



National Report for Italy

Roberto Pardolesi^(*) – Massimiliano Granieri^(**)

1. Framework and hierarchy of foreign investment laws and treaties

- a) The legal framework governing foreign investment.
 - i. The domestic laws and regulations.

No specific provisions have ever been passed at constitutional level in Italy concerning foreign investments. As general principle it can be stated that foreign investments are subject to general rules of international law on the legal treatment of foreigners and of their goods¹.

The Italian Constitution fames a division of competences between the State (meaning the central government and the national Parliament) on the one side, and the Regions, on the other side. Even if Italy cannot be considered a federal state in technical terms (as of the writing of this Report institutional changes are under discussions before the Parliament), over the years there has been an increasing pressure to decentralize functions and to empower the government of the Regions with missions that traditionally had been under the exclusive jurisdiction of the national government. International relations and with the European Union of Regions, as well as foreign trade have followed this path. As a matter of fact, art. 117 has been modified with Italian Constitutional Law on October 18, 2001, n. 3². The previous version did not include any reference to matters of foreign trade or international relations. Five Italian Regions enjoy particular autonomy and their statutes (approved as constitutional laws) confer upon them competences that include foreign relations³.

Art. 117 of the Italian Constitution draws a line between the legislative power of the State and that of the Regions. As an important principle, set forth in art. 117, paragraph 1, both the State and the Regions are bound to exercise the legislative powers complying with the duties of the EU laws and with international obligations. Art. 117, paragraph 2, lists areas that fall under the exclusive jurisdiction of the state, whereas paragraph 3 lists matters where national and regional powers concur. Among the areas of concurring legislative powers international relations and foreign trade are

^(*) LUISS “Guido Carli” University, Rome, Italy (paragraphs 3, 4, 5, 6, 10).

^(**) University of Foggia, Department of Law, Foggia, Italy (paragraphs 1, 2, 7, 8, 9).

¹ Sergio Marchisio, ‘Investimenti esteri nel diritto internazionale’, in *Digesto pubbl* (Utet, Torino), 1993, vol. VIII, 567, 569.

² OJ October 24, 2001, n. 248.

³ Those regions are Friuli Venezia-Giulia, Sardegna, Sicilia, Trentino Alto-Adige/Südtirol, Valle d’Aosta, Vallée d’Aoste. See art. 116 of the Italian Constitution.



included. The same paragraph 3 makes clear that in areas of concurring power legislation there is a somehow hierarchical relationship between national and regional legislative acts, since regional laws can govern the aforementioned matters in the context of fundamental principles that must be determined at central level by national laws.

ii. Applicable international treaties.

Italy is part of the World Trade Organization since January 1st, 1995; the previous General Agreement on Tariffs and Trade was entered by Italy on May 30, 1950. As a consequence, the whole set of rules of the Uruguay Round Agreements apply.

Italy is also member of the European Union, since the creation of the European Economic Communities.

As far as foreign investments in Italy are concerned, it must be recalled the application of the Trade Related Investment Measures (TRIMs) agreement, as part of the WTO Agreement. Italy is also part of the Washington and Seoul Treaties⁴.

Besides general multilateral agreements, Italy is a party in a substantial number of bilateral agreements and FNC (friendship, navigation, cooperation) Treaties. Those treaties are made public through the system described below in paragraph (b)(i). As of April 9, 2008, Italy signed 73 BITs (currently in force) with foreign Countries and 25 BITs have been signed and not yet ratified; a general remark is that almost invariably BITs signed by Italy diverge from general principles laid down in the general multilateral agreements entered by Italy.

To some extent, also international treaties on applicable laws can be conducive of foreign investments, a remarkable example being the Convention of the Hague on the law of trusts. Because of its origins in the common law world (and, more specifically, within the courts of equity), the trust has been at the core of discussion of its compatibility of principles of Italian law, mainly as far as the segregation effect of assets is concerned⁵. Rigid interpretation of general principles of law prevented – or, at least, made highly risky – the adoption and the operation of trusts in Italy, until Italy signed the Convention of the Hague. Though a treaty on applicable law and not a source of substantial law, the adoption of the Convention in Italy paved the way to trusts in Italy with foreign applicable law.

b) The relationship between international treaties and domestic laws.

⁴ See Giorgio Sacerdoti, 'La convenzione di Washington del 1965 per la soluzione delle controversie tra Stati e nazionali di altri Stati in materia di investimenti' (1969) *Rivista di diritto internazionale privato e processuale* 627.

⁵ According to A Gambaro, 'Il "trust" in Italia e in Francia', in P Cendon (ed) *Studi in onore di Rodolfo Sacco* (Giuffrè, Milano 1994) 509 f., the law of trusts is an effective means to attract business activities in a country (the Author mentions the experience of another civil law country, as France).



i. The hierarchy between international treaties and domestic laws.

The relationship between international treaties and domestic laws is governed by constitutional principles. The questions can be framed differently and, first of all, it must be stated that, in principle, between an international treaty and a domestic law there is no hierarchical relationship until the international treaty is nationalized or, put differently, until the national legal systems is 'adapted' to the international rules.

International law scholars distinguish between ordinary procedures of adaptation and special procedures of adaptation⁶.

The "ordinary" procedure is based on national rules that by no means are formally different from those of usual national provisions, the only difference being the *occasio legis* (the occasion for a law to be passed), that is the reason why a new law is adopted. In case of ordinary procedure of adaptation the occasion is technically the need to nationalize international rules (either written or customary), meaning to create a national rule whose content corresponds to that of the international source of the law. Once the rule is internalized by a national source, it enters the national legal system and is subject to the hierarchical principle that will be discussed below (see paragraph c).

In the special procedure (also termed procedure "by reference") there is no need to recast the international source within the national system. The introduction is achieved by a reference that the organs ordinarily concerned with normative power make, being such reference a general authoritative order to abide by the terms of those rules and to apply them.

One remarkable example of adoption of international law by reference is provided by art. 10 of the Italian Constitution that reads: "The Italian legal system complies with the rules of international law generally known". The reference is to the general international law, that is to international customary rules (such as *pacta sunt servanda*). It is by this mechanisms that in Italy an international rule can be invoked imposing to the State the duty to respect foreign investments⁷.

International treaties are nationalized through the procedure by reference governed by constitutional principles; yet adaptation by reference is not automatic as is case of general international law as per art. 10 of Constitution. In particular, for an international treaty to be applied in Italy a specific *ad hoc* measure is required. Such measure (similar to a clause of implementation) is termed "order of execution" (in Italian "*ordine di esecuzione*") and the usual formula reads: "Full and complete execution shall be given to the Treaty...", such treaty normally being reproduced as an annex⁸. Because of the effect it has on the national system of the sources of law, the

⁶ Cf. B. Conforti, *Diritto internazionale* (Esi, Napoli 1988) 285.

⁷ See Mara Valenti, 'Il trattamento «conforme al diritto internazionale» degli investimenti stranieri nelle convenzioni internazionali' (2004) *Diritto del commercio internazionale* 973, 975.

⁸ The Administrative Tribunal of the Veneto Region has clarified that the effectiveness of international treaties in Italy is subject exclusively to the order of execution, no other acts being required, unless the



order of execution is adopted by a law of the Parliament (if its effects are supposed to act at legislative level). There can be cases of orders of execution adopted with acts of the public administration⁹.

According to a constitutional praxis of the Italian Parliament, the order of execution is enacted in the same law that authorizes the ratification of international treaties (art. 80 of the Italian Constitution). Technically the order of execution is passed before the entry into force of the treaty, that is usually postponed to the exchange of ratifications or at the moment the agreed number of ratifications is reached, as the case may be.

It is worth noting that in the process of having an international treaty signed and applied in Italy several powers are involved. The diplomatic delegations appointed by the government, or the government itself, are usually responsible for negotiations. The text is ratified by the President of the Italian Republic (art. 87) after the Parliament has authorized the ratification.

