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Treaty Shopping in International Investment Law

Dissertation Thesis

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There is no right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused.[1]

INTRODUCTION

In 2015 two companies – WCV Capital Ventures Cyprus Limited and Channel Crossings Limited ('WCV') commenced investment arbitration proceedings against the Czech Republic regarding an alleged breach of the Cyprus–Czech bilateral investment treaty ('**BIT**'), following the cancellation of video lottery terminal licences owned by the companies' Czech subsidiary – SYNOT.[2] At first sight, this seems to be a typical investment arbitration dispute. But once we look in detail at the ownership structure of the Cypriot companies, controversies emerge. Clearly, the companies are merely holding companies ultimately owned by the Czech national Mr Ivo Valenta. If that was not enough, Mr Valenta was at the moment of the commencement of the arbitration proceedings a Member of the Czech Senate. The ultimate beneficial ownership of the claimant companies was not even concealed by Mr Valenta.[3]

Encouraging foreign investment into the territory of the host state from abroad has long been perceived as the primary justification of the existence of international investment agreements.[4] Economic growth is the ultimate goal of foreign investment policies. The flow of foreign capital into the host state economy is the benefit that states expect in exchange for voluntary limitation of their sovereign powers, which manifests itself most starkly in the consent to be subject to arbitration by investment tribunals that are granted the power to review certain state acts.

Now, if we return to the given example, the question is obvious: how does the WCV's investment benefit the Czech economy if the only capital that is 'brought' is already in the hands of a

[1] LAUTERPACHT, H. *The Development of International Law by the International Court*. Cambridge: Cambridge University Press, 1982, p. 164.
[2] UNCTAD. *WCV and Channel Crossings v. Czech Republic* [online]. UNCTAD Division on Investment and Enterprise, 2015 [accessed 24/3/2019]. Available at: https://investmentpolicyhub.unctad.org/ISDS/Details/694.
[3] This is apparent from repeated statements and interviews with Mr Valenta in the Czech media, see for example: https://www.seznamzpravy.cz/clanek/ze-se-soudim-se-statem-muze-si-za-to-sam-rika-senator-valenta-7314, https://domaci.ihned.cz/c1-63674560-senator-valenta-kazdy-spravny-chlap-ma-mit-nejaky-skraloup or https://www.e15.cz/byznys/ostatni/valenta-ma-prvni-vitezstvi-v-arbitrazi-proti-cesku-1346522.
[4] VAN HARTEN, G. Five Justifications for Investment Treaties: A Critical Discussion. In: *Trade, Law and Development 2.1*, 2010, p. 28.

Czech national? Why should the Czech Republic face an investment arbitration dispute, whose amount reaches 1 billion Czech crowns, in exchange for no contribution to its economy?

The answer is far from easy. The described situation is a typical example of treaty shopping, a strategically planned change of the companies' corporate structure to gain benefits of an investment treaty that would otherwise not be accessible to the investor. Usually, in case of a legal person, the mere fact of incorporation in a foreign jurisdiction suffices to gain the status of the protected investor and obtain the benefits of its investment treaties.

1.1 The Research Question, Methodology and Examined Sources

International investment agreements ('**IIAs**') are international agreements concluded between two or more states that grant certain protection standards to investors, i.e. private persons belonging to the other contracting state that invested in the other contracting state. The aim of the agreements is to eliminate some of the risks related to investing abroad. By virtue of entering into investment agreements, the contracting states voluntarily limit their regulatory powers in exchange for the flow of foreign capital.

Is it possible to invoke investment protection against the very state of which the investor is, in fact, a national, as is suggested by the WCV case? The answer is to be looked for primarily within the text of investment agreements themselves; most of them include merely very formalistic requirements for gaining the provided protection, and those requirements may easily be fulfilled by corporate restructuring through a foreign entity. Nevertheless, the use of such practices should have its limits and these limits should be reflected in particular by case law of investment arbitration tribunals.

Based on an analysis of different investment agreements and arbitration awards, this dissertation thesis shall provide an overview of the legality and legitimacy of treaty shopping in investment law and describe the limits of engaging in treaty shopping. The research question of this dissertation thesis is thus the following: 'Are there limits to treaty shopping in international investment law and if yes, how can those limits be formulated? Is the decision-making practice in line with those limits?'

In order to answer the question, primarily two areas must be researched. First, it is necessary to review different types of investment agreements with a focus on how they affect the possibility of an investor to resort to treaty shopping. Secondly, an analysis of how investment tribunals approach

cases of treaty shopping must be conducted. Both areas of research shall reveal important data on where the limits of treaty shopping lie. These findings shall be confronted with principles of law in order to prevent formalistic outcomes and correct possible irregularities.

The basis of the research sources are international treaties – investment agreements themselves. As there are 3,200 IIAs[5] currently in force, it was naturally beyond my powers to examine all of them. I therefore limited the research to treaties that should be for some reason devoted more attention, such as Dutch IIAs since investors in treaty shopping cases often rely on Dutch nationality and therefore many of those treaties have been under the scrutiny of investment tribunals. I have also taken into consideration model BITs that reflect the current trends affecting investment treaties drafting practice. I also analysed investment treaties that contain examined clauses (such as clauses including the definitions of nationality or denial of benefits clauses) that stand out and bring new, inventive ideas of the solution of the problematic issues. A comprehensive analysis of such a vast number of concluded treaties was made possible by using the selected search function on *Investment Policy Hub* run by the United Nations Conference on Trade and Development ('**UNCTAD**').[6] Lastly, in order to illustrate typical features of IIAs that can be found in a large number of treaties, I chose the Czech IIAs simply for the reason of convenience.

The methodological basis of the part devoted to the examination of the treaties (mainly Chapter 3: Defining Investor and Investment, Chapter 4: Denial of Benefits Clauses and Sub-Chapter 7.1: Changes in the Drafting Practice) is primarily the comparative analysis. In Chapter 3, the technique was the following: I identified possible alternatives of how the nationality of investors might be scrutinised, and I illustrated these alternatives using specific concluded investment treaties. For the general introduction of the issue of denial of benefits clauses in Chapter 4, I used a similar technique and tried to demonstrate different outcomes of the application of the clause based on variations in wording. For the following part of Chapter 4, the approach was quite different: with the help of the selected search mentioned previously, I filtrated all IIAs concluded in the last five years that include the denial of benefits clause and examined whether the states managed to adapt their drafting practice in light of the problematic issues outlined in the general part of Chapter 4. As for Sub-Chapter 7.1, I focused on analysing IIAs that are known for following the current trends. The best sources that reflect these endeavours are usually model BITs, in which the states strive to encapsulate the best

[5] UNCTAD. *Investment Policy Monitor* [online]. UNCTAD Division on Investment and Enterprise, 2019 [accessed 15/10/2020]. Available at: https://unctad.org/system/files/official-document/diaepcbinf2019d8_en.pdf.
[6] UNCTAD. *Investment Policy Hub* [online]. UNCTAD Division on Investment and Enterprise, 2019 [accessed 15/10/2020]. Available at: https://investmentpolicy.unctad.org/.

investment treaty policies in the given period. When creating model BITs, the states are not limited by the demands of the other contracting party and thus can be more inventive. Secondly, according to my research, it is multilateral agreements that show a lesser extent of rigidity.

To conclude, since it is possible to use a whole range of different wordings, the primary method is to compare these identified differences and analyse their impacts.

The second important type of sources is the case law of investment tribunals or other international law deciding bodies. Throughout the thesis, various decisions are relied on to demonstrate how the relevant issues have been dealt with in the decisional practice. However, I aimed to avoid basing the analysis in the theoretical chapters (mainly Chapters 2, 3 and 4) on that decisional practice, and this is for two reasons. First, due to their ad hoc nature, investment tribunals lack the authority of other decision bodies such as the International Court of Justice ('**ICJ**') or the Court of Justice of the European Union ('**CJEU**'); therefore, I find it difficult to automatically perceive the outcomes reached by the tribunals as an authoritative, binding and constant interpretation of investment law: such perception is not even possible as in some cases tribunals have held opposing views on the same issue. Secondly, I saved the case law analysis for a separate part because any other approach would contradict the research question, which demands to evaluate whether the current decisional practice reflects the correct approach to treaty shopping. Naturally, if I were to deduce the general rules governing treaty shopping from the case law itself, the question could not be answered. The core analysis of the case law is therefore included in Chapter 6: Treaty Shopping in the Decision Practice of Investment Tribunals, where I first identified all relevant cases that dealt with treaty shopping or other adjoining issues, studied these cases and outlined their factual details and outcomes that the tribunals reached. In this chapter, I used the description method to familiarise the reader with the facts of each case. In the second part of the chapter, I applied the induction method to the outcomes of the presented cases to reach general conclusions based on different aspects of the disputes and the decisions reached in each relevant area. In other words, I inductively drew the conclusions on how the following problems are currently dealt with by investment tribunals:

- how tribunals approach the nationality requirements,
- how is article 25(2)(b) of the ICSID Convention interpreted,
- in which situations tribunals accepted piercing the corporate veil,
- what are the indicators of abuse of rights of investors and
- whether treaty shopping is perceived as an issue of jurisdiction or admissibility.

In each chapter, apart from Chapters 6 and 7, I also offer a shorter or a longer theoretical description of the issues. For that, I mainly used various primary and secondary sources, such as scholarly writings, handbooks, academic articles and textbooks as well as the decisions of the ICJ. To a minimum extent, I also examined other international treaties than IIAs, especially in Chapter 5: Abuse of Rights in order to illustrate the ubiquity of the principle. In the theoretical parts, I therefore also compared the available sources and their outcomes and synthesised these so that they serve the purpose of introducing the problem comprehensively to the reader.

To conclude, the methodological basis of the thesis is primarily comparative analysis in the part focused on the wording of the treaties. On the other hand, I used the induction method when looking at the case law of investment tribunals with respect to treaty shopping, and I came to general conclusions. To a lesser extent, I use description especially when outlining the factual or legal background of certain questions or disputes. Partial conclusions are introduced either throughout the text or at the end of the respective chapter. Finally, I synthesised the outcomes of my research in order to reach the principal findings in the conclusion.

1.2 The Structure of the Dissertation Thesis

The first chapter, which introduces the underlying principles of investment law and various means of treaty shopping, is followed by the second chapter which analyses different provisions by which investors and investments are defined in investment agreements and the impact thereof on the availability of treaty shopping; treaty shopping can be allowed or prevented either by the definition of investor or by the definition of investment. Given that the definitions may differ significantly from agreement to agreement, this chapter focuses on the impact of such differences and the importance of precise drafting. Overall, Chapter 2 answers whether individual definitions make it possible to gain investment protection against an investor's home state, and it notes the deficiencies of currently used definitions. As well as investment agreements, the chapter analyses the specific features of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ('**ICSID Convention**'), which is the procedural instrument most often used in investment arbitration.[7]

Chapter 3 examines a special clause that can be inserted into investment treaties to prevent the misuse of investment protection schemes – a so-called 'denial of benefits' clause. Treaty shopping

[7] BERNASCONI-OSTERWALDER, N.; ROSERT, D. *Investment Treaty Arbitration: Opportunities to reform arbitral rules and processes* [online]. The International Institute for Sustainable Development, 2014 [accessed 2/03/2021], p. 4. Available at: https://www.iisd.org/system/files/meterial/investment_treaty_arbitration.pdf.

does not necessarily have to be perceived as a negative phenomenon; however, it may be in the interest of states typically acting in the role of host states (southern states and eastern European states) to implement adequate protection against treaty shopping already within the process of IIAs conclusion. While this goal may be primarily reached by a detailed formulation of the definitions, which would include stricter criteria than incorporation or seat, it is also possible to include special protective provisions in the agreement: the denial of benefits clauses. However, the clauses cause considerable confusion with regards to their application by investment tribunals, especially relating to the timing and manner of their invocation and their impacts. The chapter answers the question of how and whether the denial of benefits clause is suitable for protecting against treaty shopping, and if it is possible to solve the controversies and ambiguities connected thereto by an appropriate formulation of the clause. Also, I evaluate the drafting quality of the clauses in various treaties, and on that basis, I offer the wording of a model clause that could overcome the difficulties that tribunals came across when the respondent invoked the clause.

Chapter 4 looks at treaty shopping more abstractly and considers its interaction with general legal principles, especially with the doctrine of abuse of rights and good faith. Those maxims are commonly referred to by the respondent states if they are sued by investors that are foreign merely on paper. A number of investment tribunals evaluating treaty shopping have referred to general principles of law. Thus, notwithstanding the fulfilment of all formal requirements on an investor or an investment imposed by the respective agreement, certain tribunals have concluded that claimants should be refused protection because they abused their rights.

Chapter 5 scrutinises treaty shopping in the case law of investment tribunals. In this sense, I searched for the limits of the legality of treaty shopping set at present by the decision-making bodies. Tribunals mainly assess the role of timing of restructuring in order to gain investment protection as well as the moment when the investment dispute between a state and an investor arises. I also analysed the practice employed by some tribunals known as the 'piercing of the corporate veil'.

The thesis is concluded by a chapter on recent developments in investment law that may have an impact on treaty shopping after which the final, concluding chapter follows.

2 TREATY SHOPPING IN INTERNATIONAL INVESTMENT LAW

2.1 International investment law

At the international level, foreign investment protection is provided by a network of predominantly bilateral, but also multilateral investment agreements. Investment agreements are international treaties concluded between two or more states, but their uniqueness rests with the fact that rights arising thereunder are enjoyed directly by subjects within the contracting states, i.e. individual investors – natural or legal persons. Even more controversial is the right vested in investors to directly commence investment arbitration against the state, which supposedly harmed their investment. Investment disputes are resolved by international tribunals consisting typically of three arbitrators chosen by the parties.

Investment agreements are in this sense instruments of limitation of sovereign regulatory powers of states and may become a strong weapon in the hands of foreign investors, which is often, especially in the eyes of the public, perceived negatively.[8] The searched compensation often reaches millions of dollars,[9] and respondent states also need to expend considerable resources to pay the costs of their legal representation even if they eventually successfully defend themselves.[10] The authority of arbitrators to resolve regulatory disputes is in certain respects more powerful than that of a court because arbitrators have the power to review sovereign acts by applying broad and often unclear standards and definitions. This is done within a structure resembling international commercial arbitration and privately chosen arbitrators effectively determine the legality of certain state acts with very limited court supervision and effective and immediate enforcement under the New York and ICSID Conventions.[11] All this may in extreme cases lead to the so-called regulatory chill,[12] causing that a state might rather not regulate a sensitive area due to the risk of future arbitrations. Some commentators suggest that this may indirectly influence the state's basic quality under international law – its sovereignty.[13] However, this is the present state that investment dispute resolution evolved

[8] See WAIBEL, M.; KAUSHAL, A.; CHUNG, K.; BALCHIN, C. *Backlash against Investment Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2010, p. 8.
[9] ROSERT, D. *The Stakes Are High: A review of the financial costs of investment treaty arbitration* [online]. The International Institute for Sustainable Development, 2014 [accessed 30/12/2020], p. 2. Available at: https://www.iisd.org/system/files/publications/stakes-are-high-review-financial-costs-investment-treaty-arbitration.pdf.
[10] Ibid. p. 1.
[11] VAN HARTEN, G. *Investment treaty arbitration and public law*. Oxford: Oxford University Press, 2011, p. 5.
[12] TITI, C. *The Right to Regulate in International Investment Law*. Baden-Baden: Nomos, 2014, p. 20.
[13] Ibid. p. 32.

into, and it is unlikely that a special court appointed to solve investment disputes will be created due to the lack of states' consensus.

Conversely, investment law grants priceless security for those who decided, often encouraged by the government of the host state itself, to enter into business in foreign markets that lack proper protection against possible sovereign risks. By providing investment protection, states signal willingness to limit their own powers in exchange for the inflow of capital, know-how or job opportunities and thus contribute to a speedier development of the local and, by the same token, of the global economy. The role of foreign direct investment is not limited to being a source of capital; indirectly, it may encourage increasing efficiency of the economy by modernisation, support competition through interaction and expose advanced practices. For many capital-importing countries, investment treaties represent a form of compensation for competitive disadvantage. [14]

The legal sources of investment law are mainly investment treaties, rulings of international investment tribunals and rules of general international law:[15] it might be necessary to apply customary international law[16] or codified rules contained in international treaties especially for issues of state responsibility, compensation or expropriation. The tribunal also do not hesitate to apply general law principles.[17] Finally, rulings of ICJ or its predecessor, The Permanent Court of Justice (PCIJ) further clarify issues of general international law often also relevant for international investment law. Therefore, it is not uncommon that investment tribunals refer to the rulings of these bodies to substantiate their decisions.[18]

The fact that there are currently more than 3,200 concluded bilateral investment treaties[19] inevitably leads to an enormous level of fragmentation of the legal sources. Notwithstanding the fact that states have full discretion to decide upon the content of investment treaties they conclude, their texts maintain a great level of coherence; they tend to have similar structures and wording of the common provisions. For this reason, it is possible to generalise conclusions reached with regards to an individual treaty and even talk about international investment law. However, although these

[14] SHIHATA, I. *Legal Treatment of Foreign Investment*. Boston: Martinus Nijhoff Publishers, 1993, p. 11.
[15] DOLZER, R; SCHREUER, Ch. *Principles of international investment law*. New York: Oxford University Press, 2008, p. 2.
[16] McLACHLAN, C.; SHORE, L.; WEINIGER, M. *International Investment Arbitration: Substantive Principles*. Oxford: Oxford University Press, 2008, p. 7.
[17] See DUMBERRY, P. The Emergence of the Concept of 'General Principle of International Law' in Investment Arbitration Case Law. In: *Journal of International Dispute Settlement*, vol. 11, issue 2, 2020, pp. 194–216.
[18] Compare PELLET, A. *The case-law of the ICJ in investment arbitration* [online]. Oxford University Press Blog [accessed 3/3/2018]. Available at: http://blog.oup.com/2014/02/icj-case-law-investment-arbitration-pil/.
[19] UNCTAD. *Investment Policy Monitor* [online]. UNCTAD Division on Investment and Enterprise, 2019 [accessed 15/10/2020]. Available at: https://unctad.org/system/files/official-document/diaepcbinf2019d8_en.pdf.

similarities may create a false impression of unified international investment law, one must always bear in mind that, in the end of the day, there is no complex treaty and that investment law is created by a number of sources that need to be interpreted and assessed individually in each case.

2.2 Nature, development and content of international investment agreements

Investment treaties are the cornerstone of international investment law. Although they are not very lengthy documents, they provide investors with unique and extensive protection against host states. Investment protection may also be provided to investors by more complex trade agreements, such as the United States-Mexico-Canada Agreement ('**USMCA**'), replacing the North Atlantic Free Trade Agreement ('**NAFTA**') in 2020; these agreements contain separate investment chapters that in substance follow the typical structure of bilateral investment agreements.

Investment treaties in the modern sense evolved in the 1960s from the so-called Friendship, Commerce and Navigation treaties ('**FCN**') which were 'designed to establish a framework within which mutually beneficial economic relations between two countries could take place [and] set forth on a reciprocal basis the terms upon which trade and shipping are conducted, and the rights of individuals and firms from one of the states living, doing business, or owning property within the jurisdiction of the other state'.[20]

The very first concluded bilateral investment treaty was the notoriously mentioned Germany–Pakistan BIT concluded in 1959. The content of the treaties has evolved under the influence of historical and political specifics of that time period. The evolution is often divided into different generations; however, no broad consensus as to the number of generations and their milestones exists. For the sake of simplicity, this dissertation identifies three generations of treaties, the first of which covers the period from the 60s to the 90s. The character of the first generation BITs, which were generous to investors and restrictive towards states, was shaped by the geopolitical factors, when the 'need for investment protection became most acute in developing countries which had no outward investment of their own, making asymmetrical rather than symmetrical treaties a more natural choice.'[21] Those instruments often did not include the full range of substantive standards as they are known now, and they focused mainly on protection against expropriation and nationalisation,[22]

[20] ARIKAKI, A., Appendix 1: Treaties of Friendship, Commerce and Navigation and Their Treatment of Service Industries. In: Michigan Journal of International Law, vol. 7, issue 1, 1985, p. 344.
[21] ALSCHNER, W. Americanization of the BIT Universe: The Influence of Friendship, Commerce and Navigation (FCN) Treaties on Modern Investment Treaty Law. In: *Goettingen Journal of International Law*, vol. 5, no. 2, 2013, p. 475.
[22] UNCTAD. *World Investment Report 2015* [online]. UNCTAD Division on Investment and Enterprise, 2015 [accessed 24/3/2019], p. 122. Available at https://unctad.org/en/PublicationChapters/wir2015ch5_en.pdf#page=10.

reflecting the main purpose of the treaties at the given time – i.e. to protect investors against the most common risks in developing countries. The inclusion of dispute settlement provisions was becoming more common but was sometimes restricted only to certain types of disputes. It was during this period when important investment instruments – the ICSID Convention and the New York Convention were concluded, but the former became the key to investment arbitration only years later.

The prime heyday of investment treaties conclusion emerged in the 90s, driven by the new possibility of business and legal cooperation between eastern and western states and subsequent speedy globalisation, giving rise to the second generation of investment treaties. The conclusion of treaties in this period was rather quick and chaotic, and the evolvement of investment arbitration only became rapid in the last twenty years[23] so the states could not assess the full implications that may follow from entering into investment treaties. The agreements were 'often signed without much thought and seldom thought of again once agreed'.[24] Although supporting economic development is perceived as the main advantage of the conclusion of investment treaties, in many cases the real reason why the countries signed the agreements has been forgotten, and the rights between states and investors were left unbalanced.[25] This had an impact on further deepening the inequality between states' and investors' positions and led to general dissatisfaction with investment protection schemes by states. Within this period, an emerging trend of multilateralisation and regionalisation of treaties is apparent, which marks the change in the perception of investment protection from merely declaratory instruments of business cooperation between states to a proper protective tool for investors, establishing their prominent role in international trade.

Partly as a reaction to the inequality mentioned above and the growing number of initiated investment disputes, a new generation of treaties emerged at the dawn of the 21st century. Moreover 'the traditional investment treaty paradigm of Northern countries being capital exporters, and the Southern States being capital importers, began to wane. Instead, emerging economies have turned into sources of outward investment, and developed countries have become the recipients of investment from the South. Investment flows [were] increasingly becoming bi-directional.'[26] These third-generation BITs are characterised by comprehensive provisions that create more balanced

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23. For example, before 1998 only two ICSID awards had been issued, see UNCTAD. *Investor-State Disputes Arising from Investment Treaties: A Review*. New York and Geneva: UNCTAD Series, 2005, p. 4.
24 CALAMITA, J. N.; SATTOROVA, M. *The Regionalization of International Investment Treaty Arrangements (Investment Treaty Law: Current Issues V)*. London: British Institute of International and Comparative Law (BIICL), 2015, p. 7.
25 GARCÍA-BOLÍVAR, O. The Teleology of International Investment Law: The Role of Purpose in the Interpretation of International Investment Agreements. In: *Journal of World Investment & Trade*, vol. 6, no. 5, 2005, p. 754.
26 ALSCHNER, W. Americanization of the BIT Universe: The Influence of Friendship, Commerce and Navigation (FCN) Treaties on Modern Investment Treaty Law. In: *Goettingen Journal of International Law*, vol. 5, no. 2, 2013, p. 477.

relationships between states and investors. Simple documents consisting of a few pages become in some cases complex treaties involving a number of carve-outs and provisions acknowledging the importance of other areas of law and business which are in close relation to investment, such as the environment protection or human rights; BITs drafters became aware of the necessity of trade as a driver of economic growth but at the same time of the need to pursue sustainable development and social and environmental goals.[27] Thus, this last period may be characterised as a period of cautious re-defining of the substance, aims and purpose of investment protection. This new approach resulted in renegotiating existing treaties, more careful drafting and the improvement of investor-state dispute settlement ('**ISDS**') procedures. Painful experiences with investment proceedings have even led some countries to cease entering into new investment treaties or to begin to terminate the existing ones.[28]

Out of all the provisions of a typical investment treaty, it is primarily clauses containing definitions that come to the limelight in order to examine the possibility of treaty shopping. Those provisions differ between the generations of treaties. In the old generations, primarily investors and investments were subject to definitions.[29] In the newer BITs, the tendency to include additional definitions and use more precise wording is traceable. This is done to strengthen legal certainty – see, as an extreme example, the 2015 India model BIT or the 2012 USA Model BIT.[30] For the purposes

[27] *Towards a New Generation of International Investment Policies: UNCTAD's Fresh Approach to Multilateral Investment Policy-Making.* IIA Issues Note [online]. UNCTAD [accessed 2/6/2018]. Available at: http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d6_en.pdf.

[28] For example, Bolivia, Ecuador or Venezuela, see VALENTI, M. New trends in international investment law treaty practice: Where does Latin America stand? In: *Seqüência: Estudos Jurídicos e Políticos*, vol. 39, no. 79, 2018.

[29] See, for example, the Czech Republic–Hungary BIT, article 1.

[30] Compare for example the complexity of the definition of investment in the 2015 Indian model BIT, article 1: '"[i]nvestment" means an Enterprise in the Host State, constituted, organised and operated in compliance with the Law of the Host State and owned or controlled in good faith by an Investor: (i) in accordance with this Treaty; and (ii) that is at all times in compliance with the obligations in Articles 9, 10, 11 and 12 of Chapter III of this Treaty. 1.6.1 For the purposes of this Treaty, an Enterprise will be considered as (i) "Controlled" by the Investor, if such Investor has the right to appoint a majority of the directors or senior management officials or to control the management or policy decisions of such Enterprise, including by virtue of their shareholding, management, partnership or other legal rights or by virtue of shareholders agreements or voting agreements or partnership agreements or any other agreements of similar nature. (ii) "Owned", by the Investor, if more than 50% of the capital or funds or contribution in the Enterprise is directly or beneficially owned by such Investor, or by other companies or entities which are ultimately owned and controlled by the Investor. 1.7 For greater clarity, Investment does not include the following assets of an Enterprise: (i) any interest in debt securities issued by a government or government- owned or controlled enterprise, or loans to a government or government owned or controlled enterprise; (ii) any pre-operational expenditure relating to admission, establishment, acquisition or expansion of the Enterprise that is incurred before the commencement of substantial and real business operations of the Enterprise in the Host State; (iii) portfolio investments; (iv) claims to money that arise solely from commercial contracts for the sale of goods or services; (v) Goodwill, brand value, market share or similar intangible rights; (vi) claims to money that arise solely from the extension of credit in connection with any commercial transaction referred to in (v) above; (vii)an order or judgment sought or entered in any judicial, regulatory, administrative, or arbitral proceeding; (viii) any other claims to money that do not involve the kind of interests or operations set out in the definition of Investment in this Treaty.' with the 1991 Czech Republic–Netherlands BIT, article I: 'the term "investments" shall comprise every kind of asset invested either directly or through an investor of a third State and more particularly, though not exclusively: i. movable and immovable property and all related property rights; ii. shares, bonds and other kinds of interests in companies and joint ventures, as well as rights derived therefrom; iii. title to money and other assets and to any performance having an

of treaty shopping, definitions of investments and investors necessarily represent one pillar of the analysis, as they are the means that enable treaty shopping in investment law in the first place.

The limits of the guaranteed treatment of investors by host states are set by substantive standards granted by investment treaties. Throughout the evolution of the treaties, a firm set of treatment obligations gradually crystallised, on the one hand, obligations regulating treatment accorded to investors in comparison to other entities, either host states' own nationals (national treatment) or investors from other countries (most-favoured-nation ('**MFN**') treatment); on the other hand, investment law recognises a wide range of absolute standards of protection, aiming at the actions of states towards investors irrespective of the treatment the state accords to any other entity. Those are primarily the obligation to provide investors with fair and equitable treatment, full protection and security and prevention from expropriation without compensation. By their very nature, the standards are vague; it is dominantly the arbitration practice that gradually determines their meaning by interpretation in the context of individual cases.

In the past decade, the standard of fair and equitable treatment has undoubtedly gained a prominent position, being frequently invoked and repeatedly marked as the decisive right in numerous arbitration proceedings. It has been given a broad interpretation as to what individual norms it includes, ranging from the non-discrimination principle to the obligations of transparency or due process.

Substantive standards are nowadays the core of investment protection; however, they lie outside the scope of this thesis, which is focused on procedural standards enabling enforceability of substantive obligations. IIAs provide investors with a unique opportunity to commence arbitration proceedings against states that host their investment. However, such procedural rights can be subject to exemptions and special requirements that may influence the possibility of treaty shopping because only a *qualified* investor with a *qualified* investment can invoke investment protection and bring any claim before an investment tribunal. Whether such qualification is fulfilled is examined by the deciding bodies in the jurisdictional phase of the arbitration proceedings before the attention is moved to the merits of the case. Once the tribunal finds that the claimant either did not meet the criteria set by the treaty to be perceived as the qualified investor or to hold the qualified investment because it did not

economic value; iv. rights in the field of intellectual property, also including technical processes, goodwill and know-how; v. concessions conferred by law or under contract, including concessions to 2 prospect, explore, extract and win natural resources.'

fall within the prescribed definitions, the tribunal must inevitably conclude that it has no jurisdiction and dismiss the case.

2.3 Investment tribunals 'case law'

International investment law is rapidly evolving, especially due to the growing number of adjudicated disputes and interpretations expressed in the reached decisions. The total number of investor-state disputes counts to date more than 1,000 cases.[31] From the methodological point of view, it is essential to make several remarks regarding the functioning of the investment arbitration system.

The possibility to resort to arbitration is anchored in arbitration clauses contained in investment agreements. Such clauses usually provide for the possibility to elect from several procedural rules that may govern the arbitration proceedings, typically the proceedings administered by the International Centre for Settlement of Investment Disputes ('**ICSID**'), permanent arbitration courts such as International Chamber of Commerce, Stockholm Chamber of Commerce, the London Court of Arbitration or ad hoc tribunals operating under the United Nations Commission on International Trade Law ('**UNCITRAL**') rules. While the ICSID was created to serve investment disputes, the other types of arbitration are designated primarily to solve private commercial disputes. However, the course of the proceedings and composition of tribunals do not substantially differ as the majority of cases are heard by three arbitrators appointed by the parties to the dispute.

The decision on the type of the used procedural rules from the options envisaged in the specific IIA is at investors' discretion and may have considerable consequences, especially if an investor decides to initiate proceedings under the ICSID. By commencing the ICSID arbitration, the ICSID Convention will automatically become applicable along with the investment treaty, which means applying an additional instrument that contains a special set of requirements which need to be fulfilled in order for the tribunal to confirm its jurisdiction; those are contained primarily in article 25 of the ICSID Convention. This results in a phenomenon referred to as a double-keyhole test, which means that certain requirements may be considered twice in the light of possibly different sets of rules – once under the respective investment agreement and for the second time under the ICSID Convention. In connection to the subject matter of this dissertation thesis, it is important to note at this point that the ICSID Convention contains its own rules on nationality.

[31] UNCTAD. *Investor-State Dispute Settlement Cases Pass the 1,000 Mark: Cases and Outcomes in 2019* [online]. UNCTAD Division on Investment and Enterprise, 2015 [accessed 15/10/2020]. Available at https://unctad.org/system/files/official-document/diaepcbinf2020d6.pdf.

Although the case law represents an essential source of treaty interpretation, and tribunals tend to refer to and follow previous cases, the decisions of other adjudicating bodies remain non-binding as no doctrine of *stare decisis* applies in international law.[32] However, inconsistencies between closely similar cases stemming from this non-binding nature of awards raise constant concern.[33] The *Lauder* and *CME* cases may serve as the most illustrative example of such discrepancy, in which tribunals assessed identical facts since the considered breach was once claimed by the harmed company (CME) and once by its ultimate shareholder (Mr Lauder). While the latter case was dismissed, the *CME* tribunal did find a breach of investment protection and awarded the investor damages in the extreme amount of USD 270 million.[34]

In extreme cases, similar inconsistencies may be capable of affecting the integrity of the international system for the protection of investments. Nevertheless, for numerous reasons, introducing the binding effect of previous awards is at the moment inconceivable, especially due to the practical unfeasibility of any systematic change and the independency principle of international arbitration. It is also virtually impossible to create any such system in the absence of a central international body and because of ad hoc nature of the establishment of tribunals.

On the other hand, previous decisions are relied upon with great regularity. Persuasive argumentation may lead to the creation of 'precedent' cases to which subsequent tribunals refer or from which they depart with great caution.[35] However, it is also not exceptional that two visible lines of opposing argumentation evolve, which is again caused by the non-binding character of previous decisions. Those key decisions are often the starting point of other tribunals' reasoning, as evidenced by the number of references to previous case law in literally all recent arbitral decisions. Thus, it cannot be disputed that investment case law has become very influential on subsequent tribunals and that the

[32] ZIMMERMANN, A.; OELLERS-FRAHM, K.; TOMUSCHAT, C.; & TAMS, C. J. *The Statute of the International Court of Justice*. Oxford: Oxford University Press, 2012, p. 855; *El Paso*, ¶ 39.
[33] For the debate, see for instance: https://www.kluwerlawonline.com/abstract.php?area=Journals&id=JOIA2013035, http://www.univie.ac.at/intlaw/wordpress/pdf/99_rev_invest_awards.pdf, http://www.univie.ac.at/intlaw/wordpress/pdf/99_rev_invest_awards.pdf, http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4062&context=flr, or https://www.ciarb.net.au/wp-content/uploads/2014/12/DJones-Investor-State-Arbitration-The-Problem-of-Inconsistency-and-Conflicting-Awards.pdf.
[34] *CME*, ¶ IX. 1.
[35] JONES, D. *Investor-State Arbitration: The Problem of Inconsistency and Conflicting Awards* [online]. German-American Lawyers' Association Practice Group Day, 2011 [accessed 1/9/2018], p. 13. Available at: https://www.ciarb.net.au/wp-content/uploads/2014/12/DJones-Investor-State-Arbitration-The-Problem-of-Inconsistency-and-Conflicting-Awards.pdf.

current state resembles, at least to a certain extent, the common law system.[36] It is therefore primarily through case law that the current investment doctrines developed.[37]

However, 'due to its ad hoc character, arbitration is flawed as a vehicle for harmonizing law',[38] and its impact is merely partial and under the current circumstances can never result in the creation of a fully self-contained set of rules. Another obstacle to developing actual case law in investment arbitration is the fact that proceedings remain primary confidential, and the parties to a dispute have no obligation to make the decisions or other documents public. Although the situation is rapidly evolving towards greater transparency,[39] any possible system of case law is naturally excluded by the unavailability of previous decisions.

The described contradictory situation has a negative impact especially on the legal certainty of parties to a dispute and was fittingly summarised by Professor Pellet: '[investment tribunals] invoke precedent abundantly, and they practice distinguishing as would common law courts, but they do not mind departing from case law, even if well established; they call for consistency in case law but imperil that same consistency in the name of their own 'sovereignty'; and they then rely on future tribunals to ensure a stability that they both call for and jeopardise.'[40] It is thus necessary to conclude that previous decisions remain merely quasi-authoritative sources of law,[41] which justifies the quotation marks in the heading of this Sub-section.

The last remark goes to the possibility of annulment of awards, which is very limited in investment arbitration. Pursuant to the ICSID Convention, it is only allowed under its article 53(2). The grounds for annulment are either manifest excess of powers or failure to state reasons; two strict requirements very difficult to satisfy. The UNCITRAL rules do not provide for annulment proceedings, and the only way to challenge the award is upon its enforcement before the local courts.[42] Investment arbitration in its current state does not provide for the possibility of an appeal.[43]

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[36] COMMISSION, J. Precedent in Investment Treaty Arbitration–A Citation Analysis of a Developing Jurisprudence. In: *Journal of International Arbitration*, vol. 24, no. 2, 2007, p. 132.
[37] Ibid.
[38] CATE, I. The Costs of Consistency: Precedent in Investment Treaty Arbitration. In: *Columbia Journal of Transnational Law*, vol. 51, 2013, p. 418.
[39] For example, by the UN Convention on Transparency in Treaty-Based Investor-State Arbitration that entered into force in 2017.
[40] TATTEVIN, G.; RICHARD, J. *International Court of Justice case law in ICSID awards* [online]. LALIVE, 31 ASA bulletin 3/2013 [accessed 3/3/2018], p. 686. Available at: http://www.lalive.ch/data/publications/Lalive_Lecture_2013.pdf.
[41] see *Saipem*, ¶ 90.
[42] WAIBEL, M.; KAUSHAL, A.; CHUNG, K.; BALCHIN, C. *Backlash against Investment Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2010, p. 104.
[43] However, an opposite trend might be slowly approaching; for example, the proposed version of the Transatlantic Trade and Investment Partnership (TTIP) expressly provided the possibility of appeal.

During proceedings, numerous questions which demand the application of general international law or various law principles of law may be raised.[44] Apart from previous investment tribunals' decisions, investment tribunals are also keen to refer to decisions of other international adjudicating bodies, especially to the ICJ for settling public international law issues. Notwithstanding that, the previous conclusion about the non-binding nature applies correspondingly.[45]

2.4 Procedural advantages of investment agreements

In order to fully appreciate the revolutionary shift that investment agreements brought to foreign investors, one must first look at the remedies previously available in case of adverse state's acts towards investments in its territory.

Before the investment agreements were introduced, there were primarily two ways of seeking redress with regards to harmed investments.

Firstly, the investor could commence court proceedings under the local laws, especially those to protect property rights or contractual obligations. The disadvantages of bringing the claim against the state in its own courts are immediately obvious. The court decision will be made by organs of the same entity that allegedly breached the rights in question, which alone could in some cases cast doubts on the impartiality of the juridical body's decisions. Moreover, the quality level of the juridical proceedings is questionable, especially in the developing countries struggling with the shortage of trained staff or corruption. The process might become lengthy and may lack fair trial securities. Lastly, even if the court decided in favour of an investor, it might still face problems connected to the unenforceability of the decision.

Apart from local remedies, the investor could demand protection under international law. The problem was, however, that although customary international law already contained rules on the protection of aliens, especially the minimum standard and the requirement that in case of expropriation or nationalisation, compensation must be paid,[46] the only way to enforce those international obligations of host states was by exercising diplomatic protection on behalf of the injured investor.[47] But this power of the investors' home state is only discretionary, and it would depend on many factors whether the state would be willing to engage in a dispute with the other state. Before the

[44] TATTEVIN, G.; RICHARD, J. *International Court of Justice case law in ICSID awards* [online]. LALIVE, 31 ASA bulletin 3/2013 [accessed 3/3/2018], p. 687. Available at: http://www.lalive.ch/data/publications/Lalive_Lecture_2013.pdf.
[45] PELLET, A. The case-law of the ICJ in investment arbitration. In: *ICSID Review – Foreign Investment Law Journal*, vol. 28, issue 2, 2013, p. 227.
[46] CASESSE, A. *International Law*. Oxford: Oxford University Press, 2005, p. 523.
[47] McLACHLAN, C.; SHORE, L.; WEINIGER, M. *International Investment Arbitration: Substantive Principles*. Oxford: Oxford University Press, 2008, p. 4.

emergence of investment treaties, there was thus no dispute settlement mechanism available to the investors directly,[48] although it is true that the result of exercising diplomatic protection could result in an agreement with the host state to submit the arbitration of the dispute to a claims commission.[49] But even if the home state agreed to the intervention, the principle of exhaustion of local remedies would apply in diplomatic protection,[50] and the investor would first have to endure the disadvantages explained above.

It is evident that such remedies were inappropriate for the protection of foreign investments that by nature demand quick and impartial intervention. The solution did not, however, come automatically with the introduction of investment agreements. In fact, the first investment agreements did not contain provisions on dispute settlement.[51] This possibility only came later after the adoption of the ICSID Convention in 1965. The ICSID was established as a permanent institution administering the disputes between private investors and states.[52] The dispute settlement mechanism subsequently became routinely included into investment treaties after the adoption of the ICSID Convention. This solution tackled existing problems of rights enforcement under the previous regimes.

Harten recognises three key advantages of investment dispute settlement: (i) the possibility of seeking enforcement of claims of the investor against the state parties, (ii) sovereign acts are subject to broad review and (iii) those disputes are decided using a private model of adjudication originating in commercial arbitrations.[53] An investor may commence arbitration proceedings at its own discretion without the help or approval of its home state. Except for treaties that expressly require exhaustion of local remedies, an investor may bring the claim directly to the dispute settlement body without first seeking redress under local law. The tribunal itself will generally consist of three impartial arbitrators that will be experts in investment law. And even if the proceedings may take months or years, the process is still regarded as quick also because of the limited access to appeal and thus the finality of the award.

The abyss expanding between lengthy and uncertain remedies offered by local law or diplomatic protection and fast and depoliticised arbitration proceedings with the direct participation of an

[48] GUPTA, V. Exclusion from within the ambit of a protected investor, a fair price to pay for the act of abusive treaty shopping? In: *Transnational Dispute Management*, vol. 11, issue 1, 2014, p. 3.
[49] McLACHLAN, C.; SHORE, L.; WEINIGER, M. *International Investment Arbitration: Substantive Principles (Oxford International Arbitration Series)*. Oxford: Oxford University Press, 2008, p. 4.
[50] GUPTA, V. Exclusion from within the ambit of a protected investor, a fair price to pay for the act of abusive treaty shopping? In: *Transnational Dispute Management*, vol. 11, issue 1, 2014, p. 3.
[51] Ibid.
[52] CASESSE, A. *International Law*. Oxford: Oxford University Press, 2005, p. 525.
[53] HARTEN, V. H. *Investment Treaty Arbitration and Public Law*. Oxford: Oxford University Press, 2008, p. 11.

investor regardless of its home state intervention is enormous, and it is no surprise that investors exert all their effort to avoid the former.

2.5 The role of international law

The emergence of investment law undoubtedly contributed to the fragmentation of international law. The negative impact of the development of relatively autonomous international law systems primarily resides in the danger of conflicts between different rules, which may ultimately lead to the erosion of international law.[54] However, general public international law is still the foundation of investment law, which is sometimes overlooked because of the hybrid nature of investment law. But, as McLachlan states, '[i]nternational law is a legal system, and investment treaties are creatures of it and governed by it.'[55]

It is naturally not feasible to regulate all relevant issues within investment agreements themselves, nor is this intended. For that reason, agreements enumerate the sources of law that are to be applied in case of a dispute. These clauses often include the rule to decide the dispute 'in accordance with applicable rules of international law'. But, even without express reference, international law applies to investment disputes because international law is *lex generalis*[56] to investment law, and it 'will always be the law governing the interpretation and the application of the treaty providing the basis for the arbitration, to the extent that what is at stake, in investment treaty arbitration, is the international responsibility of a State.'[57]

Under article 42(1) of the ICSID Convention, international law serves the purpose of corrective and supplemental function to the application of domestic law to the substance of the dispute and to fill in the gaps not covered by domestic law and the treaty itself.[58] Simply put, 'it must be presumed that all other matters are governed by the provisions of the [BIT] itself which in turn is governed by international law.'[59] For that reason, certain matters are ruled exclusively by international law, for

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[54] *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission* [online]. United Nations, 2006 [accessed 11/9/2017], p. 11. Available at: https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf.
[55] McLACHLAN, C. Investment treaties and general international law. In: *International and Comparative Law Quarterly*, vol. 57, issue 2, 2008, p. 369.
[56] *Amoco*, ¶ 112.
[57] BANIFATEMI, Y. The Law Applicable in Investment Treaty Arbitration. In: YANNACA-SMALL, K. (ed.) *Arbitration under International Investment Agreements: A Guide to the Key Issues*. Oxford: Oxford University Press, 2010, p. 210.
[58] SCHREUER, Ch. *The Relevance of International Law in International Commercial Arbitration: Investment Disputes* [online]. Universität Wien [accessed 1/3/2017], p. 12. Available at: https://www.univie.ac.at/intlaw/pdf/csunpublpaper_1.pdf.
[59] *ADC*, ¶ 292.

example the state responsibility, the interpretation of the treaty or available remedies.[60] In other questions, international law serves to correct or fill in the gaps that domestic law or the IIA do not cover.[61] In addition, law principles may come into play as they have the function of setting the rules of operation of the legal system and introducing the common set of underlying rules.[62] Customary international law offers important guidance on substantial questions; its rules on the minimum standard for the treatment of aliens including their property, more specifically on expropriation and compensation, on the prohibition of denial of justice or injury to aliens are obvious examples.[63] To conclude, it is often not sufficient to examine the text of the IIA in question; one must bear in mind that the matrix creating investment law is more complex.

2.6 Treaty shopping

The term treaty shopping is most commonly used in international law with regards to the optimisation of tax obligations and in this sense refers to a situation when the taxpayer 'shops' into the benefits of a treaty which normally are not available to it and to this end it generally incorporates a corporation in a country that has an advantageous treaty.[64] Similarly, in investment law, treaty shopping may be understood as 'legal operations aimed at a strategic invocation, creation or change of nationality with the aim of assessing more beneficial investment treaties'.[65] It is a process of routing the investment in order to reach the protection of an investment treaty that would originally not be available.[66] An investor may only rely on the protection that the state of its nationality provides. If such protection is not sufficient or suitable for an investor, it may attempt to seek another investment treaty to secure its protection.

Reasons for treaty shopping in investment law are generally threefold. First and probably the least controversial reason for treaty shopping is the situation when an investor intends to invest in a

[60] SCHREUER, Ch. *The Relevance of International Law in International Commercial Arbitration: Investment Disputes* [online]. Universität Wien [accessed 1/3/2017], p. 10. Available at: https://www.univie.ac.at/intlaw/pdf/csunpublpaper_1.pdf.
[61] International Centre for Settlement of Investment Disputes. *Applicable law* [online]. United Nations [accessed 1/3/2017], p. 13. Available at: http://unctad.org/en/docs/edmmisc232add5_en.pdf.
[62] McLACHLAN, C. Investment treaties and general international law. In: *International and Comparative Law Quarterly*, vol. 57, issue 2, 2008, p. 373.
[63] International Centre for Settlement of Investment Disputes. *Applicable law* [online]. United Nations [accessed 1/3/2017], p. 23. Available at: http://unctad.org/en/docs/edmmisc232add5_en.pdf.
[64] WEEGHEL, V. S. *The Improper Use of Tax Treaties, With Particular Reference to the Netherlands and the United States*. London: Kluwer Law International, 1998, p. 119.
[65] BAUMGARTNER, J. *Treaty Shopping in International Investment Law*. Oxford: Oxford University Press, 2017, p. 12.
[66] CHAISSE, J. The Treaty Shopping Practice: Corporate Structuring and Restructuring to Gain Access to Investment Treaties and Arbitration. In: *Hastings Business Law Journal*, vol. 11, no. 2, 2015, p. 228.

country with which its home state has not concluded any investment treaty; thus, the investor would lack investment protection completely.

Secondly, treaty shopping may prove a viable solution when the investor's home state and the intended host state did conclude an investment treaty, but the host state also concluded other investment treaties that are more favourable for the investor. More favourable conditions may, for example, be represented by the access to the ICSID since in order to commence ICSID arbitration, both contracting parties must be parties to the ICSID Convention. More favourable agreements will naturally also be those which provide investors with broader substantive protection,[67] lack certain exceptions or do not impose special jurisdictional requirements. A good example in this respect is the *Phillip Morris* case against Australia. Phillip Morris is an American company; nevertheless, the free trade agreement between the US and Australia does not contain an ISDS clause. Therefore, before commencing the investment arbitration, the assets were transferred to a Hong Kong subsidiary Phillip Morris Asia, and Australia was sued under the Hong Kong–Australia BIT.

The third and most controversial reason for treaty shopping (further in the text also referred to as the '3rd type treaty shopping') is acquiring protection against actions of the home state of the investor itself. As was mentioned above, investment agreements are concluded to attract *foreign* capital; for that reason, states are willing to sacrifice a part of their sovereignty, provide investors with certain additional guarantees and accept jurisdiction of investment tribunals. Nonetheless, providing such guarantees to home investors does not bring the aimed results as the state does not get anything additional in return. However, this does not change the fact that in the current system, it seems, even home state investors may successfully shop into a treaty that would protect them against their own home state.

It is often desirable for a company that would otherwise not reach the protection of the investment scheme to make the investment through a holding company in a jurisdiction that concluded an investment treaty with the host state. In this way, it is the holding company that will qualify as an investor.[68] However, treaty shopping might be only a positive externality for multinational

[67] SKINNER, M.; MILES, C. A.; LUTTRELL, S. Access and advantage in investor-state arbitration: The law and practice of treaty shopping. In: *Journal of World Energy Law & Business*, vol. 3, no. 3, 2010, p. 261.
[68] SINCLAIR, A. The Substance of Nationality Requirements in Investment Treaty Arbitration. In: *ICSID Review – Foreign Investment Law Journal*, vol. 20, issue 2, 2005, p. 360.

companies that might restructure for other purposes – tax, costs benefits or for language and cultural reasons, creating operating divisions for better management activity.[69]

The most common way to treaty shop is the following. An investor sets up a subsidiary in the third state, and it is this company that will actually make and hold the investment in the territory of the host state. In case a dispute arises, the affiliate company may bring the claim before the tribunal. However, it might also be the parent company that brings the claim on the basis of either (i) indirect investment or (ii) direct investment in the form of shares of the affiliate company that lost value by the adverse action of the host state. There might also be more holding corporations inserted between, and the above-mentioned still applies. In this way, the ultimate investor may possibly include several companies from different jurisdictions in order to facilitate the broadest protection possible, because practically any of them might invoke protection under a different treaty.

There are other ways to treaty shop: it may be the assets and business of the company that are transferred. Treaty shopping can also be done by a change of share ownership that would be an 'upstream ownership change'. Also, corporate nationality can be changed directly;[70] however, that is not always easily done. All of these variations include global implications concerning the relocation of assets or setting up corporations in different jurisdictions.

Not surprisingly, treaty shopping may be, in some cases, perceived as an abuse of the investment protection system that may cause certain distrust towards investment arbitration. Indeed, abusive corporate restructuring already led to the termination of some treaties[71] and to the denunciation of the ICSID Convention by several states.[72] Treaty shopping undermines the functioning of the international investment system mainly for the following reasons: (i) violation of the principle of reciprocity[73] that governs the legal relations between the contracting states of investment treaties granting both the same rights and obligations; if the investor treaty shops, it has no ties with its strictly formal home state while the real home state most probably does not reciprocally grant the same rights

[69] TIETJE, Ch.; KRAFT, G.; LEHMANN, M. (eds.). *The Determination of the Nationality of Investors under Investment Protection Treaties* [online]. Martin Luther University Halle-Wittenberg [accessed 2/4/2017], p. 84. Available at: http://telc.jura.uni-halle.de/sites/default/files/BeitraegeTWR/Heft%20106.pdf.

[70] LEE, Ch. Resolving Nationality Planning Issue Through the Application of the Doctrine of Piercing the Corporate Veil in International Investment Arbitration. In: *Contemporary Asia Arbitration Journal*, vol. 9, no. 1, 2016, p. 101.

[71] For example, the Bolivia–Netherlands BIT, in 2017 Ecuador terminated all its BITs – for more detail see MUÑOZ, P.; GUSTAVO, J. Ecuador's 2017 Termination of Treaties: How Not to Exit the International Investment Regime. In: *Brazilian Journal of International Law – Revista de Direito Internacional*, vol. 14, no. 2, 2017, p. 6.

[72] BRABANDERE, E. 'Good Faith', 'Abuse of Process' and the Initiation of Investment Treaty Claims. In: *Journal of International Dispute Settlement*, vol. 3, no. 3, 2012, p. 612; namely Bolivia, Ecuador and Venezuela.

[73] LEE, E. Treaty Shopping in International Investment Arbitration: How often has it occurred and how has it been perceived by tribunals? In*: London School of Economics and Political Science: Working paper Series 2015*, no. 15–167, p. 6.

to the host state, (ii) possible lack of state consent because it is often questionable whether it was the intention of the contracting states to extend the protection so widely also to investors that are in fact nationals of other states, (iii) limitation of state powers resulting in the so-called regulatory chill that describes the unwillingness of the states to legislate on matters that might possibly provoke investment arbitration, which may prevent proposing important reforms in health, social and environment areas; due to treaty shopping the pressure not to introduce these reforms might multiply because the range of investors that might sue the state becomes wider, (iv) internationalisation of domestic disputes because treaty shopping gives the home state investors the option to relocate their investment in such manner that they can access the international remedy system.

For those reasons, it seems desirable to set appropriate limits on treaty shopping, to know beforehand to what range of investors the protection would apply.

3 DEFINING INVESTOR AND INVESTMENT

Treaty shopping is a practice that includes gaining additional protection by creating a new identity or changing the existing one in such a way, that an investor becomes a qualified investor under a desired treaty. For that reason, identifying a qualified investor is a crucial point for any subsequent analysis of the issue. I will wholly focus on corporate investors due to the fact that treaty shopping done by individual persons is difficult to execute.

In order to be subjected to the chosen treaty, an investor must fall within the definition of investor contained in that treaty. Therefore, in cases of treaty shopping, tribunals are regularly asked to interpret the notion of corporate nationality in international law, as well as under the respective treaty. As will be presented further down in this chapter, corporate nationality is a sophisticated concept, whose meaning is not yet fully clarified.

Firstly, I will provide a summary of how the corporate nationality is perceived in the general international law optics. In the second part of this chapter, I will focus on divergences from this general concept peculiar to international investment law.

