School of International Arbitration, Queen Mary, University of London

International Arbitration Case Law

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THE REPUBLIC OF ITALY
V.
THE REPUBLIC OF CUBA

(AD HOC ARBITRATION),

FINAL AWARD

Case Report by Orlando F. Cabrera C.[**]
Edited by Ignacio Torterola [***]

A final award rendered, on January 15, 2008, in Paris, France, by the majority, under the Agreement between the Government of the Republic of Italy (hereinafter Italy) and the Republic of Cuba (hereinafter Cuba) on the Promotion and Protection of Investment (hereinafter the Agreement) in accordance with the arbitration rules prepared by the ad hoc Arbitral Tribunal.

Tribunal:	Me. Yves Derains, (President), Prof. Attila Tanzi and Dr. Narciso A. Cobo Roura
Claimant's Counsel:	Avv. Ivo Maria Braguglia, Head of the Diplomatic Litigation, Ministry of Foreign Affairs, assisted by the Counsel for the State Gaetano Zotta, Minister Plenipotentiary Giorgio Bosco and Prof. Roberto Baratta
Defendant's Counsel:	Lda. Mercedes de Armas García, Ministry of Foreign Affairs

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1. Facts of the case

According to Italy, and based on the facts described below, Cuba did not comply its treaty obligations. Therefore, Italy initiated diplomatic demarches for the settlement of disputes without success.[1] By note of 16 May 2003, Italy notified Cuba its intention to resort to arbitration.[2]

Italy acted not only as a subject directly harmed in its subjective rights guaranteed by International Law and the Agreement, but also exercised diplomatic protection on behalf of its investors, whose rights have been breached because of the behaviour of the Cuban authorities or actions of Cuban persons, mainly companies under the control of the State allegedly attributable to Cuba.[3] The remedy claimed by Italy encompassed the following cases: (a) Caribe and Figuerella Project s.r.l. (Caribe); (b) Finmed s.r.l. (Finmed); (c) Icemm s.r.l. (Icemm); (d) Crystal Vetro SA; (e) Pastas y Salsas Que Chevere. and (f) Menarini Società Farmaceutica.[4]

Caribe is an Italian company incorporated to operate particularly in the Caribbean markets. Its main purpose is the creation and management of aesthetic medicine, beauty, health and tourist centres. On September 3, 1999, Caribe and Grupo Hotelero Gran Caribe SA executed a contract with a term of three years for the opening of a beauty centre in the hotel Habana Libre Trip. On November 3, 2000, the Cuban party closed without notice to the beauty centre on the ground that there was a service of tattoos, which was not in the list of services authorized by the Ministry of Internal Commerce. Despite that the operating licence was restored, the Italian company was not informed. Therefore, the Italian company was not able to resume its activity.[5]

In 1996, Grupo Cubanacan (Cubanacan) and Finmed Limited (Finmed Ltd) executed a "convenio de asociación" which provided for the establishment of a joint company Medi Club SA (Medi), a company organized under the Cuban law, whose corporate purpose was the construction and management of a tourist resort in Cuba. Cubanacan is dependent on the Cuban State; Finmed Ltd is an Irish company whose shareholders are two Italian companies that requested that Finmed Ltd. be substituted by Finmed, an Italian company. In 1998, the Shareholders' Meeting of Medi approved the entry of Finmed in Medi in lieu of Finmed Ltd., subject to the approval of the Cuban authorities. Cubanacan

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[1] Final Award ¶ 1

[2] Final Award ¶ 2, Art. 10 of the Agreement.

[3] Final Award ¶ 46

[4] Final Award ¶ 55, in its first writings, Italy submitted 16 cases. Following the Preliminary Award of March 15, 2005, Italy only submitted to the Tribunal 9 cases. During the development of the proceedings, Italy waived to submit the following cases: Mego srl, Mercadino s.r.l. and Costa Container Lines Spa. Therefore, the above cases were not discussed in the final award.

[5] Final Award ¶ 56

considered that there was no need for a government approval because the shareholders of Finmed were the same shareholders of Finmed Ltd. The shares of Finmed Ltd. were not transferred to Finmed.

