THE REQUIREMENT OF CONTINUOUS CORPORATE NATIONALITY AND CUSTOMARY INTERNATIONAL RULES ON FOREIGN INVESTMENTS: THE LOEWEN CASE

PIA ACCONCI

1. INTRODUCTION

In its Award of 26 June 2003, the ICSID arbitral Tribunal dismissed the claim of the Loewen Group, Inc., (TLGI) against the United States, inter alia, for its lack of continuous nationality.

The ICSID case arose from litigation before the US's Mississippi State Court between TLGI, doing business in Mississippi, and a local competitor. This Court rendered a judgment against TLGI and condemned it to pay a considerable sum of money, US$ 500 million. As Mississippi law requires an appeal bond of 125 per cent of the judgment to stay execution, TLGI did not appeal against this verdict. TLGI could not comply with that condition and agreed to settle the case for US$ 175 million. The settlement took place one day before the forced execution of the Mississippi Court's judgment began. TLGI then filed a request for arbitration with the ICSID Secretary against the US under Chapter Eleven of the NAFTA Agreement for breach of the Agreement, in particular its Article 1105, due to the Mississippi Court's harsh verdict and the requirement of excessive bond for appealing prescribed by Mississippi law.

The ICSID Award includes the Tribunal's findings with regards to most of the merits of the case, as the US's additional objection concerning the NAFTA requirement of diversity of nationality was filed after the ICSID Tribunal had already dealt with them.

Briefly, the Tribunal denied that there had been "a violation of customary international law and a violation of NAFTA for which Respondent [was] responsible". However, it admitted the US had not treated TLGI in accordance with the "minimum standards of fair international law and fair and equitable treatment". The

* Associate Professor of European Union Law, University of Teramo; Member of the Committee on International Law concerning Foreign Direct Investment of the International Law Association. The present article is based on a paper circulated at the Fourth Public Conference of the British Institute of International and Comparative Law's Investment Treaty Forum on "Nationality and Investment Treaty Claims", held in London on 6 May 2005. The author may be contacted at pacconci@tiscali.it.

1 Para. 217 of the 2003 ICSID Award. This Award, as well as the other ICSID decisions mentioned in this paper, are available at the ICSID website, http://www.worldbank.org/icsid.

2 In particular, para. 137, ibidem.
Tribunal considered decisive in this sense "the question whether [...] the trial and the verdict alone or in combination with the subsequent proceedings amounted to an international wrong", as TLGI claimed, for the lack of available and appropriate remedy under US’s municipal law. TLGI maintained that it had voluntarily settled the case "under extreme duress". The Tribunal dismissed this claim, arguing that TLGI had not explained why it had settled and had "failed to pursue its domestic remedies". According to the Tribunal, the Mississippi Court’s verdict and the bond requirement had not made the settlement agreement "the only course which TLGI could [have] reasonably be[en] expected to take". Therefore, the Tribunal ruled that TLGI’s claim should be dismissed on the merits, even though dismissal was eventually grounded on “a question of jurisdiction”.

The Tribunal upheld the US’s additional objection to its jurisdiction because of the change in the claimant’s corporate structure and nationality following the reorganization plan approved by the Canadian and US bankruptcy courts, while the ICSID proceedings were pending.

At the time the claim arose, TLGI was the Canadian parent company of a group of companies which were doing business in Canada and the US. TLGI had been established by a Canadian citizen, Raymond Loewen. The latter was also its main shareholder and chief executive officer.

According to the reorganization plan, TLGI ceased to exist as an independent company and transferred its assets and obligations to its former American subsidiary, the Loewen Group International, Inc., (LGII). Meanwhile LGII changed its name to Alderwoods Group, Inc., and established two new companies: Nafcanco – a wholly-owned Canadian subsidiary – and Delco, a Delaware limited liability company. In the light of the reorganization plan, TLGI retained “bare legal title” to its NAFTA Articles 1116 and 1117 claims against the United States, while it transferred to Nafcanco all rights and responsibilities concerning these claims.

The US presented its Memorial on Matters of Jurisdiction and Competence arising from the Restructuring of the Loewen Group, Inc., on 1 March 2002, to justify its new jurisdictional objection, stressing that, after the reorganization plan and the subsequent change in the corporate structure, Canada was no longer the claimant’s home State. As Alderwoods was its new parent company, TLGI’s group of companies had

1 Para. 142, ibidem.
2 Para. 7, ibidem.
3 Para. 217, ibidem.
4 Para. 215, ibidem.
5 Para. 1, ibidem. For a criticism of the Tribunal’s findings see generally WERNER, “Does the Loewen Award Endanger the Credibility of the NAFTA Dispute Settlement Mechanism?”, The Journal of World Investment & Trade, 2005, p. 79 ff.; MENDELSON, “Does the Loewen Award Endanger the Credibility of the NAFTA Dispute Settlement Mechanism?”, ibidem, p. 83 ff. In favour of the ICSID Award cf. LEGUM, “Does the Loewen Award Endanger the Credibility of the NAFTA Dispute Settlement Mechanism?”, ibidem, p. 89 ff.; CARVER, “Does the Loewen Award Endanger the Credibility of the NAFTA Dispute Settlement Mechanism?”, ibidem, p. 95 ff.