INTERNATIONAL DECISIONS

EDITED BY DAVID J. BEDERMAN AND DAVID P. STEWART

Interstate arbitration—bilateral investment treaties—diplomatic protection—exhaustion of local remedies—definition of investment

REPUBLIC OF ITALY v. REPUBLIC OF CUBA. Interim Award. *At* http://italaw.com.
Ad Hoc Arbitral Tribunal, March 15, 2005.

REPUBLIC OF ITALY v. REPUBLIC OF CUBA. Final Award. *At* http://italaw.com.
Ad Hoc Arbitral Tribunal, January 15, 2008.

In two recently unveiled decisions (Interim Award of March 15, 2005, and Final Award of January 15, 2008),[1] an ad hoc arbitral tribunal resolved an interstate dispute between Italy and Cuba arising out of "the interpretation and application" of the 1993 Bilateral Investment Treaty (BIT) in force between the two countries.[2] This case marks the rare occurrence when a BIT's interstate (rather than investor-state) dispute settlement provision has been invoked with a view to resolving disputes between certain home state nationals and the host state. The tribunal rejected all of the Italian claims, either on jurisdictional grounds or on the merits.

The dispute originated in injuries that a group of sixteen Italian companies, operating in a range of industry sectors (among them pharmaceuticals, tourism, and food production), claimed to have suffered as a consequence of a series of acts attributable to Cuba. In May 2003, Italy espoused these claims and, exercising diplomatic protection of these companies, invoked Article 10 of the Italy-Cuba BIT, which provides for ad hoc arbitration for the settlement of "disputes between the Contracting Parties concerning the interpretation and application" of the treaty.[3] Italy claimed that, through the conduct either of its organs or of certain state-owned entities, Cuba had breached its obligations arising under the BIT; specifically, to encourage investments in its territory (Art. 2(1)); to grant the necessary authorizations to prospective investors (*id.*); to provide fair and equitable treatment (Art. 2(2)); to abstain from arbitrary and discriminatory measures (*id.*); to provide national treatment (Art. 3(2)); to provide full protection and security (Art. 5(1)); to refrain from expropriating investments (Art. 5(2)); and to guarantee the repatriation of invested capital (Art. 6). Italy further claimed that Cuba had failed

[1] Republic of Italy v. Republic of Cuba, Interim Award (Sentence préliminaire) (Ad Hoc Arb. Trib. Mar. 15, 2005) (in French), *at* http://italaw.com [hereinafter Interim Award]; Republic of Italy v. Republic of Cuba, Final Award (Sentence finale) (Ad Hoc Arb. Trib. Jan. 15, 2008) (in French), *at* http://italaw.com [hereinafter Final Award]. English translations of the French and Italian documents in this case report are by the author. For an early comment on the two then-unpublished decisions, see Valeria Tonini, *La definizione di investimento nell'arbitrato tra Italia e Cuba*, 91 RIVISTA DI DIRITTO INTERNAZIONALE 1046 (2008).

[2] Accordo sulla promozione e protezione degli investimenti, Cuba-It., May 7, 1993, *at* http://www.unctad.org/sections/dite/iia/docs/bits/italy-cuba-it.pdf (in Italian) [hereinafter Italy-Cuba BIT or BIT].

[3] *Id.*, Art. 10(2).

to respect certain ancillary obligations provided for in the BIT's additional protocol (Interim Award, para. 30).

Italy maintained that, in pursuing its claim, it was invoking "double standing" (*double légitimation*), meaning that it was protecting not only its own rights arising out of the BIT but also the rights of its nationals on whose behalf it was acting (Interim Award, paras. 24–25). According to Italy, this double standing was rooted in the very institution of diplomatic protection, which implies that the rights of the state exercising diplomatic protection are indissolubly linked to the interests of the natural or juridical persons in whose favor it is acting (*id.*, para. 25).

The relief sought by Italy reflected this alleged double facet of its claim. In addition to requesting that Cuba cease the wrongful acts and provide guarantees of nonrepetition, Italy sought compensation (calculated in relation to each of the injuries allegedly suffered by the investors) and satisfaction (Interim Award, para. 34). In relation to the latter, Italy asked the tribunal to award "the symbolic amount of 1 euro for the continued and reiterated violation of the terms, the spirit and the purposes of the BIT, and for the refusal, the indifference and the silence by the Cuban authorities vis-à-vis the innumerable diplomatic initiatives directed at the amicable settlement of the disputes concerning the Italian investors" (*id.*).