2. *Legal issues discussed in the decision*

In the Preliminary Award rendered by majority, the Tribunal decided that Italy could invoke diplomatic protection and therefore exercise it on behalf of its nationals as long as the investor has not brought international arbitration against the host State. The Tribunal quoted that diplomatic protection is "*l'endossement (appropriation serait peut-être plus exacte) par un Etat de la réclamation d'un particulier lésé par un fait internationalement illicite d'un autre Etat ou d'une organisation internationale.*"[6] Thus by the appropriation of the claims of Italian nationals, Italy did not need to justify any representation.[7]

In addition, the Tribunal recalled that in its Preliminary Award decided that: (i) the concept of investment, according to the agreement must, be understood as any economic operation comprising an economic contribution, certain duration in time and a participation in the risks of the operation; (ii) there is no need to verify the exhaustion of local remedies when Italy submits a breach of one of its rights under the Agreement even if it grounded the violation of the Agreement on a harm allegedly suffered by individual investors. Whether local remedies have or have not been exhausted by the investor may be an element for the appreciation of the Agreement's breach ground alleged by Italy; (iii) when Italy exercises the right of diplomatic protection of its nationals, the existing local remedies in the Cuban legal order must have been exhausted, unless it is established that such remedies are not effective.[8]

Additionally, the Tribunal recalled that it should, when analysing the merits, verify if, in each of the cases submitted to arbitration, the conditions for the exercise of diplomatic protection are met, i.e. that there has been a behaviour of Cuba bearing on the interests and rights of natural or legal Italian persons. A wrongful behaviour of Cuba may involve the requirement of exhaustion of local remedies and a breach of the rights and interests of Italian persons.[9]

2.1 The six cases advanced by Italy

(a) Caribe and Figuerella Project s.r.l. (Caribe) (¶¶ 144-169)

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[6] "The endorsement by a State of the claim of an individual injured by an internationally wrongful act of another State or international organization." Dailler, Pallet, Droit international public, 7 ed., Paris, 2002, p. 809.

[7] Final Award ¶ 141

[8] Preliminary Award ¶¶ 2, 3 and 88

[9] Citing the Preliminary Award p. 38 ¶ 66, Final Award ¶ 143

The Tribunal held that the ownership of the equipment provided for leasing by Caribe did not affect the qualification of investment.[10] The contract was a lease agreement for equipment and provision of services. The Tribunal considered that such contract was comprised by the broad definitions of investment according to Art. 1 of the Agreement. Section e) states: "any right of economic order conferred by law and the contract" and section c) states the "financial debts for sums of money or any other right for obligations or services having an economic value as well as the results of investments, as defined in section 5 below." Nevertheless, for the purpose that a contract be protected by the Agreement, it must also meet the conditions of contribution, duration and participation in the risks stated in the Preliminary Award, in the light of the international jurisprudence.

In this case, the existence of a contribution was established. As regards the duration, the Tribunal noted that the contract was for three years. The duration of three years justified the qualification of investment. The required minimum duration in order to confer the qualification of investment, as the doctrine has observed is 2 to 5 years.[11] Therefore, the requirement of duration was met.[12]

The Italian company was part of the risks by ensuring the Hotel its participation in relevant expenditures in addition to a monthly fixed income. The Tribunal emphasized the essential character of the risk met on investor's remuneration, in the distinction between an investment and a simple services agreement.[13]

The contract filled the requirements of an investment set out in the Preliminary Award: economic operation comprising an economic contribution, certain duration in time and a participation in the risks of the operation. The Agreement was applicable and the Tribunal dismissed the objection of lack of jurisdiction raised by Cuba.[14]

The Tribunal found that the cancelling of the license could not be characterized as an internationally wrongful act of Cuba. In addition, the Tribunal noted that Caribe was not the holder of the licence but the Hotel, because according to the contract, the service provided by the Italian company was to rent the necessary equipment for the operation and the support services. Caribe was not covered by the cancelling decision. Furthermore, the decision was not illegal. The authority that granted the certificate was unaware that services of tattoos would be performed when it awarded the licence. The cancelling, after knowing the

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[10] Final Award ¶ 145

[11] Salini c. Maroc, "La Jurisprudence du CIRDI", Emmanuel Gaillard, 2004 p. 621 and D. Carreau Th Flory, P. Jauillard, Droit International Economique, 3 ed., Paris, LGDJ, 1990, p. 558-578 ; C. Schreuer, «Commentary on the ICSID Convention » ICSID Review-FILJ, vol. II, 1996, 2 p 318-493.