3.1 How to approach nationality of corporations

Investment treaties are unique instruments of international law as they diverge from the traditional system, in which only states could be subjects of international rights and obligations. Investment treaties appoint rights directly to individuals and so international investment law is arguably the area of international law, in which individuals play the paramount role.[74] However, the range of protected subjects is not universal as opposed, for example, to international human rights law. Since IIAs are bilateral or multilateral and pose serious restrictions on sovereign powers of states, the interest of the contracting parties is to limit the personal scope of investment treaties only to investors that are somehow connected to the other contracting party. For that reason, the rights are not to be granted to *any* foreign investor. Inherently, the link for determination of who will be entitled to seek a redress under investment treaties was chosen to be nationality.

Nationality is a relationship. A relationship is a bond. However, how to define the quality of the bond? Who determines who is a national of a state and who is not? From an internal point of view

[74] DUMBERRY, P.; LABELLE-EASTAUGH, E. Non-State Actors in International Investment Law: The Legal Personality of Corporations and NGOs in the Context of Investor-State Arbitration. In: D'ASPREMONT, J. (ed.) *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law*. Oxford: Routledge-Cavendish, 2011, p. 360.

of a state, municipal law is free to define the contents of the term nationality and to specify requirements to be fulfilled in order to gain it. As it is firmly apprehended already in the Convention on Certain Questions Relating to the Conflict of Nationality Law ('**Hague Convention**'), '[i]t is for each State to determine under its own law who are its nationals.'[75]

Externally, though, this power of states is not unlimited. Article 1 of the Hague Convention continues as follows: '[t]his law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.' The limitations on the states' freedom to determine nationality posed by international law are noticeable especially in the area of human rights law, where they operate in order to prevent statelessness or deprivation of citizenship.[76] Another illustration of how international law affects the notion of nationality independently of municipal law is the doctrine of the 'effective link' evolved by the ICJ case law, which requires a higher quality of the bond of an individual to a state in order to be validly recognised its national under international law than most states may pose in their domestic legislation.

It may not be obvious at first sight; however, nationality is one of the central points of international investment law. The rights arising under investment treaties are granted not to states but to individuals of the contracting states. Therefore, identifying the correct subjects who may enjoy the investment protection rights is vital, otherwise the protection would be stretched contrary to the intentions of the contracting parties.

Instinctively, qualifying nationality of individuals seems less complicated than qualifying nationality of corporations. This is due to the fact that – first – the former is often regulated in detail in municipal legislations and – second – nationality plays an important role in the life of each individual and the concept of nationality of individuals is therefore known for decades. Whereas, in respect to companies, their nationality is a relatively young concept, a quality that had to be artificially assigned to them. The difficulties encountered when apprehending corporate nationality are also caused by the fact that companies are legal constructs and their bond to a state cannot be established on the notion of the place of birth or on the nationality of ancestors. Inversely to nationality of individuals that once established may be changed only with difficulty, nationality of a corporation may change when the

[75] Hague Convention, article 1.
[76] ACHIRON, M.; BATCHELOR, C.; LECLERC, P. (eds.) *Nationality and statelessness: A handbook for parliamentarians.* Geneva: Inter-Parliamentary Union, 2005, p. 9.

basis on which its nationality was determined is changed,[77] since reincorporation or change of a seat may arguably transform nationality of a corporation.[78] Such shift of nationality was for instance accepted by the tribunal in the *Aguas del Tunari* case. A change of corporate nationality requires that both jurisdictions – of the original state and of the target state – allow such corporate migrations. Those situations will generally be relatively rare, nonetheless, in this case, the possibility was allowed by the Cayman Islands as well as by Luxembourg laws. The legal entity in question was not deemed to cease to exist and to be newly established, on the contrary, it was perceived as a continuation of the original entity with changed nationality.[79]

Notwithstanding, it is corporations that represent the overwhelming majority of claimants in investment arbitration disputes, not natural persons[80] and so investment tribunal are often compelled to identify the protected subjects. Nationality of legal persons is usually not regulated by municipal laws[81] that mainly concentrate on administrative and statutory rules governing corporations connected to the national economy.[82] This absence is probably caused by the fact that special 'nationality' obligations imposed on individuals (such as military defence obligations) are not easily applicable to legal persons and other obligations find different means of identifying the obliged subjects than through their nationality. There is, therefore, no real demand for regulating corporate nationality in municipal law. For that reason, local laws are not interested in nationality of corporations as it is in fact a different concept than nationality of individuals. Confusingly, the same term is used merely for the reason that no other term has – and probably will not – emerged yet, even though using the same name for relationships of different qualities may bring certain confusions. A tie – nationality – of a corporation to a country facilitates merely the existence of a corporation that is wholly fictional. For this reason, it must be the legal system of a state that facilitates its creation and subsequent existence. However, in no account such relationship includes obligations and benefits of nationality of individuals, although they share some characteristics; compared to nationality of individuals, nationality of a corporation is not truly nationality at all.[83]

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[77] SCHOKKAERT, J.; HECKSCHER, Y. Protected Investors Nationality. In: *The Journal of World Investment & Trade*, vol. 10, issue 5, 2009, p. 711.
[78] Ibid. p. 717.
[79] *Aguas del Tunari*, ¶ 174.
[80] DUMBERRY, P.; LABELLE-EASTAUGH, E. Non-State Actors in International Investment Law: The Legal Personality of Corporations and NGOs in the Context of Investor-State Arbitration. In: D'ASPREMONT, J. (ed.) *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law*. Oxford: Routledge-Cavendish, 2011, p. 360
[81] BROWNLIE, I. *Principles of public international law*. Oxford: Oxford University Press, 2003, pp. 407–408.
[82] ROBERTS, W. Corporate Nationality in International Law. In: *Jurist*, vol. 10, 1952, p. 73.
[83] SCHOKKAERT, J.; HECKSCHER, Y. Protected Investors Nationality. In: *The Journal of World Investment & Trade*, vol. 10, issue 5, 2009, p. 710.

Which source of law does determine what nationality of a legal person is? An interesting differentiation was suggested by Young who introduces the concept of *personal law* of a corporation – the law under which it was organised, carried on its legal life and was in the end liquidated. As opposed to this stand *social activities* of the company – nationality in the political sense that is centred on its actions carried out in the commercial sphere. The first notion is dealt with by municipal and private international law, whereas for the second, the functional view, international law should be given preference.[84]

For the vast majority of companies, their nationality will be irrelevant during their whole existence, however, it may become important once they need to rely on international law protection. Conversely, generally it is not important for states to determine companies that shall be regarded as their nationals as corporation nationality does not include any 'nationality' obligations whose fulfilment states could demand, so domestically, it would be an empty and superfluous concept. If anyone, it would be corporations themselves that would demand fulfilment of 'nationality' obligations from states. It is therefore no surprise that the concept of nationality of corporations was mainly developed in the area of diplomatic protection. In the pre-investment treaty regime, nationality was necessarily the key to remedies that legitimised a state's intervention against another state on the basis of exercise of diplomatic protection.[85]

Diplomatic protection means the right of a state to protect and search international remedy on behalf of its nationals against wrongdoings of another state.[86] Before the rise of investment treaties, diplomatic protection was the primary means of protection against ill-treatment abroad. For that reason, diplomatic protection cases are those in which international judicial bodies rendered decisions that concern nationality of corporations that create rudiments of the concept until today.

I cannot but briefly start with a few remarks on the famous *Nottebohm* case. It is probably redundant to remind its factual details; it is only important that it concerned the question of nationality of an individual. In this case, the ICJ developed the notion of the 'effective nationality' that is demanded so that a state can exercise diplomatic protection on behalf of the harmed person. It requests that the connection of a national and the state asserting diplomatic protection must be

[84] ROBERTS, W. Corporate Nationality in International Law. In: *Jurist*, vol. 10, 1952, p. 74.
[85] TIETJE, Ch.; KRAFT, G.; LEHMANN, M. (eds.) *The Determination of the Nationality of Investors under Investment Protection Treaties* [online]. Martin Luther University Halle-Wittenberg [accessed 2/4/2017]. p. 11. Available at: http://telc.jura.uni-halle.de/sites/default/files/BeitraegeTWR/Heft%20106.pdf.
[86] DUGARD, J. *Introductory note to 2006 Articles on Diplomatic Protection* [online]. United Nations Wittenberg [accessed 2/4/2017]. Available at: http://legal.un.org/avl/ha/adp/adp.html.

sufficiently close, real and effective.[87] The ICJ characterised nationality as 'a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State'.[88]

According to the ICJ, the fulfilment of formal criterions is not sufficient in order to rely on a certain nationality for the purposes of diplomatic protection. It follows that even if the state of the asserted nationality (in this case, Lichtenstein) may perceive the person as its national, this view may not prevail in the context of international law rights and obligations.

Are these conclusions, at least to some extent, applicable also to corporations?

As early as in 1927, the Committee of experts for the progressive codification of international law under the League of Nations was posed the question whether it was possible to formulate by way of a convention international rules concerning nationality of commercial corporations.[89] I find it convenient to reproduce some of the findings of the committee, which seem to be a good starting point for the further analysis, as the conclusions seem applicable until the present. The committee arrived at the following findings.

> '1 The nationality of a commercial company shall be determined by the law of the contracting party under whose law it was formed and by the situation of the actual seat of the company which may only be established in the territory of the State in which the company was formed.
>
> 2 The determination of nationality in the above sense shall in no way affect the full right of the contracting States to make rules as to the formal and material conditions governing the formation of commercial companies: such rules depend entirely upon the municipal law.
>
> 3 As between the contracting parties, the legal definition of the seat of a company shall be determined by the municipal law under which the company

[87] *Nottebohm*, p. 24.
[88] *Nottebohm*, p. 23.
[89] League of Nations. *Report of the Council of the League of Nations on the Nationality of Commercial Corporations and their Diplomatic Protection*, adopted in 1927. Available in: The American Journal of International Law, vol. 22, no. 1, 1928, p. 172.

was formed and its seat established. Nevertheless, inasmuch as the seat of the company as defined by the terms of association must be connected with the country of formation, the contracting parties shall be free to regard a seat as fictitious and artificial if its connection with the territory, whether it be that of a contracting State or of a third State, is fraudulent and intended to evade imperative provisions of the applicable law or if the real and effective seat is not situated in the country of formation of the company. Withdrawal of nationality from a company, on the ground of a fictitious and artificial seat, shall be recognised by each signatory State in the measure in which judgments are reciprocally recognised and executed in the relations between the signatory States.

[…]

6 The right of diplomatic protection and intervention on behalf of commercial companies shall belong to the State of which they are nationals under the provisions of the present Convention […]'[90]

To sum up the findings, the committee acknowledged that nationality of corporations shall be determined by the municipal law of the country of their formation, however, it also suggested the possibility of disregarding the place of the seat if it is merely fictional, chosen fraudulently or if the effective seat is located elsewhere. The committee also referred to some of the criteria, which are suggested for identifying corporate nationality in international law: incorporation, seat and effective activities. As will be shown further in the text, these criteria are regularly relied on until today.

3.2 Barcelona Traction case – the mother of all problems?

In the context of diplomatic protection, nationality of multinational corporations was interpreted by the ICJ in the notorious *Barcelona Traction* case that is commonly referred to also by investment tribunals. For that reason, I find it important to outline the outcomes of the decision here.

The dispute concerned Belgium that attempted to exercise diplomatic protection on behalf of its citizens that were shareholders of Barcelona Traction, a company incorporated and having its head office in Canada which operated and held most of its assets in Spain. Bankruptcy proceedings were

[90] League of Nations. *Report of the Council of the League of Nations on the Nationality of Commercial Corporations and their Diplomatic Protection*, adopted in 1927. Available in: The American Journal of International Law, vol. 22, no. 1, 1928, p. 204–205, emphasis added.

commenced against the company in Spain and Belgian shareholders were said to sustain damage as result of the course of the proceedings which were allegedly instituted contrary to international law.[91]

The court strictly differentiated between the company, the subject that could oppose the acts of the state, and its shareholders that were not endowed with such powers. Although shareholders may be indirectly damaged, that does not imply that both the company and its shareholders could search compensation, except in two cases (i) if the company itself ceases to exist and (ii) if the state of the company has no capacity to take an action in diplomatic protection.

Importantly, Canada was indirectly recognised as the 'state of nationality' of Barcelona Traction, even though the ICJ specifically noted that since the question of Canada's right to bring the claim on the basis of diplomatic protection was not brought before it, the court did not find it necessary to fully clarify the issue.[92] Nonetheless, all concerned parties considered the company to be Canadian since it was incorporated and had its seat in Canada, existed under its laws, its accounts and registers were also allocated in Canada and it was also the place where the board meetings took place; the links were thus multiple.[93] Canada in fact exercised diplomatic protection of the company in several cases.[94]

The court admitted that 'in allocating entities to States for purposes of diplomatic protection, international law is based, however, only to a limited extent on an analogy with the rules governing the nationality of individuals'.[95] According to the ICJ incorporation and a registered office have been confirmed by a long practice and by numerous international instruments to be the main criteria to be looked at. The court also noted that some states only granted diplomatic protection under the condition that the company had a seat (*siège social*), management or centre of control in its territory or if the majority of shareholders were its nationals.[96]

In the decision, the court presented slightly contradictory findings with regards to the application of the genuine link theory on corporations. Firstly, the court stated that provided there are the aforementioned additional requirements apart for incorporation (such as a seat, management or control), 'only then […] there exist between the corporation and the State in question a genuine

[91] *Barcelona Traction*, p. 8–11.
[92] Ibid. ¶ 84.
[93] Ibid. ¶ 71.
[94] Ibid. ¶ 74.
[95] Ibid. ¶ 70.
[96] Ibid. ¶ 70.

connection of the kind familiar from other branches of international law."[97] However, it highlighted that in the area of diplomatic protection of companies 'no absolute test of the "genuine connection" has found general acceptance.'[98]

Another aspect of the decision important for the issue of treaty shopping is the possibility of 'lifting the corporate veil', in this case meaning disregarding the company and granting the right of international protection to its shareholders. With reference to municipal law, the court admitted that in some cases, it is possible to resort to lifting the corporate veil, especially if that was equitable in order to 'prevent the misuse of privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as creditors or purchases, or to prevent the evasion of legal requirements or of obligations.'[99] The veil might be lifted, as was asked in the case of *Barcelona Traction*, to protect entities within the company, i.e. shareholders, nonetheless, it is more common to lift the veil in order to protect the third parties. The independent existence of a company cannot be treated as absolute, but even then, lifting the corporate veil should be made an exceptional circumstance.[100] The court in the end admitted that the principle is admissible to play a similar role in international law and in special circumstances it might be justifiable to lift the corporate veil.[101]

The problem of the decision is that it opened many important issues but left many related questions unanswered. If the genuine link is not applicable to corporate persons, yet certain quality of connection is required, what kind of connection should it be? If the doctrine of lifting the corporate veil might be imported to international law, how should it operate and in which cases? Unfortunately, in this sense, the ICJ only slightly touched the question of nationality of corporations without any detailed analysis. Yet it remains the cornerstone decision often referred to by investment tribunals.

The decision was followed by several separate opinions, some of which fittingly highlighted the insufficiencies of the judgement. Judge Fitzmaurice in fact found close resemblance of the *Nottebohm* and *Barcelona Traction* cases and an the end of his opinion he stressed that 'doctrinally, [there has] been much discussion and controversy as to what is the correct test to apply in order to determine the national status of corporate entities; and although the better view is that […] the correct test is that of the State of incorporation, there is equally no doubt that different tests have been applied for different purposes, and that an element of fluidity is still present in this field. This being so, it is surely

[97] *Barcelona Traction*, ¶ 70.
[98] Ibid. ¶ 70.
[99] Ibid. ¶ 56.
[100] Ibid. ¶ 57.
[101] Ibid. ¶ 58.

a highly tenable proposition that the very circumstances which might lead to the State of incorporation being held to be disqualified from claiming, due to the fact that the absence of a "genuine link" due to the company's ownership and control and main business interests being elsewhere, might equally tend to suggest that in such a case a different test of nationality should be applied.'[102] He subsequently criticised the approach of the court which did not go into any detailed examination of nationality of corporations solely on the basis of the fact that neither of the parties contested the claimed Canadian nationality.[103]

The judges were also well aware that too loose interpretation may cause unnecessary problems in the future. Judge Jessup opined that the 'genuine link' concept represents a general principle of law and not merely an ad hoc rule and that it is applicable on legal persons. He pointed at the same test known in maritime law to prevent 'flags of convenience' and then referred to number of international law sources that used the 'genuine link' as an applicable nationality rule.[104]

Judge Gros even asserted the Canadian nationality void of judicial significance. According to him '[a] holding company whose capital is apportioned among shareholders of several nationalities and of which the object is to operate an industry abroad cannot be governed by one system of municipal law in respect of all the problems concerning it. And the question of which municipal law is applicable to a specific problem is a matter for international law. That is what underlies the problem of the "nationality" of companies. The assertion by a State that it has jurisdiction over a company is nothing but a claim so long as it has not been admitted by all the States directly concerned in that situation or by an international judicial decision.'[105] He went on to express the opinion that the genuine link should even have greater importance in case or corporations than in case of individuals: '[t]he decision regarding Nottebohm, an individual, which tacitly left the case of companies open, can be applied with even greater reason to companies, for the connecting factor of economic interest, as between investments and the State from which they really come, is essential […]'[106]

This illustrates that the conclusions of the ICJ were not the outcome of general consent, on the contrary the question of the relationship of companies to states was not well established even

[102] *Separate Opinion of Judge Sir Gerald Fitzmaurice to Barcelona Traction*, p. 33.
[103] Ibid. p. 34.
[104] For instance, in the case *I'm alone* the claim was denied to a vessel although it operated under the British flag because it was de facto controlled by the US, see Joint Interim Report of the Commissioners dated the 30th June, 1933 to the *I'm alone* case [online]. *United Nations* [accessed 21/9/2018, p. 1614. Available at: https://legal.un.org/riaa/cases/vol_III/1609-1618.pdf.
[105] *Separate Opinion of Judge Gros to Barcelona Traction*, p. 21.
[106] *Separate Opinion of Judge Gros to Barcelona Traction*, p. 22.

between the deciding judges. Unfortunately, the findings of the court demanded more complex elaboration and argumentation as by way of it turned out, they gained significant importance.

Some of the findings of the ICJ were later in 2006 adopted and reflected in the Draft Articles on Diplomatic Protection ('**Draft Articles**') whose article 9 sets forth that 'for the purposes of the diplomatic protection of a corporation, the State of nationality means the State under whose law the corporation was incorporated.'[107] The court's outcomes concerning protection of shareholders are almost literally adopted in article 11 of the Draft Articles. The commentary on article 9 itself refers to the *Barcelona Traction* case and notes that the court indicated two conditions for the acquisition of nationality for companies – incorporation and a seat and since 'the laws of most States require a company incorporated under its laws to maintain a registered office in its territory, even if it were mere fiction, incorporation is the most important criterion for the purposes of diplomatic protection.'[108] The commentary also stresses the fact that these criterions were not found wholly satisfactory by the ICJ and although the court did not require the 'genuine connection' link, it still suggested the need of a certain qualified link – a close and permanent connection between the company and the state. The Draft Articles further partially reflect this in the second part of article 9, according to which: '[w]hen the corporation is controlled by nationals of another State or States and has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality.'[109] The Draft Articles thus provide for an exception in cases when there is no substantial link with the country of incorporation as opposed to another state. As the commentary states, 'policy and fairness dictate such option'.[110] The derogation from the incorporation test is drafted in a way that prevents multiple claims, i.e. all of the conditions set in the second part of article 9 must be fulfilled in order for the other state to be able to exercise diplomatic protection on behalf of the company. It is hence the state of incorporation or the other state, never both that are granted such option.[111]

The *Barcelona Traction* case did not indeed help very much with clarifying how the corporate nationality should be approached in international law and it is also important to bear in mind that the

[107] Draft Articles on Diplomatic Protection, article 9.
[108] Draft Articles on Diplomatic Protection with Commentaries [online]. *United Nations* [accessed 21/9/2018], p. 37. Available at: https://www.refworld.org/pdfid/525e7929d.pdf.
[109] Draft Articles on Diplomatic Protection, article 9.
[110] Draft Articles on Diplomatic Protection with Commentaries [online]. *United Nations* [accessed 21/9/2018], p. 38. Available at: https://www.refworld.org/pdfid/525e7929d.pdf.
[111] Draft Articles on Diplomatic Protection with Commentaries [online]. *United Nations* [accessed 21/9/2018], p. 38. Available at: https://www.refworld.org/pdfid/525e7929d.pdf.

case concerned diplomatic protection that calls for a slightly different approach than investment law disputes as it is underlined by different principles justifying its existence. Diplomatic protection 'is necessarily limited to intervention on behalf of [the State's] own nationals because, […] it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection'.[112]

The judgement later received wide criticism[113] and might seem even more unsatisfactory nowadays in the time of globalisation when nationality of corporations is by many perceived more as a fact of coincidence or convenience.[114] In fact, for diplomatic protection, some form of a sufficiently substantial 'genuine link' will always ipso facto be needed, since states would not exercise diplomatic protection merely on the basis of incorporation as they would presumably not spend their energy, money and political influence on protection of corporations without any material connection to the state.[115] The problem is that the decision became the leading corporate nationality case in general while in other areas of international law, this factual predisposition (factual genuine link) does not work. Nonetheless, in the diplomatic protection context '[the] practice of the post-Barcelona Traction era shows that States adopt a variety of approaches in deciding whether to espouse the claim of a company against another State. Some, such as the United Kingdom of Great Britain and Northern Ireland and the United States of America, require a real and substantial connection with the corporation, while others emphasize the *siège social* or economic control. In summary, tests such as control, *siège social* or majority shareholding, which emphasize the genuine connection between the State exercising diplomatic protection and the company, enjoy greater support than the slender and neutral link of incorporation.'[116] Vicuňa expresses his conviction that the practice has already moved towards the perception of nationality of corporations in its economic reality: 'nationality has followed a process of de-linking from the nation state so as to become an element of interconnection with the framework governing the activities concerned […] Nationality in respect of those activities is no longer exclusively national but also global'.[117] This shift towards looking into the control of corporations is evident also

[112] *Panevezys-Saldutiskis Railway case*, p. 16.
[113] *Fourth report on diplomatic protection* [online]. United Nations [accessed 21/9/2018], part 3, p. 14. Available at: https://digitallibrary.un.org/record/497843.
[114] TIETJE, Ch.; KRAFT, G.; LEHMANN, M. (eds.) *The Determination of the Nationality of Investors under Investment Protection Treaties* [online]. Martin Luther University Halle-Wittenberg [accessed 2/4/2017], p. 11. Available at: http://telc.jura.uni-halle.de/sites/default/files/BeitraegeTWR/Heft%20106.pdf.
[115] *Fourth report on diplomatic protection* [online]. United Nations [accessed 21/9/2019], part 3, p. 16. Available at: https://digitallibrary.un.org/record/497843.
[116] Ibid.
[117] VICUÑA, F. The Globalization of Nationality. In: *Conference on Nationality and Investment Treaty Claims*. British Institute of International and Comparative Law, London, 6th May 2005, p. 119. Available at: https://www.biicl.org/files/955_the_globalization_of_nationality_(3)_-_vicuna.doc.

in another ICJ judgement following *Barcelona Traction*, the *ELSI* case that in fact enabled shareholders of a company to search a remedy by means of diplomatic protection or by investment claims.[118] However, in the *ELSI* case, shareholders were not seeking redress for a direct injury, but for reflective loss.[119] The ICJ in this case considered the effective control of the ELSI by the US companies, but this was done mainly to decide the merits of the claim in order to ascertain whether the shareholders' right to effective control and manage corporations of the other contracting party as granted by the FCN Treaty between the US and Italy was hampered by Italy.[120] For this reason the notion of effective control does seem limited only to the circumstances of the case or rather to its legal basis that specifically concerned effective control.

Given the consequences that nationality of corporations has in international law, I held the position that certain quality of the relationship with the state should be demanded. I admit that complications may arise if there are several states to which a company may have the genuine connection, however first, analogies with double nationality of natural persons may serve as a good start for the solution of those situations and secondly, this risk is inseparably connected to juridical persons due to the character of their existence. No straightforward answer is available here as corporations will always be artificial constructs, but nowadays, as Schokkaert and Heckscher aptly note: '[c]orporate domicile and residence are, for all practical purposes in a globalised world, so susceptible to manipulation as to become meaningless if not indeed deceptive.'[121] The practice should not give up on searching the solution of this issue that is admittedly difficult to tackle only because one of the available solutions is uncomplicated, but does not necessarily reflect the reality.

3.3 Corporate nationality under investment treaties

According to the ICJ, shareholders do not generally have a right to claim compensation for the losses incurred on the basis of an adverse state act vis-à-vis the company. Conversely, investment protection facilitates exactly such possibility. Based on some of the investment arbitration cases, it may seem that contrary to the conclusions of the ICJ, in investment law, each part of the shareholders' chain may

[118] Elettronica Sicula SpA (ELSI), United States v Italy, Judgment, Merits, ICJ GL No 76, [1989] ICJ Rep 15, (1989) 28 ILM 1109, ICGJ 95 (ICJ 1989), 20th July 1989, United Nations [UN]; International Court of Justice [ICJ]. In this case, the US initiated the proceedings before the ICJ on behalf of two US companies that jointly held 100% of shares of the Italian company ELSI allegedly harmed by the Italian local government; the case arose out of a FCN Treaty between Italy and the US.
[119] DOUGLAS, Z. *The International Law of Investment Claims*. New York: Cambridge University Press, 2012, p. 408.
[120] *ELSI*, ¶ 120.
[121] SCHOKKAERT, J.; HECKSCHER, Y. Protected Investors Nationality. In: *The Journal of World Investment & Trade*, vol. 10, issue 5, 2009, p. 711.

have a right to bring a claim against the state.[122] This is due to the fact that this possibility is commonly envisaged in investment treaties themselves. Agreeing with this finding, the ICJ in the *Diallo* case admitted that 'in contemporary international law, the protection of the rights of companies and the rights of their shareholders, and the settlement of the associated disputes, are essentially governed by bilateral or multilateral agreements for the protection of foreign investments.'[123]

Typically, IIAs themselves define the range of investors who qualify for the protection that they provide. Definitions of investors or of investments are thus true gates to the realm of treaty shopping. Investment law creates no unified system, and the same applies to the wording of clauses which vary from more liberal to more restricted types. On the other hand, although differing in details, in general there is the same pattern followed in IIAs.

Are the previous outcomes regarding nationality of corporations also applicable in international investment law? What is the relation between the ICJ findings regarding nationality and definitions contained in investment agreements? Is it true that 'by agreeing on specific language of BIT, the signatory states have shown in this respect an intention to exclude any other rule of international law'?[124] Does that mean that general international law is superseded? There are several reasons to think otherwise.

First, definitions in IIAs are often insufficient in order to identify nationality of corporations and the treaties tend to use undefined terms. Those terms must then be interpreted in accordance with international law envisaged in the Vienna Convention on the Law of the Treaties ('**Vienna Convention**') whose article 31(3)(c) demands the interpretation in line with 'any relevant rules of international law applicable in the relations between the parties'. In this sense international law operates indirectly by application of its interpretation rules.

Secondly, the *lex specialis* rule does not prevent application of general international law on questions that are not dealt with in the treaty.[125] As Schreuer notes, 'however wide their subject matter, [investment treaties] are all nevertheless limited in scope and are predicated for their existence and

[122] SINCLAIR, A. The Substance of Nationality Requirements in Investment Treaty Arbitration. In: *ICSID Review - Foreign Investment Law Journal*, vol. 20, issue 2, 2005, p. 361.
[123] *Diallo*, ¶ 88.
[124] TIETJE, Ch.; KRAFT, G.; LEHMANN, M. (eds.) *The Determination of the Nationality of Investors under Investment Protection Treaties* [online]. Martin Luther University Halle-Wittenberg [accessed 25/9/2018], p. 41. Available at: http://telc.jura.uni-halle.de/sites/default/files/BeitraegeTWR/Heft%20106.pdf.
[125] Ibid.

operation on being part of the international law system.'[126] International law as the source of the legal matrix that shall be used by investment arbitration tribunals is often recognised expressly in IIAs themselves and it is specifically referred to also in the ICSID Convention.[127]

The last theoretical way how general international law may influence notion of nationality in investment law are limitations posed by the *ius cogens* rule, although probably no conflicts have arisen with regards to nationality requirements of investment treaties in this regard.

What methods of linking a corporation to a state have evolved in investment law? Not surprisingly, nationality has reminded the key criterion. Interestingly, the first BIT did not refer to the term of nationality in respect of corporations but used simply the words 'company of either state'.[128] The following treaties however tend to perceive the protected corporate investors as 'nationals'.

To identify nationality, several defining tests emerge throughout treaties. They typically refer to incorporation of the company, its seat, its head office, the place of its substantial activities or its control. There is no single generally accepted link between a company and a state, the preference of the criterion depends on political, economic or cultural factors of the contracting states.[129] For that reason it is necessary to approach each treaty with caution since definitions range widely even in cases of the same contracting state. The mentioned criteria might also be combined and impose multiple requirements that must be fulfilled. However, the most common condition is still incorporation as a single criterion,[130] although the practice now slowly turns to using combination of factors[131] since it has long been argued that incorporation or *siège social* tests are not appropriate for multinational corporate investors as they are not capable of revealing the true links and relations to a state.[132]

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[126] McLACHLAN, C. The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention. In: *International and Comparative Law Quarterly*, vol. 54, 2005, p. 280.
[127] Article 42 of the ICSID Convention reads: '[t]he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.'
[128] TIETJE, Ch.; KRAFT, G.; LEHMANN, M. (eds.) *The Determination of the Nationality of Investors under Investment Protection Treaties* [online]. Martin Luther University Halle-Wittenberg [accessed 25/9/2018], p. 46. Available at: http://telc.jura.uni-halle.de/sites/default/files/BeitraegeTWR/Heft%20106.pdf.
[129] SINCLAIR, A. The Substance of Nationality Requirements in Investment Treaty Arbitration. In: *ICSID Review - Foreign Investment Law Journal*, vol. 20, issue 2, 2005, p. 367.
[130] LEE, Ch. Resolving Nationality Planning Issue Through the Application of the Doctrine of Piercing the Corporate Veil in International Investment Arbitration. In: *Contemporary Asia Arbitration Journal*, vol. 9, no. 1, 2016, p. 97.
[131] SCHOKKAERT, J.; HECKSCHER, Y. Protected Investors Nationality. In: *The Journal of World Investment & Trade*, vol. 10, issue 5, 2009, p. 718.
[132] BURGSTALLER, M. Nationality of Corporate Investors and International Claims against the Investor's Own State. In: *The Journal of World Investment & Trade*, vol. 7, issue 6, 2006, p. 857.

An interesting analogy was suggested in 1971, following the *Barcelona Traction* case, by Metzger who looked into the outcomes of the judgement under investment law long before the first investment cases concerning shell companies appeared. He made a detailed account of how investment guaranty schemes (programmes of capital exporting countries for ensuring private foreign investment) operate and of the nationality requirements necessary in order to benefit from them. He warned of the insufficiencies of using the incorporation test for investment law. In the end he concluded that 'mere local incorporation is far too slender and neutral a connection to motivate capital-exporting countries to expend the extraordinary time, energy and international political capital needed in pressing international claim. The respondent developing country likewise cannot be accepted such a minor connection to contributing the "genuine link" necessary to confer standing to present an international claim when capital-exporting countries, in putting their own money at risk, are unwilling to do so on the basis of so slight a connection. Rather, the common denominator of the insurance schemes – local incorporation plus 51% local ownership – would appear in corporate cases to represent the current reality of the "genuine link" of the Nottebohm case. And in international economic affairs, as much as, or more than in international political and security affairs, it pays to stay close to reality.'[133]

Especially nowadays, in a globalised economy created by complex multinational companies, it would seem necessary for creating equilibrium between the concerned parties that not only formalistic incorporation details were important, but that also the true ties were be considered. In many cases, due to operation of companies in multiple economies it may seem inappropriate to connect a company to a single state.

Nevertheless, the investment arbitration application practice took a different course, disregarding mostly any search for a closer link to the country of claimed nationality, honouring the literal wording of the treaties and predominantly only examining the incorporation criterion. Two problematic outcomes emerge based on this approach: some corporations were characterised as nationals of a state when they arguably only had a tenuous relationship with such state and it also led to characterising a corporation as foreign when it had a closer relationship with the host state itself.[134]

I will now introduce the various concepts used most commonly in investment treaties for defining the investor.

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[133] METZGER, S. Nationality of corporate investment under investment guaranty schemes: the relevance of Barcelona Traction. In: *Journal of International Law*, vol. 65, no. 3, 1971, p. 541.

[134] McLACHLAN, C.; SHORE, L.; WEINIGER, M. *International Investment Arbitration: Substantive Principles (Oxford International Arbitration Series)*. Oxford: Oxford University Press, 2008, p. 132.

3.3.1 Incorporation / constitution

The most rudimentary criterion that might be used for qualification of a corporate investor is incorporation or constitution under the laws of the respective state. This factor is decisive mainly in IIAs of the Latin American countries and common law jurisdictions.[135]

For example, the Czech–Canada BIT defines an investor who is a legal person as 'any corporation, partnership, trust, joint venture, organization, association or enterprise incorporated or duly constituted in accordance with the applicable laws of [a] Contracting Party.'[136]

Expressed or implied reference to conditions imposed by local law may imply that it would be at the discretion of each state to determine the protected investors.[137] However, such conclusion is simplified. Brownlie remarks that reference to municipal law is unworkable in the case of legal persons,[138] since as mentioned before, municipal laws hardly ever define corporate nationality. Moreover there are other problems of concurrence between municipal and international law; those were aptly summarised by Judge Tanaka who in his separate opinion to *Barcelona Traction* in which he argues that 'concept such as nationality, which is concerned with both municipal and international law, may have a different content according to the objective of each branch of law and its interpretation and application may be relative. Even if the nationality of an individual is established by municipal law, it may not necessarily have validity in international law.'[139]

It is true that by the reference to local laws, a treaty demands to examine municipal laws in order to identify the investor. However, in case of a dispute, the question of *ius standi* of an investor as a claimant falls within the competence–competence decision of investment tribunals and a tribunal has the power to make its own ruling on nationality independent on the view of the local authorities of the home state.[140] This fact was most strongly reflected in the *Soufraki* case in which the tribunal stated that it will 'accord great weight to the nationality law of the State in question and to the interpretation and application of that law by its authorities. Nonetheless, it will in the end decide itself whether […] the person whose nationality at issue was or was not a national of the State in question

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[135] SCHOKKAERT, J.; HECKSCHER, Y. Protected Investors Nationality. In: *The Journal of World Investment & Trade*, vol. 10, issue 5, 2009, p. 717.
[136] Canada–Czech Republic BIT, article 1(e)(ii).
[137] TIETJE, Ch.; KRAFT, G.; LEHMANN, M. (eds.) *The Determination of the Nationality of Investors under Investment Protection Treaties* [online]. Martin Luther University Halle-Wittenberg [accessed 25/9/2018], p. 16. Available at: http://telc.jura.uni-halle.de/sites/default/files/BeitraegeTWR/Heft%20106.pdf.
[138] BROWNLIE, I. *Principles of public international law*. Oxford: Clarendon Press, 2002, p. 425.
[139] *Separate Opinion Judge Tanaka to Barcelona Traction*, p. 122.
[140] DOUGLAS, Zach. *The International Law of Investment Claims*. New York: Cambridge University Press, 2012, p. 287.

[…]'[141] For this reason, tribunals may commence their examination by consulting local laws but then should apprehend the issue from international law perspective.

There are indisputable advantages of the incorporation test. Incorporation is a notion easy to comprehend and to be identified as it is a very formalistic criterion. The sole fact of setting up and existing in a certain jurisdiction will suffice for acquiring the protection of the treaty and subsequent changes to the head office or transfer of company's activities into other territories will not affect its standing as the qualified investor.[142] Clearly, insertion of the incorporation criterion will support legal certainty and predictability of the application of the investment treaty.[143]

On the other hand, if no other tie with the state of incorporation is required, the loose incorporation criterion literally invites investors to treaty shop and it is no coincidence that most cases concerned with treaty shopping arise under treaties containing a sole incorporation criterion.[144]

The adoption of the incorporation test will be in the interest of capital exporting countries that intent to secure their investors easily acquired protection and also to promote their country as an attractive territory for companies to set their business in, inter alia with the aim of maximising tax incomes. The Netherlands used to be perceived as a notarial example of a country benevolent to protect letter box companies, although this trend has changed with the introduction of the new 2019 Model BIT that now also demands the investor to have substantial business activities in the home state.[145]

Given the fact of broadly drafted treaties and their liberal interpretation by tribunals, it now appears that the bond of nationality diminished often to a mere formality link.[146] Sinclair comes with an interesting comment highlighting the disparity between requirements imposed on individuals and corporations. With reference to the *Nottebohm* case who found nationality based on the speedy naturalisation ineffective, such acquisition of 'nationality' would still demand more labour than

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[141] *Soufraki*, ¶ 55.
[142] NIKIÈMA, S. *Best Practices: Definition of Investor*. Manitoba: The International Institute for Sustainable Development, 2012, p. 8.
[143] ZHANG, X. Proper Interpretation of Corporate Nationality under International Investment Law to Prevent Treaty Shopping. In: *Contemporary Asia Arbitration Journal*, vol. 6, no. 49, 2013, p. 50.
[144] LEE, Ch. Resolving Nationality Planning Issue Through the Application of the Doctrine of Piercing the Corporate Veil in International Investment Arbitration. In: *Contemporary Asia Arbitration Journal*, vol. 9, no. 1, 2016, p. 98.
[145] 2019 Netherlands Model BIT, article 1(b)(ii).
[146] SINCLAIR, A. The Substance of Nationality Requirements in Investment Treaty Arbitration. In: *ICSID Review - Foreign Investment Law Journal*, vol. 20, issue 2, 2005, p. 362.

incorporation of a simple shell company. Yet, the second case does not find the same solution of the effective link.[147]

3.3.2 Seat

The requirement of having a seat in the territory of the home state is usually combined with the incorporation criterion and seemingly results in a two-fold test. Including the seat criterion encounters difficulties since the explanation of what is meant by the term 'seat' is usually missing in investment treaties. According to Battifol the seat means 'the place where the management of the company is really conducted.'[148] He argues that it is the place where the corporation is *really* established, where it has its management, administrative and authority centre.[149] It this sense 'the actual management of a company determines its nationality.'[150] However, others find the term to have a different meaning as seat might mean either an administrative seat within the meaning of the aforementioned or only a registered office – a basic formal statutory seat of a company.[151] Not clarifying which type of a seat is meant could become problematic for the subsequent application of the provision. On the example of investment treaties concluded by the Czech Republic, it is clear that a wide range of various terms is used which may add to the confusion. For example, the Czech–Sri Lanka BIT includes an elementary incorporation and seat definition and sets forth that: '[the] term "legal person" shall mean, with respect to either Contracting Party, any entity incorporated or constituted in accordance with, and recognized as a legal person by its laws, having its seat in the territory of that Contracting Party.' In other treaties, the definitions differ and the following terms are used: 'headquarters in the territory of the Contracting Party',[152] 'the registered office in the territory of one of the Contracting Parties',[153] 'principal place of business or head office in the territory of one of the Contracting Parties',[154] 'permanent residence in

[147] SINCLAIR, A. The Substance of Nationality Requirements in Investment Treaty Arbitration. In: *ICSID Review - Foreign Investment Law Journal*, vol. 20, issue 2, 2005, p. 366.
[148] SCHOKKAERT, J.; HECKSCHER, Y. Protected Investors Nationality. In: *The Journal of World Investment & Trade*, vol. 10, issue 5, 2009, p. 714, citing BATTIFOL, H. *Traité élémentaire du droit international privé*. Paris Libraire générale de droit et de jurisprudence, 1955, p. 230.
[149] SCHOKKAERT, J.; HECKSCHER, Y. Protected Investors Nationality. In: *The Journal of World Investment & Trade*, vol. 10, issue 5, 2009, p. 715.
[150] GUPTA, V. Exclusion from Within the Ambit of a Protected Investor, a Fair Price to Pay for the Act of Abusive Treaty Shopping? In: *Transnational Dispute Management*, vol. 11, issue 1, 2014, p. 15.
[151] TIETJE, Ch.; KRAFT, G.; LEHMANN, M. (eds.) *The Determination of the Nationality of Investors under Investment Protection Treaties* [online]. Martin Luther University Halle-Wittenberg [accessed 2/4/2017], p. 15. Available at: http://telc.jura.uni-halle.de/sites/default/files/BeitraegeTWR/Heft%20106.pdf.
[152] Czech Republic–Turkey BIT.
[153] Czech Republic–Malta BIT.
[154] Czech Republic–Mauritius BIT.

the territory thereof',[155] 'main office in the territory of one Contracting Party'[156] or 'the head office in the territory of this Contracting Party'.[157]

The differentiation between a seat as a registered office and a seat as an administrative office where the management is exercised may be decisive for cases of treaty shopping as the location of these places may differ. Usually, investors use letterbox companies that are in fact managed from abroad yet still inevitably have their registered office in the country of their incorporation. It is then paramount for investors that the tribunal interprets the term as the registered seat. However in different jurisdictions, the term seat may be perceived differently, mainly based on the municipal law perspectives and demands of the national laws. For example, in many treaties but also by scholars and arbitrators, the term *siège social* is used interchangeably with the English term seat. The term *siège social* originates in France and is explained as '[t]he place where the legal life of a corporate body is concentrated. In particular, this is where its administrative organs function, and where its general meetings are held. The *siège social* may differ from the place where the corporate body pursues its principal business activities and where its industrial and commercial establishments are located. The domicile of the body corporate is at its *siège social*.'[158] *Siège social* is connected to legal, administrative and managerial activities of a company and clearly encompasses additional activities than a plain registered office. Thus, for example, the Czech–France BIT uses in its French version the term 'siège social', however, in the Czech side of things, merely the term 'seat', where seat in the Czech national law would undoubtedly be interpreted as the registered office.

This divergence could lead to an unwanted result that the term would bear different meanings for either of the contracting states of the investment treaty. For this reason, it would be better if tribunals disregarded the domestic law perspective and interpret the terms independently thereof. Only thus would a coherent meaning be reached.

Also, in many countries, the legislation obligatory demands choosing a seat in the country of incorporation[159] and a seat and incorporation requirements thus coincide. If the seat is inevitably

[155] Czech Republic–Jordan BIT.
[156] Czech Republic–Mexico BIT.
[157] Czech Republic–Tunisia BIT.
[158] SCHWARZENBERGER, G. *International Law as Applied by International Courts and Tribunals*. Sweet & Maxwell Ltd, 1957, p. 155, citing CAPITANT, H. *Vocabulaire Juridique Presses Universitaires de France*, 1936.
[159] TIETJE, Ch.; KRAFT, G.; LEHMANN, M. (eds.) *The Determination of the Nationality of Investors under Investment Protection Treaties* [online]. Martin Luther University Halle-Wittenberg [accessed 2/4/2017], p. 46. Available at: http://telc.jura.uni-halle.de/sites/default/files/BeitraegeTWR/Heft%20106.pdf.

located in the country of incorporation, adding the seat criterion into the definition seems redundant since the incorporation theory inevitably implies it.[160]

Various terms used to indicate seat are regularly interpreted by tribunals. If it is not indicated, which type of seat the treaty demands, the definition may prove insufficient.

3.3.3 The control rule

Although seat and incorporation tests may contribute to relative predictability of nationality identification since they consider nationality with a formalistic approach, they might not reflect the economic reality and their application might make is easier for investors to treaty shop. For these reasons is may seem more convenient to take a different approach – to pierce the corporate veil and look at nationality of controlling entities of a corporation. Only if nationality of these entities was of the home state, an investor would qualify for protection; in this way easy manipulation of the protection regime would be prevented for a real connection between an investor and its home state would be demanded. The test of control would not allow a corporation to enjoy the benefits of treaty shopping if the true controlling person was not a national of the home state.[161]

It is interesting to note that in 1950s when the question of nationality of companies in international law was not yet explored in detail, Roberts presented a firm believe that it is control that identifies nationality of corporations in international law: '[i]t is […] the nationality of the owners or of other persons that control a corporation, which in the domain of international law constitutes the decisive factor in determining its nationality.'[162] However, this belief did not find general acceptance.

In investment treaties, control may serve two purposes – first, broadening the protection also to indirect holders of an investment or allowing for protection of local investors provided that they are controlled by a foreign national. Secondly, the control criterion may narrow the protection only to investors that not only have seat or are incorporated in the territory of the home state, but that are also controlled by an entity of the home state.

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[160] TIETJE, Ch.; KRAFT, G.; LEHMANN, M. (eds.) *The Determination of the Nationality of Investors under Investment Protection Treaties* [online]. Martin Luther University Halle-Wittenberg [accessed 2/4/2017], p. 46. Available at: http://telc.jura.uni-halle.de/sites/default/files/BeitraegeTWR/Heft%20106.pdf.

[161] ZHANG, X. Proper Interpretation of Corporate Nationality under International Investment Law to Prevent Treaty Shopping. In: *Contemporary Asia Arbitration Journal*, vol. 6, no. 49, 2013, p. 53.

[162] ROBERTS, W. Corporate Nationality in International Law. In: *Jurist*, vol. 10, issue 71, 1952, p. 83.

The control criterion used to broaden the scope of protection

I will first turn to the function of control that broadens the scope of protected investors. This may be reached either by the definition of investment or of investor. Often, definitions of investments read as follows:

> '[t]he term "investment" means any kind of asset held or invested either directly, or indirectly through an investor of a third state, by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the latter's laws and, in particular, though not exclusively, includes […]'[163]

If the control is indirect, 'the claimant does not have direct ownership or control over the assets comprising the investment, nonetheless, instead exercises such ownership or control indirectly by having direct ownership or control of the legal entity that does have direct ownership or control of the assets.'[164]

The same broadening effect may be reached also through the definition of investor:

> '[t]he term "investor" refers with regard to either Contracting Party to […] (c) legal entities established under the law of any country which are, directly or indirectly, controlled by nationals of that Contracting Party or by legal entities having their seat, together with real economic activities, in the territory of that Contracting Party.'[165]

In this case, domestic or third country companies will be deemed foreign and being deemed nationals of the other contracting party by way of a legal fiction. The most notorious example of this possibility is article 25(2)(b) of the ICSID Convention that will be explained in more detail further in this chapter.

For the sake of completeness, some treaties also allow for derivative claims, for example the 2012 US Model BIT ascribes the claimant the right to submit the claim on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, if the respondent has breached certain obligations towards the controlled entity or if the controlling enterprise itself has incurred loss or damage by reason of, or arising out of, that breach.[166]

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[163] Czech Republic–Canada BIT, article 1(d), emphasis added.
[164] DOUGLAS, Z. *The International Law of Investment Claims*. New York: Cambridge University Press, 2012, p. 302.
[165] Czech Republic–Switzerland BIT, article 1, emphasis added.
[166] 2012 USA Model BIT, article 24.

Including the mentioned definitions in the treaty opens doors to another way of how it is possible to make use of the protection of a treaty; a foreign investor becomes protected even though it did not directly invest in the host country. Instead, it was its affiliate company in which it holds shares that made the investment.

Moreover, even if the definition of investor is not construed as in the examples, the controlling entity may still be provided remedy since the notion of investment is so broad, that it traditionally encompasses 'shares in and stock and debentures of a company and any other form of participation in a company'[167] as one form of protected investments. The controlling entity may thus argue that it was harmed as its shares in the affiliate company that was harmed directly, lost their value. In this way, it might be possible to treaty shop merely by the transfer of shares to another entity at the right moment. However, it is more convenient for an investor if it can rely on the indirect ownership contained in the definition of an investor because if the claim is based on the ownership of shares, it may have important impacts on the assessment of the loss of value of shares for it may not directly reflect the loss of the affiliate company.[168]

In cases when an investor based its claim on indirect control, some tribunals did not hesitate to apply the control test even if it was not expressly mentioned in the treaty. This was done for example in the case of *Sedelmayer*, in which the tribunal pierced the corporate veil of companies located in the US, Lichtenstein and St. Vincent in order to enable the ultimate holder – a German national – to bring a claim as a protected investor (i.e. not as a derivative claim) on the basis of the Germany–Soviet Union BIT, even though the treaty did not specifically allow for claims based on foreign control or indirect ownership.[169] This might be a result of the trend that generally, tribunals tend to rule in favour of jurisdiction. However, for example the tribunal in *Chartred Bank* decided contrariwise, noting that: '[i]n the absence of text in the BIT expressing a contrary intent and on a record indicating no involvement or control of the UK national over the investment, it would be unreasonable to read the BIT to permit a UK national with subsidiaries all around the world to claim entitlement to the UK-Tanzania BIT protection for each and every one of the investments around the world held by these daughter or granddaughter entities. The BIT preamble says "reciprocal protection" and "reciprocal"

[167] E.g. Czech Republic–United Kingdom BIT, article 1.
[168] TIETJE, Ch.; KRAFT, G.; LEHMANN, M. (eds.) *The Determination of the Nationality of Investors under Investment Protection Treaties* [online]. Martin Luther University Halle-Wittenberg [accessed 12/4/2017], p. 80. Available at: http://telc.jura.uni-halle.de/sites/default/files/BeitraegeTWR/Heft%20106.pdf.
[169] *Sedelmayer*, ¶ 215: 'Mr. Sedelmayer shall, thus, be regarded as an investor under the Treaty, even with respect to investments formally made by SGC International or the other companies.'

must have some meaning.'[170] This decision was based inter alia on the fact that the BIT demanded that the investment was 'made', not 'held' by the investor and therefore the tribunal concluded that it should have involved an investment activity exercised by the claimant,[171] in the words of the tribunal: 'a claimant must demonstrate that the investment was made at the claimant's direction, that the claimant funded the investment or that the claimant controlled the investment in an active and direct manner. Passive ownership of shares in a company not controlled by the claimant where that company in turn owns the investment is not sufficient […].' [172] The Tribunal was not persuaded that 'an "investment of" a company or an individual implies only the abstract possession of shares in a company that holds title to some piece of property'.[173] It must be noted that the tribunal arrived at this conclusion notwithstanding the fact that shares were listed in the definition of investment.

It should be reminded that in general international law, according to *Barcelona Traction*, shareholders do not normally have access to protection regarding the company. A slight shift was made by the ICJ in the *ELSI* case that allowed the US to exercise diplomatic protection on behalf of two companies acting together as 100% shareholders of an Italian company that was allegedly harmed.[174] Nonetheless it was not a direct turn from the *Barcelona Traction*, as there were also other reasons to diverge from the previous decision.[175] However, the situation in investment law is different precisely due to the language of treaties that may specifically allow for direct or indirect protection of shareholders. The tribunal in *CMS* even suggested that protection of shareholders by international investment rules represents a shift from the existing approach an affects back general international law. The tribunal asserted that:

> '[it] finds no bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned, not even if those shareholders are minority or non-controlling shareholders. Although it is true, as argued by the Republic of Argentina, that this is mostly the result of lex specialis and specific treaty arrangements that have so allowed, the fact is that lex specialis in this respect is so prevalent that it can now be considered the general rule, certainly in respect of foreign investments and increasingly in respect of other

[170] *Chartered bank*, ¶ 260.
[171] *Chartered bank*, ¶199, further clarifying that: 'even if performed at the investor's direction or through an entity subject to investor's control.'
[172] *Chartered bank*, ¶¶ 230–231.
[173] *Chartered bank*, ¶¶ 230–231.
[174] *Fourth report on diplomatic protection* [online]. United Nations [accessed 21/9/2017], p. 10. Available at: https://digitallibrary.un.org/record/497843.
[175] For example, it were the direct rights that were harmed, additionally, the company ceased to exist.

> matters. To the extent that customary international law or generally the traditional law of international claims might have followed a different approach – a proposition that is open to debate – then that approach can be considered the exception.'[176]

What is more, according to the developed arbitration practice, the right to claim is granted even to minority shareholders.[177] As the *CMS* tribunal held, 'there is indeed no requirement that an investment, in order to qualify, must necessarily be made by shareholders controlling a company or owning the majority of shares.'[178] The fact that the protection under investment law is available also to minority shareholders was also acknowledged by the *AIG* tribunal, who found jurisdiction in case of a claimant who indirectly held only 5% of shares (that however exclusively held voting rights).[179]

Although the notion of control is commonly inserted to treaty provisions, the majority of treaties do provide any definitions of control.[180] However, this trend is slowly changing, for example, the Singapore–Sri Lanka FTA defines 'control' as the power to name a majority of directors or otherwise to legally direct the actions of the company and 'ownership' as the situation when more than fifty percent of the equity interest is beneficially owned by natural persons or enterprises of the home state.[181] A more detailed explanation of control was also in past reached by The European Energy Charter Conference with regards to the ECT, according to which:

> 'whether an Investment made in the Area of one Contracting Party is controlled, directly or indirectly, by an Investor of any other Contracting Party, control of an Investment means control in fact, determined after an examination of the actual circumstances in each situation. In any such examination, all relevant factors should be considered, including the Investor's
> (a) financial interest, including equity interest, in the Investment;
> (b) ability to exercise substantial influence over the management and operation of the Investment; and

[176] *CMS*, ¶ 48.
[177] For example *AAPL* or *Lanco* – around 18%, *CMS* 30%.
[178] *CMS*, ¶ 51, *Enron*, ¶¶ 39, 44, 49.
[179] *AIG*, ¶ 9.4.3(5).
[180] DOUGLAS, Z. *The International Law of Investment Claims*. New York: Cambridge University Press, 2012, p. 300.
[181] Singapore–Sri Lanka FTA, artice 10.14.4(b), similarly Australia–Uruguay BIT, article 1.1(e).

