull'efficienza energetica*).

In addition the copious national legislation and regulation on subsidies and feed-in tariffs for renewable sources (please see the following point (ii)) and the regional provisions, very important since, under Article 117, in the Italian Constitution, the competence in energy field is shared (concurrent) between State and Regions.

(b) Please find summarized below the main feed-in tariffs and incentive schemes in renewable power generation by sectors:

1. Photovoltaic sector: Italy introduced this support scheme in 2005 (Ministerial Decree of 28 July 2005 – 1st feed-in scheme). Subsequent schemes have followed (as per Ministerial Decree of 19 February 2007– 2nd feed-in scheme; Ministerial Decree of 6 August 2010– 3rd feed-in scheme; Ministerial Decree of 5 May 2011– 4th feed-in scheme). The last 5th feed-in tariffs scheme, regulated by the Ministerial Decree of 5 July 2012 has ceased to be applied on July 6, 2013, that means after 30 calendar days from the date of reaching an annual cumulative of feed-in tariffs granted of € 6.7 billion. In general terms, under the aforementioned schemes, PV plants with a minimum capacity of 1 kW and being connected to the grid, could benefit from a **feed-in tariffs**, which are based on the power produced. The tariff differs depending on the capacity and type of plant and is granted over a **period of 20 years**.
2. Thermodynamic solar sector: the feed-in tariffs support scheme for solar thermodynamic plants is regulated by the Ministerial Decree of 11 Apr. 2008, as subsequently amended by the Ministerial Decree of 6 July 2012. Under the scheme, electricity generation by solar thermodynamic plants is supported through feed-in tariffs over a period of **25 years**. The tariffs remain constant throughout the support period.
3. Heating & Cooling: the Ministerial Decree of 28 Dec.2012 (the so-called "**Renewable Energy for Heating & Cooling Support Scheme**") implemented Legislative Decree no. 28 of 3 Mar. 2011 on a scheme of support for small-scale projects of energy efficiency improvement and production of thermal energy from renewable energy sources (hereinafter, "**RES**"). The eligible projects concern area, inter alia, energy efficiency improvements in existing building envelopes (thermal insulation of walls, roofs and floors, replacement of doors, windows and shutters, installation of solar screens), replacement of existing systems for winter heating with more efficient ones (condensing boilers); replacement and, in some cases, construction of new renewable-energy systems (heat pumps, biomass boilers, heaters and fireplaces, solar thermal systems, including those based on the solar cooling technology). The new decree also introduces - subject to specific requirements -incentives for energy auditing and energy certification associated with the above projects. The support is granted on the basis of the **type of project** and on the improvement of the energy performance of the building which may be achieved and/or on the energy which may be produced by renewable-energy systems. The incentive (contribution to the costs incurred for the project) will be paid in **yearly installments** over a variable support period (2 to 5 years), depending on the projects.

4. Wind, biomass, hydro, geothermal etc - Green certificates and Feed in Tariffs: green certificates (hereinafter, "**GCs**") is a form of incentives for the production of electricity from RES. Under the GC regime (Leg. Decree 79/99, Art. 11), as of 2002, energy generators and importers can meet their obligations by generating energy from RES and obtaining the required amount of GCs or by purchasing GCs from another energy producer or the GSE (*Gestore Servizi Elettrici* - Italian Authority for the promotion of environmental sustainability through the promotion and development of renewable energy generation). GCs can be traded through bilateral agreements or via the dedicated market created and managed by the GSE. In fact, the GCs, which conventionally attests the production of 1 MWh of renewable energy is issued by the GSE – upon request of the holder of a IAFR- qualified plant (a plant powered by RES) and it has a negotiable value of 1 MWh. According to the provisions of Law 244/07, the production of electricity from RES in plants which began operating or had been repowered as of 1 April 1999 until 31 December 2007 is entitled to receive a GC attesting its generation from renewable sources for the first 12 years of operation. The production of electricity from RES in plants which began operating or had been repowered with effect as of 1 January 2008, however, is entitled to receive certification of renewable energy production for the first 15 years of operation.
For plants that entered into service after December 31, 2007-of annual average nominal power exceeding 1 MW and 0.2 MW for wind power plants - the GSE releases GCs for 15 years, recognized by multiplying the net energy recognized at the intervention carried out for the constants, differentiated by source, in compliance with the 2008 Budget Law, and subsequently updated.

3.1.2 Has such legal framework been amended recently? If so, has it been ameliorated for investors or deteriorated?

From 2010 onwards, the incentives set out in RES sectors, in particular, in photovoltaic sector and relevant support schemes have been reduced through several government decrees. Although these measures had an impact mainly on the photovoltaic sector, more importantly, they did not affect the level of feed-in tariffs that was guaranteed to a photovoltaic power plant at the time of connection to the national grid.

