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*New ICSID decisions on jurisdiction.**

I- Construction operation can be qualified as investment.

In the Salini v. Morocco case,[1] the Tribunal analyzed the objections to its jurisdiction, one of which referred to the argument that construction contracts did not qualify as investments under the Convention. The Tribunal considered the criteria generally identified by the Convention's commentators, indicating that those were: existence of contribution, certain duration and risk participation. It also added that the operation should contribute to the development of the host State as stated by the Convention's preamble. In that specific case the Tribunal found that the construction contract fulfilled the criteria. Even in the risk aspect, the Tribunal indicated that a construction project that lasts several years, for which total costs cannot be established with certainty in advance, created a risk for the contractor. Thus, the construction operation could be qualified as investment and the disputes that arose directly out of it were susceptible to be heard by ICSID.

[1] Salini Costruttori SpA & Italstrade SpA v. Kingdom of Morocco, Decision on Jurisdiction, 23 July 2001, Journal de Droit International 196 (2002)

II- Act of court of a State could be attributable to the State.

In the Loewen case,[2] the additional facility Tribunal was presented with the issue of whether an act of a court of a State could be attributable to the State.

The Loewen Group and Raymond Loewen were Canadian investors in the funeral home and funeral insurance business. An American competitor in an American court sued Loewen. According to Loewen, the court that handled the trial violated different provisions of NAFTA. The Tribunal reiterated a previous decision stating that a court is an organ of a State. Thus, its acts are attributable to it.

However, the Tribunal stated that for an act of a local court to be challengeable at the international level as an act of the State the act needs to be a final decision of the judiciary against which all local remedies had been exhausted.

In the same direction, in CMS[3] the Tribunal found that a State could be internationally liable under a treaty for actions taken by the judiciary, administrative agencies, the executive and legislative branch of the State, unless an express

[2] The Loewen Group, Inc and Raymond L. Loewen v. United States of America, Case No. ARB (AF)/98/3 award of June 26, 2003.
[3] CMS v. Argentina, 42 ILM 788 (2003).at paragraph 108

reservation is made in that regard when the treaty from which the responsibility arises is executed.

III- Nationality needs to be continuous.

In Loewen,[4] the claimant entered into a reorganization plan (better known as Chapter 11 of the United States Bankruptcy Code) and ceased to exist as a business entity. The former Canadian business was reorganized as a United States corporation. The rights, titles and interests under the arbitration claim against the United States of America were assigned to a newly created Canadian corporation, whose apparent only asset and business was the arbitration claim.

The Tribunal found that the real party in interest, i.e., the beneficiary of the claim was an American citizen, i.e., the company created as part of the reorganization plan.

The Tribunal stated: "In international law parlance, there must be continuous national identity from the date of the events giving rise to the claim, which date is known as the *dies a quo*, through the date of the resolution of the claim, which date is known as the *dies ad quem*."[5]

IV- Minority shareholders can have access to ICSID.

In CMS,[6] an American company CMS, who had invested in an Argentine company Transportadora de Gas del Norte (TGN) and owned 29.42% of the shares was affected by an alleged suspension by Argentina of a tariff adjustment formula for gas transportation all of which, it was argued, arose out of general economic policies.

The Tribunal stated that although it did not have jurisdiction over general economic policies taken by Argentina, it did have jurisdiction over measures of general economic policies that affect the investment provided they have been adopted in violation of international law or in violation of commitments made to the investor. "This means in fact that the issue of what falls within or outside the Tribunal's jurisdiction will be subsumed in the determination of whether a given claim is or is not directly connected with specific measures affecting the investment".[7]

The Tribunal then held that nothing in international law prohibited investment claims submitted by shareholders independently from those of the corporation concerned. It also said that although that ruled seemed to protect majority

[4] *Supra note 2.*
[5] *Id* at paragraph 225.
[6] *Supra note 3.*
[7] *Id* at paragraph 34.

or controlling shareholders, the prevalence of protection to all kind of shareholders through treaty arrangements made that approach the exception.

V- Umbrella clause was defined.

In SGS v. Pakistan,[8] a Swiss company, SGS, had entered into a contract with Pakistan to provide pre-shipment inspection services with respect to goods to be exported from certain countries to Pakistan. Subsequently, Pakistan notified SGS that the contract was terminated. Both Pakistan and SGS initiated separate legal actions in Switzerland and Pakistan for breach of contract. SGS also filed a request for ICSID arbitration alleging that Pakistan had breached the contract and had also violated the BIT between Switzerland and Pakistan.

Pakistan objected to the Tribunal's jurisdiction, inter alias, because the dispute as submitted by claimant had arisen out of actions and omissions with respect to a contractual arrangement between Pakistan and SGS, which had a choice of forum provision different from ICSID.

SGS argued that by virtue of an, arguable umbrella clause (article 11) in the relevant BIT,[9] a breach of contract was elevated to a violation of a BIT. Thus, when the contract was breached SGS had two actions against Pakistan, one for breach of contract and one for violation of the BIT.

The Tribunal appeared to be the first ICSID Tribunal facing the issue of whether a BIT provision could transform a purely contractual claim into a BIT claim. It held that "…under general international law, a violation of a contract entered into by a State with an investor of another State, is not, by itself, a violation of international law".[10]

The Tribunal then stated that "…it is not saying that States may not agree with each other in a BIT that henceforth, all breaches of each State's contracts with investors of the other State are forthwith converted into and be treated as breaches of the BIT".[11]

However, in that case the Tribunal found that that was not the intention of the parties to the BIT, for which it rejected SGS's argument about article 11. The Tribunal pointed out that that article contained an obligation to constantly guarantee the observance of the commitments the State has entered into with respect to the investments of the investors of the other Contracting Party. Those commitments could imply implementing rules to give effect to contractual or statutory undertakings or could preclude a State from taking actions short of denial of justice.

The Tribunal concluded that it did not have jurisdiction over the contractual claim or over the contractual claim transformed into a BIT claim by virtue of an umbrella clause. However, it retained jurisdiction over the other parts of the BIT claim.

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

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[8] SGS Societé Générale de Surveillance S.A. v. Islamic Republic of Pakistan, International Arbitration Report, Vol 18, # 9, September 2003.

[9] Article 11 of the Switzerland-Pakistan BIT provided: "Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party"

[10] *Supra note* 8 at paragraph 167.

[11] *Id* at paragraph 173.