THE SYSTEMIC CHALLENGE OF CORPORATE INVESTOR NATIONALITY IN AN ERA OF MULTINATIONAL BUSINESS

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Abstract

This Article examines the attribution of corporate nationality in investment treaties, particularly in the context of multinational enterprises. It traces the treatment of corporate investor nationality seen in various arbitral awards issued pursuant to international investment agreements as well as in broader public international law. The author argues that use of place of incorporation alone to determine nationality is an outdated approach given the current role of multinational enterprises in world economy. Exclusive use of this test, which disregards factors such as foreign corporate control, or lack of economic presence, allows investment treaties to serve as portals for corporate investors with nationalities of convenience. This result should either be acknowledged by states as a deliberate policy initiative, or nationality definitions should be altered and made more comprehensive in order to address this phenomenon. A downside of the use of place of incorporation alone to determine nationality in investment treaties is the risk of parallel proceedings and double recovery as well as the risk of claims by *de facto* local investors. Use of place of incorporation alone to determine nationality renders expansive states' prior consent to arbitrate, and investors' standing to launch claims. Neither denial of benefits clauses, nor arbitrators' application of the doctrine of abuse of right, are sufficient in themselves to narrow the wide scope of states' prior consent or investors' standing to arbitrate which is established by use of place of incorporation alone as nationality test.

1. Introduction

The concept of corporate nationality stands at the confluence of national and international law and at the crossroads between economic expediency and legal significance. It merits reflection as the rule of law grows to follow global economic affairs. Corporate nationality is furthermore central to the domestic and international regulation of multinational enterprises (MNEs).

One field where corporate nationality is of fundamental importance is investment treaty arbitration; corporate investors must be nationals of a state party to an investment treaty in order to launch claims against their host state. While many investor claims have been dismissed by arbitral tribunals, others have resulted in monetary settlements with host states as well as damages awards.[1] Investors have made claims for a very high quantum of damages in several disputes, some of which remain, as yet, unresolved.[2] Since the first investment treaty[3] arbitral

1. *E.g.*, *Ethyl Corp.* v. *Canada*, Award on Jurisdiction (June 24, 1998), <http://ita.law.uvic.ca/documents/Ethyl-Award.pdf>. A settlement was reached in July 1998 whereby Canada lifted the restriction on the chemical in question and agreed to pay the claimant $13 million. See, Sean D. Murphy, *United States Practice in International Law: Volume 1* (Cambridge: Cambridge University Press, 1999) at 234. *E.g.*, *Feldman* v. *Mexico*, Award (16 Dec. 2002), <http://www.economia-snci.gob.mx/sphp_pages/importa/sol_contro/consultoria/Casos_Mexico/Marvin/laudo/laudo_ingles.pdf>.
2. For example the investor claim in *Libananco Holdings Co. Limited (Cyprus)* v. *Republic of Turkey*, under the Energy Charter Treaty, is USD 10 billion. See "Investor-State Dispute Settlement Cases" *Energy Charter Treaty*, <http://www.encharter.org/index.php?id=213&L=0#Libananco>. See also, *Libanco Holdings Co. Limited* v. *Turkey* (23 June 2008), Preliminary Issues Award (ICSID CASE NO. ARB/06/8), at para. 61, <http://ita.law.uvic.ca/documents/Libanco-Decision.pdf>.
3. *E.g.*, *Energy Charter Treaty*, December 1994, Part V art. 26, <http://www.encharter.org/fileadmin/user_upload/document/EN.pdf#page=55> (entered into force April 1998); *Protocol to Amend the Agreement among the Governments of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments*, 12 September 1996, <http://www.aseansec.org/6465.htm>; *Agreement among the Government of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore and the Kingdom of Thailand for the Promotion and Protection of Investments*, 15 December 1987, art. 10, <http://www.aseansec.org/6464.htm>. The Australia – New Zealand – ASEAN Free Trade Agreement also contains investor-state dispute settlement: *Agreement Establishing the ASEAN-Australia New Zealand Free Trade Area*, art. 20, 27 February 2009, <http://www.aseansec.org/22260.pdf>; Central America-Dominican Republic-United States Free Trade Agreement, 5 August 2004, art. 10.16, at <http://www.sice.oas.org/Trade/CAFTA/CAFTADR_e/CAFTADRin_e.asp> (last visited 24 September 2009) (entered into force 1 January 2005).

award in 1990,[4] awards have been issued in at least 357 disputes between foreign investors and host states.[5] It is difficult to judge the true extent of such activity, however, since an unknown number of investment treaty arbitrations are unreported.