The situation has now changed due to the latest measures contained in the act recently approved by the Italian Parliament (**Law 11 August 2014, No. 116**, published in the *Italian Official Gazette* no. 192/2014 on 20 August 2014) that ratified (with amendments) the decree issued by the Italian Government on an urgent basis on 24 June 2014, the so-called "**Decreto Competitività**" (D.L. no. 91, published in the *Italian Official Gazette* No. 144/2014 on 25 June 2014) (the "**Act**").

Broadly speaking, the Act reduces the feed-in tariffs levels guaranteed to photovoltaic plants already connected to the national grid and that were subject to agreements between photovoltaic electricity producers and the GSE. In this sense, the measures contained in the Act are retroactive in nature.

3.1.3 May different legal frameworks applicable to renewable energy facilities coexist within your jurisdiction? What is the criterion to benefit from one or other?

Yes, different legal frameworks applicable to RES production facilities can coexist in Italy. The criterion to benefit from one or other is, usually and as a general rule, the date of commissioning (connection to the grid) of the generation plant or facility.

3.1.4 If your jurisdiction grants an incentive scheme for renewable energies: Has your country notified it to the European Commission under Article 108(3) TFEU so that it can be assessed under the State aid legislation?

After a preliminary research, we can conclude that during July 2010 the Ministry of Economic Development has transmitted to the European Commission the Action plan on RES energies, drawn up by Italy in compliance with Art. 4 of the Directive 2006/32/EC and of the Decision of June 30th 2009, no. 2009/548/EC, even if we do not have evidence neither (i) of the content of such a plan and, thus, if this was anticipating the modalities and quantities of the public aids (incentives) to the renewable energies sector, nor (ii) of the Commission's decision related to the aforesaid plan.

Even if we have awareness of the fact that diverse notifications referring to the subsiding programs – on a regional level – to the renewable energies production sector have been transmitted to the European Commission, according to Art. 108 of the TFEU, it has not been possible to verify if every subsiding discipline approved from 2003 onwards by the Italian State has been notified or, otherwise, if this/those complies with the exemption-conditions of the notification as of Regulation (EU) No 800/2008, or as of Regulation (EU) no. 651/2014.

With reference to the FER subsiding-system, approved from 2005 onwards through different ministerial decrees (the so called "Conti Energia", "Decreti FER", etc.), it is also worth noting that the aforesaid decrees do not mention in their premises (differently from what is done in the new draft of the RES Decree, that is currently awaiting to be approved) the European regulation of State-aids, in pursuance of the Regulation (EC) no. 800/2008, as condition for been granted with the exception of the notification-obligation to the European Commission according to the said Regulation. Furthermore, it is possible to conclude that the Italian RES subsiding-systems can – in many cases – be considered out of the application-field of the aforementioned exemption of the notification obligation, since the aforesaid subsidies-regimes (i) overstep – in many cases – the amount of 7,5 millions Euros for each single enterprise, in pursuance of the Regulation (EC) no. 800/2008, and (ii)

exceed the yearly average State-aids endowment equal to 150 millions Euros (to this regard, it is worth noting that the new draft of the FER Ministerial Decree has already been notified to the European Commission, according to Art. 108 of the TFEU).

3.1.5 If the answer is in the positive: Has the European Commission issued any decision on your current or former national incentive scheme? On what grounds was its ruling based?

Broadly speaking, most of the European Commission's decisions did not raise objections against the Italian aids to RES projects, save for some measures related to the power consumption and photovoltaic sector, in which the Commission has considered that the relevant aids were superior than the rates dictated by the Community guidelines on State aid for environmental protection.

3.2 Law-making process

3.2.1 By what means may the renewable sector exert an influence on the law-making process in your country? Does the renewable sector hold a fluent relation with the national energy authorities of your country? What about foreign investors?

Please note that in the law-making process, generally, Italian Government through its different Ministries used to take part to round tables with the main RES representative associations in order to listen and evaluate their considerations.

3.2.2 Has any renewable subsector recently or in the past reached any sort of agreement(s) with your State on a particular issue concerning the applicable legal framework?

After a preliminary research we have evidence that some agreements have been executed by and between the Italian Government and Companies operating in the field of the RES sector. Notwithstanding the above we have no evidence of the terms of such agreements.

3.2.3 If the answer is affirmative: What are the agreed-upon terms of such agreement(s)? How is/are that/those agreement(s) regarded from a legal perspective (an administrative act, a bilateral contract, etc.)?