In its Interim Award of 2005, the arbitral tribunal addressed various preliminary objections Cuba had raised as to the jurisdiction of the arbitral tribunal and the admissibility of certain claims. Cuba's first objection concerned the right of Italy to pursue its diplomatic protection claim. While Cuba did not appear to contest that petitioner could bring claims in its own name concerning the interpretation and application of the BIT, it did object to Italy's resort to the interstate dispute settlement clause for the purposes of the diplomatic protection claims (Interim Award, para. 47). In rejecting this objection, the tribunal considered whether the inclusion in Article 9 of the BIT of the usual investor-state provision was a bar to the home state's exercise of diplomatic protection within the framework of state-to-state proceedings pursuant to Article 10. In the tribunal's view, as long as the investor had not consented to international arbitration with the host state or submitted the dispute to arbitration, it could request diplomatic protection from its home state (*id.*, para. 65). On the other hand, if the investor had already brought a claim before an investor-state tribunal or given its advance consent to such dispute settlement, the home state would be barred from espousing the claim (*id.*).

This way of coordinating the two dispute settlement mechanisms closely reflects the approach provided for in Article 27 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, which prohibits diplomatic protection once the investor has submitted or consented to submit the dispute to ICSID arbitration.[4] Cuba, however, is not a party to the ICSID Convention and accordingly the investor-state provision in the Italy-Cuba BIT provides for ad hoc arbitration. In the tribunal's view, the absence of a similar provision in the Italy-Cuba BIT could not prevent the application "by analogy" of the principle in Article 27 (Interim Award, para. 65). Thus, Italy had the right to resort to diplomatic protection within the BIT's interstate arbitration framework, provided that the other jurisdictional requirements set forth in the treaty were met (*id.*, paras. 65–67).

[4] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 UST 1270, 575 UNTS 159 [hereinafter ICSID Convention].

Cuba's second objection concerned the BIT's *ratione materiae* requirement that the dispute concern an "investment." Article 1(1) of the BIT contains a typically broad definition of what constitutes an "investment" for the purposes of the treaty. According to the chapeau, an investment is to be understood as "any kind of asset invested by a natural or juridical person of a Contracting Party in the territory of the other Contracting Party, in accordance with the latter's laws and regulations." An enumerative list follows, which encompasses, inter alia, "claims to money or to any performance having an economic value," and "any economic right accruing by law or by contract."[5]

The tribunal noted that it had to look beyond the "tautological" terms of the BIT ("*investment* means . . . any kind of asset *invested*") (Interim Award, para. 80 (emphasis added)), in particular by referring to case law and doctrinal works (*id.*, para. 81). Without much elaboration, it concluded that, "except if otherwise expressly provided for in a Bilateral Investment Treaty, three elements are required for an investment: contribution, duration, and risk by the investor . . . . This permits excluding, for example, ordinary sales transactions" (*id.* (footnote omitted)).

In light of this holding, the tribunal invited Italy to submit, in the subsequent phase of the arbitration, only those cases which would qualify as "investments" as defined by the tribunal, that is, those that would entail a contribution, a certain duration, and participation in the risks associated with the economic operation (Interim Award, para. 85).

Cuba's third objection addressed the local remedies rule in international law. Cuba argued that the Italian investors had not exhausted their local remedies, and that Italy was therefore barred from resorting to diplomatic protection (Interim Award, para. 57). Italy responded that the rule was inapplicable when a state was pursuing its own rights, that Cuba had waived the requirement by entering into the BIT, and that in any event the remedies would not have been effective (*id.*, para. 41). On this issue, the tribunal distinguished the claim Italy was bringing in its own name from its diplomatic protection claim. The exhaustion rule, it said, did not apply to the first (*id.*, para. 88) but was a prerequisite to the second, as confirmed by the ruling of the International Court of Justice (ICJ) in the *Interhandel* case[6] (*id.*, para. 89). Italy further contended that because the treaty granted investors a direct right to resort to arbitration against the host state in its Article 9, there was no room left for the exhaustion rule. If the rule was dispensed with in connection with investor-state arbitration, it would be "illogical" to require Italy to respect that rule when it was invoking Cuba's responsibility within the interstate framework and seeking a favorable result for its investors (*id.*, para. 41). The tribunal disagreed and held that nothing in the BIT indicated that the state parties had waived the exhaustion rule for the purpose of diplomatic protection (*id.*, para. 90). The tribunal thus deferred to the merits phase its examination of whether in each of the submitted cases the investors had exhausted local remedies (*id.*, para. 91).

