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Potential application of the Energy Charter  
Treaty to a hydrocarbon matter in Italy:  
Advocating an FET violation

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## TABLE OF CONTENTS

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<b>Abbreviations</b>	3
<b>1. INTRODUCTION</b>	4
1.1 A Statement of Claim in disguise	
1.2 Structure	
1.3 Methodology and Source Material	
<b>2. PRESENTATION OF THE FACT PATTERN</b>	6
2.1 The granting of the exploration permit and the application for the exploitation concession	
2.2 Delay of the administrative procedure and changes in the relevant legal framework	
2.3 Inconsistencies in the administrative procedure and the recourse to local remedies	
2.4 The recourse to supranational remedies	
2.5 Acquisition of the UK Parent Company by another UK-based Company	
2.6 The current situation as of April 2015	
<b>3. ITALY BREACHED THE FAIR AND EQUITABLE TREATMENT STANDARD UNDER THE ECT IN THE PRESENT CASE</b>	12
3.1 The relevant provisions of the ECT	
3.2 Arbitration under the ICSID Convention	
3.3 No fork-in-the road bar	
3.4 The FET under the ECT	
3.4.1 The FET standard and its components	
3.4.2 The application of the FET standard to the present situation	

#### 3.4.4 Grounds supporting the FET violation

- i. The Italian Republic has failed to create stable and favourable conditions for BEX's investment and has failed to protect BEX's legitimate expectations
- ii. The Italian Republic has failed to guarantee transparent conditions for BEX's investment
- iii. The Italian Republic is in breach of its obligation not to impair unreasonably and arbitrarily the use and enjoyment of BEX's investment

#### 3.5 The applicable law

### **4. CONSEQUENCES OF THE FET VIOLATION: REMEDIES AVAILABLE** 30

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4.1 Secondary rules arising out of an internationally illegal conduct

4.2 Performance in kind and compensation

4.3 Compensation (alternatively)

### **5. CONCLUDING REMARKS AND ADDITIONAL CONSIDERATIONS** 37

---

### **6. REFERENCES** 40

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6.1 Articles and Books

6.2 Case Law

6.3 Internet links

## Abbreviations

AIA	Autorizzazione Integrata Ambientale
AOG	Alpha Oil&Gas plc
BEX	Beta Exploration plc
d.l.	Decree Law
DCF	Discounted cash flow
ECT	Energy Charter Treaty
EIA	Environmental Impact Assessment
FET	Fair and Equitable Treatment
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IEA	Integrated Environmental Authorisation
MCHA	Ministry of Cultural Heritage and Activities
MED	Ministry of Economic Development
MEPLS	Ministry of the Environment and of Protection of Land and Sea
PCA	Permanent Court of Arbitration
SCC	Stockholm Chamber of Commerce
TAR	Tribunale Amministrativo Regionale
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
VCLT	Vienna Convention on the Law of Treaties
VIA	Valutazione di Impatto Ambientale

## 1. INTRODUCTION

### 1.1 *A Statement of Claim in disguise*

The subject of this *sui generis* thesis is a real-life situation where the investment of a British Company in the energy sector has been hampered by measures adopted by the Italian Government. The purpose of this work is to provide the Company in question with an effective legal protection by invoking the application of the Energy Charter Treaty (ECT), and commencing an international arbitration.

Although the conduct of the Italian Republic appears to have violated multiple international obligations under the ECT, this thesis will focus on the possible breach of the Fair and Equitable Treatment (FET), which nevertheless constitutes the most successfully-invoked standard of protection in Investor-State dispute.

### 1.2 *Structure*

First, the paper will introduce a rather accurate and objective description of the situation spotted. Then, it will argue that the current situation falls within the scope of applicability of the ECT and that the British Company might initiate an arbitration before an ICSID Tribunal. Subsequently, the thesis will put forward arguments advocating the infringement of the FET provision. Next, the consequences of the FET breach and the respective remedies available for the British Company will be discussed. Finally, the paper will highlight some of the main advantages of the whole arbitral proceedings.

### 1.3 *Method and Source Material*

This research project involved legal and doctrinal analysis, relying on relevant academic commentaries. Most of the materials obtained in order to write such a thesis are publicly available through internet, including documents

pertaining to the granting of mining rights, decrees, environmental reports and rulings of the Administrative Tribunals.

As to the information related to the British Company – whose actual name has been replaced to honour confidentiality – I relied on data kindly made available to me by the Company itself, especially with respect to the timing and the numbers of the investment.

## 2. PRESENTATION OF THE FACT PATTERN

The present chapter reconstructs the relevant events in a chronological order from May 2005 until April 2015. Such events will be the subject of the legal analysis in the next chapter through the prism of the FET standard.

### *2.1 The granting of the exploration permit and the application for the exploitation concession*

In May 2005 Alpha Italia SpA – an oil & gas exploration and production company incorporated in Italy and wholly owned by Alpha Oil&Gas plc (AOG), a UK based company – applied for and obtained an exploration permit (B.R269.GC) to conduct off-shore research in the Adriatic Sea in an area along the Italian coasts.<sup>1</sup>

Following the discovery of a large hydrocarbon deposit, in 2008 the subsidiary Company drilled a well that was proved successful with hydrocarbon mineralization (*Progetto Sirenetta Mare*) and installed a temporary oil rig. The subsidiary Company spent approx. € 20 million in the whole project. On 17 December 2008, the subsidiary Company submitted an application for the exploitation concession (d 30 BC- MD) to the Ministry of Economic Development (MED), pursuant to article 9 of the law no. 9/1991 (“Rules for implementing the National Energy Plan”).<sup>2</sup> To this end, on 9 December 2009 the subsidiary Company submitted the Environmental Impact Assessment (EIA - *Valutazione di Impatto Ambientale*, VIA) to the Ministry of the Environment and of Protection of Land and Sea (MEPLS), pursuant to article 23(1) of the Environmental Code, in order to get the necessary MEPLS’ approval for obtaining

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<sup>1</sup> See “Titoli minerari vigenti”, Ministero dello Sviluppo Economico. Available on: <http://unmig.sviluppoeconomico.gov.it/unmig/titoli/dettaglio.asp?cod=673> (accessed 20 April 2015).

<sup>2</sup> See “Istanza di Concessione di Coltivazione in Mare”. Ministero dello Sviluppo Economico. Available on: <http://unmig.sviluppoeconomico.gov.it/unmig/istanze/dettaglio.asp?cod=294> (accessed 20 April 2015).

the exploitation concession from the MED.<sup>3</sup> The whole administrative procedure was surrounded by bitter controversy fuelled by the regional and local governments, whose enmity against the *Sirennetta* Project was the first item of electoral campaigns in 2013 (for the national elections) and in 2014 (for the regional ones).

## *2.2 Delay of the administrative procedure and changes in the relevant legal framework*

Although the Administration is required to issue a reasoned decision approving or disapproving the application of the Environmental Impact Assessment (EIA ) within 150 days of its submission,<sup>4</sup> the MEPLS failed to comply with this timeframe. During delays in this administrative procedure concerning the evaluation of the EIA by the MEPLS, the Italian Government brought about a reform in the extraction sector by amending the Environmental Code. Namely, in the aftermath of the Deepwater Horizon platform accident in the Gulf of Mexico, on 29 June 2010 the Government issued – upon proposal of the MEPLS – a Legislative Decree (**D.lgs. 128/2010**, Art. 2) imposing a ban on the oil and gas explorations/exploitations within 5 nautical miles from the baseline of the territorial waters and within 12 miles from the external perimeter of protected marine and coastal areas, and introducing an additional environmental compliance to release any exploitation concession (the so-called Integrated Environmental Authorisation, IEA - *Autorizzazione Integrata Ambientale*, AIA).

These regulatory measures directly affected the investment made by the Company, since its oilfield is located approx. 4 nautical miles from the coastline. As a result of the new restrictions established by the decree no. 128/2010, the Environmental Impact Assessment (EIA) submitted by the Company was rejected because of the distance of the Project from the coast.

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<sup>3</sup> See “*Istanza di concessione di coltivazione idrocarburi liquidi e gassosi "d30B.C-MD" - Progetto di coltivazione del giacimento Sirennetta Mare*”. Available on: <http://www.va.minambiente.it/it-IT/Oggetti/Info/306> (accessed 20 April 2015).

<sup>4</sup> Article 26 of the Environmental Code set the deadlines for this procedure.

In June 2012, the Italian Republic again amended the Environmental Code. The Government issued – upon proposal of the MED – a Decree Law (**d.l. n. 83/2012**, then converted into **law no.134/2012**) to the effect that the previous ban on off-shore hydrocarbon explorations/exploitations setting two different thresholds (5 and 12 miles) was replaced by a ban fixing a single limit of 12 nautical miles from the coastline. However, this Decree Law made clear that the ban did not apply to procedures for granting off-shore hydrocarbon concessions that were ongoing when Legislative Decree No. 128/2010 went into effect. This allowed the subsidiary Company to resume the authorization process regarding the scrutiny of the EIA.

On the other hand, the Law no.134/2012 increased the off-shore royalties by more than 40% (from 4% to 7% for oil and from 7% to 10% for gas) in order to finance the protection of the sea and the safety of the extraction activities.<sup>5</sup> These dramatic changes of royalty rates impinged on the Company's profit from the other oil field located in Italy and co-owned at 20% with an Italy-based Company. This fully operative oilfield is critical for Alpha Oil&Gas plc, since it provides alone the 75% of its portfolio revenue.

