Growing together

Special Green Economy Issue

Challenging Spalmaincentivi under Investment Agreements: focus on the Energy Charter Treaty

Newsletter by Rödl & Partner - Update

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> Current developments in Italy on ECT proceedings for renewable energy plants

1. Italy withdrawal from the ECT

Rumors about Italy’s formal denunciation of the Energy Charter Treaty (”ECT”) have spread in recent weeks, in consequence of the provisions of Law 23 December 2014 n. 190 (Legge di stabilità), which expressly establishes the Italian withdrawal from the ECT¹.

¹ According to article 1, paragraph 318 of Law 23 December 2014, n. 190 (Legge di stabilità 2015) and Annex 8 of the same Law, Italy is planning to reduce its international financial engagements, including those deriving from being part to the Energy Charter Treaty. More precisely, article 1, paragraph 318 states that “Il Ministro degli affari esteri e della cooperazione internazionale provvede agli adempimenti eventualmente necessari, anche sul piano internazionale, per negoziare i termini degli accordi internazionali concernenti la determinazione dei contributi volontari e obbligatori alle organizzazioni internazionali di cui l’Italia è parte, per un importo complessivo pari a 25.243.300 euro per l’anno 2015 e a 8.488.300 euro a decorrere dall’anno 2016. Le relative autorizzazioni di spesa si intendono ridotte per gli importi indicati nell’allegato n. 8 annesso alla presente legge, per cui, a decorrere dall’anno 2015, non è ammesso il ricorso all’articolo 26 della legge 31 dicembre 2009, n. 196”. Annex 8 to the Law provides for the denunciation of the Energy Charter Treaty.

Notably, the reason for the withdrawal is a desire by Italy to save on the costs associated with its membership in international organizations, including the Energy Charter Conference; but increasing risk of investment disputes in relation to the changes introduced to the regime governing renewable energy production (Spalmaincentivi law) might also have played a role.

Italy’s withdrawal is expected to take effect in January of 2016; however, after that, the ECT’s protections will continue to apply to existing investments for a further twenty years. Article 47 of the ECT, in fact, establishes that “[t]he provisions of this Treaty shall continue to apply to investments made in the Area of a Contracting Party by Investors of other Contracting Parties or in the Area of other Contracting Parties by Investors of that Contracting Party as of the date when that Contracting Party’s withdrawal from the Treaty takes effect for a period of 20 years from such date”.

The present Newsletter, therefore, aims to analyze the provisions of the ECT, highlighting opportunities and risks deriving from the application of the ECT to challenge the Italian renewable energy reform before international arbitration tribunals.

The Newsletter will also discuss the application of other investment agreements, notably the bilateral investment treaty (“BIT”) in force between Italy and the Peoples’ Republic of China and the Italy- Hong Kong BIT, with the aim of challenging the Italian renewable energy reform.
2. The ECT and the Italian energy reforms

The Energy Charter Treaty represents one of the most important investment treaty in existence. It has been signed and ratified by 47 States and provides for some basic standards of treatment and protection of foreign investments in the energy sector, as well as a mechanism for international dispute settlement.

Part III of the ECT commits States to create stable and transparent conditions for investors of other contracting parties and to guarantee "fair and equitable treatment" (art. 10). Part III of the ECT also establish the principle that any form of direct and indirect expropriation of foreign investments shall be carried out, for public reason, according to due process of law, in a non discriminatory way and upon payment of prompt, adequate and effective compensation (art. 13). Article 26 of the ECT, moreover, guarantees effective legal redress to foreign investors, as it establishes that States which do not comply with the standards and obligations established in Part III can be sued by the foreign investor before international arbitration, outside the domestic judicial system of the contracting States. According to article 26 investors can resort alternatively to the International Centre for Settlement of Investment Disputes ('ICSID'), the ICSID Additional Facilities, ad hoc arbitration under the UNCITRAL Arbitration Rules and the Arbitration Institute of the Stockholm Chamber of Commerce.