In light of the Interim Award, Italy decided to pursue only six of the sixteen individual claims it had originally submitted and withdrew the remaining ten. In its Final Award of 2008, the tribunal examined each of these six claims and dismissed them all, for different reasons. In two cases the tribunal found that the contracts at stake were merely contracts for the sale of goods (Final Award, paras. 197, 219). It held that while such contracts may entail a certain duration,

[5] Italy-Cuba BIT, *supra* note 2, Art. 1(1).

[6] Interhandel (Switz. v. U.S.), 1959 ICJ REP. 6, 27 (Mar. 21).

they lacked both the element of a "contribution" (because through the performance of the contract the seller loses any legal bond with the good sold, which is replaced by a sum of money) and the element of "risk" (because the risk borne by the seller consists merely of nonpayment by the buyer) (*id.*, paras. 198, 219). The tribunal rejected two further claims on the ground that the two companies were not incorporated in Italy, and thus did not satisfy the BIT requirements *ratione personae*. As regards Article 1(1) of the BIT (defining "investment," as seen above, as "any kind of asset invested by a natural or juridical person of a Contracting Party"), the tribunal found that the relevant criterion for determining the nationality of a juridical person was the place of incorporation, whereas any question about the nationality of the shareholders would be irrelevant (*id.*, paras. 200–11). It is unclear why the tribunal focused only on the first paragraph of Article 1 and never discussed the definition of "juridical persons" in paragraph 4 of the same article, which is based on the (different) criterion of the company's seat. The dissenting arbitrator, Attila Tanzi, criticizing the majority's reliance on the place-of-incorporation test as too restrictive (*id.*, diss. op., para. 31), would have taken into greater consideration the origin of the capital (exclusively Italian), also in view of the exception to the place-of-incorporation rule in Article 9 of the International Law Commission's Draft Articles on Diplomatic Protection (*id.*, paras. 31–36).[7] In the two remaining cases the tribunal found that the jurisdictional requirements of the BIT had been fulfilled but rejected the claims on their merits, holding that Cuba's revocation of a license to run a beauty center had not been "wrongful" (Final Award, paras. 156–69) and that the failure of Cuban authorities to authorize the transfer of shares from an Irish company to an Italian company within the framework of an Italian-Cuban joint venture for the development of a tourism project did not involve a wrongful act (*id.*, paras. 174–94).

All of the investor claims having been rejected either on jurisdictional grounds or on the merits, the tribunal accordingly also rejected the claims, based on the same facts, that Italy was pursuing in its own name (Final Award, paras. 222–52). Finally, the tribunal dismissed Cuba's counterclaim for a public apology from Italy for its decision to initiate the arbitration, which the arbitrators declined to view as "abusive" (*id.*, paras. 253–54).

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Investor-state provisions are now customarily included in the almost three thousand BITs concluded in recent decades, resulting in a true boom in investment treaty arbitrations. But the interstate dispute settlement clauses in these treaties have so far been largely ignored.[8] The Italy-Cuba arbitration can thus be considered a milestone because it is the first publicly known instance where an arbitral tribunal has rendered an award in an interstate dispute arising under

[7] The Dissenting Opinion of Arbitrator Attila Tanzi is also available at http://italaw.com. For the ILC Draft Articles and Commentary on Diplomatic Protection, Art. 9, see Report of the International Law Commission, Fifty-eighth Session 22, 52, UN GAOR, 61st Sess., Supp. No. 10, UN Doc. A/61/10 (2006).