### *2.3 Inconsistencies in the administrative procedure and the recourse to local remedies*

On 30 June 2010, and again on 11 February 2013 the Ministry of Cultural Heritage and Activities (MCHA) gave its consent to the *Sirenetta* Project as far as it falls under its competence.<sup>6</sup>

On 25 January 2013 the EIA Technical Committee ruled in favour of the Company's EIA submission, and on 17 April 2013 the EIA Director General of MEPLS sent the draft of the EIA decree with a positive recommendation to the office of the Minister. Nevertheless, on 9 July 2013 the Environmental Minister – instead of signing the EIA decree – required the Company to submit an additional environmental assessment (the Integrated Environmental Authorisation IEA,

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<sup>5</sup> Article 35, Law no.134/2012.

<sup>6</sup> Pursuant to Article 26 of the Legislative Decree No. 42/2004.

brought about by the decree 128/2010) as a precondition for MEPLS' approval of the Environmental Impact Assessment (EIA),<sup>7</sup> notwithstanding that in October 2012 the MEPLS itself had formally advised the Company that, consistent with applicable law, an IEA would not be required prior to the start of the first production round of the project.<sup>8</sup> Moreover, in March 2013 the Ministry caused further delays in the administrative procedure by re-opening the EIA procedure to allow the Abruzzo Region to give its view on the Project, even though the deadline to get its opinion had passed<sup>9</sup> and the Region had failed to respond to the numerous requests by the Ministry during the previous months.

Consequently, further to the continuing delays and obstructions to the *Sirenetta Mare* Project, on 8 August 2013 the Company lodged a claim with the Administrative Court (*Tribunale Amministrativo Regionale - TAR*) in Rome against MEPLS seeking to annul MEPLS' decision requiring the Company to apply for and obtain the Integrated Environmental Authorisation (IEA). As part of the claim, the Company also requested a judicial order to instruct MEPLS to issue the EIA Decree (*i.e.* the environmental compatibility decree).

On 16 April 2014, the TAR rejected the claim submitted by the Company.<sup>10</sup> The Administrative Court upheld the MEPLS' decision to conduct the additional environmental appraisal because of the complexity of the Company's plan.<sup>11</sup>

In May 2014, the Company submitted the Integrated Environmental Authorization (IEA), which is now under evaluation by the MEPLS.<sup>12</sup> Nevertheless, in November 2014 the Company decided to appeal to the Council of

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<sup>7</sup> *Nota bene*: according Article 23(4) of the Environmental Code, the Minister has to verify the completeness of the supporting documents within 30 days of the application, which was resumed on 11 July 2012, therefore the Minister cannot ask for additional documents such the IEA a year after the submission of the EIA.

<sup>8</sup> Press Release of Alpha Italia SpA (12 July 2013).

<sup>9</sup> Pursuant to Article 24(4) of the Environmental Code, any stakeholder can have access to the information regarding the project and present its observations within 60 days of the submission of the EIA. The Legislative Decree No. 128/2010 extended such limit to 90 days for receiving the observations from the Regions (as amended in Article 25(2) Environmental Code).

<sup>10</sup> TAR Lazio, sent. N. 04123/2014. Available on: <https://www.giustizia-amministrativa.it/cdsintra/cdsintra/AmministrazionePortale/DocumentViewer/index.html?ddocname=SS3LYL5JG3WM5XHVUCYGNRRH3U&q=medoiligas> (accessed 20 April 2015).

<sup>11</sup> TAR Lazio, sent. N. 04123/2014, see para VII.

<sup>12</sup> According to Article 29-quater (10) of the Environmental Code, the Administration has to issue a reasoned decision in this respect within maximum 150 days of the submission of the IEA.

State (*Consiglio di Stato* - the Highest Administrative Court) against the ruling of the TAR with the view of obtaining a judgment declaring that there is no obligation to perform the IEA as a precondition for the issue of the environment compatibility decree. This case is still pending.

#### *2.4 The recourse to supranational remedies*

On the supranational plane, the Company urged *Assomineraria* (the Italian petroleum and mining industry association) to file a complaint with the EU Commission alleging the inconsistency of the Legislative Decree 128/2010 with the Union law, arguing disproportion between the goal pursued, the actual environmental risk and the measure enacted. However, the EU Commission declared itself non-competent, and upheld the competence of the European Court of Justice to settle this question, in case an Italian Administrative Court would have referred the question to the ECJ.

#### *2.5 Acquisition of the UK Parent Company by another UK-based Company*

In the meantime, in August 2014, Beta Exploration plc (BEX) completed the acquisition of Alpha Oil&Gas plc for \$50 million (GBP 29.3 million) in a cash and shares deal. Accordingly, Alpha Italia SpA became Beta Italia SpA.

BEX is a UK-based oil and gas exploration company listed on the Alternative Investment Market (AIM) of the London Stock Exchange with exploration interest in the Falkland Islands. Thanks to the takeover of AOG, BEX attained a portfolio of production, development/appraisal, and exploration interests in Italy, Malta, and France.

The AOG's 100% owned *Sirenetta Mare* asset having 2C contingent resources<sup>13</sup> of 25.1 million barrels of oil and 6.5 billion cubic feet of gas<sup>14</sup>

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<sup>13</sup> 2C denotes the probable estimate of contingent resources. See <http://www.oilsearch.com/investor-centre/glossary.html> (accessed 23 April 2015).

represented one of the main reasons why BEX acquired AOG.<sup>15</sup> The development plan for the *Sirenetta* Project envisages the drilling of 4-6 wells utilizing a single platform and a Floating Production Storage and Offloading Unit (FPSO), and outputting up to 10.000 bopd (barrels of oil per day).

## *2.6 The current situation as of April 2015*

At the present time, the oilfield *Sirenetta Mare* of the subsidiary Company (Beta Italia SpA) is still not operative – notwithstanding being potentially productive since 2008 – due to the lack of the necessary exploitation concession (since the EIA has still not been signed by the MEPLS). Furthermore, the validity of the exploration permit held by the subsidiary Company has expired on 5 May 2015, and the local government is about to establish a Regional Natural Park nearby the Company's project with the intent of preventing any hydrocarbon extraction in the area.

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<sup>14</sup> Competent Person's Report completed by ERC Equipoise Limited (an independent Reservoir Evaluation Company), 18 October 2013. Results available on: <http://www.iii.co.uk/research/LSE:AOG/news/item/873497> (accessed 23 April 2015).

<sup>15</sup> See Jon Mainwaring, Rigzone Staff, Rockhopper to Buy Mediterranean Oil & Gas, 23 May 2014. Available on: [http://www.rigzone.com/news/oil\\_gas/a/133236/Rockhopper\\_to\\_Buy\\_Mediterranean\\_Oil\\_Gas](http://www.rigzone.com/news/oil_gas/a/133236/Rockhopper_to_Buy_Mediterranean_Oil_Gas) (accessed 23 April 2015).

### 3. ITALY BREACHED THE FAIR AND EQUITABLE TREATMENT STANDARD UNDER THE ECT IN THE PRESENT CASE

This chapter aims to contend the violation of Article 10(1) of the Energy Charter Treaty (ECT) by the Italian Republic. The ECT is a multilateral treaty with binding force for the promotion and protection of foreign investment in the energy sector.<sup>16</sup> Both Italy and UK are currently Contracting Parties to the ECT. Both States deposited their respective instruments of ratification with the Government of the Portuguese Republic (the Depository of the ECT)<sup>17</sup> on 16 December 1997. The ECT entered into force on 16 April 1998. In January 2015 Italy gave written notification to the Depository of its withdrawal from the ECT, which will take effect in January 2016.<sup>18</sup> The ECT will still bind Italy with regard to existing investments for a period of 20 years from the date its withdrawal becomes effective.<sup>19</sup>

#### 3.1 *The relevant provisions of the ECT*

Part III of the ECT (Articles 10-17) sets forth substantive rights that the Contracting Parties are obliged to accord foreign investors and their investments.<sup>20</sup> The purpose of these provisions is to ensure stable conditions for foreign investments in the energy sector and to reduce the non-commercial risk related to such investments.<sup>21</sup> Namely, Article 10(1) of the ECT – entitled “Promotion, Protection and Treatment of Investments” – imposes upon Italy the obligation to treat constantly Investments of Investors of other Contracting Parties fairly and equitably.<sup>22</sup>

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<sup>16</sup> Article 2 ECT.

<sup>17</sup> Article 49 ECT.

<sup>18</sup> Luke Eric Peterson, “Italy follows Russia in withdrawing from Energy Charter Treaty, but for surprising reason”, Investment Arbitration Reporter, 17 April 2015.

<sup>19</sup> Article 47(3) ECT.

<sup>20</sup> Emmanuel Gaillard and Mark McNeill, *The Energy Charter Treaty, Arbitration under International Investment Agreements : a Guide to the Key* (Oxford University Press 2010) 46.

<sup>21</sup> Kaj Hobér, *Selected Writings on Investment Treaty Arbitration* (Studentlitteratur 2013) 221.

