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## **Burgeoning ICSID Decisions \***

Over the past few months several ICSID decisions have been published regarding jurisdiction and merit issues. The following sections highlight the most important questions addressed by the ICSID tribunals.

### **IN GENERATION UKRAINE V.**

**UKRAINE:**<sup>1</sup> a U.S. corporate vehicle, wholly owned by a U.S. national, claimed damages for violating the terms of the Ukraine-U.S. BIT for alleged expropriation.

### **Acts of municipalities are attributable to the State under International Law.**

The respondent objected the tribunal's jurisdiction contending that the alleged expropriation was an act of a municipal authority rather than of the central government.

The Tribunal ruled that in international law, acts of municipalities are attributable to the State of which they are part. However, the Tribunal underlined that it would have been a different matter if cause of action had

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<sup>1</sup> <http://www.asil.org>

been based on an alleged breach of contract between the investor and the municipality.<sup>2</sup>

## **Creeping expropriation**

Generation Ukraine alleged that property had been taken by means of creeping expropriation. The Tribunal rejected the claim pointing out that "a plea of creeping expropriation must proceed on the basis that the investment existed at a particular point in time and that subsequent acts attributable to the State have eroded the investor's rights to its investment to an extent that is violative of the relevant international standard of protection against expropriation"<sup>3</sup>. The Tribunal did not find the State to have taken right-eroding acts and stressed that investments inherently entail risk and thus investments' loss of value do not imply expropriation. The Tribunal also mentioned that failure to seek reasonable correction from local courts for acts affecting an investment, even if not required by the rule of exhaustion of local remedies, could disqualify an international claim. At the end, the arbitral Tribunal dismissed the claim.

### **IN MTD EQUITY SDN.BHD AND MTD CHILE S.A. V. REPUBLIC OF**

**CHILE**<sup>4</sup>, a Malaysian company made an investment in Chile to build a "planned community" in an urban section of Santiago. The company obtained a permit to invest in the form of a contract with Chile's Foreign Investment Commission. Subsequently, the investor learned the land where the community was to be built was exclusively for

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<sup>2</sup> Id. Generation Ukraine, Inc, v. Ukraine, at para 10.5, award of September 15, 2003

<sup>3</sup> Id at para 20.26

<sup>4</sup> Award of May 21, 2004

agricultural purposes under Chile's urban development and environmental policies.

The investor initiated ICSID arbitration alleging indirect expropriation and unfair and inequitable treatment in violation of the Malaysia-Chile BIT.

### **Fair and Equitable Treatment in public policy**

The investor alleged that the government's approval of the investment in spite of knowing of its impossibility violated the obligation of fair and equitable treatment.

Based on the Malaysia-Chile BIT MFN clause, fair and equitable treatment provisions of the Denmark-Chile and Croatia-Chile BITs were deemed applicable to the investor.

The Tribunal ruled that States are not limited in their authority under national laws or policies except to the extent that exercising that authority would contravene BIT obligations.

The Tribunal then indicated "...in terms if the BIT, fair and equitable treatment should be understood to be treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment".<sup>5</sup>

However, the Tribunal stressed that "...BITs are not an insurance against business risk"<sup>6</sup> and pointed out that under International Law, a State cannot be compelled to change a policy or pass a law. That is to say the investor did not have the right to amendment of a land use policy. The investor was not denied a permit, but rather denied amendment

of a regulation. Thus, while the failure to amend public policy was not considered expropriation, unfair treatment did occur, as the investor was admitted to invest in the country under circumstances known by the State that made impossible the investment. The Tribunal reached a decision whereby only a portion of the compensation claimed by the Malaysian firm was awarded because "the claimant failed to protect themselves from business risks inherent to their investment in Chile".

### **In CHAMPION TRADING COMPANY, AMERITRADE INTERNATIONAL, INC., JAMES T. WAHBA, JOHN B. WAHBA, TIMOTHY T. WAHBA v. ARAB REPUBLIC OF EGYPT**<sup>7</sup>

claimants were shareholders of an Egyptian cotton trade company. According to claimants, Egypt took measures which constituted violations of the U.S.-Egypt BIT and thus filed for ICSID arbitration.

### **Double nationality of individuals**

Egypt objected to ICSID jurisdiction based on the argument that, besides American nationality, claimants had Egyptian nationality. Regarding the issue of double nationality, the Tribunal analyzed the Nottebohm ICJ decision and the A/18 decision from the IRAN-United States Claims Tribunal in reference to "real and effective nationality".

Claimants alleged that their real and effective nationality was American. The

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<sup>5</sup> Id at para 113

<sup>6</sup> Id at para 178

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<sup>7</sup> Award of October 21, 2003



Tribunal quoted the A/18 decision and stressed that “real and effective nationality was indeed relevant ‘unless an exception is clearly established’”. That exception was present in Article 25(2)(a) of the ICSID Convention which expressly provides that Nationals of another Contracting State do not include any persons who, on the date of consent or the date when the request was registered, were nationals of the Contracting State party to the dispute. The Tribunal found that since claimants mentioned Egyptian nationality in the documents setting up the vehicle of their investment without mention of their US nationality, it did not have jurisdiction.