[8] The only known precedent in the field other than the Italy-Cuba dispute is the interstate arbitration initiated by Peru pursuant to the Chile-Peru BIT in an attempt to block or hinder an ongoing investor-state arbitration where Peru was the respondent. Peru requested suspension of the investor-state proceedings as a consequence of the interstate arbitration. The request was denied by the investor-state arbitral tribunal and the interstate arbitration was pursued no further. *See* Empresas Lucchetti SA v. Peru, ICSID No. ARB/03/4, Jurisdiction, paras. 7, 9 (Feb. 7, 2005), *at* http://italaw.com; *see also* Christoph H. Schreuer, *Investment Protection and International Relations*, *in* THE LAW OF INTERNATIONAL RELATIONS—LIBER AMICORUM HANSPETER NEUHOLD 345, 350–51 (August Reinisch & Ursula Kriebaum eds., 2007).

a BIT when investor-state arbitration would have been an alternative option according to the treaty.[9]

The invocation of this kind of dispute settlement mechanism raises several issues of greater relevance to the architecture of the investment dispute settlement system, such as the scope of interstate dispute resolution provisions, the continuing role to be played by the exhaustion of local remedies rule, and the potential interplay between interstate and investor-state dispute settlement.[10] The contribution made by the Italy-Cuba arbitral tribunal on some of these issues is certainly noteworthy.

First, the tribunal clarified that interstate dispute settlement clauses on the interpretation and application of the BIT could also cover classic diplomatic espousal claims brought by the investor's home state. This conclusion should not be viewed as too surprising: identical dispute resolution clauses were often contained in the BITs' predecessors, the friendship, commerce, and navigation (FCN) treaties, and there is little doubt that disputes relating to an alleged injury to a national were subject to the dispute resolution clauses of those treaties.[11] Unlike FCN treaties, however, BITs also allow for investor-state arbitration, which prompts the question of how investor-state and state-to-state proceedings should be coordinated. The relevance of the observations made by the Italy-Cuba tribunal on this point extends beyond the case at issue, since most BITs provide for both dispute settlement mechanisms. One treaty that expressly addresses the interplay between diplomatic protection and investor-state arbitration is the ICSID Convention. The thrust of its Article 27 is that, once an investor has consented to submit or has submitted a dispute to ICSID arbitration, the investor's home state is barred from instituting state-to-state proceedings with a view to exercising diplomatic protection (except where the host state fails to abide by the arbitral award).

In the present case, the ICSID Convention did not apply since Cuba had neither signed nor ratified it. Nor did the applicable BIT contain any rule addressing the interplay between diplomatic protection and investment arbitration, as some other BITs do.[12] In such an uncertain framework[13] the tribunal first quoted with approval (Interim Award, para. 65) the finding in *CMS v. Argentina* that "diplomatic protection is intervening as a residual mechanism to be

[9] *See* Italy-Cuba BIT, *supra* note 2, Art. 9 (providing for investor-state arbitration).

[10] *See* Michele Potestà, *State-to-State Dispute Settlement Pursuant to Bilateral Investment Treaties: Is There Potential?*, *in* INTERNATIONAL COURTS AND THE DEVELOPMENT OF INTERNATIONAL LAW—ESSAYS IN HONOUR OF TULLIO TREVES (Nerina Boschiero & Tullio Scovazzi eds., forthcoming 2012).

[11] N. STEPHAN KINSELLA & NOAH D. RUBINS, INTERNATIONAL INVESTMENT, POLITICAL RISK, AND DISPUTE RESOLUTION: A PRACTITIONER'S GUIDE 420 (2005). One such example is the *ELSI* case, where it was undisputed that the claim brought by the United States on behalf of two American companies was subject to the state-to-state dispute settlement clause contained in the FCN treaty between Italy and the United States, which provided that "[a]ny dispute . . . as to the interpretation or the application of this Treaty" be submitted to the ICJ. *See* Elettronica Sicula S.p.A. (*ELSI*) (U.S. v. It.), 1989 ICJ REP. 15, 41–42, paras. 48–49 (July 20).

[12] *E.g.*, [Model] Agreement Between the Government of the Italian Republic and the Government of the ___ on the Promotion and Protection of Investments, Art. 10(5), *in* 12 UNCTAD, INTERNATIONAL INVESTMENT INSTRUMENTS: A COMPENDIUM 295 (2003), *available at* http://www.unctad.org/en/docs/dite4volxii_en.pdf; *see* Ben Juratowitch, *The Relationship Between Diplomatic Protection and Investment Treaties*, 23 ICSID REV. 10, 16–22 (2008).