[12] Final Award ¶151

[13] Salini c. Maroc op. cit.

[14] Final Award ¶ 155

existence of a tattoo service constituted a significant activity of the beauty centre and such services were not allowed, was a brutal decision, but not illegal.[15]

The existence of problems in relations with public authorities is a universal reality that not only nationals, but also foreigners sometimes have to suffer. Such inconveniences, without other qualifiers, and the resulting dissatisfaction do not necessarily justify the protection of International Law.[16]

The Tribunal held that a wrongful act is attributable to the State if it is committed by a person or an entity which is a body of the State under domestic law of the State in question. The same applies if it is not a body of that State but an entity authorized by the law of that State to exercise prerogatives of public power, provided that, in this case, the person or entity acts in that capacity.[17] However, the State cannot hide behind a private law structure devoid of prerogatives of public power in order to escape from its responsibility if it commits an act which incurs in responsibility by its intermediary.[18] The statue or the prerogatives conferred to an entity by the law of the State that created it, it is not a definitive test to decide whether it should be treated as a State entity capable of engaging the responsibility of the State. It is a question of fact and law to be determined according to the principles of international law.[19]

International jurisprudence has developed criteria to determine the existence of a State entity. Structural Order: If the entity is directly or indirectly owned by the State, or controlled by the State, it can be assumed that it is a State entity.[20] However, this presumption is not conclusive. In order to consider a State company as a State entity capable of engaging the responsibility of the State, it is needed that in fact or in law it be entrusted with the elements of governmental authority and that said company acts in this capacity. This is why a functional test is preferred to the structural test in international jurisprudence.[21] The fact that a company be owned or controlled by the State is not decisive to assimilate it to the State if its activities are essentially of commercial nature and not governmental. Similarly, a commercial private company that fills government functions will be regarded as an organ of the State capable of engaging the liability of the last.[22]

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[15] Final Award ¶ 156, the brutality of the decision was attenuated by the reinstatement of the license 20 days later. However, there was a condition; the service of tattoos had to be suspended until a final decision be adopted.

[16] Final Award ¶ 157, citing *Azinian et al. v. Mexico* ICSID Reports, Vol. 5, pp. 286-7

[17] Final Award ¶ 160, Arts. 4 and 5 of the Draft articles on the Responsibility of States for internationally wrongful acts adopted by the International Law commission in its 53rd Session (2001).

[18] Ian Brownlie, System of the Law of Nations, State responsibility, Part I pp. 132-137.

[19] Decision on jurisdiction issued in the ICSID case of Mafezzini v. Kingdom of Spain, June 25, 2000, ¶82.

[20] *Id.* ¶ 77

[21] Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic, ICSID Case No. ARB/97/4, Decision on jurisdiction, May 24, 1999, ICSID Review — Foreign Investment Law Journal, Vol. 14, 1999, p. 250.

[22] Final Award ¶ 161

Finally, the responsibility of the State is committed by the actions or omissions of any physical or juridical person, which acts on these directives or under its control.[23] But, the control of the State must be focused on the fault of the person and not on it from a structural point of view.[24]

The Tribunal accepted the functional test. Thus, the Hotel could not be considered a Cuban State entity. The management of a hotel is not an activity of governmental nature nor involves the exercise of governmental authority. It is a commercial activity. In general, the actions or omissions of the Hotel cannot undertake the liability of Cuba and thus base the exercise of diplomatic protection. It would have been different if it had been established that the attitude of the Hotel to Caribe was controlled by the State, however, this was not the case.

