ABUSE OF CORPORATE NATIONALITY AND THE JURISDICTION OF INTERNATIONAL INVESTMENT TRIBUNALS

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1. Introduction

Protection shopping is by no means a new phenomenon in international law which has at all times sought ways to limit its nefarious effects.[1] However, the spectre of protection shopping is particularly prevalent in modern international investment law, characterized by an extensive network of bilateral and regional treaties which offers fertile ground for abuses of the protection offered to foreign investors. Indeed, the spectre has haunted many investor-state arbitrations and continues to haunt many disputes. This article will examine one particular type of protection shopping: the abusive recourse to corporations of convenience to access international dispute settlement mechanisms. Through an analysis of recent arbitral awards, the article offers a normative framework to help distinguish between permissible cases of treaty planning and reprehensible cases of treaty shopping.

The standards of treatment guaranteed in treaties protecting foreign investments have a relatively long history dating back at least to the claims commissions of the 19th Century and the Treaties of Friendship, Commerce and Navigation concluded in the early part of the 20th Century.[2] In contrast, the investor-state dispute settlement mechanism

1. The rule of continuous nationality is one example of a rule designed to prevent individuals from switching their allegiance to a foreign state for the sole purpose of securing its espousal of their claim. *First report on diplomatic protection (Addendum)*, by Mr. John R. Dugard, Special Rapporteur, U.N. Doc. A/CN.4/506/Add.1 at para. 3.
2. For a historical overview of the development of investment treaty law see: Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties* (The Hague: Kluwer Law International, 2009).

found in most Bilateral Investment Treaties ("BITs") constitutes a novel feature in international law.[3] Indeed, the open-ended offer of states memorialized in treaties to arbitrate future investment claims has contributed to "a dramatic extension of arbitral jurisdiction in the arbitral realm."[4] By agreeing to the inclusion of investor-state arbitration provisions in a treaty, a capital exporting state provides its nationals with a direct international right of action in a dispute resolution forum distinct from the domestic courts of the other treaty party.[5] Access to this dispute settlement mechanism is commonly granted to both natural and legal persons provided they have invested in the territory of one of the state parties to the treaty. Moreover, under most treaties, investors in a limited liability company[6] may bring an international claim against the host state even if the company is incorporated in a third state or even the host state. Such a claim, of course, is what the ICJ refused to entertain in the *Barcelona Traction* case.[7] The possibility for shareholders to bring claims is generally achieved through a liberal definition of "investor" but also more rarely through a liberal definition of "investment".[8]

The liberal extension of the right to bring international claims to shareholders undoubtedly contributes to the security, and therefore the promotion, of cross-border investments. However this extension may, in certain cases, create an important threat to the legitimacy of the investor-state dispute settlement process. By recognizing the distinct legal personality of a corporation, there exists a possibility that an investor will abuse that legal personality to artificially create the required diversity of

3. The settlement of private claims through international arbitration is not an entirely new concept and its modern origins can be traced back to the Jay Treaty of 1794. The real novelty of investor-state arbitration mechanisms is not the ability of private claimants to bring claims against states, nor compulsory arbitration, but rather the combination of those two features.
4. Jan Paulsson, "Arbitration Without Privity" (1995) 10 ICSID Rev. 232 at 233; Barton Legum, "The Innovation of Investor-State Arbitration under NAFTA" (2002) 43 HILJ 531.
5. *Draft Articles on Diplomatic Protection with Commentaries*, UN GAOR, 61st Sess., Suplement No. 10 UN Doc. A/61/10. The commentaries to Article 17 state that "The dispute settlement procedures provided for in BITs and ICSID offer greater advantages to the foreign investor than the customary international law system of diplomatic protection".
6. Any reference in this article to "company" or "corporation" refers to a limited liability company whose capital is represented by shares.
7. *Case Concerning the Barcelona Traction, Light and Power Company Limited*, I.C.J. Reports 1970, p. 3 [*Barcelona Traction*].
8. See for example article 1(6) of the ECT that defines "investment" as "every kind of asset, owned or controlled directly or indirectly by an Investor".

nationality with the host state to gain access to an international dispute settlement process that would not otherwise be available.[9]

It may be true that some forms of treaty planning are not abusive, and may even be desired by some states. For example, an international investor may well decide to incorporate a company in a country and conduct substantial foreign operations through that company because of that country's extensive network of investment protection agreements, just as it may decide to incorporate in that country because of its favourable taxation regime or its reliable transportation network. Indeed, it is in part the belief that securing favourable treatment for its foreign investors will make it an attractive hub for foreign investors that has led many countries to adopt aggressive bilateral investment treaty programmes. However, few would disagree that a colourable attempt by a putative foreign investor to bring a pre-existing dispute with a state under the scope and coverage of a treaty through the incorporation of a legal person in a foreign state should not be tolerated. Between those two examples lies a wide array of factual possibilities including the case of intermediary holding corporations with no substantial business activity in their home state. The challenge for arbitrators is to distinguish between permissible cases of treaty planning and cases of treaty shopping which would amount to an abuse of the investor-state dispute settlement process. As is discussed more fully below, treaty shopping becomes abusive when the right to invoke the binding dispute settlement provisions of a treaty is exercised in a manner that does not accord with the interests the treaty was designed to protect.[10]

Arguably, such abusive treaty shopping is already taking place. To date, at least four investment tribunals have disregarded the separate legal identity of a foreign corporate investment vehicle and dismissed a claim (in whole or in part) for lack of diversity of nationality.[11] Another tri-

9. This is not to say that treaty shopping is limited to cases where corporate investors are involved. Just as the nominal ownership of an investment can be granted to a corporation of convenience, the same nominal ownership can be granted instead to an individual possessing the desired nationality of a state party to a BIT. However, the relative ease with which a corporation can be created and controlled, through majority ownership of its capital stock or the nomination of a majority of its board of directors, means that incorporation is probably the easiest, more secure, and thus most widespread, method of acquiring the required diversity of nationality.

10. See Part 4 below.

11. *The Loewen Group Inc. and Ramond L. Loewen* v. *United States of America*, (Award, June 26, 2003) 7 ICSID Rep. 421 [*Loewen*]; *TSA Spectrum de Argentina S.A.* v. *Argentine Republic* (Award, December 19, 2008) ICSID Case No. ARB/05/5 [*TSA Spectrum*]; *Phoenix Action, Ltd* v. *The Czech Republic* (Award, April 15, 2009) ICSID Case No. ARB/06/5 [*Phoenix Action*]; *Mobil Corporation* v. *Bolivarian Republic of Venezuela* (Decision on Jurisdiction, June 10, 2010) ICSID Case No. ARB/07/27 [*Mobil*].

bunal has been criticized by commentators (and given rise to a strong dissenting opinion from the president of the very same panel) for refusing to ignore the nationality of a corporation controlled by nationals of the host state.[12] However, regardless of whether some investors are in fact abusing the liberal rules granting jurisdiction to investment tribunals, the mere fact that such abuse *can* take place is sufficient to warrant an examination of the rules available to tribunals to address such threats to the international investment protection system.

The objective of this article is to examine the options available to tribunals in modern international investment law to address cases of reprehensible treaty shopping through corporations of convenience. To do so, the article will first examine the jurisdiction conferring rules of modern investment treaties to identify the circumstances under which such treaty shopping may come about. Secondly, the article will review some recent arbitral awards where the jurisdiction of tribunals was contested by the respondent state on the ground that the required diversity of nationality was absent. Finally, the article will examine whether international law may provide a theoretical framework to address abuses of corporate nationality. It will be argued that, through the application of general principles of law, modern international investment tribunals are well equipped to deal with investor-state claims where jurisdiction has been manufactured through the incorporation of an investment vehicle in a foreign state.

2. The jurisdiction *ratione personæ* of investment tribunals in modern investment protection treaties

In 2004, a tribunal set up to hear a claim pursuant to a BIT between Italy and the United Arab Emirates dismissed the investor's claim because it found that the individual claimant lacked the required Italian nationality to avail himself of the protection of the treaty.[13] The claimant, Mr. Soufraki, had entered into a concession agreement, in his personal capacity, with the Dubai Department of Ports and Customs for the purpose of developing, managing and operating the Port of Al Hamriya. Despite adducing evidence of his alleged Italian citizenship, the tribunal held that Mr. Soufraki had lost his Italian citizenship by becoming a Canadian citizen and taking up residence in Canada in 1991 (some twelve

12. Markus Burgstaller, "Nationality of Corporate Investors and International Claims against the Investor's Own State" (2006) 7 J.W.I.T. 857 commenting on the award rendered in *Tokios Tokelés* v. *Ukraine*, (Decision on Jurisdiction, April 29, 2004) 20 ICSID Rev-FILJ 205 [*Tokios*].
13. *Soufraki* v. *The United Arab Emirates*, (Award, July 7, 2004) ICSID Case No. ARB/02/07 [*Soufraki*].

years before the registration of the arbitration claim) and that he had failed to regain it pursuant to Italian law. The award is notable for reaffirming the principle that where the disputed nationality of a claimant is a matter of jurisdiction, the tribunal has sole jurisdiction to decide the issue according to the principle of *kompetenz-kompetenz* and is not bound by pronouncements of domestic authorities on the issue. For the purposes of this article the award is also notable for a comment made by the tribunal at the end of its award where it expressed sympathy for the plight of Mr. Soufraki as an international businessman:

> [The Tribunal] further appreciates that, had Mr. Soufraki contracted with the United Arab Emirates through a corporate vehicle incorporated in Italy, rather than contracting in his personal capacity, no problem of jurisdiction would now arise. But the Tribunal can only take the facts as they are and as it has found them to be.[14]

A casual reader may find it odd that Mr. Soufraki, who was born on Italian soil of Italian parents and who, throughout his life, maintained some links with Italy, is not able to benefit from the protection of an Italian treaty when he invests abroad but that a corporation, that he would have incorporated, owned and controlled and which would, for all intent and purposes, have been his *alter ego*, could have benefited from the same protection denied to him personally.

This seemingly innocuous statement of the tribunal highlights the contrast that exists under municipal laws between the difficulty with which individuals can acquire (and maintain) citizenship and the ease of creating a juridical person with a distinct legal personality. It is precisely that contrast that raises the spectre of treaty shopping in the case of corporations.

To help better frame the issue, and to understand why investors, such as Mr. Soufraki, could seemingly overcome nationality obstacles in investment protection treaties by structuring their business ventures through a foreign juridical person, it is necessary to analyze the jurisdiction conferring rules found in investment protection treaties as they relate to corporations.

2.1 The case of the ICSID Convention

The *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*[15] ("ICSID Convention") is

14. *Ibid.*, para. 83.
15. 575 U.N.T.S. 159.

the most widely adhered to international investment protection instrument. It creates a forum, the International Center for the Settlement of Investment Disputes ("ICSID"), in which private investors can peacefully resolve their investment disputes with anyone of the 144 states that have ratified the Convention.[16] The available evidence on the number of investment claims initiated worldwide also suggests that it is the most used forum for the settlement of investment disputes.[17]

The jurisdiction of the ICSID is set out in Article 25 and is extended to investment disputes between contracting states and nationals of another contracting state which the parties to the dispute consent in writing to submit to ICSID. The required consent can be expressed in compromissory clauses included in investment contracts or may also take the form of the acceptance, by a claimant, of a contracting state's standing offer to arbitrate expressed in a treaty or domestic legislation. Whatever form the required consent takes, it is clear that the disputing parties cannot consent to submit to ICSID arbitration a dispute that would not satisfy the jurisdictional requirements of Article 25 of the ICSID Convention. This is why Article 25 is often described as establishing the objective "outer limits" within which the disputing parties may agree to submit a dispute to arbitration.[18] One of these limits relates to the nationality of the national party to the dispute. Pursuant to article 25(2)(b), the term "National of another Contracting State" includes juridical persons:

> (2) "National of another Contracting State" means:
>
> [...]
>
> (b) 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.

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16. As of November 1, 2009.
17. According to UNCTAD, as of the end of 2008 there had been at least 317 investment claims filed, of which 201 have been brought before ICSID. UNCTAD, *IIA Monitor No. 1 (2009) – Latest Developments in Investor-State Dispute Settlement*, UNCTAD/WEB/DIAE/IA/2009/6/Rev1 (2009) at p. 2.
18. *Vacuum Salt Products Limited* v. *Ghana*, (Award, February 16, 1994) ICSID Case ARB/92/1 at para. 36; Aron Broches, "The Convention on the Settlement of Investment Disputes", 136 Recueil des Cours 331, at 351.

It is apparent from this definition that nationality plays a key role in determining the scope of application of the ICSID Convention, and consequently, the jurisdiction *ratione personæ* of ICSID tribunals. It circumscribes the class of claimants that may have access to the investor-state dispute settlement forum. Only juridical claimants that are nationals of a contracting state, or are deemed as such, may submit a claim to ICSID. Notwithstanding its importance, the ICSID Convention does not define how the concept of nationality is to be determined, leaving it to the contracting states to define the notion in their contracts with foreign investors, in their treaties or legislation.[19] Generally, tribunals that have had to decide jurisdictional challenges based on article 25(2)(b) have adopted the traditional incorporation and registered office test that is applied in diplomatic espousal cases. According to Professor Schreuer: "the overwhelming weight of the authority [...] points towards the traditional criteria of incorporation or seat for the determination of corporate nationality under Art. 25(2)(b)."[20]

Although the nationality conferring rule appears traditional, article 25(2)(b) *in fine* expands this traditional rule and allows the host state to treat a domestically incorporated company as foreign for the purposes of ICSID jurisdiction if the corporation is controlled by nationals of another contracting state. Early on in the jurisprudence of the ICSID tribunals have had to determine whether the "control test" incorporated in article 25(2)(b) could extend beyond the determination of the nationality of a foreign incorporated investment vehicle. In other words, would investors of a contracting state still benefit from the provisions of the ICSID Convention if they invested in the territory of another contracting state through an intermediary corporation incorporated (and thus formally a national) of a third (non-contracting) state?