It follows from the above that, unless the international treaty is nationalized according to the constitutional provisions, it cannot be applied within the Italian legal system and domestic laws will apply¹⁰.

ii. Direct effect of international treaties in domestic legal system.

It is debated whether international treaties (*per se*) signed by Italy have direct effect in the Italian legal system when they have not yet received the order of execution, that is when the procedure by reference has not been followed¹¹. As stated before, no automatic legal effects can be produced in Italy as far as the international law of treaties is concerned (different situation being that of the general international law because of the mechanism of art. 10 of the Italian Constitution)¹².

Once a treaty has been ratified and enters into force, it acquires the same effectiveness as that of the order of execution. Thus, if the order is adopted by law, the content of the treaty (its rules) become part of the Italian legal system with the same level of

treaty requires positive actions for its goals to be achieved. See T.a.r. Veneto, sez. II [ord.], 21 January 1994, n. 1, *Associaz. it. World Wildlife fund v Reg. Veneto* (1994) *Rivista italiana di diritto pubblico comunitario* 475.

⁹ The order of execution is not required in case of so called agreements in simplified form, in matters that are not included in art. 80 of the Italian Constitution. See C. Stato, sez. VI, 23 June 2008, n. 3154, *Associaz. naz. Italia Nostra Onlus v Min. beni culturali* (2009) *Rivista di diritto internazionale privato e processuale* 656.

¹⁰ See the decision of the Italian Court of Cassation, SS.UU., 23 March 1972, n. 867, 17 April 1972, n. 1196, and 8 June 1972, n. 1773 (1973) *Rivista di diritto internazionale* 856 ff.

¹¹ The solution is consistent with the that adopted in other legal systems: for an overview see Wenhua Shan, *General Report on the Protection of Foreign Investment*, Washington, 2009.

¹² The Italian Constitutional Court has reaffirmed this position in recent cases involving the direct application for European Convention on Human Rights; see Constitutional Court October 24, 2007, n. 348 (2008) *Foro italiano*, I, c. 40.



legal strength of the law.

As far as international treaties not (yet) ratified are concerned, some authors argued that since Italy signed the agreement (manifesting a political willingness to be bound to the treaty) then some immediate effect could be justified. Such reading of the facts is not consistent with the constitutional principles. Yet, there is general consensus in affirming that such political intention to enter the agreement allows to take into consideration the international rules at interpretative level. As a consequence, when interpreting and applying domestic laws on a given matter (for which a treaty has been signed but not yet ratified), judges and the public administrations can interpret the laws in a way that reconciles the national legal systems with the rules negotiated at international level¹³.

c) The hierarchy among different forms and levels of domestic laws/regulations.

The hierarchy in sources of law in Italy is defined by Article 1 of the Preliminary provisions of the Italian civil code of 1942¹⁴. This provision states that the hierarchical system is made by the law, the regulations, and customs. Such system has been integrated in 1948, when Italy approved its republican Constitution. The Constitution (and constitutional laws approved by the Parliament) takes prevalence over the law (either national or regional), the law over regulations (and general normative acts of the executive power and its branches). Customs have currently a very limited force, being at the bottom of the sources of law and applicable where recalled by the law as integrative sources (*secundum legem*).

A major change in the hierarchical system of sources took place because of the adhesion of Italy to the European Economic Communities (now European Union). The ratification of the Rome Treaty by the Italian Parliament created a further level in the system with the provisions of the Treaties prevailing on Italian statutes by the Parliament. It is commonly held that such special position for the Treaty over the law is authorized by the Italian Constitution through article 11. Pursuant to this rule, Italy accepts limitations in sovereignty (as certainly a change in the sources of law is) in

¹³ Such rule of purposive interpretation of domestic laws has found some merit in the case of EU directives not yet implemented after the term for implementation has expired and their content is sufficiently clear and unconditional Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1991] 1 ECR 4135 (also published in (1992) *Rivista di diritto internazionale* 164); Case 91/92 *Faccini Dori v soc. Recreb* [1994] 1 ECR 3325 (also published in (1994) *Rivista di diritto internazionale private e processuale* 883; Case 334/92 *Wagner Miret v Fondo de Garantia Salarial* [1993] 1 ECR 6911 (also published in (1994) *Notiziario di giurisprudenza del lavoro* 56).

¹⁴ 'Disposizioni sulla legge in generale' (Provisions on the law in general), approved preliminarily with respect to the Civil Code with R.D. (royal decree) on March 16, 1942, n. 262. Such provisions have general application and they are still in force as law of the State, as long as they do not conflict with the Italian Constitution. Originally, they included rules on the applicable law (articles from 17 through 31) now repealed and replaced by special provisions of law.



favour of a system that is aimed at peace and justice among nations, such as the European Union. The Italian Constitution and its Article 11 predate (1948) the Treaty of Rome (1957); yet this provision allowed the modification in the hierarchy of the sources and the creation of a supranational source that is able to surpass the national laws. The constitutional coverage given to the Treaty of Rome (and its following amendments and new treaties within the European Union) also justifies the peculiar legal force that mainly regulations have over national laws, pursuant to Article 249 of the Treaty¹⁵.

d) Transparency.

- i. Ways to make publicly available laws, regulations, administrative procedures, administrative rulings and judicial decisions.

Art. 10 of the Preliminary provisions to the Italian civil code states that laws and regulations must be published as a condition for the entry into force and, unless otherwise provided, they enter into force after the fifteenth day after publication. An analogous rule, although hierarchically more important, is contained in art. 73, paragraph 3, of the Italian Constitution, that mandates publication after the promulgation of the law (that is, signature by the President of the Republic of Italy of the law approved by the Parliament). Also the decisions of the Constitutional Court must be published. Law, regulations, as well as decisions of the Constitutional Court are published on the Official Journal of the Italian Republic (“Gazzetta Ufficiale della Repubblica Italiana”: GURI or GU). When the Court declares unconstitutional a law, the decision is binding the day following its publication¹⁶.

The regime of publicity of certain Italian normative sources is now governed by the law on December 11, 1984 n. 839. Pursuant to article 1, the following must be published in their entirety on the official collection: (a) constitutional laws (b) ordinary laws of the State (c) legislative decrees of the government (d) other decrees of the President of the Republic, of the Prime Minister and of the government (e) other acts of ministerial committees that are strictly necessary for the application of the law (f) binding agreements for the Republic in international relations.

Every year, the Minister of Foreign Affairs prepares a volume that must be enclosed to the issue of the Official Journal where annual indexes are published. Such volume

¹⁵ It is not without friction that the national legal system accepted the idea that EU regulations can prevail over national laws. The European Court of Justice in 1964 in a preliminary ruling originating from an Italian Court clarified that subsequent national laws cannot be applied if conflicting with precedent regulations; Case 6/64 *Costa v Enel* [1964] ECR 585. The Italian Constitutional Court has given its contribution in terms of interpretation of Article 11 in a series of important decisions: Cases n. 183/1973, (1974) *Foro italiano*, I, c. 314, and n. 170/1984, (1984) *Foro italiano* I, c. 2062.

¹⁶ The matter is governed by art. 136 of the Italian Constitution. See, among others, C. Stato, sez. IV, 27 March 2002, n. 1734, *Min. difesa v Cangemi* (2002) *Foro amministrativo-Consiglio di Stato* 658.



must provide an account of the situation of all international conventions applicable in Italy, with an indication of the states where such conventions are in force and reservations placed by the States¹⁷.

Legislative and administrative acts of the Regions and of sub-regional entities (such as provinces and municipalities, as well as other non-territorial administrations) are published on the national Official Journal or on regional (so called official regional bulletins, “*Bollettino Ufficiale della Regione*”: BUR) and sub-regional official publications, as the case may be. Due to the increased competences of Regions in the field of international relations and foreign trade, the BUR becomes an important source of information also for foreign investments.

The Italian ‘*Rivista di diritto internazionale*’ (Italian Review of International Law) has a special section where the editors provide a full list of multilateral and bilateral agreements signed by the Italian Republic as well as those receiving every year the order of execution.