[13] A similar situation would arise where the ICSID Convention has been ratified by both the home and the host states, but the investor avails itself of a different investor-state arbitration option (e.g., arbitration under the UNCITRAL Rules), which may be provided for in the BIT.

resorted to in the absence of other arrangements recognizing the direct right of action by individuals."[14] It then turned for guidance to Article 27 of the ICSID Convention. Without characterizing the principle established in Article 27 as a codification of a customary norm (for which it would have been difficult to provide relevant practice),[15] the tribunal nonetheless applied the principle "by analogy" (*id.*). This solution may be applauded as a matter of policy, because it curtails the risk that the host state will be exposed both to a diplomatic protection claim and to an investor-state arbitration at the same time, as well as the risk of possibly conflicting decisions by two different tribunals on the same facts. But it is difficult to say that this solution reflects the *lex lata*, as opposed to a consideration *de lege ferenda* on how to coordinate the two dispute settlement mechanisms correctly.

A further issue is the tribunal's adoption of an "objective" notion of investment for the purpose of the BIT's *ratione materiae* requirement. What constitutes an "investment" so as to establish the jurisdiction of an investor-state tribunal has become an acute issue under the ICSID framework.[16] Both case law and scholarship have suggested different approaches to the notion of investment under Article 25 of the ICSID Convention.[17] Tribunals have usually followed a "double-barreled" test, requiring that there be an "investment" under both ICSID Article 25 and the relevant BIT. One approach to the notion of investment under ICSID that has been widely (though not unanimously) followed refers to certain characteristics usually shared by investments. In particular, the criteria identified in the famous test in *Salini v. Morocco* (requiring a contribution, a certain duration, an element of risk, and a contribution to the economic development of the host state) have enjoyed wide success among ICSID tribunals.[18]

The conclusions of the Italy-Cuba tribunal should be viewed against this backdrop. In proposing its own tripartite definition (which adopts the first three *Salini* criteria, leaving out the fourth, relating to the contribution to the host state's development), the tribunal stated that it was guided by "international case law" (*la jurisprudence internationale*) (Interim Award, para. 81). Although no further references are provided in this regard (as the *Salini* case is mentioned only in connection with the different issue of legality of investment (*id.*, paras. 82–84)), the tribunal was clearly referring to case law developed under the ICSID framework. In other words, the tribunal refused simply to verify whether the economic operations at stake would fall under the extremely broad wording of the BIT[19] but applied a sort of double-barreled test,

[14] CMS Gas Transmission Co. v. Argentine Republic, ICSID No. ARB/01/8, Jurisdiction, para. 45 (July 17, 2003), 42 ILM 788, 795 (2003).

[15] Martins Paparinskis, *Investment Arbitration and the Law of Countermeasures*, 2008 BRIT. Y.B. INT'L L. 264, 285.

[16] *See* CHRISTOPH H. SCHREUER, WITH LORETTA MALINTOPPI, AUGUST REINISCH, & ANTHONY SINCLAIR, THE ICSID CONVENTION: A COMMENTARY 114–41 (2d ed. 2009).

[17] *See* Emmanuel Gaillard, *Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice*, *in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY—ESSAYS IN HONOUR OF CHRISTOPH SCHREUER (Christina Binder, Ursula Kriebaum, August Reinisch, & Stephan Wittich eds., 2009).

[18] Salini Costruttori S.p.A. v. Kingdom of Morocco, ICSID No. ARB/00/4, Jurisdiction, para. 52 (July 23, 2001), 6 ICSID Rep. 400 (2004), 42 ILM 609 (2003).