In the arbitration involving SOABI and Senegal,[21] the investor had invested in the construction of a concrete factory in Senegal. A dispute arose relating to the construction of a housing project in Dakar and the claimant submitted a claim to ICSID pursuant to an arbitration clause

19. Commenting on the negotiations that led to the signature of the Convention, Mr. Aron Broches observed: "The World Bank staff [...] drew the conclusion from the Consultative Meetings that attempts at definitions should be abandoned and that instead an attempt should be made, relying on the consensual character of the Convention, to give the greatest possible latitude to the parties to decide under what circumstances a company could be treated as a 'national of another Contracting State'". Broches, *supra* note 18, at 360.
20. Christoph H. Schreuer, *The ICSID Convention: A Commentary*, (Cambridge: Cambridge University Press, 2001) at 281.
21. *Société Ouest Africaine des Bétons Industriels* v. *Sénégal*, (Decision on Jurisdiction, August 1, 1984) 2 ICSID Rep. 175 (1994) ICSID Case No. ARB/82/1 [*SOABI*].

contained in the establishment contract. Senegal objected to the jurisdiction of ICSID on the ground, *inter alia*, that although SOABI had been incorporated in Senegal and was foreign owned, its shareholder was a Panamanian company and since Panama had not ratified the ICSID Convention the jurisdictional requirement of article 25(2)(b) had not been met.

The tribunal first referred to the rules of attribution of nationality found in Senegalese law and observed that the claimant was a Senegalese national by reason of having been incorporated in that country. However, the Panamanian nationality of the intermediary company, which was the sole shareholder of the claimant and served as an intermediary for the ultimate beneficiaries who were Belgian nationals, was contested by the parties. Senegal argued that the company was Panamanian by reason of having been incorporated in that country. The claimant argued for its part that the company had its seat in Switzerland (a member of ICSID) and should therefore be considered as a Swiss national. The tribunal ultimately did not resolve the issue concerning the nationality of the intermediary corporation for it held that, for the purposes of article 25(2)(b), the indirect control of SOABI by Belgian nationals was sufficient to ground the jurisdiction of the tribunal since Belgium was a member of the ICSID Convention. In so doing it explicitly rejected the interpretation submitted by Senegal that article 25(2)(b) requires immediate control by nationals of an ICSID contracting state.[22]

By "looking through" the legal personality of the intermediary corporation the *SOABI* tribunal appeared to contradict an earlier decision of another ICSID tribunal which had held that article 25(2)(b) requires immediate control by nationals of an ICSID member state. In *Amco* v. *Indonesia*[23] the tribunal was seized of a dispute concerning the expropriation of a hotel in Indonesia by way of an arbitration clause in a contract for the construction and management of the hotel. The investors had incorporated a local Indonesian corporation that was owned and controlled by a United States corporation. Subsequent to the conclusion of the investment agreement, the United States corporation entered into an agreement that caused it to be controlled by a Hong Kong corporation and its sole shareholder, a Dutch citizen. Indonesia challenged the jurisdiction of the tribunal on the ground that the true controller of the locally incorporated company was not a United States national. The tribunal refused to look beyond the nationality of the United States corporation for the purposes of article 25(2)(b). It held:

22. *Ibid.*, p. 182.
23. *Amco Asia Corporation and Others* v. *Republic of Indonesia*, (Decision on jurisdiction, September 25, 1983) 1 ICSID Rep. 389 (1993) (ICSID Case No. ARB/81/1) [*Amco*].

> To take this argument into consideration, the Tribunal would have to admit first that for the purposes of Article 25(2)(b) of the Convention, one should not take into account the legal nationality of the foreign juridical person which controls the local one, but the nationality of the juridical or natural persons who control the controlling juridical person itself: in other words, to take care of a control at the second, and possibly third, fourth, or xth degree.
>
> Such a reasoning is, in law, not in accord with the Convention. Indeed, the concept of nationality is there a classical one, based on the law under which the juridical person has been incorporated, the place of incorporation and the place of the social seat. An exception is brought to this concept in respect of juridical persons having the nationality, thus defined, of the Contracting State Party to the dispute, where said juridical persons are under foreign control. But no exception to the classical concept is provided for when it comes to the nationality of the foreign controller.[24]

The decision on jurisdiction in the *Amco* case caused the president of the *SOABI* tribunal to issue, along with the final award, a declaration relating to the jurisdictional decision issued in 1983.[25] In his declaration, Mr. Broches (who had been General Counsel of the World Bank and had been instrumental in the negotiations leading up to the ICSID Convention) defended the *SOABI* tribunal's jurisdictional decision and noted that the *Amco* tribunal's reasoning relating to article 25(2)(b) can at best be considered *obiter dicta* since the United States, the Netherlands and the United Kingdom were all members of ICSID. He expressed disagreement with the *Amco* tribunal's holding that only direct control is relevant for the purposes of ICSID by noting that such an interpretation did not accord with the text of article 25(2)(b) which is silent as to the requirement of direct or indirect control. For Mr. Broches, "the parties should be given the widest possible latitude to agree on the meaning of 'nationality', and any stipulation of nationality made in connection with a conciliation or arbitration clause which is based on a reasonable criterion should be accepted."[26]

Professor Schreuer notes that commentators appear to favour the *SOABI* tribunal's interpretation of article 25(2)(b) and accept that investors may bring indirect claims before ICSID[27] but he also recognizes that

24. *Ibid.*, pp. 395-397.
25. *SOABI*, *supra* note 21, p. 289.
26. *Ibid.*
27. Schreuer, *The ICSID Convention: A Commentary*, *supra* note 20, at p. 317. This interpretation also seems to accord with an amendment proposed by the delegate from the United States during the negotiations leading up to the conclusion of the ICSID Convention. The proposed drafting of what became article 25(2)(b) read as follows:

such an interpretation opens the door to treaty shopping by the incorporation of companies of convenience: "Is it sufficient for nationals of non-Contracting States or even of the host State to set up a company of convenience in a Contracting State to create the semblance of appropriate foreign control?"[28]

It appears this rhetorical question was also on the mind of some of the delegates during the negotiations that led to the conclusion of the ICSID Convention. During a consultative meeting of legal experts in Santiago Chile in February 1964, the representative of Guatemala expressed some concern with respect to the absence of any rules governing the nationality of corporations in the proposed Convention. He remarked that: "[t]here were States that conferred their nationality on investing companies in return for payment. The Convention seemed to recognize as valid a fictitious nationality of that kind and that could leave the capital-importing countries at a disadvantage."[29] In a subsequent consultative meeting in Geneva the representative from South Africa also warned against the potential abuse of a strict reliance on the incorporation test for the purposes of determining the nationality of corporate investors: "The suggestion put forward by the representative of Germany that any company recognized by another Contracting State as its national should be acceptable would open the door to abuses and allow nationals of non-contracting States to benefit from the protection afforded by the Convention."[30] He suggested that tribunals be allowed to "look behind the corporate veil to the shareholders or physical persons affected by adverse action."[31] The chairman of the meeting, Mr. Aron Broches, responded that such an inquiry would require "an immense amount of investigation in each case and be unduly complicated."[32] According to the report of the meeting the chairman felt "that it should be left to the State concerned to carry out at the time of signing the agree-

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"(b) any juridical person which possessed the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to the jurisdiction of the Center in respect of that dispute, and any other juridical person <u>in which the controlling interest on said date is directly or indirectly in the nationals of a Contracting State</u> other than the State party to the dispute, or in such Contracting State itself." Convention on the Settlement of Investment Disputes between States and Nationals of Other States: Documents Concerning the Origin and the Formulation of the Convention, Vol. II (Washington: International Center for the Settlement of Investment Disputes 1968) p. 837 [ICSID Travaux] [Emphasis added].

28. Schreuer, *ibid.*, p. 318.
29. ICSID Travaux, *supra* note 27 at 323.
30. *Ibid.*, at 447.
31. *Ibid.*
32. *Ibid.*, at 448.

ment whatever investigations it felt to be necessary."[33] He also reiterated that "the Convention was based on consent and that the purpose of the definition was to establish the outer limits within which this consent could be exercised."[34]

The Chairman's response to the preoccupations relating to protection shopping voiced by certain participants in the negotiations is better understood when one considers that consent to ICSID jurisdiction was originally expected to derive mainly from express stipulations in investment contracts.[35] Of course it is easily understood that, where ICSID's jurisdiction stems from an arbitration clause contained in an investment contract, the host state is free to undertake any investigation it deems necessary to ascertain the true nationality of its co-contractor who is then readily identifiable. In such cases, as Mr. Broches appeared to argue, the host state should assume full responsibility for its due diligence investigation (or lack thereof) into the nationality of the investor. However, Mr. Broches' response fails to address the case where the jurisdiction of the ICSID stems, not from a contract, but from an investment treaty or even domestic legislation containing a standing offer to arbitrate. In such cases, which contemplate arbitration "without privity", the host state ignores the full extent of the class of investors who could potentially benefit from the treaty. Indeed, the host state cannot possibly investigate the corporate structure of all corporate investors who could claim to be nationals of the other treaty party. An ICSID party who relies solely on the "outer limits" of the jurisdictional provisions of article 25(2)(b) would thus appear to expose itself to treaty shopping through the establishment of corporations of convenience.

A recent award rendered by an ICSID tribunal constituted pursuant to a BIT between The Netherlands and Argentina alleviates some of the concern posed by the practice of treaty shopping.[36] The award concerned a dispute brought by a legal person incorporated in Argentina but controlled by a holding company incorporated in The Netherlands. The dispute related to the termination of a concession contract granted by the Argentine government for the provision of radio spectrum administration

33. *Ibid.*
34. *Ibid.*
35. *PSEG Global Inc. & al.* v. *Turkey*, (Decision on Jurisdiction, 4 June, 2004) (ICSID Case No. ARB/02/5) at para. 138: "[...] at the time the Convention was negotiated it was envisaged that the Contracting States would normally express their consent in investment agreements concluded with the private investors, which were later supplemented by the massive network of bilateral investment treaties in force today." See also, *Waguih Elie George Siag & al.* v. *Egypt*, (Partial Dissenting Opinion on Jurisdiction, 11 April, 2007) (ICSID Case No. ARB/05/15) at p. 64.
36. *TSA Spectrum*, *supra* note 11.

services. Argentina objected to the jurisdiction of the tribunal on four grounds, one of which being that the Dutch company controlling the claimant was itself under the control of an Argentine national and that therefore the diversity of nationality required by Article 25(2)(b) of the ICSID Convention was absent. The claimant contested Argentina's objection by pointing to the fact that, as a wholly owned subsidiary of a company incorporated in The Netherlands, it satisfied the jurisdictional requirement of the BIT[37] and that it was unnecessary, for the purposes of the ICSID Convention, to pierce the veil of its parent corporation to ascertain the nationality of its "ultimate controller".

The tribunal granted Argentina's objection and dismissed the claim for lack of jurisdiction *ratione personæ*. It repeated the oft-quoted principle that contracting states to the ICSID Convention may not, by treaty, contract or otherwise extend the jurisdiction of ICSID tribunals beyond the outer limits of Article 25 of the Convention. The tribunal thus centered its analysis on the provisions of Article 25(2)(b) and, more specifically, on the second prong of that article which allows the contracting states to treat a legal person incorporated in the host state as a foreign national because of foreign control. Contrary to the *Amco* tribunal, the *TSA Spectrum* tribunal did not have any qualms about piercing the corporate veil of the foreign juridical person which controlled the claimant, nor did the tribunal express any reservation about the possibility of lifting as many veils as necessary to identify the "real source" of control: "it would not be consistent with the text [of the Convention], if the tribunal, when establishing whether there is foreign control, would be directed to pierce the veil of the corporate entity national of the host State and to stop short at the second corporate layer it meets, rather than pursuing its objective identification of foreign control up to its real source".[38] In the event, as the Dutch holding corporation was controlled by an Argentine national at the time the dispute was submitted to arbitration, the tribunal found that it did not have jurisdiction to settle the dispute notwithstanding any provision contained in the relevant treaty.

Perhaps cognizant of the fact that ICSID tribunals have expressed different views on the need to identify the nationality of the "ultimate con-

37. The treaty defined the term "investor" as: "legal persons, wherever located, controlled, directly or indirectly, by nationals of that Contracting Party." A Protocol to the BIT provided: "The following facts, inter alia, shall be accepted as evidence of the control: i) being an affiliate of a legal person of the other Contracting Party; ii) having a direct or indirect participation in the capital of a company higher than 49% or the direct or indirect possession of the necessary votes to obtain a predominant position in assemblies or company organs."
38. *TSA Spectrum*, *supra* note 11, para. 147.

troller" of a claimant, the tribunal limited its analysis to the second prong of Article 25(2)(b) and opined that the extent to which the corporate veil of intermediary companies can be pierced varies depending on whether a particular claim is brought under the first or second prong of Article 25(2)(b). Accordingly, contrary to the claim brought by TSA Spectrum, where a claim is brought by a foreign investor directly, the first prong "may be interpreted in a strict constructionist manner to mean that a tribunal has to go always by the formal nationality"[39] of the foreign corporation that is bringing the claim. This opinion begs the question whether the tribunal would have upheld its jurisdiction to settle the dispute had the claim been filed, not by TSA Spectrum, but rather by its Dutch parent company directly. In light of the dichotomy the tribunal operated between the first and second prong of Article 25(2)(b) it is possible that it would have found that such a claim satisfied ICSID's jurisdictional requirement.[40]

The *TSA Spectrum* tribunal's interpretation of Article 25(2)(b), if followed by other tribunals, would go a long way to alleviate the concerns associated with the practice of treaty shopping through corporations of convenience, at least in the context of ICSID arbitration. The search for an investment's "ultimate controller" would ensure that disputes not only have the appearance of disputes between a contracting state to the ICSID Convention and an investor of another contracting state but that they are so in substance as well.

