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 as it lacked continuous nationality.

The Tribunal upheld the U.S.A.’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 U.S. 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 U.S.A. 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 Arts. 1116 and 1117 claims against the United States, while it transferred to Nafcanco all rights and responsibilities concerning these claims.

The U.S.A. 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 become based in the U.S.A. The U.S.A. maintained that, as a matter of fact, there were no longer any NAFTA claims. Specifically, TLGI had ceased to be a «disputing party» in conformity with NAFTA Chapter Eleven as, with the reorganization of its corporate structure, TLGI had voluntarily changed its relevant nationality to this end.

In particular, TLGI’s NAFTA claims had to be dismissed because of the principle that no private person ‘can maintain an international claim against its own State’ and more specifically because of the principle that the requirement of continuous nationality has to be fulfilled through the date of the award. In the U.S.A.’s opinion, TLGI, with its complex reorganization plan, had tried, on one hand, to relaunch its business activities in the U.S.A., where it had been earning most of its revenues, and, on the other, to maintain, at least indirectly, its NAFTA claims thanks to the Nafcanco’s Canadian nationality. However, according to the U.S.A., the assignment of TLGI’s NAFTA claims to Nafcanco was not relevant since this latter lacked independence in respect of Alderwoods which had undoubtedly become the beneficial owner of such claims.

In order to demonstrate that a claimant like TLGI could no longer bring a claim before ICSID arbitration under NAFTA Chapter Eleven, in its 2002 Memorial, the U.S.A. referred not only to the
text of the NAFTA Agreement, but also to principles of customary international law, to the jurisprudence of Canadian as well as American courts and of international arbitral tribunals.

Precisely, to prove that customary international law prescribed the requirement of continuous nationality through the settlement of the dispute, in this Memorial, the U.S.A. mentioned some examples of international practice which had developed in the field of diplomatic protection especially during the period of time between the end of the nineteen hundreds and the beginning of the following century. The U.S.A. also referred to such practice, and to other developments which had subsequently taken place in the field of diplomatic protection, such as the 1970 International Court of Justice’s judgment on the Barcelona Traction case, to show that the nationality of an international claim depended on that of the ‘real claimant and equitable owner’. Hence, there were no longer NAFTA claims since, after the reorganization plan, Alderwoods, a U.S. company, rather than Nafcanco, a Canadian company, had become the real equitable owner.

Note that, in their Art. 1128 Submissions, also Canada and Mexico found grounded the U.S.A.’s objection to the ICSID jurisdiction over TLGI’s claim in the light of customary international law and the NAFTA Agreement.

The claimants, TLGI and Raymond Loewen, argued that the U.S.A.’s objection was not grounded since TLGI was a proper NAFTA «disputing party» when it had submitted the claim. At that time, TLGI had a nationality other than the American one and had maintained this nationality continuously since the time the claim had arisen. TLGI stressed that, also in conformity with previous ICSID case-law, «both the pre-submission and post-submission assignment of claims do not affect jurisdiction» as «the former cannot create jurisdiction where none exists, and the latter cannot destroy jurisdiction once a claim is vested».

2. THE ICSID TRIBUNAL’S FINDINGS CONCERNING THE REQUIREMENT OF CONTINUOUS NATIONALITY IN THE LOEWEN CASE

In its 2003 award, the ICSID Tribunal upheld the U.S.A.’s objection to its jurisdiction due to the lack of the claimant’s continuous nationality since it assumed that «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».

The Tribunal also agreed that the requirement of continuous nationality was a principle of international law which could be waived only expressly. Since the NAFTA Agreement does not include Contracting States’ clear intention in this connection and refers to the date of the submission of the claim only as regards the requirement of nationality in general, the Tribunal decided to apply customary international law to solve the problem, in conformity with Art. 1131 of the Agreement itself.

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1 See, in particular, the second Art. 1128 Submission of Canada of 27 June 2002 and the third Art. 1128 Submission of Mexico of 2 July 2002.
4 Para. 229 of the 2003 ICSID Award.
5 Para. 226 of the 2003 ICSID Award.
Then, the Tribunal concluded that, according to «applicable rules of international law», corporate nationality had to be indeed continuous through the resolution of the dispute\textsuperscript{6}. The Tribunal denied that claimants had proved a contrary development of international law in this connection\textsuperscript{7}.

The Tribunal totally disregarded the fact that contemporary investment treaties, either bilateral or multilateral, and the recent works of the International Law Commission\textsuperscript{8} do not include the requirement of continuous nationality through the resolution of the claim.