<sup>22</sup> Article 10(1) of the ECT reads: “Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall

Part V of the ECT (Articles 26-28) deals with the dispute settlement mechanisms available under the Treaty. Notably, Article 26 provides for direct Investor-State arbitration and thereby gives a qualified Investor the right to bring a claim against the host State for breaches of the obligations enshrined in Part III of the ECT. Indeed, Article 26(3)(a) contains the unconditional consent of each Contracting Party of the ECT to the submission of a dispute to international arbitration. A qualified Investor may select one of the *fora* of international arbitration listed in Article 26(4) by filing his Request for Arbitration to the competent Institution and thereby expressing his consent to arbitrate.

Part I of the ECT (Articles 1-2) defines respectively what and who is a qualified Investment and Investor for the purpose of the Treaty. Pursuant to Article 1(7) a qualified Investor can be a natural person having the citizenship or nationality of, or who is permanently residing in, a Member State of the Energy Charter Conference in accordance with its applicable law, or a company or other organization organized in accordance with the law applicable in that Member State.

According to Article 1(6) a qualified Investment is every kind of asset, connected with an “Economic Activity in the Energy Sector” and owned or controlled directly or indirectly by an Investor and may include, *inter alia*, a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise.

Based on Article 1(5) an “Economic Activity in the Energy Sector” constitutes any economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products.

Being Beta Exploration (BEX) a public limited company registered in UK whose investment in the extraction sector – represented by its complete

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include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.”

participation in Beta Italia SpA (the exploration and production Company incorporated in Italy) – has been unduly affected by the actions and omissions of the Italian Republic in violation of Part III of the ECT, BEX could avail itself of the ECT protection by commencing an international arbitration under the auspices of the International Centre for Settlement of Investment Disputes (ICSID), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) or before an *ad hoc* tribunal under the UNCITRAL Arbitration Rules.<sup>23</sup>

### 3.2 Arbitration under the ICSID Convention

In case BEX would select the ICSID as *forum* to settle the dispute, it can readily be observed that BEX meets the additional requirements set forth in Article 25 of the ICSID Convention<sup>24</sup> in order to have *jus standi* before an ICSID Tribunal:

- both the UK and the Italian Republic are Contracting Parties to the ICSID Convention. Italy deposited its instrument of ratification with the International Bank of Reconstruction and Development (the World Bank) on 29 March 1971. The Convention entered into force for Italy on 28 April 1971.<sup>25</sup> The UK deposited its instrument of ratification with the World Bank on 19 December 1966. The Convention entered into force for the UK on 18 January 1967;<sup>26</sup>

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<sup>23</sup> Article 26(4) of the ECT.

<sup>24</sup> Article 25(1) of the ICSID Convention reads: “The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.”

<sup>25</sup> Legislative measure adopted by Italy to make the Convention effective in its territory (Article 69 of the ICSID Convention): Legge 10 maggio 1970, n. 1093 Ratifica ed esecuzione della Convenzione per il regolamento delle Controversie relative agli investimenti tra Stati e cittadini di altri Stati, adottata a Washington il 18 marzo 1965 (Off. Gaz. 8, January 12, 1971, p. 155).

<sup>26</sup> Legislative measures adopted by the UK to make the Convention effective in its territory (Article 69 of the ICSID Convention): the Arbitration (International Investment Disputes) Act 1966. (1966 c. 41); the Arbitration (International Investment Disputes) Act 1966 (Commencement) Order 1966. (Statutory Instruments, 1966, No. 1597, December 21, 1966); the Arbitration (International Investment Disputes) Act 1966 (Application to Colonies etc.) Order 1967. (Statutory Instruments, 1967, No. 159, February 10, 1967); the Arbitration (International Investment Disputes) (Guernsey) Order 1968. (Statutory Instruments, 1968, No. 1199, July 26, 1968); the Arbitration (International Investment Disputes) (Jersey) Order 1979. (Statutory Instruments, 1979, No. 572, May 23, 1979); the Arbitration (International Investment Disputes) Act 1983 (an Act of Tynwald).

- BEX is a juridical person which has the nationality of a Contracting State (British nationality) other than the State party to the dispute (Italy) on the date on which the parties consent to submit such dispute to arbitration (*i.e.* the date when BEX will file its Request for Arbitration by means of which it will accept in writing the offer to arbitrate of the Italian Republic expressed in Article 26 of the ECT);

- first AOG and then, after its acquisition, BEX have made large investments in Italy. The two UK-based Companies have spent millions of euro in developing the Italian exploration and production sector of the oil and gas industry. As a result of the acquisition, BEX consolidated AOG's assets, liabilities and rights, being the purpose of the Scheme of Arrangements of the Acquisition<sup>27</sup> to enable BEX to become the holder of the entire issued and to be issued share capital of AOG. Consequently, AOG ceased to exist and all its rights were assigned to BEX, which subrogated to AOG in all its legal relations – and for what matters the most in this respect – BEX substituted AOG in its rights against the Italian Republic. BEX's direct investment in Italy consists of Beta Italia SpA (former Alpha Italia SpA), which falls fair and square within the definition of Article 1(6)(b) of the ECT.<sup>28</sup> In particular, the main asset of Beta Italia Spa – represented by the *Sirenetta* Project – has been heavily impaired by the measures deliberately adopted by, and accordingly directly attributable to, the Italian Government;

- the dispute between BEX and Italy is a legal dispute since it concerns the existence of a legal obligation – to accord foreign investors and their investments fair and equitable treatment – and the nature of the reparation to be made for the breach of such obligation (performance in kind and/or compensation).<sup>29</sup> Indeed, the acts and omissions of the Italian Republic in relation to BEX's investment

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<sup>27</sup> Scheme of Arrangement dated 20 June 2014 to be implemented under Part 26 of the Companies Act 2006.

<sup>28</sup> “A company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise.”

<sup>29</sup> Christoph Schreuer, “What is a Legal Dispute?”, *International Law between Universalism and Fragmentation*, Festschrift in Honour of Gerhard Hafner (Brill Nijhoff 2008) p 968, quoting the “Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States” (18 March 1965), adopted by Resolution No. 214 of the Board of Governors of the International Bank for Reconstruction and Development on 10 September 1964, *IICSID Rep.* 23, at 28 (1993).

allegedly violated Italy's obligation under Article 10(1) of the ECT, and fall within the scope of the consent to arbitration given by Italy in Article 26 of the ECT;

- the dispute would arise directly out of the investment made by BEX in Italy. Even though the ICSID Convention does not define the term "investment", an investment within the meaning of Article 25 of the ICSID is in place since the Contracting Parties to the relevant Multilateral Investment Treaty (the ECT) expressly agreed to treat projects like BEX's as a qualified investment under that Treaty.

In sum, the dispute between BEX and Italy concerning the *Sirenetta* Project constitutes a legal dispute between a Contracting State to the ICSID Convention and a national of another Contracting State arising directly out of an investment. It follows that the ICSID Centre would have jurisdiction over such a dispute.

### 3.3 *No fork-in-the road bar*

Having the subsidiary Company locally incorporated in Italy initiated proceedings against the MEPLS before the Administrative Tribunal aimed at obtaining the EIA Decree, there could be issues barring the jurisdiction of the arbitral tribunal,<sup>30</sup> primarily due to the application of the fork-in-the-road provision contained in Article 26(3)(B)(i) of the ECT.<sup>31</sup>

A fork-in-the-road provision typically requires investors to choose between litigation in national courts and international arbitration with the consequence that once that choice has been made it becomes final. Such a provision is the expression of the Latin maxim *una via electa non datur recursus*

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<sup>30</sup> See e.g.: *H&H Enterprises v Egypt*, Award 6 May 2014, where the Tribunal declined jurisdiction over the majority of H&H's claims because it found that the fork-in-the-road clause of the BIT had been triggered by H&H when it submitted its claims with the same fundamental basis to the Cairo Arbitration and the domestic Courts. See also *Pantechniki S.A. v. Albania*, where the sole arbitrator held that the decisive point is whether the entitlements claimed in multiple proceedings have the same normative source.

<sup>31</sup> "The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b)." The Italian Republic is one of the Contracting Parties listed in Annex ID.

*ad alteram* (once a road is selected, there is no recourse to the other).<sup>32</sup> Its rationale reflects States' public policy considerations and the intent to prevent conflicting decisions.<sup>33</sup>

In order for a fork-in-the-road provision to operate, viz. to preclude the competence of the arbitral tribunal, it is required the triple identity of the parties to the dispute, the cause of action (*causa petendi*) and the relief sought (*petitum*).<sup>34</sup>

In our case the fork-in-the-road provision has not been triggered by the recourse of Alpha Italia Spa to the Administrative Courts pleading the annulment of the Ministerial Note and requesting the issuance of the EIA decree, even if the remedy sought might coincide in part with the one pursued in front of the arbitral tribunal. This is because the parties of the arbitral proceedings would be different from parties of the local proceedings. In the international arbitration the Claimant would be the parent Company (BEX), while in the administrative proceedings the Claimant is another juridical person with its own legal personality (Alpha Italia Spa). As to the *causae petendi*, they are also distinct: the causes of action in the domestic proceedings maintain breaches of Italian Law, whereas the cause of action in the international arbitration is a treaty claim alleging the violation of rights conferred by the ECT.