- ii. Public consultation procedures, under which the Government of the host State provide opportunities for comments by the public before the adoption, amendment or repeal of regulations of general application that affect any matter relating to foreign investment.

No specific provisions can be mentioned that introduce or govern public consultation procedures for comments or hearings on the enactment, repeal or abrogation of regulations that can affect foreign investments to Italy adopted a general law on the administrative procedures. Yet, besides ordinary judicial remedies against any act, Italy adopted a general law on administrative procedures. In an attempt to improve efficiency, publicity, and transparency, the Italian Law 241/1990 provides an extremely detailed discipline of the procedural rules that the public administration at all levels must follow.

A number of general principles inspires the provisions of Law 241/1990 in terms of access to the documents of the procedure, right to participate and submit (written) observations, the duty to motivate any decision of the public administration, the duty to adopt always a final decision when the procedure is obligatorily initiated upon request of an interested party¹⁸.

Although probably limited in its impact (since normative acts are not touched by the law), Law 241/1990 sets important guaranties for individuals and entities, the right to access documents (and obtain copies) being an important way to enhance

¹⁷ Italian law December 11, 1984, n. 839 (OJ n. 345 of December 17, 1984), ‘*Norme sulla raccolta ufficiale degli atti normative della Repubblica Italiana e sulla Gazzetta Ufficiale della Repubblica Italiana*’; see, in particular, article 9.

¹⁸ Italian Law on August 7, 1990, n. 241, ‘*Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi*’ (OJ August 18, 1990, n. 192), amended in 2005 and 2007.



transparency and to have elements that could be used in seeking judicial remedies against the public administration.

- iii. Other measures to enhance transparency of administrative and/or judicial procedure with regard to foreign investment.

Even if not directly concerning foreign investments, it is worth mentioning the general provisions in force in Italy on the impact assessment of the regulation, that were passed to bring the nation at the level of most advanced countries as advocated by the OECD and the European Union¹⁹. Pursuant to art. 5 of the Italian Law on March 8, the government introduced the impact analysis with the d.p.c.m. March 27, 2000 (technically a decree of the Prime Minister). The impact assessment is still at an experimental stage. Yet, the procedure itself can be an occasion where the impact of regulation is assessed also with respect to potential effects any administrative or regulatory act can have directly or indirectly on foreign investments.

2. General standards of treatment of foreign investment/investors

- a) Standards of treatment under international treaties.

A principle of non discrimination is not recognized in Italy in general terms. It is expressed in the Most-Favoured Nation Clause that is applicable in Italy as part of the GATT 1994 (article I)²⁰. Moreover, the same principle can be found in many of the bilateral agreements currently in force between Italy and foreign Countries²¹.

Being Italy a member of the WTO and a previous member of the GATT 1994, the Agreement on Trade-Related Investment Measures (TRIMs) is also applicable. Italy remains free to regulate any sector under the condition that measures adopted are compatible with the principles of article III (national treatment) and of article XI (removal of quantitative restrictions) of the GATT 1994 (see article 2 of the TRIMs Agreement)²².

¹⁹ A thorough account of the situation in Europe on the impact assessment is provided by A Renda, *Impact Assessment in the EU. The State of the Art and the Art of the State* (Brussels, CEPS 2006).

²⁰ See P Picone, A Ligustro, *Diritto dell'organizzazione mondiale del commercio* (Padova, Cedam 2002) 102.

²¹ An example can be found in art. 3 of the bilateral agreement signed on May 22, 1990 (in force from October 14, 2003), between Italy and Argentina (Trattato fra la Repubblica italiana e la Repubblica argentina sulla promozione e protezione degli investimenti). The same provision applies also in other instances, such as China: see art. 3 of the BIT done in Rome on January 28, 1985 (Trattato tra il Governo della Repubblica Popolare Cinese e il Governo della Repubblica Italiana relativo alla promozione ed alla reciproca protezione degli investimenti).

²² More details in P Picone, A Ligustro, *Diritto dell'organizzazione mondiale del commercio* (Padova, Cedam 2002) 223.



Being a party in the main international multilateral treaties, Italy recognizes such standard as fair and equitable treatment (as per art. 12 d iv of the MIGA). As for other principles, the fair and equitable treatment can be found also in bilateral investment treaties signed by Italy²³.

As to specific treaties, in some occasions agreements entered by Italy refer to principles of international law generally known, to those aimed at preserving the international order, and to good faith²⁴.

Art. 3 of the Agreement on Trade-Related Aspects of Intellectual Property Rights imposes to Member States the principle of national treatment with regard to the protection of intellectual property rights. In stating that advantages, favors, privileges or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members, art. 4 of the same Agreement introduces the principle of the Most-Favored Nation in the protection of intellectual property rights.

b) Standards of treatment under domestic law.

The general rule on the treatment of foreign investments, and in general on the treatment of foreigners and their goods, is set forth by art. 16 of the Preliminary provisions of the Italian civil code of 1942. The article provides a principle national treatment of foreign citizens in Italy subject to the condition of reciprocity²⁵.

Such article is a fallback provision. Courts have clarified that bilateral treaties with other states can derogate to the rule and introduce other standards²⁶; this has been done rarely. If not contracted out, the principle has been interpreted to apply to non fundamental rights. For fundamental rights (human rights) the standard of treatment in Italy would be non discrimination (equal protection)²⁷.

3. Admission/entry requirements

a) The admission regime in general.

²³ See again art. 2, paragraph 2, of the bilateral agreement with Argentina (see, retro, note 22).

²⁴ See article 1 of the Friendship, Partnership and Cooperation Treaty between the Republic of Italy and the Big Giamahiria Arabian Libyan Popular Republic, done in Bengasi on August 30, 2008, and ratified with Italian law February 6, 2009, n. 7 (OJ February 18, 2009, n. 40), also published in (2009) *Rivista di diritto internazionale* 603.

²⁵ Reciprocity exists when the Italian citizen is not discriminated in the exercise of a right that is formally recognized both to him and to nationals by a foreign Country. See Cass. 19 May 1995, n. 6918 (1995) *Giustizia civile*, I, 2640.

²⁶ See T. Como 7 April 1994 (1994) *Vita notarile* 620.

²⁷ See the recent decision of the Italian Court of Cassation on May 7, 2009, n. 10504, (2009) *Repertorio Foro italiano*, voce *Straniero*, n. 58.



In principle, foreign companies are admitted in Italy at the same conditions that apply for national companies, subject to the rule of reciprocity unless otherwise agreed. Yet, there are fields where special authorization are needed for particular protection purposes. Among several examples, pursuant to art. 46 of the Ministerial Decree June 18, 2001, foreign companies must receive an authorization for civil flights.

The incorporation of a limited partnership (*società a responsabilità limitata*), the most common form of commercial entity in Italy for running business, is subject to a paid-in minimum capital requirement, as per article 2463, paragraph 4, of the Italian Civile Code (Italy does not have a separate commercial code). The 25% of the minimum capital must be deposited in a bank account prior to the registration of the company before a public notary.

b) Areas open to foreign investment

i. General approach.

In general, all areas of trade are open to foreign investors. In bilateral treaties entered by Italy it has been noted the emergence of a principle of “open door” for foreign investments, even though legal texts refrain from declaring it *jus cogens* and fully enforceable²⁸.

Companies willing to invest in Italy do not receive a general authorization; they rather need to refer to specific regulations governing that specific industry. Requirements and procedures may differ consistently by case to case, and a remarkable difference exists between the treatment of companies coming from other member states of the European Union and those from abroad. In the former case, a principle of mutual recognition and home-country control is becoming more and more the rule. In the latter, there might exist intense controls by national authorities, particularly in regulated industries (see, *infra*, lett. c).

ii. Conditions and qualifications for admission.

Performance requirements (both as local content requirements and trade balancing requirements) are contrary to the obligation of national treatment set forth by article III of the GATT 1994, as implemented by art. 2 of the TRIMs Agreement (Picone and Ligustro 224).

c) Specific admission procedures.

