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FOREIGN DIRECT INVESTMENTS IN THE ITALIAN PORT ENVIRONMENT:

INTERNATIONAL LEGAL TOOLKIT AND SOME PROPOSALS TO BOOST ATTRACTIVENESS

Contents: 1. Introduction. Ports, port operations market, maritime spatial planning and investment attraction. – 2. The legal framework of FDI: maritime sector and the notion of 'investment'. – 3. Maritime and port spaces as 'territory' of the host State. – 4. The 'investment' relationship between foreigners and Italian port authorities. – 5. Investment protection standards in port environment. – 6. Maritime and port security. – 7. Appropriate means for the settlement of maritime and port investment disputes. – 8. Concluding remarks. Plea for an *Italian Maritime and Port Investment Centre*.

1. ***Introduction. Ports, port operations market, maritime spatial planning and investment attraction.*** To date, it sounds naive to identify the relevant markets for Italian port operations and services by looking at a single port[1]. Increasing, global and interconnected trade in goods and services along with the eligibility of foreign ports to attract national champions and ships are quite illustrative, irrespective of whether the import market or the logistics and transport operations fall within the Italian territory. Port operations markets are independent of, and even separable from, the domestic port area.

Against this background, Italy is called to provide international port markets with regulatory bodies that can enhance the attractiveness of Italian ports to foreign investors. This does not mean focusing solely on port operations. In fact, ports do more than simply serve as locations for gathering and managing economic activities aimed at overseeing port operations lifecycle. They also account for pivotal drivers for businesses related to goods and services that extend to back-port infrastructures and city-port hinterland. Logistics, non-maritime transport, manufacturing activities in the supply chain, and business activities in the port-city hinterland, all benefit from port infrastructures that work efficiently, with efficiency playing the role of attracting domestic and

[1] See extensively Sergio M Carbone, Francesco Munari, *I porti italiani e l'Europa* (Franco Angeli 2019).

foreign investments. Furthermore, in keeping with the evolving geopolitical landscape, ports are urged to keep pace with contemporary challenges related to energy, digital, and security transitions, just as much as investment policies are.

Special Economic Zones (SEZ) are illustrative of geographic spaces that include port areas in the multi-level chain that connects international transport networks with back-port economic activities in view of attracting investments[2]. SEZ may be attractive because of tax exemptions or concessions and administrative simplification, with the Port System Authorities playing a pivotal role in gauging whether the business aligns with and supports the local economic environment.

However, Italian ports should not work as watertight compartments in bringing in foreign investments. As a matter of principle, each port should be considered as a part of a national aggregated system that unitarily works to attract foreign capitals in maritime and port sectors. Accordingly, the national port system may face well competition in the European and international markets as long as each port authority, and the ports themselves, scale up as components of a unified national champion.

Moreover, port authorities should be strongly active in managing and planning port areas in order to contribute to an efficient maritime planning that meets the EU policies. Even though Directive (EU) no. 2014/89 does not deal directly with ports[3], it nevertheless acknowledges that, as maritime spaces are much needed for multi-fold activities, ranging from maritime transport to tourism and trade, they require a much-integrated planning regime with a management strategy that looks at the best land-sea interaction. Ports and Port Authorities are paramount in this regard, all the more because the Directive urges public authorities and private stakeholders to interact with each other to accommodate the greatest number of interests that may benefit from good maritime planning.

Put differently, an efficient land-sea integration brings in foreign investments.

That being said, this paper aims to focus on the main features that the attractiveness of the port business environment should disclose taking account of the contemporary challenges that global trade and investments are facing.

The old saying of Treaties on Trade, Navigation and Friendship that protection is the best means to attract investments is still valid as a premise, but with some adjustments.

[2] It is worth noting that one of the reasons for introducing the SEZ in the Italian economic system was to attract international investors. See Articles 4(7)(a), law decree 20.6.2017 no. 91 – converted by l. 3.8.2017 no. 123 – and Article 8(2)(i), Council of Ministries President decree 25.6.2018 no. 12.

[3] Directive 2014/89/EU of the European Parliament and of the Council of 23.7.2014 establishing a framework for maritime spatial planning (OJ L257/135).