### 3.4 *The FET under the ECT*

Article 10(1) of the ECT – which enshrines an enforceable obligation upon the Contracting States – provides in the pertinent part:

“**Each Contracting Party** shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a **commitment to accord** at all times to Investments of Investors of other Contracting Parties **fair and equitable treatment**.”

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<sup>32</sup> Christoph Schreuer, Travelling the BIT Route of Waiting Periods, Umbrella Clauses and Forks in the Road (The Journal of World Investment & Trade, Vol. 5 No. 2, April 2004) 240.

<sup>33</sup> *Maffezini v Spain*, Decision on Jurisdiction, 25 January, para 63.

<sup>34</sup> *Azurix v Argentina*, Decision on Jurisdiction, 8 December 2003, para 88.

### 3.4.1 *The FET standard and its components*

The Fair and Equitable Treatment (FET) is a standard stemming from international law, and provided by many International Investment Agreements (IIAs). The standard encompasses multiple elements whose contours have been defined by the arbitral practice in accordance with Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT).<sup>35</sup>

In the domain of investment law the main function of the FET clause is to incorporate in Multilateral and Bilateral Investment Treaties (MITs and BITs) the general principle of *bona fides* – which constitutes one of the foundations of international law – and, consequently to fill in the *lacunae* of those treaties in a comprehensive and flexible fashion.

Arbitral tribunals have identified the main elements of the FET standard as requiring the host State:

- a) to create proactively a stable and predictable legal and business environment where foreign investments may thrive;<sup>36</sup>
- b) to protect foreign investors' legitimate expectations;<sup>37</sup>
- c) to act in a non-arbitrary manner or adopt unreasonable or disproportionate measures against foreign investments;<sup>38</sup>
- d) to ensure the transparency of legal frameworks and the relative processes;<sup>39</sup>
- e) to comply with contractual obligations entered into with foreign investors;<sup>40</sup>
- f) to guarantee the procedural propriety and the right of due process in civil, criminal and administrative proceedings, as well as, not to

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<sup>35</sup> “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

<sup>36</sup> Emmanuel Gaillard and Mark McNeill, *The Energy Charter Treaty, Arbitration under International Investment Agreements : a Guide to the Key* (Oxford University Press 2010) 46. See also *Occidental v Ecuador*, Award, 1 July 2004, para 191; *CMS v Argentina*, Award, 12 May 2005, paras 274-276.

<sup>37</sup> *National Grid v Argentina*, Award, 3 November 2008, para 173

<sup>38</sup> See *Bilcon v Canada*, Award, 17 March 2015, para 357.

<sup>39</sup> See *SPP v Egypt*, Award 20 May 1992, para 82-83; *Metaclad v Mexico*, Award, 30 August 2000, para 83.

<sup>40</sup> See *SGS v Paraguay*, Decision on Jurisdiction, 12 February 2010, para 146.

hinder any arbitral proceedings where the host State is acting as Respondent;<sup>41</sup>

g) to not discriminate against foreign investors;<sup>42</sup>

h) to refrain from and prevent any type of coercion or harassment to the detriment of foreign investments.<sup>43</sup>

All these components are permeated by the overarching principle of good faith.<sup>44</sup> The most widely accepted definition of the FET was provided by the tribunal in *Tecmed v Mexico*, where the arbitral panel described the pattern of conduct that the host State should keep with respect to the foreign investors and their investments in order to comply with the FET standard:

“The Arbitral Tribunal considers that this provision of the Agreement [an FET clause], in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. 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... The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State...not to deprive the investor of its investment without the required compensation.”<sup>45</sup>

Four features characterize the application of the FET standard:

**1) Its origin:** being its source conventional international law insofar FET clauses are set forth in International Investment Agreements (IIAs) such the ECT, the level of protection accorded by the FET standard is not determined by the municipal law of the host State, rather it is established by international law itself. This means that the FET standard may be violated even if the domestic law is not

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<sup>41</sup> See *Middle East Cement v Egypt*, Award, 12 April 2002, para 143.

<sup>42</sup> See *Loewen v United States*, Award, 29 March 2005, paras 132-173.

<sup>43</sup> See *Total v Argentina*, Decision on Liability, 27 December 2010, para 338.

<sup>44</sup> Ian Brownlie, *Principle of Public International Law* (Oxford University Press 1989) 19.

<sup>45</sup> *Tecmed v Mexico*, Award, 29 May 2003, para 154.

breached or the foreign investor undergoes the same treatment as nationals of the host state.<sup>46</sup>

**2) Its evolutive trait:** tribunals called to apply the FET standard have adopted an evolutive and broad interpretation of what a fair and equitable treatment consists in order to keep the standard up with the times and the ever-changing character – even if at a slow pace – of customary international law.<sup>47</sup>

**3) Its temporal orientation:** the level of protection of the FET standard is gauged against the legal framework of the host State at the time the foreign investor made the investment,<sup>48</sup> given that the municipal law is relevant as a question of evidence and fact.

**4) Its fact-specific dependence:** “whether a particular treatment is considered to be fair and equitable is a fact-dependent and case specific inquiry that must be assessed in the light of all of the facts and circumstances of the particular case,”<sup>49</sup> since it would be impossible to determine *a priori* in the abstract what treatments are fair and equitable.<sup>50</sup> This also entails that in determining the breach of the FET an arbitral tribunal should not take into account the acts of the host State individually, but it has to consider the overall cumulative impact on the foreign investment of the measures adopted by the host State.<sup>51</sup> As a matter of fact the breach of an international obligation can occur through a series of actions or omissions defined in aggregate as wrongful.<sup>52</sup>

### 3.4.2 *The application of the FET standard to the present situation*

In the light of the contents of the FET standard, Italy failed to accord BEX fair and equitable treatment by failing to protect its legitimate expectations and acting arbitrarily and non-transparently. The major measures directly attributable

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<sup>46</sup> Rudolf Dolzer & Christoph Schreuer, *Principles International Investment Law* (Oxford University Press 2012) 133.

<sup>47</sup> See *ADF Group v United States*, Award, 9 January 2003, para 179; *Merrill & Ring Forestry L.P. v Canada*, Award, 31 March 2010, para 213.

<sup>48</sup> See *National Grid v Argentina*, Award, 3 November 2008, para 173.

<sup>49</sup> *Gold Reserve v Venezuela*, Award, 22 September 2014, para 539.

<sup>50</sup> See *Mondev United States*, Award, 11 October 2002, para 118.

<sup>51</sup> See *El Paso v Argentina*, Award, 31 October 2011, para 518.

<sup>52</sup> Article 15, International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts, 2011.

to Italy under Article 4 of the ILC Articles on State Responsibility<sup>53</sup> that violated Article 10(1) of the ECT are the following:

- I. The **politically motivated delay of the administrative procedure** for the issuance of the EIA decree concerning the *Sirenetta* Project by approximately 5 years,<sup>54</sup> which also constitutes an infringement of legitimate expectations under Italian Administrative Law,<sup>55</sup> Articles 1(1)<sup>56</sup>, 2-bis(1)<sup>57</sup> of Law No. 241/1990 (Administrative Procedure Act) and Article 97(1) of the Italian Constitution<sup>58</sup> (impartiality and good-government conduct);
- II. The introduction and retroactive application of the **Legislative Decree 128/2010** to BEX's investment thereby BEX's Project was paralysed, an act which is sharply in contrast with the exploration permit B.R269.GC previously granted to BEX in 2005;
- III. The **Ministerial Note**<sup>59</sup> demanding BEX to submit an additional environmental compliance (the Integrated Environmental Authorisation), which is inconsistent with the previous MEPLS's formal communication ensuring the Company that the IEA was not

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<sup>53</sup> "The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

An organ includes any person or entity which has that status in accordance with the internal law of the State."

<sup>54</sup> Starting counting from May 2010, viz. when the 5 months (150 days) from the application for the EIA elapsed.

<sup>55</sup> The concept of legitimate expectations (*interessi legittimi*) is in fact present also in the Italian legal order according to which some expectations may be reasonably or legitimately created for a private person by the constant behavior and/or promises of the Public Administration on which the private person is dependent.

<sup>56</sup> "**Administrative action** shall pursue the objectives established by law and **shall be founded on criteria of economy of action, effectiveness, impartiality, publicity and transparency**, in accordance with the modes of action provided for both by the present Law and by the other provisions governing individual procedures, as well as by the principles underpinning the Community's legal order."

<sup>57</sup> "**Public authorities...shall compensate any unjust loss or damage caused by their intentional or negligent failure to observe the time-frames for concluding a procedure.**"

<sup>58</sup> "**Public offices** are organised according to the provisions of law, so as to **ensure the efficiency and impartiality of administration.**"

<sup>59</sup> 8 July 2013 protocol No. 0040231/GAB.

necessary, and which is also incompatible with Article 23(4)<sup>60</sup> of the Environmental Code, and Articles 3,<sup>61</sup> 21-octies(1)<sup>62</sup>, 21-nonies(1)<sup>63</sup> of the Law No.241/1990 (Administrative Procedure Act).

#### 3.4.4 Grounds supporting the FET violation

- i. The Italian Republic has failed to create stable and favourable conditions for BEX's investment and has failed to protect BEX's legitimate expectations

The Italian Republic has the obligation under Article 10(1) of the ECT to provide stable, predictable and favourable conditions for foreign investments through its legal framework, undertakings and representations, which form the basis of the legitimate expectations of foreign investors. The frustration of a foreign investor's legitimate expectations – previously generated by the State's conduct – amounts to the violation of the FET standard when investor's legitimate expectations are reasonable. Legitimate expectations are deemed reasonable if the foreign investor may plausibly rely on State's conduct given the objective circumstances of the case.