Admission procedures for foreign investors differ from case to case and can be particularly intense for regulated industries, such as banks, financial activities

²⁸ See Sergio Marchisio, ‘Investimenti esteri nel diritto internazionale’, in *Digesto pubbl* (Utet, Torino), 1993, vol. VIII, 576.



(intermediation), insurance, payment services. Without any ambition of generalization, for foreign investment companies in the financial sector, a detailed discipline is provided by Legislative Decree on February 24, 1998, n. 58 (“Testo unico delle disposizioni in materia di intermediazione finanziaria, ai sensi degli articoli 8 e 21 della legge 6 febbraio 1996, n. 52; so called TUF) that, together with other law, empower an independent administrative agency (“Commissione Nazionale per le Società e la Borsa”, CONSOB) with the task of authorizing investment companies and of surveillance of the market. In case of foreign investors, a company can be admitted to operate in Italy if it establishes an agency. The agency must receive an authorization by the CONSOB, that has to consult with the Bank of Italy. The authorization is subject to the existence of a number of conditions, mostly related to the regime applicable to the foreign investor in his country of origin. One of the conditions to comply with is the rule of reciprocity, as far as it is compatible with bilateral treaties entered by Italy with other countries²⁹.

d) Relevant aspects of competition policy and antitrust law.

Under art. 25, paragraph 2, of the Italian antitrust law (10 October 1990, N. 287), the Italian Prime Minister has some power to prevent a merger or an acquisition by a foreign company with respect to a national target. In particular, the Prime Minister can permanently block an M&A transaction, upon official decision of the Government on a proposal by the Ministry of Industry, if the acquiring entity (whether commercial corporation or not) comes from a State that does not ensure independence for Italian companies with rules having the same effect as those set forth under the same Law 287/1990. The blocking decision must rely on “essential reasons of national economy”. This rule, which has never been applied as yet, provides the sole basis upon which the entry in the Italian market by means of acquisition can be limited or prevented for foreign investors. In all other instances, general rules of antitrust applies both to national or foreign companies³⁰.

4. Investment contracts

a) Forms of investment contracts under domestic law.

The taxonomy, of Public-Private Partnership (PPP), as spelled out in Article 3 (15 ter) D. lgs. 163/2006, Codice dei contratti pubblici relativi a lavori, servizi e forniture, c.c.p., as modified by the Third Corrective Decree of 2008), is quite reach.

²⁹ See article 28, paragraph 1(e) of the T.U.F.

³⁰ For an account of the Italian antitrust system in a comparative perspective see R Pardolesi, M Granieri, ‘National Report on Antitrust’, XVI Congress of Comparative Law, in J Basedow (ed), *Limits and Control of Competition with a View to International Harmonization* (Kluwer Law International, The Hague 2002).



It comprises the general model of ‘concession for building and operating’ (BOT; DBOT; BOOT; BLT; ROL), which was the pre-existing and traditional one, nowadays revisited and refurbished in a perspective that does no longer privilege the authoritative power of the administration, and aims to fully exploit the cooperation between private undertakings and the public hand. On this model the so called Law Merloni ter (No. 109 of 1994) grafted the more sophisticated mould of Project Financing, as of now disciplined in a highly detailed way by Article 153 of the aforementioned Codice. (It deserves noting that the elaborated provisions contained in this Article perform a kind of transplant of the private contract praxis shaped by the common law systems, including arrangements, like the step-in right reserved to the financial sponsors of the project in case of breach of the SPV responsible for performing the contract, which would have been otherwise deemed radically incompatible with the Italian administrative legislation). Other cooperative arrangements mentioned by Article 3 (15 ter) are: (a) the general Contractorship, firstly introduced by Law 21 December 2001 No. 443 (so called Legge obiettivo) and now converted into Article 176 ff. of the Codice, which is mainly characterized –again introducing a shocking deviation from the Italian administrative practice- by the circumstance that the contractor, invested of the task of perfecting a project of relevant dimensions is left free to reach the goal with the means it considers proper, whichever they are (needless to say, in the range of legality); (b) Sponsoring contracts; (c) Leasing; (d) though not mentioned by Article 3 (15 ter), Outsourcing and, possibly, Urban concessions (obliging private parties, endowed with the right to build new houses, to finance and create adequate zoning facilities) should be added to the list.

It should be stressed, anyway, that PPP is not necessarily expressed through contract inter-action. A particularly important alternative is represented by the Institutionalized PPP (or PPPI), which represents the investment strategy commonly resorted to in the area of local public utilities, through the creation of so-called mixed corporations, participated by private parties (usually, but not necessarily) as minority shareholders. This kind of cooperation is currently regarded as extremely useful, since it promises to combine the expertise and efficiency of private entrepreneurship with the focus of public administration on social goals, that the market alone would not provide for; but it is also suspected of paving the way to elusions and discriminating practices. On this count, the legal attitude, also because of strict monitoring by the EU, is evolving toward more reliable arrangements.

- b) Requirement on governing law to investment contracts under domestic law.

Application of Italian law to investment contracts is determined primarily by the choice of law done by the parties of the agreement and, if the contract fails to identify the applicable law, by the general criteria provided in the source of international private law. The general system of international private law in Italy results from the application of the Law on May 31, 1995, n. 218 (“Riforma del sistema italiano di diritto internazionale privato”) and of a number of EU regulations that were passed



over the years to ensure harmonized criteria in the identification of the governing law. As far as investments are concerned, it is worth recalling Council Regulation (EC) No. 44/2001 of 22 December 2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (by which the EU implemented the Brussels Convention)³¹.

Recently, the EU approved a specific regulation, directly applicable in Italy – and thus further conforming the national system of international private law – on the applicable law to contractual obligation, aimed at providing general default criteria within European member states.

c) Domestic law requirements on jurisdiction over contractual disputes.

Under Italian civil procedure, parties are free to elect arbitration as a dispute resolution method. Article 806 of the Italian Code of Civil Procedure limits the ability of parties to choose arbitration to those controversies not dealing with unalienable, fundamental, personal rights, and allows arbitration in labor disputes only when arbitration is accepted as a method to solve disputes in collective agreements.

The arbitration agreement (so called “convenzione di arbitrato”) or term, if part of a contract (so called “clausola compromissoria”), must be in writing as a condition of their validity and must determine the object of the dispute³².

Both the agreement and the specific term can make reference to institutional arbitration courts, both national and international (such as the ICC or other arbitration courts)³³. One very common national system of administered arbitration is provided by the arbitration chambers of the local chambers of commerce in Italy.

When one of the parties is resident in Italy and has in Italy a permanent office or a secondary office, the arbitration is considered national. On the contrary, it is qualified as international arbitration to the purposes of applicable law³⁴.

It is worth recalling that since 1970 Italy is a member of the Convention européenne sur l’arbitrage commercial international, done in Genève on April 21, 1964, ratified in Italy with law May 10, 1970, n. 418.

³¹ For a comprehensive reading, A Frignani, *Il contratto internazionale*, in F Galgano (ed) *Trattato di diritto commerciale e di diritto pubblico dell’economia* (Cedam, Padova 1990, also available in the new edition, co-authored by F Toriello, Cedam, Padova 2010).

³² See articles 806 and 807 of the Italian Code of Civil Procedure. For a most detailed account of international arbitration procedure with an Italian perspective see A Frignani, *L’arbitrato commerciale internazionale*, in F Galgano (ed) *Trattato di diritto commerciale e di diritto pubblico dell’economia* (Cedam, Padova 2004).

³³ Such possibility is expressly recognized by art. 832 of the Italian code of civil procedure.

³⁴ A. Milano 12 December 2003, *McDonald’s Development Italy inc. v Soc. Autogrill* (2004) *Rivista dell’arbitrato* 485, held that the presence of a secondary place of business in Italy excludes the international dimension of a given arbitration from a subjective standpoint.



