Summary

The current thesis focuses its attention on the arena of international investment protection. Using available case-law, it aims at answering the question as to in what way the nationality of an investor is being determined under international law – in particular in arbitration. Moreover, it aims at determining the impact a chaining of investors from different states into a holding structure potentially has on the arbiters' view when determining an investor's (or an investment's) nationality.

The objective of this thesis is to determine to what extend the institution of *corporate veil* influences the nationality of persons participating on above described holding structures, in terms of how these are viewed in international arbitration and to what extend piercing a corporate veil exists in the arbitral case law.

The dissertation is divided into several chapters which, although relatively independent interrelate in the covered subject matter with one another as follows:

The first chapter's objective is to introduce the reader into the arena of investment protection and to provide him/her with a historic overview and discussion of international law. In doing so, the discussion starts with the customary regime of diplomatic protection – as defined by E. de Vattel[1] in 1759. Then, then the discussion moves on to the contemporary particular regimes created by bi- and multilateral treaties on investment protection.

This chapter also discusses the difference between these two categories of regimes (that is the customary regime of diplomatic protection and the particular category regimes pursuant to the various bi- and multilateral treaties), as well as the difference in the position of an individual pursuant to these regimes. Besides a historic introduction into the arena of investment protection and the discussion of the role of an individual in the various regimes, it in particular focuses on the mutual relationships of these regimes – that is of the customary diplomatic protection and regimes created by the treaties.

The second chapter discusses nationality as an institution of international law, both in regard to natural as well as juristic persons. In regard to legal persons, in particular

[1] Vattel de, E. *The Law of Nations; or the principles of the law of nature, applied to the conduct and affairs of nations and sovereigns*. London: Newbery, 1759.

corporations are discussed. The chapter contains the analysis of the basic approaches adopted by municipal laws in determining one's nationality; subsequent to that, the 20th Century development of international law that rests in its absorption of rules determining nationality within the scope of subject matter regulated by international law is discussed. In particular the institution of *effective nationality* (and that of *genuine link*) is subject to an analysis – with the particular accent on the question as to whether these institutions constitute valid parts of customary international law, be it vis-à-vis natural or juridical persons.

Regarding juridical (legal) persons another area of focus of this dissertation is the development of the customary rules of the determination of nationality of such an entity. The analysis starts with the discussion of the principle of *siège social* and some rather less systematic applications of this principle in older case law. Subsequent to that the discussion turns to the control test and in particular to incorporation test of corporate nationality, the latter being the prevailing customary rule as summarized by the ICJ in *Barcelona Traction*. In this context the question, already touched upon in the previous part of this chapter, namely to what extend and in what way international law contains its own rules of determination and recognition of a person's or an entity's nationality is discussed. The analysis of existing customary international law is complemented in this chapter by a discussion of two particular regimes of rather "self-contained" nature, namely the case law of the Iran/USA Tribunal and – as far as public international law is concerned yet another international court - namely the European Court of Justice (ECJ) .

The conclusions of the discussions within this chapter are as follows: The rule of incorporation The rule of incorporation is under contemporary customary international law "the" rule of determination of nationality of corporations; the principle of *effective nationality* cannot be considered for a valid part of customary international law vis-à-vis juridical persons; the latter is clearly shown by recent case law of the ICJ, such as the *Diallo case.*

The third chapter focuses on holding structures. Within this term, the subject of discussion here is the definition of a "concern" as a group of companies, the definition of a holding as well as the question whether there exists a difference between these terms and if so, what that is. Moreover, the chapter discusses to what extent selected legal orders do have a theoretically defined doctrine covering this subject matter.

The fourth chapter discusses the institution of *corporate veil*. The term is first defined and subsequently analyzed in the light of the world's major legal orders. The discussed legal orders are that of the United States (or to be precise, a summary of overlapping doctrines

within the fifty orders systems within this federation), the laws of England and Wales, Germany and France.

In the context of *corporate veil* in particular the doctrine of *piercing the corporate veil* and its (non)existence in the above identified legal orders is discussed and analyzed.

Based on the analysis of relevant case law, the relevant conclusion of this chapter says that while in the United States the case law on *piercing the corporate veil* has developed and has more less (depending on the case law of each relevant federal state) settled, for instance English courts, although the concept is known to the local legal environment due to the closeness of the two legal sub-cultures, generally refuse to apply it and keeps to the principles of a separate entity of a legal persons (corporate veil) as set by the House of Lords in *Salomon v. Salomon.* Germany has got a comparable theoretical as well as practical approach of the case law vis-à-vis piercing the *corporate veil*. Yet this approach is based on the fundaments of Germany's civil legal system with its own maxima, different from those of the American common law. As regards France, its practice is basically not familiar with this doctrine at all.

The description of the national legal orders is followed by the discussion of the question whether, and if to what extent, this institution has become part of customary international law. When discussing this, one has to substantially differentiate between a proven existence of this principle as a general principle of law recognized by (civilized) nations and between a mere fact of this institution being applied by arbitration tribunals as this practice is always influenced by those legal orders from where the very arbitrators come from. The above analysis of the case law shows rather substantially that while the principle of corporate veil is generally accepted by all analyzed legal orders, as far as the principle of piercing the corporate veil is concerned, one cannot really talk of concrete rules and maxima that could indicate that the institution of piercing the corporate veil would have become a general principle of law recognized by civilized nations.

Subsequently follows a separate discussion of the regimes based on bi- and multi-lateral treaties on investment protection - that is chapter five.

This part focuses on the definition of an investor – with the use of the determination of nationality in these particular treaties and, second, defines an investment. The set of treaties concluded by the Czech Republic (and its legal predecessors) served here as an analytic sample. This discussion is followed by an analysis of available arbitral case law, with the result being that the arbitrators clearly tend to respect the principle of corporate veil, in

particular in situations, where the incorporation test is “the test” chosen by the relevant bilateral investment treaty. In all analyzed cases, the tribunal refused the attempts of the defendant state to have the corporate veil around the investor pierced.

The last, sixth, chapter, follows the previous discussion in questioning whether all the discussed subject matter can used for creating such holding structures (with members based in different states) that by making use of various bilateral investment treaties could serve for protection of assets vis-à-vis the country of the origin of the capital.

By elaborating a hypothetical example the current writer argues in this chapter that by correctly choosing such a holding structure, under existing case law, with a high level of likelihood, one can indeed conclude that this is possible. This is despite the fact that original intentions of the states negotiating the various bilateral investment treaties may have been different.