(c) ability to exercise substantial influence over the selection of members of the board of directors or any other managing body.'[182]

It is also not explained in the provisions whether factual control or only the capacity to control satisfy the test. In case of *Aguas del Tunari*, the requirement was perceived as the legal capacity to control, either based on the majority shareholding or on the possibility to exercise majority votes.[183] *Douglas* agrees with this approach, arguing that: '[i]t would be meaningless for a claimant to assert that it is the de facto owner of the land that constitutes its investment or has some other form of de facto control in respect thereof. Either the claimant has a power to control that property that is recognised by the lex situs or it does not.'[184] However, in the dissenting opinion to *Aguas del Tunari*, the arbitrator Alberro-Semenera argued that the claimant should have proved the actual control, relying on the basic grammatical interpretation – from the wording of the provision he deemed apparent that the control should be 'an actual event, an action (controlled) and not a possibility'.[185] The dissent favoured the reflection of the factual relationships rather than relying on formal structures.

On the other hand, in *Thunderbird*, the preference was given to de facto control of the minority shareholder, as 'Thunderbird had the ability to exercise a significant influence on the decision-making of EDM and was, through its actions, officers, resources, and expertise, the consistent driving force behind EDM's business endeavour […]'[186] Tribunals are thus not unified in the answer whether only capacity to control suffices or whether the control must be actual.

What level of control should be looked was analysed in *Aguas del Tunari* in which the tribunal had to deal with the objection of Bolivia that control must be understood as the ultimate control. The tribunal resolved the case by rejecting this objection stating that since the BIT included the possibility that control might be direct or indirect, there is no need to protect only the ultimate owner.[187] Although it is true that looking for the ultimate beneficiary would impose a strict burden on tribunals, as Burgstaller points out, 'what is at stake is the legitimacy of the ICSID system in general.'[188] The approach of tribunals to this issue is however not consistent. For example, in *Siemens*, the claimant was the mother company owning 100% shares in the company that held 100% shares in the local

[182] Final Act of the European Energy Charter Conference [online]. *Energy Charter* [accessed 15/10/2017]. 1994, point 3. Available at: https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/1994_Final_Act.pdf.
[183] *Aguas del Tunari*, ¶ 264.
[184] DOUGLAS, Z. *The International Law of Investment Claims*. New York: Cambridge University Press, 2012, p. 301.
[185] *Dissenting Declaration of Jose Luis Alberro-Semerena to Aguas del Tunari (Jurisdiction)*, point 31.
[186] *Thunderbird*, ¶ 107.
[187] *Aguas del Tunari*, ¶ 237.
[188] BURGSTALLER, M. Nationality of Corporate Investors and International Claims against the Investor's Own State. In: *The Journal of World Investment & Trade*, vol. 7, issue 6, 2006, p. 877.

company that made the investment in Argentina. The tribunal held that the second level parent company qualified as an investor.[189] Depending on the details of the case, tribunals perceived the indirect owner as a top-level shareholder as well as an intermediate-level shareholder.[190]

It is apparent that the scope of possible claimants becomes very wide if the definition is extended to direct or indirect control. If indirect control is sufficient to bring a claim before an investment tribunal, it is a logical consequence that each member in the group of companies may have legal standing in the proceedings with respect to the same dispute.[191] Unfortunately, in past tribunals refused to apply basic principles of *res iudicata* in these cases and prevent concurring claims, perceiving such outcome as an inevitable feature of investment treaty regime.[192] This may have serious effects on the possibility of parallel proceedings commenced by various levels of investors and may result in double recovery. There is at present no settled guidance on how tribunals should approach claims by shareholders from different levels of corporate structures.[193] For that reason, it is advisable to include a provision precluding parallel proceedings, an unfortunate consequence of employing the control criterion for widening purposes, as evidenced most notably in the *CME* and *Lauder* cases. Such consideration is for instance incorporated in the Czech–Sweden BIT by the rule that '[a] legal entity may not invoke protection under this agreement if it invokes remedies available to it pursuant to another investment protection agreement, concluded with a third country.'[194]

The control criterion used to narrow the scope of protection

As indicated above, in order to prevent companies to take advantage of a favourable treaty merely by incorporation, the control rule may be introduced into treaties also for the purposes of preventing an easy acquisition of the investor status. Under the control rule, only the truly foreign investors may seek protection against the state's adverse acts;[195] it is not sufficient that the investor is incorporated in the territory of the other contracting party, it must also be controlled by a corporate or natural person from that state. It follows that the control criterion is combined mostly with the incorporation test. In this sense, applying the control criterion narrows the scope of protection; control is examined

[189] *Siemens*, Decision on Jurisdiction, ¶ 137, also *Enron*, ¶ 39.
[190] GAUKRODGER, D. Investment Treaties and Shareholder Claims. In: *OECD Working Papers on International Investment*, 2014/03, OECD Publishing, 2014, p. 18.
[191] DOUGLAS, Z. *The International Law of Investment Claims*. New York: Cambridge University Press, 2012, p. 308.
[192] Ibid. pp. 308–309.
[193] UCHKUNOVA, I., *Indirect Investments Through Chain Of Intermediary Companies: A Philosopher's Stone or Not Any More?* [online]. Kluwer Arbitration Blog [accessed 20/10/2017]. Available at: http://arbitrationblog.kluwerarbitration.com/2013/07/03/indirect-investments-through-chain-of-intermediary-companies-a-philosophers-stone-or-not-any-more/.
[194] Czech Republic–Sweden BIT, article 1.
[195] ZHANG, X. Proper Interpretation of Corporate Nationality under International Investment Law to Prevent Treaty Shopping. In: *Contemporary Asia Arbitration Journal*, vol. 6, no. 49, 2013, pp. 50, 51, 53.

for the purpose of protecting only investors that are in fact sufficiently connected to the alleged home state. Mere incorporation in a favourable jurisdiction would not facilitate the searched protection, if the entity controlling the investment was from another jurisdiction.

However, this mode of application of the control criterion is not broadly used. Even though commentators commonly refer to control as one of the basic possible methods of identifying nationality in international investment law, I found the narrowing definition requiring control of an entity from the host state only in a very limited number of investment treaties. For example, in the 2015 India Model BIT, the investor is defined in the following way for legal persons:

> ' "Investor" means: (i) A legal entity constituted, organized and operated in compliance with the Law of the Home State, owned or controlled by a Natural Person or a legal entity of the Home State and conducting real and substantial business operations in the Home State […]'[196]

Defining investor by control is indeed a rarity amongst the existing BITs. Several Israeli BITs apply it in different variations, for example the Israel–Argentina BIT defines the investor as '[a company] incorporated or constituted in accordance with the law of the Contracting Party concerned and having its seat in the territory of that Contracting Party, which are not directly or indirectly controlled by investors of the other Contracting Party or by investors of a third State',[197] other Israeli BITs only exclude companies controlled by the other contracting party from protection[198] or demand control only with regards to Israeli investors.[199] Other examples include the BIT between Germany and Antigua and Barbuda[200] and Germany and Brunei[201] excluding from protection only investors of the latter parties. The BIT between Canada and Hungary is presumably drafted insufficiently as it demands control by any contracting parties and thus by mistake also protects investors controlled by entities of the host state.[202] The Swiss–Jamaica BIT[203] and Swiss–Sri Lanka BIT[204] demand only control of Swiss investors. The Taiwan–Saint Vincent and the Grenadines BIT demands the corporation to

[196] 2015 India Model BIT, article 1.9, emphasis added.
[197] Israel–Argentina BIT, article I(3), emphasis added.
[198] Israel–Slovenia BIT, article I(2); Israel–Cyprus BIT, article I(3); Israel–Belarus BIT, article I(2).
[199] Israel–Germany BIT, article I(4)(b).
[200] Germany–Antigua and Barbuda BIT, article 1(3).
[201] Germany–Brunei BIT, article 1(5).
[202] Canada–Hungary BIT, article 1(d) – an investor means 'any corporation, partnership, trust, joint venture, organization, association, enterprise or legal person incorporated or duly constituted in accordance with applicable laws of that Contracting Party directly or indirectly controlled by nationals of one of the contracting Parties.'
[203] Switzerland–Jamaica BIT, article I(b)(1).
[204] Switzerland–Sri lanka BIT, article I(d).

be owned or controlled by citizens of Saint Vincent and The Grenadines and the other way round[205] and finally the now terminated Czech Republic–Ireland BIT demanded from Irish investors to have their 'central management and control in the territory of Ireland'.[206] Yet another way of limiting the access to the investment protection through control was adopted in the German Model BIT that introduced the following limitation for indirect investments to qualify for the protection: '[i]n the case of indirect investments, in principle only those indirect investments shall be covered which the investor realizes via a company situated in the other Contracting State.'[207] Therefore, it gives only a few examples and this fact suggest that it is not a widely used criterion. The definitions are also varying and not always sufficiently drafted in order to obtain the desired result.

Applying the control criterion to limit nationality of companies requires the establishment of a genuine link between the entity and the home state.[208] A company shall have nationality of the majority of shareholders since they are those who take the most important decisions and in a way create the will of the company.[209] Nevertheless, in cases of multiple shareholders from different jurisdictions applying the control criterion may generate uncertainty which becomes even more confusing if shareholders are not individuals but also corporations.[210] In some cases, determining nationality based on the control criterion may prove very difficult, if not impossible, for instance if the control criterion was applied to companies operating on the stock market.

Tribunals are reluctant to give any weight to control of the company if the treaty does not provide so expressly, even though insufficient links to the home state or obvious control from other states is often used as an argument of respondents. According to the *Yukos* tribunal that was deciding a dispute based on the Energy Charter Treaty ('**ECT**'), 'the Tribunal knows of no general principles of international law that would require investigating the structure of a company or another organization when the applicable treaty simply requires it to be organized in accordance with the laws of a Contracting Party.'[211]

If control is used to narrow the scope of protection, the ultimate controlling entity should according to me be identified, for otherwise the purpose of the limitation would not be served as it

[205] Taiwan–Saint Vincent and the Grenadines BIT, article I(2).
[206] Czech Republic–Ireland BIT, article I(2)(b).
[207] 2008 Germany Model BIT, article 1(1) in fine.
[208] ZHANG, X. Proper Interpretation of Corporate Nationality under International Investment Law to Prevent Treaty Shopping. In: *Contemporary Asia Arbitration Journal*, vol. 6, no. 49, 2013, p. 53.
[209] SCHOKKAERT, J.; HECKSCHER, Y. Protected Investors Nationality. In: *The Journal of World Investment & Trade*, vol. 10, issue 5, 2009, p. 715.
[210] Ibid.
[211] *Yukos*, ¶ 415.

would suffice to establish one additional corporate layer incorporated in the alleged home state to overcome the requirement. The need to identify the ultimate owner is for example reflected in the mentioned Israeli BITs that demand the legal person searching protection to be controlled by citizens or permanent residents of the home state, that is by ultimate owners, as by nature individuals may not be subjected to any further control.

The control criterion serves well for extending the protection if states wish to do so, however, it is perceived to be problematic for the narrowing purpose for two reasons. First, in some cases, it might be difficult to search for an ultimate investor by a tribunal ex officio and secondly, if a company were a part of a multinational corporate structure, it may be perceived too disproportionate that it should be excluded from protection if its controlling entity originates from another state, especially if the company were in fact incorporated in the home state, exercised wide activities there and were firmly established as company belonging to such state. For these reasons, it seems that the last criterion – effective activities is more appropriate for the use in international investment law and for forestalling treaty shopping.

3.3.4 Effective activities

As opposed to benevolent requirements of the incorporation or the seat tests and a problematic application of the control criterion, a growing number of states has started to demand a closed link of an investor to its claimed home state by requiring that an investor conducts effective activities within that state.[212] The requirement stands on the opposing side of the spectrum to the liberal definitions and it is included indeed primarily to avoid treaty shopping.[213] However, it is not applied as a self-standing criterion, it is used as an additional requirement jointly with the incorporation or the seat test.

The criterion may be found for example in the BIT between the Czech Republic and Chile in which it is construed in the following way:

> '[the term "investor" means…] (b) a legal entity, including companies, corporations, business associations and other legally recognizes entities, which are constituted or otherwise duly organised under the law of that

[212] Currently, 412 out of 2577 mapped IIAs contain some sort of effective activities requirement according to the search of investment policy hub available at: https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping#section-22.
[213] *Yaung*, ¶ 52.

Contracting Party and has its seat together with effective economic activities in the territory of that same Contracting Party."[214]

The criterion may also be expressed by various other wording forms such as 'substantial business activities',[215] 'real economic activities'[216] or 'having headquarters and carrying out effective management'.[217]

In order to examine the contents of the requirement, it is helpful to look at treaties that include a closer explanation of what is meant by the term. The Japan–Pakistan BIT mentions the following examples that indicate effective business activities: (i) the maintenance of branches, offices, agencies, factories and other establishments appropriate to conduct business activities, (ii) the control and management of companies established or acquired by investors, (iii) the employment of accountants and other technical experts, executive personnel, attorneys, agents and other specialists, (iv) the making and performance of contracts and (v) the use, enjoyment or disposal, in relation to the conduct of business activities, of investment and returns.

Requiring substantial activities aims not only at preventing easily exercised treaty shopping, it also prevents protection of shell companies that might not generate any economic benefits expected from the host state. In order to be protected, a company must effectively operate in the home state and carry out its real economic activities there. This demands a higher standard than the incorporation or the seat test as following incorporation the company may remain entirely 'passive' in its business life.

This criterion also plays a dominant role in the 'denial of benefits' clauses, and so it will be more closely observed in the next chapter.

3.4 Nationality under the ICSID Convention

If the dispute is brought before an ICSID tribunal, the claimant must establish the fulfilment of dual requirements – it must fall within the definition of investor under the relevant BIT and also under the ICSID Convention.

The ICSID Convention includes a provision concerning the determination of jurisdiction *ratione personae* in case of legal persons in its article 25. However, it does not specify any explicit criteria

[214] Czech Republic–Chile BIT, article 2, emphasis added.
[215] Czech Republic–Azerbaijan BIT.
[216] Czech Republic–Romania BIT.
[217] Czech Republic–Philippines BIT.

on the identification of nationality except for a 'circular' definition which sets forth that the national means 'any juridical person which has the nationality of a contracting state'.[218]

Article 25(2)(b) of the ICSID Convention reads as follows:

> '["National of another Contracting State" means] any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.'[219]

There are two separate situations in which an ICSID tribunal may grant its jurisdiction. First, when the claimant is a juridical person of another contacting state apart from the respondent state. Secondly, as an exceptional measure, the ICSID Convention allows *ius standi* to companies that are nationals of the respondent state itself but are under foreign control of an entity belonging to another contracting state.

The reason for introducing the exception of the second part of the letter b) was the fact that it is not uncommon that investors are required to conduct their business by means of a locally incorporated company, especially for supervisory purposes of the host state; those entities would otherwise lose the possibility to resort to international arbitration and would be dependent on local courts.[220] The opposite rationale of the provision is to grant that the respondent states are sued by foreign investors only.[221]

The first part of the provision specifies a national unhelpfully by referring only to nationality of the contracting state. The ICSID Convention does not give any leads as to how to define nationality and the clause is often perceived as an outer limit of jurisdiction,[222] which might be made narrower by the consent of the contracting parties that specify the nationality requirements within the applicable

[218] ICSID Convention, article 25.
[219] ICSID Convention, article 25.
[220] NERETS, V. Nationality of investors in ICSID arbitration. In: *RGSL research papers no. 2*, 2011, p. 28.
[221] ASTORGA, R. The Nationality of Juridical Person in the ICSID Convention in Light of its Jurisprudence. In: *Max Planck Yearbook of United Nations Law*, vol. 11, 2007, p. 451.
[222] Ibid. p. 444.

investment treaty. This is done primarily in the text of the BIT concluded between the contracting states to the ICSID Convention.

What is then the correct interpretation of the 'nationality' in the first part of the clause? Although no specification of the nature of the link between the state and the investor is mentioned, some commentators suggest that since the control test is present in the second limb in form of an exception, it cannot represent the general rule. Therefore, two traditional notions – incorporation of seat are generally perceived as the implicit deciding criterions.[223] This conclusion was also arrived at for instance by the tribunal in *SOABI*, verifying that the location of the head office and incorporation should be the leading criteria.[224]

In order to rely on the second limb of the article, an investor must prove that it is controlled by a national of another state. Control may emerge in different forms, especially as equity participation, voting rights or management powers[225] or even in a form of a minority shareholding.[226] The undefined question of control opens the space for the interpretation that the control may also be indirect. Such conclusion would however enable a virtually unlimited number of possible claimants. This question was touched upon by the tribunal in *AMCO* that concluded that other forms of control than direct should be disregarded.[227] However, as will be showed later, tribunals have not been consistent with the approach to indirect control.

The second limb of the article demands that the corporate veil of the claimant is pierced. Contrary to many respondents that asked tribunals to pierce the corporate veil and disregard the formal nationality of the claimant, in this case, the veil is pierced for the benefit of the claimant. Also, as mentioned before, control is not the sole criterion to be looked at. It is a fact that the foreign control must be present, however, in order to define whether the controller is foreign, some of the other tests must be applied (such as incorporation or seat).[228]

Schokkaert and Heckscher perceive the nationality under article 25(2)(b) being 'ad hoc', having only temporary effectivity – once the foreign investor ceases to control the corporation, the nationality

[223] For more detail see ASTORGA, R. The Nationality of Juridical Person in the ICSID Convention in Light of its Jurisprudence. In: *Max Planck Yearbook of United Nations Law*, vol. 11, 2007, pp. 445–447.
[224] *SOABI*, ¶ 29.
[225] SCHREUER, Ch. *The ICSID Convention: A Commentary*. Cambridge: Cambridge University Press, 2009, p. 279.
[226] ASTORGA, R. The Nationality of Juridical Person in the ICSID Convention in Light of its Jurisprudence. In: *Max Planck Yearbook of United Nations Law*, vol. 11, 2007, p. 449.
[227] *AMCO*, in ICSID Report, p. 396.
[228] SCHREUER, Ch. *The ICSID Convention: A Commentary*. Cambridge: Cambridge University Press, 2009, p. 298.

disappears.[229] Amadio calls it the 'subsidiary nationality' as opposed to the effective nationality – the one given to the company by the domestic law. In this sense, article 25 of the ICSID Convention creates something resembling dual nationality – the company in the host state does not cease to be its national, but for limited purposes it is also granted nationality of another state.[230] It is an outcome of the compromise between an agreement on nationality and an automatic treatment of a controlled investor as foreign, two approached considered during the ICSID Convention formation.[231]

Article 25(2)(b) raises much controversies and tribunals have not been united in the interpretation of its requisites. The two main issues of the provision to be answered are how the agreement to treat the company as foreign should be expressed and secondly, of what nature control should be and what is the impact if non-ICSID states appear within the controlling corporate chain.

As for the demands on the form of the agreement, tribunals have mostly been benevolent in the search for it. As opposed to the requirement of consent expressed 'in writing' demanded by article 25(2) of the ICSID Convention, nothing in the text of the letter (b) of the provision precludes an implicit agreement, however the claimant must present sufficient evidence that such agreement was indeed reached.[232] Tribunals have found sufficient an insertion of an ICSID arbitration clause into the contract,[233] conditional consent[234] or even granting the right that would normally be granted only to foreign investors (currency convertibility, customs and duty exceptions)[235] or a provision of local law.[236] The tribunal in *LETCO* held that: 'when a contracting party signs an investment agreement, containing an ICSID arbitration clause, with a foreign controlled juridical person with the same nationality as the Contracting state and it does so with the knowledge that it will only be subject to ICSID jurisdiction if it has agreed to treat that company as a juridical person of another Contracting state, the Contracting parties could be deemed to have agreed to such treatment by having agreed to the ICSID arbitration clause.'[237]

On the other hand, one of earlies cases, *Holidays Inn*, required an express and clear agreement explaining that: 'the solution which such an agreement is intended to achieve constitutes an exception

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[229] SCHOKKAERT, J.; HECKSCHER, Y. Protected Investors Nationality. In: *The Journal of World Investment & Trade*, vol. 10, issue 5, 2009, p. 720.
[230] Ibid.
[231] SCHREUER, Ch. *The ICSID Convention: A Commentary*. Cambridge: Cambridge University Press, 2009, p. 297.
[232] Ibid. p. 301.
[233] *Klockner*, *SOABI* or *LETCO*.
[234] *Autopista*, ¶ 90.
[235] *Cable*, ¶¶ 5.17, 5.18.
[236] SCHREUER, Ch. *The ICSID Convention: A Commentary*. Cambridge: Cambridge University Press, 2009, p. 310.
[237] *LETCO*, ¶ 352.

to the general rule established by the Convention, and one would expect that the parties should express themselves clearly and explicitly with respect to such derogation. Such agreement should therefore normally be explicit. An implied agreement would only be acceptable I the event that the specific circumstances would exclude any other interpretation of the intention of the parties.'[238] For that reason, the interpretation is not unified, although it strongly tends to favour a benevolent approach.

The requirement of control by a foreign party may pose two difficulties. Which level of control should be looked at? And in case of indirect control – are the benefits of the clause lost if an intermediary in the chain of companies originates from a non-ICSID member state? Both problematic issues have been encountered by investment tribunals and, not surprisingly, they reached a wide range of solutions.

In *SOABI*,[239] the tribunal granted legal standing to a company whose direct controller was a non-ICISD state national and only indirectly it was controlled by a national from a signatory state. The tribunal was thus satisfied by indirect member state ownership. However, the decision was accompanied by a dissenting opinion that expressed concerns that nothing in the ICSID Convention implies that the tribunal should go beyond the immediate control level.[240] The approach of the tribunal attracted much criticism since of its consequences if applied in other cases. Schreuer warns that it might lead to a search by the tribunal until a foreign control of a national of the contracting state is found.[241]

On the other hand, the tribunal in *Autopista* refused the demand of the respondent to look at the 'ultimate' indirect controller and to limit the application of the ICSID Convention as, according to the tribunal, the contracting parties specifically chose direct ownership as the decisive criterion.[242] The tribunal thus disregarded the fact that the ultimate owner originated from a non-contracting state.

It seems that doors are opened from both directions – if the ultimate holder is from the contracting state but its affiliate is from a non-contracting state, it may still reach protection, by the same token, the protection may not be precluded if the local company is controlled by a member state entity, yet this entity is itself controlled by a non-contracting state entity. Nonetheless, bearing in mind the exceptional nature of the provision and its purpose – application in cases when the local law demands or it is convenient for other reasons to set up a company within the host state jurisdiction

[238] SCHREUER, Ch. *The ICSID Convention: A Commentary*. Cambridge: Cambridge University Press, 2009, p. 305.
[239] *SOABI*, ¶ 35.
[240] *Dissenting opinion of Kéba Mbaye to SOABI*, ¶ 77.
[241] SCHREUER, Ch. *The ICSID Convention: A Commentary*. Cambridge: Cambridge University Press, 2009, p. 297.
[242] *Autopista*, ¶¶ 118–120.

and bearing in mind that the ICSID Convention should not have any positive implication for non-Contracting states,[243] the presence of a non-ICSID member state party should according to me cause rejection of ICSID Convention protection.

As for the quality of control, an objective fact of foreign control over the local company is needed.[244] According to the *Vacuum Salt* these words 'are clearly intended to qualify an agreement to arbitrate and the parties are not at liberty to agree to treat any company of the host state as a foreign national: They may only do so "because of foreign control" '.[245] If an arbitration clause is inserted, it only creates a rebuttable presumption of foreign control[246] that must nevertheless be firmly established by facts.

3.5 Concluding remarks

Identifying corporate nationality in international and investment law is intricate. There are several tests that might be used: incorporation, a seat, effective activities or control: each of the criterions has problematic aspects. Nowadays, states do not rely on one of the factors but rather tend to use multiple combinations, arguably for the reason to avoid protecting 'phantom corporations'[247] however, even the combination of factors does not usually suffice to reach this goal for the requirements are mostly interpreted formalistically and loosely by tribunals.

It is nevertheless advisable that if states wish to eliminate treaty shopping risks, they should agree on more detailed definitions in their treaties, including additional requirements that are also properly explained. States should especially try to define what type of a seat should be considered and where the dividing line to consider activities of the investor as effective or substantial lies. If the control criterion is applied, states should draft the provision carefully as to answer the opened questions suggested in the text. States should also be mindful of the interpretation of article 25(2) of the ICSID Convention that might be used broaden investment protection.

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[243] ASOUZU, A. A Review and Critique of Arbitral Awards on Article 25(2)(b) of the ICSID Convention. In: *Journal of World Investment*, vol. 3, no. 3, 2002, p. 418.
[244] SCHREUER, Ch. *The ICSID Convention: A Commentary*. Cambridge: Cambridge University Press, 2009, p. 314.
[245] *Vacuum Salt*, ¶ 38.
[246] *Vacuum Salt*, ¶ 38.
[247] SCHOKKAERT, J.; HECKSCHER, Y. Protected Investors Nationality. In: *The Journal of World Investment & Trade*, vol. 10, issue 5, 2009, p. 718.

4 DENIAL OF BENEFITS CLAUSES

4.1 What are denial of benefits clauses

One of the means that can protect against the undesirable practice of treaty shopping is to adopt a denial of benefits clause into an investment treaty. In Dolzer's and Schreuer's understanding, '[u]nder such a clause the states reserve the right to deny the benefits of the treaty to a company that does not have an economic connection to the state on whose nationality it relies. The economic connection would consist in control by nationals of the state of nationality or in substantial business activities in that state.'[248]

However, the deficiencies of the wording of denial of benefits clauses render them useless in some cases. A more precise perception therefore would be that the denial of benefits clauses *may* be one of the available tools to prevent treaty shopping but cannot be used in all cases. Even if the clause is available based on the treaty, in some cases it might be almost a weapon of mass destruction (at least from the position of the respondent), but in other cases, it can hardly do any real harm.

In the first place, the treaty on the basis of which the investor brings the claim must contain the clause. But, as will be shown further in the text, denial of benefits clauses are rare birds indeed. Secondly, the clause must be invoked in a timely and proper manner. And here, tribunals have disagreed on numerous aspects of the invocation and application of the denial, leaving any attempt for unified reading in shatters.

After briefly touching upon the historical origin of the denial of benefits clauses and scrutinising their typical content and construction, the divergent case law on the application of denial of benefits clauses will be given attention. In the final part of this chapter, based on an analysis of the problems encountered when applying the clauses, I will examine investment treaties concluded in the last five years with the following question in mind: have states tried to tackle the ambiguous questions that have arisen and have they adjusted their drafting practices accordingly? In the end, I will offer a model wording of the denial of benefits clause that would reflect the mentioned application problems.

4.2 Evolvement of denial of benefits clauses

Since it has become evident, that treaty shopping may constitute a serious problem, states started to search for an effective means of defence against the misuse of the offered additional protection

[248] DOLZER, R.; SCHREUER, Ch. *Principles of international investment law*. Oxford: Oxford University Press, 2012, p. 55.

originally intended for qualified foreign investors only. One of the possible solutions proved to be the denial of benefits clauses.

Historically, in FNC treaties,[249] the predecessors of investment agreements, denial clauses served to enable the refusal of benefits offered by the treaty to enemy entities whose protection would be against the interests of the state,[250] in those times primarily due to political reasons. Gradually, their objective was broadened to the possibility to deny the rights to companies that '[do] not have an economic connection to the state on whose nationality they rely'[251] because such companies were 'free-riders', i.e. 'third-party entities that may only as a matter of formality be entitled to the benefits of a particular agreement.'[252]

In its modern version, a typical investment treaty denial of benefits clause might be construed as follows:

> 'Each Party reserves the right to deny to any company the advantages of this Treaty if nationals of any third country control such company and, in the case of a company of the other Party, that company has no substantial business activities in the territory of the other Party or is controlled by nationals of a third country with which the denying Party does not maintain normal economic relations.'[253]

The historical function of preventing entities of enemy states from gaining the protection still lingers in a number of clauses. For example, the 2012 US Model BIT covers two separate cases: (i) investors from a country with which the denying state does not maintain diplomatic relations or adopts measures that prohibit transactions in question and (ii) purposive letterbox companies, i.e. companies that do not fulfil the criterion of substantial business activities and are controlled by an entity from a non-party to the treaty or the host state itself.[254]

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[249] 'The traditional friendship, commerce and navigation treaty was designed to establish a framework within which mutually beneficial economic relations between two countries could take place. The FCN treaty sets forth on a reciprocal basis the terms upon which trade and shipping are conducted, and the rights of individuals and firms from one of the states living, doing business, or owning property within the jurisdiction of the other state,' see ARIKAKI, A., Appendix 1: Treaties of Friendship, Commerce and Navigation and Their Treatment of Service Industries. In: *Michigan Journal of International Law*, vol. 7, issue 1, 1985, p. 344.

[250] BALTAG, C.; MISTELIS, L. Denial of Benefits and Article 17 of the Energy Charter Treaty. In: *Penn State Law Review*, vol. 113, no. 3, 2008, p. 1301.

[251] SCHREUER, Ch. Nationality Planning. In: ROVINE, A. (ed.) *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers*, 2013, p. 18.

[252] WALKER, H. Provisions on Companies in United States Commercial Treaties, In: *American Journal of International Law*, vol. 50, 1965, p. 388; DOLZER, R.; SCHREUER, Ch. *Principles of international investment law*. Oxford: Oxford University Press, 2012, p. 55.

[253] Czech Republic–US BIT, article 1.II, emphasis added.

[254] 2012 US Model BIT, article 17.

The denial of benefits clauses may be very powerful tools in the hands of host states, provided that they are well drafted, and the prescribed procedure of their application is complied with. An objection based on the denial of benefits clause has indeed led tribunals to dismiss some of the claims brought by letterbox companies.[255]

Notwithstanding, not even one-tenth of the concluded IIAs contain a denial of benefits clause.[256] In the case of the Czech Republic, that is not unfamiliar to disputes concerning treaty shopping, only four treaties contain some form of the denial of benefits clause, namely the bilateral investment treaties with Canada, Azerbaijan, Australia, and the US.[257] On the other hand, it is a common feature of the US treaties where it may be found in at least 43 cases; most of the case law thus unsurprisingly concerns US investors.

Appropriate attention should be directed to the ECT that contains the denial of benefits clause in article 17 of its investment part III and that has been repeatedly considered by investment tribunals. Its wording, which will be returned to later, is the following:

> 'Article 17: Non-Application of Part III in Certain Circumstances
> Each Contracting Party reserves the right to deny the advantages of this Part to:
> (1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organised; or
> (2) an Investment, if the denying Contracting Party establishes that such Investment is an Investment of an Investor of a third state with or as to which the denying Contracting Party:
>
> (a) does not maintain a diplomatic relationship; or
> (b) adopts or maintains measures that:
>
> (i) prohibit transactions with Investors of that state; or
> (ii) would be violated or circumvented if the benefits of this Part were accorded to Investors of that state or to their Investments.'[258]

[255] For example *Pac Rim* or *Rurelec*.
[256] 215 out of 2571 mapped treaties according to the selected search on https://investmentpolicyhub.unctad.org/.
[257] According to the selected search on https://investmentpolicyhub.unctad.org/.
[258] Energy Charter Treaty, part III, article 17.

4.3 The construction of the denial of benefits clauses

The content of a denial of benefits clause may be generally broken down into the following elements that will be briefly described in the next paragraphs:

- the right to deny,
- the carve-out (i.e. consequences of the application),
- the character of the investor,
- the invocation.

4.3.1 'The right to deny' element

The clauses operate on the basis of active invocation by respondent states. This is different to requirements of the definition of the investor, which are examined ex officio, although they ultimately may have a similar effect – the investor in question will not be protected by the treaty. The mere inclusion of the clause is not enough for the tribunal to examine whether its conditions are fulfilled. It must be the state who awakens the clause from plain existence to activity.

4.3.2 'The carve-out' element

The clauses are drafted as carve-out provisions that, as their name suggests, once invoked, deprive the investor of the protection of its rights. Here, the question arises as to what rights are no longer available to the investor. As will be later elaborated more, in most cases, the denial of benefits clauses will affect the whole treaty, however, especially in free trade agreements ('**FTAs**'), they may only affect the investment chapter and the substantive investment protection provisions, having, therefore, no effect on dispute resolution provisions.

4.3.3 'The character of the investor' element

The clauses commonly define their personal scope of application by two requirements: (i) lack of substantiality of business activities in the home state and (ii) control over the investor by a third party. For the sake of completeness, the clauses also commonly contain a requirement that the host state maintains diplomatic relationships with the other contracting party and the requirement of the absence of sanctions or similar measures imposed on the investor (or its controller) or the other contracting party. Since only the first two requirements are concerned with treaty shopping, the last requirement will not be given further attention.

4.3.4 'The invocation' element

This last element, which would often help the parties with exercising their right, is usually missing. The clauses are frequently silent on the matter of timeliness and their application and do not provide guidance on the occasions in which they may be invoked. There are some exceptions containing further references in the clause or at least in the soft-law 'mutual understandings' of the contracting parties or in explanations to the text, but they are unfortunately in the minority. This brings us to the following sub-chapter of the application problems, which are caused mainly by gaps and silences of the treaties.

4.4 Application problems

4.4.1 Jurisdiction or merits issue?

If the predispositions commonly found in denial of benefits clauses (control and substantiality) are not included in the definition of the investor or investment, the investor, provided it complies with the rest of the criteria demanded by the treaty, qualifies as an investor within the meaning of the agreement and may enjoy its benefits. The consequence of an effective triggering of a denial of benefits clause is then the refusal of the protection to a *qualified* investor, in other words, the denial does not prevent the investor from qualification under the definition clause.

Such differentiation is not merely theoretical. In the first case, i.e. if it is found that an investor does not fulfil definition criteria, the inevitable outcome will be that the tribunal lacks jurisdiction and cannot validly hear the case. In the second case, the tribunal may hear the case, but a claimant will cease to have *ius standi* if a respondent successfully invokes the denial of benefits clause. Thus, notwithstanding that at the beginning of the proceedings the tribunal might validly have jurisdiction, in the course of the proceedings a claimant might lose its procedural position due to the operation of a denial of benefits clause. This perception was applied by the tribunal in *Rurelec* that understood the impacts of the denial of benefits clause as making the consent to arbitration conditional.[259]

It is true that in both situations the ultimate outcome is the same – both clearly represent a jurisdictional issue and they cause that a case is dismissed for the lack of jurisdiction to hear the dispute. This is because in the case of an invocation of the denial of benefits, an investor is normally denied *all* rights conferred by the treaty, including the right to commence arbitration against the host state.

[259] *Rurelec*, ¶ 372.

In this way, the denial of benefits clause may in some way be perceived as adding an extra conditional criterion on the jurisdictional requirements.

However, this is not a universal conclusion as it may become inapplicable once the wording of the clause changes. With a closer look at the previously quoted denial of benefits clause of the ECT, one may notice a slight difference to clauses commonly found in BITs, that however has an enormous impact. The clause reads that '[e]ach Contracting Party reserves the right to deny the advantages of this Part [of the ECT].'[260]

Due to this, the clause shall only apply to the Part III of the ECT, headed *Investment, Promotion and Protection*. Notably, this part does not contain any provisions on arbitration, because dispute resolution is dealt with in the separate Part V of the ECT while the Part III contains exclusively substantive provisions. Therefore, the effectiveness of the denial in the ECT is limited and does not expand to other parts of the ECT, such as the dispute settlement provisions. This interpretation of the wording of the clause was confirmed by the *Plama* tribunal.[261] In this sense, the denial of benefits clause in the ECT cannot prevent the claimant from filing the claim and the tribunal should not reject its jurisdiction. Still, the case might be dismissed later on in the merits stage because it might turn out that due to the denial of benefits, the investor might have no rights to call upon. As a result, the denial of benefits may also be viewed as a question of merits, depending on the clause in question.

The reasoning of the *Plama* tribunal is supported mainly by the plain textual reading of the provision that limits the denial to rights 'of this Part'. Even so, some commentators suggest that the *Plama* tribunal chose the easiest way to interpret the provision instead of allowing for the possibility of a more complex elaboration that could also lead to the conclusion, that even article 17 of the ECT is a question of jurisdiction. According to Shore, '[i]t is a perfectly plausible reading of ECT Arts 1(7) [definition of the investor], 17 and 26 [investor-state dispute settlement], pursuant to Art. 31 of the Vienna Convention, to find that as Art. 17(1) relates so centrally to the Art. 26(1) requirements of investor status ("Investor of another Contracting Party") and a breach of a Pt III obligation, that it constitutes a jurisdictional consideration for an arbitral tribunal. Indeed, in this respect Art. 17(1) might be distinguished from Art. 17(2), which concerns a denial of Pt III advantages to an "Investment" and expressly requires that the denying contracting party "establishes" that the investment has certain characteristics.'[262] However, this interpretation would principally blur the

[260] Energy Charter Treaty, part III, article 17, emphasis added.
[261] *Plama*, Decision on Jurisdiction, ¶ 148.
[262] SHORE, L. The Jurisdiction Problem in Energy Charter Treaty Claims. In: *Oil, Gas & Energy Law*, issue 3, 2008, p. 6.

distinction between an unqualified investor and a qualified investor that has been deprived of its rights as indicated above and I do not see a valid foundation for such reading because, at least, the characteristics from the defining provisions must always be fulfilled, whereas even if the requirements of the denial of benefits clause are fulfilled, it does not automatically mean that the investor loses the protection of the treaty as long as the clause is not invoked; the two sets of requirements operate in different ways, which is a sufficient reason for the need of distinction.

However, it can be concluded that in the vast majority of IIAs, the denial of benefits clause will not be limited only to selected standards of protection but will expand to the whole treaty and will apply to both substantive and procedural rights of an investor that may be denied by a state. Therefore, in most cases, the denial will be considered among the jurisdictional deliberations.

4.4.2 The burden of proof

Once the denial of benefits clause emerges in the text of the treaty, the question arises on who bears the burden of proving fulfilment of its requirements. Is it a state that invokes its right to limit the scale of protected subjects who must prove that the invocation was established on firm grounds or does it suffice to claim that an investor does not meet the required standards and it is on an investor to provide evidence to the contrary?

The conclusion that the burden of proof rests with a state seems more logical as it is the state who raises the objection. However, such demand may also appear excessive as states might find themselves short on evidence. A state might have certain information available which indicate that there is a valid reason to deny protection to an investor, for instance on the basis of tax return or statistics databases or as a result of an exchange of information with the investor's home state, but it is questionable whether such proof would be found sufficient by a tribunal. For instance, according to the Understanding 3 to the ECT, the following factors should be considered when examining the control of an investment:

- financial interest, including equity interest, in an investment;
- the ability to exercise substantial influence over the management and operation of an investment; and

- the ability to exercise substantial influence over the selection of members of the board of directors or any other managing body.[263]

It that light it is difficult to imagine a state having detailed access to this information that are clearly internal issues of companies. On the other hand, shifting the burden of proof onto investors does not appear to be just as it is not them who raise the objection.

The most frequently used procedural rules – the ICSID rules, do not contain any provisions on the question of the burden of proof and so do not provide any further guidance. The doctrine encapsulated in the maxim *onus probandi actori incumbit* is however frequently recognised in the practice of tribunals[264] as the principle governing the determination of who bears the burden of proof. The principle was applied for instance in the *Tokios Tokelės*[265] or *Amto*[266] decisions. Conversely, the tribunals in *AAPL*[267] or *Egypt Middle East Cement*[268] have characterised this rule as an established international law rule and a general principle of international procedure.[269]

The essence of the principle is the rule that the party making an allegation bears the burden of proving it, irrespective of its position as a claimant or a respondent in the case – the term actor is not to be taken to mean the claimant from the procedural standpoint, but the claimant in the view of the issues involved.

The maxim is also applied when tribunals consider the denial of benefits. According to the tribunal in *Generation Ukraine*, 'the burden of proof to establish the factual basis of the "third country control", together with the other conditions, falls upon the State as the party invoking the "right to deny" […]'[270] Similarly, when the tribunal in *Petrobart* considered article 17(1) of the ECT, it allocated the burden of proof of fulfilment of all requirements (i.e. ownership or control by the third state nationals and lack of substantial business activities in the territory of the home state) solely to the respondent.[271]

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[263] *The International Energy Charter Consolidated Energy Charter Treaty with Related Documents. Understanding with respect to Article 1(6)* [online]. Energy Charter [accessed 24/3/2019]. Available at: https://energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf, p. 41.
[264] LIM, Ch.; HO, J.; PAPARINSKIS, M. *International investment law and arbitration: commentary, awards, and other materials*. Cambridge: Cambridge University Press, 2018, p. 166.
[265] *Tokios Tokelės*, Award, ¶ 121.
[266] *Amto*, ¶ 64.
[267] *AAPL*, ¶ 56.
[268] *Egypt Middle East Cement*, ¶ 90.
[269] Ibid.
[270] *Generation Ukraine*, ¶ 15.7.
[271] *Petrobart*, p. 59.

It is important to note the distinction to the requirements *ratione personae*. It would be another case entirely if the conditions for the denial invocation were included in the definition of the investor itself. In that instance the burden would rest on the claimant.[272]

The application of the *onus probandi actori incumbit* rule is logical but from the states' perspective unfortunate. States are ultimately called upon providing facts to which they may have only limited access. If we consider a simple example of proving details of the shareholding interest in the company or of its actual control, it is evident that, especially in cases of complicated, hidden or offshore corporate structures, the respondent state may not have many possibilities to acquire satisfactory information without cooperation of the investor. That being said, respondent states nevertheless must be aware of some facts that raise the suspicion and lead to the invocation of the denial of benefits clause.

Probably because of these difficulties a modified approach was adopted by the *Plama* tribunal that concluded that the final burden of proof to establish ownership and control is on the claimant.[273] The tribunal indicated that the initial burden is on the respondent, but once doubts arise as to who controls the investor, the burden is shifted to the claimant. In most cases, the denial of benefits will be the question of jurisdiction, therefore, ultimately, it is on the claimant to 'satisfy the tribunal that its jurisdiction is properly invoked.'[274]

4.4.3 Contents of the requirements

The possibility of the denial invocation is commonly linked to *substantiality* and *control* criterions that indicate insufficient connection to the home state and enable refusal of the protection of an investment.

Certain ambiguity arises as to the question whether both of the conditions must be met. For example, the paragraph 2 of article 10.12 of the Central America Free Trade Agreement ('**CAFTA**') reads:

> 'Subject to Articles 18.3 (Notification and Provision of Information) and 20.4 (Consultations), a Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such other Party and to investments of that investor if the

[272] CHENG, B. *General principles of law as applied by international courts and tribunals*. New York: Cambridge University Press, 2006, p. 332.
[273] *Plama*, ¶ 89.
[274] SINCLAIR, A. The Substance of Nationality Requirements in Investment Treaty Arbitration. In: *ICSID Review – Foreign Investment Law Journal*, vol. 20, issue 2, 2005, p. 381.

enterprise has no substantial business activities in the territory of any Party, other than the denying Party, and persons of a non-Party, or of the denying Party, own or control the enterprise.'[275]

Tribunals are relatively consistent with the conclusion that fulfilling only one criterion does not provide a sufficient basis for the denial, both within the context of the ECT[276] and various BITs.[277] Nevertheless, this conclusion may change upon a different wording of the clause. Although most treaties I have researched included wording similar to the CAFTA as far as the criterions are concerned (i.e. joint by 'and'), I also came across at least one BIT that uses 'or' to link substantiality and control criterions, namely the San Marino–Azerbaijan BIT.[278] In this case, it would be a logical consequence that only the lack of substantial business activities in the home state or a control of a third party would suffice for allowing the exercise of the denial.

Furthermore, other treaties may contain only one of the criterions, for example the Canada–Guinea BIT refers only to the lack of substantial activities,[279] and examining control would therefore be superfluous.

The tribunal in the *AMTO* case that was considering the denial clause contained in the ECT is an often-quoted decision which dealt with the question of substantiality of the business activities of the claimant in the home state. In this case, the tribunal concluded that a small number of permanent staff (namely two)[280] and the conduct of the investor's business activities from small premises located in the home state were sufficient to satisfy substantiality.[281] In the words of the tribunal: 'the materiality, not the magnitude of the business activity is the decisive question'.[282]

The *Pac Rim* tribunal noted that the protection could not be denied to all holding companies *en blanc* and continued by enumerating the properties that it would expect from a holding company in order to consider that it has substantial business activities in the home state. To those belong the

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[275] CAFTA, article 10.2, emphasis added.
[276] e.g. *Plama*, ¶ 143.
[277] e.g. *Ulysseas*,¶ 167.
[278] See Azerbaijan–San Marino BIT, article 11, emphasis added:
'1. A Contracting Party may deny the benefits of this Agreement, including the right to commence or to continue dispute settlement proceedings, to an investor of the other Contracting Party and to the investments of that investor, if:
a. the investor is owned or controlled by persons having the nationality of a State that is not a Contracting Party or of the denying Party; or
b. the investor conducts no substantial business activities in the state territory of the other Contracting Party.'
[279] See Guinea–Canada BIT, article 19.
[280] *Amto*, ¶ 68.
[281] Ibid. ¶ 69.
[282] Ibid.

existence of the board of directors, keeping board minutes, a continuous physical presence of representation in the home state, and a bank account.[283] It further rejected the view that substantiality should be perceived jointly for the activities of the whole group of companies, asserting that '[i]f that enterprise's own activities do not reach the level stipulated by the CAFTA Article 10.12.2, it cannot aggregate to itself the separate activities of other natural or legal persons to increase the level of its own activities.'[284]

The fact that holding companies are not excluded from the protection only for their passive character was also acknowledged by the *Masdar* tribunal. The holding company in question had 'substantial international assets under its control'[285]and thus in this case, the substantiality criterion was satisfied.

However, if the claimant is a pure shell company with no active operations that can be attributed to it, carrying out merely 'passive, limited and unsubstantial'[286] activities, it cannot pass the test of substantiality even if it were a part of a holding structure that is otherwise economically active and complex.[287]

The notion of control was interpreted by the *Plama* tribunal as 'the ability to exercise substantial influence over the […] management, operation and the selection of members of [the investor's managing body].'[288]

Some of the recent treaties include further explanations of the criterions. For example, in the Japan–Ukraine BIT a note is inserted, stating that:

> 'For the purposes of this Article, an enterprise is: (a) "owned" by an investor if more than fifty (50) percent of the equity interest in it is owned by the investor; and (b) "controlled" by an investor if the investor has the power to name a majority of its directors or otherwise to legally direct its actions.'[289]

Control can be either direct or indirect, leading through numerous layers of corporations up to the ultimate beneficial owner. Usually, treaties do not contain any specification as to what level of control should be looked at. For example, the *Pac Rim* tribunal, in the context of the CAFTA, was

[283] *Pac Rim*, ¶ 4.72.
[284] Ibid. ¶ 4.66.
[285] *Masdar*, ¶ 253.
[286] *Pac Rim*, ¶ 4.75.
[287] Ibid. ¶ 4.66.
[288] *Plama*, ¶ 170.
[289] Ukraine–Japan BIT, article 27.

considering the situation in which the claimant was held by a third-state parent company and only shareholders of that parent company were allegedly nationals of the home state. In this situation, the tribunal concluded that the claimant was owned by a non-CAFTA party, and thus the condition of the foreign control was met. For that reason, the tribunal did not find it necessary to examine the indirect control.[290] From this approach it may seem that there is a room for the interpretation that the criterion is fulfilled once any third-party element emerges in a controlling position anywhere in otherwise possibly complex multilevel holding structure.

4.4.4 Consequence of the absence of the clause or absence of some of its parts

The underlying principle of the existence of the denial of benefits clauses is that they reflect the prohibition of abuse of rights: they aim to prevent the misuse of the granted benefits.

On that basis, a question may arise whether it is necessary to include a denial of benefits clause in the text of a treaty in the first place, when it is only an expression of this universally binding maxim. Would states not be able to invoke abuse of rights without a specific reference to their right to do so?

In *Tokios Tokelès*, the tribunal understood the absence of the clause as an important indication of the states' will, regarding 'the absence of [the denial of benefits clause] as a deliberate choice of the Contracting Parties. In [the view of the tribunal], it is not for tribunals to impose limits on the scope of BITs not found in the text, much lower limits nowhere evident from the negotiating history. An international tribunal of defined jurisdiction should not reach out to exercise a jurisdiction beyond the borders of the definition.'[291] The possibility to rely on the abuse of rights doctrine in order to 'import' the contents of the denial of benefits clause was thus not admitted. The tribunal accepted the respondent's general submission that: '[...] it is clearly an abuse for an investor to manipulate the nationality of a shell company subsidiary to gain jurisdiction under an international treaty at a time when the investor is aware that events have occurred that negatively affect its investment and may lead to arbitration',[292] although it refused to rule that in the particular case the restructuring resulted in the abuse of process.[293]

Not only the absence of the whole clause, but also of some of its parts may have significant consequences. Most provisions specify the control to be by the 'third parties'. In other words, they do not protect host states from being sued with regards to investments controlled by nationals of the

[290] *Pac Rim*, ¶¶ 4.79–4.82.
[291] *Tokios Tokelès*, ¶ 36.
[292] *Pac Rim*, ¶ 2.100.
[293] Ibid.

host state itself (i.e. the '3rd treaty shopping type', obviously the least desired). In the absence of such reference, a tribunal might be reluctant to rule that the control criterion was fulfilled since there will not be any strictly third-party control.

4.4.5 Invocation and effect

As the *Plama* tribunal observed, the 'existence of a right is distinct from an exercise of that right'.[294] If the clause is drafted as providing a right to deny that might be invoked by the state, the denial does not occur automatically once the requirements are met, but an act of the state is needed. The tribunal further emphasised the liberal character of the denial, noting that the state might never actually use that right and that the invocation is entirely at its discretion,[295] also, as further noted by the *Yukos* tribunal, the clause merely reserves the right to deny the advantages, but must be exercised in order to have a full effect.[296]

The need to exercise the right is not a subject of any great disagreement. But doubts emerge once the details of the exercise are being scrutinised. The process of the invocation is far from settled. According to the *Plama* tribunal, the exercise of the right must be made in a public manner and must be reasonably available to investors. The tribunal elaborated on the publication of the notice of the exercise of the denial and arrived at the following conclusions: '[…] a declaration in a Contracting State's official gazette could suffice; or a statutory provision in a Contracting State's investment or other laws; or even an exchange of letters with a particular investor or class of investors. By itself, Article 17(1) ECT is at best only half a notice; without further reasonable notice of its exercise by the host state, its terms tell investor little; and for all practical purposes, something more is needed.'[297] Not surprisingly, precautionary announcements issued in this sense have indeed started to emerge.[298] The conclusions of the *Plama* tribunal were followed by subsequent decisions concerning the ECT, conditioning the application by a notice made prior to the commencement of the arbitration proceedings. Tribunals justified such approach also by transparency obligations contained in the ECT.[299] However, it seems that according to this interpretation, the clause would be rendered meaningless in most cases. It is not feasible for a state to have a full (or actually not even half or

[294] *Plama*, ¶ 155.
[295] Ibid. ¶ 155.
[296] *Yukos*, ¶ 456.
[297] *Plama*, ¶ 157.
[298] Announcement about denial of benefits to Adams & Co. Inc. by the Slovak Republic. 23/10/ 2014. Bratislava [online]. *Finance.gov.sk* [accessed 24/3/2019]. Available at: https://web.archive.org/web/20141124103904/www.finance.gov.sk/en/Default.aspx?CatID=10&id=78.
[299] *Khan Resources*, ¶¶ 427, 429.

hundredth) knowledge of all investments made within its territory unless it is for some reason noticeable or otherwise important or publicly discussed. Apart from the knowledge of its existence, a state would also have to keep track of its control which may change at any time. Surely, any clause should be interpreted as bearing meaning, and to my mind, such limiting interpretation should not be followed.[300]

Another approach was adopted by the *Pac Rim* tribunal that was considering the CAFTA denial provision. The tribunal concluded that since no express time limit is fixed in the treaty for the invocation of the denial, the denial may be exercised at any time before the time limit to present jurisdictional objections elapses.[301] This interpretation is more reasonable especially since the ownership structure is quickly variable and any prior notifications and denials may not bring searched effects as an owner of an investment may change the very next day. It is more logical to observe the ownership structure once the dispute arises or the arbitration proceedings are commenced and then inquire whether the control criterion is fulfilled.

Some treaties also specifically set additional guidance as to the application of the clause. For instance, article 10.12 of the investment chapter in CAFTA reads:

> 'Subject to Articles 18.3 (Notification and Provision of Information) and 20.4 (Consultations), Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of any Party, other than the denying Party, and persons of a non-Party, or of the denying Party, own or control the enterprise.'[302]

By way of reference to transparency obligations of the contracting parties, a prior notification and a consultation are needed in order to secure a correct invocation of the CAFTA denial of benefits. It should be noted that these two obligations are aimed at different addressees. Notifications are made towards an investor while consultations take place between concerned parties to the treaty, i.e. states.