Please refer to the previous point no. 3.2.2.

3.3 Development objectives

3.3.1 What policy instruments has your country implemented to meet the EU's binding 2020 renewable energy targets in the last few years (renewable action plans, incentive programs to increase installed capacity, etc.)? Will your country presumably comply with these objectives going forward?

(i) Please refer the answer in point 3.1.1 (b) above.

(ii) Based on the last Progress Report 2015 (3° *Relazione biennale dell'Italia sui progressi realizzati nella promozione e nell'uso dell'energia da fonti rinnovabili*) issued by GSE at the end of 2014 Italy reached the target assigned by the Directive 2009/28 /EC for 2020, by a 17,1% of final power consumption covered by renewable sources.

3.3.2 What kind of initiatives have been taken by your national energy authorities in order to foster the proliferation of renewable energy within your country? In contrast, what kind of restrictions have been put in place to restrict the installed capacity within your country's borders?

In addition to the framework reported in point 3.1.1 (b) above, the Italian government has promoted, by approving different laws, also under European Directives implementation (i.e. Legislative Decree no. 115/2008, Legislative Decree no. 28/2011, Legislative Decree no. 145/2013, and Law Decree no 63/2013, converted into Law no 90/2013, Legislative Decree no. 102/2014 and relevant Ministerial Decrees), the energy efficiency relating to the consumption and building services sector.

3.4 Grandfathering policy

3.4.1 Is there any grandfathering regulation or clause included in your jurisdiction's legal framework for renewable energies that prevents existing investors from any retroactive changes in the regulatory paradigm in the future?

In addition to the Umbrella and "*Pacta Sunt Servanda*" Clauses provided in the Energy Charter Treaty, entered into force in Italy by means of the Law no. 41571997, there is no Italian laws or regulations only for renewable energies that prevent existing investors from any retroactive changes in the regulatory paradigm in the future.
In general terms, the Italian Constitution (Articles 2, 3 and 41) provides, in accordance to the jurisprudence of the Italian Constitutional Court, for the "protection of the legitimate expectations" (*principio di ragionevolezza e di legittimo affidamento*) and the "entrepreneurial autonomy" (*autonomia imprenditoriale*) principles. With reference to the non-retroactive effects of the laws principle, the Italian Constitution only provides such limitation with reference to the criminal laws, even if in accordance to the Articles 11 and 14 of the General Law Provisions ("Preleggi") of the Italian Civil Code and with the majority jurisprudence, the principle of non-retroactivity of the law can be only derogated when this is required by the criteria of reasonableness, without ever *'affecting arbitrarily on substantive situations put in place by previous laws*" and always in compliance with the principles of protection of legitimate expectations and legal certainty (*certezza del diritto*).

3.4.2 If a regulation or clause of this sort exists: How does national case law construe it? Is it applicable to every regulatory aspect or exclusively to particular ones?

With reference to the RES sector, the most important law case is the judgment of consultation of the constitutionality (*questione di legittimità costituzionale*) of the Act

(Please see point 3.1.2 above) – which reduces the feed-in tariffs granted, before the date of entering into force of such Act, to photovoltaic plants already connected to the national grid and that were subject to agreements between photovoltaic electricity producers and the GSE– sent by the Administrative Court of Lazio to the Italian Constitutional Court (please refer to *Ordinanza TAR Lazio, Sezione Terza Ter, n. 8669/2015; udienza del 19 marzo 2015; deposito del 24 giugno 2015 - no. 15359/2014 Reg.Ric.*). Nevertheless, the proceeding is already pending and, therefore, no relevant decision of the Italian Constitutional Court has been dictated yet.

In addition, we highlight that with decision 10/2015, on March 2015 the Constitutional Court declared that the so-called Robin Hood Tax infringes constitutional. law. The Robin Hood Tax, introduced in 2008, is a surtax (for 2014 at the rate of 6.5%) applied on top of corporate income tax for enterprises operating in the energy sector. Such tax was introduced by the Government to hit extra-profits realized by the energy sector, but the Constitutional Court stated that its mechanics are such that the tax does not apply to extra-profits only, thus concluding that the tax is discriminatory and therefore unconstitutional. The Court, however, did not quash the Robin Hood Tax since its introduction, but declared it is to be eliminated only from the date of the decision: hence the tax is no longer due for the future, but there is no room, based on the decision, for a refund of the surtax paid for past years.

3.4.3 Has your country ever undergone a profound change in the legal framework for renewable energies, recently or in the past?