However, the *TSA Spectrum* tribunal's reasoning is only applicable to ICSID arbitration and even in those cases, its application was expressly limited to claims brought under the second prong of Article 25(2)(b). As such, even if the tribunal's reasoning is followed by other tribunals, its impact is likely to be relatively limited. In any event, and not-

39. *Ibid.*, para. 145. It should be noted that the tribunal did not expressly agree with such a strict interpretation and in the next sentence observed that such an interpretation "may appear to go against common sense in some circumstances, especially when the formal nationality covers a corporate entity controlled directly or indirectly by persons of the same nationality as the host state."

40. Even if such a claim would have satisfied the jurisdictional requirement of the ICSID Convention it likely would not have satisfied the additional jurisdictional requirement of the BIT since the treaty at issue requires that a legal person constituted under the law of a contracting party other than the contracting party to the dispute conduct business activities in its state of incorporation; a criterion the Dutch parent company may not have fulfilled as it was nothing more than a holding company. The BIT does not impose this "business activity" requirement on claims brought by legal persons, such as TSA Spectrum, which are controlled by nationals of a contracting party other than the contracting party to the dispute, which perhaps explains why the claim was brought in the name of TSA Spectrum instead of directly by its parent company.

withstanding the relative merit of this recent award, the practice of states with respect to the conclusion of investment protection agreements indicates that many states have not relied solely on the "outer limits" of the ICSID Convention and have at times adopted a more restrictive definition of the class of investors that can claim protection under the treaty.

2.2 *The coverage ratione personæ of investment protection agreements*

With over 2,600 investment protection agreements in existence, a thorough examination of the jurisdiction conferring rules of the various instruments is beyond the scope of this article. It will be sufficient for our purposes to examine representative examples of some of the better known (and most often used) treaties.

2.2.1 NAFTA

The jurisdiction conferring provisions of Chapter 11 of the NAFTA are found in articles 1116 and 1117. Article 1116 allows an investor of a Party to bring a claim on its own behalf, while article 1117 allows an investor of a Party to claim on behalf of an enterprise of another Party that the investor owns or controls. The term "enterprise" is defined in article 201 as "any entity constituted or organized under applicable law, [...] including any corporation". Article 1139 defines in turn the term "enterprise of a Party" as "an enterprise constituted or organized under the law of a Party" and the term "investor of a Party" as "a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment". Pursuant to article 1120, investment claims under Chapter 11 may be submitted under the ICSID Convention, the Additional Facility Rules of ICSID or the UNCITRAL Arbitration Rules.[41]

Thus, NAFTA article 1117, as article 25(2)(b) of the ICSID Convention, allows an investor to bring a claim for loss or damage incurred by a company incorporated in the host state but controlled by nationals of another NAFTA Party. However, unlike the ICSID Convention, the NAFTA expressly provides that the test of incorporation is the relevant national link for the purposes of identifying which legal person may bring claims. Article 1117 also expressly provides that control may be direct or indirect.

41. As of the date of writing, neither Canada nor Mexico have ratified the ICSID Convention. As a result, only the Additional Facility Rules of ICSID and the UNCITRAL Arbitration Rules are available to investors under NAFTA.

Another important distinction with the ICSID Convention is the inclusion in article 1113 of a denial of benefits clause that allows a Party, subject to prior notification and consultation, to deny access to the investor-state dispute settlement process to an enterprise of another Party that is owned or controlled by investors of a non-Party and "has no substantial business activities in the territory of the Party under whose law it is constituted or organized."[42] In their commentary to article 1113, Kinnear, Bjorklund and Hannaford observe that its inclusion was rendered necessary by the expansive definition of "investor of a Party" and "enterprise of a Party" in article 1139 and the need to prevent a "sham company" with no substantial business activity in the NAFTA country in which it is incorporated from claiming the protection of Chapter 11 of the NAFTA.[43] As the authors note, no NAFTA state has yet invoked article 1113 to deny the benefits of the treaty to an investor.

In light of the broad language used in article 1117 it is perhaps not surprising that Chapter 11 tribunals have allowed indirect claims to proceed, as the ICSID tribunal allowed in *SOABI*. In *Waste Management Inc.* v*. Mexico*,[44] a United States company brought a claim under Chapter 11 against Mexico concerning an investment it had made in that country for the provision of waste management services in the city of Acapulco. Mexico contested the jurisdiction of the tribunal on the ground that the locally incorporated company was controlled by two Cayman Island corporations and not by a Party to the NAFTA. The tribunal dismissed Mexico's objection holding that: "[t]here is no hint of any concern [in the NAFTA] that investments are held through companies or enterprises of non-NAFTA States, if the beneficial ownership at relevant times is with a NAFTA investor."[45] Thus, the tribunal felt empowered by the language of the treaty to look through the veil of the intermediary Cayman Island corporations. Since the beneficial owner of the locally incorporated company was an investor of the United States the diversity of nationality requirement of Chapter 11 was satisfied.

2.2.2 Energy Charter Treaty[46]

The investor-state dispute settlement mechanism of the ECT is similar to that provided in the NAFTA in that it contains a relatively broad

42. NAFTA Article 1113(2).
43. Meg Kinnear, Andrea Bjorklund and John Hannaford, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11*, (The Hague: Kluwer Law International, 2006) at p. 1113-1114.
44. *Waste Management Inc.* v. *The United Mexican States* (Award, April 30, 2004), ICSID Case no. ARB(AF)/00/03 [*Waste Management*].
45. *Ibid.* at para. 80.
46. *Energy Charter Treaty*, 17 December 1994, 2080 U.N.T.S. 100 ("ECT").

grant of jurisdiction coupled with a denial of benefits clause that allows a state to deny access to the dispute settlement mechanism to corporations that are controlled by nationals of a third state and have no business activity in the state in which they are organized.

Article 26 of the ECT provides that: "Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III [dealing with investment protection] shall, if possible, be settled amicably." If the dispute is not settled within a three months period "the Investor party to the dispute may choose to submit it for resolution" under either the ICSID Convention, its Additional Facility rules, the Arbitration Rules of the UNCITRAL, or the arbitral facilities of the Stockholm Chamber of Commerce.

The term "investor" is defined at article 1(7) as, with respect to juridical persons: "a company or other organization organized in accordance with the law applicable in that Contracting Party." As seen above, the definition of "investment" covers both direct and indirect investments.[47]

2.2.3 ASEAN Agreement for the Promotion and Protection of Investments [48]

The ASEAN Agreement provides for a slightly more restrictive scope of protection as compared to the NAFTA and the ECT. Only corporate investors that have been incorporated in a state party to the agreement and have their place of effective management in the same state may benefit from the protection of the treaty.[49]

Article X of the treaty provides that: "Any legal dispute arising directly out of an investment between any Contracting Party and a national or company of any of the other Contracting Parties shall, as far as possible, be settled amicably between the parties to the dispute." If such dispute cannot be resolved within a six months period then "either party can elect to submit the dispute for conciliation or arbitration" before, *inter alia*, the ICSID or the UNCITRAL.

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47. *Ibid.*
48. *ASEAN Agreement for the Promotion and Protection of Investments* (December 15, 1987) 27 ILM 612, III Compendium II 293.
49. Another restrictive feature of the agreement is the obligation made in article II that an investment be pre-approved in writing and registered by the host state.

The term “company of a Contracting Party” is defined in article I(2) as “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.” [emphasis added] This definition would appear to prevent a shell corporation from bringing a claim and minimizes the risk of investors adopting a corporate nationality of convenience for the purpose of claiming protection under the treaty.

2.2.4 Selected Bilateral Investment Agreements

A number of countries, when drafting their investment protection agreements, appear to have been preoccupied by the possibility of protection shopping through the incorporation of a juridical person of convenience. To counter this possibility, states have at times adopted a restrictive definition of “investor” or adopted a broad denial of benefits clause such as in the NAFTA and the ECT (and sometimes both). Paul Peters, in an extensive examination of some 850 BITs, cites as examples of the former method the Dutch BITs with the Philippines and Argentina and the Polish BITs with Romania and Slovenia that require that the investor, in order to bring a claim, must in fact be doing business in his purported home state.[50] Wisner and Gallus, in another study, note that the Indonesia-Chile BIT requires that a corporate claimant, in addition to the incorporation requirement, conduct “effective economic activities” in the state of incorporation.[51] Norway’s model BIT, which it recently decided to withdraw, was another example of the same method. The model defined “investor” as “any entity established in accordance with, and recognised as a legal person by the law of a Party, and engaged in substantive business operations in the territory of that Party.”[52] Some Israeli BITs, Peters notes, even expressly disqualify corporations incorporated in the home state from the protection of the treaty if they are owned or controlled by nationals of the host state.

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50. Paul Peters, “Some Serendipitous Findings in BITs: the Barcelona Traction Case and the Reach of Bilateral Investment Treaties” in Erik Denters & Nico Schrijver eds., *Reflections on International Law from the Low Countries in Honour of Paul de Waart* (Martinus Nijhoff Publishers 1998) 27 at 37.
51. Robert Wisner & Nick Gallus, “Nationality Requirements in Investor-State Arbitration” (2004) 5 J.W.I.T. 927 at p. 933.
52. Norway Model Agreement for the Promotion and Protection of Investments, online: Investment Treaty Arbitration, <http://ita.law.uvic.ca/documents/NorwayModel2007.doc>.

As an example of states that have adopted extensive denial of benefits clauses one can look at the Bulgaria-Sweden BIT (1994) where article 1(c) provides that:

> Each Contracting Party reserves the right to deny to any legal person the advantages of this Agreement if nationals of any third State control such legal person and the said legal person is established on the territory of one of the Contracting Parties with the only or predominant purpose to invest in the territory of the other Contracting Party.[53]

The Canadian and U.S. model BITs are structurally similar to Chapter 11 of the NAFTA in that both models refer to the test of incorporation for determining the nationality of a corporate investor and rely on a denial of benefits clause to deny the protection of the treaty to legal persons that are controlled by non-Party investors that have no substantial business activities in the state of incorporation.[54] Article 22 of the Canadian model FIPA and article 24(a) of the U.S. model BIT allow an investor of a Party to bring a claim on its own behalf, while articles 23 and 24(b) of the Canadian and U.S. models respectively allow an investor of a Party to bring a claim on behalf of an enterprise of another Party that the investor owns or controls. The definitional provisions of the term "enterprise" and "enterprise of a Party" found in the Canadian and U.S. models are substantially similar to the definitions of the same terms in the NAFTA and provide that the test of incorporation is the relevant national link for the purposes of identifying who may bring claims.

As can be ascertained from a brief review of the treaties mentioned above, the scope of protection offered varies from one treaty to another. This led one author to remark: "it is not possible to indicate a consistency in the practice of states regarding the determination of the nationality of corporations. Accordingly, bilateral investment treaties cannot constitute a framework from which a generally accepted rule of corporate nationality can be deduced."[55] Notwithstanding this variety of practice, it is apparent that many modern investment protection agreements determine the nationality of a corporation (and by the same token whether a corporate investor can benefit from the protection of the treaty) by reference to the

53. *Agreement between the Government of the Kingdom of Sweden and the Government of the Republic of Bulgaria on the Mutual Promotion and Protection of Investments*, April 19, 1994, online: UNCTAD, <http://www.unctad.org/sections/dite/iia/docs/bits/bulgaria_sweden.pdf>.
54. The Canadian FIPA model can be accessed at: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/2004-FIPA-model-en.pdf>. The U.S. model BIT is available at: <http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf>.
55. Okan Beygo, "Nationality of Corporations in International Claims Arising out of Foreign Investment Disputes" (1993) 46 R.H.D.I. 33 at 66.

traditional criteria of incorporation or seat. Many treaties also extend their protection to indirect investments, that is to say investments channeled through corporations in which they have a beneficial interest. This tendency, as has been observed above, opens the door to possible abuses in the form of corporations of convenience. If investment tribunals, such as the ones set up in the disputes concerning *SOABI* v. *Senegal* and *Waste Management* v. *Mexico*, are allowed to look through the corporate veil of a company for the purpose of identifying the beneficial owners of the investment and *establishing* jurisdiction, can tribunals also look through the corporate veil of a corporation of convenience to *deny* jurisdiction over a dispute? Such a jurisdictional argument was made by respondent states in a number of relatively recent investment disputes with limited success.

3. A formalistic interpretation of investment treaties

The echo of the jurisdictional debate that gripped the *SOABI* and *Amco* tribunals[56] still resonates almost a quarter of a century later. Tribunals are still faced today with the problem of deciding to what extent the corporate veil of intermediary companies may be pierced to establish the diversity of nationality required to bring a claim before an international tribunal. Some commentators suggest that arbitrators should look through as many veils as necessary until the required diversity of nationality is *established* while denying that the same veils can be pierced to *deny* jurisdiction.[57] Respondent states have often objected to such a generous, *in favorem jurisdictionis*, interpretation of the jurisdiction conferring rules of international investment agreements. The following sections examine five recent cases which are illustrative of a formalistic interpretation of the jurisdiction conferring provisions of investment treaties. While they by no means provide an exhaustive review of the arbitral awards rendered on this issue, they do exemplify the legal reasoning most often invoked by arbitrators who emphasize the importance of a literal interpretation of BITs.

