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ICSID Decision on Jurisdiction in AZURIX and Tokios .*

Two new ICSID arbitral tribunal decisions on jurisdiction have been published. One is *AZURIX CORP v. The Argentine Republic*[1], the other is *Tokios Tokeles v. Ukraine*[2].

In *AZURIX* , an American corporation filed a request to arbitrate a dispute against the Argentine Republic for alleged breach of the Argentine Republic- United States of America Bilateral Investment Treaty (BIT) related to a supposed expropriation in connection with a concession for distribution of potable water and the treatment of disposal sewerage in the Province of Buenos Aires. Although the concession was granted to an *ad-hoc* Argentine company incorporated by Azurix's Argentine subsidiaries, the parent company took the claimant's role.

Argentina objected the jurisdiction of the ICSID Tribunal based on the arguments that Azurix had agreed to the jurisdiction of the courts of La Plata and had waived any other fora and that Azurix had submitted the dispute to local courts and that triggered the "fork in the road" provision of the BIT.

In *Tokios*, a business enterprise established under the laws of Lithuania initiated arbitration against Ukraine alleging that Ukraine engaged in actions that breached the BIT between Ukraine and Lithuania. Tokios created a wholly owned subsidiary in Ukraine. Ukrainian nationals, in turn owned the majority of shares of Tokios.

Ukraine objected the jurisdiction of the ICSID Tribunal arguing that claimant was not an investor of Lithuania, had not made an investment in accordance with the local laws and the dispute did not arise from the investment. It also objected the admissibility of the claim.

These are the main principles set by those decisions:

I- Waiver of jurisdiction does not exclude ICSID jurisdiction in certain circumstances.

In *AZURIX*, the Tribunal stated that when the claims or causes of action between a local claim and a claim before an ICSID Tribunal are different, the waiver of jurisdiction clause does not exclude its jurisdiction. The dispute before the local courts was related to contractual arrangements whereas the one before ICSID was related to alleged breach of treaty obligations. Consequently, the waiver of any other jurisdiction and forum related to contractual actions and not to treaty actions. Rights arising under a contract are different from the rights arising out of the treaty. The Tribunal analyzed previous cases and concluded that the forum selection clause did not exclude ICSID jurisdiction when the "subject-matter of any proceedings before the domestic courts under the contractual arrangements in question and the dispute before the ICSID tribunal was different and therefore the forum selection clauses did not apply"[3].

[1] 43 ILM 262 (2004)
[2] Decision of April 29, 2004, Case No. ARB/02/18. http://www.worldbank.org/icsid/
[3] *Supra note* 1 at paragraph 79.

II- "Fork in the road" provision's requirements.

Azurix rejected the objection to jurisdiction based on the argument that the dispute has already been submitted to the courts of Argentina under the provisions of the USA-Argentina BIT.

The Tribunal followed the same rationale used for the former objection to jurisdiction, i.e., the difference between contract and treaty claims. It concluded that for the "fork in the road" provision to be applicable the local court proceeding and the ICSID arbitration proceeding needed to be between the same parties, based on the same cause of action and based on the same facts.[4] Thus, a choice by a local subsidiary to file a domestic law suit arising out of a contract does not impede a foreign parent company to file a request for arbitration with ICSID –if all the other requirements for ICSID jurisdiction are met– for an alleged violation of a treaty.

III- Determination of investor's nationality.

In *Tokios*, the majority of the Tribunal stated that the parties to a BIT were free to determine the criteria to determine nationality[5] and set the definition of investor and foreign control of a local entity for purposes of article 25 (2)(b) of the ICSID Convention. It was not up to the Tribunal to question the criteria used therein.

"…Contracting Parties are free to define their consent to jurisdiction in terms that are broad or narrow; they may employ a control-test or reserve the right to deny treaty protection to claimants who otherwise would have recourse under the BIT. Once that consent is defined, however, tribunals should give effect to it, unless doing so would allow the Convention to be used for purposes for which it clearly was not intended".[6]

The majority of the Tribunal concluded that Tokios, a Lithuania incorporated company under control of

Ukrainian nationals was a foreign investor under the terms of the Lithuania-Ukraine BIT and rejected the objection to its jurisdiction based on this argument.

The dissenting arbitrator[7] stated that "…it is within the limits determined by the basic ICSID Convention that the BITs may determine the jurisdiction and powers of the ICSID tribunal, and it is not for the Contracting Parties in their BIT to extend the jurisdiction of the ICSID tribunal beyond the limits determined by the basic ICSID Convention".[8]

Accordingly, the ICSID system was not intended to be used to settle disputes between a State and its own nationals, even if the investor acted through a foreign entity. Prof. Weil stressed that the purpose of the ICSID Convention was to govern international investments, that is one that implies a transborder flux of capital.[9]

[4] *Id* at paragraph 90.
[5] *Supra note* 2 at paragraph 24.
[6] *Id* at paragraph 39.
[7] Professor Prosper Weil dissented from the majority. http://www.worldbank.org/icsid/cases/awards.htm April 29, 2004
[8] *Supra note 2* at paragraph 13.
[9] *d* at paragraph 19.

IV- Capital of investment needs not be originated from abroad.

According to the majority in *Tokios*, the parties to a BIT have discretion to determine what is an investment and the requirements an investment should meet for ICSID jurisdiction. If the relevant BIT does not impose the requirement that a specific investment needs to be originated in the other Contracting Party, the tribunal cannot read differently.

'In our view, however, neither the text of the definition of 'investment', nor the context in which the term is defined, nor the object and purpose of the Treaty allow such an origin-of-capital requirement to be implied. The requirement is plainly absent form the text…the origin-of-capital requirement is inconsistent with object and purpose of the Treaty, which …is to provide broad protection to investors and their investment on the territory of the other party".

The majority then concluded that the ICSID Convention does not contain any requirement that the investment at issue in a dispute has to have an international character in which the origin of the capital is decisive.[11]

Prof. Weil, dissenting from the majority stated that "…when it comes to ascertaining the international character of an investment, the origin of the capital is relevant, and even decisive. True, the Convention does not provide a precise and clear-cut definition of the concept of international investment –no more than it provides a precise and clear-cut definition of the concept investment–, and it is therefore for each ICSID tribunal to determine whether the specific facts of the case warrant the conclusion that it is before an international investment".[12]

V- Directness of an investment dispute.

The Tribunal of *Tokios* stated that for jurisdiction to arise the dispute needs not to be only about the investment. It could also be about the investment operations.

"For a dispute to arise directly out of an investment, the allegedly wrongful conduct of the government need not be directed against physical property of the investor. The requirement of directness is met if the dispute arises from the investment itself or the operations of its investment…"[13]

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The views expressed here should not be attributed to the organizations with which he is affiliated.

[10] *Id* at paragraph 77.
[11] *Id* at paragraph 82
[12] *Supra note* 7 at paragraph 20.
[13] *Supra note* 2 at paragraph 91.