Governments obviously retain legitimate right to regulate domestic matters in the public interest,<sup>64</sup> however State measures that fundamentally reverse the relevant legal framework for the foreign investment will exceed the acceptable margin of regulatory change and violate the legitimate expectations of the investor,<sup>65</sup> especially where investor's expectations were created by governmental specific assurances like in the case at hand.<sup>66</sup>

By granting the Exploration Permit B.R269.GC to BEX in 2005, the Italian Republic supported and encouraged the extraction activities in that specific

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<sup>60</sup> “**Within thirty days** of the competent authority shall **verify the completeness of the documentation...**”

<sup>61</sup> “**...every administrative measure...must include a statement of reasons.** The statement of reasons must set out the factual premises and the points of law that determined the authority's decision, as these emerge from the preliminary fact-finding activities.”

<sup>62</sup> “**Administrative measures** that have been adopted in breach of the law or are **vitiated by excess of power** or by lack of specific jurisdiction **shall be voidable.**”

<sup>63</sup> “When there exist grounds in the public interest for so doing, **an administrative measure that is unlawful in accordance with section 21-octies may be annulled** *ex officio* by the organ that issued it or by other organs so empowered by the law, within a reasonable timeframe and taking account of the interests of the addressees and parties with conflicting interests.”

<sup>64</sup> See *Saluka v Czech Republic*, Partial Award, 17 March 2006, para 305 and 309.

<sup>65</sup> See *El Paso v Argentina*, Award, 31 October 2011, para 402.

<sup>66</sup> See Press Release of subsidiary Company of 12 July 2013.

area of the Adriatic Sea situated roughly 4 nautical miles away from the coast of the Abruzzi. Relying on the Italian Government's support expressed through the governmental permit, BEX invested approximately 20 million of euro in an exploration & production (E&P) plan (the so-called *Sirenetta* Project). As stated in *Mobil v Canada*, "a permit is a clear and explicit representation to induce investment,...[it] implies political support and is an explicit representation that something will be permitted".<sup>67</sup> By the same token it would be totally unreasonable to grant an exploration permit without the prospect of issuing the exploitation concession within a reasonable time. The exploration permit is not an end in itself, neither to the holder nor to the Administration, neither industrially nor legally speaking: the exploration permit is in fact applied for and issued for the purpose of the discovery of hydrocarbon deposits and their production. Thus, it is reasonable to argue that the permit induced the investment and had Italy not granted the permit, BEX would have invested somewhere else.

By adopting in 2010 the Legislative Decree No. 128, Italy repudiated for the first time its previous assurances manifested towards BEX by means of the exploration permit. The Legislative Decree 128/2010 had the effect of halting BEX's investment by establishing a buffer zone of 12 miles from the coastline where oil and gas explorations and exploitations were prohibited. Such measure frustrated *de jure* BEX's legitimate expectations.

Then in June 2012 the Italian Government rectified its conduct and manifested a further assurance in favour of BEX's investment by issuing the Decree Law No. 83 thereby clarified that the prohibition did not apply to procedures for granting off-shore hydrocarbon concessions that were pending when the Legislative Decree No. 128/2010 entered into force. Moreover, in October 2012 the MEPLS itself formally advised BEX that, consistent with the relevant framework, an IEA would not be requested. Such declaration constitutes another specific representation in favour of BEX's investment.

However, Italy repudiated for the second time its guarantees with respect to BEX's project when in July 2013 a MEPLS' Note requested the Company to submit the IEA (brought about by the decree 128/2010) as a precondition for

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<sup>67</sup> *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada*, Decision on Liability and on Principles of Quantum, 22 May 2012, paras 566 and 569.

MEPLS' issuance of the Environmental Impact Assessment (EIA) decree. In addition, the Italian Republic repudiated for a third time the assurances regarding BEX's investment when the TAR (the administrative court of first instance) upheld the validity of the MEPLS' Note. These measures resulted in frustrating *de facto* BEX's legitimate expectations and should be considered altogether as a continuing<sup>68</sup> and composite<sup>69</sup> wrongful act for the purpose of Italy's responsibility under international law.

In the light of the foregoing circumstances, Italy first fuelled BEX's legitimate expectations and then annihilated them. Consequently, the Italian Republic failed to provide stable and predictable legal and business conditions – which are essential elements of the FET<sup>70</sup> – by arbitrarily altering the legal framework in which BEX's investment has been made.<sup>71</sup>

**Table No. 1: Investor's Legitimate Expectations**

INVESTOR'S LEGITIMATE EXPECTATIONS: their basis and their respective crushing	
<i>Governmental manifestations of encouragement vis-à-vis BEX's investment:</i>	<i>Governmental measures frustrating BEX's investment:</i>
- 2005: the granting of the exploration permit;	- Legislative Decree No. 128/2010 (Article 2) imposing the ban;
- Decree Law No. 83/2012 (Article 35) revoking the ban;	
- 2012: specific representation of the MEPLS: IEA not needed	- 2013: Ministerial Note: IEA is required - 2014: TAR Ruling upholding the MEPLS

<sup>68</sup> Article 14(2) ILC Articles on State Responsibility: "The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation."

<sup>69</sup> Article 15(1) ILC Articles on State Responsibility: "The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act."

<sup>70</sup> See *CMS v Argentina*, Award, 12 May 2005, para 274.

<sup>71</sup> See *Occidental v Ecuador*, Award, 1 July 2004, para 191; *PSEG v Turkey*, Award, 19 January 2007, para 239-240.

The fact that the general legal framework was altered for the alleged purpose of environment protection, or the more likely purpose of *votes collection*, – as is apparent from the declarations realised during the electoral campaign by the current President of the Abruzzi region<sup>72</sup> – do not exempt the Italian Republic from honouring its investment-protection obligations that it undertook by entering the ECT.<sup>73</sup> A breach of one of those obligations – regardless the intent of the measures, whether genuinely environmental or political driven – will still call for reparation thereof.<sup>74</sup> Reparation is much more needed when State’s right to regulate did not conform to proportionality. The right to regulate in the public interest is not an *unregulated* right, but it requires proportionality between the means adopted and the goal sought. Measures annihilating any prospect of a timely release of the exploitation concession would place an individual and excessive burden on BEX, therefore run afoul of any proportionality relationship test.<sup>75</sup>

Furthermore, BEX’s reasonable expectations at the time it decided to invest in Italy were also grounded on the low rate of royalties (4% for oil and 7% for gas) and the relatively short time to get an exploitation concession in the Adriatic Sea Zone B (the area where *Sirenetta* Project lies), since that the average time lapsing between the application for the exploitation concession and its release is 2 years.<sup>76</sup> The undue administrative delays<sup>77</sup> and the abrupt increase of the royalties, which even if it is excluded by the ECT protection because of

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<sup>72</sup> See for example: “Il caso Ombrina in campagna elettorale, il Wwf frena: “Non bastano le dichiarazioni” Dopo la dichiarazione del candidato presidente della regione Luciano D’Alfonso e le accuse rivolte a quets’ultimo da Confindustria, sul tema interviene il Wwf Abruzzo” (Chieti Today, 14 March 2014). Available on: <http://www.chietitoday.it/cronaca/ombrina-mare-dalfonso-confindustria-wwf.html> (accessed 29 April 2015); “Il candidato Pd in Abruzzo: “Stanno arrivando gli Ufo” (La Stampa, 13 May 2014). Available on: <http://www.lastampa.it/2014/05/13/multimedia/italia/il-candidato-pd-avverte-gli-ufo-stanno-arrivando-RYcrXRqif2O5GYesOU95PI/pagina.html> (accessed 29 April 2015).

<sup>73</sup> See e.g. *ADC v Hungary*, Award 2 October 2006, para 423.

<sup>74</sup> See e.g. *Santa Elena v Costa Rica*, Award, 17 February 2000, para 72.

<sup>75</sup> See *Azurix v Argentina* quoting the ECHR in *James v UK*, Judgement of 21 February 1986, para 311.

<sup>76</sup> B.C 1.LF: 2 years; B.C 2.LF: 1 year; B.C 3.AS: 1 year; B.C 4.AS: 1 year; B.C 5.AS: 1 year; B.C 7.LF: 1; B.C 8.LF: 2 years; B.C 9.AS: 1 year; B.C 10.AS: 1 year; B.C 11.AS: 1 year; B.C 12.AS: 1 year; B.C 13.AS: 1 year; B.C 14.AS: 1year; B.C 15.AV: 2 years; B.C 17.TO: 2 years; B.C20.AS: 5 years; B.C 21.AG: 1 year; B.C 22.AG: 6 years; B.C 23.AG: 7 years.

<sup>77</sup> Which may constitute itself a breach of international law, see e.g.: Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, [1973] ICJ Reports, para 92; Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization, Advisory Opinion, 1 February 2012, para 30.