The Cuban State would be liable if Caribe would have been deprived of the opportunity to exercise local remedies in Cuba for the alleged damage suffered. If such had been the case, Italy would have the right to exercise diplomatic protection for this remedy.[25]

The Tribunal considered that Caribe did not exhaust local remedies. Italy mentioned several proceedings leading to decisions of inadmissibility, rejection or incompetence. The Tribunal found that the decisions of rejection were duly grounded, and in most cases, the action was declared inadmissible because of the arbitration clause of the contract. Due to this clause a Cuban tribunal declared itself incompetent to examine a claim of the Hotel against Caribe. Nevertheless, Caribe did not resort to the competent arbitral tribunal as it could have made.[26]

The claim of Italy exercising diplomatic protection to obtain compensation for the damage alleged by Caribe was rejected.

(b) Finmed s.r.l. (¶¶ 170-194)

Italy claimed that Cuba prevented the transfer of the investments made in Cuba by an Irish company to an Italian company Finmed on the initiative of Italian companies, i.e. Italy claimed that Cuba did not allow Finmed to be an investor. The Tribunal was competent because the Agreement undertakes Cuba to encourage Italian investment.[27]

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[23] Art. of the Draft Articles

[24] Final Award ¶ 162, Commentaires sur le Projet d'Articles sur la responsabilité de l'Etat pour fait internationalement illicite de la Commission de Droit International, *Documents officiels de l'Assemblée génerale, cinqunte-sixième sesión, Supplément n° 10,* (A/56/10) p. 92 - 97.

[25] Final Award ¶ 164

[26] Final Award ¶ 165

[27] Final Award ¶ 173, citing Art 2 ¶ 1 of the Agreement

Before analysing the merits, the Tribunal decided that it was important to verify whether the Italian company had exhausted local remedies in order to obtain compensation or whether it established that these remedies were not effective.[28]

The Tribunal only found that, through Mr Filippi, Finmed sought to trigger criminal proceedings. This has been sufficient to consider that local remedies have been exhausted.[29]

According to the Cuban Foreign Investment Law "*creada una empresa mixta, no pueden cambiar los socios, sino por acuerdo de las partes y con la aprobación de la autoridad que otorgó la autorización.*"[30] Accordingly, when the representatives of Cubanacan wrongly said to Mr. Filippi or Ms. Ciscato that there was no need to obtain a governmental approval, for a change of partner in Medi Company, this approval was essential. This error or the excessive optimism, if it were established, which was not the case, could not constitute a wrongful act giving rise to the damage alleged by Italy. It was however established that the documents to request this approval were never provided by the representatives of Finmed, due to the conflict between its associates. The Tribunal considered comprehensible that Cubanacan preferred to await clarification of the situation, due to the contradictory information of shareholders of Finmed Ltd. However, neither Mr. Filippi nor Ms. Ciscato submitted an application for the Government's approval, concerning the substitution of Finmed Ltd by Finmed, accompanied by their power to represent Finmed Ltd.[31]

There was a very complex situation regarding the documents related to the powers of Mr. Rampinini and Ms. Ciscato who were appointed as legal representative of Finmed Ltd. However, the Tribunal considered that without regard of the value of the documents submitted by Mr. Rampini to Cubanancan, the decision to replace Finmed Ltd. by Finmed could not be effective, where Ms. Ciscato could not show to be capable of making such a decision on behalf of Finmed Ltd. Furthermore, she did not represent Finmed Ltd. any more.[32]

It is possible that Cubanacan acted with certain precipitation in recognizing Mr. Rampini as representative of Finmed Ltd. before the Shareholders' Meeting of Medi. The documents submitted by Mr. Rampini looked quite suspicious. Nevertheless, this precipitation is explained by the will to end the blocking activity of Medi caused by the dispute between the shareholders of Finmed Ltd. Also, it should be noted that between opposing claims, Cubanacan retained one that respected the status quo, as with Mr. Rampinini, the investment in Medi remained the property of the investor of origin.