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[300] This approach was accepted by the *Rurelec* tribunal: 'As a matter of fact, it would be odd for a State to examine whether the requirements of Article XII ['denial of benefits' clause] had been fulfilled in relation to an investor with whom it had no dispute whatsoever. In that case, the notification of the denial of benefits would—per se—be seen as an unfriendly and groundless act, contrary to the promotion of foreign investments. On the other side, the fulfilment of the aforementioned requirements is not static and can change from one day to the next, which means that it is only when a dispute arises that the respondent State will be able to assess whether such requirements are met and decide whether it will deny the benefits of the treaty in respect of that particular dispute.' See *Rurelec*, ¶ 379.

[301] *Pac Rim*, ¶ 4.83.

[302] CAFTA, 10:12 section 2, emphasis added.

The question of the proper notification was examined by the *Pac Rim* tribunal with regards to the CAFTA. The tribunal firstly rejected to draw on previous decisions concerning mainly the ECT due to the different wording of the clause.[303] The claimant raised the issue of the necessary notification, or more precisely, of its timing. It objected that the respondent deliberately prolonged its notification to the US (the other concerned contracting state) and thus exercised its right too late. To be exact, the notification was made on 1 March 2010, the clause was exercised towards the claimant on 3 August 2010, but the notice of intent to arbitrate dated back to 9 December 2008.[304] The tribunal dismissed those objections on the grounds that: (i) given that this was the first denial of benefits exercised by any CAFTA member, it required particular attention, careful consideration and, inevitably, also time on the side of the respondent,[305] and (ii) according to the ICSID rules under which the arbitration was held, any jurisdictional objection may be raised at the time limit fixed for the filing of the counter-memorial at the latest, which was complied with.[306]

The requirement of prior consultations occurs also in other treaties,[307] but reasons for its inclusion seem not very clear. The denial should ideally operate on a unilateral basis and the host state should be enabled to exercise it at its will as the means of defence. The requirement of consultations between states that are contracting parties to the concerned treaty is superfluous – even if the home state did not agree with the invocation, the outcomes of the consultations would not prevent the effective denial. Thus, the need for consultations between the contractual parties of the investment treaty seems to be only another obstacle prolonging the final effect of the denial. Even more extreme case may be found in the Czech Republic–Australia BIT according to which '[w]here a company of a Contracting Party is owned or controlled by a citizen or a company of any third country, the Contracting Parties may decide jointly in consultation not to extend the rights and benefits of this Agreement to such company.'[308] In this case, the effect of the denial is dependent upon a mutual agreement of both contracting parties. In this respect, the sought effect may easily be lost.

Some of the other treaties contain further guidance on the process of the denial invocation in order to prevent ambiguities. For example, the 2015 India Model BIT specifically states that '[a] Party may at any time, including after the institution of arbitration proceedings […] deny the benefits of this

[303] *Pac Rim*, ¶ 4.3.
[304] Ibid. ¶ 4.38.
[305] Ibid. ¶ 4.84.
[306] Ibid. ¶ 4.85, similar conclusion was reached by the *Ulysseas* tribunal which operated under the UNCITRAL rules, see *Ulysseas*, ¶ 172.
[307] See for example Canada Model BIT.
[308] Czech Republic–Australia BIT, article 2(2), emphasis added.

Treaty […]'[309] Such an approach is advisable as the tribunal is then not forced to second-guess what effects the parties intended to give to the clause.

After the denial is invoked, it is necessary to ask what effects it brings, whether only prospective or retrospective. The conclusions on the prospective effects of the denial by some tribunals were based mainly upon the 'object and purpose' interpretation of the treaty, arguing that since the aim of the treaty is the 'long term cooperation', a prospective denial would operate in contradiction to the principle and would deprive investors of their legitimate expectations.[310] This conclusion was arrived at by the *Plama* tribunal. With regards to this reasoning, Mistelis notes that the interpretation provided by the tribunal can be read as the following: 'investors cannot be expected to commit and invest in the host State under the possibility that, suddenly, the advantages granted to them under the applicable IIA will be wiped out.'[311] This is however a misinterpretation of the situation in which the investors find themselves. The advantages would not be wiped out 'suddenly' or in other words 'unexpectedly'. An investor that falls within the scope of operation of the denial of benefits clause must inevitably foresee that wiping out of its rights is a likely outcome of its decision to use a letterbox company under control of a third party.

As indicated above, according to the *Plama* tribunal, referring to the object and purpose of the ECT, the exercise of the denial should not have a retrospective effect;[312] the tribunal highlighted legitimate expectations of investors and the 'long term cooperation' objective. The tribunal suggested that '[a] putative investor therefore requires reasonable notice before making any investment in the host state whether or not that host state has exercised its right under Article 17(1) ECT,[313] in order to decide whether or not to invest in the territory in question. The *Rurelec* tribunal disagreed with such a conclusion. In this dispute, the denial was invoked during the investment proceedings within the statement of defence. The tribunal arrived at a conclusion that '[w]henever a BIT includes a denial of benefits clause, the consent by the host State to arbitration itself is conditional and thus may be denied by it.'[314] It further elaborated that '[t]he Tribunal cannot agree with the Claimants when they argue that the Respondent is precluded from applying the denial of benefits clause retroactively. The very purpose of the denial of benefits is to give the Respondent the possibility of withdrawing the benefits

[309] 2015 India Model BIT, article 35, emphasis added.
[310] e.g. *Plama*, ¶¶ 161, 162.
[311] MISTELIS, L; BALTAG, C. 'Denial of Benefits' Clause in Investment Treaty Arbitration. In: *Queen Mary University of London, School of Law Legal Studies Research Paper No. 293/2018*, p. 17.
[312] *Plama*, ¶ 162.
[313] Ibid. ¶ 161.
[314] *Rurelec*, ¶ 372.

granted under the BIT to investors who invoke those benefits. As such, it is proper that the denial is "activated" when the benefits are being claimed."[315] In this sense, it disagreed completely with the reasoning of the *Plama* tribunal. However, it should be noted that contrary to the *Plama* decision, the investment at hand was made before the respective BIT was concluded, so the legitimate expectations of the investor could play no role in this case.[316] In the end, the tribunal pointed out that '[a]s a matter of fact, it would be odd for a State to examine whether the requirements of Article XII had been fulfilled in relation to an investor with whom it had no dispute whatsoever.'[317] Similarly, the *Ulysseas* tribunal noted: '[i]n reply to Claimant's argument that this would cause uncertainties as to the legal relations under the BIT, it may be noted that since the possibility for the host State to exercise the right in question is known to the investor from the time when it made its investment, it may be concluded that the protection afforded by the BIT is subject during the life of the investment to the possibility of a denial of the BIT's advantages by the host State.'[318] This reasoning was also followed by some of the subsequent tribunals that employed it when dealing with the objection of the breach of legitimate expectations.[319]

Personally, I consider the aim of securing the 'mutual benefits',[320] which are contained in investment treaties probably as regularly as a reference to the 'long term cooperation', equally important. Is not part of the mutuality a possibility to exclude the rights of entities that do not bring states any positive effects? I find the prospective application rule difficult to accept because it imposes too disproportionate burden on the state. The interpretation referring to the deprivation of investor's legitimate expectations is not very convincing; investment is always a gamble to some extent and an investor raises the level of such a gamble by deciding to invest through an entity that has no substantial activities in the home state and is controlled by beneficiaries that are not nationals of the protected parties. Such a decision is surely balanced by other positive aspects, be it business, legal or tax aspects. In that case the investor must accept a higher level of uncertainty because, after all, it is the investor who caused it.

It seems so far that two approaches have evolved – first, a more liberal stream of interpretation that does not impose strict requirements on the invocation of the clause and allows for a prospective

[315] *Rurelec*, ¶ 376.
[316] Ibid. ¶ 380.
[317] Ibid. ¶ 379.
[318] *Ulysseas*, ¶ 173.
[319] *Rurelec*, ¶ 372.
[320] See for example the preamble of the Czech Republic–Azerbaijan BIT highlighting the desire 'to intensify economic cooperation to the mutual benefit of both Contracting parties' or the Czech Republic–Bahrain BIT preamble calling upon the desire to 'develop economic co-operation to the mutual benefit of both States'.

application and secondly, a rather constant interpretation of the ECT article 17(1) that provides only for a retrospective application. Such divergence is often justified by the different wording of the considered clauses. However, if the ECT and for instance the former NAFTA clauses were compared, a persuasive force of the different wording argumentation is hard to agree upon as both clauses are very similar. Nevertheless, even if the differences in wording may serve as an explanation of the different outcomes, it seems that the interpretation established by the *Plama* tribunal readily followed in the subsequent cases sadly makes the ECT clause useless and practically inapplicable. As noted above, the argumentation of tribunals with legal certainty is doubtful at least.

4.5 Drafting

It is evident that the application of the clauses brings various problems. It is also apparent that most of the problems could be effectively overcome by a careful drafting of the provisions or at least eased by explaining notes agreed upon by the contracting states.

Since most of the denial of benefits clause case law was issued in the last decade, I decided to analyse whether tribunals' outcomes had any positive impacts on the treaty drafting in the period of the last five years.

4.6 Evaluation of the model BITs and IIAs concluded in the last five years

Notwithstanding the negative impacts caused by treaty shopping, only about one quarter of the 206 IIAs signed from 2014 include some form of a denial of benefits clause.[321]

Going beyond the numbers, I will now turn to the evaluation of those 47 IIAs with regards to their content. As a base for the analysis, I chose IIAs concluded in 2014 onward and model BITs introduced by states in the same time period. The object of this section is to evaluate whether states managed to reflect the problems of the 'typical' denial of benefits clause and to introduce more functional models in the concluded IIAs.

Most of the IIAs unfortunately contain the clause in its usual wording. Further, I will focus on the IIAs whose contracting parties attempted to solve some of the problematic aspects. I will also identify the gaps that still remain in a number of treaties and indicate the way which the drafting practice should ideally take in the future.

[321] According to the selected search on *Investment Policy Hub* [online]. UNCTAD Division on Investment and Enterprise [accessed 28/9/2019]. Available at: https://investmentpolicyhub.unctad.org/.

4.6.1 The triggering of the clause

As shown above, the clause is commonly drafted to enable the state to trigger its application and thus an active intervention is needed. The aim of the clause is to deny protection to unwelcome investors that fulfil the set criteria.

From the perspective of a state, a question arises whether the clause could not in principle operate in an automatic way, thus adding another condition for investors to qualify for protection, since this approach would ease the position of states for whose benefits the clauses exist.

Indeed, this approach has been already used in some BITs, namely in the 2016 Iran–Slovakia BIT[322] that reads that the benefits of the treaty 'shall be denied', and the United Arab Emirates–Mauritius BIT,[323] according to which the benefits of the agreement 'shall not be available'. If the contracting states perceive treaty shopping as a problem that they seek to tackle in the investment treaty, it is in the interest of the states to secure as easy application as possible.

4.6.2 The burden of proof

Some of the contracting parties clearly responded to the uncertainty regarding the burden of proof of the fulfilment of the criteria of substantiality and control. For that reason, some treaties contain an express indication that it is the party invoking the clause that should provide evidence that its requirements are fulfilled.

For instance, the Nigeria–Singapore BIT provides that 'a Party may deny the benefits of [the] agreement to an investor of the other Party that is an enterprise of such Party and to investment of such an investor where the Party establishes that the enterprise is owned or controlled by persons of a non-Party, or of the denying Party, and has no substantive business operations in the territory of the other Party.'[324]

4.6.3 Express reference to treaty shopping practices

In two of the analysed treaties, an express reference to treaty shopping practices may be found. Such references undoubtedly strengthen the position of respondent states and also have effect on the legal certainty and expectations of investors. It may also facilitate further interpretation of the provision

[322] See Iran–Slovakia BIT, article 8.
[323] United Arab Emirates–Mauritius BIT, article 15, emphasis added.
[324] Nigeria–Singapore BIT, article 26; Japan–Iran BIT, article 12, emphasis added.

and widen the scope of unprotected investments. For instance, the United Arab Emirates–Mauritius BIT states that:

'The benefits of this Agreement shall not be available to:

i. an investor of a Contracting Party, if the main purpose of the acquisition of the nationality of that Contracting Party was to obtain benefits under this Agreement that would not otherwise be available to the investor; or
ii. an investor of a non-party who acquires the ownership or control of an investment through planning of nationality where the investor has structured his investment through intermediary countries and that non-party has no diplomatic relationship with the host state.'[325]

Instead of focusing on substantiality of the business and control of the investment, this particular denial of benefits clause concentrates the attention on the intention of an investor to restructure the investment so that it would gain otherwise unavailable protection. Although it might seem only as a different side of the same coin, upon thorough examination of this clause it clearly shifts the focus primarily on the acquisition phase of an investment and investor's motivation, whereas substantiality of its activities do not play a major role. Nonetheless, this wording seems rare even if it makes the clause directed more precisely against treaty shopping as this wording would presumably provide tribunals with more manoeuvring space when deciding on the denial.

4.6.4 Timeliness

The part concerning the timeliness of the denial invocations can be found in certain IIAs. Such a reference indicates a prudent approach of the contracting states aimed to prevent future controversies about whether the denial was or was not invoked too late. The lack of such specification causes unnecessary uncertainty for both claimants and respondents that can be very easily prevented. For instance, the Canada–Hong Kong BIT simply states that: '[a] party may, at any time including after the institution of arbitration proceedings […], deny the benefits of this agreement to an investor of the other Party that is an enterprise of that Party and to investment of that investor […]'[326]

[325] United Arab Emirates–Mauritius BIT, article 15, emphasis added.
[326] Canada–Hong Kong BIT, article 18, emphasis added; similarly see Hongkong–Chile BIT, article 19, or also 2015 India Model BIT, article 35.

Still, one must bear in mind that, even in such a case, the applicable procedural rules may limit the possibility of revoking the clause within jurisdictional objections at the latest, as was indicated by some of the decisions.

A problem of timeliness also arises if the denial is drafted as automatic as is, for example, the case of the aforementioned Slovakia–Iran BIT. Under this BIT, the parties included a rule according to which the rights should be denied if the preconditions for the denial are fulfilled at the time when the claim is submitted to arbitration.[327]

4.6.5 Specification of the denied benefits

All of the analysed BITs refer to all benefits granted by the agreements as to those that will be denied. Some of the treaties specifically mention the denial of the right to commence dispute settlement proceedings,[328] however, such reference is redundant and might raise more doubts than bring more clarity.

All multilateral FTAs, on the other hand, refer to the benefits of the respective investment chapters which, if the approach adopted by the *Plama* tribunal was followed, would result in the availability of the dispute settlement mechanism, but necessary subsequent dismissal of the dispute on the merits.

4.6.6 Notification and consultation

A handful of treaties demand that a state first notifies and consults the other contracting party, i.e. the home state of the investor, before invoking the denial of benefits. None of the analysed treaties contains any specification as to the moment or manner in which such notification should be made. In some cases it is not even entirely clear who is to be notified – most of the treaties expressly subject the denial to 'notification or consultation with the other party',[329] whereas other treaties merely subject the denial to prior notification and consultation[330] without any further specification. Finally, in some of the clauses, the contracting parties simplified the need for notification and turned it into softer instruments of a non-binding nature. The Korea–Turkey FTA states that '[t]he denying party shall, to the extent practicable, notify the other Party before denying the benefits. If the denying Party provides such notice, it shall consult with the other Party at the request of the other Party.'[331] However, this

[327] Slovakia–Iran BIT, article 8(3).
[328] Azerbaijan–San Marino BIT, article 11.
[329] e.g. ASEAN–India Agreement on Investment, article 13(2), emphasis added.
[330] Nigeria–Singapore BIT, article 26.
[331] Korea–Turkey FTA, article 1.15(2), emphasis added, similarly Rwanda–Turkey BIT, article 11(2).

provision is drafted in an unfortunate way as it is not at all apparent in what situation the notice would not seem practicable and what the consequences are thereof.

On the other side of the spectrum is the United Arab Emirates–Mexico BIT which demands agreement of the home and host states on the application of the denial; it requires that '[t]he Contracting Parties may decide jointly in consultation to deny the benefits of this Agreement to an enterprise of the other Contracting Party and to its investments, if a natural person or enterprise of a non-Contracting Party owns or controls such enterprise.'[332]

The only specification of the obligation to notify can be found in the Australia–Korea FTA that stipulates that '[i]f, before denying the benefits of this Chapter, the denying Party knows that the enterprise has no substantive business operations in the territory of the other Party and that persons of a non-Party, or of the denying Party, own or control the enterprise, the denying Party shall to the extent practicable, notify the other Party before denying the benefits. If the denying Party provides such notice, it shall consult with the other Party on request of the other Party.'[333]

However, on the second sight, the seemingly elaborated obligation is rather an illusion. In short, the only thing that the clause states, is, that the notification shall be made prior to the denial (which is contained in all of the other clauses demanding notification) and that it shall be made only if the party is aware that the investor fulfils the criteria for the denial, which is an inevitable prerequisite of every case of the denial of benefits clause invocation.

4.6.7 Protection against the treaty shopping of domestic nationals

Astonishingly, what many contracting parties forget is to secure the extension of the protection provided by the denial of benefits clauses against investors controlled by their own citizens. I believe that this must be a result of the lack of attention during the stipulation of the agreement. There is no logical explanation for leaving out investors under the control of the host state.

A clause with such gap is construed as follows: '[a] Contracting party may deny the benefits of this Agreement to an investor of the other Contracting party and to its investments, if investor of a Non-Contracting Party owns or controls the first mentioned investor and that investor has no

[332] See UAE–Mexico BIT, article 30, emphasis added.
[333] Australia–Korea FTA, article 11.11 (2).

substantial business activity in the territory of the Contracting party under whose laws it is constituted or organised.'[334]

This gap unfortunately has severe consequences. Presumably, not many tribunals would be ready to go beyond the wording of the clause and conclude, for example with reference to the maxim *a minori ad maius*, that if the clause applies to investors controlled by third-state parties, the applicability of the denial should extend to the control of host state entities as well.

4.6.8 Definitions of substantiality and control

Some treaties go as far as including the definition of substantiality and control, which – taking into account the complications that those criteria caused while they were examined by tribunals – can only be perceived as a positive step. It is not unlikely that those definitions were inspired by deliberations of tribunals, as their wordings suggest.

To give an example, some agreements concluded by Japan define the criterions in the following manner:

> 'an enterprise is:
> "owned" by an investor if more than 50 per cent of the equity interest in it is beneficially owned by the investor,
> "controlled" by an investor if the investor has the power to name a majority of its directors or otherwise to legally direct its actions.'[335]

4.6.9 The personal scope of the denial

The Azerbaijan model BIT touches upon the scope of the denial and states that 'once exercised, [the] denial may apply to all or only specified investors or investment of investors, and whether existing or future investors or investments.'[336] The denial may thus be invoked against an individual investor in connection to the dispute or against abstractly defined investors that fall within a certain category.

4.6.10 Criterions

A clear majority of the treaties make the denial possible only if both lack of substantiality and foreign or host state control criterions are present. I traced two exceptions from this trend, but it is

[334] Australia–Kyrgyzstan BIT, article 12, emphasis added.
[335] Japan–Ukraine BIT, article 26.
[336] Azerbaijan–San Marino BIT, article 11, Azerbaijan Model BIT, article 11.

questionable to what extent they are the result of a deliberate omission. As already mentioned, the Azerbaijan–San Marino BIT contains both criterions, but links them with the word 'or' instead of 'and'. Precisely the 'and' was an important reason for tribunals to conclude that the fulfilment of only one of the criterions is not enough for the clause to be legitimately invoked. *A contrario* this would mean that under the Azerbaijan–San Marino BIT either lack of substantiality or lack of control could potentially deprive the investor of its rights.

In the second case – the EU–Canada Comprehensive Economic and Trade Agreement ('**CETA**'), the substantiality criterion is missing entirely.[337] On the other hand, application of the denial is conditioned by fulfilling an additional set of criterions (mostly of political character).

4.7 Recommendations

Besides the above-mentioned examples, many clauses do not reflect the interpretation problems at all and remain plainly drafted. For all, let me mention the Austria–Kyrgyzstan BIT as an example, which reads:

> '[a] Contracting Party may deny the benefits of this Agreement to an investor of the other Contracting Party and to its investments, if investors of a Non-Contracting Party own or control the first mentioned investor and that investor has no substantial business activity in the territory of the Contracting Party under whose law it is constituted or organised.'[338]

Such a clause does not contain any protection against host state investors or any details on its proper application or effect.

In order to improve this state of affairs, the following points should be ideally covered in a proper denial of benefits clause if states intend it to be applied without difficulties:

- specification of the denial timing,
- protection against investment controlled by host state entities,
- if possible, the denial should be made automatic,
- if the clause is construed to demand its invocation, then process of application should be described.

[337] CETA, article 8.16.
[338] Austria–Kyrgyzstan BIT, article 12.

The model denial of benefits clause could then be drafted in the following manner for an automatic and wide application.

'The benefits of this agreement are denied to investors that:

a) are controlled or owned by a national of a non-party or of the party that is the host state of the investor or
b) have no substantial business activities in the territory of the home state, especially investors whose primary purpose is to gain protection of this treaty that would not otherwise be available to them.'

In such a case, timeliness and invocation do not have to be covered since the clause would operate as another criterion for investor qualification. A state could raise the objection of the denial until the time limit for objections to jurisdiction according to the rules applied in the case at hand.

If the clause is to operate on the basis of an invocation, the structure to secure easy application is more complex. I suggest the following wording.

'Any Contracting Party may deny the benefits of this Agreement to investors that:

a) are controlled or owned by or whose UBO is a national of a non-party or of the party that is the host state of the investor or
b) have no substantial business activities in the territory of the home state, especially investors whose primary purpose is to gain protection of this treaty that would not otherwise be available to them.

Such denial may be exercised at any time, in case of a dispute until the time limit for the jurisdictional objections according to the applicable procedural rules. The denial may be exercised directly towards the investor or in an official gazette of the contracting party. The other contracting party shall be informed of the exercise of the denial. Once exercised, the denial shall apply to the investors or investments specified therein, whether existing or future ones.

For the purposes of this clause,

"substantiality" means carrying out active business activities in the territory of the home state, such as maintaining employees or entering into business transactions,

"control" means especially the direct or indirect ability to appoint directors or other bodies responsible for the decision making or having more than 50 percent of the voting rights either individually or jointly with other connected entities,

"owned" means direct or indirect ownership of 50 percent of the company or more either individually or jointly with connected entities,

"UBO" means any natural person who ultimately owns or controls the investor, especially on the basis of a sufficient percentage of shares, voting rights or other means.'

4.8 Concluding remarks

It is evident that the way in which the denial of the benefit clauses function poses a number of problems that investment tribunals were inevitably confronted with when they examined the possibility of denying the treaty protection on their basis.

It is also clear that most of the problems arise due to the clauses' deficits and could be effectively tackled by more thoughtful wording. Therefore, it is a rather sad conclusion that states have learned almost no lessons from the evolvement of denial of the benefits clauses' application. Most treaties concluded in the last five years lack the respective clause entirely. As for the ones that do contain it, the traditional ambiguous versions prevail. It appears that only exceptionally states decided to reflect some of the arisen problems in their treaties.

The conclusions are even more pressing considering the fact that the denial of benefits clauses are truly capable of preventing the treaty shopping practices and that such practices may cause the unnecessary costs of states running into millions.

It is true that the suggested wording of the denial of benefits clause that aims at overcoming the emerged problems is complex, however, more elaborated provisions and more comprehensively structured treaties belong to one of the current trends of the drafting practice. Moreover, in the case of the denial of benefits clauses, it may be counterproductive to think that less is more.

5 ABUSE OF RIGHTS

5.1 The doctrine of abuse of rights in the context of investment law

The prohibition of abuse or rights is one of the manifestations of the good faith principle.[339] For the sake of ease, those two principles will be used interchangeably. The principle of good faith is recognised as a general principle of law.[340] For instance, the ICJ acknowledged in the *Nuclear tests* case that 'one of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith'.[341] Similarly, other international law bodies apply the principle regularly.[342] The principle of good faith is also one of the seven basic principles of international law enlisted in the 1970 United Nations ('**UN**') Declaration on Friendly Relations,[343] and it is mentioned in a variety of international law instruments,[344] for example in the UN Convention on the Law of the Sea[345] or in the World Trade Organisation ('**WTO**') Understanding on Rules and Procedures on the Settlement of Disputes.[346] Apart from that, it is deeply rooted in the prevailing number of national legal orders,[347] if not in all. Clearly, this principle may not be ignored in any legal relationship.

5.1.1 General understanding of abuse of rights doctrine

In general international law, abuse of rights 'refers to a State exercising a right either in a way which impedes the enjoyment by other States of their own rights or for an end different from that for which the right was created, to the injury of another state'[348] or when the exercise of a right is 'unreasonable and pursued in an arbitrary manner, without due considerations of the legitimate expectation of the other state'.[349] It is also abuse of rights if the state 'exercises the right to the end which it was not

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339 POLONSKAYA, K. *Abuse of Rights: Should the Investor-State Tribunals Extend the Application of the Doctrine?* Toronto: University of Toronto, master thesis, 2014, p. 14.
340 CHENG, B. *General principles of law: as applied by international courts and tribunals*. Cambridge: Grotius Publications, 1987, pp. 121–132.
341 *Nuclear Tests*, ¶ 46.
342 *United States – Shrimp*, ¶ 158.
343 UN General Assembly resolution no. 2626 (XXV). *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*.
344 SCHILL, S; BRAY, H. Good Faith Limitations on Protected Investments and Corporate Structuring. In: ANDREW, D. MITCHELL, SORNARAJAH M.; VOON, T. (eds.) *Good Faith and International Economic Law*. Oxford: Oxford University Press, 2015, pp. 88–116.
345 UN Convention on the Law of the Sea, article 300.
346 Annex 2 to the Agreement Establishing the World Trade Organization, Understanding on Rules and Procedures Governing the Settlement of Disputes, article III(10).
347 GAILLARD, E. Abuse of Process in International Arbitration. In: *ICSID Review*, vol. 32, issue 1, 2017, p. 34.
348 KISS, A. Abuse of Rights. In: BERNHARDT, R (ed.) *Encyclopedia of Public International Law, vol. 1*. Amsterdam: North-Holland, 1992, p. 4.
349 OPPENHEIM, L. *International Law*, 8th edition. London: Longmans, Green & Co., 1955, p. 345.

intended for (improper purpose)'.[350] It is especially the last understanding of the principle that assumes crucial importance in investment law with respect to treaty shopping because treaty shopping may manipulate the legal regime to such an extent that it no longer serves its purpose.

In the context of international treaties, an abuse occurs '[w]hen a law-applying agent takes action in reliance of a right held under a treaty, [and] although the action may be allowed by the language of the treaty, it renders the purpose of the treaty ineffective'.[351] Consequently, an act, although performed in reliance of a treaty text may still be contrary to law if the treaty right is exercised abusively.[352]

An explicit reference to general principles of law is not a regular part of investment treaties.[353] Nevertheless, the principle of good faith has been recognised as one of the fundamental principles also by a number of investment tribunals[354] when examining a wide range of procedural and substantive issues. It thus seems that also in the context of investment dispute settlement, it is a well-established maxim.[355]

The principle of the prohibition of abuse of rights may be applied in a variety of contexts in investment arbitration. It is often considered with regards to the evaluation of states' acts, especially when a possible breach of the fair and equitable standard or illegal expropriation is considered. But it may also be applied as part of a defence of states against investors. This only illustrates that it is a general principle that creates a matrix of different rights, no matter who their holders are. The principle may also play a valuable role during the decision process of an investment tribunal itself, for the purposes of damage evaluation[356] or in the context of the drafting of investment treaties and their conclusion. The fact that the principle of good faith appears in the majority of arbitral awards, albeit

[350] REINHOLD, S. Good Faith in International Law. In: *UCL Journal of Law and Jurisprudence*, vol. 2, 2013, p. 49.
[351] LINDERFALK, U. *The Concept of Treaty Abuse: On the Exercise of Legal Discretion*, 2014, p. 37.
[352] Ibid. p. 1.
[353] However, compare for example article 8(4) of the UK–Argentina BIT: '[t]he arbitral tribunal shall decide the dispute in accordance with the provisions of this Agreement, the laws of the Contracting Party involved in the dispute, including its rules on conflicts of laws, the terms of any specific agreement concluded in relation to such an investment and the applicable principles of international law.'
[354] For example *Abaclat*, ¶¶ 646–649; *Cementownia*, ¶ 153; *Malicorp*, ¶ 116; *Plama*, ¶ 144; *Phoenix*, ¶ 108.
[355] *Abaclat*, ¶ 646; *Hamester*, ¶ 123; *Exxon Mobil*, ¶ 169; *Europe Cement*, ¶ 171.
[356] LAVAUD, G.; FRIEDMAN, M. Damages Principles in Investment Arbitration. In: TRENOR, J. (ed.) *The Guide to Damages in International Arbitration*. Global Arbitration Review. London: Law Business Research, 2018, p. 104.

in varying contexts, without doubt evidences its importance,[357] because the good faith principle is the underlying premise for the functioning of any legal system.[358]

The principle of the prohibition of abuse of rights has been invoked regularly by respondents to dismiss investment claims.[359] However, while considering this principle to be an objection that states can validly raise, investment tribunals have seldom found its breach.[360] This reluctance may be caused by the unsettled relationship between general international law and investment law. Partly, it may also be caused by the different legal backgrounds of investor-state arbitrators, as they may perceive the maxims in different connotations; the principle of good faith is in some jurisdictions connected to the principles of estoppel or equity,[361] which might be unfamiliar to arbitrators from different legal systems. These are some of the factors that might have contributed to the hesitation to rely more extensively on the principle of good faith beyond the treaty text.

5.1.2 The source and purpose of the principle of the prohibition of abuse of rights in investment law

The ICSID Convention contains the rule that tribunals should apply any such rule of international law as may be applicable. Similarly, for example under the USMCA, rules of international law are to apply to the dispute.[362] Similar provisions can also be found in many other investment treaties. In the first place they should serve the aim of filling possible gaps of investment agreements.[363] Apart from that, the principles should secure that the rights are exercised genuinely in pursuit of the interests that they are destined to pursue[364] by constraining the manner in which the rules may be legitimately exercised.[365] In this sense, application of principles also enables the legal system to be flexible by

[357] CREMADES, B. Good Faith in International Arbitration. In: *American University International Law Review*, vol. 27 no. 4, 2012, p. 788.
[358] DJAJIC, S. Mapping the Good Faith Principle in International Investment Arbitration: Assessment of its Substantive and Procedural Value. In: *Zbornik radova Pravnog fakulteta, Novi Sad*, 2012, p. 208.
[359] ASCENSIO, H. Abuse of Process in International Investment arbitration. In: *Chinese Journal of International Law*, vol. 13, issue 4, 2014, p. 763.
[360] SIPIORSKI, E. *Good Faith in International Investment Arbitration*. Oxford: Oxford University Press, 2019, p. 2.
[361] SCHILL, S; BRAY, H. Good Faith Limitations on Protected Investments and Corporate Structuring. In: ANDREW, D. MITCHELL, SORNARAJAH M.; VOON, T. (eds.) *Good Faith and International Economic Law*. Oxford: Oxford University Press, 2015, p. 89.
[362] USMCA, article 14.D.9.
[363] PARRA, A. Applicable Law in Investor-State Arbitration. In: *Transnational Dispute Management*, issue 1, 2009, p. 6.
[364] CHENG, B. *General principles of law: as applied by international courts and tribunals*. Cambridge: Grotius Publications, 1987, p. 80.
[365] SIPIORSKI, E. *Good Faith in International Investment Arbitration*. Oxford: Oxford University Press, 2019, p. 12.

modifying its rules.[366] The main role of the principles is therefore twofold: to fill in the gaps and to balance the law so as to achieve the optimal application of the rules.[367]

The application of principles as part of international law is usually derived from the general rule in article 38 of the Statute of the ICJ, according to which general principles of international law represent one of the sources of international law. Good faith is perceived to be one of these principles.[368] Tribunals do not usually refer to any specific treaty provisions when they employ the good faith principle; instead, they refer to general principles of international law or the teleological application of the ICSID Convention,[369] provided that the proceedings are held under the ICSID Rules.

5.1.3 Definition of abuse of rights

The central aim of the prohibition of the abuse of rights principle is to make the exercise of the right compatible with legitimate interests of the other contracting party so that a fair balance is kept.[370] The range of situations in which it may find its use is therefore wide and will be dependent upon the factual specifics of each case. The principle is connected to moral principles such as honesty, good conscience, fairness, equity or reasonableness;[371] therefore, for the overreaching nature of this principle, it is difficult to define it in absolute terms.[372] As Zeller and Lightfoot suggest, and I wholeheartedly agree, 'explanation of good faith is defined by its function'.[373]

Although generally principles are not perceived as being direct sources of obligations and good faith is considered predominantly as an interpretative principle,[374] investment tribunals – unlike the

366 LINDERFALK, U. What Are the Functions of the General Principles? Good Faith and International Legal Pragmatics. In: *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht: Heidelberg Journal of International Law*, p. 3.
367 SIPIORSKI, E. *Good Faith in International Investment Arbitration*. Oxford: Oxford University Press, 2019, p. 12.
368 ASCENSIO, H. Abuse of Process in International Investment arbitration. In: *Chinese Journal of International Law*, vol. 13, issue 4, 2014, p. 766.
369 GAFFNEY, J. Abuse of Process in Investment Treaty Arbitration. In: *Journal of World Investment & Trade*, vol. 11, issue 4, 2010, p. 518.
370 CHENG, B. *General principles of law: as applied by international courts and tribunals*. Cambridge: Grotius Publications, 1987, p. 129.
371 MANIRUZZMAN, M. *The Concept of Good Faith in International Investment Disputes – The Arbitrator's Dilemma* [online]. Kluwer Arbitration Blog [accessed 30/4/2020]. Available at: http://arbitrationblog.kluwerarbitration.com/2012/04/30/the-concept-of-good-faith-in-international-investment-disputes-the-arbitrators-dilemma-2/.
372 REINHOLD, S. Good Faith in International Law. In: *UCL Journal of Law and Jurisprudence*, vol. 2, 2013, p. 40.
373 LIGHTFOOT, R.; ZELLER, B. Good Faith - An ICSID Convention Requirement? In: *Victoria University Law and Justice Journal*, vol. 8, no. 1, 2018, p. 19.
374 MANIRUZZMAN, M. *The Concept of Good Faith in International Investment Disputes – The Arbitrator's Dilemma* [online]. Kluwer Arbitration Blog [accessed 30/4/2020]. Available at: http://arbitrationblog.kluwerarbitration.com/2012/04/30/the-concept-of-good-faith-in-international-investment-disputes-the-arbitrators-dilemma-2/.

ICJ – have interpreted the principle as functioning autonomously.[375] For example, the tribunal in *Inceysa* held that 'general principles of law are an autonomous and direct source of international law'.[376] In this sense, the parties are under the obligation to act in good faith.

5.1.4 When abuse may occur

If we look at the situations in which the principle is used by states to object to investors' actions, it may be applied principally in the following three cases.

First, the good faith principle may be breached by an attempt to artificially establish jurisdiction by corporate restructuring or transfer of assets. This issue will be the central point of this chapter. In order to present a complete picture and highlight that investors may also be abusing their rights in other ways, I also mention the other possible scenarios that might result in abuse.

Related to the first case, rights may also be abused by an attempt to conduct parallel proceedings at different levels of the chain of companies in order to maximise the chances of success to solve the same dispute or for other reasons,[377] because investment treaties often protect direct and indirect investments. Gaillard warns against the unbalanced situation between investors and states because 'to prevail in overall dispute, the host state must win each of the arbitrations brought against it while the investor needs only to succeed before any one of the tribunals to prevail.'[378] It might seem that the doctrine of *lis pendens* should protect the states against such proceedings but is has proven ineffective,[379] because causes for action, claimants and underlying investment treaties usually differ.

Finally, fraudulent assertion of ownership or other misconduct by the investor may lead to abuse of process,[380] sometimes explicitly differentiated from abuse of rights as from the general concept, for example in the form of corruption, bribery or misrepresentation. These three possible manifestations of abuse of rights are all of jurisdictional nature.

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[375] DJAJIC, S. Mapping the Good Faith Principle in International Investment Arbitration: Assessment of its Substantive and Procedural Value. In: *Zbornik radova Pravnog fakulteta, Novi Sad*, 2012, p. 208.
[376] *Inceysa*, ¶ 226.
[377] GAILLARD, E. Abuse of Process in International Arbitration. In: *ICSID Review*, vol. 32, issue 1, 2017, p. 10 – for example for the purposes of discontinuing criminal proceedings.
[378] Ibid. p. 26.
[379] Ibid. p. 29.
[380] LOPEZ, C.; MARTINEZ, L. Corruption, Fraud and Abuse of Process in Investment Treaty Arbitration. In: LEGUM B. (ed.) *Investment Treaty Arbitration Review*. London: Law Business Research Ltd, 2017.

5.1.5 The abuse of the investment arbitration process by treaty shopping

According to the Commentary to the ICJ statute, 'abuse of procedure is a special application of the prohibition of abuse of rights […] It consists of the use of procedural instruments or rights by one or more parties for purposes that are alien to those for which the procedural rights were established'.[381] Abuse of process relates to the manner in which an investor tries to secure the jurisdiction of an investment tribunal;[382] the filing of the claim may by itself qualify as abuse of process.[383] In case of illegitimate restructuring, tribunals in some cases perceived the creation of corporations solely for the purpose of accessing the arbitration system with respect to a particular claim as an abuse.[384] It has been argued that for this reason, the possibility to resort to arbitration does not fall within the consent of the state.[385] The manner and details of the restructuring may leave room for doubts whether it was not made solely for the purpose of getting access to investment arbitration.[386] This assessment can make restructuring and subsequent attempt to claim investment protection contrary to the purpose of the investment treaty. In this sense, if an investor previously restructured in order to reach jurisdiction of an investment tribunal, a special manifestation of abuse of rights in the form of abuse of process may occur.

As mentioned, the range of practices that might qualify as abuse of process is wide, be it treaty shopping, actions brought by remote shareholders, parallel proceedings, claims that clearly lack basis of jurisdiction or are manifestly unfounded or initiating proceedings with a harmful goal.[387] The highest number of cases, however, related to the means used to gain access to arbitration, most commonly by restructuring involving a change of nationality.[388]

In the past, tribunals focused mainly on the abuse of investors' substantive rights (for example in *Saluka* or *Phoenix*), the concept of abuse of process has only gained autonomy in more recent decisions.[389] Recently, tribunals are increasingly policing the gates to investment arbitration.[390] For

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[381] KOLB, R. *General Principles of Procedural Law*. In: ZIMMERMANN, A. et al. (eds.). *The Statute of the International Court of Justice: A Commentary*. Oxford: Oxford University Press, 2012, p. 904.
[382] GAILLARD, E. Abuse of Process in International Arbitration. In: *ICSID Review*, vol. 32, issue 1, 2017, p. 3.
[383] BRABANDERE, E. 'Good Faith', 'Abuse of Process' and the Initiation of Investment Treaty Claims. In: *Journal of International Dispute Settlement*, vol. 3, no. 3, 2012, p. 620.
[384] *Exxon Mobil*, ¶ 205; *Phoenix*, ¶ 142.
[385] BRABANDERE, E. 'Good Faith', 'Abuse of Process' and the Initiation of Investment Treaty Claims. In: *Journal of International Dispute Settlement*, vol. 3, no. 3, 2012, p. 621.
[386] DJAJIC, S. Mapping the Good Faith Principle in International Investment Arbitration: Assessment of its Substantive and Procedural Value. In: *Zbornik radova Pravnog fakulteta, Novi Sad*, 2012, p. 223.
[387] ASCENSIO, H. Abuse of Process in International Investment arbitration. In: *Chinese Journal of International Law*, vol. 13, issue 4, 2014, pp. 766, 767, 770.
[388] Ibid. p. 771.
[389] Ibid. p. 779.
[390] DESIERO, D. Arbitral Controls and Policing the Gates to Investment Treaty Claims against States in Transglobal Green Energy v. Panama and Philip Morris v. Australia [online]. *EJIL:Talk!* [accessed 12/4/2020]. Available at:

example the *Philip Morris* decision, which has rejected the claim on the ground that the claimant artificially created jurisdiction of the tribunal by last-minute restructuring, has been seen as suggesting an important shift in arbitrators' consciousness of the critical nature of their arbitral function.[391]

This shift is also apparent in the reaction to the investment law system's failures caused by its abuse because it undermines the justification of foreign investment protection. One of the ways to acknowledge and handle the problem are the denial of benefits clauses in case of treaty shopping but also the introduction of the rule 41(5) of the ICSID Convention Arbitration Rules ('**ICSID Rules**') that enables to dispose of unmeritorious claims within preliminary proceedings[392] and thus to detect possible manifest abuses of the system. Arguably, those abuses can involve both jurisdictional and meritorious issues,[393] as well as abuse of the right to file a claim, but it is suggested that due to its complexity, it would not be convenient to examine treaty shopping under this provision.[394] It however creates quick and effective protection against evident abuses of investors that may save considerable amount of resources. Nevertheless, it remains the truth that although the prohibition of abuse of rights is a classic legal concept and the abuse of investment arbitration process is an acknowledged problem, treaties and procedural rights remain generally silent on it,[395] and tribunals have been exceptionally prudent and conservative with the application of the principle.[396]

There are two topics that I find especially important to analyse with regards to abuse of rights by restructuring. Firstly, it is the problem of proper interpretation of treaties in the context of discovering their purpose and, secondly, the doctrine of piercing the corporate veil that is usually necessary to apply in order to prove the misuse of the treaty.

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https://www.ejiltalk.org/arbitral-controls-and-policing-the-gates-to-investment-treaty-claims-against-states-in-transglobal-green-energy-v-panama-and-philip-morris-v-australia/.

391 Ibid.

392 Manifest Lack of Legal Merit [online]. *ICSID* [accessed 16/4/2020]. Available at: https://icsid.worldbank.org/services/arbitration/additional-facility/process/manifest-lack-of-legal%20merit.

393 See for example the interpretation of the tribunal in *RSM*, ¶ 6.1.1.

394 UCHKUNOVA, I. *Rule 41(5) of the ICSID Arbitration Rules: The Sleeping Beauty of the ICSID system* [online]. Kluwer Arbitration Blog [accessed 16/4/2020]. Available at: http://arbitrationblog.kluwerarbitration.com/2014/06/27/rule-415-of-the-icsid-arbitration-rules-the-sleeping-beauty-of-the-icsid-system/.

395 ASCENSIO, H. Abuse of Process in International Investment arbitration. In: *Chinese Journal of International Law*, vol. 13, issue 4, 2014, p. 764.

396 VOON, T.; MITCHELL, A.; MUNRO, J. Legal Responses to Corporate Manoeuvring in International Investment Arbitration. In: *Journal of International Dispute Settlement*, 2014, p. 65.

5.2 The impact of good faith on the interpretation, and the impact of the interpretation on good faith

As international treaties, investment agreements are to be interpreted in accordance with the rules of the Vienna Convention. The principle of good faith is well established in the Vienna Convention, and it is expressly mentioned several times within its text. In the preamble, one can read: '[n]oting that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized […]'[397], the principle is again mentioned in article 26 and in article 31 concerning interpretation.[398]

Article 31 of the Vienna Convention specifies that:

> '1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) Any agreement relating to the treaty, which was made between all the parties in connexion with the conclusion of the treaty;
>
> (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) Any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.'[399]

Thus, for interpretation of treaties, three aspects shall be looked at: (i) the text itself and its ordinary meaning, (ii) the context and (iii) the object and purpose of the treaty; while all these

[397] Vienna Convention, preamble.
[398] It is further reflected in articles 46 and 69 of the Vienna Convention.
[399] Vienna Convention, article 31, emphasis added.

interpretation mechanisms should be engaged in good faith. In my view, good faith is already entangled in the object and purpose interpretation because – as was stated above – good faith means, inter alia, that the rights shall be executed in accordance with their object and purpose.

The text of the Vienna Convention does not provide that any of these aspects should have preference over the others, and thus, the ultimate interpretation should ideally be made in such a way that they are in harmony.

5.2.1 Searching for the object and purpose

As mentioned, the content of the principle of abuse of rights is usually defined by its objective. Therefore, 'an abuse of right occurs when its beneficiary uses it in contradiction with the goal pursued by the rule […] or when its exercise affects the balance of interests at stake and favours in a disproportionate manner the beneficiary of the right'.[400] In order to apply the 'object and purpose' interpretation, one must first identify the objects and purposes pursued by the investment treaty.

Although it is true that individual motives of the contracting parties may differ, the underlying purpose of investment agreements conclusion is deemed to be the increase of inward capital flows, fostering investment protection within the state or investment and market liberalisation.[401] Ortino argues that by way of proclaiming 'long-term' purposes of investment treaties in their preambles, the ultimate goal is to secure sustainable development that involves economic, social, political and legal considerations.[402] In plain words, countries do not guarantee protection to foreign investments because investors are incorporated in the foreign country, but because of the positive influences they bring into the host state.[403] Therefore, in the broader context, the object of investment treaties is also the development of the host state in general as they do not entail only one-sided protection of investments.[404] Although it may appear that the main purpose of investment treaties is the protection of investors, it is not so. Protection is merely a tool chosen to reach the goals mentioned above that the states want to pursue by the conclusion of investment agreements. The object and purpose should be searched for considering the will of the contracting parties, which are not investors, but states. I

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[400] ASCENSIO, H. Abuse of Process in International Investment arbitration. In: *Chinese Journal of International Law*, vol. 13, issue 4, 2014, p. 765.
[401] Compare SALACUSE, S. Do BITs really work? In: SAUVANT, K.; SACHS, L. (eds.) *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows*. Oxford: Oxford University Press, 2009.
[402] ORTINO, F. *Investment Treaties, Sustainable Development and Reasonableness Review: A Case Against Strict Proportionality Balancing*. King's College London Law School Research Paper No. 2105-30, 2015, pp. 77, 79.
[403] GARCÍA-BOLÍVAR, O. The Teleology of International Investment Law: The Role of Purpose in the Interpretation of International Investment Agreements. In: *The Journal of World Investment & Trade*, vol. 6, 2005, p. 754.
[404] ORTINO, F. *Investment Treaties, Sustainable Development and Reasonableness Review: A Case Against Strict Proportionality Balancing*. King's College London Law School Research Paper No. 2105-30, 2015, p. 77.

therefore conclude that the main purpose is, in general, the sustainable development of the contracting states (facilitated by the inflow of foreign capital, know-how, technologies etc.), and any protection regime offered to investors is only a way how to secure this goal. Investment treaties should thus be interpreted in the light of this object and purpose.

However, some scholars are of a different view. For example, García-Bolívar argues that if a treaty does not expressly state the purpose of the economic well-being and development of the concerned states, this 'may leave the host State powerless against foreign investments that are economically detrimental.'[405] He advocates the view that '[a]n expressed purpose that neglects to indicate that foreign investments are protected because they are a means to economic development will only allow arbitrators to see IIAs as a means to protect foreign investments. On the contrary, IIAs that express that their purpose is to protect foreign investments as a means to reach economic development will broaden the scope of interpretation of the treaties on behalf of the arbitrators by also including the interests of the recipient countries'.[406]

I cannot agree with this conclusion. The object and purpose interpretation demands to examine the true purpose of why the states entered into the agreement. Such analysis cannot be limited to inspecting the text of the preamble only. It is true that preambles contain important leads regarding the intentions of the contracting parties and the purpose of the adoption of the investment treaty, but they are not the sole source to be looked at.

A great number of scholarly articles on investment protection indicate the benefits the states anticipate and for which they partially sacrifice their sovereignty as the main rationale for the formation of the foreign investment regime. It is therefore unconvincing to turn a blind eye on this reasoning, which is generally known, and hypocritically conclude that because this rationale is not mentioned within the preamble of the treaty concerned, it was not the purpose for entering into it. The interpreters should look closely at why the treaties are concluded, i.e. also to the context of the whole investment system. Only than the real objective is revealed.

I dare to draw an analogy to municipal law. One of the basic interpretation methods of statutes and their provisions in the civil law jurisdictions is the teleological interpretation, i.e. looking at the object and purpose of the legislation. However, acts themselves rarely state their object explicitly in their texts. Yet, even if not mentioned, the legal subjects as well as the judges are perfectly capable of identifying the purpose of the legislation and interpreting the provisions accordingly. There is no

[405] GARCÍA-BOLÍVAR, O. The Teleology of International Investment Law: The Role of Purpose in the Interpretation of International Investment Agreements. In: *The Journal of World Investment & Trade*, vol. 6, 2005, p. 757.
[406] GARCÍA-BOLÍVAR, O. The Teleology of International Investment Law: The Role of Purpose in the Interpretation of International Investment Agreements. In: *The Journal of World Investment & Trade*, vol. 6, 2005, p. 772.

reason why this could not and should not be done when interpreting the object of an international treaty.

5.2.2 Is the rejection to go beyond the text of the treaties interpretation in good faith?

The aforementioned is why I find the interpretation given by many tribunals that considered treaty shopping and refused to 'go beyond the texts of the treaties' erroneous. Often, tribunals reject respondents' objections based on the abuse of process because they find no foundation for rejection of the case in the text of the treaties. However, this is not interpretation of a treaty in good faith. The unhealthy obsession with the textual and investor-centred interpretation should not be tolerated, especially if the far-reaching consequences that a wrong interpretation may lead to are considered. This is even more true if we consider that tribunals often do not hesitate to use object interpretation in order to extend the protection of investors beyond the treaty text.[407]

If the interpretation rules require interpretation in good faith and if the good faith principle is breached when the beneficiary of the right uses it in contradiction with the pursued goal, it follows that the provisions cannot be interpreted in a way that would go against the goal of the treaty which reflects the rationale of the existence of investment regimes in general, which is not the protection of *any* investments, but only of such investments that are capable of bringing the anticipated goal, i.e. inflow of foreign capital. Any other interpretation will not be made in good faith; some even go as far as seeing such interpretation being made *mala fides*.[408]

Another argument against the prevailing prudent and formalistic approach is to consider the concept of the 'evolutive' interpretation sometimes used by the ICJ[409] and gradually also by international arbitration tribunals.[410] According to the evolution interpretation, the content of the treaty terms is not necessarily static but rather evolutionary. This could also mean that the interpretation of the notion of the protected investments may evolve in time and although in the beginning it was sufficient to interpret the term formalistically, with time tribunals could gradually adopt a more materialistic view of the term in the light of the emerged trend of an easy manipulation

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[407] For example in *Siemens* when the tribunal interpreted the most-favoured-nation clause or in *SOABI* in order to examine indirect control of the contracting party.
[408] LINDERFALK, U. *The Concept of Treaty Abuse: On the Exercise of Legal Discretion*, 2014, p. 4.
[409] *Namibia (Legal Consequences)*. Advisory Opinion of ICJ, p. 31: 'concepts embodied in a treaty are "by definition, evolutionary", their "interpretation cannot remain unaffected by the subsequent development of law […] Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.' The same interpretation was also applied by the WTO Appellate Body in *United States – Shrimp*, see ¶ 130.
[410] *Iron Rhine*, ¶ 79.

and misuse of investment treaties. In this sense the meaning of treaty terms may change over time even without the intervention of the contracting parties.[411]

5.2.3 Evaluation of the act in compliance with good faith interpretation

Only when the object and purpose of the treaty is correctly defined in compliance with the good faith principle, one should proceed to its application on the facts; in other words, the interpretation shall be used in order to examine whether the acts of the investor were abusive, i.e. made against the object and purpose identified by interpretation of a treaty in good faith.

Here, again the purpose should be examined, but this time the purpose of the restructuring. Typically, tribunals examine the timing and manner of the restructuring, but this approach should not operate as a mantra that is often formalistically followed. Tribunals should examine the situation in a manner that would enable to reveal an intent to use the investment system for improper purpose by benefiting from the system at the risk of destabilisation.[412] This approach has lately been applied in the *Philip Morris* case, where the tribunal tested for more indicative elements than in previous decisions in order to evaluate the intent of the investor in relation to the corporate restructuring.[413] It is paramount to examine not only timing and structure of the corporate manoeuvring, but also overall expression and to look at the alleged as well as its actual purpose. The focus should not be directed so much at the determination of the exact purposes of the conduct deemed to be abusive, but should be shifted to demonstrating that the right was exercised in a way that contradicts the goals of the system concerned.[414]

To sum up, it is crucial to identify the object and purpose of the treaty rather than literally observe its wording;[415] consequently, the treaty rights and obligations should be performed with intentions of the contracting parties in mind rather than clinging to a formalistic meaning of the text.[416]

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411 BJORGE, E. *Introducing The Evolutionary Interpretation of Treaties* [online]. EJIL: Talk! [accessed 18/4/2020]. Available at: https://www.ejiltalk.org/introducing-the-evolutionary-interpretation-of-treaties/.
412 ASCENSIO, H. Abuse of Process in International Investment arbitration. In: *Chinese Journal of International Law*, vol. 13, issue 4, 2014, p. 781.
413 DESIERO, D. Arbitral Controls and Policing the Gates to Investment Treaty Claims against States in Transglobal Green Energy v. Panama and Philip Morris v. Australia [online]. EJIL:Talk! [accessed 12/4/2020]. Available at: https://www.ejiltalk.org/arbitral-controls-and-policing-the-gates-to-investment-treaty-claims-against-states-in-transglobal-green-energy-v-panama-and-philip-morris-v-australia/.
414 ASCENSIO, H. Abuse of Process in International Investment arbitration. In: *Chinese Journal of International Law*, vol. 13, issue 4, 2014, p. 780.
415 *Gabčikovo-Nagymaros*, ¶ 142.
416 REINHOLD, S. Good Faith in International Law. In: *UCL Journal of Law and Jurisprudence*, vol. 2, 2013, p. 61.