As a general rule, the Tribunal chose to confine itself strictly to the text of the NAFTA Agreement as the only source of its jurisdiction\textsuperscript{9}. Therefore, it paid no attention to the fact that under the ICSID Convention the requirement of continuous nationality was not even prescribed for corporate investors\textsuperscript{10}. The Tribunal did not apply this Convention at all, since neither Canada nor Mexico were ICSID Member States and consequently the proceedings were held under the ICSID Additional Facility Rules\textsuperscript{11}.

On the other hand, the ICSID Tribunal endorsed the relevance attributed by the U.S.A. to past international practice in the field of diplomatic protection. The Tribunal established that even the NAFTA Agreement corroborated such relevance\textsuperscript{12}, although this Agreement, like many other recent ones, did not refer to diplomatic protection for the settlement of disputes between a Contracting State and an investor of another Contracting State. On the contrary, the Tribunal recognized that NAFTA Chapter Eleven «represents a progressive development in international law whereby the individual investor may make a claim on its own behalf and submit the claim to international arbitration»\textsuperscript{13}.

3. ASCERTAINING CUSTOMARY RULES IN THE FIELD OF FOREIGN INVESTMENTS: A HIGHLY CONTROVERSIAL ISSUE

The ICSID Tribunal’s approval of the U.S.A.’s reference to customary international law casts doubt, as the exact content of customary rules on the treatment of foreign investors is uncertain and subject to different views.

Undeniably, between the end of the nineteen hundreds and the beginning of the following century, the consolidation of principles and rules of customary international law guaranteeing full security to foreign investors was an essential feature of international obligations concerning the treatment of aliens. However, as is well-known, things changed with the expansion of Communist regimes, as well as with the birth of State-planned economies in Central Europe and of the newly independent countries from the decolonization process. A heated debate between industrialized countries and developing countries enlivened the UN General Assembly meetings especially in the

\textsuperscript{6} In particular, Paras. 228, 229 and 230 of the 2003 ICSID Award.
\textsuperscript{7} Para. 235 of the 2003 ICSID Award.
\textsuperscript{8} See, in particular, the 2000 ‘Special Addendum concerning Continuous Nationality and the Transferability of Claims’ prepared by the rapporteur on diplomatic protection of the International Law Commission, Professor John Dugard (A/CN.4/506/Add.1), as well as Arts. 5 and 10 of the Draft Articles on Diplomatic Protection approved within the International Law Commission on 24 May 2004 (A/CN.4/L.647).
\textsuperscript{9} Para. 234 of the 2003 ICSID Award.
\textsuperscript{10} According to the ICSID Convention, only the date on which the parties to a dispute consented to submit the dispute to ICSID conciliation or arbitration is relevant to determine the nationality of a company for ICSID jurisdictional purposes. However, in the Tradex case the ICSID Tribunal took a different decision.
\textsuperscript{11} In particular, Para. 235 of the 2003 ICSID Award.
\textsuperscript{12} Paras. 229 and 230 of the 2003 ICSID Award.
\textsuperscript{13} Para. 223 of the 2003 ICSID Award.
1960’s and 70’s. Traditional rules were challenged. As a consequence, their content became uncertain and legal security for foreign investments under customary law was undermined.

This debate between north and south raised the problem of identifying the sources of so-called international law regarding foreign investments. In particular, this debate made it difficult, if not impossible, to apply ‘classical’ international law as it was conceived by industrialized countries.

Even today, when foreign direct investment is welcome in the developing world, a clear consensus on the exact content of customary principles and rules concerning foreign investments has not been consolidated yet. That is why treaty regulation is nowadays paramount in order to dispel doubts related to the level of treatment and protection that foreign investment is entitled to, especially in the relations among industrialized countries, developing countries and economies in transition.

In this connection the ICSID award of 9 January 2003 in the ADF case is of the greatest significance, since it shows that even industrialized countries, such as the U.S.A. and Canada, may not share a common view as to the existence of customary rules concerning the treatment of foreign investments.

The uncertain content of customary principles and rules on foreign investments also concerns the issue of determining nationality, and its continuance, as a prerequisite either for a State to exercise diplomatic protection or for the jurisdiction of international arbitral tribunals which can be activated by a State or by a private investor, whether a person or a company. That is mainly true at present since the widespread dynamism produced by the globalization process makes persons and companies operate all over the world and, hence, get linked to different countries.

Thus, the ICSID Tribunal of the Loewen case could not have upheld the U.S. view that continuous nationality through the solution of the claim was to be considered an uneventful requirement prescribed by customary international law.