In addition to the Legislative Decree no. 28/2011 and the subsequent regulations, which has changed the legal framework related to the RES, the most important change related has been imposed by Article 26 of the Annex 1 of the Act (Law Decree 24th June 2014 no. 91, converted into Law 11th August 2014 no. 116) and the relevant implementation Decrees of the Ministry of Economic Development dated 16th October 2014 and 17th October 2014 (publicized in Official Gazette on 24th October 2014 no. 248) (hereinafter, "**Ministerial Decrees**"), has significantly changed the mechanism of granting of the FITs already awarded to the existing and already subsiding PV Plants with a nominal capacity exceeding 200 kW, by imposing (i) a reduction, from 1st January 2015, of the FITs already granted; and (ii) postponement of payment of part of FITs (10%), starting from 1st January 2015.

Reduction of the FITs

Pursuant to Article 26 (3) of the Act, from 1st January 2015, the incentive rate for electricity generated by PV plants with a power capacity higher than 200 kWp is reformulated, at the operator's choice, among one of the following options, to be communicated to the GSE by 30 November 2014:

Option 1) FITs period extension: extending of the duration of the FITs period, from 20 to 24 years. This extension will entail a re-calculation of the amount of the awarded tariff, which will vary depending on the remaining incentive period, as per the table below:

Remaining years of subsiding	Percentage of reduction
12	25%
13	24%
14	22%
15	21%
16	20%
17	19%
18	18%
More than 19	17%

- **Option 2)** FITs re-modulation: The FITs, which will be maintained for the original 20 year period of duration, will be re-modulated providing for a first period during which the FITs will be reduced in respect to the current awarded tariff and a second period in which the tariff will be increased in a measure equal to the previous reduction. The percentage of the reduction will be set by means of a Ministerial Decree to be issued by 1 October 2014. The percentages of FITs payment remodelling were established, in accordance with AEEGSI, by the Ministerial Decree dated 17th October 2014.

- **Option 3) FITs cut:** a reduction of the FIT over the unchanged period of 20 years with a cut-off depending on the power capacity of the PV Plants, as follows:

- A reduction by 6% for PV Plants with a power capacity between 200 kWp and 500 kWp;
- A reduction by 7% for PV Plants with a power capacity between 500 kWp and 900 kWp;
- A reduction by 8% for PV Plants with a power capacity over 900 kWp.

- The producer must opt for one of the 3 options above and communicate its choice to the GSE by and no later than 30 November 2014. Should the GSE not receive any communication from the producer by such date, the FITs cut option as per 5.1 (3) above will be applied.

- **Payment mechanics**

The Ministerial Decrees change the mechanics under which the GSE pays the FITs. Starting from the second half of 2014, GSE pays incentives in monthly instalments, in an amount equal to 90 per cent of the PV Plant's estimated annual electricity production, based on GSE's historic records for the relevant plant. The remaining balance will be paid by the GSE on or before 30 June of the year following the year of production. The implementation modalities, defined by the GSE, were established by the decree of the Ministry of Economic Development of 16 October 2014.

- Moreover, with reference to the Municipal Tax (IMU) over facilities, with a cadastral classification as D- productive (and therefore, including of the Res power generation plants), *Agenzia delle Entrate* by Circular Letter no. 2 / E dated February 01, 2016, has provided some clarifications on the provision of Article 1, paragraph 21, of the Law of 28 December 2015, n. 208 (Stability Law 2016) which has excluded from the determination of the cadastral rent (taxable base for IMU purposes) of such facility classified as D ("plants") the items falling within the definition of "the plant components, functional to a specific manufacturing process". Consequently, the Municipal tax for this kind of RES facilities has been strongly reduced.

- With reference to the photovoltaic sector, please note that by means of the execution of a Power purchase agreement by and between the RES power producer and the GSE, the energy produced and fed into the grid by each PV Plant was sold to the GSE, which shall purchase it pursuant to the terms and at a price established by Articles 6 and 7 of the AEEGSI Resolution no. 280/07 and subsequent AEEGSI Resolution no. 103/11. This Resolution provides that, in order to ensure the profitability and coverage of the management costs, the energy produced by PV Plants with a power capacity lower than 1 MW shall be purchased by GSE at a Minimum Guarantee Price, which is calculated, by each power source on the basis of (a) base price fixed in Euro 76,2 per MWh (hereinafter, "Base Price") and (b) the management market costs and fuel price. The Minimum Guarantee Price is automatically renewed on a yearly basis, by applying to the Minimum Guarantee Price of the previous year the annual Consumer Price Index adjustment (*Tasso di variazione annuale dei prezzi al consumo per le famiglie di operari e impigati rilevato dall'Istat*). AEEGSI Resolution no. 280/07 guarantees that Minimum Guarantee Price could not be lower than the Average Zone Price recognized to the bigger photovoltaic plants. Nevertheless, the aforementioned regimen was heavily modified by the following regulations: (i) Legislative Decree no. 145/2013 (so-called Destinazione Italia), converted into law February 21, 2014, no. 9, which provides that from 1st January 2014 the Minimum Guarantee Price is equal to the Average Zone Price in the case that the energy is produced by plants incentivized (Article 1.2) and, therefore, up to a 40% lower respect to the Minimum Guarantee Price; and (ii) the AEEGSI Resolution no. 618/2013/R/EFR of 19th December 2013 and AEEGSI Resolution no. 179/2014/R/EFR of 17th April 2014, which mainly have (a) reformulated the management market costs and fuel price; (b) eliminated the Base