Once the object and purpose are rightly specified, tribunals must closely examine whether the acts of the investor were not contrary to this purpose, and such determination again cannot be done in a formalistic manner. The devil of the application of the good faith principle lies in the fact that it is 'merely' an incorrect use of the treaty that does not involve its formal breach.[417] The act itself is not *prima facie* illegal,[418] and the application of the principle in this sense places higher demands on the arbitrators and requires more complex reasoning because the breach does not occur if the treaty text is examined in the strict way but only occurs on the higher level of principles. For that reason, it follows that the text of the treaty itself should not be the exclusively applied standard in the arbitration proceedings.[419]

Unfortunately, as Schill and Bray note: 'arbitral tribunals have continuously rejected arguments made by respondents [regarding good faith], instead preferring to rely on the text of the applicable investment treaty.'[420]

5.3 Treaty shopping as abuse of rights and piercing of the corporate veil

In order to evaluate the nature of the restructuring and its purposes, tribunals inter alia need to examine the details of the ownership structure. International business is regularly conducted by complex company chain structures. At the same time, companies are perceived as legal entities distinct from natural persons that control them because the 'principle of separation of legal identity and liability between different companies'[421] applies. The veil falls between the corporate entity itself and the entities that brought it into being or own or control it, legally, the bonds between these subjects are by this torn.

5.3.1 Origins of the doctrine

The freedom to structure the companies is not without limits.[422] Most jurisdictions recognise that, where there has been abusive conduct or fraud, a company's separate personality can be disregarded

[417] Supplementary Note to Treaty Abuse and Treaty Shopping (E/C.18/2006/2) [online]. United Nations – Economic and Social Council [accessed 17/4/2020], p. 5. Available at: https://www.un.org/esa/ffd/wp-content/uploads/2014/10/2STM_Supplementary-note-EC18-2006-2-Add-1-ES.pdf.
[418] GAILLARD, E. Abuse of Process in International Arbitration. In: *ICSID Review*, vol. 32, issue 1, 2017, p. 19.
[419] LEE, Ch. Resolving Nationality Planning Issue Through the Application of the Doctrine of Piercing the Corporate Veil in International Investment Arbitration. In: *Contemporary Asia Arbitration Journal*, vol. 9, no. 1, 2016, p. 110.
[420] SCHILL, S; BRAY, H. *Good Faith Limitations on Protected Investments and Corporate Structuring*. In: ANDREW, D. MITCHELL, SORNARAJAH M.; VOON, T. (eds.), Good Faith and International Economic Law. Oxford: Oxford University Press, 2015, p. 108.
[421] KRYVOI, Y. Piercing the Corporate Veil in International Arbitration. In: *Global Business Law Revie*w, vol. 1, 2010, p. 173.
[422] OTAZU, J. The Law Applicable to Veil Piercing in International Arbitration. In: *McGill Journal of Dispute Resolution*, vol. 5, no. 2, 2018–2019, p. 37.

and its shareholders held liable.[423] This is done by 'piercing' or 'lifting' the corporate veil and examining the ties that were previously untied in order to perceive the company in the full ownership or control structure, i.e. 'disregard the separation between entities organised in corporate form with limited liability of shareholders.'[424]

In essence, the doctrine of piercing the corporate veil is based on the presumption that if the control of another entity is sufficient enough and rights were misused, it is possible to ignore the separate entity perception.[425] However, lifting the corporate veil may also be used in the opposite direction – to enable shareholders to claim compensation for losses incurred by the companies they own. In investment law, this is enabled by the application of the control criterion in the investor definition (see Chapter 3 of this thesis).

The doctrine of piercing the corporate veil originates in the common law system and represents 'equitable remedy […] to disregard corporate personality, which is abused by shareholders [and] demands shareholders to be liable for the debts of the company towards a third party, in case of the third party cannot be satisfied by the company due to shareholders' abuse of limited liability.'[426] It was introduced in order to provide a tool against manipulation made possible by the concept of separate personality and liability. Manipulations occur especially in form of fraudulent transfers of assets, use of corporations to bypass shareholders' obligations or acquiring unlawful assets. The doctrine thus protects not only creditors, but also public interests and policies.[427] It may also be applied if the manipulation is made amongst company groups and holdings – 'the operation and business [of multinational corporate groups] apparently transcendent geographical and jurisdictional boundaries, international and domestic legal regimes remain territoriality bound. This inconsistency between reality and the legal system enables multinational corporate groups to manipulate, insulate, or distribute responsibility with separate corporate personality and limited liability.'[428]

[423] OTAZU, J. The Law Applicable to Veil Piercing in International Arbitration. In: *McGill Journal of Dispute Resolution*, vol. 5, no. 2, 2018–2019, p. 37.
[424] KRYVOI, Y. Piercing the Corporate Veil in International Arbitration. In: *Global Business Law Revie*w, vol. 1, 2010, p. 173.
[425] OTAZU, J. The Law Applicable to Veil Piercing in International Arbitration. In: *McGill Journal of Dispute Resolution*, vol. 5, no. 2, 2018–2019, p. 39.
[426] LEE, Ch. Resolving Nationality Planning Issue Through the Application of the Doctrine of Piercing the Corporate Veil in International Investment Arbitration. In: *Contemporary Asia Arbitration Journal*, vol. 9, no. 1, 2016, p. 90.
[427] Ibid.
[428] Ibid. 93.

5.3.2 Application of the doctrine in investment law

The current application of the lifting of the corporate veil doctrine in investment law contains a double standard which favours foreign investors – the veil is more readily disregarded in order to protect the parent company's access to benefits under an investment treaty,[429] as compared with the efforts of respondents to lift the corporate veil with the objective of declining the investment protection. This is partly because of the wide possibility of using the control criterion in order to access the tribunal, especially under article 25(2)(b) of the ICSID Convention.

According to Lee, the concept of piercing the corporate veil is a sub-concept of abuse of rights and should be applied in the cases of nationality planning.[430] Analogically to its use in municipal law, it may be applied in cases of corporate structures that amount to deprivation of separate personality of individual companies. The determination whether that is the case should be done based on formal evidence, especially by examining the percentage of controlling shares, existence of orders of the controlling entity to the directors of the controlled company, existence of any substantial business activities and assets as well as substantial evidence such as integration of the investor and controlling company, dependence on the controlling company or on its financial sources. The outcome of such analysis should be the evaluation whether the company acts on its own will or if it is rather the will of the controlling entity and subsequently whether the act of corporate restructuring is its own act or a deliberate act of the controller. The latter would indicate that the real interested party is the controller, which may result in the evasion of legal obligations and acquisition of unlawful interests (rights that would otherwise not be available), which would justify the piercing of the corporate veil.[431]

As concluded above, the evasion of the rights would occur if the conduct violates or frustrates the object or purpose of the investment treaty. Lee contends that this would happen especially in the following two cases.

Firstly, if the investor has no economic relationship or does not carry out substantial business activities in the home state. Such conduct would violate the basic principle of reciprocity often

[429] VASTARDIS, A.; CHAMBERS, R. Overcoming the corporate veil challenge: Could investment law inspire the proposed business and human rights treaty? In: *International & Comparative Law Quarterly*, vol. 67, issue 2, 2018, p. 391.
[430] LEE, Ch. Resolving Nationality Planning Issue Through the Application of the Doctrine of Piercing the Corporate Veil in International Investment Arbitration. In: *Contemporary Asia Arbitration Journal*, vol. 9, no. 1, 2016, p. 113.
[431] LEE, Ch. Resolving Nationality Planning Issue Through the Application of the Doctrine of Piercing the Corporate Veil in International Investment Arbitration. In: *Contemporary Asia Arbitration Journal*, vol. 9, no. 1, 2016, p. 116.

envisaged in the preambles of investment treaties.[432] It could also lead to the protection of investments that are not foreign, in cases when a purely domestic dispute is elevated into international forum.

The second type of cases when tribunals sometimes resort to piercing of the corporate veil is if the restructuring takes place when the dispute is foreseeable and was done for the purpose of commencing investment proceedings against the host state. Such conduct would violate the purpose of improving and stimulating economic cooperation and development between the contracting states.[433] In the case of lifting national disputes to international forum, it has been argued that the veil should be pierced regardless of when such nationality planning occurred, because the intention of such restructuring violates the purpose of investment protection no matter if it happened before the dispute arose or after.[434]

Piercing the corporate veil is not an obligatory requirement that tribunals must resort to; however, in order to secure the proper application of the treaty in good faith it might be necessary to lift the veil. If concerns emerge as to whether the rights exercised by the investor go against the object of the treaty, there may be no other way to examine whether the rights were exercised in good faith than to look beyond the formal corporate structure.

5.3.3 Practical issues of lifting the corporate veil

While it might be argued that it can be practically impossible to search for the controlling entity, I am of the opinion that the practice has already sufficiently dealt with this issue because the control test is used in a variety of legal areas, especially in tax and company law. Although the areas and reasons for examining control may differ, the applied criteria are of similar nature.

Generally, in order to prevent abuses, evasions, commercial crimes and money laundering, the ultimate beneficiary ownership is gradually beginning to be in the limelight, and corporations therefore

[432] Compare for example the preamble of the Croatia–Argentina BIT: 'Desiring to promote greater economic cooperation between them, with respect to investment by investors of one Contracting Party in the territory of the other Contracting Party; Recognizing that agreement upon the treatment to be accorded to such investment will stimulate the business initiative and the economic development of the Contracting Parties; Agreeing that a stable legal framework for investment will maximize effective utilization of economic resources and improve living standards' or the USA–Moldova BIT: 'Desiring to promote greater economic cooperation between them, with respect to investment by nationals and companies of one Party in the territory of the other Party; Recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties; Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources; Recognizing that the development of economic and business ties can contribute to the well-being of workers in both Parties and promote respect for internationally recognized worker rights'.
[433] LEE, Ch. Resolving Nationality Planning Issue Through the Application of the Doctrine of Piercing the Corporate Veil in International Investment Arbitration. In: *Contemporary Asia Arbitration Journal*, vol. 9, no. 1, 2016, p. 119.
[434] LEE, Ch. Resolving Nationality Planning Issue Through the Application of the Doctrine of Piercing the Corporate Veil in International Investment Arbitration. In: *Contemporary Asia Arbitration Journal*, vol. 9, no. 1, 2016, p. 118.

encounter this issue on daily basis. In the European Union, when the companies fulfil the anti-money laundering regulations or when they report financial statements,[435] they are often compelled to declare their ownership structure and their ultimate beneficial owner.[436] In addition, special rules are applicable to company groups under corporate law, for example a duty to remunerate the loss encountered by the controlled company due to the controlling entity may arise. The perception of legal entities has therefore shifted towards stressing the connection between a company and its owners.

The reluctance of investment tribunals to lift the corporate veil should also be changed towards a more opened approach. The interpretation made by investment tribunals should not permit unsubstantiated support for ignoring abuses of the investment protection system. At least this is how I perceive the impact of recent developments of the separate personality doctrine. After all, this possibility has long been sanctioned by the *Barcelona Traction* case, which allowed for piercing the corporate veil in cases of abuse.

The lifting of the corporate veil may give important information that the investor may wish to hide, especially that the capital invested in the host country originates from the host country itself or from a country whose investors are not protected by the applicable treaty. That could suggest that to provide the protection to such entities would go against the purpose of the treaty and thus might constitute abuse of rights.

5.4 Consequences of abuse of investors' rights

It stays open to discussion and it is not settled whether the claim brought before a tribunal following abusive treaty shopping should be dismissed as inadmissible or for lack of jurisdiction.

To briefly distinguish the different concepts, the claim is inadmissible if it cannot be decided upon at all or not just yet while the tribunal has no jurisdiction if the claim cannot be brought to it.[437] Admissibility often concerns time issues and temporary defects.[438] If the claim is inadmissible, there is no legal obstacle of commencing the proceedings once the lacking requirements are met, provided that the reason for inadmissibility can be amended. On the contrary, if the tribunal lacks jurisdiction,

[435] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings.
[436] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.
[437] PAULSSON, J. Jurisdiction and Admissibility. In: *Global Reflections on International Law, Commerce and Dispute Resolution*, ICC Publishing, Publication 693, 2015, p. 617.
[438] WAIBEL, M. Investment Arbitration: Jurisdiction and Admissibility. In: *University of Cambridge Faculty of Law Research Papers*, Paper No. 9/2014, 2014, p. 2.

the claim cannot be re-submitted[439] because the tribunal simply has no power to hear the claim.[440] Jurisdiction is mostly connected to the consent of the state.[441]

According to Brabandere, in case of restructuring that constitutes abuse of process, the tribunal should declare the case inadmissible, because 'although the corporate structure and access to investment arbitration was in conformity both with the relevant investment treaty and the ICSID Convention and hence could not affect jurisdiction.[442] However, tribunals mostly perceive treaty shopping as precluding jurisdiction.[443]

Both these scenarios lead to dismissing the case and that is why tribunals themselves considered this distinction as being of little importance[444] and often preferred a 'pragmatic approach' and avoided the distinction[445] so it might seem as an unimportant theoretical distinction. Some commentators even suggest that the doctrine of admissibility should not be applied at all.[446]

However, the distinction has one practical impact. The decision on jurisdiction can be, in contrast to the decision on admissibility, subjected to the annulment proceedings.[447] This distinction may have significant consequences – if the tribunal finds lack of jurisdiction in cases of inadmissibility, it will 'unjustifiably extend the scope for challenging awards'[448] or the other way round – it might frustrate the parties of the possibility to challenge the decision.

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439 BRABANDERE, E. 'Good Faith', 'Abuse of Process' and the Initiation of Investment Treaty Claims. In: *Journal of International Dispute Settlement*, vol. 3, no. 3, 2012, p. 617.
440 WAIBEL, M. Investment Arbitration: Jurisdiction and Admissibility. In: *University of Cambridge Faculty of Law Research Papers*, 2014, Paper No. 9/2014, p. 2.
441 HEISKANEN, V. Ménage à trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration. In: *ICSID Review - Foreign Investment Law Journal*, vol. 29, issue 1, 2014, p. 7.
442 BRABANDERE, E. 'Good Faith', 'Abuse of Process' and the Initiation of Investment Treaty Claims. In: *Journal of International Dispute Settlement*, vol. 3, no. 3, 2012, p. 626.
443 GAFFNEY, J. Abuse of Process in Investment Treaty Arbitration. In: *Journal of World Investment & Trade*, vol. 11, issue 4, 2010, pp. 531–532.
444 *GREMCITEL*, ¶ 181; *Pac Rim*, ¶ 2.10.
445 HEISKANEN, V. Ménage à trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration. In: *ICSID Review - Foreign Investment Law Journal*, vol. 29, issue 1, 2014, p. 2.
446 SÖDERLUND, Ch.; BUROVA, E. Is There Such a Thing as Admissibility in Investment Arbitration? In: *ICSID Review - Foreign Investment Law Journal*, vol. 33, issue 2, 2018, p. 526.
447 BRABANDERE, E. 'Good Faith', 'Abuse of Process' and the Initiation of Investment Treaty Claims. In: *Journal of International Dispute Settlement*, vol. 3, no. 3, 2012, p. 617.
448 PAULSSON, J. Jurisdiction and Admissibility. In: *Global Reflections on International Law, Commerce and Dispute Resolution*, ICC Publishing, Publication 693, 2015, p. 601.

Whatever the result of the divergence of opinions is, the result for the investor that abused its rights is clear – the case will not be heard by the tribunal. Additionally, the tribunal may decide that the claimant pays the respondent the legal costs incurred.[449]

5.5 Concluding remarks

The principle of good faith appears in some form in a number of investment arbitral awards, which evidences its importance.[450] The principle plays a prominent role during interpretation of investment treaties but extends also to the application of the obligations arisen under them.[451] One of the manifestations of the good faith principle is the prohibition of abuse of rights which in case of treaty shopping means that the claimant is an entity to which the rights should not belong. By treaty shopping investors are abusing their procedural rights when they manipulate their nationality in such a way that it goes against the function of investment law.[452] This may undermine the fair and orderly resolution of investment disputes[453] and object and purpose of investment treaties.

Good faith emphasizes the intention of the parties to the agreement and the rationales behind its conclusion, i.e. the purpose of the treaty. In order to identify it, the treaty should be interpreted according to the rules of the Vienna Convention, which require searching for the true object and purpose of the treaty, which is not limited only to examining its text. Once the purpose it extracted, any exercise of a right under the treaty that goes against this objective is abusive. The object and purpose of investment treaties is not primarily the protection of investors but the development of contracting parties. The protection of investors is only a tool to attain the goal.

One may look at good faith from a wider perspective, its role also rests with attracting attention on systematic malfunction[454] and in this sense treaty shopping may point out abuse of the whole current investment protection system that needs to be sufficiently addressed.

There is now a long-standing trend to rely on the good faith principle for the defence in order to deny the right to jurisdiction, yet it has been refused by most of tribunals on the basis of a formalistic

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[449] GAFFNEY, J. Abuse of Process in Investment Treaty Arbitration. In: *Journal of World Investment & Trade*, vol. 11, issue 4, 2010, p. 536.
[450] CREMADES, B. Good Faith in International Arbitration. In: *American University International Law Review*, vol. 27 no. 4, 2012, p. 788.
[451] LIGHTFOOT, R.; ZELLER, B. Good Faith - An ICSID Convention Requirement? In: *Victoria University Law and Justice Journal*, vol. 8, no. 1, 2018, p. 28. The same reasoning was applied in *Europe Cement*, ¶ 171.
[452] POLONSKAYA, K. *Abuse of Rights: Should the Investor-State Tribunals Extend the Application of the Doctrine?* Toronto: University of Toronto, master thesis, 2014, p. 27.
[453] GAILLARD, E. Abuse of Process in International Arbitration. In: *ICSID Review*, 2017, vol. 32, issue 1, 2017, p. 19.
[454] ASCENSIO, H. Abuse of Process in International Investment arbitration. In: *Chinese Journal of International Law*, vol. 13, issue 4, 2014, p. 785.

approach and unacceptable widening of the wording of the treaty. In this way tribunals completely ignore that with the help of legal principles the system may react to new conditions or practices that misuse and destabilise the legal system. On the contrary, a wider application of the principle would maintain the integrity of the investment regime[455] and a close examination of the facts of the case with piercing the corporate veil where necessary may help to realise the agreements' objective.

Unfortunately, this is not usually done by tribunals, even though, as it is known, the true law begins where the text ends and the realm of principles opens its gates.

[455] POLONSKAYA, K. *Abuse of Rights: Should the Investor-State Tribunals Extend the Application of the Doctrine?* Toronto: University of Toronto, master thesis, 2014, p. 2.

6 TREATY SHOPPING IN THE DECISION-MAKING OF INVESTMENT TRIBUNALS

The objection of abusive corporate manoeuvring is not an uncommon one: respondents have presented it in numerous cases.[456] However, the majority of tribunals ruled against those objections and upheld their jurisdiction.

There is an apparent unwillingness to cross limits given by the plain text of the treaties, as this would require the step to the unknown and argumentation based on the abuse of right doctrine, i.e. resorting to the application of legal principles. On the other hand, if the misuse of the system was maliciously apparent, tribunals have not hesitated to dismiss the claim.

From the tribunals that were deliberating on the defence based on illegal treaty shopping, the majority has rejected it. One of the tribunals examining the treaty shopping objection was the tribunal in the *Saluka* case. In its deliberations on the corporate restructuring, the tribunal made the following notorious observation: '[t]he Tribunal has some sympathy for the argument that a company which has no real connection with a State party to a BIT, and which is in reality a mere shell company controlled by another company which is not constituted under the laws of that State, should not be entitled to invoke the provisions of that treaty. Such a possibility lends itself to abuses of the arbitral procedure, and to practices of 'treaty shopping' which can share many of the disadvantages of the widely criticised practice of 'forum shopping'.[457] The tribunal subsequently followed by adding that 'the predominant factor which must guide the Tribunal's exercise of its functions is the terms in which the parties to the Treaty now in question have agreed to establish the Tribunal's jurisdiction. In the present context, that means the terms in which they have agreed upon who is an investor that may become a claimant entitled to invoke the Treaty's arbitration procedures. The parties had complete freedom of choice in this matter, and they chose to limit entitled "investors" to those satisfying the definition set out in Article 1 of the Treaty. The Tribunal cannot in effect impose upon the parties a definition of "investor" other than that which they themselves agreed. That agreed definition required only that the claimant-investor should be constituted under the laws of (in the present case) The Netherlands, and

[456] According to the analysis of *Lee* in 2012, until then more than 15% of claimed investment disputes were potentially treaty shopping cases, see LEE, E. Treaty Shopping in International Investment Arbitration: How often has it occurred and how has it been perceived by tribunals? In*: London School of Economics and Political Science: Working paper Series 2015*, no. 15–167, p. 11.

[457] *Saluka*, Partial Award, ¶ 240.

it is not open to the Tribunal to add other requirements which the parties could themselves have added but which they omitted to add'.[458]

This quotation has become almost a mantra for the subsequent tribunals. It is my opinion that its popularity is caused by the fact that it enables the arbitrators to admit that there is certain peculiarity inherent to treaty shopping cases although they subsequently rule in the favour of the claimant, almost taking up the position of victims that cannot rule on how their sense of justice would accord them.

The tribunals that have stepped out of this widely accepted view on treaty shopping were generally those in which the abuse was so apparent that it could not have been overlooked.

This part will summarise the details of the rulings that concerned treaty shopping and relating issues such as the notion of control and the operation of article 25(2)(b) of the ICSID Convention. After that, a summary of how particular questions relating to treaty shopping were resolved by tribunals will be provided. The rulings are indexed based on the date of their issuance.

Although the following part will be mostly descriptive and some of the cases are well known, I find it convenient to summarise most of the treaty shopping cases here, because to my knowledge there has been assembled no complex overview in such extent before.

6.1 Vacuum Salt v Ghana (16/2/1994)

The claimant, Vacuum Salt, was developing a salt production and mining facility in Ghana. The arbitration was commenced on the basis of article 25(2)(b) of the ICSID Convention and although Vacuum Salt was locally incorporated in Ghana, it was, according to the claimant, controlled by a Greek national, Mr. Panagiotopulos, with 20% direct share on the company.[459] The remaining portion of the shareholding was owned by Ghanaian entities or nationals. The Vacuum Salt tribunal was the first one to consider article 25(2)(b) with regards to a claim brought by a minor shareholder.[460] The respondent objected that the conditions of article 25(2)(b) were not satisfied by the claimant because it was in fact not under foreign control due to mere minority shareholding.

The consent to the ICSID arbitration was given in the lease agreement between Ghana and Vacuum Salt which referred to the resolution of disputes by arbitration according to the ICSID Convention.

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[458] *Saluka*, ¶ 240.
[459] *Vacuum Salt*, ¶¶ 2, 73.
[460] Ibid. ¶ 45.

The tribunal held that the parties' agreement 'to treat Claimant as a foreign national "because of foreign control" does not *ipso jure* confer jurisdiction.'[461] The reference in Article 25(2)(b) to 'foreign control' necessarily sets an objective limit beyond which ICSID jurisdiction cannot exist and parties therefore lack power to invoke same no matter how devoutly they may have desired to do so.'[462] The tribunal further noted that the words 'because of foreign control' do not mean that the parties are not at liberty to give the words any effect – but the treatment of a company as foreign will only be within the limits of the ICSID Convention, if it is under foreign control.[463]

Although the tribunal acknowledged that there is no unified level of share the foreign entity must own in the local company in order to reach the conclusion that the latter is controlled by a foreign national, it also admitted that it was 'true that the smaller is the percentage of voting shares held by the asserted source of foreign control, the more one must look to other elements bearing on that issue'.[464]

For this reason, the claimant presented a number of details of the operation of Vacuum Salt and the role of Mr. Panagiotopulos who from the start served continuously in a significant technical capacity of Vacuum Salt, was employed as the technical director from 1986,[465] presented minutes from the board meetings according to which Mr. Panagiotopulos was given a broad authority, while some of them even referred to Mr. Panagiotopulos as the 'general manager', although he was reported mainly technical issues.[466] He also shortly continued in the technical consultant position after the actual management was assumed by an interim management team inserted by Ghana.[467] Established on these facts, the tribunal marked that it was significant that 'nowhere does there appear to be any material evidence that Mr. Panagiotopulos either acted or was materially influential in a truly managerial rather than technical or supervisory vein'[468] and that at all times, Mr. Panagiotopulos was subject to the managing director who had also controlled the largest block of shares.[469] It was also never suggested that Mr. Panagiotopulos was able, and did, use his 20% share alone or in alliance with other

[461] *Vacuum Salt*, ¶ 36.
[462] Ibid. ¶ 36.
[463] Ibid. ¶ 38.
[464] Ibid. ¶ 44.
[465] Ibid. ¶ 48.
[466] Ibid. ¶ 49.
[467] Ibid. ¶ 51.
[468] Ibid. ¶ 53.
[469] Ibid. ¶ 53.

shareholders to secure significant power in order to control the decision of Vacuum Salt and gained significant managerial influence.[470]

The tribunal reminded that the object and purpose of the ICSID Convention is to support a larger flow of private foreign capital.[471] As consequence of the abovementioned factual conclusions, the tribunal viewed accepting the jurisdiction under article 25(2)(b) of the ICSID Convention in this case as permitting 'parties to use the Convention for purposes for which it was clearly not intended',[472] because the indications of a foreign national did not justify regarding Vacuum Salt as foreign.[473] In the eyes of the tribunal, the drafters of the ICSID Convention 'cannot have contemplated that a case such as this one would bring into play an international dispute settlement regime designed to promote greater private international investment by providing a forum for the resolution of any ensuing disputes between a State and a national of another State'.[474] The tribunal therefore rejected its jurisdiction.

6.2 Banro v Congo (1/8/2000)

The *Banro* tribunal had to consider a case of treaty shopping which also concerned the ICSID jurisdiction. The decision rejecting the jurisdiction to hear the dispute was never fully published, however certain parts focused on treaty shopping have been made available.

In this case, the Canadian company Banro Resource entered into a mining agreement with Congo governing the conditions of the investment. Under the agreement, the contracting parties, i.e. Banro Resource and Congo, consented to ICSID arbitration in case of the emergence of disputes arising out of the agreement.[475]

However, one of the major flaws was that Canada was not a signatory of the ICSID Convention, which was apparently the reason why the investor resorted to the following solution: it established (i) Banro American, an American affiliate and (ii) SAKIMA, its Congolese subsidiary, to who the mining rights were assigned and who carried on with the mining business in Congo instead

[470] *Vacuum Salt*, ¶ 53.
[471] Ibid. ¶ 39.
[472] Ibid. ¶ 54.
[473] Ibid. ¶ 54.
[474] Ibid. ¶ 54.
[475] *Banro*, ¶¶ 4, 5 of the excerpt.

of the Canadian Banro Resource. Since the US are the party to the ICSID Convention, the jurisdictional problem should thus have been overcome.[476]

Nevertheless, the tribunal pointed out that there are indeed two conditions for establishing valid jurisdiction of an ICSID tribunal, namely:

- both home state and host state are parties to the ICSID Convention, which was complied with since it was Banro American and SAKIMA who filed the claim and represented the claimants;
- the claimant must have the nationality of the contracting state on the date on which the parties consented to arbitration.[477]

It is the second condition that proved to be problematic for Banro American. The tribunal pointed out that the mining agreement did not contain the consent of Banro American but merely consent of the (Canadian) Banro Resource. Thus, the tribunal concluded that: 'the condition that the Claimant must possess the nationality of the "Contracting state" [i.e. the US] would be met; however, the condition pertaining to the consent of the parties would no longer be met'.[478] It further clarified that: 'Banro American could not […] avail itself, on a derived basis, on the consent of ICSID arbitration provided by the (Canadian) Banro Resource under [the mining agreement].'[479] Should such extension be able to work, Banro Resource would have to possess the right to commence the ICSID proceedings; however this was not the case because it was Canadian, i.e. a non-signatory national. There was subsequently no right to be possibly passed onto its American affiliate.

The claimant presumably asked the tribunal to pierce the corporate veil and attempted to convince the arbitrators that the actual parent company of SAKIMA (i.e. the local subsidiary, owned by Banro American) is in fact Banro Resource, who is the party that gave the consent in the mining agreement and that for that reason such consent should be sufficient. The tribunal admitted that such approach 'would have the advantage of allowing the financial reality to prevail over legal structures'[480] and would be consistent with handful of press releases by Banro Resource (describing the measures of Congolese government, the action taken by Banro Resource and information on instituting the arbitration proceedings by 100% owned subsidiary Banro American). However, the tribunal in fact did not elaborate on whether it should or should not resort to piercing the veil because it noted that the ultimate result would not change. If Banro Resource was perceived as the factual claimant, the

[476] *Banro*, ¶ 3.
[477] Ibid. ¶ 1.
[478] Ibid. ¶ 4.
[479] Ibid. ¶ 5.
[480] Ibid. ¶ 7.

condition of its consent in the mining agreement would be met, however still the other condition would not be met, because the claimant would not have nationality of the contracting state to the ICSID Convention.[481] Clearly, no mix of the consent of Banro Resource and Banro American would be able to secure the tribunal's jurisdiction.

The tribunal further distinguished the assignment of rights conferred by a contractual instrument to another company in the same shareholding group from the possibility to assign the *just standi* in international arbitration. The first is the question of private law, while the second is the question of international law that does not allow the tribunal to overlook the formal requirements by a flexible approach.[482] The tribunal concluded that 'the conditions required under the ICSID Convention for a State to be considered as a Contracting State will or will not be fulfilled depending on which company of the group files the request for arbitration. Beyond a literal analysis of the relevant provisions of the ICSID Convention and the Mining Convention, beyond the choice between a realistic and a formalistic approach regarding the jurisdiction of ICSID tribunals, they are considerations that fall within the scope of public international law that take the present case outside the jurisdiction of the Centre and the Tribunal.'[483]

The tribunal refused to pierce the corporate veil in favour of the claimant and rejected the case on the basis of the lack of consent to arbitration.

6.3 Autopista v Venezuela (27/11/2001)

In 1995 ICA, a Mexican engineering and construction company, was awarded the state bid of Venezuela to construct, operate and maintain a part of local highway system.[484] ICA created a direct local subsidiary in Venezuela Aucoven, in full Autopista Concesionada de Venezuela ('Autopista') in order to be used as a local concessionaire.[485] ICA fell under a Mexican shareholding structure 'ICA Holding'.[486] After negotiations, Aucoven and Mexico entered into a concession agreement.

Allegedly as a result of the peso crisis during 1995 and 1996, ICA Holding decided to internationalise some of its projects and as consequence, the US-based company Icatech, a subsidiary of ICA Holding (therefore a sister company of ICA) was chosen to acquire ICA's shares of

[481] *Banro*, ¶ 8 of the excerpt.
[482] Ibid. ¶ 14.
[483] Ibid.
[484] *Autopista*, ¶¶ 6, 8.
[485] Ibid. ¶ 9.
[486] Ibid. ¶ 10.

Autopista.[487] Shortly after the commencement of the effectiveness of the concession agreement in 1997, Autopista requested, as the concession agreement set forth, authorisation of the transfer of 75% of Aucoven's shares to Icatech.[488]

During the approval process, the Venezuelan Ministry of Infrastructure asked Autopista to provide a guarantee from ICA Holding as it noticed negative financial results of the company covered by the parent company.[489] The guarantee was later submitted by ICA Holding and subsequently the approval was granted by the ministry. As result, the US company Icatech became the 75% shareholder of the Venezuelan Autopista. In 1998, Autopista's shareholder issued a resolution stating that Autopista was subject to foreign control of Icatech for the purposes of the ICSID Convention, the resolution was provided to the ministry. The ministry opined in its administrative decision, that the concession agreement was concluded with a local company and that as an administrative contract it is subject to jurisdiction of local courts because the possible disputes may not give rise to foreign claims.[490] Autopista appealed against the decision and the appealing body confirmed that the arbitration clause in the concession agreement is effective and valid.[491]

Later disagreement arose between the parties of the concession agreement: in 2000 Autopista gave Venezuela notice of the termination of the agreement.[492]

On several occasions, which took place also after the transfer of shares to Icatech and even after the request for arbitration was filed, Mexican diplomatic also intervened against Venezuela, regarding possible amicable solution of the disagreements.[493]

Venezuela argued that the tribunal lacked jurisdiction because Autopista was a local company and Venezuela never agreed to treat it as a foreign national nor was in reality Aucoven under foreign control.[494] From the beginning, Aucoven had been controlled by ICA Holding and the insertion of Icatech did not change this direct control. ICA Holding was the sole shareholder of ICA, Icatech and many other subsidiaries, but it also exercised full control over them, including the fact that some of the directors of ICA Holding hold the same position in Icatech. This control was not diminished by the change of the corporate structure of Autopista who was always under the control of Mexican

[487] *Autopista*, ¶ 17.
[488] Ibid. ¶ 18.
[489] Ibid. ¶ 21.
[490] Ibid. ¶ 29.
[491] Ibid. ¶ 30.
[492] Ibid. ¶¶ 32, 33.
[493] Ibid. ¶ 35.
[494] Ibid. ¶ 38.

nationals.[495] The fact that Venezuela perceived Autopista as being under the control of the Mexican ICA Holding was also illustrated by the request of this company to provide guarantee in connection to the transfer of the shares and by the Mexican Government intervention into the disputes.[496] Venezuela also never agreed to treat Autopista as a foreign national, on the other hand it expressly rejected Aucoven's claim to be under the foreign control for the purposes of the ICSID arbitration.[497] The arbitration in the concession agreement solely referred to arbitration under Venezuelan law.[498] And even if the consent was found by the tribunal, the jurisdiction must have been declined because the control should be foreign in the objective sense and the true control should be considered.[499]

The tribunal started its discussion by examining the arbitration clause of the concession agreement according to which the parties agreed to submit the disputes to ICSID 'if the shareholder or the majority of shareholder(s) of the Concessionaire, i.e. Aucoven, come to be a national of a country in which the ICSID Convention is in force'.[500] Such clause is conditioned upon the transfer of shares. Venezuela further agreed in the concession agreement that it will attribute Autopista the character of a national under another contracting state for the purposes of the ICSID Convention from the date in which the condition is fulfilled and the arbitration clause becomes effective.[501]

Even though the respondent objected that the arbitration clause does not apply in that case because it was not aimed at the transfer within the ICA group if the ultimate and actual control over the claimant remain identical,[502] such view was rejected by the tribunal. Instead, it found that the meaning of the arbitration clause is clear, not giving rise to doubts that the words 'majority of the shareholder(s)' do not suggest effective control over Autopista.[503]

The tribunal found the clause to be applicable between the parties and moved on to the examination of the requirements of article 25(2)(b) of the ICSID Convention. The tribunal firstly held that the ICSID Convention does not require any specific form of the agreement to treat a locally incorporated person as a foreign national.[504] It also noted that the ICSID Convention does not define

[495] *Autopista*, ¶¶ 39, 40.
[496] Ibid. ¶¶ 42, 45.
[497] Ibid. ¶ 47.
[498] Ibid. ¶ 49.
[499] Ibid. ¶ 51.
[500] Ibid. ¶ 83.
[501] Ibid. ¶ 83.
[502] Ibid. ¶ 85.
[503] Ibid. ¶¶ 85, 86.
[504] Ibid. ¶ 105.

nationality and that the most widely used test is the incorporation test. The decisive factor is whether the test chosen by the parties is reasonable.[505]

According to Venezuela, foreign control should mean effective control, nevertheless such interpretation was rejected by the tribunal. Apart from practical difficulties of identifying the actual control, the tribunal explained that the parties are given autonomy to define what is meant by the foreign control and that in this case they chose plain direct ownership of the shares in the concession agreement.[506] As long as such choice is not unreasonable or does not abuse the ICSID Convention, it must be enforced by the tribunal.[507] Even though the tribunal accepted that economic criteria might reflect reality better than legal ones, in this case the parties have identified majority shareholding criterion as the decisive factor and the tribunal had to respect such exercise of the parties' autonomy.[508]

The tribunal also shortly examined the nature of Icatech and arrived at the conclusion that it was not a company of convenience inserted only for jurisdictional purposes. During the analysis, the tribunal considered the following factors: the company was established well before the transfer of the shares, it had more than 20 subsidiaries, US were not considered as tax haven and the tribunal found it reliable that the reason for the restructuring was the fact that at the time of the transfer, it was difficult to finance foreign projects due to the peso crisis. All this added to the conclusion that Icatech was not considered as a corporation of convenience.[509]

As to the Mexican government intervention into the dispute, the tribunal agreed that it was somewhat disturbing in the light of the purpose of the ICSID Convention but distinguished between diplomatic protection and efforts to settle a dispute which were present in the case of Autopista.[510] The latter is not considered as a prohibited diplomatic protection within the meaning of article 27 of the ICSID Convention.[511] Even so, the tribunal also reminded that lack of jurisdiction is not the consequence of the prohibited exercise of diplomatic protection.[512]

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[505] *Autopista*, ¶¶ 107, 109.
[506] Ibid. ¶¶ 113–117.
[507] Ibid. ¶ 116.
[508] Ibid. ¶¶ 119, 120.
[509] Ibid. ¶¶ 123–126.
[510] Ibid. ¶ 137.
[511] Ibid. ¶¶ 137–140, compare article 27 of the ICSID Convention: '(1) No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute. (2) Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.'
[512] Ibid. ¶ 140.

The tribunal concluded that the requirements of article 25(2)(b) of the ICSID Convention were met in the case of Autopista. It also noted that such decision should not be read as giving preference to the definition of foreign control by share ownership and that such interpretation applies only under the circumstances of the case, especially due to the wording of the arbitration clause of the concession agreement. The tribunal also distinguished its decision against the *Banro* tribunal[513] by highlighting differences of the two cases, resting especially in the fact that in the *Autopista* case, there was an express consent of the government required for the transfer of shares which was in fact issued and that the parties have contractually defined the test to be applied for foreign control.

6.4 CME v Czech Republic (13/8/2001)

In the CME arbitration, the respondent attempted to raise the objection of treaty shopping based on the assignment of investment; the respondent also pointed at the parallel proceedings brought by Mr. Lauder arising out of the same acts of the Czech Republic vis-à-vis the same company.

The case concerned derogation of a television broadcasting licence, however the factual details of the case are particularly complex. The licence was granted to a Czech company ČNTS whose 66% original shareholder was a German company CEDC. The shares were later transferred to a Dutch company CME. The assignment was never notified to the Media Council as proscribed by the granted licence.[514] Moreover, the respondent objected that the assignment could not be perceived as an investment.[515] The tribunal stated that the failure to notify did not remove the protection under the Czech–Netherlands BIT.[516] It also concluded that by the assignment, CME acquired full protection of the transferred investment, including the protection under the investment treaty.[517] The tribunal reacted to the suggested unacceptable forum shopping done by the assignment in the following words: 'In respect to jurisdiction, this defence is not persuasive. CEDC, when making the investment in ČNTS in 1993/1994, was under the protection of the German-Czech Republic Investment Treaty which, in essence, provides a similar protection as the [Czech–Netherlands] Treaty. The assignment of the investment in ČNTS from a German corporation to a corporation having its legal seat in the Netherlands does not have, on the face of it, the stigma of an abuse.'[518] The tribunal also refused any objections with regards to the parallel proceedings; according to the tribunal the respondent refused to consolidate both proceedings, the result of which was that 'there [would] be two awards on the

[513] *Autopista*, ¶ 143.
[514] *CME*, ¶ 385.
[515] Ibid. ¶ 396.
[516] Ibid. ¶ 386.
[517] Ibid. ¶ 390.
[518] Ibid. ¶ 396.

same subject which may be consistent with each other or may differ.'[519] A possible abuse by the initiation of another proceedings by Mr. Lauder could not affect jurisdiction of the tribunal under the Czech Republic–Netherlands BIT.[520]

The previous outcome was the decisive perception of the majority of the tribunal. Its third member, Dr. Hándl, issued a detailed and harsh dissenting opinion. He did not mark the assignment as forum shopping but according to him, the transfer could not legally establish a protected investment. Dr. Hándl maintained that the initial investment was undisputedly made by a German investor CEDC and refused the possibility that the investment was made by CME only 'through' CEDC. According to him, for that reason the investment can never be protected by the Czech Republic–Netherlands BIT. He presented an argument that in a virtual situation when a Czech Republic had no BIT concluded with Bolivia and a Bolivian investor would encounter troubles with its investment, it would be unacceptable that only by assignment of its rights based on the investment to a foreign company from Netherlands it would fall within the protection of the Czech Republic–Netherlands investment treaty. This would be a plain circumventing of law.[521]

It however remains the fact that the jurisdiction of the tribunal was upheld and ultimately led to the highest award in the history of investment arbitration in the Czech Republic.

6.5 Yaung Chi Oo Trading v Myanmar (31/3/2003)

Although it is not directly focused on treaty shopping, it is essential to mention this award because it revolved around the notion of the 'effective management', in this case a requirement of the incorporation test in the 1987 Association of South East Asian Nations (ASEAN) Agreement for the Promotion and Protection of Investments treaty[522] ('**ASEAN Treaty**'). The respondent maintained that the claimant lost its required effective management in Singapore once Mme. Win Nu, the main director of Yaung, moved to Myanmar.

The tribunal posed several questions in its analysis, first of all at what point the effective management should be examined. According to the tribunal, the logical approach is to examine the requirement at the time when the investment is made. Since the investment at hand was made over a

[519] *CME*, ¶ 412.
[520] Ibid.
[521] Dissenting opinion of the Arbitrator JUDr Jaroslav Hándl to the Partial Arbitration Award in CME, pp. 4–5.
[522] Article 1(2) of ASEAN reads: '[t]he term "company" of a Contracting Party shall mean a corporation, partnership or other business association, incorporated or constituted under the laws in force in the territory of any Contracting Party wherein the place of effective management is situated.'

period of time, the effective management could also be required throughout the whole period.[523] Secondly, the tribunal examined the contents of the effective management. In this case, Yaung kept a resident director in Singapore, held annual meetings there and its accounts were audited in Singapore.[524] Although the respondent suggested that they were all the minimum requirements for any Singaporean company, the tribunal found no reasons why to disregard such local requirements as indicia of effective management.[525] Moreover, it turned out that Mme. Win Nu continued to manage the company from Myanmar in order to run joint venture that constituted the investment which was demanded from her according to the joint venture agreement. In the view of the tribunal 'there is a presumption that "effective management" once established is not readily lost, especially since the effect will be the loss of a treaty protection.'[526] The tribunal also recollected the reason why the material management is included in ASEAN treaty – to protect from forum shopping. The tribunal found no evidence that such a scheme was present in the disputed case and that it was intended by the claimant.[527]

6.6 Tokios Tokelės v Ukraine (29/4/2004)

Tokios Tokelės is probably the most significant decision concerning treaty shopping. This tribunal was the first that heard the case of a purely 3rd type treaty shopping nature, but the decision is also unparalleled for its dissenting opinion of Professor Weil who was the chairman of the tribunal.

The claimant, Tokios Tokelės, was a company incorporated under the laws of Lithuania. However, 99% of its shares were owned by Ukrainian nationals who also represented two thirds of the management.[528] Under these circumstances, Tokios Tokelės searched protection in investment arbitration against Ukraine.

The respondent raised the objection that Tokios Tokelės was not a genuine foreign investor and that by finding its jurisdiction the tribunal would allow Ukrainian nationals to pursue international arbitration against their own government. Such outcome would go against the object and purpose of the ICSID Convention and it was the reason why the respondent asked the tribunal to 'pierce the corporate veil' and disregard the claimant's state of incorporation.[529]

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[523] *Yaung*, ¶ 49.
[524] Ibid. ¶ 51.
[525] Ibid. ¶ 52.
[526] Ibid.
[527] Ibid.
[528] *Tokios Tokelės*, ¶ 21.
[529] Ibid. ¶ 22.

The tribunal firstly ascertained the nationality requirement of the Ukraine–Lithuania BIT, found that its object is to provide broad protection to investors and their investment,[530] refused to reach beyond the borders of the definition of nationality included in the BIT[531] and found the establishment under the laws of Lithuania to be the only relevant consideration.[532] Such decision would, in the words of the tribunal, 'fulfil the parties' expectations, increase the predictability of dispute settlement procedures and enable investors to structure their investment to enjoy the legal protection afforded under the treaty'.[533]

After this conclusion, the tribunal turned to the consideration of the conditions of the ICSID Convention in the light of the previous deliberations on nationality under the BIT. It found the outcome of its BIT analysis consistent with the ICSID Convention that itself, according to the tribunal, does not set forth a method for determining corporate nationality. The tribunal found it as a generally accepted rule that the nationality of a corporation should be determined according to its place of incorporation.[534] Thus, the same conclusion as for the BIT would apply for the ICSID Convention.

The tribunal also deliberated on the argument of the respondent, reasoning that the ICSID Convention actually does regard foreign control, albeit within a different context and that is in its article 25(2)(b) under which the tribunal might find its jurisdiction in cases that a local investor is under a foreign control and parties agreed to treat the investor as a foreign national. However, the tribunal stated that in this case, the foreign control is considered to expand the jurisdiction of the tribunal and cannot serve as an argument for its restriction.[535]

Finally, the tribunal turned to the question of piercing the corporate veil of the claimant and refused to proceed in this direction. It agreed that the doctrine is indeed applicable in the context of international law as verified by the ICJ in the *Barcelona Traction* case. On the other hand, according to this ICJ decision, it is an exceptional measure that can only be applied in cases of misuse of the privileges of legal personality or of fraud or malfeasance or to prevent evasion of legal requirements or of obligations.[536] None of those were present in the heard case. The jurisdiction was upheld.

[530] *Tokios Tokelės*, ¶ 31.
[531] Ibid. ¶ 36.
[532] Ibid. ¶ 28.
[533] Ibid. ¶ 40.
[534] Ibid. ¶ 42.
[535] Ibid. ¶ 46.
[536] Ibid. ¶ 54.

The decision was followed by the dissenting opinion of Professor Weil who fiercely criticised the course of the analysis and the final conclusions of the remaining members of the tribunal. The strongest basis of disagreement was the 'object and purpose' argument which was rejected by the majority tribunal.

Professor Weil, relying on the Report of the Executive Directors on the Convention, remarked in his dissenting opinion that the ICSID was created in order to enable the settlement of disputes between states and foreign investors in order to stimulate the flow of international capital which is the primary purpose of the ICSID Convention.[537] The preamble of the ICSID Convention itself speaks of 'the possibility of the disputes that may from time to time arise in connection with the investment between Contracting States and nationals of other Contracting states'. From those references, Professor Weil concludes that the investment arbitration is meant for *international* disputes only, i.e. disputes between a state and a *foreign* investor and not between a state and its own nationals.[538]

It was also recollected that the *Tokios Tokelės* claim was the very first one concerning the claim brought by an investor that was ultimately held by a national of the state to the dispute in contrast to previous ICSID case law that might have concerned treaty shopping from the side of a possibly artificially created investor, that was nevertheless still foreign – thus, the object of the ICSID Convention could not have been hampered in the previous cases.

One of the limbs of the criticism was also aimed at the process of how the tribunal approached the order of examining its jurisdiction. Pursuant to the dissenting opinion, the tribunal should have first determined whether it had jurisdiction under the ICSID Convention and only after that ascertain the same on the basis of the requirements of the BIT and not the other way round as it did. In the light of the Professor Weil's reading, the tribunal should have first asked whether the dispute is between the contracting state and a national of the other contracting state.[539] This sequence of the process stems from the fact the provisions of the BIT can only be given effect within the limits set by the ICSID Convention as the ICSID Convention sets an outer limit of jurisdiction of an ICSID tribunal and the parties may only set a narrower jurisdiction than the ICSID Convention but they cannot grant jurisdiction in cases where there is none under the ICSID Convention in the first place.[540]

[537] Dissenting opinion of Professor Weil to the Decision on Jurisdiction in *Tokios Tokelės*, ¶ 3.
[538] Ibid. ¶ 5.
[539] Ibid. ¶ 9.
[540] Ibid. ¶ 13.

Based on the object and purpose of the ICSID Convention, Professor Weil asked whether Tokios Tokelės can be perceived as a foreign investor. He agreed that the ICSID Convention does not include any definition as to the corporate nationality, but he strictly refused that such definition could be left to subsequent decision of the relevant contracting parties expressed in the BIT because 'it is not for the parties to extend the jurisdiction of ICSID beyond what the [ICSID] Convention provides for. It is the [ICSID] Convention which determines the jurisdiction of ICSID and it is within the limits of the ICSID jurisdiction […] to define the disputes they agree to submit to an ICSID arbitration.'[541] The parties are not free to dispose of the limits of the definition of the corporate nationality, otherwise article 25 would be a purely optional clause.[542] Such interpretation is according to me logical, because otherwise article 25 could bear a different meaning in any arbitration between different members of the ICSID Convention which is unacceptable. There must be only one meaning of the provision for all signatories of the ICSID Convention.

Professor Weil furthermore pointed at the process laid down by the Vienna Convention and ascertained the nationality criterion in the light of the object and purpose of the ICSID Convention. He further elaborated that the ICSID Convention aims only to international disputes which should be perceived as those that 'imply a transborder flux of capital'[543] and is not meant to 'remedy investments made in a State by its own citizens with domestic capital through a channel of a foreign entity.'[544] Professor Weil perceived the origin of the capital as the relevant question contrary to the majority decision.

Finally, he opposed the reading of the argumentation based on article 25(2)(b) of the ICSID Convention. In the eyes of Professor Weil, the object of the provision is actually to enable the reality of foreign investment to prevail over its formal domestic character and prevent a genuinely foreign investment from being deprived of the ICSID protection because of its legally domestic structure. The theoretical foundation is the similar for giving prevalence to economic reality above the legal structure.[545] The ICSID Convention should grant the protection to 'all genuinely international investment but, by the same token, only to genuinely international investments.'[546]

[541] Dissenting opinion of Professor Weil to the Decision on Jurisdiction in *Tokios Tokelės*, ¶ 16.
[542] Ibid. ¶ 28.
[543] Ibid. ¶ 19.
[544] Ibid. ¶ 19.
[545] Ibid. ¶ 23.
[546] Ibid. ¶ 24.

6.7 Aguas Del Tunari v Bolivia (21/10/2005)

The claimant was a local company Aguas del Tunari incorporated in Bolivia that received the right to provide water and sewage systems under the concession agreement concluded in 1999. The concession was rescinded in 2000 and the acts and omissions leading to the rescission allegedly breached Netherlands–Bolivia BIT that extents its protection to legal persons controlled directly or indirectly by Dutch nationals.[547]

In 1999 when the concession was granted, Aguas del Tunari was owned by a shareholding of Bolivian companies, a Uruguay company and a company incorporated in the Cayman Islands.[548]

In autumn of 1999, after the conclusion of the concession contract that should have been effective for 40 years, there was a hostile reaction from public especially because of the transparency issues of the concession bid. Around the same time, Aguas del Tunari commenced its restructuring[549] and in December 1999 several Dutch and one Luxembourg companies were incorporated into the structure. After this change, 55% of the shareholding of Aguas del Tunari was owned by a Luxembourg company which was in turn wholly owned by a Dutch shareholder International Water Tunari also wholly owned by a Dutch shareholder, International Water Holdings.[550] The company International Water Holdings was ultimately owned by a US and Italian companies. Meanwhile the intensity of the opposition movement grew, and the concession was terminated in April 2000 following major violent protests.[551]

Amongst other objections, the respondent asserted that the claimant was not an entity controlled by nationals of Netherlands as was required by the BIT. The respondent argued that the control should be read as ultimate control, who, in this case, belonged to a US company.[552] The respondent also argued that the question of control must be analysed with regard to the facts of each case and that 100% ownership is not necessarily the proof of control.[553] In this case, the Dutch companies were mere shell companies that did not exercise control and factual power over Aguas del Tunari.[554] Control shall mean the exercise of power, not only the potential to do so.[555]

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[547] *Aguas del Tunari*, ¶¶ 1–3.
[548] Ibid. ¶ 60.
[549] Ibid. ¶ 62.
[550] Ibid. ¶ 70.
[551] Ibid. ¶ 73.
[552] Ibid. ¶ 207.
[553] Ibid. ¶ 207.
[554] Ibid. ¶¶ 208, 209.
[555] Ibid. ¶ 222.