As already pointed out, the Tribunal came to such a decision since the NAFTA Agreement does not expressly waive the alleged customary rule, that is continuous nationality through the solution of the claim.

That is a crucial point as regards the Tribunal’s reasoning.

The Tribunal recognized that today the requirement of continuous nationality tends to be applied differently as most of the disputes between foreign investor and host State are settled without recourse to diplomatic protection. Besides, the Tribunal admitted that even the NAFTA Agreement is in line with this trend as regards settling investment disputes between a Party and an investor of another Party.

Nevertheless, the Tribunal applied the alleged customary rule, which at any rate chiefly regarded investors as physical rather than corporate persons. The Tribunal deemed the silence of the

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14 Paras. 178-183, in particular para. 179, of the 2003 ICSID Award.
16 See F. Orrego Vícuña, “Changing Approaches to the Nationality of Claims in the Context of Diplomatic Protection and International Dispute Settlement”, *ICSID Review*, 2000, p. 340 ff., esp. p. 353. However, the ICSID Decision on Jurisdiction of 29 April 2004 in the Tokios Tokéles case refers to a completely different view. According to this Decision, incorporation is still the standard rule in customary international law to determine corporate nationality (esp. Paras. 69-70).
NAFTA Agreement as clear ground for applying such a rule. In the Tribunal’s opinion, this silence could not allow a less strict application of the traditional requirements of diplomatic protection\(^{18}\).

4. IS THE ALLEGED CUSTOMARY INTERNATIONAL RULE ON THE REQUIREMENT OF CONTINUOUS NATIONALITY APPLIED BY THE ICSID TRIBUNAL IN THE LOEWEN CASE IN LINE WITH RECENT INTERNATIONAL PRACTICE CONCERNING SETTLEMENT OF INVESTMENT DISPUTES?

Our critical remark on the Tribunal’s reasoning is supported by some scholars whose opinions differ from the U.S.A.’s about the solution to the problem of continuous nationality emerging from past international practice in the field of diplomatic protection\(^ {19}\). It is also supported by the different trend in the solution to this problem which is shown by the great number of recent investment treaties, as well as by some other examples of recent international practice developed on the same issue with special regard to corporate investors.

The Iran-U.S. Claims Tribunal case-law is one of these examples.

Art. VII, para. 2, of the 1981 Iran-U.S. Claims Settlement Declaration states that «“claims of nationals” of Iran or the United States, as the case may be, means claims owned continuously, from the date on which the claim arose to the date on which this Agreement enters into force by nationals of that State».

The Tribunal’s Chambers and the Full Tribunal have had to interpret this provision due to the silence of the Declaration in this connection.

Iranian arbitrators strenuously asserted that, according to customary international law, the nationality of any claim had to be continuous all through the corresponding arbitration proceedings, that is until the date of the pertinent final award\(^ {20}\).

The Chambers did not accept such a view in many cases, especially in those where they applied the guidelines defined by the first Chamber in the Flexi-Van, Inc., and General Motors Corp. cases to determine the nationality of public companies.

The Chambers decided that for jurisdictional purposes the nationality of the claim had to be continuous from the date on which the claim had arisen to the date of entry into force of the 1981 Algiers Agreements.

The Chambers also followed the same attitude in most of the cases concerning so-called indirect claims.

They ascertained their jurisdiction even in cases where a wholly-owned U.S. subsidiary had transferred its claim to another wholly-owned U.S. subsidiary linked to the same U.S. parent company. The Chambers did not consider this transfer as an interruption of the continuous U.S. nationality of the claim\(^ {21}\). In the Endo Laboratories, Inc., case, the U.S. nationality of the claim was

\(^{18}\) Paras. 229 and 230 of the 2003 ICSID Award.


\(^{20}\) For the same view see I. Brownlie, Principles of Public International Law, 5\(^{th}\) ed., Oxford, 1998, pp. 483-484. However, the same author later admitted that «much depends on the terms of the agreement creating the machinery for the settlement of claims» (Principles of Public International Law, 6\(^{th}\) ed., Oxford, 2003, p. 461).

\(^{21}\) See the Gould Marketing, Inc.; Oil Field of Texas, Inc.; Mobil Oil Iran, Inc.; and Arthur J. Fritz & Co. cases.
considered continuous, although, after the deadline to submit claims had expired, there was a merger between the damaged subsidiary and its parent company.