Price for the calculation of the Minimum Guarantee Price and (c) eliminated the GSE's commitment of payment of the Minimum Guarantee Price for the energy produced by photovoltaic plants with a power capacity up to 1.000 kW, if they already enjoy another kind of incentives on electricity production.

3.4.4 If the answer is positive: What were the alleged reasons by the national authorities leading to those changes? Were acquired rights respected by the new regulatory legislation? What kind of transitional rules were enacted?

Based on the statements of the Italian Government, the principal scope of changes related to the reduction of the subsides or benefit on RES production were the reduction of the energy cost paid by the PMI and final consumers (small and medium companies), even if the principal effect has been the discourage the RES investments.

3.5 Dispute resolution

3.5.1 Are there any pending claims before either the state courts or arbitral tribunals for changes in the legal framework regarding investor incentives in the renewable energy sector?

In this regard please refer to point 3.4.2 above.

In connection with the Energy Chapter Treaty, under which investors have the opportunity to bring arbitration claims against states directly (ISDS, pursuant to Article 26 of such Treaty), rather than having to seek redress in domestic courts, please note that the Italian government has recently declared its withdrawal from such Treaty, through the law published in the Italian Official Gazette no. 190/2014 so called "*Legge di Stabilità*", starting from January, 2016. In addition, according to the last data provided by the Energy Charter Secretariat, Italy was involved in its first known case in 2014 with respect to the notorious Act.(the decision taken by Italy to decrease incentives granted in the past to electricity production from PV plants). Therefore, one may think that the risk of future disputes may have played a role in the decision to withdraw from the Energy Chapter Treaty, other than the mere need to save costs related to the adherence to the Energy Chapter Treaty.

According to Italian newspapers, the solar power producers have notified the Italian Government of numerous planned lawsuits in about 1,000 cases by violation of Italy's duties under the Energy Chapter Treaty with respect to Articles 10 and 13. They object to the legitimacy of the Act and especially challenge its retroactive effect. From a legal perspective, Italy has every right to withdraw from the Energy Chapter Treaty, Article 47 allows each member state to withdraw from the Treaty at any time after five years of membership. Any withdrawal will become effective after a period of one year – meaning in Italy's case at the beginning of 2016. Nevertheless, quitting the Energy Chapter Treaty will not protect Italy from the looming claims because the Treaty contains a "sunset provision" in Article 47. Regarding investments made

before the withdrawal, foreign investors may use the dispute resolution procedures provided for in the Treaty for a period of another 20 years from the date when the withdrawal takes effect – and until 2036, solar energy investors affected by the Decree will probably have enough time to consider legal actions.

3.5.2 Are there any final decisions of your state courts approving/disapproving of changes in the legal framework regarding investor incentives in the renewable energy sector?

Please refer to the previous point no. 3.4.2

DISCLAIMER

General Reporters, National Reporters and Speakers grant to the Association Internationale des Jeunes Avocats, registered in Belgium (hereinafter: "AIJA") without any financial remuneration licence to the copyright in his/her contribution for AIJA Annual Congress 2016.

AIJA shall have non-exclusive right to print, produce, publish, make available online and distribute the contribution and/or a translation thereof throughout the world during the full term of copyright, including renewals and/or extension, and AIJA shall have the right to interfere with the content of the contribution prior to exercising the granted rights.

The General Reporter, National Reporter and Speaker shall retain the right to republish his/her contribution. The General Reporter, National Reporter and Speaker guarantees that (i) he/she is the is the sole, owner of the copyrights to his/her contribution and that (ii) his/her contribution does not infringe any rights of any third party and (iii) AIJA by exercising rights granted herein will not infringe any rights of any third party and that (iv) his/her contribution has not been previously published elsewhere, or that if it has been published in whole or in part, any permission necessary to publish it has been obtained and provided to AIJA.