The sub-mentioned provisions of the ECT acquire special value in the context of the legislative panorama characterizing the Italian renewable energy sector. The series of legislative changes, introduced by the Italian government and administrative authorities between 2013 and 2014 for photovoltaics – in particular, Delibera 19 dicembre 2013, n. 618 (AEVG 618/2013/RIEFR) and D.L. 23 dicembre 2013 n. 145, in relation to the minimum granted price for the purchase of the energy; D.L. 24 giugno 2014 n. 91 (art. 26), the so-called "Spalmaincentivi", and the D.M. 16 ottobre 2014 and D.M. 17 ottobre 2014; the decision of the AEVEGSI to abolish minimum prices for plants with nominal capacity under 1 MW, the decision of the Italian Tax Agency dated 19 December 2013, related to the amortization of the photovoltaic installation (together the "Italian renewable energy reform") –, in fact, have completely changed the framework in reliance on which the foreign investors have decided and made their investments in the Italian photovoltaic industry and have created great uncertainty on the legislative panorama regulating the sector 2. For the other green technologies cuts of the feed-in-tariffs are for the time being operated only on a voluntary basis, but might occur by legislative changes in the future.

3. Merits: a glance to the fair and equitable treatment (FET) standard and indirect expropriation

The fair and equitable treatment standard is designed to create an absolute baseline of treatment for foreign investments and it is currently the most important standard applied in investment disputes 3.

Tribunals have identified a certain number of recurrent elements, which they consider as constituting the content of the fair and equitable treatment standard. In particular, due process of law, non-discrimination, transparency, stability and the respect of investors' legitimate expectations 4. Recent case law has increasingly focused on claimant's expectations in connection with their investments as a central element of the FET standard, connecting the latter to the required stability and predictability of the

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2 With regard to the Spalmaincentivi law, Rödl & Partner Italy has already brought, on behalf of its clients, 110 challenges before the Administrative Court in Rome (TAR Lazio), out of which 49 involve PV-plants owned by companies whose partners are foreign investors protected by the ECT. Rödl & Partner Italy has also brought 8 cases under the Hong Kong – Italy BIT and 4 cases under the China - Italy BIT to challenge the Spalmaincentivi law. The total number of proceedings brought against the Spalmaincentivi law before the Administrative Court in Rome amounts to approximately one thousand, decisions on part of these proceedings by the Administrative Court are expected to be published shortly.


business environment, founded on solemn legal and contractual commitments⁵.

The frustration of the investors’ legitimate expectation and the lack of transparency, created by the number of overlapping legal and administrative provisions, offer interesting arguments to the foreign investor to assert the Italian State’s violation of its obligations under art. 10 of the ECT and to claim damages.

Beside the FET standard, the provisions on expropriation, contained in art. 13 of the ECT, guarantee the foreign investor against any form of direct and indirect taking of its investment. The terms indirect expropriation or “measures having effect equivalent to nationalization or expropriation” give shape to all government’s measures that have adverse effects on the foreign investment, but that do not entail a formal transfer of the title or a physical outright taking of the investment. Indirect expropriation may result from an individual measure of the State, or a series of acts and/or omissions, that, in sum, lead to a deprivation of property rights⁶. Because of its effects, indirect expropriation is equated to direct expropriation and States are subject to the same conditions established by the Treaty’s provision on expropriation, most importantly they have to pay compensation to the affected investor. In this respect, it is worth observing that indirect expropriation is recognised as such only in retrospect, as it is usually the investment tribunal’s task to decide whether a specific measure, which has affected a foreign investment, constitutes an indirect expropriation and gives rise to the obligation to pay compensation.

In light of the above, the series of legislative reforms introduced in the energy sector might be recognized as having expropriatory effects and entail the obligation of the State to pay compensation to the foreign investor⁷.

4. Jurisdiction: the fork-in-the-road clause and the definition of investment

Resorting to the ECT, however, brings about some procedural issues. In particular, the application of the so called “fork-in-the-road” provision ex article 26 (3) (b) (i) of the ECT, on the one hand; and the definition of investment, on the other hand.

Article 26 (3) (b) (i) of the ECT features a typical “fork-in-the-road” clause, as it establishes that the States listed in Annex ID of the ECT, including Italy, do not give unconditional consent to the submission of a dispute to international arbitration or conciliation, where the investor has previously submitted the dispute to its courts or administrative tribunals, or to previously agreed dispute settlement procedure. That means that the investor is called to choose preemptively where to incardinate its claim and that a domestic choice might prevent the international proceeding.

Investment tribunals have interpreted the “fork-in-the-road” provision in a flexible manner, excluding its application and giving access to international arbitration where the dispute before the domestic courts or administrative tribunals was not identical with the dispute in the international proceedings (same parties, object and cause of action).