Consistently, the third Chamber in the award on the SEDCO, Inc. v. NIOC case denied its jurisdiction for the lack of continuous nationality of the claim, since, during the relevant period of time for jurisdictional purposes, the Iranian government had taken shares of the Iranian SEDCO subsidiary, Sediran. The Chamber clarified that «the transfer of shares and not the taking is of prime jurisdictional significance for it is the loss of shareholder status that breaks the Claimant’s ownership of the indirect claim». For similar reasons the Tribunal’s jurisdiction was dismissed in other cases concerning indirect claims, such as the Hawaiian Agronomics Co. (International) (Re) case and the International Systems & Controls Corp. v. IDRO case. The award on the latter case comes with an interesting dissenting opinion by the U.S. arbitrator, Brower. In his opinion, the Tribunal’s jurisdiction should have been based on the «actual beneficial ownership», rather than on the «legal title», and then upheld in the light of «ultimate, i.e. beneficial, American ownership» of the claim. In fact, according to Arbitrator Brower, the U.S. subsidiary maintained «beneficial ownership», although a Canadian trustee had been nominated.

As regards the effects of share transfers on the requirement of nationality of the claim, some ICSID cases, such as the Amco Asia, Klöckner and SOABI, are also noteworthy22.

In particular, in the Klöckner case the ICSID Tribunal upheld its jurisdiction even if, following a relevant change in control which had taken place after the date of the disputing parties’ consent to ICSID arbitration, the local subsidiary, SOCAME, had become mainly controlled by nationals of the host State, Camerun. As SOCAME had previously been controlled by nationals of Germany and the Netherlands, the Tribunal decided that the claim fell within its jurisdiction up to the time SOCAME had been under foreign control. Speaking of the Loewen case, the ICSID award on the Amco Asia (Resubmitted) case was probably even more important, since it concerned the legal effect of the claimant company’s dissolution as the holder of rights and duties in an agreement to arbitrate. The ICSID Tribunal denied that this dissolution had altered the claimant’s status. On the contrary, the Tribunal agreed that «Amco Asia continued in existence under the laws of the State of Delaware for purposes of this arbitration»23, although a new company, Amco Asia Corporation, had been established.

Therefore, by analogy with the ICSID award on the Amco Asia (Resubmitted) case, the ICSID Tribunal of the Loewen case could have decided that TLGI ‘continued in existence’, as a Canadian company, for ICSID purposes, even if, as a general rule, the principle of stare decisis is inapplicable within the ICSID legal system.

As for the pre-submission assignment of claims from a parent company to a subsidiary, the practice of the Iraq-Kuwait United Nations Compensation Commission (UNCC) is also important. Some UNCC panels have, in fact, accepted such claims, even when the parent company had changed its name24 or had merged with another company25.

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24 See the Report of 29 September 2000 on the tenth instalment of E3 claims as to the claim of ABB Schaltanlagen GmbH (S/AC.26/2000/18).
25 See the Report of 22 June 2001 on the thirteenth instalment of E3 claims as to the claim of NCC International AB (S/AC.26/2000/12).
Note that the 1991 Decision No. 7 of the UNCC Governing Council, which *inter alia* lays down the criteria «for processing claims of corporations», does not provide anything as regards the continuity of the claimant’s identity and nationality.

As a consequence, UNCC panels have been able to accept claims of parent companies for damages suffered by one of their subsidiaries, even if the parent company and the subsidiary in question had different nationalities26.

5. CONCLUSION

Briefly, the ICSID Tribunal’s reasoning on the diversity of nationality in the *Loewen* case does not seem to be well-founded on international law, as it has mainly developed so far.

Contrary to the Tribunal’s statements in the concluding paragraphs of its award of 26 June 2003, reference to customary international law and the Tribunal’s will to enhance the «viability» of the NAFTA Agreement would not have hindered the Tribunal itself from finding the establishment of Alderwoods irrelevant for ICSID purposes.

Like the UNCITRAL arbitral Tribunal in the *UPS* case27 and the ICSID arbitral Tribunal in the *ADF* case28, the Tribunal took a strict attitude towards the issue of the contribution to customary international law that the great number of investment treaties now in force can *per se* give29. Indeed, this is the dominant view of scholars30. However, the awards issued by other arbitral tribunals, such as those on the *Pope & Talbot Inc.*31, on the *Mondev*32 and on the *CME*33 cases, referred to a completely different approach to the relevance of recent investment treaties to ascertain customary international law. Some scholars also support this approach34.

Thus, we think the ICSID Tribunal could have taken into account that most of these treaties and other examples of international practice show a change in the traditional view on the requirement of continuous nationality.

