The 2008 Investment Arbitration Between Italy and Cuba: The Application of the Rules of Attribution and the 1993 BIT's Scope *Ratione Personae* Under Scrutiny

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1 Preliminary Remarks

In a recently reported award rendered on 15 January 2008,[1] an *ad hoc* arbitral tribunal, instituted in accordance with Article 10 of the 1993 bilateral agreement on the promotion and protection of investments (BIT) between Italy and Cuba,[2] concluded a lengthy inter-State litigation involving the espousal by the Italian government of a number of private claims originally connected to 16 Italian investors economically active in Cuba.

The case raises several interesting international legal issues. In terms of litigating strategies, the singular choice of the Italian government to act in diplomatic protection on behalf of its investors and the preference accorded to diplomatic protection, rather than the standard option of private investors using the arbitration clause under the BIT, are noteworthy. Moreover, the award lends itself to a critical analysis of the substantive issues dealt with, especially the notion of investment adopted by the Tribunal, the rule on the exhaustion of local remedies, the question of attribution to the Cuban State of conduct by State-owned corporations and the exclusion of the applicability *ratione personae* of the BIT to Italian investors active on the Cuban market through the vehicle of companies incorporated in third countries.[3] The two latter aspects have proved particularly controversial and have been

[1] Arbitral Tribunal: Italy v. Cuba, Final Award ("*Sentence Finale*") (15 January 2008). http://italaw.com/documents/Italy_v_Cuba_FinalAward2008.pdf. Accessed on 10 January 2012.

[2] Accordo fra il Governo della Repubblica Italiana e il Governo della Repubblica di Cuba sulla promozione e protezione degli investimenti (Rome, 7 May 1993). Entered into force on 23 August 1995. http://itra.esteri.it/trattati/CUBA018.pdf. Accessed on 10 January 2012.

[3] With regard to the notion of investment endorsed by the Arbitral Tribunal see Tonini 2008.

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N. Boschiero et al. (eds.), *International Courts and the Development of International Law*, DOI: 10.1007/978-90-6704-894-1_54,

analysed in detail in the dissenting opinion delivered by the Italian arbitrator, Attila Tanzi. They will be discussed in the present contribution, after having provided an overall description of the arbitral proceedings, of the conclusions reached in the award of 15 January 2008 and of the dissent expressed by Arbitrator Tanzi.

2 The Arbitral Proceedings

On 16 May 2003 the Italian Government notified the Cuban Government of its intention to institute proceedings against the Republic of Cuba on the basis of Article 10 of the 1993 Italy/Cuba BIT.[4] Article 10 is a dispute settlement clause, which provides that in case of disputes on the interpretation and application of the treaty, the Parties will endeavour to reach an amicable solution through diplomatic means; if a settlement is not reached within three months from the notification of a written request to that effect, either Party may institute *ad hoc* arbitral proceedings.[5] In line with the procedure established in Articles 10.3 and 4, Italy's request was followed by Italy's and by Cuba's appointment of Attila Tanzi and Olga Miranda Bravo[6] as arbitrators, respectively; upon their designation, Yves Derains of France was appointed as President of the Tribunal.

Italy originally complained in its own right, and by way of diplomatic protection granted to 16 investors, of a series of breaches of the 1993 BIT effected by Cuban authorities and entities, in particular of Article 2.1 (the obligation to encourage and promote investments) and 2.2 (the obligation to guarantee a fair and equitable treatment to investors and to avoid unjust and discriminatory practices), Article 3.2 (the obligation to accord to Italian investors the same treatment granted to national investors), Article 5.1 (the obligation to ensure full protection and security to investors) and 5.2 (the obligation not to expropriate either directly or indirectly), Article 6 (the obligation to ensure the return of invested capital) and of

[4] Accordo sulla promozione e protezione degli investimenti, con protocollo e scambio di lettere (Rome, 7 May 1993), enterd into force on 23 August 1995.