For instance, in some cases, arbitrators admitted the international proceeding, even though investors had previously resorted to domestic courts, on the ground that the claim before the international tribunal alleged a breach of an investment treaty, while the dispute before the domestic courts or administrative tribunal did not concern an

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alleged breach of a right conferred or created by an investment treaty.

In other cases, arbitrators have dismissed the objection to jurisdiction on the ground that the parties in the domestic proceedings were not identical with the parties in the international proceedings. That happened, for example, in the case of *Hulley Enterprises Limited (Cyprus) v. The Russian Federation* (regarding the application of the ECT), where the Russian local company, Yukos, resorted to Russian courts and to the European Court of Human Rights, while the foreign investors, holding an interest on the local company (the Cypriot company *Hulley Enterprises Limited*), initiated international proceedings.

In general terms, arbitrators have been keen to admit international investment proceedings, even in cases where the investor had previously resorted to domestic courts or tribunals, and this trend might favor foreign investors, who are willing to resort to both Italian courts and international arbitration to oppose the Italian renewable energy reform.

Moreover, according to the Italian written statement of its “policies, practices and conditions” provided to the ECT Secretariat in accordance with Article 26 (3) (b) (ii) of the Energy Charter Treaty “if a resolution of the dispute has not yet been made by internal judicial or conciliation bodies, the investor may revoke his judicial action or arbitral procedure by procedural or lateral renouncement and apply to other forms of dispute settlement”, while “if a resolution or any formal or legal document of execution has already been made to settle the dispute, conciliation or international arbitration is no longer possible”. That means that, according to the Italian government, until the Italian tribunal has not made a decision on the dispute, the investor retains the right to revoke its judicial action and resorts to international proceedings. A decision by the internal judicial or conciliation bodies, by contrast, seems to prevent the investor to pursue international proceedings.

To avoid any contestation, the best choice would be to submit the claim to domestic courts after the institution of the international arbitration. In the case of the *Spalmaincentivi* law, however, this was not possible due to the fact that the terms for claims before domestic courts were too short to properly evaluate and prepare a proceeding under the ECT. In light of the above, in this specific case, arbitrators might be positive to admit the international dispute, even if investors have already resorted to Italian courts, if it emerges that the latter had no real choice, but to assert their rights before domestic courts and tribunals, due to time constraints or competence.

As to the definition of “investment”, article 1 (6) of the ECT includes an asset-based definition, which details the economic activities the contracting States agree to consider as “investment”. The definition refers to “every kind of asset, owned or controlled directly or indirectly by an investor” and includes inter alia: (a) tangible and intangible, moveable and immovable property, (b) shares, stocks, or other forms of equity participation in a company, (c) claims to money and claims to performance pursuant to a contract having an economic value associated with an investment. These economic activities usually feature a substantial commitment of resources by the investor and imply a certain duration and risk.

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10 Transparency Documents, Policies, Practices and conditions of Contracting Parties Listed in Annex 1D of the ECT, at

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13 Salini Costruttori SpA and Italsider SpA v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001; C.
The investments made by foreigners in the Italian photovoltaic industry are usually represented by majority participation (through shares or other form of equity participation) in Special Purpose Vehicles ("SPVs"), which are limited liability companies construed and regulated under Italian company law. These SPVs own the photovoltaic installation and all relevant contractual rights deriving from its operation and management. The SPVs are designed to operate and manage the installation for a medium-long term. The foreign investors’ participations in the Italian SPVs represent, therefore, a form of investment as defined and covered by the ECT and give rise to their right to resort to international arbitration in accordance with the provisions of the Treaty.

Besides, it shall be noticed that the definition of investment included in article 1 (6) of the ECT also covers assets that are indirectly owned or controlled by the investor. In this regard, the ECT contains a common Understanding (Nr. 3) concerning the interpretation of the term “control”. Control of an investment means control in fact, determined after an examination of the actual circumstances in each situation. It covers both equity interests of the investor and the ability to exercise substantial influence over the company, e.g. in the selection of the members of the board of directors or any other managing body.

Often, in the photovoltaic sector, an indirect control on the SPV is exercised by the foreign investor through a holding company. The holding company, established under the laws of Italy, has the only purpose of controlling the SPV on behalf of the foreign investor and to safeguard the interests of the latter. According to the ECT Readers’ Guide, this hypothesis of indirect ownership and control through a holding company represents a relevant investment under the ECT and may attract the protection granted by the Treaty. This appears to be confirmed by investment case law and doctrine.