3.1 Tokios Tokeles v. Ukraine[58]

The jurisdictional award rendered in this case has become somewhat of a *cause célèbre.* The opposing views expressed by a majority of

56. See part 2.1, above.
57. C.F. Amerasinghe, "Interpretation of Article 25(2)(b) of the ICSID Convention" in Lillich & Brower, eds., *International Arbitration in the 21st Century: Towards Judicialization and Uniformity?* (Ardsley: Transnational Publishers Inc., 1994) 223 at 236.
58. *Tokios*, *supra* note 12. For an insightful account of the arbitration written by the lawyers who represented Ukraine see Andriy Alexeyev & Sergiy Voitovich, "Tokios

the tribunal and its president epitomize the conflict between the proponents of a formalistic interpretation of the jurisdiction conferring provisions of treaties and those who, as Professor Weil, believe that arbitrators should scrutinize the underlying "economic and political reality"[59] of a dispute to ascertain whether the dispute genuinely concerns cross-border investments between the BIT parties.

In the *Tokios* arbitration, the claimant, a corporation incorporated in Lithuania, invoked the compulsory arbitration provisions of the BIT between Lithuania and Ukraine alleging that politically motivated measures adopted by the Ukrainian government had expropriated its investment in Ukraine. In accordance with the provisions of the BIT, it initiated arbitration under the ICSID Convention. Although the claimant formally satisfied the definition of an "investor" contained in the BIT, which extended its protection to legal persons incorporated in Lithuania, the respondent objected to the jurisdiction of the ICSID tribunal on the ground, *inter alia*, that the investor was not a "genuine entity of Lithuania". It pointed to the fact that, although it was incorporated in Lithuania, 99% of the claimant's outstanding shares were owned by Ukrainian nationals and Ukrainian nationals comprised two thirds of the company's management. The respondent also alleged that the claimant had no substantial business activities in Lithuania and maintained its *siège social* in Ukraine. In short, although the claimant satisfied the treaty's formal definition of an "investor" Ukraine asked the tribunal to adopt a "control test" to determine the claimant's nationality and pierce the veil of the Lithuanian corporation to determine who its true controllers were. The tribunal thus had to decide whether it could use a "control test" not to establish its jurisdiction but to decline it even though the formal jurisdiction conferring requirements of the treaty and Article 25 of the ICSID Convention were satisfied.

A majority of the tribunal dismissed Ukraine's objection. It noted that Ukraine's attempt to limit the scope of the relevant BIT through a "control test" is inconsistent with the purpose of providing "broad protection of investors".[60] It adopted a formalistic interpretation of the treaty and found that in the absence of express language in the relevant BIT or the ICSID Convention excluding juridical persons controlled by nationals of the host state from the coverage of the treaty "it is not for tribunals to impose limits on the scope of BITs not found in the text".[61] It noted that a

Tokeles: Jurisdictional Issues in ICSID Case *Tokios Tokeles* v. *Ukraine*" (2008) 9 J.W.I.T. 519.

59. *Tokios*, *ibid.*, Dissenting Opinion, para. 24.
60. *Ibid.*, Decision on Jurisdiction, para. 31.
61. *Ibid.*, para. 36.

number of Ukraine's BITs contained denial of benefits clauses allowing a host state to deny the benefits of the treaty to investors controlled by nationals of another state. It regarded the absence of such a clause as a "deliberate choice of the Contracting Parties"[62].

The majority also examined whether the "equitable doctrine of veil piercing" should override the terms of the BIT.[63] After referring to the ICJ's judgement in *Barcelona Traction* it found that the evidence did not show "that the Claimant has used its status as a juridical entity of Lithuania to perpetrate fraud or engage in malfeasance."[64] It held that there was no evidence that the investor created the Lithuanian corporation for the purpose of gaining access to ICSID arbitration since the claimant was incorporated six years before the relevant BIT came into force.

The President of the tribunal disagreed with the jurisdictional findings of the majority and issued a strongly worded dissenting opinion before resigning from the tribunal. Professor Weil rejected the formalistic interpretation of the jurisdiction conferring provisions of the treaty and the ICSID Convention retained by his colleagues and objectively assessed the dispute as one involving Ukraine and its own nationals, a matter that should have been left to the domestic Ukrainian courts. He criticized the majority's decision as giving effect to the legal structure of the claimant while ignoring the economic reality of the dispute.

Professor Weil's reasoning on this point is reminiscent of an earlier award rendered in another ICSID arbitration over which he presided[65] in which he also avoided importing into international investment law concepts of domestic corporate law. According to him, in matters governed by public international law, economic and political reality must prevail over formal legal structures:

> Insofar as business law and issues of business liability are involved, there is no reason for denying effect to the corporate structure chosen by the economic agents. When it comes to mechanisms and procedures involving States and implying, therefore, issues of public international law, economic and political reality is to prevail over legal structure, so much so that the application of the basic principles and rules of public international law

62. *Ibid.*
63. *Ibid.*, para. 53.
64. *Ibid.*, para. 55.
65. *Banro American Resources Inc. & al.* v. *Democratic Republic of Congo*, (Award, September 1, 2000) ICSID Case No. ARB/98/7 Excerpts in Foreign Investment Law Journal, vol. 17 (2002), No. 2, p. 380.

> should not be frustrated by legal concepts and rules prevailing in the relations between private economic and juridical players.[66]

Professor Weil cautioned that an "unwarranted extension of the ICSID arbitral jurisdiction would entail an unwarranted encroachment on both the availability of diplomatic protection and the jurisdiction of domestic courts"[67]. He thus first sought to establish whether the purported grant of jurisdiction in the BIT fell within the "outer limits" of the ICSID Convention because "it is not for the Parties to extend the jurisdiction of ICSID beyond what the Convention provides for."[68] Interpreting Article 25 of the ICSID Convention according to the canons of treaty interpretation set out in the *Vienna Convention on the Law of Treaties* [*Vienna Convention*],[69] Professor Weil found that the "ICSID mechanism and remedy are not meant for investments made in a State by its own citizens with domestic capital through the channel of a foreign entity, whether preexistent or created for that purpose."[70] He ultimately held that the "undisputed Ukrainian character of the investment"[71] should have prevented the claimant from gaining access to ICSID arbitration even though it may have satisfied the formal incorporation test of the relevant BIT. In other words, Professor Weil would have accorded paramount importance to the object and purpose of the ICSID Convention (i.e. the protection of *foreign* investment) over a formalistic grant of jurisdiction based on the place of incorporation of a corporate claimant. He stressed the importance of determining the true origin of the capital invested since only foreign investments, as opposed to domestic capital, could be protected by the ICSID Convention.[72]

3.2 AdT v. Bolivia[73]

The claimant was a Bolivian incorporated company that had entered into a concession agreement to provide water services to the city

66. *Tokios*, *supra* note 12, Dissenting Opinion, para. 24.
67. *Ibid*., para. 8.
68. *Ibid.*, para. 16.
69. 23 May, 1969, 1155 U.N.T.S. 331.
70. *Tokios*, *supra* note 12, Dissenting Opinion, para. 19.
71. *Ibid*., para. 20.
72. For a criticism of the importance of the origin of capital see Devashish Krishan, "Nationality of Physical Persons" in Federico Ortino, Lahra Liberti, Audley Sheppard & Hugo Warner, eds., *Investment Treaty Law Current Issues II* (London: British Institute of International and Comparative Law, 2007) 57 at 58 where the author remarks that BITs are not about protecting capital but rather control over capital. See also, Wisner & Gallus, *supra* note 51, at p. 944: "[...] it is artificial to talk of capital belonging to any particular nation".
73. *Aguas del Tunari S.A.* v. *Republic of Bolivia*, (Decision on Jurisdiction, October 21, 2005) ICSID Case No. ARB/02/03 [*AdT*].

of Cochabamba. The dispute involved acts and omissions on the part of the Bolivian government, amid severe public criticism of the agreement, which allegedly breached a number of rights guaranteed by the BIT between the Netherlands and Bolivia. At the time of signature of the agreement the claimant's shares were owned by four Bolivian companies (20%) and a Uruguayan company (25%) while the remaining shares (55%) were held by a Cayman Islands corporation that was in turn wholly owned by a United States corporation. Some time after the conclusion of the concession agreement, but before its termination, the Cayman Islands corporation underwent a complex corporate reorganization and the corporation was purportedly "migrated" into a Luxembourg corporation. The shares of the Luxembourg corporation were wholly owned by a Dutch corporation that was in turn owned by another Dutch corporation (50%) in which the original United States investor retained a 100% interest and an Italian corporation (50%).

The claimant availed itself of the investor-state dispute settlement procedure of the Netherlands-Bolivia BIT as a "legal person controlled directly or indirectly, by nationals of [the Netherlands], but constituted in accordance with the law of [Bolivia]".[74] The respondent state contested the Dutch nationality of the locally incorporated claimant company under the BIT by arguing that the Dutch corporations were mere shells and could not be considered to control the claimant who remained within the ultimate control of the same United States investor (the Bechtel engineering firm). Bolivia argued that the corporate reorganization was a colourable attempt to bring any dispute arising from the concession agreement under the protection of a BIT since at the time of the agreement there did not exist a BIT between Bolivia and the United States. The tribunal summarized the dispute between the parties on the issue of jurisdiction as follows: "the difference in view between the Parties is not between 'control' and 'ownership', but rather between 'control' as requiring the legal potential to control and 'control' as requiring the actual exercise of control".[75]

A majority of the tribunal concluded, after a careful textual analysis of the relevant BIT, that the term "controlled directly or indirectly" referred to legal control rather than factual control and did not limit the scope of eligible claimants to only the ultimate controller as Bolivia had argued. The tribunal therefore upheld its jurisdiction over the dispute since the Dutch corporations had, because of their indirect ownership of 55% of the shares of the claimant, the potential to control their Bolivian subsidiary.

74. *Ibid.*, para. 80.
75. *Ibid.*, para. 223.

The *AdT* tribunal thus favoured a formalistic interpretation of the jurisdiction conferring rules of the relevant BIT. It gave full effect to the Dutch nationality of the shell corporations and refused to consider the economic reality of the claimant's structure, which would presumably have led it to another conclusion. The majority of the tribunal appeared to favour a "bright line" test of nationality because it found that the uncertainty associated with a test requiring evidence of actual control would frustrate the effort of the BIT to stimulate investment.[76] The tribunal also commented on the developing practice of treaty planning:

> This decision reflects the growing web of treaty based referrals to arbitration of certain investment disputes. Although titled 'Bilateral' Investment Treaties, this case makes clear that which has been clear to negotiating states for some time, namely, that through the definition of 'national' or 'investor', <u>such treaties serve in many cases more broadly as portals through which investments are structured</u>, organized, and, most importantly, encouraged through the availability of a neutral forum. The language of the definition of national in many BITs evidences that such national routing of investment is entirely in keeping with the purpose of the instruments and the motivations of the state parties.[77] [emphasis added]

The majority also rejected Bolivia's allegation of fraud and abuse of corporate form. It observed that the reorganization that led to the migration of the holding company from the Cayman Islands to Luxembourg was part of a much larger corporate reorganization process and that the incorporation of subsidiaries in the Netherlands seemed to have been driven by taxation motives.[78] In short, the majority of the tribunal considered the claimant's corporate restructuring as an example of legitimate treaty planning as opposed to an abusive case of treaty shopping. The tribunals' insistence in dealing with these allegations could lead to speculation that had Bolivia succeeded in proving, as a matter of fact, that the corporate reorganization was structured with the predominant objective of securing access to a favourable BIT the majority could have felt inclined to disregard the separate legal personality of the Dutch corporations.

The decision also attracted a strongly worded dissenting opinion from one of the arbitrators. In his dissenting opinion, Mr. Alberro-Semerena rejected the mechanistic interpretation of "control" retained by the majority and preferred a functional definition based on actual con-

76. *Ibid.*, para. 247.
77. *Ibid.*, para. 332.
78. *Ibid.*, para. 330, 331.

trol. As Professor Weil in the *Tokios* arbitration, he stressed the importance of looking past formal interpretations and at actual relationships.[79]

3.3 ADC v. Hungary[80]

The dispute related to an airport construction project in Budapest. The claimants were corporations that had been incorporated in Cyprus with the knowledge of the respondent state for the sole purpose of the construction project. The claimants' shareholders were Canadian corporations and the ultimate beneficiaries were Canadian nationals. The claimants were allegedly incorporated in Cyprus to benefit from an advantageous tax treaty regime with Hungary.

As in the *Tokios* and *AdT* arbitrations, the respondent state sought to challenge the jurisdiction of the ICSID tribunal under the Hungary-Cyprus BIT on the ground that the required diversity of nationality was absent. Hungary argued that the Cypriot companies had no genuine connection with Cyprus and that the real investors in the construction project were nationals of a non-ICSID country, namely Canada.