Article 21(1),<sup>78</sup> can give further hints – together with the denunciation of the ECT itself – of the anti-investment climate BEX had to face in the Italian Republic in order to carry out its investment.

ii. The Italian Republic has failed to guarantee transparent conditions for BEX's investment

The Italian Republic must ensure transparent conditions for foreign investors according to the FET standard enshrined in Article 10(1) of the ECT. The concept of transparency includes “the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made,...or intended to be made,...should be capable of being readily known to all affected investors”<sup>79</sup> without ambiguity. A State's conduct characterized by contradictions and uncertainties is prejudicial to a foreign investor's substantive rights under the FET standard to the extent that it may undermine the planning of its investment.<sup>80</sup>

Lack of transparency such as inconsistencies within the State's conduct causing loss or damages to the investment triggers the State's international responsibility under the FET standard.<sup>81</sup> The foreign investor's right to transparency goes in hand with the principle of legal certainty, one of the pillars of the rule of law.

Many tribunals have found the host State in breach of its obligations under an FET provision because of the contradictory or ambiguous representations addressed to the investor by its government or its officials.<sup>82</sup>

Here, BEX was entitled to rely on the specific representation of the MEPLS asserting that the IEA was not needed in order to obtain the EIA decree. Accordingly, the Company was confident that it had fulfilled every environmental compliance related to the *Sirenetta* Project. Had the situation been otherwise,

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<sup>78</sup> “...nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties.” However see Yukos cases where the Tribunal upheld it had jurisdiction over claims with respect to expropriatory taxes (*Hulley Enterprises Limited v The Russian Federation*; *Yukos Universal Limited v The Russian Federation*; *Veteran Petroleum Limited v The Russian Federation*).

<sup>79</sup> *Metaclad v Mexico*, Award, 30 August 2000, para 76.

<sup>80</sup> See *Tecmed v Mexico*, Award, 29 May 2003, para 172.

<sup>81</sup> See *MTD v Chile*, Award, 25 May 2004, paras 165-166; *Mafezzini v Spain*, Award, 13 November 2000, para 83.

<sup>82</sup> See e.g. *SPP v Egypt*, Award, 20 May 1992, paras 82-83.

BEX would have carried out the IEA procedure and completed it as soon as possible.<sup>83</sup> If an investor or investment reasonably relies on the specific representations or declarations of government officials and suffers damages because of such reliance, State responsibility is engaged under international law.<sup>84</sup> State liability for detrimental reliance arises from the general international law principle of *bona fides* and the customary international standard of FET.<sup>85</sup>

The inconsistent conduct of the Italian Government requesting the IEA definitely breached the obligation under Article 10(1) of the ECT to guarantee transparent conditions for BEX's investment throughout the whole procedure undertaken to receive the exploitation concession.

iii. The Italian Republic is in breach of its obligation not to impair unreasonably and arbitrarily the use and enjoyment of BEX's investment

The Italian Republic has the obligation under the FET standard not to inflict damages upon foreign investments, regardless of whether there is or not any discriminatory intent involved.<sup>86</sup> The prolonged administrative delay coupled with the Legislative Decree 128/2010 designed to force BEX to relocate its project to another site (bearing the costs and the risks inherent in a new business) – are tantamount to harassments against the foreign investor, which are held plainly in contrast with the fair and equitable treatment to be accorded under the ECT.<sup>87</sup>

Moreover, the fact that the measures adopted by the Italian Government violated fundamental principles and provisions of Italian law<sup>88</sup> demonstrates *a fortiori* the arbitrary nature of those acts and omissions that damaged BEX's investment and its legitimate expectations to be treated in accordance with the law of the country in which it invested. Indeed, the Investor was fully entitled to expect that the Administration would have complied with its own regulations.<sup>89</sup>

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<sup>83</sup> Press Release of Alpha Italia SpA (12 July 2013).

<sup>84</sup> See *Total v Argentina*, Decision on Liability, 27 December 2010 paras 117-118.

<sup>85</sup> *Thunderbird v Mexico*, Award, 26 January 2006, para 138.

<sup>86</sup> See *Alpha Projektholding GmbH v. Ukraine*, Award, 8 November 2010, para 420.

<sup>87</sup> Rudolf Dolzer and Christoph Schreuer commenting *Tecmed v Mexico* in *Principles International Investment Law* (Oxford University Press 2012) 159.

<sup>88</sup> See paragraph 3.3.2 above.

<sup>89</sup> See *Bilcon v Canada*, Award, 17 March 2015, para 392; *Gold Reserve v Venezuela*, Award, 22 September 2014, para 544.

In conclusion it can be stated that the Italian Government treated BEX unfairly and inequitably by repudiating key guarantees of the regulatory framework and representations according to which BEX could reasonably expect to operate. Accordingly, Italy violated the FET standard envisaged by Article 10(1) of the ECT. The losses suffered by BEX have arisen as a direct consequence of the violation by the Italian Republic of its international obligations<sup>90</sup> under Part III of the ECT.

### 3.5 *The applicable law*

In the scenario where BEX would commence an international arbitration in the exercise of the right granted to it by the ECT by submitting a cause of action based on Italy's violation of its obligations under Part III of the ECT, this case would be in its entirety a claim under international law and more specifically a treaty claim.

The ECT is explicit on the issue of applicable law by providing in Article 26(6) that the arbitral tribunal shall decide the dispute by applying the provisions of the ECT and the applicable rules and principles of public international law.

Depending which forum (among the ones listed in Article 26(4) of the ECT) the claimant would choose, a further clarification is due with regard to the procedural law. The claimant's choice of one of the *fora* available will determine which procedural rules will govern the dispute. In case BEX would select the ICSID (which offers a totally delocalized arbitration), then the ICSID Convention and ICSID Arbitration Rules will regulate the procedural aspects of the dispute.

Since such a dispute would arise in connection with the ECT (an international multilateral treaty), the interpretation of its provisions shall be carried out according to the generally accepted rules of treaty interpretation, i.e. the VCLT. Pursuant to Article 31 of the VCLT, the determination of the common intention of the Parties to a treaty must be undertaken "in accordance with the

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<sup>90</sup> Article 12 of the ILC Articles on State's Responsibility: "There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character."

ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose”. In this respect it is worthy to recall that one of the main purposes of the ECT is to ensure a high level of protection for the investments in the energy sector of foreign investors.

Once made clear that such a claim would be a treaty claim and that the applicable law to this dispute is the ECT and the rules and principles of international law, it is important to define the role of the Italian Republic’s national law. Two corollaries stem from the fact that international law is the law applicable: the first corollary is that for the purposes of an international law claim, domestic law and governmental measures are essentially matters of fact or evidence;<sup>91</sup> the second corollary is that a State cannot rely on its internal law as a justification for not complying with its international obligations.<sup>92</sup>

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<sup>91</sup> *Petrobart v The Kyrgyz Republic*, Award, 29 March 2005, p 23.

<sup>92</sup> See Articles 3 and 32 of the ILC Articles on State’s Responsibility. Article 3 reads as follows: “The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.” Article 32 states: “The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this part.”

#### 4. CONSEQUENCES OF THE FET VIOLATION: REMEDIES AVAILABLE

Having showed the breach of an international obligation set forth in the ECT (given that Italy did not act in conformity with what is required under the FET standard contained in Article 10(1) of that Treaty),<sup>93</sup> this chapter will tackle the types of relief that the British Investor could be entitled to.

##### 4.1 *Secondary rules arising out of an internationally illegal conduct*

The breach of a primary substantive obligation by Italy – in our case the breach of the fair and equitable treatment – triggers secondary obligations: an obligation of continued performance of the primary rule that has been breached;<sup>94</sup> an obligation of cessation of the wrongful conduct;<sup>95</sup> an obligation of assurances of non-repetition of the wrongful conduct; and above all an obligation to afford full reparation for the damages caused by the internationally wrongful act.<sup>96</sup>

Full reparation shall aim to restore the situation that would have existed had the wrongful act not been occurred.<sup>97</sup> Full reparation takes the form of restitution, compensation and satisfaction, either individually or in combination.<sup>98</sup>

As an arbitral award finding Italy in breach of its obligation under the ECT would constitute in itself a form of satisfaction for the Claimant<sup>99</sup> and since a

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<sup>93</sup> Article 12 ILC Articles on State Responsibility : “There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.”

<sup>94</sup> Article 29 ILC Articles on State Responsibility: “The legal consequences of an internationally wrongful act under this part do not affect the continued duty of the responsible State to perform the obligation breached.”

<sup>95</sup> Article 30 ILC Articles on State Responsibility: “The State responsible for the internationally wrongful act is under an obligation: a) to cease that act, if it continuing; b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.”

<sup>96</sup> Article 31 ILC Articles on State Responsibility – reflecting the caveat prescribed by the Permanent Court of International Justice in 1928 in the case concerning the Factory at Chorzów (Germany v. Poland) - states: “The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.”

<sup>97</sup> See Case concerning the Factory at Chorzów, Merits, 1928, PCOJ, p 47.

<sup>98</sup> Article 34 ILC Articles on State Responsibility.

<sup>99</sup> See the Pulp Mills Case (*Argentina v Uruguay*, 20 April 2010) where the ICJ considers that its finding of wrongful conduct by Uruguay in respect of its procedural obligations per se constitutes a measure of satisfaction for Argentina (para 269).

declaratory award would not suffice to wipe out all the consequences of the illegal conduct held by Italy, it will be discussed in more detail the availability of the other two forms of reparation: *restitutio in integrum* and pecuniary compensation.