5. Strategic choices

The legal changes occurred in the Italian renewable energy sector in the last couple of years have created negative effects to the foreign investors and have impacted significantly on the value and profitability of their investments. The "Spalmaincentivi" law, together with other administrative acts enacted by the Italian State, have dramatically changed the legislative framework according to which foreign investors have decided and implemented their investment operations. For this reason and in the light of the above, there are significant arguments to successfully resort to international arbitration under the ECT and good opportunities to obtain adequate compensation for the loss incurred.

In addition, international investment arbitration is particularly appealing because it usually recognizes higher damages, compared to national courts and other international institutions, such as the European Court of Human Rights; and, on the other hand, it guarantees a neutral forum, where investors can have their case heard outside of the possibly overbearing influence of domestic politics.

Another interesting aspect of international investment arbitration relates to the opportunity to obtain third party financing (TPF). Investors, in fact, may choose to resort to external funders to pay for their international arbitration proceedings. Financing includes the payment of some or all costs of the arbitral proceedings. In return for this financial liability, the funders receive a certain percentage of the finally awarded damages or a certain multiple of their overall investment in the case. TPF allows investors to overcome the high costs of the proceeding and to take advantage of the high potential damages awards characteristic of arbitral awards in investment disputes.

Finally, it would be worth considering the interaction between ECT and EU law. In particular, it would be worth analyzing whether and how EU law might influence an investment tribunal’s determination of its own jurisdiction and whether EU law might impact on the enforcement of the final investment award. As to jurisdiction, so far, investment tribunals have generally upheld their jurisdiction, disregarding the doctrinal debate over the interac-

tion between ECT and EU law\textsuperscript{16}. As to enforcement, in the ICSID case Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. (Sweden) v. Romania, the EU Commission intervened asserting that "any payment of compensation arising out of this Award would constitute illegal state aid under EU law and render the Award unenforceable within the EU"\textsuperscript{17}. The Tribunal, however, dismissed the arguments of the EU, stating that any award rendered in ICSID proceedings shall be binding, recognized and enforced without review by domestic courts\textsuperscript{18}.

It is evident that the argumentation advanced by the EU Commission in the case Ioan Micula will be employed in future intra EU-investment arbitrations. However, whether enforcement of an arbitral award constitutes illegal state aid will probably have a limited impact on the investment tribunal’s decision and will depend on the concrete circumstances of the case, including, for example, if the measure violating the investment agreement consists of repealing a legal regime that itself constitutes illegal state aid\textsuperscript{19}.

In light of the above, time is ripe to seize the opportunities offered by the ECT and to start proceedings before international arbitration tribunals. In this regard, Rödl & Partner has formed an international team of experts, composed by German, Spanish and Italian lawyers, to deal with arbitration proceedings under the ECT and is at your disposal for giving you any further information on the issue.


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> The Italian Renewable Energy Reform under Investment Agreements: the Case of Chinese and Hong Kong Investors

**1. The Italian Investment Agreements and the Energy Reforms**

More than 150 international investment agreements are currently in force between the Italian State and other States worldwide. All these agreements, highly similar in content, aim to create a stable international legal framework to facilitate and protect foreign investment flows and to enhance national economic development.

With investment agreements, the Italian State accepts binding obligations in relation to the treatment of the foreign investment and recognizes to the foreign investor the right to proceed directly against it in case of a violation. The obligation that the State owes to a foreign investor or investment is generally referred to as the standard of treatment. Investment agreements include absolute standards, such as guarantees of fair and equitable treatment; as well as relative standards, such as national treatment and most-favored nation treatment, whose application depends on the treatment accorded by the State to other investors\textsuperscript{20}. International investment agreements also contain specific norms on expropriation and dispute settlement, to which States usually devote separate sections of the treaty.

The content of Italian investment agreements is highly similar to the content of Part III of the ECT, analyzed above, except for the express reference to the energy sector. The ECT, in fact, only focuses on investments in the energy sector, while investment agreements refer to investments in general.

As the ECT, therefore, investment agreements may be used by foreign investors to challenge the Italian renewable energy reform. Especially, in cases where the ECT

cannot come into play, because the foreign investor involved comes from a non-signatory State, e.g. China or Hong Kong.