Hungary's arguments fared no better than those of Ukraine and Bolivia in the above referenced arbitrations. The *ADC* tribunal adopted a literal interpretation of the Hungary-Cyprus BIT and dismissed Hungary's jurisdictional challenge:

> As the matter of nationality is settled unambiguously by the Convention and the BIT, there is no scope for consideration of customary law principles of nationality, as reflected in *Barcelona Traction*, which in any event are no different. In either case inquiry stops upon establishment of the State of incorporation, and considerations of whence comes the company's capital and whose nationals, if not Cypriot, control it are irrelevant.
>
> [...]
>
> The Tribunal cannot find a 'genuine link' requirement in the Cyprus-Hungary BIT [...] The Tribunal cannot read more into the BIT than one can discern from its plain text.[81]

The tribunal further rejected Hungary's contention that the Canadian investors had misused the distinct legal personality of their Cypriot

79. *Ibid.*, Declaration of José Luis Alberro-Semerena, para. 34-35.
80. *ADC Affiliate Limited and ADC & ADMC Management Limited* v. *The Republic of Hungary*, (Award, October 2, 2006) ICSID Case No. ARB/03/16 [*ADC*].
81. *Ibid.*, para. 357.

subsidiaries since it held that those companies had a legitimate role in the structure of the complex construction project. In reaching this conclusion the tribunal emphasized that Hungary had, at all relevant times, full knowledge of the existence of the corporations and that the companies paid taxes in Cyprus where they retained Cypriot auditors.[82]

3.4 Saluka Investments v. Czech Republic[83]

In the 1990s, the Czech Republic sought to reorganize and privatize its previously centralized banking system that was plagued by non-performing loans dating back to the communist era. During this period, the Nomura Group, a major Japanese merchant banking and financial services group of companies, acquired 46.16% of the shares of IP Banka a.s. ("IPB"), one of four large state-owned commercial banks which dominated the banking sector in the Czech Republic. The share acquisition was channelled through Saluka Investment BV ("Saluka"), a special-purpose vehicle that the Nomura Group incorporated in The Netherlands for the sole and express purpose of holding the shares of IPB.

The Czech Republic subsequently suffered through an extended banking crisis which included a series of bank runs. As a consequence of this crisis, and as a result of persistent doubts as to the solvency of IPB, the Czech government placed the bank under forced-administration and a rival financial institution ultimately purchased IPB's enterprise. The Dutch holding company, Saluka, filed a claim against the Czech Republic invoking a breach of the Fair and Equitable Treatment standard guaranteed by the Czech-Netherlands BIT and alleging that it had been deprived of its investment unlawfully and without just compensation.

The Czech Republic sought to dismiss Saluka's claim on the basis that Saluka was not an "investor" entitled to invoke the arbitration provisions of the Czech-Netherlands BIT. It invoked three arguments in support of its motion, two of which are particularly relevant to the issue of corporate nationality. The tribunal rejected each of these arguments and dismissed the respondent's motion.

First, the Czech Republic argued that Saluka was not a *bona fide* investor because it was nothing more than a shell used by its parent, Nomura Europe plc, a company incorporated in England. Accordingly,

82. *Ibid.*, para. 352-353.
83. UNCITRAL (Partial Award, March 17, 2006).

the dispute, although ostensibly involving a Dutch corporation, in reality opposed the respondent and an English corporation which could not benefit from the protection of the treaty. In essence, the Czech Republic requested that the tribunal overlook the formal legal structure of the claimant and consider the actual economic relationships instead.

The tribunal readily recognized that while ownership of the controlling shares in IPB vested in Saluka, "in reality and substance",[84] however, Saluka's rights of ownership were exercised in accordance with instructions received from its parent companies in the Nomura Group.[85] Despite this recognition, the tribunal refused to let reality and substance prevail over the formal legal structure set up by the Nomura Group. The tribunal observed that in setting up such legal structures with the full knowledge of the Czech authorities, the "companies concerned have simply acted in a manner which is commonplace in the world of commerce".[86] The tribunal then noted that the jurisdiction conferring provisions of the BIT expressly empower legal persons constituted under the laws of The Netherlands to claim the benefit of the treaty's protection and it refused to read into the BIT any additional requirement or exclusion. According to the tribunal, the parties to the BIT could have expressly excluded from the treaty's ambit corporations incorporated in one party but wholly-owned by third-party interests. In the absence of such express exclusions, the tribunal refused to take it upon itself to "read them in" the terms of the BIT: "it is beyond the powers of this Tribunal to import into the definition of 'investor' some requirement relating to such a relationship having the effect of excluding from the Treaty's protection a company which the language agreed by the parties included within it."[87]

The tribunal went on to accept that in certain circumstances, such as when corporate structures are used to "perpetrate fraud or other malfeasance",[88] arbitrators could, as an equitable remedy, look through the veil of a claimant's corporate structures in order to rule on their jurisdiction over a claim. However, in the case before it, the tribunal could find no evidence that Saluka had been incorporated in order to perpetrate fraud or other malfeasance and it refused to exercise its discretionary power to lift the Claimants' corporate veil.[89]

84. *Ibid.* para. 73.
85. *Ibid.*
86. *Ibid.* para. 228.
87. *Ibid.* para. 229.
88. *Ibid.* para. 230.
89. *Ibid.*

The Czech Republic also objected that Saluka could not benefit from the protection of the BIT because it lacked real and continuous links to The Netherlands. This argument appeared to strike a chord with the tribunal which recognized that a literal and inflexible adoption of the incorporation test for establishing jurisdiction could lend itself to "treaty shopping":

> The 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.'[90]

However, once again, the tribunal felt bound by the letter of the BIT which solely referred to the incorporation test:

> [T]he 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 who 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.[91]

Having dismissed the respondent's objections to its jurisdiction, the tribunal considered the merits of Saluka's claim and found that the Czech Republic breached the treaty's Fair and Equitable Treatment guarantee. The Czech Republic unsuccessfully sought to challenge the tribunal's findings before the Swiss courts.[92]

3.5 Rompetrol v. Romania[93]

As the *Saluka* arbitration, this dispute has its origins in the privatisation of former state enterprises that characterized the transition

90. *Ibid.*, para. 240.
91. *Ibid.*, para. 241.
92. *Tschechische Republik* v. *Saluka Investments BV*, 4P 116/2006 (September 7, 2006).
93. (Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, April 18, 2008) ICSID Case No. ARB/06/03.

of many central European countries in the 1990s from a centrally planned economy to a market economy. The claimant, The Rompetrol Group N.V. ("TRG"), was incorporated in The Netherlands and owns shares in a number of Romanian companies which in turn own assets in the oil refinery and petrochemical sector. It alleged that Romania breached its obligations under the BIT between The Netherlands and Romania by conducting extraordinary and unreasonable investigations into corruption allegations relating to some of its investments in Romania. At the time the arbitration was initiated a Romanian national indirectly owned a majority of the shares of the claimant through an intermediary Swiss holding company.

Romania, as Ukraine did in the *Tokios* arbitration, challenged the jurisdiction of the tribunal objecting that the dispute, although formally a dispute brought by a Dutch corporation, was in reality brought by one of its own nationals through a foreign shell company and that a person cannot bring an international claim against his own state. The respondent state also sought to minimize the importance of the claimant's incorporation in The Netherlands as only one of a number of factors to be taken into account for the purpose of determining the tribunal's jurisdiction and encouraged the tribunal to also consider other factors such as ownership and control of the claimant, its effective seat and the source of the funds used for the relevant investment. In short, it sought to apply the real and effective connection test devised by the ICJ in the *Nottebohm* case[94] in the context of the diplomatic protection of natural persons to treaty claims brought by legal persons. According to this argument, the claimant's formal Dutch nationality could not be opposed to Romania since its real and effective nationality was Romanian.

The tribunal rejected both inter-related arguments. As the arbitration was brought under the ICSID Convention, the tribunal analyzed the jurisdiction conferring provisions of both the ICSID Convention and the BIT separately.

It first observed that Article 25(2)(b) of the ICSID Convention leaves the contracting states wide discretion to adopt "incorporation under their own laws as a necessary *and also sufficient* criterion of nationality for purposes of ICSID jurisidiction".[95] [emphasis added] It then rejected Romania's argument, based on Professor Weil's dissent in the *Tokios* arbitration, that, for the purpose of ascertaining the nationality of corporate investors in arbitrations brought under the ICSID Conven-

94. *Nottebohm* (Liechtenstein v. Guatemala), 1955 I.C.J. 4.
95. *Rompetrol*, *supra* note 93, para. 83.

tion, formal legal structures should be disregarded when they do not accord with economic reality. It stated that it would have "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."[96]

The tribunal also distinguished the *Nottebohm* and *Barcelona Traction* cases on which Romania relied to apply a "real and effective nationality" rule for corporate nationality in ICSID arbitration. It observed that the "real and effective nationality" rule applied by the ICJ in the context of the diplomatic protection of natural persons in the *Nottebohm* case had not been followed by the same court in the *Barcelona Traction* case in the context of the diplomatic protection of shareholders in a foreign corporation. To the contrary, the ICJ in that latter case held that only the national state of the corporation, as defined by its place of incorporation, has the capacity to bring an international claim in respect of an injury to the company. Therefore, far from supporting Romania's argument, *Barcelona Traction* actually supported the contrary view that "Contracting States to a specific bilateral treaty act well within the normal parameters of international law when they employ [the incorporation] criterion to set up the nationality regime of their treaty."[97] Moreover, the tribunal observed that both the *Nottebohm* and *Barcelona Traction* cases dealt with rules of customary international law which applied in the absence of conventional rules. The tribunal thus concluded that the specific conventional rule contained in Article 25 of the ICSID Convention left no room for the application of a "supposed rule" of real and effective nationality.

Turning its attention to the relevant BIT, the tribunal adopted a formal interpretation of its jurisdiction conferring provisions: "the key question is therefore what the BIT expressly provides."[98] In light of the treaty's clear and succinct definition of "investors" in the BIT which comprises "legal persons constituted under the law of [either] Contracting Party", the tribunal again refused to read into the definition a "real and effective nationality" for essentially the same reasons as those expressed in its analysis of Article 25 of the ICSID Convention. It found that the jurisdiction conferring provisions of the BIT are "clear and unambiguous" that Romania consented to arbitrate under the ICSID Convention claims brought by legal persons incorporated in The Netherlands "without regard to the incidents of control or source of capital".[99]

96. *Ibid.*, para. 85.
97. *Ibid.*, para. 89.
98. *Ibid.*, para. 94.
99. *Ibid.*, para. 89 and 108.

The tribunal accordingly dismissed Romania's objection to its jurisdiction *ratione materiæ*.

3.6 A purposive interpretation of the jurisdiction conferring provisions of BITs

These five cases exemplify a literal and formalistic interpretation of the jurisdiction conferring rules of investment agreements. Investment tribunals appear to favour "bright line" tests when it comes to determining the nationality of corporations for the purpose of establishing jurisdiction over a dispute and have shied away from reading into treaties requirements of a "genuine connection" or "substantial business activity" in an investor's state of incorporation. The brief review above shows that while tribunals will not hesitate to look through the veil of intermediary corporations to establish jurisdiction, they will refuse to do so to deny jurisdiction in the absence of express language in the treaty such as a denial of benefits clause or a "genuine connection" requirement. It may be that the reluctance of arbitrators generally to impose on claimants the burden of satisfying jurisdictional obligations not expressly contained in the treaty can be at least partly explained by the perceived indeterminacy of rules requiring linkages with a given state beyond mere incorporation. Indeed, there is no definitive and exhaustive list in international law of factors that can qualify as relevant links[100] and even if there were, it is clear that the relative weight to be given to each will vary from case to case and depend to some degree upon the subjective analysis of each arbitrator. For example, would it be sufficient for a company to generate sales of $10 million in its state of incorporation if its worldwide sales are $30 million. What if its worldwide sales amount instead to $1 billion? It is not at all difficult to imagine cases where reasonable people, applying the same criteria, might arrive at different conclusions when comes the time to determine whether a corporation may benefit from the protection of a treaty. Arguably, such uncertainty has a negative effect on investment security and therefore investment promotion, the main object and purpose of investment protection treaties. Although the reluctance of arbitrators to wade into "wide-ranging policy discussion" is understandable, arbitrators have not been consistently reluctant, as some have not shied away from entering into such discussions.[101]

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100. *ADC*, *supra* note 80 at para. 345 citing Brownlie: "there is 'no certainty as to the criteria for determining [the] connection'."

101. But see *TSA Spectrum*, *supra* note 11 where an ICSID tribunal, applying the second prong of Article 25(2)(b) of the ICSID Convention looked through the veil of a foreign holding company to deny ICSID jurisdiction. See also *Phoenix Action*, *supra* note 11 where another ICSID tribunal read into the definition of "investment" a *bona fide* requirement.

3.6.1 A purposive interpretation of the definition of "investor"

The formalistic and textual interpretation favored in the above-mentioned cases appears to conflict with the position adopted by at least two NAFTA tribunals that adopted a purposive interpretation of NAFTA Chapter 11 to reach, somewhat surprisingly, opposite conclusions on a challenge to jurisdiction.

In *S.D. Myers* v. *Canada*[102] an arbitral tribunal was constituted to settle a claim brought by a United States corporation that specialized in hazardous waste disposal services. Canada objected to the jurisdiction of the tribunal on the ground that the claimant did not own the local corporation that allegedly constituted the claimant's investment in Canada. Rather, the local corporation was wholly-owned by individual members of the Myers family who also owned the claimant corporation. As a result, a formal assessment of the legal relationship at issue should have led the tribunal to dismiss the claim since only the Myers family members legally owned or controlled the Canadian investment. The tribunal rejected such a formalistic interpretation: "Taking into account the objectives of the NAFTA, and the obligation of the Parties to interpret and apply its provisions in light of those objectives, the Tribunal does not accept that an otherwise meritorious claim should fail solely by reason of the corporate structure adopted by a claimant in order to organise the way in which it conducts its business affairs."[103] It held that evidence that the claimant's business interest in the United States and Canada "was all in the family"[104] satisfied the definition of "investor" of NAFTA Chapter 11.