#### 4.2 *Performance in kind and compensation*

In our case the starting point of the analysis is Article 26(8) of the ECT, which expressly foresees that an arbitral award ruling against measures adopted by a disputing Contracting Party shall provide that the State may pay monetary damages in lieu of any other remedy granted. It follows that compensatory awards should be rendered in the alternative to awards enjoining restitution in kind, which should remain the primary remedy under the ECT.

This conclusion is backed up by the position of many international adjudicatory bodies which have repeatedly confirmed that the prerogative to order specific performances is an inherent power of a competent tribunal, both in the form of *interim* measures<sup>100</sup> and final awards.<sup>101</sup> This is particularly true for ICSID arbitrations whose legal framework allows the tribunal seized to order a party to perform certain acts.<sup>102</sup> Plus, ICSID's institutional dimension – embedded within the World Bank Group – might urge the loosing State to conform expeditiously with the terms of the award.

Arbitral practice has also underscored that *restitutio in integrum* should be prioritized over other remedies<sup>103</sup> as the most suitable way to induce the resumption of performance of the primary obligation that has been breached in the first place.<sup>104</sup>

In other words, the British Company could request the arbitral tribunal to order Italy to issue – within an adequate time period set by the arbitral panel<sup>105</sup> –

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<sup>100</sup> See *Perenco v Ecuador*, Decision on Provisional Measures, 8 May 2009, para 50.

<sup>101</sup> See *Enron v Argentina*, Decision on Jurisdiction, 14 January 2004, para 79-81.

<sup>102</sup> Opinion echoed by the founder of the ICSID Convention, Mr. Aron Broches, in *History of the Convention* vol. II (1968) p. 903.

<sup>103</sup> See *TOPCO v Libya*, Award, 19 January 1977, paras 497-504.

<sup>104</sup> See Sungjoon Cho, *The nature of remedies in international trade law*, *University of Pittsburgh Law Review* Vol. 65:763, 2004 p. 782-783.

<sup>105</sup> See R. Doak Bishop, *International Arbitration of Petroleum Disputes: The Development of a Lex Petrolea*, 23 *Y.B. Com. Arb.* 1131 (1998), p. 36.

the EIA decree (or directly the Exploitation Concession) as injunctive relief. Then, of course, it will be up to the Italian Government whether to carry out such a specific performance or to comply with the subsidiary obligation to pay damages. The choice between these two options is what will preserve the undisputed sovereignty of the Italian Republic.<sup>106</sup> Such a choice, albeit being discretionary, should adhere to the guidance set in Article 35 of the ILC Articles on State Responsibility, which rules out reparation only when it is materially impossible or disproportionately burdensome for the losing Party.

In case Italy will not voluntarily comply with the award and, accordingly, contravene Article 53 of the ICSID Convention,<sup>107</sup> what will be enforceable in one (or more) of the 151 jurisdictions (the number of the Contracting States to the ICSID Convention) is its pecuniary content.<sup>108</sup>

In any case an award ordering restitution could not and should not overlook the losses incurred by BEX so as to repair to the fullest the damages caused by the actions and omissions attributable to Italy. Hence, compensation for *damnum emergens* and *lucrum cessans*<sup>109</sup> – occurring in the period between 2008 and the date of the award<sup>110</sup> – should not be excluded even in case *restitutio in integrum* is awarded and performed. Indeed, Article 34 of the ILC Articles on State Responsibility expressly envisages that restitution and compensation can be accorded jointly.

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<sup>106</sup> See e.g. *Antoine Goetz v Burundi*, Award, 10 February 1999, para 133, where the tribunal ascertained that: « [I]l incombe à la République du Burundi, en vue d'établir la licéité internationale de la décision litigieuse de retrait de l'agrément, d'accorder aux requérants l'indemnité adéquate et effective ... à moins qu'elle ne préfère leur restituer le bénéfice du régime de la zone franche. Le choix relève de la décision souveraine du Gouvernement burundais. Faute de prendre dans un délai raisonnable aucune de ces deux mesures, la République du Burundi commettrait un acte internationalement illicite dont il appartiendrait au Tribunal de tirer les conséquences appropriées. »

<sup>107</sup> Article 53 of the ICSID Convention reads in the pertinent part as follows: "Each party shall abide by and comply with the terms of the award..."

<sup>108</sup> Article 54 of the ICSID Convention: "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State [...]"

<sup>109</sup> See e.g. *Sapphire International Petroleum v National Iranian Oil Company* where the arbitrator ascertained that damages due to a wrongful conduct include "the loss suffered... and the profit lost..."

<sup>110</sup> As stated in the *Chorzów* case, the date of the damages assessment should be the date of the award and not the date of the unlawful act, since this is what is necessary to put the plaintiff in the same position as if the wrongful act had not occurred.

### 4.3 Compensation (alternatively)

In case the Italian Republic would opt for compensation, then it shall abide by Article 36 of the ILC Articles on State Responsibility<sup>111</sup> which governs compensation under international law.

Pursuant to Article 36(1), Italy has the obligation to compensate the damages caused by its internationally wrongful conduct. In the instant case the causal link between State's measures and losses suffered by BEX is axiomatic:<sup>112</sup> but for the illegal conduct of Italian Republic – primarily, the continuing omission to issue the EIA decree and, grant the exploitation concession – BEX would have had the opportunity to develop and operate the *Sirenetta Mare* Project. Consequently, BEX would be entitled to seek damages for Italy's unlawful deprivation of its investment. More specifically, BEX is entitled to the *quantum* of damages that would put it in the position it would have occupied if the exploitation concession had been granted and the *Sirenetta Mare* Project had been permitted to proceed within a reasonable time over a period of 30 years (the regular duration of a production concession under Article 38 of the Law Decree No. 133/2014).<sup>113</sup>

Article 36(2) dictates what is compensable: all the financially quantifiable damages including the lost future profits. The generally accepted standard to quantify damages is the “fair market value” of an investment, that is to say, the price that a hypothetical buyer would normally pay to a willing seller to secure the transaction. The fair market value is attained when a reasonable investor would be almost indifferent between the pecuniary compensation and the restoration of the *status quo ante*.<sup>114</sup> Even though this standard is usually adopted to assess damages for unlawful expropriations (whose compensation shall be prompt, adequate and

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<sup>111</sup> Article 36 ILC Articles on State Responsibility: “The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.”

<sup>112</sup> See Iona Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (Oxford University Press, 2008) 135.

<sup>113</sup> Such a duration can also be extended for a period of 10 years.

<sup>114</sup> See William H. Knull, III, Scott T. Jones, Timothy J. Tyler & Richard D. Deutsch, *Accounting for Uncertainty in Discounted Cash Flow Valuation of Upstream Oil and Gas Investments*, *Journal of Energy and Natural Resources Law*, Vol. 25, No 3, August 2007, p. 5.

effective, with “adequate” meaning according to the fair market value),<sup>115</sup> tribunals have applied the market value standard also to FET violations insofar as indirect expropriations and breaches of FET have similar harmful consequences.<sup>116</sup>

There are different methods to determine the fair market value of an investment: the discounted cash flow (DCF) method, the net book value, the liquidation value, the going concern value, the replacement value, the underlying asset valuation approach, etc. The choice of one method over another depends on the circumstances of the case<sup>117</sup> and tribunals have often applied a variety of methods<sup>118</sup> so as to establish a more sound determination of the market value with which they can feel more comfortable, or they have been rather laconic about how they arrived to the amount of compensation.<sup>119</sup>

The DCF is the most dependable and used method for appraisal of the fair market value of investments in international arbitrations.<sup>120</sup> Its suitability has been corroborated by the practice of the UN Compensation Commission.<sup>121</sup> The DCF method is a forward-looking technique that estimates a business’ net present value by computing the future free cash flows that would have been generated through the income-earning assets and, then by discounting those cash flows at a rate which takes into account time, uncertainties and feasible risks inherent in a business. The reason why the DCF is so widely used is because this methodology captures the present value of a business in terms of expected cash flows,<sup>122</sup> given that an investment’s worth lies in the future benefits it was expected to

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<sup>115</sup> The World Bank Group, Legal Framework for the treatment of foreign investment: Guidelines Volume 2 (1992) 41-42.

<sup>116</sup> See *Enron and Ponderosa v Argentina*, Award, 22 May 2007, paras 361-362.

<sup>117</sup> Kaj Hobér, *Selected Writings on Investment Treaty Arbitration* (Studentlitteratur 2013) 447.

<sup>118</sup> William H. Knull, III, Scott T. Jones, Timothy J. Tyler & Richard D. Deutsch, Accounting for Uncertainty in Discounted Cash Flow Valuation of Upstream Oil and Gas Investments, *Journal of Energy and Natural Resources Law*, Vol. 25, No 3, August 2007, p. 43.

<sup>119</sup> See Sergey Ripinsky and Kevin Williams, *Damages in International Investment Law* (British Institute of International and Comparative Law) 191.

<sup>120</sup> See e.g. *Phillips Petroleum Co. v Iran*, Award, 29 June 1989, para 112-113; *ADC Affiliate v Hungary*, Award, 2 October 2006, paras 519-521; *Sempra v Argentina*, 28 September 2007; paras 407-415.