5. Performance requirements

See paragraph 3, b), ii) above. As to quantitative restrictions, the following are considered contrary to article X, as incorporated in article 2 of the TRIMs Agreement: maximum import limitations, foreign exchange balancing requirements and domestic sales requirements³⁵.

6. Tax regime and incentives

a) General introduction of the tax regime.

The Italian tax system is based on both direct and indirect taxation. The two main bodies of law governing the tax system are (a) Presidential Decree (D.P.R.) 22 December 1986, N. 917 (Testo Unico delle Imposte sui Redditi, T.U.I.R.), amended and modified several times and still containing the discipline of all income taxes (for natural and legal persons), and (b) Presidential Decree 26 October 1972, N. 633 (institution of the value added tax, VAT), amended and modified several times.

Main income taxes are the IRPEF (Imposta sul Reddito delle Persone Fisiche), for income of natural persons, and IRES (Imposta sul Reddito delle Società), for income of corporate entities and institutions that carry out commercial or industrial or financial activities (see art. 2195 of the Italian civil code) in Italy, and IRAP (Imposta Regionale sulle Attività Produttive) that is charged on the value of gross production of companies realized on the territory of one or more Italian regions. IRES and IRAP will be dealt with below under paragraph b).

The VAT applies to trade of goods and provision of services carried out in the context of a commercial (that is, professional, not occasional) activity. Its current rate is 20% of any consideration received for the sale of goods or provision of services. The VAT also applies to imported goods, regardless the nature of the importer.

The VAT is subject to the principle of territorial application (art. 7 of the Decree 633/1972), meaning that sales of goods and provisions of services are taxed as long as they happen in the territory of Italy. According to this principle, a foreign company willing to engage in trade in Italy on a professional basis has to apply for a VAT registration and obtain a VAT number (so called Partita IVA) from the National Tax Agency (Agenzia delle Entrate) of the Italian Ministry of Economy. All purchases and sales will be registered by the company and marked with the VAT number for the purposes of determining periodically the amount of taxes collected and due to the State.

b) Special tax regimes for foreign investors.

³⁵ P Picone, A Ligustro, *Diritto dell'organizzazione mondiale del commercio* (Padova, Cedam 2002) 224.



Foreign companies carrying out their business as corporate entities or trusts as well as under any other form are subject to the IRES, as per article 73, paragraph 1, lett. D) of Legislative Decree 344/2003. Entities are subject to this tax as long as they are “resident”, that is they either have a stable place of business in Italy or the core business of the entity is carried out in Italy. The rationale behind this tax is that the State should be able to charge incomes that are generated mainly in Italy or by companies that are headquartered in Italy (and presumably receive the income). Originally, the IRES was set as 33% of the income (art. 77). Recently, to align the Italian tax system to those of other European countries, the percentage was brought down to 27,5% of the income (see art. Art. 1, paragraph 33, lett. e) of the Law 24 December 2007, N. 244).

Foreign companies, even if not resident in Italy, are subject to the IRAP, as per art. 12, paragraph 2, of the Legislative Decree 15 December 1997, N. 446. They are subject to the tax if the commercial activity that generates that income was carried out in Italy for no less than three months by means of a permanent establishment, or fixed organization or an office, as well as if the income is generated by agricultural activities conducted on the territory of the State. The tax rate ranges passed from an original 4,25 to 3,9%.

c) Double taxation treaties.

Over the years, the Italian Government signed a number of treaties with other countries to avoid double taxation both on the estate and on earnings. The first multilateral treaty was signed on April 6, 1922 with Austria, Hungary, Kingdom of Yugoslavia, Poland and Romania, and was based on a different regime for direct and indirect taxes; it also introduced for the first time in the Italian legislation the notion of permanent establishment. Other treaties were signed later on with Germany (1925), France (1930), Belgium (1931). A significant thrust in the execution of this kind of agreement came from the effort of the Organization for Economic Co-operation and Development and the introduction of model tax conventions.

As of February 2008, the Italian Government, through the National Tax Agency (named “Agenzia delle Entrate”, a department of the Ministry of Economy) made available on its website a list of treaties against double taxation with other Countries, signed and ratified by Italy and still in force. The list is the following.

Contracting State	Signed (place and date)	Ratified	Entry into force since
Albania	Tirana 12.12.1994	L. 21.05.1998, n. 175	21.12.1999
Algeria	Alger 3.02.1991	L. 14.12.1994, n. 711	30.06.1995
Argentina	Rome 15.11.1979	L. 27.04.1982, n. 282	15.12.1983
Australia	Canberra 14.12.1982	L. 27.05.1985, n. 292	5.11.1985



Austria	Vienna 29.06.1981	L. 18.10.1984, n. 762	6.04.1985
Bangladesh	Rome 20.03.1990	L. 5.07.1995, n. 301	7.07.1996
Belgium	Rome 29.04.1983	L. 3.04.1989, n. 148	29.07.1989
Brazil	Rome 3.10.1978	L. 29.11.1980, n. 844	24.04.1981
Bulgaria	Sofia 21.09.1988	L. 29.11.1990, n. 389	10.06.1991
Canada	Toronto 17.11.1977	L. 21.12.1978, n. 912	24.12.1980
China	Beijing 31.10.1986	L. 31.10.1989, n. 376	13.12.1990
Cyprus	Nicosia 24.04.1974	L. 10.07.1982, n. 564	9.06.1983
South Korea	Seoul 10.01.1989	L. 10.02.1992, n. 199	14.07.1992
République de Côte d'Ivoire	Abidjan 30.07.1982	L. 27.05.1985, n. 293	15.05.1987
Denmark	Copenhagen 26.02.1980	L. 7.08.1982, n. 745	25.03.1983
	+ amending protocol Copenhagen - 25.11.88	L. 7.1.1992, n. 29	28.7.1992
	+ amending protocol Copenhagen - 5.5.99	L. 11.7.2002, n. 170	27.01.2003
Ecuador	Quito 23.05.1984	L. 31.10.1989, n. 377	01.02.1990
Egypt	Rome 07.05.1979	L. 25.05.1981, n. 387	28.04.1982
United Arab Emirates	Abu Dhabi 22.01.1995	L. 28.08.1997, n. 309	05.11.1997
Estonia	Tallinn 20.03.1997	L. 19.10.1999, n. 427	22.02.2000
Ethiopia	Rome 8.04.1997	L. 19.08.2003, n.242	9.08.2005
Philippines	Rome 05.12.1980	L. 28.08.1989, n. 312	15.06.1990
Finland	Helsinki 12.06.1981	L. 25.01.1983, n. 38	23.10.1983
France	Venice 05.10.1989	L. 07.01.1992, n. 20	01.05.1992
Georgia	Rome 31.10.2000	L. 11.07.2003, n. 205	19.02.2004
Germania	Bonn 18.10.1989	L. 24.11.1992, n. 459	26.12.1992
Ghana	Accra 19.02.2004	L. 06.02.2006, n. 48	05.07.2006
Japan	Tokyo 20.03.1969	Tokyo 20.03.1969 L. 18.12.1972, n. 855	17.03.1973
Greece	Athens 03.09.1987	L. 30.12.1989, n. 445	20.09.1991
India	New Delhi 19.02.1993	L. 14.07.1995, n. 319	23.11.1995
Indonesia	Djakarta 18.02.1990	L. 14.12.1994, n. 707	02.09.1995
Ireland	Dublin 11.06.1971	L. 09.10.1974, n. 583	14.02.1975
Israel	Rome 08.09.1995	L. 09.10.1997, n. 371	06.08.1998