[5] In the Spanish text, Articles 10.1 and 2 provide: "Articulo 10 – Conciliación de las controversias entre las Partes Contratantes. 1. – Las controversias entre las Partes Contratantes sobre la interpretación y la applicación del presente Acuerdo deberán, cuando sea posible, ser conciliados por medio de consultas amigables de las dos Partes a través de los canals diplomáticos. 2. – En el caso en que tales controversias no puedan ser arregladas en los tres meses sucesivos a partir de la fecha en la cual una de las Partes Contratantes haya notificado por escrito a la otra Parte, las mismas serán sometidas, a solecitudo de una de las Partes, a un Tribunal Arbitral ad hoc de acuerdo a lo dispuesto por el presente Articulo." Article 10 has to be read in conjunction with Article 9, which provides for the possibility of the investor of either Party to seek a solution to a dispute either before a domestic court or before an arbitral tribunal constituted in accordance with Article 10.

[6] As Olga Miranda Bravo passed away in 2007, the Cuban Government appointed Dr. Narciso Cobo-Roura as arbitrator.

the Additional Protocol, Point 1.b (the obligation to settle questions related to the entry and stay of Italian investors in Cuba in the most favourable way to the investor). Italy sought the payment of 1 Euro by way of satisfaction for the direct breaches of its own rights and of a sum totalling several millions of US dollars by way of compensation for the injury suffered by its investors and, as a subsidiary claim, for the unjust enrichment ensuing from Cuba's contractual breaches.[7]

The Tribunal rendered, by majority, a preliminary judgment on 15 March 2005. In the judgment, the Tribunal rejected a number of preliminary objections raised by Cuba: in particular, the Tribunal recognised Italy's right of action in diplomatic protection, notwithstanding the private investor/State jurisdictional clause under Article 9; it established that the rule of the prior exhaustion of local remedies applied to the claims in diplomatic protection only (not to Italy's claims "in its own right") and that it would be examined at the merits phase; at a preliminary stage, it did not uphold Cuba's objections related to Italy's claims concerning Italy's investors other than the companies Caribe and Figurella and Finmed, notwithstanding the fact that they were not included in the initial request of 16 May 2003 and reserving a final decision at the merits phase.[8] Quite importantly, the Tribunal adopted a definition of investment for the purpose of the 1993 BIT, which extended to any economic operation carried out by a natural or juridical person of either Party characterised by a contribution to the economic development of the host State, a certain duration and the participation of the investor in the risks deriving therefrom.[9] It established that this definition should be applied in the merits phase and it invited the Applicant not to submit in the subsequent phase of the proceedings any claim concerning economic operations that did not meet the above requirements.[10]

Subsequent to the Tribunal's adoption of the above definition of investment, Italy renounced its stance that it would act in diplomatic protection with regard to ten cases. Italy also dropped its claim in diplomatic protection concerning Menarini Società Farmaceutica as a consequence of an extra-judicial settlement reached by the Parties (but did not withdraw its claim concerning the direct breach of its treaty rights). On the other hand, Cuba raised a counter-claim seeking from Italy a public apology for the moral damage caused by the proceedings.

The Tribunal rendered its final award on 15 January 2008. It rejected all of Italy's claims and Cuba's counter-claim.

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[7] For a summary of Italy's original claims see Arbitral Tribunal: Italy v. Cuba, Interim Award ("*Sentence Preliminaire*") (15 March 2005), paras 21–34. http://italaw.com/documents/Italy_v_Cuba_InterimAward_15Mar2005.pdf. Accessed on 10 January 2012.

[8] Ibidem, *dispositif*, paras 1, 3–4.

[9] Ibidem, paras 76–85.

[10] Ibidem, para 85.

3 The Award of 15 January 2008

The Tribunal's final award is mainly characterised by a detailed analysis of the factual elements, and the legal consequences flowing therefrom relevant to Italy's claims in diplomatic protection, which turn out to be determinative of Italy's claims for the direct breaches of its own rights under the 1993 BIT. The Tribunal examined in turn the cases espoused by the Italian Government.