<sup>121</sup> See UNCC, Report and Recommendations Made by the Panel of Commissioners, Concerning the Second instalment of “EI” Claims, S/AC.26/I 999/10 (24 June 1999), para. 439.

<sup>122</sup> Aswath Damodaran, *Investment Valuation, tools and techniques for Determining the value of any asset* (2d ed. 2002) 730.

generate.<sup>123</sup> A compensation which fails to make up for the loss of those future profits would be inadequate.<sup>124</sup>

Although the DCF is mainly used to determine the value of an enterprise which is a going concern with a proven record of profitability, in the oil and gas sector the absence of such a historic record of profitability with respect to a project is no impediment for using the DCF method in assessing the damages. Oil and gas projects derive their primary value from the existence of reserves (proven and probable), and their output consists of easily tradable commodities, which already have a market value. Therefore, an oil and gas project does not need to have generated revenues in order to attest the profitability of that business. As long as it is possible to estimate its discovered reserves – and *Sirenetta Mare* Project’s reserves have been certified by an independent Reservoir Evaluation Company<sup>125</sup> – it is possible to apply the DCF to an oil and gas project, even if the project in question has not entered in operation yet.<sup>126</sup>

A correct application of the DCF has to take into consideration the following items: the expenditures specific to the Project and the expected production (which should reach up to 10.000 barrels of oil per day); the total hydrocarbon resources recoverable (equivalent to 25.1 million barrels of oil and 6.5 billion cubic feet of gas); the expected revenues of the Project; the expected taxation and royalties (7% for oil and 10% for gas); the appropriate discount rate, which will address the intrinsic volatility of crude oil and gas prices and the extent of the Project’s reserves. The resulting valuation will represent the fair market value of the Project.

Pre-award and post-award interest – which in most of the cases are compound interest<sup>127</sup> – will have to be added to the fair market valuation in order

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<sup>123</sup> Frank K. Reilly and Keith C. Brown, *Investment Analysis & Portfolio Management* (Southwestern/Thomson-Learning 7th ed. 2003) 378; Mark Kantor, *Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence* (2008) 131.

<sup>124</sup> See William C. Lieblich, *Determining the Economic Value of Expropriated Income-Producing Property in International Arbitrations*, 8 J. INT’L ARB. 37, 40 (1991) p. 64.

<sup>125</sup> ERC Equipoise Limited certified probable contingent resources amounting to 25.1 million barrels of oil and 6.5 billion cubic feet of gas.

<sup>126</sup> Manuel A. Abdala, *Key Damage Compensation Issues in Oil and Gas: International Arbitration Cases* (American University International Law Review, 2009) 550-551.

<sup>127</sup> For instance see *Siag v Egypt*, Award, 1 June 2009, paras 594-598, or *Impregilo v Argentina*, Award, 21 June 2011, paras 382-384.

to make fully good the damages faced by the Investor due to the State's breach of its international obligation,<sup>128</sup> and to prompt a timely resolution of the dispute. Full reparation is achieved when the interest rate can remedy the actual loss incurred by the injured party because of the delayed payment.<sup>129</sup> The obligation to pay interest begins in the moment the wrongful act of the State took place and ends when the sum is paid in full. In our case – where a State committed a creeping violation of the FET<sup>130</sup> by means of cumulative measures – that moment could ideally coincide with the issuance of the Legislative Decree 128/2010 on the 29 June 2010.

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<sup>128</sup> Article 38(1) of the ILC Articles on State Responsibility: "Interest on any principal sum due...shall be payable when necessary in order to ensure full reparation".

<sup>129</sup> See Irmgard Marboe, *Calculation of Compensation and Damages in International Law* (2009) para 6.228.

<sup>130</sup> See *El Paso v Argentina*, Award, 31 October 2011, para 518, as an example of creeping violation of the FET standard. See Scott Vessel, *A Creeping violation of the Fair and Equitable Treatment Standard?* (Arbitration International, Vol. 30, Issue 3, 2014), 553-554.

## 5. CONCLUDING REMARKS AND ADDITIONAL CONSIDERATIONS

This thesis took a somewhat unusual approach by using a current situation involving the investment of a British Company in the energy sector to explore the viability of an FET claim by the British Investor against the Italian Republic. The thesis made a quite compelling case for finding Italy in breach of the FET standard on three mutually reinforcing grounds:

1) the Italian Republic failed to protect, or at least to take into account, British Investor's legitimate expectations by reversing completely the relevant regulatory framework for the investment in question;

2) it failed to act transparently because of the contradictory representations of the Environmental Ministry directly addressed to the British Investor;

3) it acted arbitrarily since it did not comply with its own internal law as every foreign investor would have expected from a host State abiding by the rule of law.

As "by-product", the thesis also shows how resorting to an international arbitral tribunal for the application of the Energy Charter Treaty bears significant advantages. In comparison to the recourse to national courts, international arbitration offers undoubtedly a higher protection to the British investor in terms of pecuniary compensation, degree of independence of the adjudicatory body and duration of the proceedings.

The local Company could avail itself of remedies under Italian domestic law. Its legitimate interest could be protected under Italian Administrative Law. The local Company could file an action for annulment – as it did – against the Ministerial Note due to excess of power, primarily grounded on the illogicality and contradictory reasoning of the administrative act.<sup>131</sup> The subsidiary Company could also lodge a claim for damages with the Administrative Tribunal pursuant to Law No. 205/2000, which provides Administrative Tribunals with jurisdiction

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<sup>131</sup> See G. Miele, G. Cotzi and D. Falconi, *Italian Administrative Law*, *The International and Comparative Law Quarterly*, Vol. 3, No. 3 (Cambridge University Press, July 1954) 440.

over claims for compensation against administrative authorities.<sup>132</sup> Notably, the subsidiary Company could claim compensation for the damages incurred due to the delay based on Article 2-bis Law No. 241/1990 brought about by the Law No. 69/2009.<sup>133</sup> However, Administrative Tribunals are rather reluctant to uphold demands for compensation against public agencies. Compensation is often denied with the argument that the damage is not caused by the administrative act, albeit unlawful, or the proof has not been offered that the plaintiff would have been entitled to the substantial benefit claimed, had the administration behaved lawfully instead of unlawfully. And even in cases where the administrative act is revoked by the administrative tribunal because the request of a license or concession has been rejected throughout a determination that did not explain clearly the grounds on which the decision was based, it is possible that the administrative authority in re-examining the application it rejects it again by giving this time a reasonable justification, thus averting the obligation to compensate.<sup>134</sup> Indeed in our case, the Administrative Tribunal did not quash the Ministerial measure, and upheld the ministerial position. And even in cases where damages were granted by the administrative tribunal of last resort (*Consiglio di Stato*), they would fall short of the standard of compensation adopted by international arbitration aimed at putting the damaged party in the same position had the unlawful act not occurred,<sup>135</sup> let alone the average length of administrative proceedings and the delay in the payment of indemnities.<sup>136</sup>

There might be also an advantage for the Government called upon to respond to a treaty violation caused by the intent of turning back on an unpopular choice, such that of authorizing an oil platform close to its coasts. Even if the general public might perceive differently that the new Government authorized the

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<sup>132</sup> Giancarlo Montedoro (2011) New Requirements and New Forms of Protection in the Italian Administrative Process (International Journal of Public Administration 2011) 131.

<sup>133</sup> Article 2-bis: "Public authorities... shall compensate any unjust loss or damage caused by their intentional or negligent failure to observe the timeframes for concluding a procedure. Disputes relating to the application of the present section shall fall within the exclusive jurisdiction of the administrative court..."

<sup>134</sup> Guido Corso, The Evolution of Italian Administrative Procedures, 1990–2009 (International Journal of Public Administration, 2011) 94.

<sup>135</sup> For instance, pursuant to Law No. 244/2007, when an expropriation is intended to implement socio-economic reform the indemnity paid can be reduced by 25% of the market value.

<sup>136</sup> Italian judicial efficiency world rank is no. 147. The ranking is based on how much time elapses before a contract default is enforced judicially. See Doing Business 2015, World Bank Group, 194.

oil platform because it was compelled by an international award rather because it wanted to do so. Public opinion will accept the second hypothesis with more “leniency” towards its government.

A final advantage, this time for both parties, of an arbitration based on the Energy Charter Treaty is represented by the cooling-off period of three months preceding the arbitration where the parties to the dispute may engage in serious negotiations. Many Investor-State disputes are settled even before the commencement of the arbitral proceedings (101 cases out of 356 ICSID cases were concluded by a settlement). The reason is clear: if a breach of a State’s international obligation is apparent *ictu oculi*, then the State will probably meet Claimant’s requests to avoid international responsibility and the costs of the arbitration;<sup>137</sup> whereas the Claimant will reduce the risks due to the inherent unpredictability of the outcome of a legal dispute by reaching an agreement with the State. Thus, it is reasonable to submit that the cooling-off period constitutes an optimum channel of negotiation for the parties to reach a satisfactory settlement of their differences.

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<sup>137</sup> See e.g. *Vattenfall v Germany (I)*: the dispute was settled in 2011, with Germany agreeing to issue a less stringent environmental permit in favour of Vattenfall. See Nathalie Bernasconi-Osterwalder and Rhea Tamara Hoffmann, *The German Nuclear Phase-Out Put to the Test in International Investment Arbitration? Background to the new dispute Vattenfall v. Germany (II)* (IISD, 2012) 4.

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