2. The legal framework of FDI: maritime sector and the notion of 'investment'. Port and back-port operations carried out by foreign companies may be the object of foreign direct investments (FDI). Accordingly, Italy plays the role of host State for FDI in such cases.

The definition of FDI provided in Article 2(1) of Regulation (EU) 2019/452 helps identify assets and activities involved[4]. FDI 'means an investment of any kind by a foreign investor aiming to establish or to maintain lasting and direct links between the foreign investor and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity in a Member State, including investments which enable effective participation in the management or control of a company carrying out an economic activity'. The definition largely replicates that outlined in the Bilateral Investment Treaties ('BIT') to which Italy is a party, as well as in some agreements concluded by the EU that include investment law rules[5].

The concept of 'investment' is usually broad enough to include 'every kind of asset' that BITs qualify by way of examples[6]. It also includes individual rights to exploration, exploitation and conservation of marine resources[7]. In particular, the concept covers the right to prospect for, explore and exploit natural resources.

In light of the foregoing, granting individual economic rights on sea, seabed, subsoil, and port areas generates an investment, and triggers the application of BITs, which set the rights and obligations of host States and foreign investors.

Notably, while the protection resulting from international rules covers the *exercise* of 'investments', the *admission* (or establishment) of the investment falls outside the BIT unless the latter provides otherwise. BITs specifically protect investments that the investor has been entitled to in the host State under domestic law, public procurement, grants, investment contracts or administrative practices.

[4] Regulation (EU) 2019/452 of the European Parliament and of the Council of 19.3.2019 establishing a framework for the screening of foreign direct investments into the Union (OJ LI79/1). The reform of regulation is underway.

[5] In this regard, it is worth recalling that the EU has acquired exclusive competence in matters of FDI after the entry into force of the Lisbon Treaty in 2009.

[6] For instance, Article 1(1) of the Italy-United Arab Emirates of 22.1.1995 speaks of movable and immovable property, property rights, shares, stocks of companies, trademarks, industrial design, know-how.

[7] See Article 1(1)(e) of the BITs with Tunisia (17.10.1985), Albania (12.9.1991) and Libya (13.12.2000); see also Article 8.1 (*Definitions*) of the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada.

For instance, should Italy intend to bring in FDIs employing the SEZs, the foreign investor is offered a legal business environment that rests primarily on national rules and regulatory schemes, namely those governing the access to SEZs. International obligations to which Italy is bound vis-à-vis the investor's home State apply afterwards, i.e. after the investor has been granted the SEZ advantages.

BITs usually recognize minimum standards of protection that vary from one BIT to another. The standards exhibit commonalities, especially when they replicate customary law standards. However, the interpreter can only work out how to protect the investor by relying on the specific BIT applicable in the concrete case.

Be that as it may, everything depends on whether a BIT or other investment treaty applies between Italy and the investor's home State. This requirement is contingent upon some requirements, starting with the investment being made in the Italian 'territory'.

3. Maritime and port spaces as 'territory' of the host State. In order to qualify the 'territory' to which they apply, BITs usually include maritime zones, namely those on which the host State exercises sovereignty, sovereign rights or jurisdiction. Despite this requirement being commonplace, BITs differ from one another in detailing its content.

Some BITs adopt far-reaching notions, such as those contained in Article 1(4) of the Italy-Albania BIT of 12.9.1991, Article 1(4) of the Italy-United Arab Emirates of 22.1.1995, Article 1(4) of the Italy-Saudi Arabia BIT of 10.9.1996 and Article 1(4) of the Italy-Libya BIT of 13.12.2000, which refer to maritime areas ('marine and submarine zones') on which States exercise sovereignty, sovereign rights, or jurisdiction under international law.

Other BITs single out the definition of 'Maritime Zones' from the general notion of 'territory'. That is the case of Article 1(6) of the Italy-Egypt BIT of 2.3.1989, which defines 'maritime zones' as 'the marine and submarine zones over which the Contracting States exercise, under international law, sovereignty, sovereign rights and/or jurisdiction'.

There are rules, such as Article 1(6) of the Italy-Turkey BIT of 22.3.1995, that lay down far-reaching definitions according to which 'territory' means 'the land within the land boundaries and the territorial waters of each Contracting Party as well as the exclusive economic zone and the continental shelf that extends outside the limits of the territorial waters […], over which they have or could have jurisdiction or sovereign rights for the purposes of exploration, exploitation and conservation of natural resources, pursuant to international law'.

The Italy-Tunisia BIT of 17.10.1985 circularly defines 'territory' as 'the territories' respectively of Italy and Tunisia, making it possible to include maritime areas by drawing on the external context of the BIT pursuant to Article 31(3)(c) of the Vienna Convention on the Law of Treaties of 23.6.1969. This entails tapping into the definitions of 'territory' adopted by other BITs.

The Italy-China BIT of 28.1.1985 qualifies 'territory' by means of a separate Protocol, which mentions maritime areas in barely the same way as the BITs with Libya and Albania.

There are BITs that provide a different definition of 'maritime zone' depending on the interested Contracting Party. For instance, Article 1(4) of the Italy-Morocco BIT of 18.7.1990 states: *'Le terme "territoire" désigne : a) pour le Royaume du Maroc: le territoire du Royaume du Maroc y compris toute zone maritime située au-delà des eaux territoriales du Royaume du Maroc et qui a été ou pourrait être par la suite désignée par la législation du Royaume du Maroc relatifs au fond de la mer et au sous-sol marin ainsi qu'aux ressources naturelles, peuvent s'exercer. b) pour la République Italienne : le territoire de la République italienne délimité par les frontières terrestres y compris "les zones maritimes". Celles-ci comprennent les zones maritime et sous-marines sous la souveraineté de l'Italie et sur lesquelles celle-ci exerce, conformément au droit international, les droits souverains et juridictionnels'*.

Other BITs include narrower definitions of 'territory' in relation to maritime spaces. For instance, according to Article II(4) of the Italy-Republic of the Philippines BIT of 17.6.1988, the term 'territory' means the land and the territorial sea. The latter includes territorial waters and the sea-subsoil over which the Contracting Parties exercise their sovereignty, sovereign rights, or jurisdictional rights, in accordance with international law.

As a policy pattern for future negotiations (which may be conducted upon authorization by the European Commission), the 2022 Italian model BIT includes maritime spaces in the notion of 'territory'. Article 2 reads: '"territory" means the part of a land area, internal and territorial waters, air space above them, the sea area outside the territorial waters, including the seabed and subsoil on which the Party exercises sovereign rights, and subject to its jurisdiction, according to international law'.

Despite the nuances and differences above, all BITs to which Italy is bound apply to ports, back-port areas, port infrastructures, and anything in the sea-land route that lies behind, within, or beyond ports under Italian sovereignty or jurisdiction. Incidentally, sovereignty, sovereign rights and jurisdiction over maritime zones that qualify as 'territory of the investment' are generally determined by the United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOS). In other words, Italy is required to comply with investment law obligations if it has sovereignty, sovereign rights, or jurisdiction in accordance with the UNCLOS over the maritime zones where the investment is undertaken.

4. The 'investment' relationship between foreigners and Italian port authorities. Access to FDI protection is not necessarily limited to foreign entrepreneurs having company structures based on foreign law. In fact, investors often prefer conducting business in foreign port environments through legal vehicles based on the port State's law.

BITs cover and protect joint ventures entered into by Italian and foreign companies or investments that are conducted in the Italian port environment by Italian companies under the control of foreign investors. It is for the applicable BIT to determine if domestic companies under such foreign control amount to 'foreign investors', or if foreign companies controlling domestic vehicles in the host State should have substantial contacts (such as conducting business activity) with their home State in order to benefit from the BIT.

Needless to say, EU investors may open branches, agencies or other secondary seats in Italy to perform port activities under the freedom of establishment, which is independent of any substantial connection with the home State as a prerequisite to carry out activities in other Member States.

On the other hand, security concerns may lead to restricting access to investment or triggering investment screening vis-à-vis EU or non-EU companies equally[8]. Restrictions based on general and imperative interests are legitimate either under EU law, BITs or other investment treaties. We will return to this point shortly.

Assuming that the activities in the port environment amount to FDIs, it is necessary to determine whether foreign investors engage with entities whose wrongful conduct triggers international responsibility for Italy. This aspect is critical as it is only when port entities perform public powers as state agents that the infringement of the investor's rights may lead to a breach of investment law standards.

Put differently, the question arises as to whether port authorities are State *alter ego* or independent bodies when their acts or omissions cause losses or damages to foreign investors. Should port authorities qualify as state entities, such losses or damages trigger investment claims, otherwise the investor may only avail of remedies under the law governing contractual or non-contractual claims. Actually, apart from the counterparty's nature, any claim against the State that falls outside the BIT or other applicable investment treaties may qualify as contractual or non-contractual (unless the so-called *umbrella clause* applies so that the claim turns into an investment one).

As the Italian port system currently stands, port authorities qualify as public economic entities with state powers. It goes without saying that Italy is attributed international responsibility for the parallel conduct of Regions and Municipalities that impact port investments in a way that breaches BITs or other investment treaties.

[8] For instance, the Italian government can use its *golden power* as a special control under law decree 15.3.2012 no. 21 over companies carrying out activities in the transport sector, including maritime transport, in the case of threats against national security and defence.

5. Investment protection standards in port environment. The standards of protection that Italy has to ensure vis-à-vis foreign investors differ depending on whether EU law or international rules apply. Some standards are common to both legal environments even when it comes to public measures of constraint depriving property or restricting the exercise of business activity. For instance, national treatment and the prohibition of discrimination protect the investors irrespective of whether the investment legal framework rests on EU law or international law.

Among the standards, Fair and Equitable Treatment (FET) and Full Protection and Security (FSP) deserve more attention in this analysis. Notably, according to the FET standard, special regulatory regimes that attract investors through incentives, such as tax benefits, cannot be abruptly amended or revoked without harming the investor's legitimate expectations.

Infringements of the FET are usually associated with the removal of stable and predictable legal frameworks, or promises and representations made by the host State that remain unfulfilled, or denial of fairness in administrative procedures, or lack of transparency in public procurement procedures, or embezzlement, coercion, abuse of law, bad faith or arbitrariness in dealing with investor's complains, or discrimination in comparison with the treatment of Italian investors. Foreign investors may complain against those conducts as long as their investments have suffered losses from the State's act or omission.

Those scenarios arise particularly out of indirect expropriations, that is when the host State adopts measures not amounting to the direct taking of property but nonetheless having effects equivalent to expropriation. For instance, an ICSID Tribunal found an indirect expropriation in the revocation of a free zone regime[9].

The protection increases vis-à-vis EU investors in compliance with the EU freedoms. It is well known that EU investors may avail of judicial remedies against the host Member State in case their EU freedoms are unduly restricted. For instance, they may claim non-contractual liability and obtain compensation for damages suffered by the breach of EU rules or demand the disapplication of national rules contrary to the EU rules governing the investment. Put shortly, EU investors are better protected[10].

Yet, BITs leave some margin for host States to exercise regulatory powers in view of general interests irrespective of whether the investors are from EU or non-EU countries. This approach

[9] *Goetz v. Burundi*, Award 10 February 1999, ICSID Case No. Arb/95/3.

[10] See European Commission, *Intra-EU Investment Protection*. Communication to the European Parliament and the Council, COM (2018) 547 final, 19.7.2018. The Communication was adopted, among other reasons, to ensure that intra-EU investors are not less protected than non-EU ones after the Court of Justice decision in the *Achmea* case (CJEU, 6.3.2018, case C-284/16).

balances standards of investment protection with economic or non-economic values that underlie regulatory powers and allows States to encroach in many respects on the investment environment.

Particularly, States retain the power to modify the investment's regulatory environment in order to cope with public interests and needs, especially in strategic sectors or during emergencies. Should the state regulatory power be so designed, the investors may only partially invoke the State's responsibility and claim compensation. Arbitral tribunals often adopt a balancing approach that, while not ruling out the State's liability, results in reducing the quantum of the compensation.

6. Maritime and port security. Turning to the FPS standard, it entails that Italy is obliged to adopt specific measures (whose nature varies depending on whether Italy bears positive or negative obligations in the concrete case) to protect the investor and the investment. Particularly as regards maritime or port environments, security works as a means to protect the infrastructures designed for realizing the investment. The mainstream approach qualifies FPS as a duty of diligence, which greatly mirrors the corresponding minimum standard requirement that customary international law establishes vis-à-vis foreigners. As a result, Italy ought to take precautionary measures to protect foreign investments, including by devising physical surveillance of the investment infrastructures.

On the other hand, both the FPS standard and the equivalent EU rules do not prevent Italy from adopting domestic measures to ensure public order, national security, public health or other overriding public interests. Maritime and port security unleashes to safeguard the overarching interests underlying environment, maritime safety, maritime strategic sectors and defence against threats that may stem from FDI. In this respect, maritime and port security appears as a *value* to be protected from hazardous inbound investments.

In light of the above, maritime and port security may fall either under the FPS in favour of foreign investors or under the so-called 'security exception', that is, the BITs clause that enables host States to block FDIs that threaten national security and defence without this constituting violation of international law.

7. Appropriate means for the settlement of maritime and port investment disputes. Investment disputes frequently arise between the host State and foreign investors. Disputes may regard wrongful expropriation, the infringement of FET and FSP, the abuse of regulatory powers, the unlawful recourse to measures of constraint under the 'security exception', and so on. Investors usually claim for compensation of the losses and damages suffered due to such conduct. For instance, disputes may arise out of the illegal revocation of tax advantages such as those previously granted under the SEZ regime.

The practice demonstrates that foreign investors are significantly more inclined to invest if they rely on settlement bodies that are detached from the host State's organization and possess technical expertise and experience in investment issues. The preference goes to arbitral tribunals or other alternative dispute resolution (ADR) systems rather than in-court venues. Host States and investors agree to resort to such means in different ways, including by inserting an arbitration clause in their investment contracts. BIT's generally include a standing offer for arbitration and/or ADRs from one contracting State to the investors of the other State.

As with other sectors of trade and investment, such a pattern fits well with 'maritime and port' investment disputes because the involved stakeholders regularly demand high levels of specialisation, speed, and neutrality from adjudicators.

Remarkably, BIT-based arbitration is limited to non-EU foreign investors after the CJEU made clear that intra-EU arbitrations are not compatible with EU law[11]. This prohibition does not cover international commercial arbitration whenever the grievances against the host State are based on contractual obligations.

***8. Concluding remarks. Plea for an* Italian Maritime and Port Investment Centre.**

Italian ports should be aggregated as a single economic unity that operates along the Italian coastline through its local or system authorities. The ongoing political debate about the reform of the Italian port system should assume that Italy represents not only a single entity bearing liability under EU and international investment law but also a single economic hub for domestic and foreign investments. This approach is consistent with the institution of a single SEZ.

Such unitarity should be perceived from the outside. In fact, foreign investors would find the Italian maritime economic environment more appealing if they could count on and trust Italy as a unique 'host system' from the admission of the investment up to the settlement of disputes.

This is why an *Italian Maritime and Port Investment Centre*, organized with as many branches as the Port System Authorities are, might do the trick in this author's view.

Forged as a hybrid entity made up of public and private representatives of the maritime cluster, it could drive investments across the board and offer a skilled and independent dispute venue. Parties would be free to select arbitrators, mediators, or conciliators from a list of experienced people or choose the settlement panel by themselves. They would also be free to choose foreign adjudicators.

Foreign or international Institutions to which the parties usually resort to settle their investment or commercial disputes are well known. However, such Institutions may not fit well

[11] See *Achmea*, supra note 10.

with a policy aimed at attracting foreign investors to the Italian port environment or into the SEZ, with the aim of shaping ports, back-ports, and the city-port economy as national champions.

In fact, what counts is organising and conducting the dispute settlement procedures in Italy as a critical service available to those who have decided to invest in Italy.

Parties may resort to the preferred regional branch of the Italian Maritime and Port Investment Centre. However, even a single centralized Centre would be suitable. The Qatar Financial Centre, the Dubai International Financial Centre, and the Shenzhen Court of International Arbitration, to name but a few that serve SEZs nearby, could be considered good models.