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[28] Final Award ¶ 176
[29] Final Award ¶ 179
[30] ¶ 5 of Art. 13 of the Cuban Law on Foreign Investment, Law No. 77 of 1995.
[31] Final Award ¶ 183
[32] Final Award ¶ 191

If there was a precipitation by Cubanacan, it was not the cause of the injury alleged by Finmed and its shareholders, which was found in the inability of Mr. Filippi and Ms. Ciscato to justify the power to act on behalf of Finmed Ltd. The Tribunal found that no wrongful act of Cubanacan nor Cuba was established that be the cause of the injury alleged by Finmed and its shareholders. The claim of Italy to obtain compensation for the damage alleged by Finmed and its shareholders had to be rejected.

(c) Icemm s.r.l. (¶¶195-199)

Icemm signed a sales agreement.[33] The Tribunal mentioned that in order to consider a sales contract as an investment, it is needed that fills the requirements of the Tribunal's concept of investment, that is to say that it covers an economic operation comprising a contribution, certain duration and a participation in the risks of operation.

The sale of goods or equipment is incompatible with the concept of contribution since the vendor looses any legal relation with the thing sold which is replaced in its patrimony by a sum of money leaving the country of alleged investment when performing the contract. The risk is limited to the risk of non-payment, that is the risk of breach by the buyer of its obligation, which is not a risk derived from the execution of the contract and from the success or failure of the transaction. Therefore, the exception of jurisdiction of Cuba was grounded and the Tribunal had no jurisdiction hear the case.

(d) Crystal Vetro SA (¶¶ 200-208)

According to the Agreement, the protected investment is performed by "natural or legal persons of a Contracting Party."[34] The wording of the Agreement appears to offer a choice of investment that is placed under the protection of the Agreement: either the person invests as a natural person of a Contracting Party, or the person invests as a juridical person of a Contracting Party. Investment of a Contracting Party through a juridical person of a third country is not contemplated by the text of the Agreement and appears to be *a priori* excluded from its scope.[35]

This literal interpretation is also consistent with views that prevailed in 1993 at the conclusion of the Agreement. Whenever the shareholder's interests are adversely affected by acts against the company, it is to the company that the shareholder must turn in order the company advance the desired action and the State of the shareholder has no title to exercise diplomatic protection in such a case, because the opposite solution would open the door to competing claims on

[33] It was expressly provided in the contract that the Vienna Convention of 1980 on the International Sale of Goods of 1980 was the applicable law.

[34] Art. 1 ¶ 1 of the Agreement

[35] Final Award ¶ 203

the part of several States which could create a climate of insecurity in international economic relations.[36]

The Agreement is only applicable to investments made in Cuba by natural or legal Italian persons and regarding legal persons, the nationality of the shareholders should not be taken into consideration.[37]

With respect to Crystal Vetro SA, Italy argued in these recent entries that the company was incorporated in Rome and became Panamanian, when the alleged harm had been already caused. Italy did not however present any document supporting its allegation. Conversely, Cuba submitted a notarized document "*Por el cual se protocoliza el Pacto Social de la sociedad denominada 'CRYSTAL VETRO S.A.' sociedad con domicilio en la ciudad de Panamá."* Therefore, Cuba's exception of jurisdiction was grounded and the Tribunal had no jurisdiction to hear the case.[38]

(e) Pastas y Salsas Que Chevere (¶¶ 209-211)

The Agreement only applies to investments made in Cuba by natural or legal persons of Italian nationality and in Italy by natural or legal persons of Cuban nationality. With regard to legal persons, the nationality of holders of capital should not be taken into consideration. The investment of Pastas y Salsas Que Chevere was carried out by a Costa Rican company, the Agreement therefore was not applicable. Accordingly, the exception of jurisdiction of the Republic of Cuba was grounded and the Tribunal had no jurisdiction to hear this case.