On the other hand, the claimant argued that where there is 100% ownership, there is necessarily control.[556] The claimant also opposed the allegation that the Dutch companies were merely shells pointing at the fact that the restructuring was part of a planned joint venture structure that occurred before the events that effected the investment took place.[557]

The tribunal identified the divergence on whether control means its actual exercise or the legal potential to do so as the crucial point of the disagreement between the parties.[558]

The tribunal firstly looked at the ordinary meaning of the word 'control' and concluded that it might mean the possibility to control as well as actual control,[559] but that if parties intended to include actual control, a better choice would have been to use the word 'manage' in the agreement.[560] The tribunal rejected the respondent's argument that the term means ultimate control because the agreement also enables indirect control and hence creates the possibility of more indirect controllers.[561]

The tribunal next moved to the interpretation in the context, object and purpose of the BIT. The aim of the BIT is to stimulate the flow of capital and technology which should be the result of the agreed treatment to investments of the investors of the contracting parties.[562] As to the context, the tribunal noted that the word 'control' is not intended as an alternative to ownership because that would lead to the result that an entity with control but without interest could be a possible claimant. Thus, control must be a quality of ownership.[563] But the tribunal rejected that this quality of control means that it must be exercised.[564]

This conclusion was substantiated by three reasons. First, the fact that control is a quality that accompanies ownership is supported by general law; an owner of 100% of shares necessarily possess the power to control, no matter whether it is a shell company or not.[565] Secondly, the respondent's argument never fully qualified the level of the exercise of the control which would need to be satisfied. The tribunal pointed at the trouble to identify what intensity of control would be satisfactory. The difficulty of the respondent to articulate a suitable test according to the tribunal also reflected the

[556] *Aguas del Tunari*, ¶ 210.
[557] Ibid. ¶ 212.
[558] Ibid. ¶ 223.
[559] Ibid. ¶ 234.
[560] Ibid. ¶ 234.
[561] Ibid. ¶ 237.
[562] Ibid. ¶ 241.
[563] Ibid. ¶ 242.
[564] Ibid. ¶ 244.
[565] Ibid. ¶ 245.

possibility that it is not practicable to apply any such test.[566] To require actual control would also turn problematic in case of indirect control which may be multiple. Thirdly, the tribunal concluded that the call for a test based on an uncertain level of control would be inconsistent with the object and purpose of the BIT – if an investor could not ascertain in advance whether it would be entitled to protection, the effort to stimulate investment flow would be frustrated.[567]

The tribunal's conclusion was that 'the phrase "controlled directly or indirectly" means that one entity may be said to control another entity (either directly, that is without an intermediary entity, or indirectly) if that entity possesses the legal capacity to control the other entity. Subject to evidence of particular restrictions on the exercise of voting rights, such legal capacity is to be ascertained with reference to the percentage of shares held.'[568] The shareholding structure in the case satisfied those requirements.[569]

The tribunal agreed that the ownership structure might be abused but found no abuse it case of Aguas del Tunari. In response to the argument that the Dutch companies were mere shells, the tribunal noted that they had a special purpose in the corporate structure due to the existence of the joint venture – half of one was owned by the members of the joint venture and thus served to secure that any of the members would have an exclusive control over the other.[570] The tribunal also found it noteworthy that the companies had a portfolio of 8 contracts and together with their subsidiaries employed 55 employees and generated net turnover of €8.6 million.[571]

6.8 ADC v Hungary (2/10/2006)

The case concerned a Cypriot company ADC Affiliate, an affiliate of a Canadian ADC company. The Cypriot ADC Affiliate was established for commercial reasons to act in the management agreement with Hungary. The respondent claimed that the nationality of Cyprus was misused by the claimant and objected with arguments based mainly on the general international law perception of nationality.

The respondent maintained that ADC Affiliate failed to meet the fundamental requirement of the rules of international law – that of a genuine connection between the corporation and the state of its nationality.[572] The respondent supported this assertion by the *Barcelona Traction* case. It also quoted

[566] *Aguas del Tunari*, ¶ 246.
[567] Ibid. ¶ 247.
[568] Ibid. ¶ 264.
[569] Ibid. ¶ 319.
[570] Ibid. ¶ 320.
[571] Ibid. ¶ 322.
[572] *ADC*, ¶ 336.

two distinguished academics, Brownlie, concluding that the genuine link introduced in the *Nottebohm* case should apply to corporations and Oppenheim suggesting that in many situations it is permissible to look behind the formal nationality to determine the reality of the relationship to the state of incorporation.[573] The respondent thus demanded the lifting of the corporate veil based on the prevention of misuse of the rights conferred to the legal persons. Lastly, the respondent called upon the dissenting opinion of Professor Weil in the *Tokios Tokelès* case opining that the origin of the capital cannot be regarded as irrelevant since that would be against the object and purpose of the ICSID Convention.[574]

However, the tribunal did not find these arguments convincing. The tribunal pointed at numerous facts that would suggest that the claimant should fall within the definition of investor, for example the fact that it was incorporated before the project agreement was concluded, it had paid taxes in Cyprus, its management was incorporated according to the laws of Cyprus and it had a perfectly legitimate role in the project recognised even by Hungary itself that had full awareness of the inclusion of the claimant in the project since Hungary paid the invoiced management fees and accepted the submitted Cypriot annual reports.[575] From this point of view, the tribunal did not perceive the situation as unusual.

Bearing these facts in mind, the tribunal turned to decide on the argument of the control and origins of the funds of ADC Affiliate that were indeed Canadian. Since the proceedings were held under the ICSID rules, the tribunal recalled the double-keyhole test but concluded that the definition of investor is fulfilled both in the case of article 25(2)(b) of the ICSID Convention demanding that the claimant must be 'any juridical person that had the nationality of Cyprus' and under the BIT, according to which the legal person should have been constituted or incorporated in compliance with the law of Cyprus. This gave 'no scope for consideration of customary law principles of nationality, as reflected in Barcelona Traction'.[576]

As to the demand to pierce the corporate veil, the tribunal found it inapplicable in the case since, according to the tribunal, it only applies to situations where the beneficial misused the corporate structure in order to disguise its true identity to avoid liability.[577]

[573] *ADC*, ¶¶ 398, 394.
[574] Ibid. ¶ 342.
[575] Ibid. ¶ 353.
[576] Ibid. ¶ 357.
[577] Ibid. ¶ 358.

Finally, the tribunal rejected also the requirement of the genuine link, pointing also at the fact that some of the BITs concluded by Hungary before and after the BIT with Cyprus demanded not only incorporation but also additional criteria of carrying out business activities in the state of incorporation. Therefore, the tribunal deduced that it must have been the will of the contracting states to include a benevolent definition of investor.[578] The tribunal also pointed out that contrary to the *Tokios Tokelės* case, the company controlling the claimant was not in fact the national of the respondent state, suggesting that the inflow of the capital was indeed secured from abroad (although from Canada and not from Cyprus).

6.9 Rompetrol v Romania (18/4/2008)

An extensive elaboration on general international law aspects of investment arbitration was also discussed by the *Rompetrol* tribunal. The respondent based its defence on the argument that the arbitration would be contrary to two basic international law principles – that a person cannot bring an international claim against its own state and that in cases of dual nationality, the effective nationality should be preferred.[579] The respondent objected that the dispute did not arise out of a foreign investment, since the Dutch company Rompetrol was a shell company effectively controlled by a Romanian citizen and the dispute should thus be dealt with in Romania. Although the respondent did not dispute that the international decision bodies do not generally go beyond the formal test of incorporation, it asked the tribunal to do so in this exceptional situation when it was obvious that the effective nationality of the claimant is that of the respondent state.[580] The respondent asserted that Romania has never consented to the ICSID jurisdiction of the dispute with the claimant since the respondent never consented to submit a dispute with its own national that only acts through a company incorporated in the contracting states jurisdiction to the ICSID tribunal. According to respondent, such consent would have to be expressly included in the treaty.[581]

The respondent further claimed with regards to ICSID Convention, that the claim would constitute an abuse of the ICSID mechanism, the rule of effective nationality should therefore be applied which should in a decisive way influence the interpretation of the applicable instruments, i.e. the ICSID Convention and the Dutch–Romanian BIT. [582]

[578] *ADC*, ¶ 359.
[579] *Rompetrol*, ¶ 51.
[580] Ibid. ¶ 54.
[581] Ibid. ¶ 56.
[582] Ibid. ¶ 84.

The nationality under the ICSID Convention is intentionally not defined within the treaty and according to the tribunal it is left to the parties to agree upon. Article 25 merely reflects 'outer limits' beyond which party consent would be ineffective.[583]

These arguments were not found persuasive by the tribunal. Initially, the tribunal refused to go against the clear language agreed between the parties and give preference to the view of 'economic reality' offered by Professor Weil in his dissenting opinion to *Tokios Tokelės* because such approach would, according to the tribunal, be contrary to the interpretation rules set in the Vienna Convention.[584]

The tribunal afterwards analysed the referred to ICJ rulings, i.e. the *Nottebohm* case and *Barcelona Traction*. It emphasised that nothing in the *Nottebohm* case suggests that the principle of effective nationality should also be applied to juridical persons and *Barcelona Traction* case itself confirms that 'there can be no analogy with the issues raised or the decisions given in the Nottebohm case' and the tribunal further pointed to the fact that if the position of general international law – envisaged in the *Barcelona Traction* decision – is that the state of incorporation of the company can bring an international claim on behalf of it in the context of diplomatic protection,[585] 'it must follow that the contracting states to a specific bilateral treaty act well within the normal parameters of international law when they employ the same criterion to set up the nationality regime of their treaty.'[586] The criterions are therefore fully in compliance with the international law perception.

Moreover, the tribunal reminded that the notion accepted by the general international law is only applicable once the concerned treaty is silent on the matter of nationality which was not the case in the dispute. The tribunal also rejected the notion that a special consent would be demanded in case of jurisdiction over the dispute with the national of the respondent state. The arbitration clause in the BIT was found to be a valid ground for such proceedings.[587]

The respondent also argued that the Dutch nationality should not be 'opposable' to Romania (analogically with the *Nottebohm* case). However, such argument was not accepted as that would mean that the claimant had no nationality for the purposes of the arbitration (in the *Nottebohm* case, Nottebohm was left with his original nationality).

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583 *Rompetrol*, ¶ 80.
584 Ibid. ¶ 85.
585 Ibid. ¶¶ 88, 89.
586 Ibid. ¶ 89.
587 Ibid. ¶ 101.

Finally, the tribunal touched upon the question of the interpretation demanding the reading of the ICSID Convention in line with its purpose which is inter alia protection of *foreign* investments. The tribunal advanced argumentation that even if such interpretation regarding the object and purpose of the treaty was accepted, nothing in the Vienna Convention would bring the ICSID Convention within its reach in the concerned case because the only valid ground for the proposed interpretation in the Vienna Convention is possibly through the 'context' interpretation. However, context in this case means according to article 31(2) of the Vienna Convention the text of the treaty, agreement relating to the treaty or any other instrument concluded between the contracting parties, but not the ICSID Convention as such.[588] The ICSID Convention can thus not have an overriding effect on the interpretation of the BIT.[589] One of the arguments was also that such approach would result in limiting the scope of the BIT with regards to the ICSID when the BIT does not give ICSID an exclusive jurisdiction or primacy in comparison with other forums. The argument specific to the ICSID Convention as instrument controlling the meaning of the definition of the BIT was therefore in the sight of the tribunal not valid.

This however only stems from the perception that nationality requirement concluded in the ICSID Convention is not an independent one. If such interpretation was accepted, these problems would not have arisen because it would be the nationality requirement of the ICSID Convention that would have to be interpreted in accordance with its object and purpose and even if the investor qualified under the BIT, in the proceedings under the ICSID, the same conclusion would not necessarily be reached. At the same time this would not deprive the BIT of an independent interpretation not dependable on the ICSID object and purpose.

6.10 TSA v Argentina (19/12/2008)

The tribunal deciding the dispute between TSA and Argentina was centred at the question of the piercing the corporate veil. The claim was brought by TSA, an Argentinian company relying on article 25(2)(b) of the ICSID Convention. The claimant based its *ius standi* on the facts that it was wholly owned by a Dutch company TSI that was controlled originally by a French company and later ultimately by an Argentinian citizen.

However, the respondent argued that the control presumed by article 25(2)(b) must be effective[590] and asked the tribunal to pierce the corporate veil because 'the Dutch company that claims

[588] *Rompetrol*, ¶ 106.
[589] Ibid. ¶ 107.
[590] *TSA*, ¶ 121.

to have control over the local company is not controlling, but is a mere vehicle to control Argentine company through other companies.'[591] To this the claimant argued that no effective control is needed and since [the French] TSI owns 100% of shares in [the Argentinian] TSA, the 'control' criterion is fulfilled.[592]

The tribunal firstly analysed article 25 of the ICSID Convention and concluded that jurisdiction based on this article 'cannot be extended or derogated from by agreement of the parties.'[593]

The letter (b) of article 25 introduces an important exception to the rule that states cannot be sued from their own nationals under the ICSID Convention and even marked this principle a general principle of international law. The exception is only justifiable on the basis of foreign control that, on the contrary to the formal legal criterion of nationality, is a material or objective criterion.[594]

The tribunal noted that the interpretation looking strictly at the formal nationality may go against the common sense in some circumstances, especially if the formal nationality protects an investor holding the nationality of the respondent state. It recalled the tribunals that applied this strict formal interpretation, but also recalled the dissenting opinion in *Tokios Tokelės*. It also draw a distinction between those decisions and the case of TSA, because neither *Tokios Tokelės*, or the second recalled case, *Rompetrol*, was analysing article 25(2)(b) of the ICSID Convention that is looking at the same problem from a different end.[595] Normally, it is the states that ask the corporate veil to be pierced in order to show that the investor is not qualified, however in article 25(2)(b) the need to pierce the veil is included in the provision itself and it is investors who ask the tribunal to look one step up to the controlling element.

Finally, the tribunal had to deal with the question how far the tribunal should look, whether only to the first shareholding level or whether it could also pierce the second or further corporate layers in order to identify the foreign control. The tribunal noted that the deciding practice is unsettled, and tribunals have both refused to and allowed examining the structure beyond the first ownership layer.

The tribunal decided to follow the second path arguing that 'the reasons for piercing of the corporate veil up to the real source of control is *a fortiori* more compelling under the second clause of

[591] *TSA*, ¶ 116.
[592] Ibid. ¶ 124.
[593] Ibid. ¶ 135.
[594] Ibid. ¶¶ 139, 140.
[595] Ibid. ¶¶ 146–148.

the Article 25(2)(b) when ultimate control is alleged to be in the hands of nationals of the host State, whose formal nationality is also that of the Claimant corporation.'[596]

The tribunal concluded that the ultimate owner and controller of TSA was an Argentinian citizen. For that reason, TSA could not have been treated as the national of the Netherlands because of the absence of foreign control. The tribunal thus decided that it did not have jurisdiction to adjudicate the dispute.

6.11 Phoenix v Czech Republic (15/4/2009)

One of the key decisions concerning treaty shopping is *Phoenix*, the case in which the tribunal ruled in favour of the respondent based on the fact that the claimant tried to abusively manipulate the system of international investment protection.[597]

The facts of the case were the following – the claimant, an Israeli company Phoenix, purchased shares of two Czech companies which were at that time bankrupt and inactive. The state authorities froze their accounts and property, seized certain documents and the companies were parties to a long-running civil proceeding heard by the Czech courts. The acts of the Czech Republic against the companies were supposed to breach substantive protection standards of the Czech Republic–Israel BIT. They have, at the same time, already occurred when Phoenix acquired the companies and the claimant was well aware of their problems. The corporate structure ultimately lead to a criminally prosecuted Czech Mr. Beňo, who fled to Israel and acquired Israeli nationality. Some members of Mr. Beňo's family were also involved in the companies' structure after the restructuring.

In the respondent's view, Phoenix was only an 'ex post facto creation of a sham Israeli entity created […] to create diversity of nationality.'[598] The respondent perceived the case as 'one of the most egregious cases of "treaty shopping" '[599] that was 'directly at odds with the fundamental object and purpose of the ICSID Convention and the BIT.'[600] The main objection was that the claimant engaged in an abuse of a corporate structure and the respondent urged the tribunal to lift the corporate veil and look beyond the apparent factual nationality.[601] The respondent also warned the tribunal that if

[596] *TSA*, ¶ 153.
[597] *Phoenix*, ¶ 144.
[598] Ibid. ¶ 34.
[599] Ibid.
[600] Ibid.
[601] Ibid. ¶ 40.

jurisdiction was upheld, it would 'send the message to the world that there is virtually no limit to ICSID jurisdiction'.[602]

The tribunal looked closely at the time schedule of the alleged investment and posed a question whether such investment deserves protection under the applicable investment treaty. Initially, the claimant argued that already existing claims of the Czech companies were assigned to Phoenix; this argumentation was later abandoned, and the claimant itself admitted that it was an attempt to 'bring the pre-existing disputes involving [the Czech companies] before the tribunal'.[603]

The key question that the tribunal assessed in order to evaluate good faith of the transaction was the timing of the investment. Intriguingly, the tribunal did not ask whether the investment is a protected investment in the sense that it fulfils the criteria for an investment to be qualified under the investment instruments. It asked whether it *deserved* the protection,[604] indicating that it actually went beyond the textual requirements of the treaty.

The tribunal observed that the damage that was claimed had already occurred at the time of the investment and it also closely analysed the shareholder structure of the concerned companies and the redistribution of the assets. It turned out that all of the transfers were made between close family members of Mr. Beňo and were of uncommon, *strange* nature.[605] Moreover, the tribunal strongly believed that Phoenix did not engage into any real economic activity in the market place and neither were any such activities intended.[606] All this led the tribunal to the understanding that the 'whole operation was not an economic investment […] but, simply a rearrangement of assets within a family, to gain access to ICSID jurisdiction to which the initial investor was not entitled.'[607] The intention of the 'investment' was in reality to transform a pre-existing dispute into an international dispute subject to ICSID arbitration. In addition, such transaction was not a *bona fide* transaction and could not have thus gained investment protection.[608]

The tribunal agreed with the respondent that the investment was an 'apparent investment', 'artificial transaction' and consequently led to the abuse of rights.[609]

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[602] *Phoenix*, ¶ 43.
[603] Ibid. ¶ 137.
[604] Ibid. ¶ 135.
[605] Ibid. ¶ 139.
[606] Ibid. ¶ 140.
[607] Ibid.
[608] Ibid. ¶ 142.
[609] Ibid. ¶ 143.

The tribunal also shared respondent's concerns that if it granted *ius standi* to Phoenix, the system of investment arbitration might become disrupted, since jurisdiction would become virtually unlimited if any pre-existing dispute could simply be made international by a transfer of assets to an international company.[610] The tribunal specifically stated that that would go 'against the basic objectives underlying the ICSID Convention as well as those of bilateral investment treaties.'[611]

Phoenix is a renowned decision often referred to by respondents in situations in which granting jurisdiction seems unjust. However, its impacts seem to be limited to the circumstances of a gross misuse of investment arbitration system. Also, the claimant here tried to elevate already long ongoing domestic disputes into international ones.

6.12 BIVAC v Paraguay (29/5/2009)

The investment concerned services agreement concluded between BIVAC BV (established in the Netherlands) and the Paraguayan Ministry of Finance. BIVAC BV was part of a large BIVAC group and was closely connected to its French affiliate BIVAC International. Some questions arose as to whether the contract was signed between [the Dutch] BIVAC BV as the claimant or [the French] BIVAC International that could not bring a claim under the Dutch–Paraguayan BIT. The respondent brought into attention several details suggesting that the contract was signed with BIVAC International, including identification of BIVAC International on the signatory page (although the cover page identified BIVAC BC) or the involvement of French diplomats and even the president in the dispute.[612] The respondent further objected that the French–Paraguayan BIT did not contain an umbrella clause and BIVAC International would not be able to commence arbitration proceedings on the basis of the contract breach and thus intentionally used another entity of the BIVAC group – BIVAC BC to do so.

The tribunal firstly recollected that 'the fact that international groups of companies put in place different strategies and legal structures cannot itself be considered to be inappropriate or even illegitimate, and cannot as such justify any suspicions of a hidden agenda as to a future litigation strategy.'[613] Furthermore, BIVAC BV was established in 1984 which 'clearly demonstrates that it was not established with the aim to profit from the favourable Dutch–Paraguayan BIT only after the dispute had arisen.'[614] It then admitted that the contract itself was ambiguous as to its contracting

[610] *Phoenix*, ¶ 144.
[611] Ibid.
[612] *BIVAC*, ¶ 78.
[613] Ibid. ¶ 94.
[614] Ibid. ¶ 93.

parties and it moved to determine the identity of the party by looking at the circumstances of the case. The obvious facts, such as that the invoices, pre-shipment inspection documents or initial security bond were without any objections issued by BIVAC BV or that the termination of contract was notified to BIVAC BV, led to the conclusion of the tribunal that BIVAC BV was considered the contracting party.[615]

Although the case was primarily concerned by the question who the correct party of the dispute was, it illustrates a tendency of the states to linger on any ambiguity arising from corporate structuring of more complex investment corporate groups. This may undermine the perception of treaty shopping as problematic in other cases when it in fact goes against the aim of international investment protection.

6.13 Cementownia v Turkey (17/8/2009)

In *Cementownia*, the tribunal hold that the claimant had 'intentionally and in bad faith abused the arbitration'.[616]

With a closer look at the details of the case, the considered questions were quite different from those of the previous presented cases. The tribunal itself has admitted that preceding tribunals have found that if an investment is not made for commercial purposes but for jurisdictional purposes in order to gain access to international tribunal, such transaction is not perceived made *bona fide*.[617] It also referred to the exceptional possibility of piercing the corporate veil.[618] Lastly, it admitted that the 'cases have been at pains to distinguish between the creation of foreign legal personality for legitimate commercial planning purposes from the kind of conduct which […] can lead to the piercing od corporate veil.'[619] But in case of Cementownia, the tribunal never engaged in the considerations of whether the transfer was unacceptable treaty shopping or not or whether it should lift the corporate veil, because the transaction itself was fabricated.[620]

Before moving to respondent's jurisdictional objections, the tribunal looked thoroughly into the nature of the investment purchase transaction itself and it concluded that it never actually took place on the claimed date (if ever). The case concerned the termination of concessions by Turkey that took place on 12 June 2003. The claimant asserted that it acquired shares in the CEAS and Kepez

[615] *BIVAC*, ¶ 97.
[616] *Cementownia*, ¶ 159.
[617] Ibid. ¶ 154.
[618] Ibid. ¶ 155.
[619] Ibid.
[620] Ibid. ¶ 156.

corporations (influenced by the termination of concessions) on 30 May 2003,[621] however it failed to provide sufficient evidence to support this claim although it was asked several times by the tribunal to produce original share certificates[622] (that were later replaced) or properly signed transfer agreements. Moreover, the transaction was never reflected in financial statements of Cementownia[623] and the tribunal concluded that it was 'impossible to accept the Claimant's allegation that Cementownia purchased the bearer shares before June 12, 2003 […]. Kemal Uzal attempted in 2005 to fabricate the transaction in order to protect the Uzan family's economic interests and to gain access to international jurisdiction.'[624]

It is imperative to note that the claimant actually in the end accepted that the tribunal lacked jurisdiction, but claimed that it was a result of events beyond his control that prevented him from presenting the required evidence.[625] Such statement was probably made in order to mitigate the possibility of being required to pay the costs of the proceedings as the losing party.

Although *Cementownia* is sometimes viewed as a case where the tribunal ruled against treaty shopping, as it was showed that the tribunal never really got into scrutinising the character of the transaction which indeed – given the date very close to the concession termination, would have raised serious doubts whether it was a legitimate corporate restructuring.

6.14 Exxon Mobil v Venezuela (10/6/2010)

In 1999, Hugo Chávez took power in Venezuela. Following that a wave of new legislation imposing limitations on tax and royalty increase in energy sector was introduced, ultimately giving rise to expropriation of some investments, inter alia of two projects run by Exxon.

The changes of the investment framework took several months during which a new Dutch entity of Exxon – Venezuela Holdings was established in order to strengthen the legal protection for the investments of Exxon.[626] The purpose was to get access to ICSID arbitration under the BIT between Venezuela and Netherlands and to gain substantive protection against the measures

[621] *Cementownia*, ¶ 15.
[622] Ibid. ¶ 85.
[623] Ibid. ¶ 17.
[624] Ibid. ¶ 136.
[625] Ibid. ¶ 152.
[626] *Exxon Mobil*, ¶ 189.

introduced by the Venezuelan government. The tribunal evaluated such action as being either 'legitimate corporate planning' or 'abuse of rights' depending on the circumstances of the case.[627]

The tribunal presented a wide analysis of the notion of abuse of rights both in international law as well as specifically in investment and ICSID case law. The tribunal concluded that the principle of the prohibition of abuse of rights is rooted deeply not only in national legal orders but also as an international law principle, recognised in the law of the treaties and mentioned by a number of international decision-making bodies. The tribunal also closely considered previous investment arbitration disputes and recalled the relevant details of each of the cases before looking at the details of the claimant's case.

The ascertaining of the possible abuse was focused mainly on the timing details of the case. The tribunal was presented two letters from February and May 2005 in which Exxon notified its complains over the increase of royalties and income tax of its projects and also specifically called on the possibility to resort to ICSID arbitration.[628] The restructuring itself took place from October 2005 to November 2006 and the tribunal perceived the notified claims as already pending disputes between the investor and the state. Nevertheless, the expropriation measures took place after the restructuring was completed and the tribunal strictly differentiated between the two concerned measures.[629]

As for the expropriation measures, restructuring was a 'perfectly legitimate goal'[630] to reach the protection, however, to grant jurisdiction to hear the pre-existing disputes would amount to an 'abusive manipulation of the system of international investment protection'.[631]

The decision analysis consistently considered the abuse of rights based on the perception of the timeliness of the restructuring. Unfortunately, the tribunal did not elaborate more deeply into the specification as to when the dispute actually arose because the facts of the case were rather clear since the letters served as a practical specification on when the disputes must have already existed. Since this was before the restructuring, the tribunal did not have to ascertain whether the disputes did not actually arise even before the letters were sent, because normally, it is presumable that the party would notify in writing after informal consultations of the problem. The tribunal also did not specify whether

[627] *Exxon Mobil*, ¶¶ 190, 191.
[628] Ibid. ¶ 200.
[629] Ibid. ¶ 203.
[630] Ibid. ¶ 204.
[631] Ibid. ¶ 205.

the expropriation measures could not have been foreseeable by the claimant and for this reason the insertion of another company would also be done in bad faith.

6.15 Millicom and Sentel v Senegal (16/7/2010)

The concern of who was the true investor arose also in this case, that was brought jointly by two companies: Millicom International Operations, a Dutch company and Sentel, a local Senegalese company.

The position of the claimant was based on indirect control of the investment through the local Sentel company. The respondent maintained that the purpose of the acquisition of the Sentel company was very probably to create an artificial competence of the ICSID and thus its standing to bring the claim should not be recognised. The respondent perceived such restructuring as a violation of the principle of good faith that should lead the tribunal to sanction the claimants' conduct since the investment must be made in good faith in order to be protected.[632]

The tribunal agreed that the 'protection afforded by an agreement of the type which is invoked and by the ICSID Convention must be refused if it is contrary to good faith.'[633] However, it did not find it necessary to engage into detailed analysis of the possible abuse because the transfers of the shares of Sentel involved only Dutch companies and also because these transfers pre-dated the proceedings by several years.[634] The tribunal concluded that '[e]ven if it is possible, or even likely that the choice of the subsidiaries was also made considering the protection that their domicile could afford them, this fact alone could not constitute an abusive solution, as long as circumstances have not been established which would demonstrate that such choice was made unknown to the other party and under artificial conditions.'[635]

Another argument of the respondent was that the conditions of article 25(2)(b) of the ICSID Convention were not met since Sentel did not fall under the definition. For a locally established entity to fall within the meaning of a foreign investor, the ICSID Convention sets two requirements, (i) it must be under foreign control and (ii) the home state must consent to it acting on such basis.[636] The tribunal reminded that the reason why a local company can be perceived as a foreign investor is simple – in some types of business, it might be a statutory requirement to conduct the business only if the

[632] *Sentel*, ¶ 84.
[633] Ibid.
[634] Ibid.
[635] Ibid.
[636] Ibid. ¶ 107.

company is a local national. Such provisions would effectively strip the investors of the protection afforded by investment agreements.[637]

Based on this, the tribunal made the conclusion, that the extension of the protection must be interpreted broadly. According to the tribunal 'it suffices that the major part of the means made available to the local company come from foreign funds. This indirect control by means of financing most often entails indirect powers of management assumed by those who have made the investment.'[638] It than had no difficulty to find that Sentel qualified under article 25(2(b) of the ICSID Convention as the investor.

6.16 Pac Rim v Salvador (1/6/2012)

The facts of the case were following – originally a Canadian company applied for mining licences in 2004 in El Salvador through its subsidiary incorporated in El Salvador Pacific Rim Mining Corp. ('Pac Rim'). The licences were not granted. In March 1998 president Saca officially announced in his speech that no licences would be granted to foreigners. Shortly before this announcement, in December 2007, the nationality of the Caymanian subsidiary that owned Pac Rim was changed from Cayman Islands to the United States.[639]

According to the respondent, Pac Rim abused the process of CAFTA by changing its nationality to bring a pre-existing dispute before the tribunal.[640] Because of its timing, the respondent perceived the change as being made deliberately in bad faith.[641]

Pac Rim claimed that the change of nationality was 'part of an overall plan to restructure the Pac Rim group of companies […] in order to save money'.[642] However, the claimants witness admitted that the availability of arbitration under CAFTA was one of the factors that were considered before changing the nationality.

At the beginning, the tribunal found it useful to identify the burden of proof applicable to the objection of the abuse of rights and concluded that and in accordance with the doctrine that the party which alleges something positive has to prove it to the tribunal, the burden lies on the claimant in case

[637] *Sentel*, ¶ 109.
[638] Ibid.
[639] *Pac Rim*, ¶ 2.16.
[640] Ibid. ¶ 2.17.
[641] Ibid. ¶ 2.19.
[642] Ibid. ¶ 2.21.

of proving its right to have its case heard – i.e. proving that the tribunal has jurisdiction, while the burden of proof is on the respondent if the respondent is asserting abuse of process by the claimant.[643]

The claimant's pleaded case has developed significantly during the proceedings.[644] In the first stages of the proceedings, the claimant pleaded various adverse steps taken by the respondent that pre-dated the restructuring, such as imposition of unreasonable delays and regulatory obstacles with the aim of preventing the claimant gaining the mining rights,[645] but later it insisted that solely the speech of the president in March 2008 and the practice of withholding the licences that it announced and in fact revealed was the measure that formed the basis of the claim, not the previous acts towards the claimant.[646] According to Pac Rim, the speech 'revealed that the permit refusals were made following an existing policy by the government'[647] which the claimant identified as a 'newly announced policy'[648] that was implemented 'abruptly and without justification'.[649] As specified by the claimant, the speech revealed that the 'practice of the licence refusal towards the investor was made according to an existing policy and they were not mere administrative incidents.'[650] Although the practice might have been followed before the restructuring and even before the applicability of CAFTA, it continued thereafter and the claimant became aware of it only after the president's speech that confirmed the existence of the de facto ban.[651] According to the claimant, it was at that point when the dispute occurred.[652]

The tribunal identified that the key aspect of the case is the assessment of time and therefore turned to answer the question whether the measures in this case took place before or after the restructuring.

As already mentioned, the claimant was not consistent with identifying the concerned measures throughout the whole proceedings. Originally, it apparently pointed at numerous measures taken by El Salvador while after it realised that most of them pre-dated the restructuring, it limited its argumentation to the fact, that the measure at issue was the practice of withholding the licences that was made public by the president's speech and as such should be perceived as the consummation

643 *Pac Rim*, ¶¶ 2.11–2.13.
644 Ibid. ¶ 2.34, this shift was also apparent from claiming protection from 'measures' in plural at the beginning and 'the measure' in singular later.
645 Ibid. ¶ 2.25.
646 Ibid. ¶ 2.57.
647 Ibid. 2.27.
648 Ibid. ¶ 2.28.
649 Ibid. ¶ 2.27.
650 Ibid.
651 Ibid. ¶ 2.32.
652 Ibid. ¶ 2.33.

point in the actions and omissions constituting the offending measure.[653] The speech is not by itself the adverse measure but according to the claimant it delimits the time point at which the dispute arose because before that the claimant was not aware that such practice was applied.[654]

The tribunal engaged into the determination of the measures as 'single', 'continuing' and 'composite' acts, in order to qualify whether the speech has launched a new policy that did not exist before (single act) or whether it acknowledged an existing practice in form of a continuous or a composite act.[655] A one-time act is an act completed at a precise moment, which does not exclude that its consequences extend in time, the example may be an issuance of an expropriation decree.[656] A continuous act is the same act extending throughout a period of time,[657] for example during the whole effectiveness of an act contrary to the investors rights. Finally, a composite act is composed of a series of different acts that in their totality give rise to a different act independent on and distinct from its individual parts, the example might be individual acts, otherwise lawful, that together result in expropriation.[658]

The tribunal reminded that the omission to grant a permit was not completely finalised before December 2007 (when the restructuring took place), the licence was not granted but no formal decision was taken by the respondent terminating the licencing proceedings[659] and according to the claimant there was still a reasonable possibility that the permit would be received.[660] It was therefore impossible to identify the practice as a one-off act.[661] The tribunal also refused to identify it as a composite act because the ban could not be characterised as a different act from the acts that would comprise it.[662] It then concluded that the 'de facto ban' should be considered as a continuing act, which (i) stared at a certain moment of time after the claimant's request for the permits exploitation concession but before the claimant's change of nationality in December 2007 and (ii) continued after December 2007, being publicly acknowledged by the president.[663] The tribunal also distinguished

[653] *Pac Rim*, ¶ 2.59.
[654] Ibid.
[655] Ibid. ¶ 2.62.
[656] Ibid. ¶ 2.68.
[657] Ibid. ¶ 2.69.
[658] Ibid. ¶ 2.71.
[659] Ibid. ¶¶ 2.84, 2.85.
[660] Ibid. ¶ 2.64.
[661] Ibid. ¶ 2.86.
[662] Ibid. ¶ 2.88.
[663] Ibid. ¶ 2.94.

between the president's speech as a culminating point of a pre-existing practice and the effective beginning of the practice itself injuring the investment.[664]

The tribunal then moved into the application of its findings into the question of the abuse of process by the claimant. It reminded that the dividing line between legitimate restructuring and misuse of the law is when an actual dispute can be foreseen as a very high probability.[665]

Generally, the tribunal held that in case of continuous acts, it would have jurisdiction to hear the portion of the act taking place after the date of the restructuring. On the other hand, it should not hear the claim if the claimant changed the nationality during the continuous practice knowing of an actual or specific future dispute.[666]

The tribunal relied extensively on the contents of the claimant's pleadings who repeatedly clarified that it was only seeking damages from March 2008 on (after the speech) and that the measure in question is the 'de facto mining ban', not the specific refusal of the permits to the claimant and other adverse act towards it. This measure identified by the claimant was according to the tribunal a continuous act that was not known to or foreseen by the claimant before the restructuring in December 2007 as a specific or actual future dispute.[667] For that reason the tribunal did not find it proven that the change of nationality had been an abuse of process by the claimant that would preclude the exercise of the tribunal's jurisdiction.[668] However, a part of the claim based on CAFTA was dismissed on the basis of the denial of benefits clause.[669]

6.17 Tidewater v Venezuela (8/2/2013)

Claimants, different entities of the Tidewater group, were providing support to the oil industry in Venezuela already from 1950s. In 2009, the company Tidewater Investment was incorporated in Barbados and it was inserted into the ownership structure so that it became the indirect owner of SEMARCA, the company contracting with the Venezuelan national oil company PDVSA.[670]

Due to world oil prices fall during 2008 and 2009 PDSVA failed to meet some of its obligations towards SEMARCA, especially its payments. On 7 May 2009, the Reserve Law was enacted in

[664] *Pac Rim*, ¶ 2.61.
[665] Ibid. ¶ 2.99.
[666] Ibid. ¶ 2.107.
[667] Ibid. ¶ 2.109.
[668] Ibid. ¶ 2.110.
[669] Ibid. ¶ 7.1.
[670] *Tidewater*, ¶¶ 2–4.

Venezuela while only one day later Venezuela seized Tidewater's operations and assets connected to SEMARCA.[671]

Venezuela objected that Tidewater was a company of convenience incorporated only for jurisdictional purposes to gain access to ICSID arbitration with respect to an already existing dispute or in preparation for anticipated litigation and therefore that the claimants were abusing the respective BIT.[672]

From the previous case law, especially the *Autopista* case, Venezuela identified four points that were supposed to show that abuse occurred: (i) the timing of the restructuring after disagreements and financial problems occurred and closely before the Reserve Law was enacted, (ii) Tidewater Investment was a shell company with little or no operations, (iii) the lack of another reasonable explanation for the restructuring and (iv) the absence of the required Venezuela's consent to the transfer of assets.[673]

The crucial point was recognised by both parties and the tribunal to be the identification of the moment when the dispute arose or was foreseeable.

Venezuela identified the dispute to be the discontinuation of services by SEMARCA after PDSVA hold payments. PDVSA also asked the contractors to renegotiate the contracts which SEMARCA refused. Subsequently, SEMARCA stopped paying wages to its workers and refused to extend the contract with PDVSA unless its demands were met. All this took place before the restructuring.[674] The respondent thus contended that the restructuring was completed in preparation for the anticipated arbitration in order to gain the BIT protection.[675] It also noted that the restructuring was firstly consulted with arbitration and compensation experts rather than with tax lawyers.[676]

The claimant, meanwhile, submitted that the restructuring was made before any dispute arose as it was done before the Reserve Law was enacted. The Claimants searched protection from expropriation measures that were a different dispute than the dispute described by Venezuela concerning the contractual problems and the questions of the extension of the contract between PDVSA and SEMARCA.[677] The Claimants were never warned that Venezuela would expropriate the

[671] *Tidewater*, ¶¶ 5–6.
[672] Ibid. ¶¶ 8, 47.
[673] Ibid. ¶ 51.
[674] Ibid. ¶¶ 57–58.
[675] Ibid. ¶ 59.
[676] Ibid. ¶ 60.
[677] Ibid. ¶ 66.

suppliers' assets, the enactment of the Reserve Law came as a complete surprise without any prior announcement.[678] The restructuring was made to gain better protection in Venezuela in general and to achieve a better tax structure.[679]

The tribunal described in detail the factual side of the interactions between the parties to arbitration with the aim to identify whether there was only one dispute that concerned the same subject matter, whether the facts of the first dispute gave rise to the other or whether there were two independent disputes.[680]

After looking closely at the list of facts, the tribunal concluded that there was a dispute between SEMARCA and PDVSA pre-dating the restructuring concerning the continuation of the provided service.[681] However, such dispute was a purely commercial one aimed at the recovery of the owed sums.[682] This dispute and other similar disputes with suppliers were not the reason for enacting the Reserve Law.[683] Furthermore, the law was aimed at many other suppliers and it was not limited only to SEMARCA as the reaction to the ongoing disputes.[684] The tribunal further found that the nationalisation was not imminent and foreseeable at the time of the restructuring. The actions towards SEMARCA were consistent with the previous business approach and previous statements of public officials were indication of the ongoing contract revision and not of the planned expropriation.[685] The Reserve Law was introduced without warning, passed into law only three days after the legislative process was commenced on 4 May 2009[686] and the seizure of the claimant's assets took effect the following day.[687] Such outcome was thus not foreseeable in March 2009 when the restructuring became effective.[688] The tribunal therefore dismissed the respondent's objection of the abuse of rights.

6.18 ConocoPhillips v Venezuela (3/8/2013)

The dispute of ConocoPhillips also arose following the Hugo Chávez' expropriation measures of oil industry after he grasped power in Venezuela. Before these measures occurred, the claimant underwent significant restructuring and transferred its assets to a Dutch company ConocoPhillips that

678 *Tidewater*, ¶ 67.
679 Ibid. ¶ 70.
680 Ibid. ¶ 14.
681 Ibid. ¶ 184.
682 Ibid. ¶ 190.
683 Ibid. ¶ 191.
684 Ibid. ¶ 191.
685 Ibid. ¶ 195.
686 Ibid. ¶ 171.
687 Ibid. ¶ 196.
688 Ibid. ¶ 197.

later initiated investment arbitration against Venezuela. According to the respondent, the described claimant's behaviour should have been perceived as creating 'corporations of convenience'. With reference to previous investment awards, the respondent contended that in some cases, tribunals refused the claims although claimants technically met the nationality requirements, based on the abuse of corporate form and blatant treaty shopping.[689]

The tribunal found that the common feature of the cases referred to by the respondent was the misuse of power conferred by law to claimants. The tribunal reminded that the principle of good faith or abuse of rights is rooted in international law as well as in investment arbitration,[690] in reaction to the claimant's argument that no principle of law exists that would preclude a corporation from creating subsidiaries or reincorporating to benefit from the protection of another country laws.[691] The tribunal also agreed that there are certain limits that allow to look further than a simple evaluation of the technical compliance with the relevant definition of investor in the treaty text.[692] However, the tribunal perceived the standard of breaching the good faith or similar principle is a high one[693] and it moved towards examining whether such limit was exceeded in case of ConocoPhillips.

After summing up the most significant moments of the state intervention compared with the restructuring timing, the tribunal concluded that the transfer of ownership (of which took place in 2005 and 2006) was made at the time when the proceedings under the relevant BIT were not in prospect – the first actions harming the claimant took place in May 2006. Another significant argument against bad faith was the fact that ConocoPhillips continued financial expenditure on the projects, amounting to USD 5.3 billion.[694] Such 'continued substantial involvement in the development and operation of the projects [was] evidence telling strongly against any finding of treaty abuse.'[695] The tribunal thus found no abuse also in this case.

6.19 National Gas v Egypt (3/4/2014)

The dispute was relating to an alleged expropriation through denial of justice and abuse of process in connection to arbitration of a contractual claim under national law by Egypt.[696] The claimant was a local company whose 90% of shares were owned by a UAE entity CTIP Oil & Gas International

[689] *ConocoPhillips*, ¶ 268.
[690] Ibid. ¶ 273.
[691] Ibid. ¶ 269.
[692] Ibid. ¶ 274.
[693] *ConocoPhillips*, ¶ 274.
[694] Ibid. ¶¶ 278–280.
[695] Ibid. ¶ 280.
[696] *National Gas*, ¶ 2.

Limited ('CTIP'). Through 100% shareholder, the companies were ultimately hold by Mr. Reda Ginena, an Egyptian national.[697]

The respondent objected that the claimant was in fact not under foreign control but under the control of an Egyptian national.[698] The UAE companies inserted into the shareholding chain have no activity in UAE, no offices or employees.[699] For this reason the respondent asked the tribunal to pierce the corporate veil.[700]

On the other hand, the claimant insisted on the strict reading of article 25(2)(b) of the ICSID Convention and on the presumption that owning majority of shares by a foreign entity is itself sufficient to establish foreign control.[701]

The tribunal reminded the parties, that while it is the prerequisite of utmost importance, consent of the parties is not the only condition of the jurisdiction of an ICSID tribunal.[702] 'In keeping with the purpose of the Convention, the jurisdiction of the Centre is further limited by reference to the nature of the dispute and the parties to it.'[703] The tribunal therefore analysed whether the parties have agreed to treat the claimant as a foreign national and whether it was under foreign control.[704]

The subjective test was met by the reading of article 10(4) of the BIT that expressly referred to article 25(2)(b) of the ICSID Convention. However, according to the tribunal, the objective test may not be satisfied simply by the fulfilment of the subjective test.[705] In the tribunal's view, there is a significant difference if the 'foreign control' is exercised by a national of a third state or by a national of the respondent state.[706] The latter is inconsistent with the object and purpose of the ICSID Convention,[707] because, in the words of the tribunal: 'it would permit the use of the ICSID Convention for a purpose for which it was clearly not intended and it would breach its outer limits'.[708]

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[697] *National Gas*, ¶ 7.
[698] Ibid. ¶ 75.
[699] Ibid. ¶ 95.
[700] Ibid. ¶ 91.
[701] Ibid. ¶ 102.
[702] Ibid. ¶ 120.
[703] Ibid. ¶ 120, quoting Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.
[704] Ibid. ¶ 130.
[705] Ibid. ¶ 133.
[706] Ibid. ¶ 136.
[707] Ibid.
[708] Ibid.

The tribunal observed that the CTIP was a pure shell company. It denied that the share ownership was the only proof of control, in this case it was clear who the controller was.[709] The tribunal also preferred the reality over the formalistic structure, noting that '[e]ach of these two UAE companies exists independently from Mr. Ginena in juridical theory, but not in practice'.[710] The tribunal also expressly admitted that it did not perceive the structure as forum shopping and believed that the structure was chosen in good faith.[711] Notwithstanding that, the tribunal decided that the claimant had not satisfied the objective test of foreign control and found no jurisdiction in this matter.

6.20 Saluka v Czech Republic (7/5/2014)

In this case, Saluka was a shell company used by a Japanese company Nomura as a single purpose vehicle for the purchase of shares in the Czech bank IPB. The respondent claimed that Saluka 'did not have bona fide, real and continuous links to the Netherlands and thus did not satisfy the requirements which were necessary to quality as an "investor" able to benefit from the provisions of the treaty'.[712] The respondent further objected that during the process of conclusion of the transaction, it dealt solely with Nomura and perceived Saluka as interchangeable with Nomura.

The tribunal responded to the allegation concerning lack of links to the Netherlands by observing that it must only consider the terms contained in the treaty that the parties have agreed therein. In the case of the Czech–Dutch BIT, the requirement sufficient for qualification as investor was merely being a legal person constituted under the laws of the Netherlands. Both requirements were satisfied by Saluka. Since 'the tribunal [could not] in effect impose upon the parties a definition of "investor" other than that which they themselves agreed',[713] the tribunal upheld its jurisdiction and concluded that Saluka was indeed a qualified investor. Notwithstanding that, the tribunal agreed that the possibility of shell companies controlled by another company belonging to another state that would not have the possibility to resort to arbitration leads to the criticised practice of treaty and forum shopping, and practically marked the situation as undesirable.[714] It then however decided to adopt the formalistic approach, adhering to the observation of the fulfilment of criteria included in the treaty.

[709] *National Gas*, ¶ 144.
[710] Ibid.
[711] Ibid. ¶ 146.
[712] *Saluka*, ¶ 239.
[713] Ibid. ¶ 241.
[714] Ibid.

6.21 Gremcitel v Peru (9/1/2015)

The dispute concerned land parcels and a development project to be realised on them in Peru. The owner of the land parcels was the company Gremcitel incorporated in Peru. Gremcitel was the claimant together with Ms Levy, a French citizen who was allegedly firstly its indirect and later its direct owner and the claimants should thus be qualified investors under article 25(2)(b) of the ICSIC Convention and the corresponding provision of the BIT.

Due to certain historical sites near the land parcels, on 10 October 2007 Peruvian authorities implemented a resolution imposing an intangibility status on the land parcels that, according to the claimant, would render the project meaningless.[715] The resolution was preceded by a number of other interactions between Gremcitel and various administrative authorities concerning the historical heritage of the area,[716] especially the issuance of the report of the Historical Commission in 2005 on which the later resolution was largely based.[717]

The claimant put forward that Ms Levy acquired indirect ownership of Gremcitel already in 2005 through another company, Hart Industries. Later, on 9 October 2007, Ms Levy acquired approximately 60% of shares and became directly the majority shareholder of Gremcitel.

However, the alleged shareholding changes were made under questionable circumstances and the respondent in particular pointed to the following facts with regards to the indirect shareholding:

- the amendment of the Hart Industries Memorandum of association that should have verified Ms Levy's shareholding in the Hart Industries in 2005 must be registered in order to come into effect, which was not the case here,
- the notarisation of the document of the transfer of shares was notarised on 7 February 2005 even though the document itself was dated 9 February 2005, i.e. after its own notarisation,
- the rectification of the notarisation later presented by the claimant in order to explain the aforementioned date discrepancies was itself of unreliable nature as it included a number of struck-through words evidencing the confusion of the notary as to what was acknowledged,
- also, according to the information of the Ministry of interior of Peru, Ms Levy could not have been in the place of notarisation at its time (which took place in Granada).[718]

[715] *Gremcitel*, ¶ 16.
[716] Ibid. ¶ 22.
[717] Ibid. ¶ 189.
[718] Ibid. ¶¶ 95–99.

As to the 2007 shareholding change which should have resulted in the direct ownership of Gremcitel, the respondent noted the following:

- Gremcitel was notified of the share transfer to Ms Levy one day after Gremcitel notified the change in the share register, i.e. before it could have gained knowledge of the change,
- Gremcitel did not register the change in its books or reports to the tax authority.[719]

The tribunal firstly analysed its jurisdiction *ratione temporis* and identified 18 October 2007, i.e. the date of the official publication of the resolution as the critical date of the alleged breach. On this date Ms Levy and Gremcitel had to be the qualified investors.[720] The tribunal remarked that 'a breach or violation does not become a 'dispute' until the injured party identifies the breach or violation and objects it.'[721]

The tribunal then turned to the identification whether Ms Levy was direct or indirect shareholder of Gremcitel. The tribunal agreed with the respondent that the documents relating to 2005 shares transfer were 'so full of inconsistencies that they [could not] be relied upon to establish that a transfer actually took place on the alleged date'.[722] This finding was strengthened by the evidence on the hearing of the notary who notarised the signatures who acknowledged that she had certified the documents not in 2005 but in 2010 and that in 2012 she was asked to 'correct the inconsistent initial backdating'. The tribunal observed that the claimant failed to bear its burden of proof as to the first restructuring.[723]

On the other hand, even though also the second restructuring was done under suspicious circumstances, the tribunal was satisfied that it effectively occurred,[724] especially since it was supported by preceding documented actions such as a notifying letter of the intention of the share transfers or a request to the shareholders to exercise the right of first refusal over the shares and the tribunal did not have doubts of the validity of the presented share transfer agreement.[725]

However, the tribunal noted that the details of the transaction and its timing evidenced that 'the [c]laimants acted as if they were pressed by time.'[726]

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[719] *Gremcitel*, ¶¶ 105–107.
[720] Ibid. ¶ 150.
[721] Ibid. ¶ 167.
[722] Ibid. ¶ 152.
[723] Ibid. ¶ 154.
[724] Ibid. ¶ 156.
[725] Ibid. ¶¶ 157–158.
[726] Ibid. ¶ 159.

The tribunal observed that restructuring in order to gain investment protection is not per se illegitimate if it is done with a view to shielding the investment from possible future disputes[727] and that the threshold for finding such restructuring illegitimate is high.[728] For that reason the tribunal turned to assessing whether the dispute was 'foreseeable as a very high probability, and not a mere possibility, at the time when Ms Levy acquired Gremcitel'.[729] According to the tribunal 'the closer the acquisition of the investment is to the act giving rise to the dispute, the higher degree of foreseeability will normally be.'[730]

The tribunal assessed the presented fact, especially that the act leading to the share sale to Ms Levy commenced about a month before the date of the dispute and the transfer was realised only one day before the resolution was issued (although officially it was published 9 days later). The tribunal noted that 'the review of the records shows such striking proximity of events is not a coincidence'[731] and concluded that 'the claimants could foresee that the 2007 Resolution was forthcoming' and it was evident that 'the transfer of shares was then set in motion in a great hurry'[732] which left 'no doubt about the correlation between the change in Gremcitel's ownership and the 2007 Resolution'.[733] The tribunal also maintained that the only reason for the transfer of the shares was Ms Levy's nationality and subsequent internationalising of the future domestic dispute since the claimants were unable to provide any other business explanation.[734] It was also not very helpful for the claimants that the documents concerning the transfer of the shares and power rights was explicitly made only temporarily, until 'all legal proceedings concerning the resolutions […] are finished'.[735] Because there were no domestic proceedings pending, it was clear to the tribunal that the condition referred to the ICSID proceedings.[736]

After the evaluation of the facts, the tribunal concluded that the restructuring constituted an abuse[737] while it described the attempt to establish the ICSID jurisdiction as 'a pattern of manipulative conduct'[738] and found it 'extremely serious that the Claimants have attempted to establish the

[727] *Gremcitel*, ¶ 184.
[728] Ibid. ¶ 186.
[729] Ibid. ¶ 187.
[730] Ibid.
[731] Ibid.
[732] Ibid. ¶ 190.
[733] Ibid.
[734] Ibid. ¶ 191.
[735] Ibid.
[736] Ibid. ¶ 192.
[737] Ibid. ¶ 193.
[738] Ibid. ¶ 194.

Tribunal's jurisdiction by way of documents which have turned out to be untrustworthy, if not utterly misleading."[739]

6.22 Philip Morris v Australia (17/12/2015)

In December 2015, the tribunal considering restructuring of the investor made before the 'plain packaging' tobacco legislation ('TPP Act') was adopted in Australia, arrived at the conclusion that the investor engaged in illegal treaty shopping.

With regards to restructuring, the tribunal had to consider two questions, firstly, when the concerned dispute arouse and whether the tribunal had jurisdiction *ratione temporis* and secondly, whether the invocation of the treaty by claimant constituted abuse of rights.

The case concerned the Australian plain packaging legislation, i.e. regulation that prescribed visual of tobacco packaging, banning most of the marketing features including trademarks on the products. Right before the adoption of the legislation, the claimant, Philip Morris restructured its investment, so that Philip Morris Australia was held by Phillip Morris Asia incorporated in Hong Kong. The decision to restructure was made in September 2010 and completed by the end of February 2011.[740]

Both parties disagreed on the answer as to at what the time the dispute arose and they both presented persuasive previous case law, be it investment tribunals, ICJ cases of the Permanent Court of Justice decisions to substantiate their positions.