**In ENRON CORPORATION AND PONDEROSA ASSETS, L.P. v. THE ARGENTINE REPUBLIC**,<sup>8</sup> Enron had previously initiated an ICSID arbitration against Argentina for alleged violations of the U.S.- Argentina BIT based on an assessment of Stamp Taxes applied to the gas transportation company within certain Argentine provinces. In the new claim, Enron Corporation intended to add ancillary claims based on the allegation that the Government of Argentina adopted measures that affected the claimant’s investment in a gas transportation company.

#### **Ius Standi when indirect ownership**

Argentina objected to the competence of the Tribunal on the ground that the claimants lack *ius standi* because they were shareholders in a company that was allegedly affected by the governmental measures and only that company could bring claims against Argentina.

The Tribunal stated that under the US-Argentina BIT, minority or indirect shareholders are protected. It established differences with *Mondev* and *Vacuum Salt* noting that the United States Supreme Court has held, in the context of the Foreign Sovereign Immunities Act, that “...when legislation refers to indirect ownership this means that minority shareholders are entitled to certain rights as well and that the formal corporate structure is no longer controlling”.<sup>9</sup> The Tribunal thus held that the dispute was within its jurisdiction.

**In SIEMENS A.G. v. THE ARGENTINE REPUBLIC**<sup>10</sup> a German company initiated ICSID arbitration against Argentina, based on alleged violation of the Germany-Argentina BIT after a contract to establish a system of migration control and personal identification was suspended and then terminated.

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<sup>8</sup> Award of August 2, 2004

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<sup>9</sup> Id at para 38.

<sup>10</sup> Award of August 3, 2004

Argentina objected to ICSID jurisdiction based on eight arguments. The Tribunal rejected all of them.

### **Interpretation of BITs**

The claimant argued that by virtue of the MFN clause of the Germany-Argentina BIT it was entitled to certain procedural benefits of the Argentina-Chile BIT. Argentina objected to this claim, but the Tribunal analyzed the purpose of the Germany-Argentina BIT to find that it was to promote investment and create conditions favorable to investors and that interpretation of the BIT provisions should be done under such context. “The Tribunal shall be guided by the purpose of the Treaty as expressed in its title and preamble. It is a treaty ‘to protect’ and ‘to promote’ investments...The intention of the parties is clear. It is to create favorable conditions for investments and to stimulate private initiative”.<sup>11</sup>

### **Extent of MFN clause**

Argentina argued that if the Argentina-Chile BIT was applicable by virtue of the MFN clause, unfavorable provisions should thus also apply. The Tribunal stressed that under the MFN clause, only the favorable provisions were applicable.

In view of the inapplicability of unfavorable provisions and the purpose of the BIT, the Tribunal rejected the objection to jurisdiction stating, “...an MFN clause...as its own name indicates...relates only to more favorable treatment. There is also no correlation between the generality of the application of a particular clause and the generality of benefits and disadvantages that the treaty concerned may include. Even if the MFN clause is of a general

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<sup>11</sup> Id at para 81

nature, its application will be related only to the benefits that the treaty of reference may grant and to the extent that benefits are perceived to be such”.<sup>12</sup>

**In JOY MACHINERY LIMITED v. ARAB REPUBLIC OF EGYPT**,<sup>13</sup> a company, incorporated under the laws of England and Wales, alleged that the Republic of Egypt violated the terms of the 1976 UK-Egypt BIT, including protection against expropriation, the guarantee of free transfer of funds and fair & equitable treatment.

The dispute arose out of a contract for mining equipment and systems with the Industrial and Mining Projects of the Arab Republic of Egypt (IMC). Claimants alleged that although it had been paid, the letters of Guarantee and Contract Performance had not been released.

### **Commercial disputes**

Egypt objected jurisdiction based on non-existence of investment, absence of treaty-based claims and the contract’s forum selection clause. The Tribunal found that a bank guarantee is simply a contingent liability and not an investment. The Tribunal found the contract from which the dispute arose to be an entirely normal commercial provision and hence the disputes that arose out of it not under ICSID jurisdiction. The Tribunal analyzed previous ICSID cases where the term “investment” had been interpreted concluding “...the activity in question was beyond doubt an investment or because there was an arbitration clause involved. The same hold true of concession contracts in which the

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<sup>12</sup> Id at para 120

<sup>13</sup> Award of August 6, 2004.

investor is called to perform a public service on behalf of the State”.<sup>14</sup>

Establishing a distinction with *Fedax*, the Tribunal stated that “...the financing in question had and was being used by the State to finance its budget under a law of public credit”.<sup>15</sup>

Although that stated above was sufficient to dismiss the claim, the Tribunal also considered the other objections to jurisdiction.

### **Umbrella clause revisited**

The Tribunal analyzed the *umbrella clause* and stressed that not all contract disputes were treaty disputes unless a clear treaty violation is present. It stated: "In this context, it could not be held that an umbrella clause inserted in the Treaty, and not very prominently, could have the effect of transforming all contract disputes into investment disputes under the Treaty, unless of course there would be a clear violation of the Treaty rights and obligations or a violation of contract rights of such magnitude as to trigger the Treaty protection, which is not the case. The connection between the Contract and the Treaty is the missing link that prevents any such effect."<sup>16</sup>

\* Written by **Omar E. García-Bolívar**. Member of the panel of arbitrators of the International Center for Settlement of Investment Disputes (ICSID) and the panel of arbitrators of the World Intellectual Property Organization (WIPO).

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

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<sup>14</sup> Id at para 59

<sup>15</sup> Id at para 60

<sup>16</sup> Id at para 81