Kazakhstan	Rome 22.09.1994	L. 12.03.1996, n. 174	26.02.1997
Kuwait	Rome 17.12.1987	L. 07.01.1992, n. 53	11.01.1993
Lithuania	Vilnius 04.04.1996	L. 09.02.1999, n. 31	03.06.1999
Luxembourg	Luxembourg 03.06.1981	L. 14.08.1982, n. 747	04.02.1983
Macedonia	Rome 20.12.1996	L. 19.10.1999, n. 482	08.06.2000
Malaysia	Kuala Lumpur 28.01.1984	L. 14.10.1985, n. 607	18.04.1986
Malta	La Valletta 16.07.1981	L. 02.05.1983, n. 304	08.05.1985
Morocco ³⁶	Rabat 07.06.1972	L. 05.08.1981, n. 504	10.03.1983
Mauritius	Port Louis 09.03.1990	L. 14.12.1994, n. 712	28.04.1995
Mexico	Rome 08.07.1991	L. 14.12.1994, n. 710	12.03.1995
Mozambique	Maputo 14.12.1998	L. 23.04.2003, n. 110	06.08.2004
Norway	Rome 17.06.1985	L. 02.03.1987, n. 108	25.05.1987
New Zealand	Rome 06.12.1979	L. 10.07.1982, n. 566	23.03.1983
Oman	Muscat 06.05.1998	L. 11.03.2002, n. 50	22.10.2002
Netherlands	The Hague 08.05.1990	L. 26.07.1993, n. 305	03.10.1993
Pakistan	Rome 22.06.1984	L. 28.08.1989, n. 313	27.02.1992
Poland	Rome 21.06.1985	L. 21.02.1989, n. 97	26.09.1989
Portugal	Rome 14.05.1980	L. 10.07.1982, n. 562	15.01.1983
United Kingdom	Pallanza 21.10.1988	L. 05.11.1990, n. 329	31.12.1990
Czech Republic	Prague 05.05.1981	L. 02.05.1983, n. 303	26.06.1984
Slovak Republic	Prague 05.05.1981	L. 02.05.1983, n. 303	26.06.1984
Romania	Bucharest 14.01.1977	L. 18.10.1978, n. 680	06.02.1979
Russia	Rome 09.04.1996	L. 09.10.1997, n. 370	30.11.1998
Senegal	Rome 20.07.1998	L. 20.12.2000, n. 417	24.10.2001
Singapore	Singapore 29.01.1977	L. 26.07.1978, n. 575	12.01.1979
Syria	Damascus 23.11.2000	L. 28.04.2004, n. 130	15.01.2007
Spain	Rome 08.09.1977	L. 29.09.1980, n. 663	24.11.1980
Sri Lanka	Colombo 28.03.1984	L. 28.08.1989, n. 314	09.05.1991
United States	Rome 17.04.1984	L. 11.12.1985, n. 763	30.12.1985
South Africa	Rome 16.11.1995	L. 15.12.1998, n. 473	02.03.1999

³⁶ Tax courts in Italy have clarified that a foreign company is not bound to file the annual tax statement if, according to a bilateral agreement against double imposition, the same provision applies to the Italian company abroad. See Commiss. trib. centrale 9 October 1998, n. 4318, in (1999) Rivista di diritto tributario IV, 127 (about Moroccan companies).



Sweden	Rome 06.03.1980	L. 04.06.1982, n. 439	05.07.1983
Swiss	Rome 09.03.1976	L. 23.12.1978, n. 943	27.03.1979
Tanzania	Dar Es Salam 07.03.1973	L. 07.10.1981, n. 667	06.05.1983
Thailand	Bangkok 22.12.1977	L. 02.04.1980, n. 202	31.05.1980
Trinidad e Tobago	Port of Spain 26.03.1971	L. 20.03.1973, n. 167	19.04.1974
Tunisia	Tunis 16.05.1979	L. 25.05.1981, n. 388	17.09.1981
Turkey	Ankara 27.07.1990	L. 07.06.1993, n. 195	01.12.1993
Ukraine	Kiev 26.02.1997	L. 11.07.2002, n. 169	25.02.2003
Uganda	Kampala 06.10.2000	L. 10.02.2005, n. 18	18.11.2005
Hungary	Budapest 16.05.1977	L. 23.07.1980, n. 509	01.12.1980
Soviet Union(*)	Rome 26.02.1985	L. 19.07.1988, n. 311	30.07.1989
Uzbekistan	Rome 21.11.2000	L. 10.01.2004, n. 22	25.05.2004
Venezuela	Rome 05.06.1990	L. 10.02.1992, n. 200	14.09.1993
Vietnam	Hanoi 26.11.1996	L. 15.12.1998, n. 474	22.02.1999
Yugoslavia (**)	Beograd 24.02.1982	L. 18.12.1984, n. 974	03.07.1985
Zambia	Lusaka 27.10.1972	L. 27.04.1982, n. 286	30.03.1990

(*) The Treaty signed with the former Soviet Union it is currently applicable to Armenia, Azerbaijan, Byelorussia, Moldavia, Kirghizstan, Tajikistan and Turkmenistan.

(**) The Treaty signed with the former Yugoslavia is currently applicable to Bosnia Herzegovina, Croatia , Slovenia, Serbia and Montenegro.

At the same date, few other treaties were signed and ratified, but not in force. Those are:

Contracting State	Signed (place and date)	Ratified
Armenia	Roma 14.06.2002	Law 25.10.2007 n. 190
Congo	Brazzaville 15.10.2003	Law 30.12.2005, n. 288
Kenya (amending protocol)	Nairobi 15.10.19790	Law 07.10.1981, n. 666
	Nairobi 18.02.1997	Legge 27.01.2000, n. 10

d) Other incentives/mechanisms to attract foreign investors.

Both at national and regional level agencies were created to attract inbound investments in Italy and to smother the process of requiring and obtaining all authorizations for a foreign company to start operations in Italy. The Italian Ministry



for the Economy has create a special, fully-owned company, called Agenzia Nazionale per l'Attrazione degli Investimenti e lo Sviluppo d'Impresa S.p.A. (National Agency for the Attraction of Investments and Enterprise Development). All agencies provide support for companies willing to invest in Italy. More importantly, the national agency is able to identify opportunities and measures adopted by the regions at all levels (law, regulations, decisions, and any other relevant administrative act).

Some Italian Regions encourage foreign direct investments by offering so called "contratti di insediamento", that is agreements among the regional agencies and foreign companies willing to settle in the territory of the Region or to open facilities, offices or R&D centres. In exchange for the obligation to start operations in the Region, foreign companies receive technical or financial support, such as contributions to cover construction costs or human resources, or receive free (or cheaper) access to local facilities and resources (research centres, laboratories, qualified manpower etc.).

7. Property rights, expropriation and compensation

- a) General protection of property rights by foreign investors.

Foreign investors enjoy national treatment as to the protection of their property rights. In the following parts a detailed account of protection measures is provided.

- b) Protection of intellectual property rights (IPRs).

Protection of intellectual property rights according the principle of national treatment is ensured by the membership of Italy in the World Intellectual Property Organisation and as signing party of the TRIPs Agreement, as well as by the adhesion to the main international convention for the protection of intellectual property rights (such as the Paris Convention or the Berne Convention).

All main intellectual property rights are recognized and protected in Italy under the principles of the Italian Code of the Industrial Property and, in particular, by art. 3 on the treatment of foreign citizens³⁷. The same article 3 clarifies that the same provisions concerning citizens apply to legal persons. The Code offers a detailed discipline for foreigners. In case of citizens of each member state of the Paris Convention (Stockholm text of 1967, ratified in Italy in 1976) or of the World Trade Organization, with actual domicile or industrial or commercial plants on the territory

³⁷ The Code has been enacted as Legislative Decree February 10, N. 30. Scarcely innovative as to the contents, the Code represents rather a consolidation of more than a hundred of legal texts (laws and regulations) on intellectual property that had been passed over the years. The Code has been amended already, remarkably by the Legislative Decree March 16, 2006, N. 140, on the implementation of the EC Directive 2004/48/EC (so called Enforcement Directive).



of a state belonging to the Convention of Paris, the treatment is the same as for Italian citizens. The same principle of national treatment is applicable for citizens of states member of the International Union for the Protection of New Varieties of Plants (UPOV). For topographies of semiconductors, a principle of reciprocity applies. For citizens of states that are not part of the Paris Convention, of the WTO or of the UPOV, the general principle is reciprocity. Article 3, paragraph, finally, introduces the Most-Favoured Nation treatment in favour of Italian citizens for rights accruing to foreign citizens because of international treaties signed by Italy.