[19] *See, e.g.*, Petrobart Ltd. v. Kyrgyz Republic, SCC No. 126/2003 (Stockholm Chamber of Commerce Mar. 29, 2005), *at* http://italaw.com (holding that a contract for the sale of gas condensate qualified as an "investment" according to the broad definition given in Article 1(6) of the Energy Charter Treaty); *see also* Mytilineos Holdings SA v. Serbia & Montenegro, Partial Award on Jurisdiction, paras. 117–18 (Ad Hoc Arb. Trib. Sept. 8, 2006), *at* http://italaw.com (holding that "[the] *ratione materiae* test for the existence of an investment in the sense of Article . . . 25 ICSID Convention is one specific to the ICSID Convention and does not apply in the context of *ad hoc* arbitration provided for in BITs as an alternative to ICSID. . . . In the present *ad hoc* arbitration under the UNCITRAL

requiring in addition that each operation also fulfill the certainly more restrictive notion of investment based on the three *Salini* characteristics.[20]

The decision by the arbitration tribunal thus places itself in the line of cases that recognize the need to find an "inherent" meaning of the term "investment" under the BIT, even when jurisdiction is established outside the framework of the ICSID Convention. The relevance of this case becomes even more apparent if one considers that the tribunal's Interim Award predates other, more recent awards embracing a similar approach, such as the decisions in *Romak v. Uzbekistan*[21] and *Alps Finance & Trade v. Slovak Republic*.[22] The tribunal's two awards in the Italy-Cuba dispute serve as a warning that the purpose of a BIT is not to protect every kind of economic transaction, and in particular not contracts for the sale of goods; and they evidence a progressive assimilation of the jurisdictional requirements (*ratione materiae*), under ICSID and non-ICSID arbitrations, toward the creation of a uniform notion of investment in all investment treaty arbitrations.

MICHELE POTESTÀ
Graduate Institute of International and Development Studies, Geneva

Sweden—state immunity—immunity from execution—commercial and noncommercial property—official purposes

SEDELMAYER v. RUSSIAN FEDERATION. No. Ö 170-10. 2011 Nytt Juridiskt Arkiv 475. Supreme Court of Sweden, July 1, 2011.

On July 1, 2011, the Swedish Supreme Court (Högsta Domstolen) held that state immunity did not preclude execution of a judgment against real property in Sweden that was owned by the Russian Federation and used in part for diplomatic and other official purposes.[1]

Rules one would therefore have to conclude that the only requirements that have to be fulfilled in order to confer *ratione materiae* jurisdiction on this Tribunal are those under the BIT" (footnotes omitted)).

[20] *See, e.g.*, Final Award, paras. 148–53 (applying this "dual approach" to one of the cases at issue).

[21] Romak S.A. v. Republic of Uzbekistan, PCA No. AA280, paras. 157–243 (Perm. Ct. Arb. Nov. 26, 2009), *at* http://italaw.com (holding that "the term 'investments' under the BIT has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a *contribution* that extends over a *certain period of time* and that involves some *risk*" (para. 207)).

[22] Alps Finance & Trade AG v. Slovak Republic (Ad Hoc Arb. Trib. Mar. 5, 2011), *available at* http://italaw.com. In this award, the tribunal considered whether an assignment contract, providing for the sale of certain receivables, could qualify as an investment under the applicable Swiss-Slovak BIT, and in particular be considered a claim "to any performance having an economic value" (Art. 1(2)(c)). In denying that such a "one-off sale transaction" (para. 245) could qualify as an investment, the tribunal noted that "when the claim arises from a contract, the contract itself should qualify as an investment. This in turn implies that the contract satisfies certain minimum requirements, such as duration, contribution and risk" (para. 231). The arbitrators found that "the BIT definition of investment is not an entirely self-standing concept, but refers to a more general concept given by international law rules" (para. 240). *See also* Emmanuelle Cabrol, Pren Nreka v. Czech Republic *and the Notion of Investment Under Bilateral Investment Treaties: Does "Investment" Really Mean "Every Kind of Asset"?*, 2009–10 Y.B. INT'L INVESTMENT L. & POL'Y 217 (commenting on the unpublished *Pren Nreka v. Czech Republic* award of Feb. 5, 2007).

[1] Sedelmayer v. Russian Federation, Nytt Juridiskt Arkiv [NJA] 2011-07-01 p. 475 Ö 170-10, *at* http://www.hogstadomstolen.se/Avgoranden/2011/#ruling (in Swedish) [hereinafter *Sedelmayer*]. The case is also available at https://lagen.nu/dom/nja/2011s475, including decisions in the lower courts. For an unofficial and fairly good English translation, see http://www.arbitrations.ru/files/articles/uploaded/Supreme_Court_of_Sweden_01072011.pdf. All translations in this case note are by the author.