Australia argued that the dispute pre-existed the making of the investment, asserting that the legislation did not necessarily have to be enacted in order for the dispute to arise. It referred inter alia to the Permanent Court of Justice *Mavrommatis* case according to which, in the respondents' reading, there should not be a 'distinction between disagreements over decisions to enact a law and the actual enactment of that law'.[741] The dispute therefore, in the eyes of the respondent, arose well before the investor acquired the investment in 2011 because the intention of adoption of the plain packaging act was announced in 2010 which 'gave rise to a disagreement and/or conflict'[742] since it was followed by a strong disagreement and criticism by Philip Morris.

[739] *Gremcitel*, ¶ 194.
[740] *Philip Morris*, ¶ 164.
[741] Ibid. ¶ 372.
[742] Ibid. ¶ 283.

Although the respondent strived to present the announcement as a final resolution and 'commitment on the highest level to introduce the measures'[743] that principally equalled the adoption, it remains the fact that the decision was made and announced by the government, while it was the parliament that had the sole discretion to pass the law.

On the other hand, the claimant perceived the previous acts – announcements and Philip Morris's reaction including a written notification pre-dating the enactment warning of the steps that the claimant was ready to make if the legislation was adopted as merely facts leading to the dispute, but not acts giving rise to it.[744] According to the claimant, the dispute 'cannot arise simply because someone expressed a view about "legality and efficiency" of plain packaging.'[745] The claimant maintained that the dispute did not arise before the TPP Act was enacted in November 2011.

The tribunal specified the analysed topic by noting that 'the test for a *ratione temporis* objection is whether a claimant made a protected investment before the moment when the alleged breach occurred.'[746] The tribunal then recalled the decision in *Gremcitel* according to which 'the critical date is the one on which the state adopts the disputed measure'[747] and maintained that the rights of the investor were affected by the enactment itself, because before the adoption, there was still the possibility that the parliament would decide not to adopt the resolution. However, the tribunal noted that the date of the dispute does not necessarily coincide with the time of the alleged breach, the dispute usually follows the breach once the investor opposes its effects.[748] Since the restructuring pre-dated the enactment of TPP Act, the requirements for jurisdiction *ratione temporis* were met.

The tribunal then moved to the question whether the commencement of the arbitration proceedings by the claimant constituted abuse of rights. Similarly to the *ConocoPhilips* tribunal, the tribunal stressed that the threshold for finding the initiation of the investment proceedings abusive is high, but also that 'the notion of abuse does not imply a showing of bad faith',[749] since it is subjected to an objective test and is 'seen in the fact that an investor who is not protected by an investment treaty restructures its investment in such a fashion as to fall within the scope of protection of a treaty in view of a specific foreseeable dispute.'[750] Based on a thorough evaluation of the previous case law

[743] *Philip Morris*, ¶ 390.
[744] Ibid. ¶ 395.
[745] Ibid.
[746] Ibid. ¶ 529.
[747] *Gremcitel*, ¶ 149.
[748] *Philip Morris*, ¶ 532
[749] Ibid. ¶ 539.
[750] Ibid.

the tribunal concluded that the concepts contained therein all revolve around the concept of foreseeability. Following that, 'the initiation of a treaty-based investor-state arbitration constitutes an abuse of rights (or an abuse of process, the rights abused being procedural in nature) when an investor has changed its corporate structure to gain the protection of an investment treaty at a point in time when a specific despite was foreseeable'.[751] By way of reference to the *BIVAC* decision, the dispute is foreseeable when there is a reasonable prospect 'that a measure which may give rise to a treaty claim will materialise.'[752] In order to apply the test to the case the tribunal outlined the most important events.

The plain packaging measures were considered at least since 2008 with the introduction of the first draft bill in August 2009. In April 2010, Philip Morris made the first approvals of the streamline of its corporate structure.[753] On April 2010, the Australia's prime minister announced the intention to adopt plain packaging and according to the tribunal, from that time on there was no uncertainty about the intention to introduce the plain packaging. 'Accordingly, there was at least a reasonable prospect that legislation equivalent to plain packaging measures would eventually be enacted, which should trigger a dispute.'[754] Although some of the political developments in the concerned time-period might have cast doubts on the certainty of the final adoption, such as the change of the prime minister or the change of the majority government into minority one after the elections in August 2010, none of those facts could make the measures no longer foreseeable.[755] The claimant acquired its shareholding in Philip Morris Asia on 23 February 2011.[756] On 21 November 2011, the TPP Bill was passed and on the very same date, the claimant sent the respondent the notice of arbitration.[757]

The tribunal made two important remarks. Firstly, that between the announcement of the intention and legislation itself was a time-period of 19 months. The length of such period is however not decisive for determining the foreseeability. Democratic states often have long legislative processes but compliance with the procedural requirements could not make the outcome less foreseeable than legislation of politically less developed states that can adopt legislation virtually overnight.[758] Secondly,

[751] *Philip Morris*, ¶ 554.
[752] Ibid.
[753] Ibid. ¶¶ 556, 557.
[754] Ibid. ¶ 566.
[755] Ibid. ¶ 566.
[756] Ibid. ¶ 563.
[757] Ibid. ¶ 566.
[758] Ibid. ¶ 567.

it highlighted the fact that from the announcement of the intended measures in April 2010, i.e. long before the restructuring, the government never withdrew from its intention.

In the end the tribunal concluded that the dispute was foreseeable at the point of the restructuring. Due to the lack of evidence, the tribunal was not convinced by the argument of the claimant that investment protection was not the main reason for restructuring, but that it was only a part of a broad restructuring scheme. For that reason, the tribunal concluded that the arbitration constituted an abuse of rights[759] and found the claims inadmissible.[760]

6.23 Ampal v Egypt (1/2/2016)

The factual background of the *Ampal* case is rather complex, but it was centred on the Egypt's infrastructure and supply of gas repeatedly attacked by terrorist groups and asserted responsibility of the state for the supply cuts.

In the jurisdictional objections, the respondent submitted that the shareholders were trying to initiate multiple claims (namely four parallel arbitrations were ongoing)[761] concerning the same factual background after an elaborated restructuring by which a complex tree of companies was created, all with the ultimate beneficial owner of Mr. Maiman[762] and warned against possible duplicate compensation.[763] The respondent objected that such strategy leads to abuse of process[764] which could lead to treaty shopping, double recovery and inconsistent outcomes.[765] The respondent also suggested that the claimant must only persuade two out of twelve total arbitrators to rule in his favour and would be fully recovered which considerably increases claimant's chances to succeed.[766]

Despite the tribunal admitted that all cases concerned the same factual matrix, it was not persuaded that the initiation of these proceedings amounted to abuse of process. The tribunal differentiated between treaty and contract claims that might be pursued in different forums but also admitted that the treaty tribunals may consider claims made by separate investors holding distinct tranches of the same investment. The tribunal also pointed to the representation of claimants

[759] *Philip Morris*, ¶ 588.
[760] Ibid. Part VII. Decisions.
[761] *Ampal*, ¶ 313.
[762] Ibid.
[763] Ibid.
[764] Ibid.
[765] Ibid.
[766] Ibid.

confirming that they were not seeking double recovery which mitigated the risks connected to parallel proceedings and their offer to consolidate of claims which the respondent rejected.[767]

However, the tribunal found one situation in which the previous conclusions did not apply, namely the analysed claim and another treaty claim initiated by another of Mr. Maiman's companies in UNCITRAL arbitration seeking recovery of the same sum. Although the claimants were different parts of the chain structure, both arbitrations concerned the same 12.5% indirect interest in EMG company. The tribunal found this 'tantamount to double pursuit of the same claim in respect of the same interest.'[768] If both arbitration bodies confirmed their jurisdiction, abuse of process would crystallise.[769] However, the tribunal stated clearly that it did not consider the materialised situation as result of acting in bad faith, but 'merely as result of the factual situation that would arise were two claims pursued before different investment tribunals in respect of the same tranche of the same investment.'[770]

Even though the UNCITRAL arbitration court confirmed its jurisdiction even before the *Ampal* decision on jurisdiction was issued and the tribunal confirmed that the abuse of process crystallised,[771] it surprisingly did not reject jurisdiction in the concerned portion of the claim, but instead invited the claimant to elect before which body it would pursue its overlapping claims.[772]

The decision is noteworthy for two reasons. Firstly, according to the decision, a situation in which the claimant artificially increases its chances of success by implementing vast holding structure all controlled by a single investor is to be tolerated. Although parallel claims by different shareholder investors are generally permitted, the tribunal should consider whether in this case, bearing in mind that the whole structure was clearly owned and controlled by its ultimate beneficial owner, Mr. Maiman such claims do not indicate abuse of right and such analysis concerned at the concrete fact in the decision is unfortunately missing in the decision.

Secondly, the offer to the claimant to opt for one of the ongoing proceedings is curiously liberal approach moving the boarders of the arbitration court competence since it transfers the ultimate outcome not to objective criteria present at certain point of time but to the choice of one of the parties to the dispute.

[767] *Ampal*, ¶¶ 328, 329.
[768] Ibid. ¶ 331.
[769] Ibid.
[770] Ibid.
[771] Ibid. ¶ 333.
[772] Ibid. ¶ 346.

6.24 Lisac v Panama (2/6/2016)

The dispute concerned a hydro-electric power generation concession granted by Panama. The claimants were Transglobal Green Energy – a US company and a locally incorporated company Transglobal Green Panama.

Originally, in 2003 the Panamanian company La Mina owned by Mr. Lisac (a Panamanian national) was granted a concession to design, build and operate a power plant in Panama; La Mina and Panama subsequently concluded a concession contract.[773] In 2006 the concession was terminated by the regulator because La Mina failed to comply with the requirement of the concession contract that the construction would start within the stated time period. La Mina requested reconsideration of the resolution that terminated the concession and after its rejection it initiated an administrative review by court.

Meanwhile, the concession to the power plant was granted to another company named Ideal and a new concession contract was concluded with this company.

Subsequently, the court approved the *ius standi* in the ongoing litigation to Mr. Lisac who applied for the change and in 2010 the court issued a judgement that declared the resolution incorrect and the original concession contract to be in force and Mr. Lisac to be a holder of the right to bring action arising from the proceedings verdict.[774]

In December 2010, Transglobal Green Energy (the claimant) and Mr. Lisac signed a memorandum of understanding and later La Mina approached Ideal to negotiate the purchase of the land connected to the power plant and of the built improvements. In September 2011 Transglobal Green Energy (the claimant) and Mr. Lisac signed a partnership and transfer agreement. Only after that, the second claimant – the local company The Green Panama was incorporated and Mr. Lisac assigned his rights arising out of the court judgement to it. The request to transfer the concession to Transglobal Green Panama was filed to the authority which was rejected on the grounds of its incompleteness. One month later a resolution was issued expropriating the power plant on the grounds of urgent social interest.[775] Mr. Lisac initiated several judicial proceedings in order to recover the concession.

[773] *Lisac*, ¶ 50.
[774] Ibid. ¶¶ 54–58.
[775] Ibid. ¶ 61–67.

The respondent opposed the claims inter alia on the basis of the fact that the claimant 'has manipulated the international investment treaty system in order to create an international dispute over a pre-existing domestic dispute'[776] and pointed at ongoing disputes between the administrator and Mr. Lisac and the fact that as the holder of the concession, La Mina was reinstalled, Mr. Lisac filed the mentioned complaints and was recognised as the holder of the right to bring action arising from the proceedings and later requested compensation from the state. Only after this the agreements with the claimant were concluded. According to respondent, 'Mr. Lisac's introduction of a foreign investor into the ownership of a domestic project, at a time when the project was already embroiled in a domestic dispute – and for the stated purpose of seeking mechanisms to resolve such dispute [included in the agreement] unquestionably amount to an abuse of process on the part of the Claimants'.[777]

The tribunal's analysis was relatively brief. It recollected that the previous tribunals have considered various aspect in order to identify abuse of rights, such as timing of the investment and the timing of the claim, substance of the transaction, true nature of the operation or foreseeability.[778] In this case, the tribunal decided to consider the timing of the investment, the terms of the transaction and some relevant incidents in the course of the proceedings[779] and concluded that 'Mr. Lisac inserted [the claimants] into the process of pursuing the execution of the Third Chamber Judgement at a time when it was clear that there was a problem with its implementation'[780] Mr. Lisac has already initiated several domestic proceedings and by the investment arbitration sought international remedies of the same dispute with the assistance of the claimants.[781] For that reason, the tribunal concluded that the claimants attempted to artificially create international jurisdiction of a pre-existing domestic dispute[782] and the claim was dismissed.

6.25 CEAC v Montenegro (26/6/2016)

The decision on jurisdiction in the dispute of CEAC – a Cypriot company – against Montenegro could well have been used as a screenplay to parody the intricacies of some lawyer's more bewildering disputes. The representatives of the parties of the dispute produced an enormous quantity of documentation arguing on what the word 'seat' means.

[776] *Lisac*, ¶ 75.
[777] Ibid. ¶ 85.
[778] Ibid. ¶ 103.
[779] Ibid. ¶ 103.
[780] Ibid. ¶ 116.
[781] Ibid. ¶ 118.
[782] Ibid.

The claimant restricted the notion of the seat to incorporation whilst the respondent added more criteria and effective management into play. Much was said about which law should be turned to in order to determine the contents of the notion. The claimant contended that the term cannot be interpreted autonomously under the BIT, but must be determined by referring to the Cypriot municipal law.[783] On the other hand, the respondent's position was that as the standard interpretation rules under the Vienna Convention do not refer to national law, the term must be interpreted autonomously.[784] The respondent presented an interesting argument, pointing to the goal of reciprocity stated in the preamble of the BIT. This principle would effectively be breached if two different sets of laws (Cypriot and Montenegrin) would be applied in order to define the same term.[785] In such a scenario 'Montenegrin shell companies would not benefit from Treaty protection, whereas Cypriot shell companies would.'[786]

The absurd drama was finished by the tribunal that failed to explain for what reasons the claimant is found to have seat on Cyprus. This was criticised by the dissenting arbitrator Park[787] The tribunal literally stated that it did not find it necessary 'to determine the precise meaning of the term 'seat' as employed by article 1(3)(b) of the BIT […] because the evidence in the record does not support a finding that CEAC had a registered office in Cyprus at the relevant time.'[788]

The tribunal considered in length the notion according to the parties' views. It observed the seat criterion from all possible angles and examined the presentation of the certificate of registered office,[789] considered a set of requirements including right to use property,[790] accessibility of the seat to the public,[791] amenability to service[792] or a company's name plate[793] offered by the interpretation of the Cypriot law by the respondent's expert. Most of the requirements were not fulfilled which was inter alia proved by the apparent inoccupation of premises with no sign of activity or inability of the delivery services to deliver correspondents due to the fact that the recipient was unknown at the address.[794]

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[783] *CAEC*, ¶ 50.
[784] Ibid. ¶ 98.
[785] Ibid. ¶ 101.
[786] Ibid.
[787] Separate opinion of William W. Park to CAEC: 'The Award reasons that the record fails to support a finding of seat according to any interpretation put forward', point. 1.
[788] *CAEC*, ¶ 148.
[789] Ibid. ¶ 154.
[790] Ibid. ¶ 174.
[791] Ibid. ¶ 175.
[792] Ibid. ¶ 294.
[793] Ibid. ¶ 198.
[794] Ibid. ¶ 190.

However, in the end it repeated three possible options how to interpret the term and considered their applicability.

Firstly, it refused to import into the BIT the criterion of management and control because that would mean 'rewriting the parties bargain'.[795] The second offered test defined the office according to six criteria, but according to the tribunal finds no support in domestic or international law. Accepting it would be assuming policy-making in excess of the tribunal's authority.[796] The last meaning that looks at the plain meaning of the word 'seat' and 'commends itself in the configuration of [the]dispute'[797]. Under this understanding, the claimant possessed the seat in Cyprus and the jurisdiction of the tribunal was affirmed.[798]

6.26 Mera v Republic of Serbia (30/11/2018)

One of the most recent decisions on treaty shopping is the *Mera* case. The claimant was a Cypriot holding company whose sole shareholder was a Panamanian corporation that was wholly owned by Mr. Marko Miskovic, a Serbian national.[799] The factual state thus referred to the 3rd type treaty shopping.

The respondent presented several folds of argumentation why the claimant should be denied the possibility to claim the investment protection against the actions of Serbia because of the ownership structure.

The BIT included, inter alia, two separate criterions for legal entities status as qualified investor: (i) being incorporated, constituted or otherwise duly organised according to the laws of the contracting and (ii) having its seat in the territory of the contracting state.[800]

The first stream of argumentation of the respondent was focused on the notion of seat and whether it should be construed as differing from the registered office. Since the registered office is a requirement of incorporation in Cyprus and is thus already implicitly included in the number (i), the number (ii) would bear no meaning and the seat must indicate something additional to incorporation 'like management of and control over the investment, and therefore it cannot be taken to signify a

[795] *CAEC*, ¶ III.20.
[796] Ibid. ¶ III.21
[797] Ibid. ¶ III.22.
[798] Ibid.
[799] *Mera*, ¶ 5.
[800] Ibid. ¶ 61.

registered office'.[801] It follows that according to the respondent the seat should be interpreted as meaning the place of effective management.[802] The respondent maintained that the claimant was only a conduit for its owners' to conduct its business activities and gain access to a dispute settlement mechanism reserved for investors and investment of foreign character.[803]

Although the presented interpretation cannot be denied certain argumentation creativity it found no response in the eyes of the investment tribunal. However, the decision offers a comprehensive analysis of the notion of seat in international law.

The tribunal substantiated that no uniformly accepted 'ordinary meaning' of corporate seat can be found in international law, but it did not accept the position of the respondent that it should mean the place of the effective management of the entity. 'Such meaning would import into the treaty an obligation which is absent.'[804] No satisfactory definition of the seat can be found in neither the ICSID Convention, nor in the respective BIT and must thus be interpreted by a way of renvoi to municipal law.

The tribunal further accepted that the term 'seat' must be understood as a different criterion from incorporation and found it to be an element of physical location, place of address, the registered office where it can be visited.[805] Such differentiation seems slightly fictitious since it is hard to imagine incorporation of a company without any address. The seat within the meaning as interpreted by the tribunal is thus already included within the incorporation. There can hardly be an incorporated corporation in a country without having an address within the territory of such country.

The second argument of the respondent aimed at the fact that granting the claimant jurisdiction would go against the object and purpose of the BIT and the ICSID Convention. The respondent referred to the goal and purpose of the documents which is 'stimulation of entrepreneurial initiative leading to development of economic relations between Serbia and Cyprus' in the case of the BIT and 'protection of investments which are of an international character – that is, foreign investment made by foreign investors' in the case if the ICSID Convention.[806] The respondent marked the claim as an abuse of bilateral investment treaties, as the claimant has no connection to Cyprus and was in fact owned by a Serbian national.

[801] *Mera*, ¶ 79.
[802] Ibid. ¶ 76.
[803] Ibid. ¶ 78.
[804] Ibid. ¶¶ 86–88.
[805] Ibid. ¶ 91.
[806] Ibid. ¶¶ 137, 156.

In the view of the tribunal, the object and purpose of the BIT is broader than the one presented by the respondent.[807] However, instead of the purpose interpretation, the tribunal employed into a detailed *textual* interpretation stating that 'the provisions of the BIT [governing the definition of investment and investors] fall silent as to any specific requirements of a stimulation of entrepreneurial initiative and development of economic relations between Contracting States. In addition, the BIT contains no requirement that the capital used by the investor to make its investment originate in the place of the investor.'[808] The interpretation of the respondent was perceived as importing additional conditions disregarding what the contracting states have expressly agreed.[809] The tribunal thus preferred textual interpretation over the purpose interpretation that is expressly demanded by the Vienna Convention.

Also in the context of the ICSID Convention, the tribunal agreed, that its purpose is 'to promote economic development through the creation of a favourable investment climate'[810], but that this is not sufficient to import the question of the origin of the capital or effective control into the notion of investor under article 25 of the ICSID Convention.

Furthermore, the tribunal pointed at the fact that there cannot be any suspicion of treaty shopping and abuse of the investment treaty since the disputed actions of the respondent followed four years after the incorporation of the claimant.[811]

[807] *Mera*, ¶ 146.
[808] Ibid. ¶ 147.
[809] Ibid.
[810] Ibid. ¶ 165.
[811] Ibid. ¶ 152.

6.27 How tribunals approach nationality requirements

6.27.1 How tribunals approach the corporate nationality

Provided that the BIT does not explicitly impose other requirements, tribunals perceive incorporation as the decisive factor for qualification as an investor; they tend to follow explicit wording of investment agreements and refuse to diverge from it in any direction.

In the view of tribunals, incorporation should be understood as being formally incorporated in the given jurisdiction. It is perceived not to entail any special qualifications such as genuine connection to the home country or having effective management or carrying out business activities in the country of incorporation. On the other hand, such aspects are not entirely irrelevant, since their absence may add to the conclusion of a tribunal that the restructuring amounted to an abusive misuse of the protection system, as will be showed further.

Even in the case that a BIT expressly included two requirements – incorporation and the seat, the seat was not interpreted as the seat of management,[812] but merely as the statutory seat, i.e. the address of an entity in the territory of the home state.[813] Under this interpretation, the requirements of seat and incorporation in fact coincide because it is difficult to imagine being incorporated in certain jurisdiction and not having a seat there.

It is apparent from the examined cases that tribunals have often been called upon by respondents to take into account additional criterions besides the place of incorporation in order to identify the qualified investor. Respondents base these demands on international law requirements or insist on more extensive interpretation of the qualification requirements in line with the object and purpose of treaties, as opposed to their wording taken in isolation. States often face arbitration proceedings initiated by evident shell companies without any real links to the alleged home country apart from incorporation. Unsurprisingly, states often perceive this as an abusive misuse of the offered investment protection scheme.

[812] With the exception of *Capital Financial Holdings*, which was issued in French. With reference to the Luxembourg law, the majority of the tribunal concluded that 'siège social' demands that real administration seat is in Luxembourg, which was not the case here. The tribunal also detected abuse of rights in the behaviour of the company that was before the commencement of the proceedings inactive for several years, see ¶¶ 362–363. The summary of the case is taken over from: UNCTAD. *Investor–State Dispute Settlement: Review of Developments in 2017* [online]. UNCTAD [accessed 30/8/2020], p. 11. Available at: https://unctad.org/en/PublicationsLibrary/diaepcbinf2018d2_en.pdf.
[813] See *Mera*, *CEAC*.

Among the respondents asking the tribunal to draw consequences from absent bonds to the country of incorporation, virtually none were successful. For example, the tribunal in *Tokios Tokelės* found the establishment under the laws of the home state to be the only relevant consideration.[814] Similarly, in *Saluka* the tribunal rejected to look beyond the incorporation criterion, stating that to do otherwise would be to impose on the parties a definition different to the one in the BIT and to disregard the definition of the corporate nationality chosen by the parties.[815] The *ADC* tribunal was also satisfied with the formal nationality requirements of the BIT and found 'no scope for consideration of customary law principles of nationality'.[816] Interestingly, the tribunal deduced the impossibility to apply other criterions than incorporation also from the fact that other BITs concluded by Hungary expressly included more demanding requirements, so the tribunal concluded that it was clearly the intention of the contracting states to include a benevolent definition.[817] By the same token, the *Rompetrol* tribunal had 'great difficulty in an approach that was tantamount to setting aside the clear language agreed upon by the treaty Parties in favour of a wide-ranging policy discussion'.[818] Only when an investment treaty imposes additional criteria, tribunals would examine them.[819]

It is therefore necessary to conclude that when it comes to the application of other criteria, tribunals have showed a considerable reluctance to do so, justifying such an approach by the need to respect the parties' will, avoiding unacceptable interference and exceeding the powers of tribunals, but also by securing the predictability of the investment protection and also by enabling investors to secure that the investment enjoys the legal protection of the treaties.[820] Although all of these justifications may hold true, such an approach also turns a blind eye to the reality. Incorporation has become an empty term; it is virtually possible to structure any investment in such a way that it would become protected by the chosen treaty if no additional criteria are applied. However, I admit that this is mainly due to careless treaty drafting rather than through the fault of tribunals that are called upon to interpret the treaties.

Incorporation has been perceived as the decisive factor also in order to ascertain nationality under the ICSID Convention.[821] Tribunals often firstly interpret the BIT provisions and then assume

[814] *Tokios Tokelės*, ¶¶ 28, 40.
[815] *Saluka*, ¶ 241
[816] *ADC*, ¶ 357.
[817] Ibid. ¶ 359.
[818] *Rompetrol*, ¶ 85.
[819] Viz *Yaung* and the examination of the place of effective management.
[820] *Tokios Tokelės*, ¶ 40.
[821] For example also in *Tokios Tokelės* or *SOABI*, ¶ 29, the decision was not analysed in this thesis since it was only issued in French, however the decision recognises incorporation or seat as the generally used criterions (or at least that is what my non-existing French abilities suggest).

that the same test is therefore automatically applicable and valid under the ICSID Convention and so they do not consider applying any further general international law requirements. For example, while interpreting the nationality under article 25 of the ICSID Convention, the *ADC* tribunal found 'no scope for consideration of customary law principles of nationality, as reflected in Barcelona Traction'.[822] It is difficult to accept this conclusion with regards to the ICSID Convention that includes a very 'modest' definition of investment; it only refers to 'nationals' without any further elaboration. This term should be therefore interpreted in accordance with the Vienna Convention, which could ultimately call for consideration of the customary law principles. The *Rompetrol* tribunal perceived article 25 of the ICSID Convention as an outer limit whose content might be further specified by the BIT. However, if this were accepted, the term would have a different meaning under each specific BIT, and it is unacceptable to admit that the same term should have a different content depending on the specific dispute and the applicable BIT. Even if the nationality under article 25 of the ICSID Convention was perceived as setting an outer limit and be very broad, it must have its own meaning which should be identical for all cases and should be properly identified by tribunals. This is why I consider it essential to examine nationality under the ICSID Convention independently of the text of the BIT. However, tribunals rarely do so, which leads to the application of the incorporation criterion also under the ICSID Convention.

6.27.2 The interpretation of article 25(2)(b) of the ICSID Convention

Tribunals are in line with the conclusion that in order to apply article 25(2)(b) of the ICSID Convention for securing jurisdiction of an ICSID tribunal with regards to a claim concerning a locally incorporated company, two predispositions must be met:

(i) the consent of the host state to treat the entity as foreign and
(ii) foreign control over the local entity.

According to the analysed decisions, the first requirement, often called the subjective criterion, is met relatively easily. In some cases, the consent was included in a contract entered into by the investor and the host state or it was included in the applicable BIT. Even if this was not the case, the consent might also be expressed implicitly as there is no prescribed form of the consent.

[822] *ADC*, ¶ 357.

When it comes to the second requirement, the case is different here than in the previous sub-chapter that showed that tribunals are mainly engaged in examining the incorporation of the entity; in connection to article 25(2)(b), the requirement of control plays a dominant role.

Most of the cases deduced the presence of control simply from the shareholding interest in the local company by a foreign entity. For example, the *Aguas del Tunari* tribunal concluded that the owner of 100% of shares necessarily possess the power to control.[823] Any objections directed at the fact that the controlling companies were mere shells principally without their own capacity to perform real control were disregarded. In other words, the control does not need to be effective, and a claimant is not required to prove an actual control or management. This conclusion was applied also in some cases when it was apparent that the claimant is effectively controlled by a national of the host state that inserted foreign entities into the corporate structure.[824] The objections based on the fact that the mother companies were mere letterbox companies whose only purpose was to serve as the legal basis for establishment of international arbitration jurisdiction, were not accepted.

However, there are two important exceptions that might be deduced from the case law. Firstly, some of tribunals, for example *Vacuum Salt*, when confronted with minority shareholding, concluded that once the shareholding is not a majority one, then actual control must be proved, presumably because the claimant cannot rely on the (apparently irrefutable) presumption that 100% ownership entails control.[825] In other words, the smaller the percentage, the more closely the effective control must be examined. Nonetheless, this seemingly only applies to minority shareholding. The tribunal in *Sentel* examined majority, but not 100% ownership and arrived at the conclusion that it is sufficient that a major part of the means made available to the company in the host state has an origin abroad.[826]

The second major exception is represented by cases in which the effective controller was a national of the respondent state. The tribunals in *TSA* and *National Gas* both refused to hear the case because the controlling entity was in fact a national of the host state. The reason for this was that the opposite interpretation would go against the object and purpose of the ICSID Convention to protect foreign investment – the very same argument that was refused in different contexts by other tribunals.

[823] *Aguas del Tunari*, ¶ 245.
[824] *Tokios Tokelės* or *Rompetrol*.
[825] *Vacuum Salt*, ¶ 44.
[826] *Sentel*, ¶ 109.

6.27.3 Piercing of the corporate veil

The issue of piercing of the corporate veil is related to the application of the control criterion and of the abuse of rights doctrine because in order to identify the real control or misuse, tribunals must look beyond the formal corporate structure. If the veil is lifted, it effectively means that the formal nationality is disregarded. In most cases, tribunals refused to do so as they found no substance for this approach in the text of the treaties.

Most often tribunals adhere to the text of the treaty and refuse to pierce the corporate veil. According to tribunals, this practice is reserved for cases of misuse or fraud (*Tokios Tokelės*) or avoidance of liability (*ADC*). However, especially the latter is problematic because it could render useless the applicability of the doctrine in investment arbitration as there is, in general terms, no liability of investors in investment law. Contrariwise, the tribunals in *Aguas del Tunari* and *Saluka* both explicitly accepted that using holding companies for nationality planning and treaty shopping is a standard part of making business which is – save for a few limited exceptions – not illegal; for that reason, there is no need to pierce the corporate veil.

As mentioned above, there may be two reasons to lift the corporate veil in investment arbitration; some tribunals therefore decided to examine the whole corporate structure and applied the doctrine which in the end served as basis for declining jurisdiction.

The first group of tribunals did so in order to clarify whether the investor abused its rights. For instance, in the *Phoenix* case the veil was pierced because the whole restructuring appeared to be realised only in order to rearrange assets of Mr. Beňo within his family with regards to an existing dispute. What allowed the piercing of the corporate veil was the apparent abuse of rights.

The second reason for lifting the corporate veil is to secure fulfilling the requirements in compliance with the object and purpose of article 25(2)(b) of the ICSID Convention, that is, to protect locally incorporated investments controlled from abroad. This was the case of the *National Gas* tribunal. The reason to pierce the corporate veil here was that the actual ultimate beneficiary was a national of the respondent state and the investment was therefore not truly foreign. On the other hand, the tribunal expressly stated that it did not perceive the restructuring and initiation of the proceedings as abusive. Finally, the reasoning of the *TSA* tribunal was similar, and the corporate veil was pierced in order to secure that entities in fact under the control of a respondent state's national could not benefit from the protection granted by article 25(2)(b) of the ICSID Convention.

6.28 How tribunals approach treaty shopping

According to the examined decisions, the corporate structure may be given attention in two situations. First, the structure is examined if tribunals apply the control criterion; as showed above, this happens exclusively in two cases – if the tribunal examines article 25(2)(b) of the ICSID Convention and if (theoretically, because none of the examined decisions was this case) the control criterion was included in the considered BIT. In this case, a tribunal may examine closely the corporate structure in order to verify that the claim is actually brought by a foreign investor who originates from an ICSID-signatory state. The result might be that because of the elected and created corporate structure, the claim will be dismissed as it will not fulfil the formal criteria of the respective clause.

Secondly, it is the doctrine of abuse of rights that played a key role in rejecting some of the treaty shopping disputes. The application of the abuse of rights doctrine demands going beyond the treaty text and relying on general legal principles.

Tribunals all agree that the standard of breach of the abuse of rights principle is considered to be a high one: for instance, the tribunal in *ConocoPhillips* took into account 'how rarely courts and tribunals have held that a good faith or other related standard is breached. The standard is a high one.'[827] Similarly, the *Gremcitel* tribunal arrived at a conclusion that the threshold for finding abuse is high and present only in very exceptional circumstances.[828] Finally, the tribunal in *Philip Morris* agreed that 'investor-State tribunals have set a high threshold for finding an abuse of process.'[829] Some tribunals have elaborated on the origins and application of the abuse of rights doctrine in investment law while others – for example the *Lisac* tribunal – did not analyse the standard more closely, which may indicate that the application of the doctrine in question has become so commonplace that it does not require a detailed explanation.

Although tribunals analyse a wider set of elements of the case in order to ascertain the existence of abuse, the considerations related to timing are clearly given more weight. In all cases that were dismissed on the basis of treaty shopping objections, the dispute either seemed to have arisen or was closely foreseeable at the moment of the restructuring. The factual analysis is, in some cases, applied more loosely than in others; for instance the tribunal in *Exxon Mobil* focused almost entirely

[827] *ConocoPhillips*, ¶ 275.
[828] *Gremcitel*, ¶ 186.
[829] *Philip Morris*, ¶ 550.

on timing issues while the *Philip Morris* or *Phoenix* tribunals paid considerable attention also to other aspects of the case.

What I miss in the decisions is a proper identification of the right that was abused and an explanation why the act of the claimant qualified as abuse. The currently widely accepted view on treaty shopping was aptly summarised in *Philip Morris*: 'the initiation of a treaty-based investor-State arbitration constitutes an abuse of rights (or an abuse of process, the rights abused being procedural in nature) when an investor has changed its corporate structure to gain the protection of an investment treaty at a point in time when a specific dispute was foreseeable.'[830] But, as was explained in Chapter 4, abuse occurs when the purpose and object, that is, the underlying rationale of a rule is breached. The reason behind is left unexplained in the decisions. This may be why tribunals prefer to focus on timing issues, which is not necessarily correct. The principle of abuse of rights protects the aims of a rule, and if only timing is examined as the sole criterion of the abusive character of the investor's intent, it is insufficient. The correct approach is to identify the concerned right and examine whether the purpose of the rule was circumvented; if this is the case, then the exercise of a right is abusive.

From the above, one may deduce that contrariwise, when a corporate restructuring is realised before the dispute emerges, it is not considered abusive by tribunals even if it was done with the sole purpose of securing investment arbitration for future cases. For example, the tribunal in *ConocoPhillips* admitted that the only business purpose of the restructuring was to enable the claimant to have access to ICSID proceedings. The tribunal nevertheless decided that because no claim had been made at the time of the restructuring and none was in prospect at the time of the restructuring, abuse did not occur.[831] Correspondingly, according to the *Tidewater* tribunal: 'it is a perfectly legitimate goal, and no abuse of an investment protection treaty regime, for an investor to seek to protect itself from the general risk of future disputes with a host state in this way'.[832]

If tribunals find misconduct by the claimant and abuse of rights, they do not hesitate to allocate all cost of proceedings including legal fees to claimants. For example, in *Phoenix* the tribunal concluded that: 'not only that the Claimant's claim fails for lack of jurisdiction, but also that the initiation and pursuit of [the] arbitration [was] an abuse of the international investment protection regime under the BIT and, consequently, of the ICSID Convention […] The Respondent has been forced to go through the process and should not be penalized by having to pay for its defence […] Therefore, using its

[830] *Philip Morris*, ¶ 554.
[831] *ConocoPhillips*, ¶ 279.
[832] *Tidewater*, ¶ 184.

discretionary power, the Tribunal concludes that the Claimant is to bear all ICSID costs (the fees and expenses of the Members of the Tribunal and of the ICSID Secretariat, excluding the lodging fee).'[833] Similarly, in *Cementownia*, because of the filing of a fraudulent claim, the claimant was to bear all ICSID costs, respondent's contribution to the ICSID and respondent's legal fees.[834] Engaging in abuse can therefore have far-reaching consequences for claimants.

6.28.1 Indication of abuse

Throughout the time, a set of aspects evolved which tribunals consider in order to evaluate possible abuse of rights by claimants. They should lead to a global assessment of the presented facts and should help to perceive the acts in the whole context of the case. Tribunals have considered mostly two aspects that could, based on their result, indicate abuse by a claimant. The first are connected to timing that means assessment of when the investment was made in relation to when the dispute arose and to the foreseeability of the dispute. The second aspect is that of the restructuring or investment itself when the arbitrators consider the true nature or purpose of the transaction. This multiple approach was introduced mainly by the *Phoenix* case and, due to its complexity, it has been consequently followed by other tribunals.

The true nature, substance and purpose of the restructuring

The true nature, substance and purpose of the restructuring were all considered by the *Phoenix* tribunal that – based on the fact that the company did not perform any economic activity and never intended to do so, as it did not have any business or economic objectives[835] – observed that 'the whole operation was not an economic investment, based on the actual or future value of the companies, but indeed, simply a rearrangement of assets within a family, to gain access to ICSID jurisdiction to which the initial investor was not entitled.'[836]

Another tribunal that examined the nature of the restructuring was the *Gremcitel* tribunal that noticed that the claimant was unable to present any valid economic reason for the hurried transfer of shares to a shareholder with foreign nationality; the claimants maintained that the decision was made as a 'family decision' motivated by the intention of internationalising the project.[837] The tribunal was not convinced that a mere inclusion of a foreign shareholder could help internationalise the project

[833] *Phoenix*, ¶¶ 151, 152.
[834] *Cementownia*, ¶¶ 177, 178.
[835] *Phoenix*, ¶ 140.
[836] Ibid.
[837] *Gremcitel*, ¶ 191.

and did not find the explanation satisfactory. On the contrary, it perceived the transfer as an attempt to internationalise the domestic dispute.[838]

The *Lisac* tribunal noticed that the agreement between the holder of the investment and the alleged claimant included the obligation to jointly or individually seek and obtain mechanisms that permit the execution of the local decision.[839] The tribunal also did not leave without attention the fact that the claimant twice applied for suspension of proceedings due to the procedural developments of the local court proceedings which revealed their close relationship.[840] Both ultimately indicated the intent of the claimant to internationalise this domestic dispute.[841]

The cited tribunals were not satisfied that the aim of the restructuring or the investment was to engage in a real economic activity, in all cases the purpose of the transaction was internationalising a domestic dispute.[842] Such transaction is consequently made in bad faith and leads to abuse of rights.

On the other hand, assessments of the aim of restructuring or operation of the concerned entities have led to diverging results and also served as support for the conclusion that the cases did not represent abuse of rights.

For instance, the tribunal in *Autopista* took into account the fact that the claimant was not merely a corporation of convenience, 'had about 20 subsidiaries in different countries, was subject to economic, tax and social regulations in the United States, a country which is not considered a tax or regulatory heaven.'[843] The tribunal also noticed that the respondent was asked to approve the transfer of shares, which it did, and that the insertion of a foreign entity was justified by the currency difficulties relating to the peso crisis.[844]

Similarly, in *Aguas del Tunari*, the tribunal concluded that the claimant was not a corporation established in order to secure the ICSID arbitration inter alia because it had a portfolio of several contracts, employed together with its subsidiaries around 50 employees and generated a turnover of 8.6 million euros.[845]

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[838] *Gremcitel*, ¶ 191.
[839] *Lisac*, ¶ 109.
[840] Ibid. ¶ 113.
[841] Ibid.
[842] see *Phoenix*, ¶ 142; *Lisac*, ¶ 118; *Gremcitel*, ¶ 191.
[843] *Autopista*, ¶ 123.
[844] Ibid. ¶ 124.
[845] *Aguas del Tunari*, ¶ 322.

In *Exxon Mobil* the tribunal observed the nature of the financing of the concerned project and although the activity and finance flows in the years concerned were limited, the tribunal found the situation fully in compliance with the nature and evolvement of the project and made no adverse conclusions on that basis.[846]

The lack of evidence that the transfer is made because of tax or other business reasons may conversely add to the conclusion that restructuring is done in bad faith.[847] But, even though some tribunals found that the main or the sole purpose of the restructuring was to gain access to investment arbitration, they still concluded that the restructuring was a legitimate corporate planning, based on other circumstances, predominantly its timing.[848] The *Tidewater* tribunal made the following observation: '[a]t least one of the reasons for [the restructuring] is accepted to be a desire to protect [the claimant] against the risk of nationalisation. But was there a reasonable prospect, either then or in March 2009 when the restructuring was consummated, that such a nationalisation was imminent?'[849] Also, the *Tokios Tokelės* decision suggests that the aim to secure investment protection must be of a certain quality so as to establish abuse. The tribunal did not exclude the possibility that the establishment of the company was a means of gaining access to the ICSID jurisdiction, but the tribunal observed that the 'claimant *manifestly* did not create Tokios Tokelės for [such purpose].'[850]

A complete fabrication of the restructuring occurred in the *Cementownia* case, where the tribunal pointed at inconsistent statements as to the transfer of the shares,[851] the fact that the transfer was allegedly made during a telephone call and only later documented in a one-page 'contract' that was not even signed by both parties,[852] the allegation of the deposition of the transferred shares abroad when no documents proving the bank deposit were presented[853] and no reflection of the transaction in the financial statements or reports to state authorities.[854] All this indicated that the restructuring transaction never even took place.[855]

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[846] *Exxon Mobil*, ¶ 198.
[847] *Philip Morris*, ¶ 584: 'the Tribunal finds that the Claimant has not been able to prove that tax or other business reasons were determinative for the restructuring. From all the evidence on file, the Tribunal can only conclude that the main and determinative, if not sole, reason for the restructuring was the intention to bring a claim under the Treaty, using an entity from Hong Kong.'
[848] *Exxon Mobil*, ¶¶ 190, 191.
[849] *Tidewater*, ¶ 194.
[850] *Tokios Tokelės*, ¶ 56, emphasis added.
[851] *Cementownia*, ¶ 124.
[852] Ibid. ¶ 125.
[853] Ibid. ¶ 127.
[854] Ibid. ¶ 129.
[855] Ibid. ¶ 147.

The timing of the restructuring, the timing of the dispute and foreseeability

In treaty shopping cases, time is given attention almost as great as in the research of the universe and sometimes it seems that it could have made Stephen Hawking the most suitable arbitrator.

Contrary to the previously discussed criteria, timing has been considered in all of the analysed cases, and without doubts takes a privileged position, since it is perceived as the most important element that helps to identify abuse. Tribunals do not consider timing as one of the indicators of the abuse but usually consider it independently. For example, the *Pac Rim* tribunal noted that 'there is an important issue of timing and other circumstances in this case, to which it is necessary to return below at some length'[856] and thus clearly distinguished between (i) timing and (ii) other details of the case. This might be the result of the fact that tribunals are used to analyse timing in another context: it is a decisive question for ascertaining tribunals' jurisdiction *ratione temporis*.[857]

In total, there are three points of time that tribunals identify in order to evaluate possible abuse, namely:

- the point when the future dispute became foreseeable,
- the time of the restructuring and
- the time when the dispute arose.

The relationship between these moments in time is then the following. First, the tribunal needs to identify the last two points in time – the time of the restructuring (i.e. when the investment was made) and the time when the dispute materialised. If the first follows the second, the tribunal will normally identify the case as an abusive attempt to internationalise a domestic dispute or otherwise manipulate the arbitration system. If the investment is made before the dispute emerges, the tribunal may still reject to hear the case due to the foreseeability of the dispute at the time of the restructuring and consequent abuse of the system. The general rule is that 'the closer the acquisition of the investment is to the act giving rise to the dispute, the higher degree of foreseeability will normally be.'[858]

Foreseeability

According to the *Pac Rim* tribunal, the dividing line that will suggest that a change of nationality becomes an abuse of process provided that it is done before the dispute materialised is 'when the

[856] *Pac Rim*, ¶ 2.43.
[857] SCHREUER, Ch. What is a Legal Dispute? In: *Transnational Dispute Management*, issue 1, 2009, p. 975.
[858] *Gremcitel*, ¶ 187.

party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy'.[859] This foreseeability must be related to a specific future dispute.[860]

The *Pac Rim* tribunal suggested that foreseeability of a dispute must be of a certain quality, which was by other tribunals described in varying terms. The *Gremcitel* tribunal held that foreseeability equals 'a very high probability, and not a mere possibility',[861] according to the *Bivac* case, the dispute is foreseeable when there is a reasonable prospect 'that a measure which may give rise to a treaty claim will materialise',[862] while the *Tidewater* tribunal introduced a somewhat less strict requirement, namely that the dispute is 'reasonably foreseeable.'[863] As already noted, the closer the acquisition of the investment is to the act giving rise to the dispute, the higher is the degree of foreseeability.[864] Although tribunals consider foreseeability objectively and should not examine whether the claimant actually foresaw the dispute as emerging, it is not always easy to identify the moment following which the dispute became foreseeable. This is because it is necessary to operate not only with the specific act that gave rise to the foreseeability but with an evaluation of circumstances that led towards such act. During the evaluation, some problems may occur. First, the measure is hardly ever an isolated and unexpected event; more commonly it is preceded by a chain of other formal or informal acts or, in other cases, evolves gradually through time. Also, if the measure is the result of a legislative process, one must bear in mind that passing a new law may be a lengthy procedure without certain results. The decision on foreseeability will thus always be, up to a certain point, second-guessing of perceptions in the past which is made more difficult by the fact that the measure has already appeared at the point of the examination.

The time of the breach and of the dispute

These points in time do not necessarily coincide. In the *Philip Morris* dispute the tribunal noted that 'the dispute normally follows the alleged breach (it arises when an aggrieved investor "positively opposes" the measure adopted or any claim of the other party that derives from them',[865] while according to the *Gremcitel* tribunal, the breach must necessarily occur sometime before the dispute.[866]

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[859] *Pac Rim*, ¶ 2.99.
[860] Ibid.
[861] *Gremcitel*, ¶ 187, similarly *Pac Rim*, ¶ 2.99: 'the dividing-line occurs when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy.'
[862] *Philip Morris*, ¶ 554.
[863] *Tidewater*, ¶¶ 195, 197.
[864] *Gremcitel*, ¶ 187.
[865] *Philip Morris*, ¶ 532.
[866] *Gremcitel*, ¶ 149.

Also, the time of the dispute must not be confused with the moment of the commencement of arbitration proceedings, which comes after the dispute materialised and is only a manifestation of the intention of the party to the dispute to solve the dispute by arbitration proceedings.

Even after the measure causing the breach is adopted, the dispute will require that there is an apparent disagreement of the legal positions of the parties and also that communication between the parties concerning the difference of the views takes place.[867]

Why is it important to differentiate between the two moments in relation to treaty shopping was explained by the *Gremcitel* tribunal that observed that 'if a claimant acquires an investment after the date on which the challenged act occurred, the tribunal will normally lack jurisdiction *ratione temporis* and there will be no room for an abuse of process. [In the opposite case] a tribunal has jurisdiction *ratione temporis* but may be precluded from exercising its jurisdiction if the acquisition is abusive.'[868] Thus, the examination of the jurisdiction *ratione temporis* is focused on the moment of the breach while for the purposes of the abuse the important moment is when the dispute itself arose, although not all tribunals strictly follow this differentiation. Nevertheless, as the measure and the dispute usually come in close succession, both should be identified, which may be problematic especially if the act giving rise to the dispute is not a single and easily identifiable act. This problem was analysed by the tribunal in *Pac Rim*, which referring to the ILC Commentaries distinguished between

- one-time acts that happen at a precise moment in time and can have continuous effect,
- continuous acts when the same acts extend throughout a period of time and
- composite acts which include a number or individual acts extending through a period of time.[869]

While identifying the timing of one-time acts and their effect might be relatively easy, the analysis turns complicated especially with composite acts since not all of them (or, in some cases, not even any) perceived as a single act may be contrary to law, yet in their complexity they may breach the provided protection.[870] Such acts might exist over a long period of time before they crystallise into a dispute.[871]

The time of the restructuring

[867] SCHREUER, Ch. What is a Legal Dispute? In: *Transnational Dispute Management*, issue 1, 2009, p. 975.
[868] *Gremcitel*, ¶ 182.
[869] *Pac Rim*, ¶¶ 2.68–2.70.
[870] Ibid. ¶¶ 2.71–2.72.
[871] *Gremcitel*, ¶ 149.

After determining when the measures were adopted and the dispute arose, it is necessary to confront those moments with the time when the investor restructured its assets.

If the restructuring is made after the moment when the measures were adopted, the claimant would be deemed to be aware of the harm made to the investment which cannot lead to the success of the dispute.[872] By the same token, with regards to a pre-existing dispute, the jurisdiction will not be upheld[873] as the tribunal normally lacks jurisdiction *ratione temporis*.[874] Nevertheless, such conclusions are not unified; for example the *Phoenix* tribunal found that 'all damages claimed by "Phoenix" had already occurred and were inflicted […] when the alleged investment was made',[875] yet the tribunal did not expressly found lack of jurisdiction *ratione temporis* but instead emphasised the abuse of the investment protection system which would suggest that the standard jurisdictional requirements (*ratione temporis*, *ratione personae* and *ratione materiae*) were met.

Tribunals would compare the date of the dispute and of the restructuring and consider whether enough time elapsed between the restructuring and the dispute or its foreseeability. For example, the tribunal in *Autopista* noted that the claimant was incorporated 'well before the conclusion of the Agreement, the share transfer and the emergence of the present dispute',[876] which was inter alia considered as a proof that the corporate structure was not misused in this case. In *Tokios Tokelės*, the tribunal noted that: '[t]he Claimant manifestly did not create *Tokios Tokelės* for the purpose of gaining access to ICSID arbitration under the BIT against Ukraine, as the enterprise was founded six years before the BIT […] entered into force'.[877] Similarly, the *BIVAC* tribunal observed that 'the fact [that the claimant was constituted around 25 years before the initiation of the proceedings] clearly demonstrates that it was not established with the aim to profit from the favourable […] BIT only after the dispute had arisen'.[878] On the other hand 'a restructuring carried out with the intention to invoke the treaty's protections at a time when the dispute is foreseeable may constitute an abuse of process depending on the circumstances'.[879]

The *Exxon* tribunal was confronted with a particularly interesting situation because it was asked to consider a set of measures imposed by Venezuela at different times. The tribunal divided the

[872] *Cementownia*, ¶ 123.
[873] *Lisac*, ¶ 118.
[874] *Philip Morris*, ¶ 539.
[875] *Phoenix*, ¶ 136.
[876] *Autopista*, ¶ 123.
[877] *Tokios Tokelės*, ¶¶ 53–56.
[878] *BIVAC*, ¶ 93.
[879] *Gremcitel*, ¶ 185.

measures into two separate cases, applying the conclusions described above. Arbitration with regards to pending disputes would constitute abuse while for the nationalisation measures introduced after the restructuring the tribunal affirmed its jurisdiction.[880]

6.28.2 Jurisdiction or admissibility?

What procedural consequences illegal treaty shopping has is subject to debate that has not been satisfactorily resolved yet and mostly tribunals either avoided classification of the legal outcomes or adopted a practical attitude, such as the *Gremcitel* tribunal that considered that 'the characterization of the abuse of process objection as a jurisdictional or as an admissibility issue can be left open in the present case [as it would] have no impact on the outcome of the case.'[881]

While this conclusion appears practical, tribunals should not give up on identifying what is legally the cause of the claim rejection because their role is to apply the law to the facts. This approach suggests certain carelessness which is undoubtedly unwanted and resembles an intuitive legal analysis – on one hand the tribunal considers the act impossible to be heard, but on the other hand it does not identify the legal basis of the conclusion.

Academic opinion is also divided, even if there is some agreement: the exact meaning is unsettled, the grey zone lying in between is extraordinary large and the arbitration practice has not yet established a satisfactory and firm explanation of the differences.

The theoretical distinction might at first sight seem relatively straightforward – jurisdiction is usually understood as the scope of the tribunal's authority[882] and the question whether a claim may even be brought before the forum seized[883] based on the states' consent. Admissibility is centred on the question whether a specific claim should not be heard at all or yet;[884] it is centred on the particular raised claim[885] and its 'temporal, personal or substantive dimensions'.[886] However, once applied to specific issues, it turns difficult to identify the correct reason for the dismissal of the claim.

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[880] *Exxon Mobil*, ¶ 206.
[881] *Gremcitel*, ¶ 181.
[882] HEISKANEN, V. Ménage à trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration. In: *ICSID Review - Foreign Investment Law Journal*, vol. 29, issue 1, 2013, p. 7.
[883] PAULSSON, J. Jurisdiction and Admissibility. In: *Global Reflections on International Law, Commerce and Dispute Resolution*, ICC Publishing, publication 693, 2005, p. 617.
[884] Ibid.
[885] HEISKANEN, V. Ménage à trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration. In: *ICSID Review - Foreign Investment Law Journal*, vol. 29, issue 1, 2013, p. 7.
[886] Ibid. p. 12.

The difficulties are made worse by the fact that the ICSID Convention and the ICSID Rules are both silent on the term 'admissibility', only mentioning 'jurisdiction' and 'competence' of the tribunal. The same applies for other ad hoc rules or procedural rules contained in BITs.[887] This has led some to the conclusion that there is no place for admissibility in investment arbitration.[888] Also, the conclusion that the result will ultimately be the same is intensified in investment arbitration because it is an ad hoc arbitration and it is impossible to lodge the claim again before the exact same body because it will no longer exist.[889] This is an important distinction to the proceedings before the ICJ, where it is of importance whether the claim is rejected because it is not ripe yet and might be brought before the ICJ again later once the requirements are met or because the ICJ has no jurisdiction to hear the case and therefore there might not be another 'try'. In case of permanent bodies, admissibility has its clear importance.