As to the rights protected, the Code provides substantial and procedural rules about trademarks, names and pseudonyms, geographic indications, industrial design, patents, utility models, mask works, trade secrets, new varieties of plants.

Importantly, the Code does not include the discipline of copyright and related rights, that is still mainly provided in Italian Law April 22, 1941, N. 633, amended several times especially to implement the whole set of EC Directives on copyright in the information society, software and related rights. A Code of Copyright has been announced in the past years but parliamentary works for the drafting never started.

Importantly, Italy is among those countries that award a *sui generis* right for database makers. Implementing EC Directive 96/9/EC, the Italian Copyright Law includes provisions on databases³⁸.

- c) General discipline of expropriation, including definitions, conditions, rules on compensation.

The taking of private property (including properties of non-national individuals or entities) is governed by constitutional principles. In particular, art. 42, paragraph 2, of the Italian Constitution declares that private property is recognized and protected by the law and the law itself determines the way property can be acquired and used, its limitations that are required to ensure a social function and to make it accessible to everyone. The same article 42, in its third paragraph, states that in cases defined by the law, and provided a compensation is paid to the owner, property can be expropriated for reasons of general interest.

Article 42 introduces three principles of protection for owners, the first being the mandatory adoption of a law defining cases where expropriation is allowed, the second is the principle of compensation and the third is a mandatory requirement that a reason of general interest exists. Importantly, the same guaranties apply both to nationals and foreigners.

The first rule (so called “riserva di legge”) is rooted in the principle of legality that inspires the Italian constitutionalism. The law is the source adopted by a

³⁸ The European discipline on database protection with the creation of a copyright-like right (*sui generis*) marks a significant distance between Europe and the United States. For more details, see Valeria Falce, ‘La disciplina comunitaria sulle banche dati. Un bilancio a dieci anni dall’adozione’ (2006) *Rivista di diritto industriale*, I, 227.



democratically elected Parliament and it represents the strongest guaranty against abuses or *ad hoc* measures. The national law provides general and abstract situations where public authorities can exercise their powers and the due process. In this respect, the law represents a source of limitation for the discretionary power of the executive branch. The overall system of guaranties for property owners must be complemented with the other constitutional principles, set for the in article 113. Against any act of the public administration interested parties always have unlimited jurisdictional protection before civil or administrative judges. National laws define which judges can set aside and repeal acts of the public administration, in cases and with effects that the same laws must determine. In this second case, the role of the law is to protect the prerogatives of the executive power, while providing individuals with jurisdictional protection.

The jurisdictional protection is supposed to ensure the effectiveness of the due process that the constitutional rules grant, particularly as far as the indemnification principle is concerned and for the previous assessment of the conditions under which the public administration exercised the power to take private property (which basically turns in the issue of determining whether a public interest exists for the procedure to take place).

The compliance with the constitutional principle that mandates an act of the parliament governing requirements and procedures for expropriation was assured by a pre-unitary law (June 25, 1865, N. 2359), followed and amended by a number of other laws and specific regulations, and constantly corrected by opinions of the Constitutional Court that was responsible for reconciling the old law with the new principles of the Constitution, dating 1948. Recently, the Italian Parliament consolidated all rules in a restatement (Testo Unico), the Decree of the President of the Republic (technically a Legislative Decree) on June 8, 2001, n. 327 (Testo unico delle disposizioni legislative e regolamentari in materia di espropriazione per pubblica utilità).

Article 4, last paragraph, of the Decree declares applicable in Italy the rules of international law generally known (general international law) and those of international treaties entered by Italy.

Decree 327/2001 also provides detailed default rules for the determining the compensation (article 32). Other specific criteria can be used if introduced by following laws. In general, the amount of money that compensates the owner (so called “*indennità di espropriazione*”) is determined according to the characteristics of the good at the time the public administration and the owner signed the assignment (in case of voluntary procedure) or at the time the public administration issues its expropriation measure (in case of non-voluntary procedure). In the assessment of the value, any improvement or addition (be it a plant, a building or any other construction) is not considered if it was done with the purpose of having a larger indemnity (which is the case when additions or improvements were initiated during the procedure).

More sophisticated criteria are provided in cases of tracks of land that, according to land regulations, can be used for constructions, since in such a case they supposedly



have more value. The indemnity here results from a formula that takes into account the market value, divided by two and reduced of 40% of its value. Such reduction does not apply, under specific circumstances, when the owner and the expropriating administration reach an agreement for the assignment of the land (art. 37, paragraph 1 and 2); it is implied that a disincentive must be given to the owner if he does not agree with the administration and opposes the expropriation. Such formula is not new. It has been imported in Decree 327/2001 by a pre-existing law (Italian Law on August 8, 1992, n. 359, turning into law an urgent decree, n. 333/1992) that was passed in years of budgetary distress, when it was crucial for public finances, among other things, to reduce the exposure towards proprietary claiming compensation. In a case concerning the previous legislation (decree 333 and the law 359) the Constitutional Court held incompatible with the Constitution the formula, both in decree 333 and in the new legislation (article 37 above), affirming that an arbitrary and significant reduction of a value that, in principle, is close that the market value is not consistent with constitutional principles on private property³⁹. The implied outcome of the opinion is that the legislator can always intervene and provide a different formula; in the meanwhile, any restoration should conform to the market value of the property.

If the area subject to expropriation has buildings or plants, the compensation equals the market value (art. 38), whereas if the area cannot be used for construction purposes, the compensation is determined according to the agricultural value, considering the kind of cultivations usually practiced and the value of premises (legally edified to run the agricultural business), not considering possible alternative uses (art. 40). Further detailed rules apply for temporary expropriations or for military purposes.

As to the compensation, general rules are provided by the law, even though special criteria are set forth in bilateral (friendship) agreements with foreign countries. For instance, in case of German citizens, a special treaty applies and the compensation is fixed according the market value of the goods expropriated⁴⁰. Notably, the Constitutional principles on compensation have been implemented also in bilateral treaties signed by Italy⁴¹.

8. Monetary Transfer

Italy belongs to the Euro area since the adoption of a single currency unity in Europe. The whole matter is regulated by the European Union and is subject to the monetary policy of the European Central Bank. National central banks, such as the Bank of Italy,

³⁹ See Constitutional Court 10 October 2007, nn. 348 and 349 (2008) *Foro italiano*, I, c. 40.

⁴⁰ Cass., sez. I, 8 March 2007, n. 5352, *Com. Ronchi Valsugana v Daltrozso* (2007) *Repertorio Foro italiano voce Espropriazione per p.i.*, n. 157 (affirming the exceptional nature of this criterion). See also Cass. 28 July 1986, n. 4811, *Parzinger v Prov. auton. Bolzano* (1987) *Rivista di diritto internazionale private e processuale* 788 (same interpretation of the friendship agreement).

⁴¹ See, for instance, art. 4 of the Treaty signed with China (see, *retro*, note 21).



are now part of the Eurosystem. By and among those member states that accepted the Euro (€) as a currency, the general principle is that cross-border and national payments receive the same treatment by payment service providers and should be done at no charges up to the value of Eur 50.000. The general discipline is now provided by Regulation (EC) 924/2009 on cross-border payments in the Community, replacing the previous Regulation (EC) No 2560/2001. Pursuant to the new Regulation, Member States have the possibility to extend its provisions to payments in national non-euro currencies. The Regulation applies to all electronically processed payments, including credit transfers, direct debits, cash withdrawals at cash dispensers, payments by means of debit and credit cards, and money remittance.