As far as the case *Caribe and Figurella Project s.r.l.* is concerned, the Tribunal found that the economic operations initiated in 1998 and formalised in two contracts concluded by Caribe and Figurella with the Cuban Hotel Habana Libre Trip (belonging to the State-owned Grupo Hotelero) for the rental of equipment and the provision of services with a view to operating a beauty centre within the Hotel met the requirements of the definition of investment established in the preliminary ruling.[11] Yet, according to the Tribunal, there was no evidence indicating that the damage suffered by Caribe and Figurella was the result of an internationally wrongful act committed by Cuba. The dispute between the Grupo Hotelero and Caribe and Figurella originated from the withdrawal by the Cuban Ministry of Internal Trade of the licence (granted to the Hotel) to operate the beauty centre as the Cuban authorities realised that a tattooing service was provided by Caribe and Figurella, which was not envisaged in the licence. The licence was reinstated 20 days later on condition that tattooing activities would be suspended. According to the Tribunal, the decision of the Cuban authorities was "sans doute brutale",[12] but it did not constitute a violation of the 1993 Agreement. Moreover, according to the Tribunal, while the omissions of the Hotel (the denial of information concerning the reinstatement of the licence, the dismantlement of the equipment and its belated return to Caribe and Figurella) may well have constituted contractual breaches and even evidence of the desire to end the Italian investment contrary to the 1993 Agreement, the acts of the Grupo Hotelero could not be attributed to Cuba, as the Hotel had a separate legal status under Cuban law and, more importantly, was engaged in commercial activities (as opposed to a governmental activity).[13] Finally, the Tribunal ruled out the hypothesis of a *deni de justice* by the Cuban State, since a number of civil suits brought by Caribe and Figurella were examined by Cuban tribunals and found inadmissible as a result of proper procedures established by law; moreover, Caribe and Figurella had failed to use the arbitration clause in the contract. If anything, the lack of the exhaustion of local remedies was an impediment to the exercise of diplomatic protection by Italy.[14]

The dispute concerning the case *Finmed s.r.l.* originated from the failed attempt by the latter Italian company, constituted in Italy by Samarcanda s.r.l. and by Clinica Santa Chiara s.r.l. at the initiative of the President of the mixed Cuban

[11] Italy v. Cuba, Final Award, supra n. 1, paras 146–153.

[12] Ibidem, para 156.

[13] Ibidem, paras 159–163.

[14] Ibidem, paras 164–168.

entrerprise Medi Club SA, Mr Filippi, to substitute the Irish company Finmed Ltd in Medi Club, which had been established in 1996 to allow Samarcanda and Clinica Santa Chiara, through Finmed Ltd and the Cuban enterprise Cubanacan, to build a tourist resort. The substitution had been approved by the assembly of Medi Club in 1998, but was not followed by a governmental authorisation in accordance with Cuban law. According to Italy, the obstruction of the substitution by the Cuban authorities and by Cubanacan was instrumental in favouring new Italian shareholders within Finmed Ltd, especially Mr Rampinini, and to allow Cubanacan to take control of the original investment. The Tribunal found that Finmed s.r.l. and Mr Filippi had indeed exhausted all available local remedies by resorting to administrative procedures, civil tribunals and by bringing accusations before the *Fiscalia General de la Republica de Cuba.*[15] Yet, the economic injury suffered by Finmed srl could not be attributed to the acts or omissions of Cubanacan, but was the result of an internal litigation within Finmed Ltd between new and original associates concerning the control of the investment. According to the Tribunal, Cubanacan's decision to accept the document certifying a new director in Finmed Ltd, Mr Rampinini, in place of the former one may have been adopted "avec une certaine precipitation", especially in light of the "apparence assez suspecte"; but it was not the cause of the damage suffered by Finmed srl, which was due to the "incapacité de M. Filippi e de Mme Ciscato du justifier du pouvoir d'agir au nom de Finmed Ltd".[16] Hence, according to the Tribunal, Italy's claim in diplomatic protection concerning Finmed had to be rejected.

The Tribunal instead found Italy's claims in diplomatic protection and in its own right concerning Icemm srl and Menarini Società Farmaceutica, respectively, to be inadmissible due to a lack of competence *ratione materiae*: in both cases the Italian companies had concluded contracts with Cuban companies for the sale of goods regulated by the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980)[17]—economic operations which, according to the Tribunal, did not amount to investments under the definition provided in the preliminary judgment, due to the lack of contribution over time and of risks entailed in the execution of the contract.[18]

Claims in diplomatic protection concerning Cristal Vetro and Pastas y Salsas Que Chevere were also rejected on the basis of a lack of competence *ratione personae*: both companies had been incorporated in third countries, Panama and Costa Rica, respectively, and could not fall under the purview of Article 1.1 of the 1993 BIT, which extends to investments realised "por persona fisica o juridical de una Parte Contratante en el territorio de la otra". According to the Tribunal, on the basis of the textual, contextual and teleological interpretation of the above provision, it was not possible to consider Cristal Vetro and Pastas y Salsas Italian as

[15] Ibidem, paras 176–179.

[16] Ibidem, paras 181–194.

[17] Entered into force on 1 January 1988.

[18] Italy v. Cuba, Final Award, supra n. 1, paras 195–199 and 212–221.

juridical persons; hence, Italy could not act in diplomatic protection on the basis of the 1993 BIT.[19]

Moreover, mainly on the basis of the findings reached in the analysis of the claims in diplomatic protection, the Tribunal rejected Italy's claims in its own right concerning the violations of several provisions of the 1993 BIT allegedly deriving from the cases of Caribe and Figurella and Finmed (the other four do not fall under the BIT); as well as the subsidiary claim of unjust enrichment.[20]

The Tribunal also rejected Cuba's counter-claim as Italy's application was the exercise of a right granted under Article 10 of the 1993 BIT and could not have caused any prejudice to Cuba requiring a public apology.[21]

The award was adopted by a majority ruling, arbitrator Tanzi attaching a thorough dissenting opinion. Points of dissent were the Tribunal's treatment of the question of the attribution of acts of the Hotel to the Cuban State in the case Caribe and Figurella, which, according to Tanzi, should have been responded to in the positive[22]; the violations of the 1993 BIT in Caribe and Figurella and Finmed resulting from Cuba's actions and omissions, including a denial of justice in the latter case[23]; as well as the interpretation of Article 1.1 of the 1993 BIT for the purpose of Italy's diplomatic protection in the cases Cristal Vetro and Pastas y Salsas.[24]

4 The Attribution to Cuba of the Acts of State-Owned Enterprises

The question of the attribution of the acts of Grupo Hotelero to Cuba raises a number of interesting legal issues under the law of State responsibility, especially in view of the particular role of the State in the Cuban economy. As mentioned, it was one of the main points of disagreement in Tanzi's dissenting opinion, exactly on the basis of the overall configuration and role of State authorities in the Cuban economic and investment sector.

The Award is consequential and plain in its identification of the relevant law of State responsibility as it is normally applied in investment arbitration, especially with regard to the question of attribution. The terms of reference—also adopted by

[19] Ibidem, paras 200–211.

[20] Ibidem, paras 222–252.

[21] Ibidem, paras 253–254.

[22] Italy v. Cuba, Final Award, supra n. 1, Dissenting Opinion of Arbitrator Tanzi, paras 6–14.

[23] Ibidem, paras 15–30. Tanzi did not dispute the findings of the Tribunal concerning the non-exhaustion of local remedies by Caribe and Figurella, hence his agreement in para 2 of the *dispositif*, where the Tribunal rejected Italy's claim in diplomatic protection concerning Caribe and Figurella's investment.

[24] Ibidem, paras 31–36.

the Parties during the proceedings—were the 2001 International Law Commission Articles on State Responsibility (ILC Articles).[25] According to the Award, actions and omissions of State organs are attributable to the State (Article 4 of the ILC Articles). A State cannot escape attribution only by creating a private law entity and claiming that it is not a State organ under its domestic law, if that entity exercises elements of governmental authority and acts in that capacity in the contested instance (Article 5 of the ILC Articles). Moreover, acts committed by private entities under the control, instructions or direction of the State are attributable to the latter (Article 8 of the ILC Articles). The Award presents some ambiguity in the language employed, especially when it refers to "State entity", but it is apparently applying Article 5. According to the Award, if a private law entity can be considered a State entity for the purpose of the law of State responsibility it depends on a joint application of a structural criterion and a functional criterion. If the entity is owned or controlled by the State, there is a presumption that it is a "State entity". However, the presumption is not absolute. One must examine if the entity exercises elements of governmental authority and if it was acting in that capacity when the alleged violation of international law was committed. The functional criterion shows that Grupo Hotelero could not be considered a State entity for the purpose of attribution, as it was engaged in purely commercial activities when entering into the contracts with Caribe and Figurella.[26]

As a matter of fact, according to the Award, the functional criterion is "généralement préféré au critère structurel dans la jurisprudence internationale".[27] One can agree with the Tribunal's statement if the issue at hand is merely the characterisation of an entity as a state entity or a private entity. However, as observed by Arbitrator Tanzi, such characterisation has been made giving prevalence to the functional criterion mainly in the context of ICSID Arbitral Tribunals affirming jurisdiction *ratione personae* on the basis of Article 25.1 of the Washington Convention with respect to "any legal dispute arising directly out of an investment, between *a Contracting State* (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) *and a national of another Contracting State*" (emphasis added).[28] In this specific regard, one cannot but agree with Tanzi where, after analysing the ICSID cases of *Ceskoslovenska Obchodni Banka, A.S. v. Slovakia*[29] and *Consortium R.F.C.C. v. Morocco*[30] (one

[25] For the text and commentary of the ILC Articles see Crawford 2002.

[26] Italy v. Cuba, Final Award, supra n. 1, paras 160–163.

[27] Ibidem, para 161.

[28] Italy v. Cuba, Final Award, supra n. 1, Dissenting Opinion of Arbitrator Tanzi, para 8. With regard to Article 25 of the ICSID Convention see Schreuer 2009.

[29] ICSID: Ceskoslovenska Obchodni Banka, a.s. v. Slovakia, ARB/97/4, Decision on Objections to Jurisdiction (24 May 1999).

[30] ICSID: Consortium R.F.C.C. v. Morocco, ARB/00/6, Decision on Jurisdiction (16 July 2001).

could also add the decisions on jurisdiction in *Salini* et al. *v. Morocco*[31] and *Maffezini v. Spain*),[32] he notes

> dans la jurisprudence CIRDI une application 'en accordéon' du test fonctionnel sur la qualification d'entité étatique – selon que l'entité publique économique soit demandeur ou défendeur – pour assurer au mieux sa competence *ratione personae* par le biais d'un exemple classique d'interprétation fondée sur l'*effet utile* de la règle juridique, notamment l'art. 25(1) de la Convention de Washingto.[33]

But the Tribunal was not called upon to establish its jurisdiction under the Washington Convention; it was called upon to determine the attribution *vel non* of the acts of Grupo Hotelero to Cuba under general international law. The truly "controlling" cases dealing with attribution should have been three, namely *Maffezini v. Spain* (merits),[34] *Noble Ventures v. Romania*[35] and *Nykomb v. Latvia*[36] with the former only—*Maffezini*, cited by the Award in a footnote—giving prevalence to the functional criterion, as interpreted through the distinction between governmental and commercial acts for the purpose of attribution. In *Noble Ventures v. Romania*, the Tribunal found that SOF, which had been entrusted by the Romanian Government to implement a privatisation process in a number of sectors and, with that aim, to promote and regulate foreign investments in those sectors, was endowed with governmental powers and was under governmental control and supervision: while not qualifying as a State organ under Article 4 of the ILC Articles as it was a separate legal entity (it should rather fall under Article 5), all its acts and omissions should have been attributed to Romania and the distinction between governmental acts and commercial acts—a distinction elaborated in the context of sovereign immunities—was not justified, nor sup-

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[31] ICSID: Salini et al. v. Morocco, ARB/00/4, Decision on Jurisdiction (16 July 2001).

[32] ICSID: Maffezini v. Spain, ARB/97/7, Decision on Jurisdiction (25 January 2000).

[33] Italy v. Cuba, Final Award, supra n. 1, Dissenting Opinion of Arbitrator Tanzi, para 8.

[34] ICSID: Maffezini v. Spain, ARB/97/7, Award (13 November 2000). In *Maffezini* the Tribunal, having found in the jurisdictional phase that the Galician legal entity SODIGA (*Sociedad para el Desarollo Industrial de Galicia*) *prima facie* could be considered a State entity (for the purpose of jurisdiction), rejected Maffezini's position that all acts of SODIGA were attributable to Spain. It asserted that SODIGA's activities were both governmental and commercial in nature. It went on to apply the functional test in considerable detail and concluded that the provision of faulty advice to Maffezini, as well as the pressure put on Maffezini to go ahead with the investment without environmental evaluation were not governmental actions. SODIGA's actions were instead attributable to Spain with regard to a bank transfer effected by an official of SODIGA for the benefit of Maffezini through EAMSA, a local bank; according to the Court the handling of that bank account was a governmental prerogative (ibidem, paras 62–71). Generally, with regard to the question of the attribution of acts of State-owned corporations to the State see Hobér 2008. With regard to the *Maffezini* case, see Cohen Smutny 2005.

[35] ICSID: Noble Ventures v. Romania, ARB/01/11, Award (12 October 2005).

[36] Stockholm Chamber of Commerce: Nykomb Synergetics Technology Holding AB (Nykomb) v. Latvia, Award (16 December 2003). http://ita.law.uvic.ca/documents/Nykomb-Finalaward.pdf. Accessed on 10 January 2012.

ported by the ILC articles.[37] In *Nykomb v. Latvia*, the contractual breaches of Latvenergo, a Latvian State company, with regard to Windau, Nykomb-controlled local subsidiary, were considered attributable to Latvia by virtue of the former's "dominant position as a major domestic producer of electric power and as sole distributor of electricity over the national grid".[38] According to the Tribunal:

> [i]t was clearly an instrument of the State in a highly regulated electricity market. In the market segment where Windau operated, Latvenergo had no commercial freedom. It had no freedom to negotiate electricity prices but was bound, and considered itself to be bound, by the legislation and the regulatory bodies' determination of the purchase prices to be paid for electric power produced by cogeneration plants. Latvenergo cannot be considered to be, or to have been, an independent commercial enterprise, but clearly a constituent part of the Republic's organization of the electricity market and a vehicle to implement the Republic's decisions concerning the price setting for electric power.[39]

Leaving aside the question of when contractual breaches imply violations of treaty norms,[40]—a question that normally must follow a determination of attribution—[41]the above case law shows that the attribution of acts of State-owned enterprises must be solved by reference to both a structural and a functional test; the latter should not be interpreted *stricto sensu* only as was done by the Tribunal, but as referring mainly to the overall function of the entity within the domestic economy.

In the case of Caribe and Figurella, the Grupo Hotelero was instrumental in the development of the tourist sector in Cuba, in attracting foreign investments and it acted under the supervision and control of the Cuban Ministry of External Trade when dealing with foreign investors. A number of evidential elements showed the close connection between different State authorities and Grupo Hotelero in the case of Caribe and Figurella, including the fact that the second contract had been signed at the insistence of the Ministry of Tourism, the advertising campaign concerning the beauty centre had to be changed due to specific instructions by the Ministry of Internal Trade, the catalogue and the prices of services were approved after consultation with the Deputy Minister and the beauty centre was closed in agreement with the Ministry of Internal Trade.

It might be that, according to a rather mechanical application of the ILC Articles, the situation did not exactly fit into that of an act of a State organ under Article 4; that the Hotel could be considered as acting in a private capacity when entering into contracts with Caribe and Figurella, hence Cuba would not bear responsibility under a strict reading of Article 5; and that the evidence was not sufficient to directly link the Hotel's actions and omissions with instructions and control by Cuban authorities in accordance with Article 8.[42] However, the "factual

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[37] Noble Ventures v. Romania, supra n. 35, para 82.

[38] Nykomb Synergetics Technology Holding AB (Nykomb) v. Latvia, supra n. 36, p. 31.

[39] Ibidem

[40] Hobér 2008, pp. 575–582.

[41] Italy v. Cuba, Final Award, supra n. 1, Dissenting Opinion of Arbitrator Tanzi, para 5.

[42] Quite interestingly, in the award in the ICSID Waste Management case (ICSID: Waste Management, Inc. v. Mexico, ARB(AF)/00/3, Final Award (30 April 2004), para 75), an ICSID

link" between the actions of the Hotel and different State authorities, on which any attribution must be based, was "structurally and functionally" present and, as correctly observed by Arbitrator Tanzi, should have been given full weight in the appreciation of facts and of the law related to a case involving an economic operation.[43] After all, the law of State responsibility is not "set in stone", but is based on general principles that must adapt to the material and legal context in which they are applied; in the case of Caribe and Figurella, the context was that of an investment of a small business in a heavily regulated and State-controlled market and enjoying the protection of a bilateral investment agreement. The Tribunal should have shown full appreciation of that specific context.

5 The 1993 BIT's Applicability *Ratione Personae* and Diplomatic Protection

Another important legal issue that has been disputed in Tanzi's dissenting opinion has concerned the interpretation of Article 1.1 of the BIT, which extends the subjective scope of the agreement to investments realised "por persona fisica o juridica de una Parte Contratante en el territorio de la otra". As anticipated, the Tribunal's conclusion had been that the BIT's protection could not extend to Cristal Vetro and Pastas y Salsas as the two companies were registered in Panama and Costa Rica, respectively, hence they could not be considered Italian legal persons allowing Italy to act in diplomatic protection.

According to the Award, the textual meaning of the provision leaves little room for ambiguity. Either Party's investments are protected by the BIT if carried out through their own nationals or own corporations, but not through corporations registered in the territory of a third party. Such textual reading would be confirmed by the legal context in which the agreement was adopted in 1993, namely a customary discipline defined by the landmark ruling in *Barcelona Traction*,[44] which confined diplomatic protection to the state of incorporation of the company (excluding the possibility of the State of nationality of the shareholders presenting concurring claims).[45] According to the Tribunal, a teleological reading of the

(Footnote 42 continued)
Tribunal presided over by Arbitrator James Crawford considered that the acts of Banobras, a development bank partly owned by agencies of the Mexican Government, would be attributable to Mexico "one way or another" for NAFTA purposes, despite the lack of clear evidence showing that the entity was a State organ under Article 4 of the ILC Articles, that it was exercising governmental authority according to Article 5 of the ILC Articles when carrying out the contested dealings, or that it was acting under the direction or control of governmental bodies.

[43] Italy v. Cuba, Final Award, supra n. 1, Dissenting Opinion of Arbitrator Tanzi, para 14.

[44] ICJ: Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application: 1962), Judgment (5 February 1970).

[45] Italy v. Cuba, Final Award, supra n. 1, para 204.

provision would also confirm this interpretation *a contrario*: if we were to uphold an extensive interpretation of Article 1.1, in accordance with the dispute settlement clause found at Article 9.2, either Party may have to respond before an arbitral tribunal to alleged violations of the BIT affecting the owners of capital or shareholders of the other Party, who have invested in a company registered in a third State, including third countries with which the host State does not want to maintain economic or diplomatic relations.[46]

In our view, the Tribunal's reading of the BIT is rather formalistic and it entails a mechanical, if not misleading, application of general international law to the issue at hand. As singled out in the dissenting opinion, one can read in the contested provision a substantial, rather than a formal notion of investment.[47] In fact, Article 1.1 defines an investment "*independientemente de la forma juridical elegida y del ordenamento juridico de referencia,* culquia tipo de bien invertido, por persona fisica o juridical de una Parte contraente en el territorio de la otra […]" (emphasis added). According to the same provision, investment may consist, among others, in movable and immovable properties, but also bonds and shares. Rather than to the form chosen and to the fact that the investment had been formally effected through a company registered in a third country, the Tribunal should have appreciated the gist of the above provision, which is to protect the investments carried out by economic operators of either Party in the territory of the other.

Even the textual reading of the qualification "por persona fisica o juridical de una Parte contraente" is not fully convincing: unlike Articles 25.1 and 2.b of the ICSID Convention, Article 1 does not refer to legal or natural persons *having the nationality of either Party* as a general rule qualified by the possibility of consensual derogation—which may warrant a narrower interpretation of the treaty—[48] but a more generic and possibly broader connection between the investor and the State Party.[49] Exactly due to the generic notion of investment *ratione personae*, the reference to general international law was not misplaced; on the contrary, it was appropriate as a means to interpret that provision. It was also appropriate to refer to notions of nationality elaborated for the purpose of diplomatic protection, given that Italy was acting primarily in that role. However, instead of construing a "legal context" for the purpose of conferring an ordinary meaning based on the alleged state of general international law in 1993, it should have meant identifying "any relevant rules of international law applicable in the relations between the parties" at the time of application of the contested provision in accordance with Article 31.3.c of the Vienna Convention on the Law of the Treaties. The most important provision should have been Article 9 of the Articles on Diplomatic Protection approved by the ILC in 2006, which is reflective of customary

[46] Ibidem, para 205.

[47] Italy v. Cuba, Final Award, supra n. 1, Dissenting Opinion of Arbitrator Tanzi, para 33.

[48] See Letelier Astorga 2007, pp. 443–445; Schlemmer 2008, pp. 75–81; Schreuer 2009, pp. 279–283.

[49] For an overview of different types of nationality clauses contained in BITs see Sinclair 2005.

international law as it has emerged over the course of the twentieth century and the first years of the current century. According to that provision:

> For the purposes of the diplomatic protection of a corporation, the State of nationality means the State under whose law the corporation was incorporated. However, when the corporation is controlled by nationals of another State or States and has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality.[50]

In other words—and unlike what the Award seems to suggest—general international law accommodates situations where the "formal" nationality of a company is purely fictitious, by providing for the prevalence of a "genuine link": this is in line with international law's original character, which is to recognise legal claims based on real and effective ties. As noted by Tanzi, the exception spelled out in the second sentence of Article 9 completely fitted the situation of Cristal Vetro and Pastas y Salsas: the two companies were fully controlled and managed by Italian nationals, their seat of management was in Italy and there were no activities carried out in Panama and Costa Rica, respectively. They should have been considered Italian legal persons for the purpose of Article 1.1 of the BIT, hence for the purpose of Italy's diplomatic protection.

Against the dangers of fictitious constructions in matters of nationality and espousals of claims, one is tempted to recall Judge Treves' conclusion in his separate opinion in the *Grand Prince* case. In discarding registration as evidence of the nationality of a ship entailing the right of Belize to seek its release under Article 292 of UNCLOS, Judge Treves concluded that:

> A "registration" of such an artificial character as that which might have existed for the *Grand Prince*, whatever the name it receives, cannot be considered as "registration" within the meaning of article 91 of the Convention. And it is only this kind of registration that makes a State a flag State for the purposes of article 292 of the Convention [on the Law of the Sea].[51]

6 Concluding Remarks

The arbitration between Italy and Cuba is a rather unique case of diplomatic protection being exercised with regard to alleged breaches of a BIT and despite the presence in the treaty of a clause allowing investor/State arbitration. It is interesting in that it has addressed a number of different issues of general international law confirming the view held by Tullio Treves in several writings[52] that the

[50] Draft Articles on Diplomatic Protection with commentaries UN Doc. A/61/10 (2006), pp. 52–55.

[51] ITLOS: "Grand Prince" (Belize v. France), Judgment (20 April 2001), Separate Opinion of Judge Treves p. 2.

[52] E.g. Treves 2007, 2012.

fragmentation of international law is far from being a reality (and especially if one seeks the evidence in international investment dispute settlement). Overall, one remains with the impression that the Award, whether settling the dispute over complex questions of fact and law or whether interpreting the BIT on the basis of customary international law, is neither incoherent, nor manifestly errs in applying the law; it is simply imbued with excessive formalism.

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