In the now (in)famous *Loewen* v. *United States* arbitration another tribunal adopted a similar purposive interpretation of NAFTA Chapter 11 to reach an opposite conclusion and dismiss a claim for lack of jurisdiction.[105] The dispute arose from a ruling by a Mississippi State Court ordering The Loewen Group Inc. ("TLGI") and its principal United States subsidiary, The Loewen Group International Inc. ("TLGII"), to pay damages of US $500 million to a United States national. That litigation arose out of a commercial dispute between Loewen and a competitor in the funeral home and funeral insurance business in Mississippi, and concerned a business deal worth a total of less than US $5 million.

After the hearing on the merits of Loewen's Chapter 11 claim, TLGI went bankrupt. Its assets were taken over by an American company but

102. UNCITRAL (Partial Award, November 13, 2000).
103. *Ibid.*, para. 229.
104. *Ibid.*, para. 228.
105. *Supra* note 11.

its NAFTA claim was assigned to a Canadian corporation whose only business was the pursuit of the Chapter 11 claim.

In the aftermath of the bankruptcy, the United States filed a new motion to dismiss the claim for lack of jurisdiction. The tribunal granted the United States' motion and dismissed the case. The tribunal held that it lacked jurisdiction because the Loewen Group had assigned its claims to a Canadian shell corporation owned and controlled by a United States company – in essence, it found the claim was really being brought by an American investor.[106]

> All of the benefits of any award would clearly inure to the American corporation. Such a naked entity as Nafcanco [the Canadian corporation], even with its catchy name, cannot qualify as a continuing national for the purposes of this proceeding. [...]
>
> The Tribunal is being asked to look at form rather than substance to resolve a complicated claim under an international treaty. [...]
>
> NAFTA does not recognize such business choices as a substitute for its jurisdictional requirements under its provisions and under international law.[107]

The *Loewen* award has been much criticized[108] and the tribunal's reliance "upon substance rather than form" does not sit easily with the formalistic approach adopted by the tribunals in the five cases described above. Unfortunately, both the *S.D. Myers* and the *Loewen* tribunals' reasons for ignoring the separate legal personality of the corporate claimants are scarce and devoid of any contextual analysis. This lack of reasons means that the awards do not provide much guidance as to the circumstances under which other tribunals could similarly look past the

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106. In addition to the jurisdictional decision that was the basis for the dismissal, the tribunal also provided what amounted to a full decision on the merits. While the tribunal found that the Mississippi trial did not meet the minimum standard of international law prescribed by Article 1105, it stated it would have nevertheless dismissed the claim on the merits. It found that Loewen had not exhausted all reasonably available domestic remedies before filing its NAFTA claim, and held that this exhaustion is a substantive requirement of international law in claims involving judicial decisions. The tribunal's subsidiary reasoning for dismissing the corporate claim became the *ratio decidendi* for dismissing an individual claim brought by Mr. Raymond Loewen.
107. *Loewen, supra* note 11, para. 237-238.
108. *Inter alia* for its interpretation of the continuous nationality requirement of NAFTA and for reintroducing into the substantive protection guaranteed by NAFTA an obligation to exhaust domestic remedies when article 1121 requires an investor to waive domestic remedies as a precondition for filing a claim. See for example J. Paulsson, "Continuous Nationality in Loewen" (2004) 20 Arb. Int'l 213.

corporate form of a company and may explain why their reasoning has generally not been followed.[109]

3.6.2 A purposive interpretation of the definition of "investment"

The literal interpretation of the treaty definitions of "investor" contrasts with the approach adopted by tribunals in a number of other disputes, although not principally concerned with the question of corporate nationality. In fact, the corpus of arbitral awards rendered to date under investment treaties is replete with examples of cases where arbitrators have adopted purposive interpretations of treaty provisions that cannot easily be reconciled with a strict literal interpretation and application of the treaty text. The contrast is especially striking with the awards that have interpreted the definition of "investment" to include a number of extraneous requirements not explicitly contained in the treaty. For example, numerous awards have incorporated into the definition a requirement that, to qualify as an investment, the commitment of capital meant to qualify as an investment contribute to the economic development of a host state.[110] Other cases have read into the definition of investment a territorial requirement that the investment be made in the territory of the host state.[111] Yet more arbitrators have rejected a literal interpretation of the definition of investment contained in a treaty to deny the status of investment to mere commercial transactions.[112]

In the case of *Mitchell* v. *Democratic Republic of Congo*, a United States national brought a claim under the United States-Zaire/DRC BIT alleging that the DRC expropriated his investment when a military court ordered the closure of his law firm, the seizure of documents and the incarceration of two of the firm's lawyers. An initial tribunal found in favour of Mr. Mitchell. An important element in dispute was whether Mr. Mitchell's law firm could qualify as an investment for the purpose of the BIT and the ICSID Convention. The tribunal adopted a literal interpretation of the definition of investment and held that the resources and

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109. The *Loewen* award, in particular, has been criticized by other tribunals; see in particular *Rompetrol*, *supra* note 93, para. 109; *Yukos Universal Limited (Isle of Man)* v. *The Russian Federation*, UNCITRAL (Interim Award on Jurisdiction and Liability, November 30, 2009) PCA Case No. AA 227 at para. 551.

110. *Mitchell* v. *Democratic Republic of Congo*, (Decision on the Application for Annulment of the Award, October 27, 2006) ICSID Case No. ARB/99/7.

111. *Canadian Cattlemen for Fair Trade* v. *United States*, UNCITRAL (Award on Jurisdiction, January 28, 2008) [*Cattlemen for Fair Trade*]; *Bayview Irrigation District & al.* v. *Mexico*, (Award, June 19, 2007) ICSID Case No. ARB(AF)/05/01 [*Bayview Irrigation*].

112. *Romak S.A.* v. *Uzbekistan*, (Award, November 26, 2009) PCA Case No. AA280.

services related to Mr. Mitchell's law firm constituted an investment protected by the BIT and the ICSID Convention. However, an *ad hoc* Committee constituted pursuant to Article 52 of the ICSID Convention to review the award disagreed with the tribunal even though Mr. Mitchell's activities in the DRC appeared to satisfy the definition of "investment" in the BIT. It referred to the "*Salini* test" followed by other ICSID tribunals that have held that, to qualify as an investment under Article 25 of the ICSID Convention, which will be recalled establishes the "outer limits" within which ICSID contracting states may agree to submit their disputes to ICSID arbitration, the following four criteria must be met: 1) a contribution of money or other assets of economic value; 2) a certain duration; 3) an element of risk; and 4) a contribution to the host state's development.[113] With respect to this last element, the *ad hoc* Committee stated that it viewed "the existence of a contribution to the economic development of the host State as an essential – although not sufficient – characteristic or unquestionable criterion of the investment".[114] It then found that the legal services provided by Mr. Mitchell's firm could not, on their own, constitute an investment absent some evidence that the services were provided in connection with a project that benefited the economic development of the DRC or at least the interests of the state.[115] The *ad hoc* Committee therefore held the tribunal's award was "incomplete and obscure" in its identification of an investment and consequently annulled the award.

In another recent dispute, a tribunal refused to adopt a literal interpretation of the Switzerland-Uzbekistan BIT which contained an expansive definition of "investment" and dismissed a claim for lack of jurisdiction as the assets which were being claimed as investments did not conform to the "inherent definition" of the term.[116] The dispute revolved around the alleged non-payment of wheat shipments to Uzbek state entities. The claimant, a Swiss corporation specializing in the international trading of cereals, alleged that its wheat supply contracts satisfied the BIT's definition of investment which included "every kind of assets and particularly: [...] c) claims to money or to any performance having an economic value".[117] The tribunal rejected the claimant's

113. *Mitchell*, *supra* note 110, para. 27 citing: *Salini Construttori S.p.A.* and *Italstrade S.p.A.* v. *Kingdom of Morocco*, (Decision on Jurisdiction, July 23, 2001) ICSID Case No. ARB/00/4 129; *Fedax N.V.* v. *Republic of Venezuela*, (Decision on Objections to Jurisdiction, July 11, 1997) ICSID Case No. ARB/96/3; *Ceskoslovenska obchodni banka, a.s.* v. *Slovak Republic* (Decision on Objections to Jurisdiction, May 24, 1999) ICSID Case No. ARB/97/4.
114. *Mitchell*, *ibid.*, para. 33.
115. *Ibid.*, para. 39.
116. *Romak*, *supra* note 112.
117. *Ibid.*, para. 174.

mechanical construction of the term "investment" as such an interpretation would lead to the conclusion that any one-off sales contracts could constitute an investment, a result which the tribunal found to be "manifestly absurd or unreasonable."[118] According to the tribunal, the term "investment" has an inherent meaning "entailing a contribution that extends over a certain period of time and that involves some risk."[119] While it accepted that, as a matter of principle, states could agree in their treaties to protect assets such as those of the claimant, such an agreement "must leave no doubt that the intention of the contracting States was to accord to the term 'investment' an extraordinary and counter-intuitive meaning."[120]

It is debatable whether the literal interpretation of the term "investor" favoured by the *Tokios*, *AdT*, *ADC*, *Saluka* and *Rompetrol* tribunals, which refused to read into a BIT a denial of benefits clause or a "genuine link" requirement between a corporate investor and its home state, is less "manifestly absurd or unreasonable" or does less "violence to the fabric" of a BIT than the literal interpretation of the definition of "investment" put forward by the claimants in *Mitchell*, *Cattlemen for Fair Trade*, *Bayview Irrigation* or *Romak* arbitrations. To use the *Soufraki* dispute as an example, is it not unreasonable for tribunals to uphold jurisdiction over a claim brought by a company incorporated, wholly-owned and controlled by an individual who would not, in his personal capacity, have been able to benefit from the protection of the treaty afforded to his corporate *alter ego*? One tribunal at least appears to have been troubled by the possibility that a company, incorporated in the territory of a contracting state of the ICSID Convention, and therefore formally a national of that contracting state, could commence binding ICSID arbitration proceedings against a host state even if nationals of the host state owned all of its share capital. In such circumstances, the arbitrators noted, "the issue is raised as to whether in light of the object and purpose of the Convention an interpretation of the second clause of Article 25(2)(d) permitting the Center to exercise jurisdiction would lead to a result which is 'manifestly absurd or unreasonable'".[121] Although this remark was framed within the context of an ICSID arbitration, it could equally well extend to other types of investor-state arbitration brought under different arbitral rules.

Moreover, it is also doubtful that the "*Salini* test", and in particular the enquiry into whether a particular contribution benefits the economic

118. Ibid., para. 184.
119. *Ibid.*, para. 207.
120. *Ibid.*, para. 205.
121. *Vacuum Salt Products*, *supra* note 18, para. 29.

development of the host state, involves any less "wide ranging policy discussions"[122] than the determination whether a particular corporation has any links with its state of incorporation. The former determination is likely to involve complex economic and political issues which may or may not fall within the expertise of arbitrators[123] whereas the latter calls upon arbitrators to subjectively appreciate the relevance and importance of objectively verifiable links between a legal person and a state.

Of course, as the tribunal in *Siemens* v. *Argentina* remarked, treaties are to be interpreted neither liberally nor restrictively "as neither of these adverbs is part of Article 31(1) of the Vienna Convention"[124] and affixing labels such as "literal" or "liberal" to the interpretation favoured by a particular tribunal "is no substitute for analysis."[125] However, the stark contrast in the interpretation method adopted by tribunals that have had to interpret the definition of "investor" with those that have had to interpret the term "investment" undermines to some extent the claim that tribunals are somehow prisoners of the text of the treaty. Indeed, the awards examined under the present heading, irrespective of their relative merit, demonstrate that tribunals are quite capable of reading into treaties extraneous requirements that were not expressly spelled out by the treaty parties themselves when it is required to preserve the perceived integrity of the treaty.

The contrast in the interpretation method, as well as the different views expressed by the dissenting arbitrators in the *Tokios* and *AdT* arbitrations, may betray deeper philosophical differences among arbitrators relating to the nature of investor-state arbitration, the subjects of international investment law, the role of arbitrators and even fundamental legal theory. Arbitrators who adhere to a strict positivist conception of law are much more likely to refrain from adopting interpretations of treaty provisions that depart from a literal reading of the treaty text and agree with Montesquieu that: "*le juge n'est que la bouche qui prononce les paroles de la Loi*".[126] At the other end of the philosophical spectrum, arbitrators who favour a naturalist conception of law in the Grotian tradition are more likely to apply unwritten "contribution to economic development" or "genuine link" requirements. These philosophical extremes are shaped

122. *Rompetrol*, *supra* note 93.
123. One recent tribunal even held that "the contribution of an international investment to the development of the host State is impossible to ascertain" *Phoenix Action*, *supra* note 11, para. 85.
124. (Decision on Jurisdiction, August 3, 2004) ICSID Case No. ARB/02/8 at para. 81.
125. *Azinian* v. *Mexico*, (Award, November 1, 1999) ICSID Case No. ARB(AF)/97/2 at para. 90.
126. Montesquieu, *De l'esprit des lois*, (Paris: Garnier, 1874) at p. 149.

to some extent by the subjective appreciation and importance that each arbitrator accords to the inherent competing, and at times conflicting, needs of objectivity/predictability and flexibility/fairness in the arbitral decision making process. In a relatively immature, but constantly maturing, legal system such as international law, these philosophical differences are compounded by the scarcity and indefiniteness of rules as well as the imperfections of the law-creating and law-amending process. Indeed, in contrast to the precision normally found in domestic legislation, investment treaties are drafted in the broad and general language of diplomacy used in communications between sovereign states and their ratification or subsequent amendment may present considerable difficulty. These characteristics mean that arbitrators, more than municipal judges, are often confronted with gaps in the law that they are asked to fill which exacerbates the cleavage of philosophical opinion between arbitrators. The "real gaps" which naturalist arbitrators may be inclined to fill through genuine interpretation, positivist arbitrators may consider "unreal" and any attempt at interpretation spurious.[127] This is not to say that investor-state arbitrations are decided according solely to the idiosyncratic philosophical beliefs of each arbitrator nor according to what an arbitrator had for breakfast; which would be akin to denying the legal nature of international investment law. A closer reading of the awards that have had to grapple with challenges to the nationality of corporations reveals that the differences between the *Loewen* award and those that have adopted a literal interpretation of the definition of "investor" may be more apparent than real.