I am more inclined towards not doing away with the differentiation of the concepts entirely but to accept the concept of jurisdiction *sensu lato*,[890] which would entail admissibility, competence and jurisdiction, and jurisdiction *stricto sensu*. This would enable tribunals to reach clear conclusions in their decisions because they would rule that they either have or have not jurisdiction (in the broad sense), while they would be free to elaborate on the exact reasoning under which the term falls without the risk of arriving at an incorrect final conclusion. This would mean that even if the tribunal identified the problem as the problem of admissibility, it would then find that it has no jurisdiction to hear the claim. However, as mentioned in subchapter 4.5, the distinction between admissibility and jurisdiction may have consequences for the possibilities of an appeal. This would however be overcome by the fact that any decision could be appealed and the claimants would not be denied their rights.

Jurisdictional and admissibility issues cover many different problems which burden investors' claims. In the analysed cases, respondents have often objected the abuse of process by investors in order to secure that the claim is dismissed. The conclusions of the tribunals were the following:

Phoenix The tribunal identified the issue as a matter of jurisdiction, because there was no protected investment (jurisdiction *ratione materiae*).

[887] SÖDERLUND, Ch.; BUROVA, E. Is There Such a Thing as Admissibility in Investment Arbitration? In: *ICSID Review - Foreign Investment Law Journal*, vol. 33, no. 2, 2018, p. 526.
[888] See SÖDERLUND, Ch.; BUROVA, E. Is There Such a Thing as Admissibility in Investment Arbitration? In: *ICSID Review - Foreign Investment Law Journal*, vol. 33, no. 2, 2018.
[889] Ibid. p. 527.
[890] HEISKANEN, V. Ménage à trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration. In: *ICSID Review - Foreign Investment Law Journal*, vol. 29, issue 1, 2013, p. 15.

Philip Morris	The tribunal perceived the initiation of proceedings constituted an abuse of rights, the claims were found inadmissible and the tribunal ruled that it was precluded from exercising jurisdiction over the dispute.
Pac Rim	The tribunal was precluded to exercise its jurisdiction or competence over a part of the claim.
Lisac	The tribunal perceived the abuse of the investment treaty system as objection to jurisdiction.
Gremcitel	The tribunal concluded that the claimant abused the process and the tribunal was precluded from exercising its jurisdiction, while expressly declaring that the distinction between jurisdiction and admissibility is superfluous.
Cementownia	The tribunal found absent jurisdiction.
National Gas	The tribunal found absent jurisdiction.

It is apparent that the conclusions vary in favour of the preclusion of jurisdiction. However, the spectrum of the outcomes includes mixing the two terms into one in case of *Philip Morris* or not paying attention to the differentiation in case of *Gremcitel*.

I would incline towards the conclusion that abuse of process in the form of treaty shopping is a question of jurisdiction because if we look into the core of the problem, it lies in the fact that the state never consented to jurisdiction with the treaty shopper. It is hence not covered by the treaty, and it is a problem connected to jurisdiction. However, I admit that treaty shopping is one of the cases that are lurking covered by shadows somewhere in the grey area and they patiently wait until an enlightened tribunal will cast light on them and classify the issue with clarity either as jurisdictional or as a problem of admissibility. I also admit that there are strong arguments for the opposite conclusions as well.

6.29 Concluding remarks

Under the current arbitration practice, treaty shopping as such is not prohibited, because otherwise it would deprive the investor of the possibility to dispose of the investment without running the risk of losing the protection afforded by investment treaties. The tribunals focused on finding the dividing line which, once crossed, causes that treaty shopping becomes abusive. This dividing line is marked

by the foreseeability or high probability and not merely by a possible controversy of the dispute at hand.[891]

If the restructuring is done after the dispute is foreseeable or already took place, the initiation of investment arbitration proceedings constitutes an abuse of rights. The generally accepted conclusion is identified most precisely in *Exxon Mobil*: treaty shopping is perfectly legitimate as far as future disputes are concerned, while treaty shopping with regards to pre-existing disputes would constitute the abuse of process.[892] However, I do not find this conclusion complete since it places emphasis solely on the timing question which was also given the most weight by the tribunals. Although it usually will be an important indicator of the motives for restructuring, it is important not to limit the analysis only to this point. It is paramount to ascertain the true reasons that lead to the restructuring. The purpose of the prohibition of abuse of rights is to secure that the rights are not exercised against their purpose. That is why it is necessary to search for the true motives of restructuring because only then can the misuse of a right be identified.

Many tribunals have dealt with the objection aimed at the nationality criteria of corporations. It is apparent from the analysed decisions that tribunals favour a strict formal reading of a treaty and they are not willing to 'import' any additional criteria. Such attempts of respondents will be in vein. The only possible path to exclude an apparent investor from protection seems to be by claiming and proving that treaty shopping constituted abuse of rights.

The fact that an investor is controlled by a third-party entity or a national of the host state itself was irrelevant for tribunals. The control criterion is only examined if article 25(2)(b) of the ICSID Convention is applied, and even then only in some cases was control by a host state national the basis for the dismissal of the claim.

[891] *Pac Rim*, ¶ 2.99.
[892] *Exxon Mobil*, ¶¶ 204, 205.

7 RECENT DEVELOPMENTS

Treaty shopping has been with us for a long time. But we cannot say that during this time we accomplished understanding it fully. The proof of this is the decision in *Phillip Morris* – one would expect that all the risks are nowadays identifiable based on the previous decisions and that investors will know well how to legitimately treaty shop. Still, the tribunal held the dispute inadmissible and marked the restructuring as abuse of rights. It is therefore not a closed chapter and further developments of the issue are surely to be expected in the future. I indicated the following relevant issues: noticeable changes in the drafting practice in reaction to treaty shopping, impacts of the *Achmea* decision on the intra-EU foreign direct investment climate and a possible inspiration by transnational tax law developments.

7.1 Changes in the drafting practice

The negative impacts of treaty shopping could not have remained ignored forever. States have gradually started to reflect its negative consequences and a growing trend of providing effective means against treaty shopping in the texts of newly concluded or re-negotiated treaties may be traced in the last decade. This comes in hand with the tendencies of the last generation of treaties that attempt to bring more equilibrium into the relationship between investors and states. I will now give a few examples of the treaties concluded in the recent years in order to demonstrate these trends.

In 2014 the European Union ('**EU**') concluded CETA with Canada which in its chapter 8 lays down rules of foreign investment protection. The agreement prescribes that the protected investor in form of legal person is only the one who is 'constituted or organised under the laws of [the contracting] Party and has substantial business activities in the territory of [the contracting] Party'.[893] The agreement therefore implicitly refuses to protect empty letterbox companies. In case of dual nationals, the CETA sets forth that the person is deemed to be a national of the country of its dominant and effective nationality,[894] which also reinforces the understanding that the agreement is aimed at protecting only investors that have qualified ties with their home state.

The CETA also limits a special form of treaty shopping which may be done using MFN clauses as it states that the MFN treatment does not apply to dispute resolution procedures and substantive obligations set forth in other investment agreements.[895]

[893] CETA, article 8.1.
[894] Ibid.
[895] Ibid. article 8.7.4.

Furthermore, the CETA explicitly excludes from arbitration investments that have 'been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process'.[896] The agreement also takes into consideration parallel proceedings as it demands that if another claim based on a different agreement is in process and there is a potential for overlapping compensation, that tribunal shall stay the proceedings and after that take into account the decision of the other tribunal.

The trend of limiting the protection scope is also manifested in the 2019 Belgium–Luxembourg Economic Union model BIT which restricts the protection to only such legal persons that have headquarters or real economic activities in the home state.[897] The model BIT includes a similar denial of benefits clause as the CETA and refers to the impossibility to submit a claim that is based on an abuse to arbitration and also provides for the same solution in case of parallel proceedings as the CETA.

Netherlands, that were deemed to be the country made for treaty shopping, which is also evidenced by a high number of investment disputes initiated by Dutch letterbox companies, introduced its new model BIT in 2019.

The BIT represents a profound shift from the previous liberal approach to investments. In case of investment qualification it demands that the investor has substantial business activities in the home state,[898] in case of dual nationals it accordingly demands effective nationality,[899] but it is more instructive than the previously mentioned treaties because it also determines possible indications of substantial business activities, which are the following:

(i) the undertaking's registered office and/or administration is established in the respective contracting party;
(ii) the undertaking's headquarters and/or management is established in the respective contracting party;
(iii) the number of employees and their qualifications based in the respective contracting party;
(iv) the turnover generated by the respective contracting party; and
(v) an office, production facility and/or research laboratory is established in the respective contracting party;

[896] CETA, article 8.18.3.
[897] 2019 Belgium–Luxembourg Economic Union Model BIT, article 2(2)(b).
[898] 2019 Netherlands Model BIT, article 1.b.ii.
[899] Ibid. article 1.b.

while the indications should be assessed in each specific case, taking into account the total number of employees and turnover of the undertaking concerned, and take account of the nature and maturity of the activities carried out by the undertaking in the contracting party in which the company is established.[900]

The model BIT also responds to possible abuses by investors, providing that '[t]he Tribunal shall decline jurisdiction if the investment has been made through fraudulent misrepresentation, concealment, corruption, or similar bad faith conduct amounting to an abuse of process'[901] and furthermore it includes a specific reference to treaty shopping practices, since the tribunal shall also 'decline jurisdiction if an investor […] which has changed its corporate structure with a main purpose to gain the protection of [the agreement] at a point in time where a dispute had arisen or was foreseeable. This particularly includes situations where an investor has changed its corporate structure with a main purpose to submit a claim to its original home state.'[902]

Another model BIT introduced in the recent years was the 2016 Slovak Model BIT that also follows the previous trends. According to the agreement, investor means 'an enterprise […], which is constituted or organised under the law of the Home State and has its seat, together with substantial business activities in the territory of the Home State.'[903] It includes the same denial of benefits clause as the CETA[904] and excludes claims based on the conduct amounting to an abuse of process from submission to an investment tribunal.[905]

The 2016 Czech Republic Model BIT defines the investor in a form of a legal person as 'any entity incorporated or constituted in accordance with, and recognized as legal person by its laws, having the permanent seat and conducting substantial business activities within the territory of that Contracting Parties.'[906] The model BIT also reacts to the negative experience with parallel proceedings underwent by the Czech Republic in the past and it stipulates that: 'if an investment is held […] by an investor, who is a legal person of one Contracting Party, in the territory of the other Contracting Party and such an investor is directly or indirectly owned or controlled by a person of a third State or of the other Contracting Party, the investor of a Contracting Party may not initiate or continue proceedings under this Article if the person of a third State or the person of the other Contracting Party submits

[900] 2019 Netherlands Model BIT, article 1.c.
[901] Ibid. article 16.2.
[902] Ibid. article 16.3.
[903] 2016 Slovak Model BIT, article 1.3.b.
[904] Ibid. article 10.
[905] Ibid. article 15.5.
[906] 2016 Czech Model BIT, article 1.3.

or has submitted a claim with respect to the same measure or series of measures under any agreement between the other Contracting Party and the third State. The arbitral tribunal shall terminate the arbitral proceedings if the dispute settlement procedure initiated by the person of a third State or a person of the other Contracting Party is decided on the merits.'[907]

The next examined investment treaty instrument is the investment chapter of the Australia–Indonesia Comprehensive Economic Partnership Agreement, entering into force in May 2020. The contracting parties decided not to impose such strict criteria on investors (the agreement demands merely that the investor carries out business activities in the territory of the concerned state), but they included a denial of benefits clause that enables the state at any time, including after the initiation of the arbitration proceedings, to deny the benefits to an investor controlled by other entity and not carrying out substantial business activities within the home state.[908]

Also in May 2020, the long functioning NAFTA was replaced by a new agreement USMCA which contains a liberal definition of the investor similarly demanding constitution in the territory of the contracting state and carrying out business activities there,[909] but at the same time includes a relatively effective denial of benefits clause against claimants owned or controlled by third parties and not having substantial business activities in the concerned territory.[910]

The last analysed investment agreement is the 2018 EU–Singapore Investment Protection Agreement which demands from the jurisdictional persons either their registered office, central administration (head office where ultimate decision making takes place) or principal place of business in the respective territory, moreover, if the entity only has registered office or central administration in the given state, it must also engage in substantive business operations there[911] and in this sense the treaty includes relatively strict criteria for qualification.

Another example of the drafting shift connected to treaty shopping might be expected in case of the ECT. The tribunals interpreting the denial of benefits clause in the ECT set forth strict requirements for its espousal, including the condition to deny the benefits before the proceedings with the concerned investor have started or even before the dispute arose. The EU lately proposed the amendment of the denial of benefits clause which suggests that the right could be exercised without

[907] 2016 Czech Model BIT, article 8.7.b.
[908] Australia–Indonesia Comprehensive Economic Partnership Agreement, article 14.3.
[909] USMCA, article 14.1.
[910] Ibid. 14.14.
[911] 2018 EU–Singapore Investment Protection Agreement, article 1.2.5.

prior notification without any time limits. The proposed change reacts directly to the arbitration practice and to the problems that evolved concerning the denial of benefits contained in the ECT.[912]

The states nowadays tend to 'attempt to circumscribe who qualifies as an investor and what counts as a protected investment'.[913] The current trend is to secure protection of genuine investors instead of purposively established shell companies. However, this only applies to situations when the states have actively considered the previous practice and decided to reflect the needs for change. If states only continue including new agreements without any further reflection of the recent trends, the texts remain mainly unchanged and do not provide for protection against treaty shopping. On the other hand, if the newly concluded FTAs or BITs will be based on the issued model BITs it is to be expected that they will include additional requirements on covered investors such as having headquarters and carrying out substantial business activities in the home states.

7.2 Implications of the *Achmea* decision and the dusk of investment treaty protection in the EU

On 6 March 2018 the CJEU issued its judgement in the case of Achmea BV against the Slovak Republic based on the request for a preliminary ruling from a German court.[914] Without doubts, it is the most important decision of the CJEU related to investment arbitration matters so far.

The request for the preliminary ruling arose before the Germany Federal Court of Justice in the course of proceedings in which Slovakia was seeking to set aside the arbitral award of the investment tribunal to pay damages to the investor, Achmea. The arbitral award was issued by an investment tribunal operating under the UNCITRAL rules based on the BIT between the Netherlands and the Czech and Slovak Federal Republic whose seat of arbitration was chosen to be Germany.[915]

The German court referred to the CJEU primarily the question whether articles 267 and 344 of the Treaty on the Functioning of the European Union ('**TFEU**') should be interpreted as precluding the dispute settlement provisions contained in BITs concluded between the EU member states.

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[912] BALTAG, C.; MISTELIS, L. *ECT Modernisation Perspectives: ECT Modernisation and the Denial of Benefits Clause: Where the Practice Meets the Law* [online]. Kluwer Arbitration Blog [accessed 21/8/2020]. Available at: http://arbitrationblog.kluwerarbitration.com/2020/07/22/ect-modernisation-perspectives-ect-modernisation-and-the-denial-of-benefits-clause-where-the-practice-meets-the-law/?doing_wp_cron=1597395406.8841099739074707031250.
[913] ROLLAND, S.; TRUBEK, D. *Emerging Powers in the International Economic Order: Cooperation, Competition and Transformation*. Cambridge: Cambridge University Press, 2019, p. 87.
[914] *Achmea*.
[915] Ibid. ¶¶ 3–12.

The preliminary ruling of the CJEU was based on the following. Article 344 of the TFEU prescribes to submit a dispute concerning the interpretation or application of the EU law exclusively to the CJEU; article 267 of the TFEU then provides for the possibility of the preliminary ruling procedure that may be exercised by the courts and tribunals of the EU member states. Under the investment treaties, the investment tribunals shall take into account law in force of the contracting parties and any agreements between them.[916] Since EU law forms part of legal debris between the member states, an investment tribunal may be called upon interpreting or applying EU law in the course of the investment dispute settlement.[917] The investment tribunal is not however empowered to pose a preliminary ruling and thus secure compliance of the award with EU law. Issued arbitration awards are typically not subject to review of courts of the EU member states that could secure the compliance with EU law instead.[918] For that reasons, the court concluded that the dispute settlement provisions in the BITs 'could prevent [the investor-state] disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law.'[919] In this sense, the investment law system has an adverse effect on the autonomy of the EU law.[920]

Finally, the answer to the referring court was that articles 267 and 344 of the TFEU must be interpreted as precluding a dispute settlement provision of investment treaties between the EU member states.[921]

The decision provoked displeasing reactions of the foreign investment community. It certainly does not by itself mean the end of investment arbitration initiated by investors against EU member states, especially because the judgement looks at the issue from the perspective of EU law and the decision of the CJEU is not binding upon investment tribunals. But, it is undisputable that it substantially increased the risk of non-recognition and unenforceability of investment awards by the courts of the EU member states that are bound by the CJEU interpretation.

To mitigate these risks, intra-EU investors have basically two options – either try to enforce the award outside the EU, or to restructure the investment in such way that the investment proceedings would not be based on an intra-EU BIT.

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[916] *Achmea*, ¶¶ 31–40.
[917] Ibid. ¶ 42.
[918] Ibid. ¶¶ 49, 50.
[919] Ibid. ¶ 56.
[920] Ibid. ¶ 59.
[921] Ibid. ¶ 60.

The view of the EU bodies on the intra-EU investment protection is indisputably negative. In the past years, the EU has taken the position more and more adverse towards the protection of investments through intra-EU BITs.

In 2015 the European Commission ('**Commission**') initiated infringement proceedings against five EU member states requesting termination of their intra-EU BITs on the basis of their incompatibilities with EU law, especially single market rules. The Commission has also submitted amicus curiae to investment arbitrations in at least eleven cases.[922] The hostility of the Commission against the intra-EU BITs is evident.

Following the *Achmea* decision, the Commission issued a communication on the protection of intra-EU investment in which it officially further clarified its position on the unlawfulness of intra-EU BITs and its conviction that EU law framework provides sufficient protection of investments.[923]

Furthermore, in January 2019, in reaction to the *Achmea* decision, 22 EU member states issued a declaration on the intention and commitment to terminate their intra-EU BITs,[924] subsequently, in October 2019, the member states reached an agreement on a plurilateral treaty for the termination of the BITs[925] and on 5 May 2020 the treaty was signed. The conclusion of the agreement is a direct reaction to the *Achmea* decision on the incompatibility of investment arbitration with EU law and current culmination of the tendencies of the EU.[926] It applies to any arbitration rules or conventions, including ICSID and UNCITRAL.[927] The treaty terminates selected investment agreements expressly including their sunset clauses[928] and arbitration clauses contained in these investment agreements cannot serve as legal basis for a new initiation of investment arbitration proceedings.[929]

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[922] SIMÕES, F. A Guardian and a Friend? The European Commission's Participation in Investment Arbitration. In: *Michigan State International Law Review*, vol. 25, no. 2, 2017, p. 257.
[923] *Communication from the Commission to the European Parliament and the Council* [online]. European Commission [accessed 20/5/2020]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0547&rid=8.
[924] *Declaration of the representatives of the governments of the Member states of 15 January 2020 on the legal consequences of the judgement of the Court of Justice in Achmea and on Investment protection in the European Union* [online]. europa.eu [accessed 20/5/2020]. Available at: https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf.
[925] *EU Member States sign an agreement for the termination of intra-EU bilateral investment treaties* [online]. European Commission [accessed 10/5/2020]. Available at: https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/191024-bilateral-investment-treaties_en.pdf.
[926] Ibid.
[927] Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, recital, article 1.
[928] Ibid.
[929] Ibid. article 5.

Although the detailed practical implications of the *Achmea* decision and its impacts are not fully clear yet, there is a wide agreement that it made investment under intra-EU BITs very risky[930] and following the inta-EU BIT termination treaty virtually impossible. In this sense, clearly, treaty shopping considerations gained prominent importance for investors that intend to engage in business in the EU. Depriving the investors of the ISDS mechanism and the following uncertainty may discourage investment inflow or the investors may decide to engage in treaty shopping[931] which is an obvious option to protect themselves against the risk that may result from an intra-EU investment claim.[932] According to the survey on the 'Effects of the Achmea decision on Intra-EU BIT Claims, Law Firms, and Third-Party Funders' conducted in 2019, a number of law firms advised their clients to restructure in order to benefit from extra-EU BITs[933] and it also indicates that the companies themselves consider to move their headquarters and restructure their investment.[934] The country advised for restructuring was mainly Switzerland followed by the after-brexit UK and Singapore.[935]

The investment climate is also influenced by the standpoint of the Commission that has in the recent years materialised and led to the gradual termination of intra-EU BITs. It seems that in the end the EU member states accepted the reading of the EU bodies suggesting the illegality of intra-EU BITs which is evidenced by the intra-EU BITs termination treaty.

The obvious conclusion is that if investors properly wish to protect their investments in the EU, they literally need to engage in treaty shopping. In this sense, this practice, although it is not new, regained significant importance.

7.3 MLI – inspiration by international tax law developments

Investment law regime proves its notorious rigidity when it comes to attempts of reforms. Although there is a general agreement that the current state of investment law consisting of countless individual investment treaties is chaotic and impractical, apart from the conclusion of the ICSID Convention

[930] NAGY, C. Intra-EU BITs after Achmea: a Cross-Cutting Issue. In: *Investment Arbitration in Central and Eastern Europe: Law and Practice*. Edward Elgar Publishing, 2019, p. 144.
[931] WIERZBOWSKI, K.; SZOSTAK, A. *The Downfall of Investment Treaty Arbitration and Possible Future Developments* [online]. International Bar Association [accessed 21/5/2020]. Available at: https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=4a89e7c5-a8e3-4629-aa89-fc8051b7acde.
[932] NAGY, C. Intra-EU BITs after Achmea: a Cross-Cutting Issue. In: *Investment Arbitration in Central and Eastern Europe: Law and Practice*. Edward Elgar Publishing, 2019, p. 138.
[933] YILMAZ, A; TUJAKOWSKA, A; MOTOC, I. *The Effects of the Achmea Judgment on Intra-EUBIT Claims, Law Firms, and Third-Party Funders* [online]. Georgetown University [accessed 21/5/2020], p. 6. Available at: https://georgetown.app.box.com/s/91mpvisyco5wtpa2rqu0uiivxwai4b6s.
[934] Ibid.
[935] Ibid. Similar suggestions are expressed in: TONOVA, S. et al. *Restructuring Recommended after CJEU Decision on Intra-EU Bilateral Investment Treaties* [online]. JonesDay [accessed 21/5/2020]. Available at: https://www.jonesday.com/en/insights/2018/03/restructuring-recommended-after-cjeu-decision-on-i.

little has been achieved in the field of unifying the investment protection regime, with the exception of the Convention on Transparency in Treaty-based Investor-State Arbitration of 2017.[936]

A good example to demonstrate that unification is indeed possible is to compare investment law with developments concerning treaty shopping in tax law with regards to double taxation treaties.

Tax treaty shopping brings similar problems as treaty shopping in investment law does, i.e. the treaty benefits are economically extended to residents of third jurisdiction in a way parties did not intend which causes the breach of the principle of reciprocity.[937] Opposite to investment law, in tax law, the practice is explicitly viewed as negative and the states are noticeably willing to address its downsides.

Under the auspices of the Organisation for Economic Co-operation and Development (OECD) 116 countries committed themselves in the 2014 'BEPS package' to implement standards on preventing the granting of treaty benefits in inappropriate circumstances. Only two years later, in 2016 a Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ('**MLI**') was negotiated in order to implement the treaty-based measures.[938] These measures include implementation of the preamble statement specifically addressing the will of the parties to prevent treaty shopping[939] and introducing a 'principal purpose test' into the double taxation treaties.

To achieve the implementation, the following the MLI model clause should be inserted into double taxation treaties: 'a benefit under the Covered Tax Agreement shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the Covered Tax Agreement.'[940] The parties undertake to introduce these measures into

[936] *Treaty shopping and tools for treaty reform* [online]. OECD [accessed 21/5/2020], p. 5. Available at: https://www.oecd.org/daf/inv/investment-policy/4th-Annual-Conference-on-Investment-Treaties-agenda.pdf.
[937] *Prevention of Treaty Abuse – Peer Review Report on Treaty Shopping* [online]. OECD publishing [accessed 30/5/2020], p. 14. Available at: https://read.oecd-ilibrary.org/taxation/prevention-of-treaty-abuse-peer-review-report-on-treaty-shopping_9789264312388-en#page1.
[938] Ibid.
[939] MLI, article 6.
[940] MLI, article 7.

their bilateral treaties and many have already done so.[941] The MLI provides for modification of over 3,000 bilateral treaties.[942]

The reason for introducing the MLI measures was the prevention of the use of tax heavens and facing multiple claims[943] and the states explicitly admitted that treaty shopping is a problem. One may try to guess the reasons for the different level of willingness of the solution of the very similar situation. It might be because tax evasion is more specific and common problem encountered by any state while treaty shopping in investment law has impact mainly on 'typical' respondent states while investors of other states benefit from it without causing any harm to their home states. This may be reason why it might be difficult to reach general agreement between with regards to investment treaties because investment treaty shopping is harmful only to some of them. Also, the arbitration practice evolved into the view that in general, investment treaty shopping is not illegal and legally problematic even though the legal justification for intervening against it is literally identical in tax as well as investment law – in both cases the negative aspect is benefiting from protection that is not aimed at the concerned addressee of the rights contrary to the object and purpose of the provided protection.

Whatever the reason is, the MLI is at least providing an important example that revision of complex bilateral treaty systems is possible if actors share the same will.

7.4 Concluding remarks

Treaty shopping still poses challenges to investment law actors. In the recent years, some states have started to take an active role in order to diminish consequences inherent to targeted corporate manoeuvring by polishing definitions of investors in the investment treaties or experimenting with inclusion of denial of benefits clauses.

It has also been showed that treaty shopping tendencies might grow as consequence of the CJEU *Achmea* decision that, together with the arrangements made by the EU member states in reaction to the decision, essentially deprived investors of intra-EU BIT protection. It is assumed that the future

941 See *MLI Matching Database* [online]. OECD. Available at: https://www.oecd.org/tax/beps/mli-matching-database.htm.
942 *Landmark tax agreement to strengthen tax treaties enters into force with additional countries joining* [online]. OECD [accessed 30/5/2020]. Available at: https://www.oecd.org/tax/beps/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm.
943 TIETJE, Ch.; KRAFT, G.; LEHMANN, M. (eds.) *The Determination of the Nationality of Investors under Investment Protection Treaties* [online]. Martin Luther University Halle-Wittenberg [accessed 30/5/2020]. p. 83. Available at: http://telc.jura.uni-halle.de/sites/default/files/BeitraegeTWR/Heft%20106.pdf.

trend will be to secure a better position by relocating investment in way that investors are protected by extra-EU BITs.

In order to face such challenge, it would be apt to re-think the current functioning of investment protection system – this would be in line with other law areas, such as international taxation law, which now tends to stress the reality of the transactions over legal perceptions. Generally, there are traceable tendencies to perceive beneficiaries not as entities separate from the companies they own, but as someone who is in fact able to effectively control them and in majority exercises the control. This is a fact that investment law should in the future face and draw appropriate consequences from. The growing unwillingness of states to tolerate treaty shopping is apparent in the recent years and let us hope that it is only a question of time until also investment law finds a more balanced solution with regards to treaty shopping issues.

8 CONCLUSION

This thesis offered a comprehensive overview and analysis of treaty shopping in international investment law. To achieve this aim, I started with largely theoretical chapters in which attention was first devoted to several related issues, such as the question of how to approach the nationality of legal persons under investment treaties, or how general principles of law operate in investment law. In the analysis that followed, I focussed on the denial of benefits clauses that are inserted into some treaties in order to prevent treaty shopping. In the second half of the thesis I examined investment arbitration tribunals' decisions and analysed their approach to treaty shopping. In the end, I brought attention to possible future challenges relating to treaty shopping. I will now set out the conclusions of my research in more detail.

The identification of nationality of legal persons in international investment law is a subject of continuing debates. There are generally four different ways how to ascertain nationality in international law – a legal person may be deemed a national of a state (i) in which it is incorporated, (ii) in which it has a seat, (iii) whose nationals have control over it, or (iv) in which it carries out its business activities.

While these factors are, in principle, of equal weight, tribunals tend to consider incorporation as the decisive factor, unless the treaty itself provides otherwise. Respondents' arguments based on the necessity of the claimant to have a closer link with the home country were rejected by tribunals on the grounds that such an approach would result in importing additional criteria into treaties and disregarding the will of the contracting states.

This is different with regards to article 25(2)(b) of the ICSID Convention, which explicitly refers to the control criterion, whose application allows to create a legal fiction that a locally incorporated company is deemed to be foreign if it is under foreign control, and the host state consented to treat it as foreign. In the case of a majority share in a local company by a foreign entity, tribunals tend to equate ownership and control, in the sense that ownership necessarily encompasses control. This also applies in the case of shell holding companies in controlling positions. Control is therefore viewed as a formal criterion, not as an effective one: tribunals do not examine whether the control is actually exercised; the mere possibility to exercise it is sufficient.

Nevertheless, there are two exceptions to this approach that follow from decisions of investment arbitration tribunals. The first exception applies to minority shareholdings: in this case the actual control should be present in order to take advantage of the benefits of article 25(2)(b) of the ICSID Convention. The second exception applies in situations when the ultimate beneficiary is a

national of the host state – i.e. in cases that are attempts to elevate domestic disputes to the international level. Some tribunals have refused to allow such protection.

The subsequent discussion focussed on the denial of benefits clauses that are sometimes included in investment treaties as a means to preclude treaty shopping. The thesis showed that a number of application problems arise when states invoke these clauses. In some instances, these issues may even render the clauses useless. On the other hand, it is relatively easy to overcome these deficiencies by accurate drafting. However, as my analysis revealed, in the recently concluded treaties the states did not, in most cases, take the opportunity to prevent treaty shopping by inserting this practical provision. In this context, I also suggested a wording of a model denial of benefits clause that takes into consideration the application problems and should therefore effectively enable states to use it to confront treaty shopping, which is the following for an automatic application:

'The benefits of this agreement are denied to investors that:

c) are controlled or owned by or whose UBO is a national of a non-party or of the party that is the host state of the investor or
d) have no substantial business activities in the territory of the home state, especially investors whose primary purpose is to gain protection of this treaty that would not otherwise be available to them.'

Or, if the clause is to operate on the basis of an invocation, I suggest the following wording:

'Any Contracting Party may deny the benefits of this Agreement to investors that:

c) are controlled or owned by a national of a non-party or of the party that is the host state of the investor or
d) have no substantial business activities in the territory of the home state, especially investors whose primary purpose is to gain protection of this treaty that would not otherwise be available to them.

Such denial may be exercised at any time, in case of a dispute until the time limit for the jurisdictional objections according to the applicable procedural rules. The denial may be exercised directly towards the investor or in an official gazette of the contracting party. The other contracting party shall be informed of the exercise of the denial. Once exercised, the denial shall apply to the investors or investments specified therein, whether existing or future.

For the purposes of this clause,

"substantiality" means carrying out active business activities in the territory of the home state, such as maintaining employees or entering into business transactions,

"control" means especially the ability to appoint directors or other bodies responsible for the decision making or having more than 50 percent of the voting rights either individually or jointly with other connected entities,

"owned" means direct or indirect ownership of 50 percent of the company or more either individually or jointly with connected entities,

"UBO" means any natural person who ultimately owns or controls the investor, especially on the basis of a sufficient percentage of shares, voting rights or other means.'

Next, I moved to the question of how the principle of good faith and the prohibition of abuse of rights may influence the protection provided to investors. An abuse occurs if a right is exercised in such a manner that it goes against the purpose of that right. With regards to treaty shopping, the prohibition of abuse of rights is a principle that is significant for two reasons.

First, the principle of good faith underlies the interpretation rules under the Vienna Convention, so investment treaties need to be interpreted inter alia in good faith and in the light of their object and purpose – the purpose interpretation is, according to my conclusions, only another reflection of the principle of good faith. Contrary to the findings of most tribunals that tend to prefer the view that the economic cooperation, protection and promotion of investors or investments are the main objectives of investment treaties, I consider the purpose and object of their conclusion to be the development of contracting states resulting from the attraction of foreign investment, and I perceive protection of investors only as a tool to reach this goal. This reading leads to the conclusion that only investments that are actually capable of bringing foreign capital are to be protected. I also argue that the object and purpose should not be extracted only from preambles of treaties, but also from the general context, including the underlying rationales of foreign investment protection.

Secondly, the prohibition of abuse of rights may be relied on to refuse treaty protection to an investor that misused its rights under the investment treaty concerned. This will, again, occur if granting protection would frustrate the purpose of that treaty. In order to make such a finding, a tribunal will normally need to lift the corporate veil of the corporation, which tribunals mostly rejected to do. In this respect, tribunals apply a double standard: the veil is lifted more commonly if this is

done for the purpose of extending investment protection, rather than limiting such protection. It is also true that tribunals applied the principle of abuse of rights only in extraordinary situations when abuse was manifestly apparent. The threshold is thus set very high.

I will now return to the research question of this thesis which reads: 'Are there limits of treaty shopping in international investment law and if yes, how can those limits be formulated? Is the decision-making practice in line with them?'

I conclude that there are two limits imposed on treaty shopping. The first limit is set by the wording of treaties, be it by carefully drafted nationality requirements or the denial of benefits clauses that might give states the right to prevent treaty shopping ex post. Treaty shopping may be prevented if treaties include a definition of an investor that requires closer links to the home country, such as carrying-out substantial business activities in the home state or being under control of nationals of that state. The denial of benefits clauses operate reversely: they give states the opportunity to deny benefits of a treaty to entities that do not have a close relationship to the home country.

However, even if the text does not provide for these possibilities, there is a second impediment to treaty shopping – the principle of abuse of rights. It will of course depend on individual circumstances of the case, still, there is abuse when providing protection to an investor would go against the object and purpose of the investment treaty in question. The object is predominantly the development of the contracting states – if this object is frustrated, the attempt to use investment protection will be abusive. Any treaty shopping carried out by the domestic investor is thus necessarily abusive because such investment can never fulfil the objective of bringing foreign capital to the host state and, in this sense, enable its further development. In other scenarios, a close scrutiny of the details of the case is necessary to verify whether the exercise of rights by an investor goes against the purpose of protection.

I base my conclusions on the operation of the principle of good faith, since it is in line with the interpretation rules of the Vienna Convention, it pursues the reciprocity principle, respects the consent of contracting states and reflect the true rationale behind the conclusion of investment treaties.

Tribunals have groundlessly preferred highlighting the first limit imposed on treaty shopping, that is, the treaty text. However, when they do so in complete disregard of the second limit, they are not interpreting the relevant treaty in good faith.

Tribunals that have considered a possible abuse of rights by treaty shopping have established a satisfactory set of criteria to examine, such as the reasons for restructuring, the substance of the corporate change, the details of the business activities of investors and, predominantly, the foreseeability of a specific dispute. However, I do not agree that the foreseeability of the dispute should be given more weight per se than the other factors. Tribunals perceive foreseeability as the major dividing line between legitimate restructuring and abusive treaty shopping; however, I see no reason for distinguishing between restructuring made with regards to possible future disputes and with regards to a specific dispute. The result is the same – establishing jurisdiction in cases in which investment arbitration would not normally be available to investors by misusing the established system and going against the object and purpose of investment protection regime.

In my understanding, the current approach of tribunals should be modified at least in two respects. First, the application of the abuse of rights doctrine should not be reserved only to manifest abuses; the standard is breached in any case when the aim of the provided protection is frustrated. Secondly, tribunals unnecessarily discriminate against interpretation techniques other than textual interpretation. Although they often refer to the will of the parties which they are not ready to disrespect, they ignore that the contracting parties' will is not imprinted exclusively in the wording of a treaty, but is also expressed by the motives and reasons for its conclusion.

I thus conclude that the limits set by the arbitration practice on treaty shopping are not satisfactory. Arbitrators have willingly overseen the reality and have been timidly using the text of the treaties as mothers' skirts. It is manifestly obvious that the case of WCV, as described at the very beginning of this thesis, is a laugh in the face of respondent states. Despite the obvious flaws of this approach, the arbitration practice has been unable to react accordingly. For all the theoretical deliberations, arbitrators might lose connection to economic reality and the motives behind the existence of the preferential investment protection regime. Investment disputes are very sensitive in two respects. First, they are extremely costly. Secondly, they are aimed at a paramount power of the state – its sovereignty, which is considerably limited by investment treaties. Especially the latter should compel arbitrators to prefer restrictive interpretations of the scope of investment protection. Nonetheless, the analysed decisions did not follow this approach. Foreign investors are investors by nature, and every investment entails a risk that they are willing to take with the profits in sight. Tribunals should bear in mind that it will be the people of often undeveloped countries that will pay the price for their extensive interpretation of investment protection.

In order not to end on a negative note, I believe that there is a solution which lies in an improved drafting or re-drafting practice. It is true that states are the masters of international treaties that they conclude, and the future is thus in their hands. It is evident that investors do not hesitate to misuse complex corporate structures to secure jurisdiction of investment tribunals, which adds to the current mistrust in investment law by the public. By the same token it is apparent that treaty shopping is perceived negatively by states which is evidenced by trends in some of the newly concluded treaties and also by the ongoing academic debate of possible reforms of the current system. If this trend continues, it is possible that the problem of treaty shopping will once be overcome.

ABBREVIATIONS

ASEAN Treaty	1987 Association of South East Asian Nations (ASEAN) Agreement for the Promotion and Protection of Investments
BIT/BITs	Bilateral Investment Treaty/Bilateral Investment Treaties
CAFTA	Central America Free Trade Agreement
CETA	EU–Canada Comprehensive Economic and Trade Agreement
CJEU	Court of Justice of the European Union
Commission	European Commission
Draft Articles	Draft Articles on Diplomatic Protection (2006)
ECT	Energy Charter Treaty
EU	European Union
FCN	Friendship, Commerce and Navigation treaties
FTA/FTAs	Free Trade Agreement / Free Trade Agreements
Hague Convention	Convention on Certain Questions Relating to the Conflict of Nationality Law of 12 April 1930
IIA/IIAs	International Investment Agreement / International Investment Agreements
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
ICSID Rules	ICSID Convention Arbitration Rules
ISDS	investor-state dispute settlement
MFN	most-favoured-nation

MLI	Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting
NAFTA	North American Free Trade Agreement
Statute of the ICJ	Statute of the International Court of Justice, United States Treaty Series: TS 993
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
USMCA	United States-Mexico-Canada Agreement
Vienna Convention	Vienna Convention on the Law of the Treaties
WTO	World Trade Organisation

CITED DECISIONS

AAPL	Asian Agricultural Products Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Final Award.
Abaclat	Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5 (formerly Giovanna a Beccara and Others v. The Argentine Republic), Decision on Jurisdiction and Admissibility.
ADC	ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary, ICSID Case No. ARB/03/16, Award of the Tribunal.
Aguas del Tunari	Aguas del Tunari, S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction.
Dissenting Declaration of Jose Luis Alberro-Semerena to Aguas del Tunari (Jurisdiction)	Dissenting Declaration of Jose Luis Alberro-Semerena to the Decision on Jurisdiction in Aguas del Tunari.
Achmea	CJEU Case C-284/16.
AIG	AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan (ICSID Case No. ARB/01/6), Award.
Amco	Amco Asia Corporation and others v. Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on Jurisdiction.
Amoco	Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran, National Iranian Oil Company, National Petrochemical Company and Kharg Chemical Company Limited IUSCT Case No. 56, Partial Award.
Ampal	Ampal-American Israel Corporation and others v. Arab Republic of Egypt, ICSID Case No. ARB/12/11, Decision on Jurisdiction.
Amto	Limited Liability Company Amto v. Ukraine, SCC Case No. 080/2005, Final Award.

Autopista	Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/00/5, Decision on Jurisdiction.
Banro	Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema S.A.R.L. v. Democratic Republic of the Congo, ICSID Case No. ARB/98/7, Award.
Barcelona Traction	Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain); Second Phase, International Court of Justice (ICJ), 5 February 1970.
Separate Opinion of Judge Gros to Barcelona Traction	Separate Opinion of Judge Gros to Barcelona Traction.
Separate Opinion of Judge Sir Gerald Fitzmaurice to Barcelona Traction	Separate Opinion of Judge Sir Gerald Fitzmaurice to Barcelona Traction.
Separate Opinion of Judge Tanaka to Barcelona Traction	Separate Opinion of Judge Tanaka to Barcelona Traction.
Capital Financial Holdings	Capital Financial Holdings Luxembourg S.A. v. Republic of Cameroon, ICSID Case No. ARB/15/18, Award of the Tribunal.
CEAC	Central European Aluminium Company (CEAC) v. Montenegro, ICSID Case No. ARB/14/8, Award.
Cementownia	Cementownia "Nowa Huta" S.A. v. Republic of Turkey, ICSID Case No. ARB(AF)/06/2, Award.
CME	CME Czech Republic B.V. v. The Czech Republic, UNCITRAL, Partial Award.
CME, dissenting opinion	Dissenting opinion of the Arbitrator JUDr Jaroslav Hándl to the Partial Arbitration Award in CME.
CMS	CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction.

ConocoPhillips	ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits.
Diallo	Case Concerning Ahmadou Sadio Diallo, Guinea v Congo, the Democratic Republic of the, Judgment on compensation, ICJ GL No 103, [2012] ICJ Rep 324, ICGJ 435 (ICJ 2012), 19th June 2012, International Court of Justice.
Egypt Middle East Cement	Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/99/6, Award.
El Paso	El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, Decision on Jurisdiction.
ELSI	Elettronica Sicula SpA (ELSI), United States v Italy, Judgment, Merits, ICJ GL No 76, [1989] ICJ Rep 15, (1989) 28 ILM 1109, ICGJ 95 (ICJ 1989), 20th July 1989, United Nations [UN]; International Court of Justice [ICJ].
Enron	Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on Jurisdiction.
Europe Cement	Europe Cement Investment & Trade S.A. v. Republic of Turkey, Award.
Exxon Mobil	Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Decision on Jurisdiction.
Gabčikovo-Nagymaros	The Gabcikovo-Nagymaros Project (Hungaryislovakia) Judgement of ICJ of 25 September 1997.
Generation Ukraine	Generation Ukraine, Inc. v. Ukraine, ICSID Case No. ARB/00/9, Award.

Gremcitel	Renée Rose Levy and Gremcitel S.A. v. Republic of Peru, ICSID Case No. ARB/11/17, Award.
Hamester	Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award.
Chartered Bank	Standard Chartered Bank v. The United Republic of Tanzania, ICSID Case No. ARB/10/12, Award.
Inceysa	Inceysa Vallisoletana S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award.
Iron Rhine	Award in the Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands, decision of 24 May 2005, PCA.
Khan Resources	Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v. The Government of Mongolia, UNCITRAL, Decision on Jurisdiction.
Klöckner	Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais, ICSID Case No. ARB/81/2, Resubmission Award.
Lanco	Lanco International Inc. v. The Argentine Republic, ICSID Case No. ARB/97/6, Jurisdiction of the Arbitral Tribunal Decision.
Lauder	Ronald S. Lauder v. The Czech Republic, UNCITRAL, Final Award.
LETCO	Liberian Eastern Timber Corporation v. Republic of Liberia, ICSID Case No. ARB/83/2, Award.
Lisac	Transglobal Green Energy, LLC and Transglobal Green Energy de Panama, S.A. v. The Republic of Panama, ICSID Case No. ARB/13/28, Award.
Malicorp	Malicorp Limited v. The Arab Republic of Egypt, ICSID Case No. ARB/08/18, Award.

Masdar	Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1, Award.
Mera	Mera Investment Fund Limited v. Republic of Serbia, ICSID Case No. ARB/17/2, Decision on Jurisdiction.
Namibia (Legal Consequences)	Namibia (Legal Consequences) Advisory Opinion (1971) I.C.J. Rep.
National Gas	National Gas S.A.E. v. Arab Republic of Egypt, ICSID Case No. ARB/11/7, Award.
Notebohm	Nottebohm Case (second phase), Judgement of April 6th, 19 jj : I.C. J. Reports 1955.
Nuclear Tests	Nuclear Tests Case (Australia v. France), International Court of Justice (ICJ), 20 December 1974.
Pac Rim	Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections.
Panevezys-Saldutiskis Railway case	Panevezys-Saldutiskis Railway case, P.C.I.J., Series AIB, No. 76.
Petrobart	Petrobart Limited v. The Kyrgyz Republic, SCC Case No. 126/2003, Award.
Philip Morris	Philip Morris Asia Limited v. The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility.
Phoenix	Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award.
Plama	Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award.
Plama, Decision on Jurisdiction	Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction.

Rompetrol	The Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility.
RSM	RSM Production Corporation and others v. Grenada, ICSID Case No. ARB/10/6, Award.
Rurelec	Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia, UNCITRAL, PCA Case No. 2011-17, Award.
Saipem	Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/07, Award.
Saluka	Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award.
Sedelmayer	Mr. Franz Sedelmayer v. The Russian Federation, SCC, rendered on July 7, 1998, Award.
Sentel	Millicom International Operations B.V. and Sentel GSM SA v. The Republic of Senegal, ICSID Case No. ARB/08/20, Decision on Jurisdiction of the Arbitral Tribunal.
Siemens	Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, Award.
Siemens, Decision on Jurisdiction	Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, Decision on Jurisdiction.
SOABI	Société Ouest Africaine des Bétons Industriels v. Senegal, ICSID Case No. ARB/82/1, Decision on Jurisdiction.
SOABI dissenting opinion of Kéba Mbaye	Dissenting opinion of Kéba Mbaye to the SOABI case.
Soufraki	Hussein Nuaman Soufraki v. The United Arab Emirates, ICSID Case No. ARB/02/7, Award.
Thunderbird	International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL, Arbitral Award.

Tidewater	Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/5, Decision on Jurisdiction.
Tokios Tokelės	Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction.
Tokios Tokelės, Award	Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Award.
Tokios Tokelės, Dissenting opinion	Dissenting opinion of Professor Weil to the Decision on Jurisdiction in Tokios Tokelės.
TSA	TSA Spectrum de Argentina S.A. v. Argentine Republic, ICSID Case No. ARB/05/5, Award.
Ulysseas	Ulysseas, Inc. v. The Republic of Ecuador, UNCITRAL, Interim Award.
United States – Shrimp	United States - Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, 12 October 1998, AB-1998-4, Report of the WTO Appelate Body.
Vacuum Salt	Vacuum Salt Products Ltd. v. Republic of Ghana, ICSID Case No. ARB/92/1, Award.
Yaung	Yaung Chi Oo Trading Pte. Ltd. v. Government of the Union of Myanmar, ASEAN I.D. Case No. ARB/01/1, Award.
Yukos	Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. 2005-04/AA227, Interim Award on Jurisdiction and Admissibility.

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TREATY SHOPPING IN INTERNATIONAL INVESTMENT LAW

ABSTRACT

Treaty shopping is a term used to describe a change of the corporate structure of an investor with the aim of falling within the scope of a chosen investment treaty that would otherwise not be accessible to the investor in order to take advantage of its benefits. This thesis offers a comprehensive overview and analysis of treaty shopping in international investment law with the aim of clarifying what the limits of treaty shopping are and whether they are currently taken into account by investment tribunals.

The thesis first examines several related theoretical issues. After introducing the notion of treaty shopping and outlining the negative impacts it may have (Chapter 1), the attention is turned to the question of how to approach the nationality of legal persons in international law and under investment treaties, since nationality is the key concept that enables treaty shopping (Chapter 2). Different corporate nationality criteria – incorporation, seat, control and effective activities – are introduced and described. The chapter also strives to illuminate how nationality is understood under the ICSID Convention.

The subsequent analysis focuses on the denial of benefits clauses (Chapter 3) that are inserted into some treaties to prevent treaty shopping. The chapter presents numerous application problems that have emerged in relation to these clauses. Based on the identification of the problematic issues, denial of benefits clauses included in the recent investment treaties are evaluated. At the end of the chapter, a model denial of benefits clause is presented.

The last theoretical chapter investigates the role of general principles of law in investment law (Chapter 4). The principles of good faith and the prohibition of abuse of rights are crucial for preventing treaty shopping; therefore, the chapter examines their origins, their applicability in investment law and their role in cases of treaty shopping, including their impact on treaty interpretation.

The second part of the thesis examines investment arbitration tribunals' decisions concerned with treaty shopping and analyses their approach to the issues of corporate nationality, the interpretation of article 25(2)(b) of the ICSID Convention, the doctrine of piercing the corporate veil and the application of the abuse of rights principle (Chapter 5). The outcomes of the decisions in relation to relevant issues are summarised; in this way, the tendencies in the current practice are identified.

In the end, the attention is brought to possible future challenges relating to treaty shopping, namely to changes in the drafting practice, current investment protection trends in the EU and possible inspiration by developments in international tax law that faced a similar treaty shopping problem (Chapter 6).

The thesis arrives at the conclusion that the limits imposed on treaty shopping are twofold. First, they are set by the text of investment treaties that might facilitate treaty shopping or considerably limit it and, secondly, by the application of the abuse of rights doctrine. Based on the analysed investment arbitration decisions, the dissertation thesis advocates the view that the limits are currently not set satisfyingly, especially due to the insufficient understanding of the abuse of rights doctrine by investment tribunals. However, it also appears that in the future, the challenges posed by treaty shopping might be overcome by more accurate treaty drafting.

KEYWORDS

abuse of rights; article 25(2)(b) of the ICSID Convention; corporate nationality; denial of benefits clause; international investment agreements; treaty shopping

TREATY SHOPPING V MEZINÁRODNÍM INVESTIČNÍM PRÁVU

ANOTACE

Pojmem *treaty shopping* je označována změna korporátní struktury investora uskutečněná s cílem dosáhnout ochrany vybrané investiční dohody, pod kterou by jinak investor nespadal, a to za účelem čerpání výhod, které taková dohoda investorovi přináší. Tato disertační práce přináší ucelený přehled a analýzu *treaty shoppingu* v investičním právu a klade si za cíl vyjasnění toho, kde se nachází limity *treaty shoppingu* a zjištění, zda jsou tyto limity v současné době dostatečně reflektovány investičními tribunály.

Disertační práce nejprve zkoumá některá související teoretická témata. Po představení pojmu *treaty shoppingu* včetně poukázání na jeho negativní důsledky, které přináší (Kapitola 1), je pozornost obrácena na otázku, jak přistupovat k národnosti právnických osob v mezinárodním právu a dle investičních dohod, neboť právě národnost je klíčovým konceptem, který *treaty shopping* umožňuje (Kapitola 2). V této kapitole jsou popsána jednotlivá kritéria, podle kterých je možné k národnosti přistupovat – kritérium právního řádu podle kterého byla právnická osoba založena či jejího sídla, její kontroly anebo místa, kde vykonává skutečnou činnost. Kapitola se dále věnuje i tomu, jak k pojmu národnosti přistupovat dle Dohody ICSID.

Následující analýza je zaměřena na doložky o odepření výhod (*denial of benefits*) (Kapitola 3), které jsou součástí některých dohod a slouží k zabránění *treaty shoppingu*. Kapitola se věnuje řadě problému, jež vyvstávají při využití těchto doložek v praxi. Ve světle identifikovaných sporných otázek jsou poté zhodnoceny doložky obsažené v investičních dohodách uzavřených v posledních pěti letech. Na konci této kapitoly je také představena vzorová doložka.

Poslední teoretická kapitola zkoumá vliv mezinárodněprávních principů na investiční právo (Kapitola 4). Zejména princip dobré víry a princip zákazu zneužití práva hrají zásadní roli při prevenci *treaty shoppingu*; z tohoto důvodu proto kapitola zkoumá původ těchto principů, jejich možné užití v investičním právu a funkci, kterou mohou zastávat v případech *treaty shoppingu*, včetně jejich dopadu na interpretaci smluv.

Druhá část disertační práce analyzuje rozhodnutí investičních tribunálů, které se zabývaly *treaty shoppingem* a zkoumá zejména přístup tribunálů k otázce národnosti, k interpretaci článku 25, odst. 2, písm. b. Dohody ICSID, doktríně sejmutí korporátní masky (*piercing of the corporate veil*) a použití principu zákazu zneužití práv (Kapitola 5). Závěry tribunálů jsou zhodnoceny pod příslušnými tematickými podkapitolami a tímto způsobem jsou identifikovány současné trendy rozhodovací praxe.

Na závěr je pozornost věnována možným budoucím výzvám, které v souvislosti s *treaty shoppingem* vyvstávají. Zejména se jedná o postupné změny v textech nově uzavíraných smluv, dále je prostor věnován současnému přístupu EU k investiční ochraně a nakonec je nastíněna možná inspirace mezinárodním daňovým právem, které čelilo obdobným problémům s pojeným s *treaty shoppingem* (Kapitola 6).

Poznatky získané při tvorbě disertační práce vedou k závěru, že existují dvě hranice *treaty shoppingu*. Zaprvé jsou stanoveny texty samotných investičních dohod, které mohou *treaty shopping* usnadnit anebo jej naopak značně omezit. Druhým limitem je poté princip zákazu zneužití práv. Na základě analyzovaných rozhodnutí investičních tribunálů práce obhajuje názor, že limity aplikované investičními tribunály nejsou stanoveny uspokojivě, a to zejména kvůli nedostatečnému porozumění principu zákazu zneužití práv. Na druhou stranu se zdá, že s problémy způsobenými *treaty shoppingem* je možné se v budoucnu vypořádat vhodnou textací investičních smluv.

KLÍČOVÁ SLOVA

článek 25, odst. 2, písm. b) Dohody ICSID; doložka odepření výhod; mezinárodní investiční dohody; národnost právnických osob; treaty shopping; zneužití práva