Furthermore, given the uncertain content of customary international law on investments, a different application of the NAFTA Agreement would have been possible. This application could have been based not only on the fact that the host State was a very powerful country which had promoted the widespread acceptance of a pro-investor attitude at an international law level, but also

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27 See Para. 97 of the Award on Jurisdiction of 22 November 2002.


29 See especially Para. 229 of the 2003 ICSID Award.


31 In particular, see Paras. 59 and 62 of the UNCITRAL Award in respect of Damages of 31 May 2002.

32 See para. 117 of the ICSID Award of 11 October 2002.

33 See, particularly, Paras. 497-498 of the UNCITRAL Final Award of 13 March 2003.

on equity terms, since the U.S. courts of the State of Mississippi had allowed a political application of law.

The ICSID Tribunal could have highlighted the peculiar pro-investor spirit to which investment treaties, including the NAFTA Agreement, tend to refer as regards the settlement of disputes between a foreign investor and a host State.

On account of the great negative relevance attributed to TLGI’s Canadian nationality by the Mississippi jury, the Tribunal could have used equity as a general principle of international law, when it considered the rule of the NAFTA Agreement which just refers to the date of the submission of the claim as regards the requirement of nationality in general.

Reference to equity would have permitted the Tribunal to adapt the broad content of this rule to the specific circumstances of the *Loewen* case (so called, equity *infra legem*)\(^{35}\).

On equity terms, the Tribunal could have at least accepted some proof of its jurisdiction provided by TLGI.

As pointed out in Raymond Loewen’s Petition to Vacate ICSID awards filed at the U.S. District Court for the District of Columbia on 13 December 2004, the Tribunal paid no attention either to the claimant’s explanation that TLGI’s NAFTA claims had been transferred not only to Nafcanco (at 75%), but also to a Canadian trust on behalf of «TLGI’s unsecured creditors» (at 25%)\(^{36}\), or to TLGI’s request to benefit from the most-favoured-nation treatment, provided by Art. 1103 of the NAFTA Agreement, in relation to the requirement of continuous nationality\(^{37}\).

Besides, reference to customary international law in the *Loewen* case does not seem to be very coherent as a whole.

In its 2002 Memorial, the U.S.A. had also recalled customary international law to prove that the nationality of an international claim depended on that of the ‘real claimant and equitable owner’. Specifically, the U.S.A. had referred to the 1970 International Court of Justice’s judgment on the *Barcelona Traction* case to demonstrate that in some circumstances applying the lifting-of-the-corporate-veil doctrine was in line with customary international law in order to identify a company’s national State.

Actually, the Court did not lift the corporate veil, which was at the base of the formal perspective of the company law used by the Court itself to justify its decision. To decide whether the formal link between Canada and Barcelona Traction was based on a ‘close and permanent connection’, the Court evaluated the link between the company and the general economic environment of the country where the company operated, rather than the link between the company and elements indicating an economic and financial connection. Evaluating these elements would have implied lifting the corporate veil\(^{38}\).

Therefore, we believe that customary international law as ascertained by the Court in 1970 was not very similar to alleged customary rules on which the U.S.A. based some assertions in its 2002 Memorial.

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\(^{36}\) See note No. 2 of the Notice of Petition to Vacate submitted by Raymond Loewen.

\(^{37}\) *Ibidem*.

\(^{38}\) See P. Acconci, *op. cit.*, p. 146.
Note that the Tribunal did not consider it necessary to deal with the issue of determining the real equitable owner of the claim, as requested by the U.S.A., although it in practice applied the lifting-of-the-corporate-veil doctrine by deciding that, due to the change of the parent company’s nationality, there was no longer any NAFTA «disputing party»\textsuperscript{39}.

That is even more remarkable in the light of the fact that the Tribunal also dismissed Raymond Loewen’s claim based on Art. 1116 of the NAFTA Agreement, that is, Raymond Loewen’s claim as «an investor of a Party on its own behalf»\textsuperscript{40}.

By denying that Raymond Loewen’s claim under the NAFTA Agreement had survived the reorganization plan and stating that «he certainly was not a party in interest at the time of the reorganization of TLGI»\textsuperscript{41}, the Tribunal somehow attributed relevance to the change in control over TLGI which had possibly taken place with its reorganization plan, despite the lack of reference to the control test in Art. 1116 of the NAFTA Agreement.

\textsuperscript{39} Paras. 237-238 of the 2003 ICSID Award. In this respect, see also Para. 65 of the ICSID Decision on Jurisdiction in the Tokios Tokèles case.


\textsuperscript{41} Para. 239 of the 2003 ICSID Award.