Transfer of money is regulated in Europe (and in Italy, henceforth) as the object of a commercial activity that is governed by the principle of free circulation of services. With the purpose of creating the so called SEPA (Single European Payment Area), with no internal barriers to the provision of payment services and, on the other side, to the use of the Euro, the European Council passed in 2007 a framework directive aimed at harmonizing all aspects of (non-cash) payments, such as direct debit, credit transfer, card payments. The Directive on Payment Services (Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC) lists a number of conditions for financial institutions and individual to start and operate a business in the payment service industry. The general principle is that those activities must be authorized by the member state where the place of business is located and authorization cannot be granted to legal persons not established in a member state⁴².

9. Dispute settlement

a) National jurisdiction

National jurisdiction is open to all cases brought by foreign citizens against natural or legal persons having a domicile or a residents in Italy, those being the criteria for determining the jurisdiction of Italian courts in cases involving foreign parties. General rules of international private law, including those concerning determinants of national jurisdiction, are contained in the Law on May 31, 1995, n. 218, *Riforma del sistema italiano di diritto internazionale privato* (see art. 3). Law 218/1995 provides default rules and refers specific issues to international treaties Italy enters. In determining the jurisdiction, also EC Regulation No. 44/2001, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (so called

⁴² More specific analyses on the impact of the Directive on the Italian system are provided in the articles collected in M Mancini, M Perassi (eds), *Il nuovo quadro normativo comunitario dei servizi di pagamento*, Quaderni di ricerca giuridica della consulenza legale della Banca d'Italia (Roma, Banca d'Italia 2009).



Brussels I Regulation), entered into force in Italy on March 1st, 2002, must be considered, since such Regulation represents the implementation among EC Member States of the Brussels Convention of 1968.

Italy has a system of civil courts (for general litigation) and administrative courts (for matters where one of the parties is the state or the public administration, acting with public law capacity). For civil law cases, a first degree level (“tribunal”) and an appellate level (“Corti d’appello”) of jurisdiction is granted on the merits, whereas the Court of Cassation (“Corte di Cassazione”) can review cases for issues of law, usually after the two levels have been pursued by the parties.

Also on dispute settlement, the principle of reciprocity (art. 16 of the Preliminary Provisions to the Civil Code) applies as the general rule, unless otherwise provided in specific laws (and treaties)⁴³.

b) International arbitration.

Italy is a member of the ICSID Convention and among the signatory parties of 1965. The President of the Republic was authorized with the Law on May 10, 1970, N. 1093⁴⁴. No reservation were made by the Italian government to the text agreed upon by the founding states.

i. Other arbitration mechanisms.

Other arbitration schemes are allowed in Italy and can be invoked by private parties in their investment contracts, pursuant to the mechanisms described above, under paragraph (4)(c).

ii. National control mechanism on international arbitration.

1. Non ICSID arbitration.

Whoever wants to enforce a foreign arbitration award in Italy has to file a petition to the president of the court of appeal of the territory where the other party has her residency⁴⁵. If the party is not resident in Italy, the Court of Appeal of Rome has jurisdiction on the petition. The president of the Court, after reviewing the formal regularity of the documents (arbitration award and the arbitration agreement or clause filed with by the petitioner), issues a decree where the award is declared applicable in

⁴³ See Cass. 29 November 2007, n. 24814, *Al Zuhair v Soc. Tecnologie vetroresina* (2009) *Rivista di diritto internazionale private e processuale* 182 (an action brought by a Saudi citizen against an Italian company in Italy allowed because the same right is given to Italian citizens in Saudi Arabia).

⁴⁴ Published on OJ January 12, 1971, N. 8.

⁴⁵ A general reading on international commercial arbitration in Italian is P Bernardini, *L'arbitrato nel commercio e negli investimenti internazionali* (2nd edn, Giuffrè, Milano 2008).



Italy. In two cases the execution cannot be granted: (a) if the arbitration award relates to subject matter excluded by arbitration and (b) if the award contains provisions contrary to the *ordre public*⁴⁶. Against the decision to grant the *exequatur* or to reject an appeal is possible, to be filed within the 30th day after the communication of the decision, before the same Court of Appeal⁴⁷.

2. ICSID arbitration.

As per article 54 of the ICSID Convention, Italy shall recognize an award rendered pursuant to the Convention. Paragraph 2 of the same article refers to national procedure for recognition and enforcement of ICSID awards, which means that, as far as Italy is concerned, the procedure is the same as the one followed for other foreign award, as previously described.

10. FDI statistics, policies and authorities

- a) Statistics of foreign investment activities in the country: trends for inward and outward investment.

A number of public bodies and institutions publishes on a regular basis statistics and studies on foreign investment activities, both inbound and outbound. The National Bank of Italy runs a number of annual surveys and statistics on external transactions and positions and a special attention is paid to foreign investments.

The most comprehensive data is collected and elaborated by the Istituto per il Commercio Estero, the national agency that is active in the promotion of economic and commercial relationships of Italy with foreign countries. Statistics offer data grouped by sector, by geographic areas, by country, by region, by class of employees, and by turnover⁴⁸.

Besides national sources, the OECD annual Report on FDI also has data related to Italy, both as outflows and inflows investments are concerned. Furthermore, national banks and foreign governments have observatories on Italy.

- b) Brief history of the development of foreign investment policies including current trend of development.

The development of foreign investment policies in Italy has been comparatively slow compared with other Western countries and, in particular, with the main European countries⁴⁹. The first activities of territorial marketing and the adoption of measures to

⁴⁶ The entire procedure is governed by art. 839 of the Italian Code of Civil Procedure.

⁴⁷ See article 840 of the Code of Civil Procedure.

⁴⁸ A dedicated web site can be found at the following URL: <http://www.ice.it/statistiche/ide.htm#>.

⁴⁹ The delay in acting to attract foreign investments was matched by a poor scholarly work. The few



attract investments from abroad did not take off until the first half of the Nineties of the past Century, after the Regions were given incentives by the national government through the ministerial decree on March 16, 1994 (so called “decreto Baratta”, because of the name of the minister Paolo Baratta who was the promoter)⁵⁰. Since then, Regions have been active in working out incentives for foreign investors, thus emphasizing the peculiarities of the territory of each and the natural local resources that could be an opportunity for investors⁵¹.

Structural deficiencies and a bureaucratic administration, as well as an inefficient system of civil justice are usually pointed out as the major obstacles to foreign investments in Italy and, although much has been done to liberalize the economy and remove barriers, still difficulties exist. The annual Doing Business Ranking of the World Bank in 2010 places Italy at the 78th position, registering a further step backward with respect to 2009 (when Italy ranked 74th). Almost all index are worse off, except for Enforcing Contracts, where Italy rose from 158th to 156th, which still means being at the bottom of the list⁵².

general contributions are F Capriglione, L Desiderio, ‘Investimenti esteri in Italia (profili generali)’ XVII Enciclopedia giuridica (Treccani, Roma 1989); M Strizzi, ‘Investimenti esteri in Italia (diritto valutario)’ *ibid.*; A Spallanzani, ‘Principi fondamentali dell’ordinamento valutario italiano. Investimenti esteri in Italia’ (1986) *Rivista del notariato* 395; G Messa, ‘Gli investimenti esteri in Italia’ (1984) *Rassegna di diritto e tecnica doganale e delle imposte di fabbricazione* 807; G Fontana, ‘Gli investimenti dei capitali esteri in Italia’ (1984) *Società* 610.

⁵⁰ For a comment of the decree, see N Novacco, ‘Il «decreto Baratta» del 16 marzo 1994 per la promozione degli investimenti esteri in Italia’ (1995) *Rivista giuridica del Mezzogiorno* 27.

⁵¹ Economists deal with the impact of FDI policies on regional economies. See F Praussello, ‘Una meta-analisi sui rapporti fra investimenti esteri diretti e crescita di un’economia regionale’ (2009) *Studi e Note di Economia* 85.

⁵² Further details on Italy are available at the following URL of the Doing Business Project: <<http://www.doingbusiness.org/exploreconomies/?economyid=96>>.