(f) Menarini Società Farmaceutica (¶¶ 212-221)

At the hearing of January 13, 2006, the Tribunal required Italy to submit the contract entered into by and between Menarini and MediCuba, a Cuban foreign trade company that would be the legal support for the investment. The contract provided to the Tribunal is entered into between Lusochimica Spa[39] and MediCuba. It is dated March 30, 1990 and is titled "Contrato de Compra - Venta."[40] Italy has produced in an annex 53 invoices issued by Menarini from 1987 to 1991 by a total of LIT. 3.552.432.187. Each invoice refers to a different contract number and to a different date. None of the invoices however refer to the contract provided to the Tribunal. The Tribunal doubted that the document presented by Italy concerns this case as it is dated 1990 while the contractual parties relation began in 1987. Nevertheless, the nomenclature is the same as that shown on the invoices; thus, the Tribunal considered this contract as a model contract. [41]

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[36] Final Award ¶ 204, citing *Barcelona Traction, Light and Power Ltd*

[37] Final Award ¶ 206

[38] Final Award ¶¶ 207 - 208

[39] An Italian company that according to Italy it would be part of the Menarini Group.

[40] In French (original language of the Award) and English it means a sales agreement.

[41] Final Award ¶¶ 215 - 217

In order to consider a sales agreement as an investment by the Tribunal, it shall fill the requirements of the concept of investment, i.e. that it includes an economic operation comprising a contribution, certain duration and participation in the risks. The sale of goods is incompatible with the concept of contribution since the vendor loses any legal relation with the thing sold when the contract is performed. The thing sold is replaced in the patrimony of the investor by a sum of money coming out of the country of alleged investment. With regard to the risk it is limited to the risk of non-payment (a breach by the buyer of any of its obligations), which is not a risk derived from the execution of the contract and from the success or failure of the transaction which is the legal framework but to its non-performing by the buyer.[42]

In addition, neither contribution nor participation in the risks were established by Italy. Therefore, the Tribunal had no jurisdiction to hear this case and the Agreement was not applicable.[43]

2.2 The action of Italy based on its own rights (¶¶222-245)

In the Caribe case, the Tribunal considered that the dysfunction in the treatment of cases by the Cuban administration[44] did not constitute a discriminatory treatment.[45] Similarly, no discriminatory treatment was discernible in the Finmed case. In fact, Italy reproach to Cubancan to have unduly favoured Italians from other Italians. If that were the case, that the Tribunal did not admit, Italy could not claim any discrimination on the part of Cuba against Italian citizens.

The Tribunal could verify, in the cases where it asserted jurisdiction that the decisions of the Cuban Tribunals had been rendered to the Italian parties in similar conditions to those in which justice is rendered in the majority of world's countries. Additionally, Italy did not prove that the treatment given to the Italian parties was different from the one reserved to Cuban citizens. Moreover, Italy's allegations pursuant to which Italian parties were unable represent themselves, were not supported by any evidence. Moreover, Italy did not establish that Cuba violated Arts. 2 ¶ 2 and 3 ¶ 2 of the Agreement.[46]

In the cases where it assumed jurisdiction, the Tribunal found no violation of the obligation of not expropriating Italian investors, either directly or indirectly, nor those related to the investors' right to retrieve the goods used for the investment in Cuba. In the Finmed case, it was found that the investment made by the Irish company was not transmitted to the Italian company for reasons that are not attributable to a wrongful act of Cuba. In Caribe case, where the problem could arise, the representative of the Italian company acknowledged at the hearing that his property had been entirely returned. The Tribunal therefore concluded that

[42] Final Award ¶ 219
[43] Final Award ¶¶ 220 - 221
[44] Failure to answer and lack of grounds in the decisions.
[45] Final Award ¶ 237
[46] Final Award ¶ 240

Italy did not establish that Cuba violated Art. 5 ¶ 2 of the Agreement nor impede investors to retrieve the goods used for the investment in Cuba.