Review of treaties and awards shows that a common method of defining corporate nationality in this field is by reference to the state of incorporation alone.[6] This approach to nationality is arguably now outdated,[7] however, in the face of global business. Place of incorporation alone is arguably a blunt tool for the assessment of current business practices. Reliance on place of incorporation alone to determine nationality also arguably renders nationality a superficial concept, and as a result undermines precision and coherency within the investment treaty system more generally. Use of this test has systemic ramifications because it renders expansive the scope of (1) states' prior consent to arbitrate and (2) investors' standing to initiate claims.

In addition to these systemic issues, reliance on state of incorporation alone leads to unaddressed doctrinal incoherence, whereby corporate veils are impenetrable for the purposes of reviewing non-national control but are pierced to permit indirect investor standing. This incoherence leads to the risk of parallel proceedings and double recovery, possible when different nationality corporate investors, along the same centrally-controlled chain of corporate ownership, are granted claimant standing in relation to the same investment dispute, albeit under different treaties.[8]

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4. *Asian Agricultural Products Ltd. (AAPL)* v. *Sri Lanka* (ICSID ARB/87/3), Award (27 June 1990, <http://ita.law.uvic.ca/documents/AsianAgriculture-Award.pdf> (United Kingdom – Sri Lanka BIT).
5. UNCTAD, *Latest Developments in Investor–State Dispute Settlement*, IIA Issues Note No. 1 (2010), at 2, <http://www.unctad.org/en/docs/webdiaeia20103_en.pdf>; See also, UNCTAD, *UNCTAD Database of Treaty-Based Investor-State Dispute Settlement Cases*, at <http://www.unctad.org/iia-dbcases/cases.aspx> (last visited 1 January 2010).
6. A 2006 UNCTAD report, "Numerous BITs concluded since 1995 use the place of incorporation as sole criterion [of nationality]." UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking*, UNCTAD/ITE/IIT/2006/5, (2006), <http://www.unctad.org/en/docs/iteiia20065_en.pdf> at 15 [*Trends*].
7. Place of incorporation is reportedly the oldest approach to corporate nationality determination, at least as regards domestic law practice. See Linda A. Mabry, "Multinational corporations and U.S. Technology Policy: Rethinking the Concept of Corporate Nationality" (1999) 87 Geo. L.J. 563 at 583.
8. See *e.g.*, Gabriel Bottini, "Indirect Claims under the ICSID Convention" (2008) 29 U. Pa. J. Int'l L. 563 at 566. See also Robin Hansen, "Parallel Proceedings in Investor-State Treaty Arbitration: Responses for Treaty-Drafters, Arbitrators and Parties" (2010) 73:3 The Modern Law Review 523.

This Article examines corporate nationality's treatment in investment treaties and arbitrations, as well as in public international law generally. In particular, I argue that place of incorporation alone is not a comprehensive test of nationality given the ease of many states' incorporation procedures, as well as the fluidity of global investment capital. Where treaty ratifying states have sparsely specified investor nationality requirements, arbitrators are left to take nationality at face value, without a review of corporate ownership, control or economic engagement in the jurisdiction.

One reason that place of incorporation alone is a superficial test for nationality is that global business today is predominantly conducted by centrally controlled, multinational corporate groups,[9] including both large[10] and small multinational enterprises (MNEs). The state of incorporation test does not address the fact that individual corporations are often part of wider corporate networks, and may be owned or controlled from abroad. Other areas of international law[11] have responded to this fact and have moved beyond place of incorporation alone to develop a more comprehensive understanding of corporate nationality. Since place of incorporation alone lacks nuance and specificity as a test, its lack of specificity contributes to inconsistency in arbitral awards. Concepts such as abuse of right have been turned to by arbitral tribunals to supplement the state of incorporation test's lack of insight, but these concepts are not sufficient in themselves to bring precision to investment law's understanding of corporate investor nationality.

In its examination of corporate investor nationality, this Article is divided into five parts. Part one continues with a brief introductory discussion of MNEs. Part two next presents public international law's treatment of investor nationality, including international law's framing of investment treaties and its past and emerging treatment of corporate nationality. Parts three and four examine nationality in investment treaties and arbitral awards, respectively. Part five concludes by suggesting ways of

9. *E.g.*, Debra Johnson & Colin Turner, *International Business*, (London, Routledge: 2003) at 101.

10. "FT Global 500 2009" *Financial Times* (29 May 2009), <http://media.ft.com/cms/8289770e-4c79-11de-a6c5-00144feabdc0.pdf>.

11. Li, Cockfield and Wilkie state: "Corporations [...] can be incorporated virtually anywhere by simply filing articles of incorporation in a country where the taxpayer wishes the corporation to reside. The 'nationality' of corporations is something of the past." In international tax treaties incorporation nationality has been transcended and notions of corporate residency have been operationalized. Jinyan Li, