JUDICIAL DECISIONS

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II. INTERNATIONAL CUSTOM, LAW OF TREATIES AND OTHER SOURCES OF INTERNATIONAL LAW

The Hermeneutics of Bilateral Investment Treaties by the *Corte di Cassazione*: Between Teleological, Textualist and Systemic Interpretation

Vienna Convention on the Law of Treaties – Treaty interpretation – Bilateral investment treaties – Foreign direct investment – Investor-State dispute settlement – Article 6 ECHR – Legitimate expectations under Article 1 of the Protocol No. 1 of the ECHR

Corte di Cassazione (*Sez. III Civile*), 24 April 2023, No. 10897
Distributrice Srl and Distributrice Investments Srl v. Presidenza del Consiglio dei Ministri and Ministero degli Esteri e della Cooperazione Internazionale

The judgment under consideration dealt with the interpretation of Article 2(d) of the Protocol attached to the Bilateral Agreement between Croatia and Italy on the Promotion and Protection of Investments of 5 November 1996 (Croatia-Italy BIT Protocol, or the Protocol) as given by the *Corte di Cassazione* (the Supreme Court, or the Court). According to Article 2(d), "each Contracting Party shall provide effective means of bringing claims and enforcing rights with respect to investments and [...] investment contracts". In light of the teleological criterion set out by Article 31 of the Vienna Convention on the Law of Treaties (VCLT), the Supreme Court held that the provision had to be intended as establishing obligations on each State Party toward investors who are nationals of the other Party. Indeed, these obligations had to be regarded as instrumental to foster the *reciprocal* protection of investors by the Parties. Therefore, the Court stated that Article 2(d) of the Protocol cannot serve as a legal basis for a compensation claim brought against the Italian Government by its own nationals investing in Croatia.

In 2002, two Italian companies made investments in Croatia and acquired a textile factory in Dalmatia. For that purpose, they established a specific company under the host State's commercial law. Two years later, the Italian investors started to face economic turmoil, as tax assessments carried out by the Croatian authorities outlined alleged fiscal irregularities. Subsequent unsuccessful administrative proceedings and the persisting crisis of the company led to the opening of insolvency proceedings before the Croatian authorities, upon request from the company's employees. By 2010, the Italian investors, having exhausted local remedies, sought legal advice from the Italian Embassy. The Embassy suggested to initiate the amicable procedure envisaged by Article 9(1) and (3) of the Croatia-Italy BIT. Upon the expiration of the six-month time limit for the amicable settlement of the dispute, the Italian investors requested the Italian authorities to provide economic support for the upcoming investor-State

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arbitration costs, relying on Article 2(d) of the Protocol. Faced with the refusal to bear the costs of the proceedings by the Italian authorities, the investors filed an action for compensation before the Italian courts and claimed that the Italian Government had violated its obligation to grant adequate economic means for the protection of its nationals' rights. The *Tribunale di Trieste* rejected the claim. This decision was subsequently upheld by the *Corte d'appello di Trieste*. The Court of Appeals stated that the obligations arising from Article 2(d) of the Protocol had to be understood as pursuing the Croatia-Italy BIT's investment promotion purposes, by securing effective means of redress and reparation for the other home State's national investors against the host State's. Moreover, the Court of Appeals excluded any obligation on the Italian government towards its nationals based on Article 9 of the Protocol, which instead contemplated the dispute resolution means available to the investors. This finding was confirmed by the Supreme Court. Before diving into the Supreme Court's considerations, it is crucial to outline the arguments put forward by the Italian investors concerning the interpretation of certain provisions in the relevant investment agreement and its Protocol.

The applicants argued that the Court of Appeals misinterpreted Articles 2 and 9 of the Croatia-Italy BIT, as well as Article 2(d) of the Protocol, in that it failed to apply the criteria set out in Articles 31 and 32 VCLT, thus providing a *contra legem* interpretation. In their view, these provisions were examined by the Court of Appeals in a manner inconsistent with their actual content. Notably, the investors relied on the literal meaning of the provisions. They considered the obligations in Article 2 of the Protocol as a set of additional protections agreed by the contracting Parties. Accordingly, the applicants interpreted the said provision as complementing the commitments made by the Parties regarding the promotion and protection of investments under Article 2 of the Croatia-Italy BIT. The applicants observed that Article 2(b) of the Protocol envisages a specific legal circumstance unfit to be applied by analogy, namely that "[e]ach Contracting Party shall enter into an investment agreement with investors from the other Contracting Party who make investments of national interest within its territory […]". Therefore, they argued that Article 2(d) of the Protocol entails obligations in favour of the contracting Parties' nationals as well, according to which the Parties shall secure enforceable remedies and rights pertaining to investments and investment contracts. The applicants argued that this interpretation grounded their legitimate expectations for the provision of effective means of enforcement by their home State. These legitimate expectations had to be considered consistent with Article 1 of Protocol No. 1 of the European Convention on Human Rights (ECHR) on the protection of private property.

As anticipated, the interpretative issues relating to Article 2(d) of the Protocol were resolved by the Supreme Court considering both the purpose and object of the BIT. The Court first assessed the general rule of treaty interpretation, which revolves around a good faith approach and the respect for the ordinary meaning of terms, as emerging from the treaty context. The latter was not confined to the text and preamble of the treaty, as it included the materials mentioned by Article 31(2)(a) and (b) VCLT. The Supreme Court drew a parallel with its previous case law on the interpretation of Article 6 of the European Convention on the Adoption of Children, where it found that Articles 31(1) and 32 of the VCLT provided a set of textual, historical and systematic methods of interpretation, and construed Article 6 by reference to its Explanatory Report (*Corte di Cassazione* (*Sez. I Civile*), *Procura generale della Repubblica v. Di Lazzaro*, 21 July 1995, No. 7950, para. 6).

Accordingly, the Supreme Court affirmed in the present case that the literal meaning of treaty provisions had no primacy over their teleological interpretation. That reasoning was considered consistent with a robust line of case law of the Court of Justice of the European Union (CJEU), which had repeatedly affirmed that the general rule of treaty interpretation under Article 31 of the VCLT imposes to interpret a treaty "[…] in good faith, that is in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose" (para. 7).

On these assumptions, the Court identified the object and purpose of the Croatia-Italy BIT in light of its preamble and the content of Article 2 of the Protocol. The former expresses the Parties' intention to create the proper conditions to enhance their economic cooperation, as the promotion and reciprocity of investment protection would foster business and thereby the Parties' economic prosperity. Article 2, in turn, outlines how the Parties agreed to promote and protect investments. The Court highlighted that Article 2(1)(2)(3) of the Croatia-Italy BIT reaffirms the objective pursued by the Contracting Parties of encouraging "[…] investors of the other Contracting Party to invest in their territory". Accordingly, the provision guarantees investment conditions no less favourable than those available to national or third-country investors, while ensuring fair and equitable treatment of such investments. The Supreme Court further defined the context of the Croatia-Italy BIT through its material standards of investment protection, which are functional to achieving the purposes of the BIT. It briefly recalled the most-favoured-nation clause under Article 3, the nationalisation and expropriation regime under Article 5 and the provisions concerning the transfer of capital, profits and income under Article 6.

The Court then interpreted Article 2(d) of the Protocol, which had to be intended as specifying the contents of Article 2 of the BIT. It observed that the reciprocal protection mentioned in the preamble is carried out by each Party through the support provided to the other Party's investors in its own territory. This support included the effective means for the enforcement of investors' rights and claims foreseen by Article 2(d) of the Protocol. The Court thus held that the obligation arising from that provision was not incumbent on the Parties vis-à-vis investors of their same nationality.

In the Court's view, that interpretation was further confirmed by the provisions concerning investor-State dispute settlement under Article 9 of the BIT. The clause provides for an amicable settlement procedure and, in case of failure, for the resolution of disputes before the host State's courts or through international arbitration, either set up in accordance with the UNCITRAL Arbitration Rules or the 1965 ICSID Convention. On the basis of the spectrum of dispute settlement options envisaged by that provision, the Court observed that Article 9 of the Croatia-Italy BIT poses no obligation on the Contracting Parties to provide economic support to their respective investors in case of an investment dispute. Accordingly, the Court remarked that both Italy and Croatia had agreed on the standards of protection available to foreign investments in their territory. That implied that no issue arose under Article 1 of the Protocol No. 1 to the ECHR safeguarding property rights.

Therefore, the Supreme Court prioritised the carving out of the purpose and object of the Croatia-Italy BIT and its Protocol, by considering treaty elements, such as the preamble and substantive provisions, in a non-hierarchical perspective (AMMANN, *Domestic Courts and the Interpretation of International Law: Methods and Reasoning Based on the Swiss Example*, Leiden, 2020, pp. 209-210). One must stress that this approach is well grounded in the wording of Article 31 of the VCLT, which certainly embodies a textualist interpretation via the ordinary meaning rule, but does not circumscribe the interpretative activity to the pure meaning of treaty terms (FITZMAURICE, "The Law and Procedure of the International Court of Justice 1951: Treaty Interpretation and Other Treaty Points", BYIL, 1957, p. 203 ff., p. 212). In other words, these criteria need to be applied concurrently by the interpreter (REUTER, *Introduction to the Law of the Treaties*, 2nd ed., London, 1995, pp. 96-97).

The interpretative methodology espoused by the Supreme Court stands out for the centrality given to the teleological criterion, given that it is often regarded as of subsidiary nature in the academic writings (SINCLAIR, *The Vienna Convention on the Law of Treaties*, 2nd ed., Manchester, 1984, p. 130; WEERAMANTRY, *Treaty Interpretation in Investment Arbitration*, Oxford, 2012, p. 75; *contra*, DOLZER, "Interpretation and Intertemporal Application of Investment Treaties", in KRIEBAUM, SCHREUER and DOLZER (eds.), *Principles of International Investment Law*, 3rd ed., Oxford, 2022, pp. 36-37). Besides, textual interpretations have to be consistent not only with the object and purpose of the treaty, but also with its context and relevant provisions (GAZZINI, *Interpretation of International Investment Treaties*, Oxford, 2016, pp. 67 and 175-177). Therefore, the context of an investment treaty, as emerging from its substantive standards and preamble, is crucial to ascertain its object and purpose (WEERAMANTRY, *cit. supra*, pp. 51-52 and 71-72; SALACUSE, *The Law of Investment Treaties*, 3rd ed., Oxford, 2021, pp. 192-193), especially when the textualist method fails (*RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14, Award of 13 March 2009, para. 383).

From that perspective, the Supreme Court appears to have correctly scrutinised the preamble of the Croatia-Italy BIT in order to identify the purpose and object of the treaty. Moreover, Article 2 of the BIT embodies the intended purpose and object pursued by the Parties, while Article 2 of the Protocol details the reciprocal obligations undertaken by the Parties in that regard. One must note that Article 2 of the BIT appears to be consistent with the view that international investment law aims at promoting and protecting investment, thus at establishing a stable legal framework fostering foreign capital flows, as generally agreed among nations (SCHILL, "International Investment Law and Comparative Public Law: An Introduction", in SCHILL (ed.), *International Investment Law and Comparative Public Law*, New York, 2010, p. 3 ff., p. 5). Usually, investment treaties tend to include vague obligations to encourage and promote investments, which essentially concern the creation of favourable conditions for foreign investors to operate (SALACUSE, *cit. supra*, pp. 254-255). This largely justifies the scarce case law concerning host States' failure to fulfil these obligations. When dealing with claims related to the promotion and protection of foreign investments, arbitral tribunals have often remarked on the vagueness of these provisions for the purposes of establishing enforceable rights (*White Industries Australia Limited v. The Republic of India*, Final Award of 30 November 2011, paras.

9.2.6-9.2.12; *Stadtwerke München GmbH, RWE Innogy GmbH, and others v. Kingdom of Spain*, ICSID Case No. ARB/15/1, Award of 2 December 2019, paras. 195-198).

Diverging from the general international practice, Article 2(d) of the Protocol lays down more detailed obligations for the contracting Parties concerning investment protection and promotion. As observed by the Supreme Court, this provision further articulates the content of the obligations under Article 2 of the Croatia-Italy BIT. Those obligations are generally considered as being directed to the promotion of inward foreign investments by each State party, rather than its respective national investors' businesses outward (NEWCOMBE and PARADELL, *Law and Practice of Investment Treaties: Standards of Treatment*, Alphen aan den Rijn, 2009, pp. 126-127). Furthermore, few investment treaties establishing obligations for the home State to sustain its national investors abroad explicitly designate the subjects entitled thereof. For instance, Article 2(3) of the 1980 BLEU-Cameroon BIT states that "[...] the Belgo-Luxembourg Economic Union shall adopt measures to encourage *its economic agents* to participate in the development effort of the United Republic of Cameroon, in accordance with its priority objectives" (emphasis added). Consequently, whether applying a purely textualist interpretative method or a teleological one, the phrasing of Article 2 of the Croatia-Italy BIT does not pose any obligation for the home State in favour of its nationals' outward investments. The provision clearly and repeatedly refers to "investors *of the other Contracting Party*" (emphasis added). The absence of any explicit reference to the Parties' nationals' investments in the territory of the other contracting Party in Article 2(d) of the Protocol, further highlights the relevance of the wording of Article 2 of the Croatia-Italy BIT, as the former details the latter's obligations which, in turn, outlines the purpose and object of the treaty.

On that ground, the Supreme Court appropriately remarked that the obligations set out by Article 2(d) of the Protocol refer to the reciprocal protection of investment assured by each contracting Party to the national investors of the other. In terms of access to justice, this is guaranteed by the arbitration clause in Article 9 of the BIT. Besides, as correctly observed by the Court, the argument set forth by the investors whereby Article 9 does not provide for a fair trial in the sense of Article 6 of the ECHR is wholly unconvincing. While systemic interpretation of investment treaties under Article 31(3)(c) VCLT allows reference to external sources such as the ECHR (CALAMITA, "International Human Rights and the Interpretation of International Investment Treaties: Constitutional Considerations", in BAETENS (ed.), *The Interaction of International Investment Law with Other Fields of Public International Law*, Cambridge, 2013, p. 164 ff., p. 178), the mere fact that the Croatia-Italy BIT does not require home States to bear the costs of the proceedings does not undermine the procedural guarantees provided by the treaty's arbitration clause. Arbitral precedents on the matter clarify that Article 6 ECHR could serve to better define the relevant obligations (*The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award of 6 May 2013, para. 172; *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment of 30 December 2015, para. 92), but it cannot create substantive rights (*Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award of 11 October 2002, para. 143). Similarly, a teleological interpretation of Article 2(d) of the BIT Protocol rules out that the claimants' legitimate expectations were breached by the Italian Government. As regards Article 1 of Protocol No. 1 to the ECHR, it has been generally construed as protecting legitimate expectations related to the actual detriment of one's enjoyment of possession and not mere beliefs (*Gratzinger and Gratzingerova v. the Czech Republic*, Application No. 39794/98, Decision of 10 July 2002, para. 73; *von Maltzan et al. v. Germany*, Applications Nos. 71916/01 and 2 others, Decision of 2 March 2005, para. 74). Therefore, the investors' assumption that the obligation to ensure effective means for enforcing investors' rights equates to the home State affording arbitration costs ha no legal basis in this ECHR provision.

In conclusion, the judgment at issue showed the Supreme Court's preference for the teleological method of interpretation. While declaring textualist primacy outdated, it ultimately interpreted the provisions of the Croatia-Italy BIT by means of a balanced approach. The wording of the treaty was examined considering its context, as well as its object and purpose. This holistic approach seemed to adequately embody the different facets of the VCLT rules on interpretation. On a side note, the decision may be seen as a missed opportunity, with regard to the Court's dismissive attitude towards the relevance of Article 6 and Article 1 of Protocol No. 1 of the ECHR. While briefly discussing the BIT's consistency with these provisions, the judgment remained silent on the broader topic of bilateral investment treaties' interpretation in light of external rules of public international law. In other words, the Supreme Court preferred not to get bogged down in a discussion of the relevance of systemic interpretation in international investment law.

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VII. LAW OF THE SEA

Hostis Migrantium: The Concept of Piracy under the Scrutiny of the *Corte di Cassazione*

Definition of piracy – Meaning of "act of depredation" – Article 101 of the 1982 United Nations Convention on the Law of the Sea – Article 1135 of the Italian Code of Navigation

Corte di Cassazione (*Sez. III Penale*), 27 December 2023, No. 51442
Criminal Proceedings against Jilani Joini et al.

The judgment under review can be seen as a stepping stone in the long process of defining and prosecuting piracy, and at the same time as an interesting application of this loaded concept in the context of migration. It was the first time that the *Corte di Cassazione* dealt with a definitional issue relating to the crime of piracy, and it was the first time that an Italian court defined an act committed in the Mediterranean Sea as piracy. The *Corte di Cassazione* (the Supreme Court, or the Court) addressed this issue by interpreting the concept of piracy under Article 1135 of the Italian Code of Navigation in the light of Article 101 of the 1982 United Nations Convention on the Law of the Sea (the Montego Bay Convention, or UNCLOS) and qualified as piracy the acts of fishermen extorting the engines of migrants' dinghies, as well as their mobile phones and money.