Italy asked the Tribunal to note that Cuba would have violated the letter, the spirit and purpose of the Agreement and the standards of International Law on the treatment and the protection of foreigners. Nevertheless, these claims were not supported by any other allegation, different from those that the Tribunal estimated not to be established.[47]

The Tribunal rejected the claim of Italy based on its own rights in order to obtain a statement from the Tribunal establishing Cuba's breach of certain provisions of the Agreement, its letter, its spirit and its purpose, obligations derived from the Agreement and the standards of International Law. In these circumstances, the Tribunal did not resolve Italy's request to order Cuba to end the alleged violations and to give all assurances that it will respect its international commitments in the future.[48]

2.3 Cuba's condemnation to the symbolic payment of €1 (¶¶246-247)

In the cases for which the Tribunal assumed jurisdiction, Italy did not establish the existence of Cuba's refusal to amicably resolve the dispute through diplomatic channels. In these circumstances, the Tribunal dismissed Italy's claim of Cuba's condemnation to the symbolic payment of €1 for the breaches of the letter, spirit and purpose of the Agreement and its refusal to amicably resolve the dispute through diplomatic channels.

2.4 The subsidiary action based on unjust enrichment (¶¶ 248-252)

In Finmed case, no enrichment of Cuba could be invoked by Italy. The investment of the Irish company, Finmed Ltd., remained in its property and under its control. The fact that the investment could not be transferred to the Italian company, Finmed, for reasons which the Tribunal considered not attributable to Cuba was not the source of any enrichment by Cuba.

In Caribe case, Italy did not establish any enrichment of the Cuban State. There would be an enrichment of the Hotel. In addition, if there is an enrichment of the Hotel, it would not be unjust since the cause would be the lease agreement. The question would arise in terms of contractual liability of the Hotel and would be beyond the jurisdiction of the Tribunal. The Tribunal dismissed the subsidiary action of Italy on the basis of unjust enrichment.

2.5 The counterclaim of Cuba (¶¶ 253-254)

Art. 10 of the Agreement give both parties the right to submit to arbitration disputes relating to the interpretation and application of the Agreement. Unless it

[47] Final Award ¶¶ 242-243

[48] Final Award ¶¶ 244-245

is abusive, the exercise of such a right may be illegal and therefore cause damage. Although Italy has been unsuccessful in all its claims, the Tribunal did not find that its right to submit to arbitration was abusive. The counterclaim of Cuba by which claimed that Italy be condemn to publicly and diplomatically retract from the allegations as compensation for moral damages was dismissed.

2.6 The costs of arbitration (¶¶255- 257)

Art. 20 of the rules of arbitration provides that "*Chaque partie supporte ses frais d'arbitrage. Toutefois, le Tribunal Arbitral peut les répartir entre les parties, dans la mesure où il le juge approprié dans les circonstances de l'espèce.*" The derogation of the principle that each party bears its costs of arbitration can only be grounded by exceptional circumstances.[49] Such circumstances were not present in the procedure. Italy was unsuccessful in all its claims, but its recourse to arbitration was not abusive.[50] In the final phase of the procedure, exceptions, means and arguments of Cuba were rejected or discarded because of their lack of grounds.[51] Accordingly, the Tribunal decided that each party shall bear the costs of arbitration, including costs and fees of arbitrators as they have been made by the parties, and all other costs incurred.

3. Decision

The Agreement was not applicable and the Tribunal had no jurisdiction to hear following cases: (i) Icemm; (ii) Crystal Vetro SA; (iii) Pastas y Salsas Que Chevere; and (iv) Società Farmaceutica Menarini. Additionally, the Tribunal dismissed the following:

a. The claim of Italy exercising diplomatic protection to obtain compensation for the damage alleged by Caribe;
b. The claim of Italy exercising diplomatic protection in order to obtain compensation for the damage alleged by Finmend and its shareholders;
c. The claim of Italy on the basis of its own rights in order to obtain a statement from the Tribunal noting the violation by Cuba of certain provisions of the Agreement, its letter, its spirit and its purpose, obligations resulting from the Agreement and standards of International Law on the treatment and the protection of foreigners;
d. The subsidiary claim of Italy based on unjust enrichment;
e. The counterclaim of Cuba;
f. All other claims of the parties.

Each Party shall bear the costs of arbitration.

[49] Final Award ¶ 255
[50] Final Award ¶ 254
[51] Final Award ¶ 256