Despite the scarcity of reasons, one can attempt to reconcile the *Loewen* award with the dominant formalist view by observing that the *Loewen* arbitration is the only one of the cases (prior to the very recent *Phoenix Action* and *Mobil* decisions) where the incorporation of an intermediary corporation had as its predominant purpose (indeed its only purpose) the acquisition (or maintenance) of treaty protection. Whereas in *Tokios*, *AdT*, *ADC*, *Saluka* and *Rompetrol* the investors all had legitimate business reasons (often related to issues of taxation) to structure their investments through a country that had entered into a BIT with the host state, the *Loewen* dispute is an example of a flagrant attempt to use the separate corporate identity of a corporation to ground treaty jurisdiction where there did not appear to exist any other motive for incorporation. Another distinction is the fact that the Loewen reorganization took place after its NAFTA claim had been brought while in the five more recent cases the investment vehicle had been incorporated well before any

127. On the problem of gaps in international law see: H. Lauterpacht, *The Function of Law in the International Community*, (Oxford: Clarendon Press, 1933) at p. 70.

dispute had crystallized (although it appears arguable that in the *AdT* case a dispute was reasonably foreseeable at the time the Cayman Island corporation was "migrated" to Luxembourg). Yet another distinction is the fact that, contrary to *Loewen*, the respondent states in the other arbitrations were aware of the fact that the investments would be structured through intermediary corporations. The *Saluka* tribunal, for example, observed that Nomura's intention to transfer the IPB shares to a foreign holding company was always apparent to the Czech Republic.[128]

A common feature of the *Tokios*, *AdT*, *ADC*, *Saluka* and *Rompetrol* awards is the effort the five tribunals expended in legitimizing the existence of the intermediary corporations which leads one to believe that had the companies not been incorporated for legitimate business reasons, the tribunals would have been prepared to look through their corporate veils at the nationality of the real controlling interests irrespective of the treaty language. Thus, the *Tokios* majority noted that the claimant had not attempted to conceal its Lithuanian nationality and that the investor had not created its Lithuanian subsidiary to gain the protection of the BIT between Lithuania and Ukraine. The majority concluded that "there is no evidence in the record that the Claimant used its formal legal nationality for any improper purpose."[129] In *AdT*, the majority also dismissed the respondent state's allegation that the investor had somehow abused the corporate form of an intermediary corporation. The tribunal noted: "it is not uncommon in practice, and – absent a particular limitation – not illegal to locate one's operations in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for example, of taxation or the substantive law of the jurisdiction, including the availability of a BIT."[130] In its concluding observations the tribunal gave a lot of weight to its finding that the migration of the Cayman Island corporation to a Dutch company was not principally motivated by the events leading up to the investor's treaty claim.[131] Finally, the *ADC* tribunal, as did the *Tokios* tribunal, emphasized that the Cypriot nationality of the intermediary corporation was known to the respondent state and that the Cypriot corporations had a "perfectly lawful and legitimate role in the Project."[132]

Once it is recognized that the text of the treaty is not necessarily all controlling, the challenge for international investment law becomes to

128. *Saluka*, *supra* note 92, para. 242.
129. *Tokios*, *supra* note 12, para. 56. See also Part 3.1, above.
130. *AdT*, *supra* note 73, para. 330.
131. See Part 3.2, above.
132. *ADC*, *supra* note 80, para. 353. See also Part 3.3, above.

accurately and predictably distinguish between impermissible abuses of the separate corporate personality of a company from the proper use of the "portals" offered by the various investment protection treaties.

One option would be for tribunals to apply a "genuine link" test even where a treaty only refers to the "incorporation test" to determine the nationality of a corporate claimant. Such a test could be drawn from the rules of customary international law as developed in the law of diplomatic protection of individuals.[133] This option is problematic on at least three levels. First, as Professor Sloane argues in a recent article, the very existence of a "genuine link" test in customary international law is of "dubious" origin and is therefore questionable.[134] Secondly, the ICJ rejected the application of such a test to the determination of the nationality of legal persons in the *Barcelona Traction* case, holding that: "[...] in the particular field of the diplomatic protection of corporate entities, no absolute test of the 'genuine connection' has found general acceptance".[135] The International Law Commission similarly has not adopted the "genuine link" test in its *Draft articles on Diplomatic Protection*. Article 9 conforms to the rule laid down by the ICJ in the *Barcelona Traction* case according to which only the state of incorporation is entitled to espouse the claim of a corporation.[136] Lastly, investment treaties were designed to remedy the perceived shortcomings of the customary international law of diplomatic protection and constitute a form of *lex specialis* which arguably leaves no room for the application of any customary international law rules requiring a "genuine link" even if such a customary rule were to exist.[137] These obstacles may not prove insurmountable but it is suggested below that a better solution exists to resolve at least the most egregious forms of treaty shopping.

A second option is to recognize the application in modern international investment law of a general theory of abuse of rights, similar to that found in the municipal legal system of many countries, which allows arbi-

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133. See in particular *Nottebohm*, *supra* note 94.
134. Robert Sloane, "Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality" (2009) 50 Harv. Int'l L.J. 1. For a different perspective see: Pia Acconci, "Determining the Internationally Relevant Link between a State and a Corporate Investor" (2004) 5 J.W.I.T. 139.
135. *Barcelona Traction*, *supra* note 7, para. 70.
136. *Draft articles on Diplomatic Protection*, *supra* note 5. Article 9 creates a presumption that a corporation has the nationality of the state where it is incorporated. This presumption may be rebutted if the corporation has closer connections to another state.
137. Peter Turner, "Issues of Scope: Parties, Ownership and Control" in Albert Jan van den Berg, ed., *International Council for Commercial Arbitration – International Arbitration 2006: Back to Basics?* (The Hague: Kluwer Law International, 2007) 444.

trators to dismiss claims where investors seek to enforce rights that are not based on any real interest of the putative home country.[138]

4. Abuse of rights as a normative framework

If the judgement of the ICJ in the *Barcelona Traction* case can be considered as the low point of the international protection of investments, the current state of international investment law, characterized by the existence of an extensive worldwide network of investment protection agreements coupled with a formalistic application by tribunals of the jurisdiction conferring provisions of investment treaties, can be considered as a high point.

But has the pendulum swung too far back since its low point after *Barcelona Traction*? Do the "portals" created by investment protection agreements (to paraphrase the expression used by the *AdT* tribunal majority) give too much leeway to international investors in allowing them to route their investments through corporations of convenience for the purpose of manufacturing the required diversity of nationality to bring an international claim against states (and even their own states)?

Admittedly, the drafters of international investment agreements must recognize the need of international corporations to structure their investments in the most efficient and cost-effective manner to take full advantage of capital mobility and global value chains. There is undoubtedly truth in the *AdT* tribunal's observation that the objective of increasing investment flows would be thwarted if investors could not be certain that their investments will benefit from the protection of a particular treaty because of uncertainty associated to their status as "genuine nationals" of a given state. On the other hand it cannot also be doubted that states must be able to guard against the most egregious forms of treaty shopping such as when an investor brings itself under the protection of a treaty by creating a corporation of convenience when a dispute has already crystallized or when it is reasonably foreseeable that a dispute will materialize in the near future. In such reprehensible cases, it can be argued that even where an investment treaty does not contain any express language requiring a "genuine link" with the state of incorporation or a denial of benefits clause, tribunals must decline jurisdiction to protect the "fabric" of the treaty.

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138. Since an earlier version of this article was initially submitted to the Canadian Arbitration Congress in June 2008 at least two tribunals have expressly dismissed a claim, in whole or in part, for lack of jurisdiction *ratione personæ* on the basis of this theory. See *Phoenix Action*, *supra* note 11 and *Mobil*, *supra* note 11.

4.1 Abuse of rights as a general principle of law

The domestic legal systems of a great many states, mainly of the civil law tradition, recognize the principle that a right cannot be exercised in an abusive manner. For example, article 7 of the *Quebec Civil Code* provides that: "No right may be exercised with the intent of injuring another or in an excessive and unreasonable manner which is contrary to the requirements of good faith."[139] The principle is still contested and for many it is a dangerous oxymoron. Despite its critics, from its municipal law origins, the principle has been extended to the plane of international law as a general principle of law or as part of customary international law.[140]

In his 2002 article on the subject, Professor Byers surveys an impressive number of judgements, awards and doctrinal pronouncements in favour of the application of the abuse of rights theory in international law. Professor Byers notes that the principle appears in the case law of the International Court of Justice, the Permanent Court of International Justice, the Appellate Body of the World Trade Organization and numerous international arbitral decisions.[141]

According to most authors, the abuse of rights theory is merely an application of the good faith principle to the exercise of rights.[142] The good faith principle finds expression in the Latin maxim *pacta sunt servanda* codified in article 26 of the *Vienna Convention* which states that: "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith". A corollary of this principle is that the rights of third states are unaffected by treaties to which they are not a party.[143]

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139. S.Q. 1991, c. 64.
140. Michael Byers, "Abuse of Rights: An Old Principle, A New Age" (2002) 47 McGill L.J. 389 at 397. See also Ian Brownlie, *Principles of Public International Law*, 6th ed. (Oxford: Clarendon Press, 2003) at 470: "It is not unreasonable to regard the principle of abuse of rights as a general principle of law"; R. Jennings & A. Watts, eds, *Oppenheim's International Law*, 9th ed., vol. 1 (London: Longman, 1992) at 408; Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, (Cambridge: Cambridge University Press, 2006) at 121; A. Kiss, "Abuse of Rights" in R. Bernhardt, ed., *Encyclopedia of Public International Law*, vol. 1 (Amsterdam: North-Holland, 1992) at 4; N. Politis, "Le problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux" (1925) 6 Recueil des Cours 1.
141. Byers, *ibid.* at 398.
142. Byers, *ibid.*; Jennings & Watts, *supra* note 140; Cheng, *supra* note 140, at 121.
143. Article 34 *Vienna Convention*.

Although the reception of the abuse of rights theory in international law is now hard to deny, the application of the theory in practice is more difficult. Bin Cheng attempts to clarify the scope of the theory by referring to the dichotomy between rights and interests:

> The reasonable and *bona fide* exercise of a right implies an exercise which is genuinely in pursuit of those interests which the right is destined to protect and which is not calculated to cause any unfair prejudice to the legitimate interests of another State, whether these interests be secured by treaty or by general international law. The exact line dividing the right from the obligation, or, in other words, the line delimiting the rights of both parties is traced at a point where there is a reasonable balance between the conflicting interests involved. This becomes the limit between the right and the obligation, and constitutes, in effect, the limit between the respective rights of the parties. [...] Any violation of this limit constitutes an abuse of right and a breach of the obligation – an unlawful act.[144] [emphasis added]

Thus, the exercise of a right in a manner that cannot be justified in light of the interest that the right is established to protect will be sanctioned as an abuse of right contrary to the good faith principle which is the cornerstone of treaty law as codified in the *Vienna Convention*.

4.2 Piercing the corporate veil to sanction an abuse of rights

Perhaps fittingly, the seeds of an answer to the problem of declining jurisdiction in cases of egregious treaty shopping were sowed by the ICJ itself in its judgement in *Barcelona Traction*. Although investment tribunals have consistently held that reliance on rules of customary international law as set out in *Barcelona Traction* is misplaced when a treaty spells out in detail the scope of protection offered to foreign investors,[145] many investment agreements, such as article 1131 of the NAFTA and article 26(6) of the ECT, bind arbitral tribunals to apply, not only the provisions of the treaty, but also "applicable rules of international law". As such, to the extent that rules of international law are not incompatible with specific treaty provisions, investment tribunals may legitimately look at, and indeed are bound to apply, principles of international law, including general principles of law such as the abuse of rights theory.

In *Barcelona Traction* the ICJ observed that the municipal laws of states that endow a corporation with a legal personality distinct from that

144. Cheng, *supra* note 140, at 131.

145. See for example *ADC* v. *Hungary*, *supra* note 80; and *Mondev International Ltd.* v. *United States of America*, (Final Award, October 11, 2002) ICSID Case No. ARB(AF)/99/2 at para. 79.

of its shareholders have had, at one point or another, to deal with the issue of the abuse of the separate legal personality of corporations. The abuse can take many forms and is done for a variety of reasons, be it for tax evasion, insurance or criminal purposes. To address these abuses, municipal laws generally allow that the separate legal personality of a corporation can be ignored in special circumstances.[146] The ICJ has recognized this possibility found in municipal laws and has held that such abuse-countering rules could be elevated to the plane of international law to address similar situations:

> [T]he process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law. It follows that on the international plane also there may in principle be special circumstances which justify the lifting of the veil in the interest of shareholders.[147]

The ICJ described the type of actions that could warrant lifting the corporate veil:

> The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations.[148]

In light of the Court's pronouncement, and the inclusion of international law as governing law in a number of investment treaties, investment tribunals are justified to invoke a doctrine of abuse of rights to deny the ability of corporations of convenience to bring investment claims in situations where holding otherwise would legitimize an abuse of corporate form. In this context, the *AdT* tribunal's observation that "corporate form may be abused and that form may be set aside for fraud or on other grounds"[149] is reassuring from the standpoint of respondent states.[150] The difficulty for tribunals is to identify when such reprehensible abuse of corporate form is taking place and to distinguish between legitimate exercises of treaty planning from reprehensible forms of treaty shopping.