2. Challenging the Italian Renewable Energy Reform under the China – Italy and Hong Kong – Italy investment agreements

The China – Italy bilateral investment treaty (‘BIT’) dates back 1985. It entered into force in 1987 and includes provisions on both the fair and equitable treatment and expropriation, as well as, a broad definition of investment.

More in detail, article 2 (1) of the China – Italy BIT defines investment as every kind of asset, held in compliance with relevant laws and regulations of the contracting parties, and in particular, though not exclusively includes: (a) moveable and immovable property and other rights in rem; (b) shares and other forms of equity participation in a company, (c) claims to money and claims to performance having an economic value. The term “investor” identifies any individual or company of a contracting party, which invests in the territory of the other contracting party.

According to article 1, States reciprocally engage to promote investments in their territory and to guarantee reasonable and equitable treatment to the investments made by investors of the other contracting party. While, article 4 (2) guarantees the foreign investor against any form of direct and indirect expropriation without compensation. Such compensation shall amount to the value of the investment at the moment the expropriation became public knowledge and shall be made without undue delay, be freely convertible and transferable.

Article 5 of the China – Italy BIT establishes that investors affected by expropriatory measures shall have the right to resort to the domestic courts of the State making the expropriation. Domestic courts shall review the measure in light of domestic laws and regulations and verify the respect of due process of law.

Any dispute arising in relation to the amount of compensation, by contrast, shall be resolved according to paragraph 4 of the additional Protocol. The additional Protocol recognizes to the foreign investor the right to resort to ad hoc arbitration under the rules of the Arbitration Institute of the Stockholm Chamber of Commerce or the International Centre for Settlement of Investment Disputes (‘ICSID’). This is the only case the foreign investor can resort to international arbitration against the State to settle disputes arising out of its investment operation. The China – Italy BIT, in fact, does not recognizes to the foreign investor the right to proceed directly against the State in case of a violation of the BIT, except for the case of expropriation and only in relation to the amount of compensation. Article 11 of the China – Italy BIT, by contrast, only provides for State-to-State arbitration. Breach of an obligation of the China – Italy BIT in the context of a legislative act or administrative decision, however, well may constitute a breach of the Italian Constitution (Article 117) under which the Italian State is bound by its international obligations.

The Hong Kong – Italy BIT of 1995, in force from 1998, provides an alternative way for Hong Kong investors to challenge the legitimacy of the measures taken by the Italian government in the photovoltaic sector, that in spite of the annexation of Hong Kong to the People’s Republic of China.

Article 13 of the (Chinese) Basic Law, in fact, stipulates that the Central People’s Government (China) is responsible for foreign affairs relating to the Hong Kong Special Administrative Region (Hong Kong SAR), but it authorizes the Hong Kong SAR to conduct the relevant external affairs in accordance with the Basic Law. Article 151 of the Basic Law provides that the Hong Kong SAR, using the name "Hong Kong, China", may maintain and devel-


22 With regard to the Spalmaincentivi law, Rödl & Partner Italy has brought, on behalf of its clients, 4 challenges before the Administrative Court in Rome (TAR Lazio) involving PV-plants owned by companies whose partners are foreign investors protected by the China – Italy BIT.

op relations and conclude and implement agreements on its own, with foreign States and regions and international organizations, in such matters as economic affairs, trade, finance and monetary affairs, shipping, communications, tourism, culture and sports. That means that, despite the annexation of Hong Kong to the People’s Republic of China, the international investment agreements concluded by the former with foreign States remain in force.

The Hong Kong – Italy BIT, therefore, can be applied to protect Hong Kong companies’ investments in Italy and to challenge the legitimacy of the Italian renewable energy reform. Such investment treaty, compared to the China – Italy BIT, provides for investor-State arbitration in any case of disputes concerning investments (art. 10 of the Hong Kong – Italy BIT), allowing investors to resort to arbitration both in case of alleged (indirect) expropriation (art. 5 of the Hong Kong – Italy BIT), as well as, in case of a violation of the FET standard (art. 2 (2) of the Hong Kong – Italy BIT).

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24 With regard to the Spalmaincentivi Law, Rödl & Partner Italy has brought, on behalf of clients of its, 8 challenges before the Administrative Court in Rome (TAR Lazio) involving PV-plants owned by companies whose partners are foreign investors protected by the Hong Kong – Italy BIT.
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