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146. See for example article 317 of the *Quebec Civil Code*: "In no case may a legal person set up juridical personality against a person in good faith if it is set up to dissemble fraud, abuse of right or contravention of a rule of public order."
147. *Barcelona Traction, supra* note 7, at p. 39.
148. *Ibid.*
149. *Supra* note 73, para. 245.
150. The *Tokios* tribunal also recognized the existence of an "equitable doctrine of 'veil piercing'" that could override the terms of the relevant BIT. However, as was discussed above, the tribunal found the doctrine inapplicable to the facts of the case.

It will be recalled that according to Bin Cheng, an abuse of rights is committed when a right is exercised in a manner that is not genuinely in pursuit of those interests that the right is destined to protect and causes unfair prejudice to the interests of another state. Therefore, to determine whether granting access to a BIT's investor-state dispute settlement mechanism constitutes an abuse of rights, a tribunal must determine whether the exercise of the right to seek binding arbitration against a state in that specific case is genuinely in pursuit of the interests the treaty was destined to protect.

The abuse of rights theory was recently expressly applied by an ICSID tribunal to dismiss a claim for lack of jurisdiction. In *Phoenix Action, Ltd.* v. *Czech Republic*[151] a claim was brought by an Israeli holding company against the Czech Republic alleging a breach of the Israeli/Czech BIT. The respondent sought to dismiss the claim on the basis that the corporate claimant was nothing more than a "sham Israeli entity created by a Czech fugitive from justice"[152] for the sole purpose of internationalizing a previously existing domestic dispute with Czech governmental authorities. The tribunal relied on the *Salini* test to determine whether the claimant had made an investment in the Czech Republic. In addition to the traditional requirements of contribution, duration, risk, and contribution to the economic development of the host state, the tribunal read into Article 25 of the ICSID Convention an obligation that the investment be realized in "good faith". The tribunal relied on a purposive interpretation of the ICSID Convention and the relevant BIT to hold that an economic transaction performed "with the sole purpose of taking advantage of the rights contained in such instruments, without any significant economic activity"[153] could not benefit from the protection of the international investment law system. It stated that such transactions "must be considered as an abuse of the system."[154] Considering the timing of the claimant's alleged investment, which was made after the alleged damages materialized, the timing of the claim, which was initially notified to the Czech Republic a mere two months after the alleged investment, as well as the evidence that the claimant never intended to perform any business activity in the market place, the tribunal concluded that the investment was made, not for the purpose of engaging in economic activity in the Czech Republic, but rather to bring international litigation against the respondent. The claim thus constituted an abuse of right: "The abuse here could be called a "*détournement de procédure*", con-

151. *Supra* note 11.
152. *Ibid.,* para. 34.
153. *Ibid.*, para. 93.
154. *Ibid.*

sisting in the Claimant's creation of a legal fiction in order to gain access to an international arbitration procedure to which it was not entitled."[155] The tribunal accordingly rejected the claim.

The approach taken by the *Phoenix Action* tribunal was closely followed by another tribunal in a very recent jurisdictional award rendered in an arbitration opposing a group of oil production companies and Venezuela.[156] The dispute concerned a series of royalty rate and tax increases decreed by the government of Venezuela from 2004 to 2006 as well as the nationalization of two oil production projects by the government in 2007. The measures applied to a group of U.S. companies that had invested in oil exploration and production projects in Venezuela. In 2005, after the first royalty increases, but before the nationalization measures, the ownership structure of the Venezuelan investments was restructured and a Dutch holding company was inserted into the ownership chain admittedly to gain access to ICSID arbitration through the Dutch-Venezuela BIT.[157] According to the tribunal, "such restructuring could be 'legitimate corporate planning' [...] or an 'abuse of right' [...] it depends upon the circumstances in which it happened."[158] In its analysis of the circumstances the tribunal accorded great importance to the timing of the dispute. It found as a matter of fact that a dispute between the parties concerning the royalty and tax increases actually preceded the corporate reorganization that purportedly brought the investments in Venezuela under the protection of the relevant BIT. The tribunal held "that to restructure investments only in order to gain jurisdiction under a BIT for such disputes would constitute, to take the words of the *Phoenix* tribunal 'an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs.'"[159] The tribunal therefore dismissed the part of the claim relating to measures that preceded the corporate reorganization and asserted jurisdiction over the part of the claim concerning measures which were adopted subsequently.

In light of the *Tokios*, *AdT*, *ADC*, *Saluka* and *Rompetrol* decisions, it is clear that tribunals generally do not consider the use of foreign holding corporations in the corporate structuring of an investment as abusive *per se*, even if they are used with the predominant purpose of accessing the protection of a treaty. However, the *Loewen* award and the two recent decisions in the *Phoenix Action* and *Mobil* arbitrations demonstrate that

155. *Ibid.*, para. 143.
156. *Mobil*, *supra* note 11.
157. *Ibid.*, para. 189 and 190.
158. *Ibid.*, para. 191.
159. *Ibid.*, para. 205.

tribunals will generally not look favourably upon any type of corporate restructuring that has taken place *after* a dispute has materialized. These last cases raise the question whether the abuse of rights theory should be limited to sanction *ex post facto* attempts to create the required diversity of nationality or whether the theory may apply more broadly to other circumstances.

Conceptually, nothing in the abuse of rights theory prevents it from also applying to cases in which the corporate structuring which brings an investment under the protection of a BIT takes place *before* a dispute materializes. It may well be that other circumstances, besides the timing of a claim, can lead a tribunal to the conclusion that the exercise of a right to seek binding investor-state arbitration is not genuinely in pursuit of the interests the treaty was designed to protect. After all, naked attempts at manufacturing the required diversity of nationality are relatively rare. Most often, tribunals will be faced with contradictory evidence concerning a corporate claimant's connections with its alleged home country. In light of the above-mentioned recent arbitral awards on the issue of corporate nationality,[160] the following non-exhaustive list of factors may guide investment tribunals in deciding when to invoke the doctrine of abuse of rights to counter impermissible treaty shopping:

– Temporal nexus between the time of incorporation and the facts giving rise to the dispute. The fact that a corporation was incorporated at a time when it was reasonably foreseeable that a dispute would arise should be an indication of abuse of corporate form, especially if no plausible justification, other than investment arbitration, is offered to explain the choice of corporate structure. On the contrary, if a corporate investor was incorporated many years before an investment treaty was even signed, let alone before any dispute arose, it would be difficult to argue that the incorporation constituted an attempt to access international arbitration mechanisms.

– The existence of effective links between the corporation and the state of incorporation. Any link such as paying taxes or retaining domestic auditors in the home state should be relevant. The greater the number of links that can be established, the less likely it will be that the corporation was created to take advantage of investor-state arbitration.

– The extent to which the corporation is beneficially owned by nationals of the state of incorporation. If 90% of the capital stock of the company is owned by nationals of its state of incorporation it will be more difficult

160. See part 3, above, for a discussion of the cases.

to argue that the investors have adopted a nationality of convenience through the incorporation of a company than if the same proportion of the capital stock is owned by nationals of the host state or another foreign state.

- The existence of legitimate business activities in the state of incorporation. The fact that a legal person is a mere holding corporation, or a shelf corporation who shares the same head office address with 225 other companies, should also be indicative of possible abuse. On the contrary, the fact that a claimant corporation conducts business operations in the state of incorporation should militate strongly against a finding of abuse.

- If the host state was aware that the investment was structured through a foreign intermediary investment vehicle and formulated no objection to such structure, then that state may be precluded from later challenging the jurisdiction of an arbitral tribunal on the basis of that corporate structure. This factor is most likely to apply in cases where the claim concerns an investment contract such as in the *ADC* arbitration where the tribunal relied heavily on the Hungarian government's knowledge of the use of Cypriot entities to refuse to pierce the corporate veil of the intermediary corporation.

None of these criteria would be determinative of the jurisdiction issue. Tribunals must rather weigh each factor in light of the facts of each particular case. For example, although the corporate reorganization at the center of the jurisdiction dispute in the *AdT* arbitration took place after the dispute seemed to have crystallized, the claimant was able to convince the tribunal that it had perfectly legitimate business reasons to restructure the investment ownership as it did and not to lift the corporate veil of the Dutch intermediary corporations. Similarly, the fact that a respondent state formulated no objection to the corporate structure of its co-contractor in an investment contract or that a corporation was incorporated before a dispute arose would not be sufficient, in and of itself, to conclude that granting access to the dispute settlement mechanism of a BIT to such a corporate entity would be in pursuance of the legitimate state interests the BIT was designed to protect.

It may well be that widespread reference to the abuse of rights doctrine would be tantamount, in some cases, to reading into investment protection treaties extraneous "genuine link" or "*bona fide* investment" requirements in cases where such requirements are not expressly spelled out in a treaty. However, tribunals should not exaggerate the importance of strict and inflexible compliance with the text of a treaty, especially in an area of international law that is in a dynamic state of flux. The powerlessness to apply anything but a literal interpretation of treaty provisions professed by arbitrators that have adopted a formalistic interpretation of the jurisdiction conferring provisions of treaties is questionable. One tribunal recently went so far as admitting that, although the negotiators of the ECT may not have sought to protect investments in a contracting state by nationals of that same contracting state through the incorporation of companies in another contracting state, it was nonetheless bound to consider a claim brought under precisely such a fact scenario in light of the "neutrally cast" jurisdictional provisions of the treaty.[161] The awards that have adopted a purposive definition of the term "investment" have shown that investment tribunals have, on occasion, read into treaties requirements that were not expressly spelled out when such a reading in is necessary to preserve the "fabric" of a treaty. In this context, the following passage from Jennings and Watts is especially relevant and instructive:

> If a right is formulated in absolute terms ('a State may expel aliens'), arbitrary and precipitate action may involve an abuse of that right; if the right is formulated in qualified terms ('a State may take reasonable measures to expel aliens'), such action would be wrongful not so much as an abuse of right but as being outside the scope of the right claimed. [...] The inclusion in a rule of a qualification requiring reasonableness, or something similar, in its application, serves much of the purpose of the doctrine of 'abuse of rights'. That doctrine is a useful safeguard in relatively undeveloped or over-inflexible parts of a legal system pending the development of precise and detailed rules.[162]

161. "If the States that took part in the drafting of the ECT had been asked in the course of that process whether the ECT was designed to protect – and should be interpreted and applied to protect – investments in a Contracting State by nationals of that same Contracting State whose capital derived from the energy resources of that State, it may well be that the answer would have been in the negative, not only from the representatives of the Russian Federation but from the generality of the delegates. The ultimate source of the investments at issue in the instant cases may be Russian. The fortunes of the "oligarchs" – a term constantly employed in the pleadings of Respondent which the Tribunal for its part repeats without pejorative intent – may derive from investments by Russians in Russian resources.
But, as the Tribunal noted earlier, the Tribunal is bound to interpret the terms of the ECT not as they might have been written so as exclusively to apply to foreign investment but as they were actually written. They are more comprehensively and neutrally cast." *Yukos*, *supra* note 109, para. 434-435. The president of the *Yukos* tribunal, Mr. Yves Fortier, was also an arbitrator on the *Saluka* tribunal as well as the *Soufraki* tribunal.

162. Jennings & Watts, *supra* note 140, at 407.

The recourse to the doctrine of abuse of rights serves the very purpose contemplated by Jennings and Watts without necessarily importing a "genuine link" requirement into the definition of "investor": the doctrine serves as a safeguard against an automatic application of "over-inflexible" nationality requirements that limit a tribunal's inquiry into the nationality of a corporate claimant to determining the claimant's place of incorporation.

5. Conclusion

With the recent multiplication of international investment agreements and the corresponding increase in the number of investor-state claims, international investment law has come a long way since the ICJ's judgement in *Barcelona Traction*. While the Court was criticized for having adopted a too narrow view of the protection of international investments, recent awards rendered under modern international investment agreements have been criticized for opening the doors too far wide to possible abuses of corporate form.

Some commentators have observed that the network of international investment agreements of a country, just like a good roads infrastructure and telephone system, is seen as an important part of the country's ability to attract investment and be a commercial center.[163] However, when foreign investors abuse the right of access to an investor-state dispute settlement forum by concocting a colorable scheme to manufacture the required diversity of nationality between itself and the host state, the object and purpose of these treaties (i.e. encouraging investment flows between specified countries) is thwarted. Contrary to what some commentators have argued, the obligations owed by a host country and created in an investment protection treaty are not *erga omnes* obligations.[164] They are owed only to nationals of a co-contracting state.

The clear adoption in modern international investment law of an abuse of rights theory has the merit of granting to investment tribunals the required flexibility to disregard formal corporate structures even in the absence of a denial of benefits clause or language requiring a

163. Robert Volterra, "Opening Remarks Section 2", in Federico Ortino, Lahra Liberti, Audley Sheppard & Hugo Warner, eds., *Investment Treaty Law Current Issues II*, *supra* note 72, at 26.
164. Barton Legum, "Defining Investment and Investor: Who is Entitled to Claim?" (2006) 22 Arb. Int'l 521 at 522.

"genuine connection with" or "substantial business activities in" the territory of incorporation. Such an adoption would serve to prevent possible egregious abuses of the current system of international investment law while at the same time provide potential investors a measure of legal certainty that is so important for the encouragement of cross-border investment flows.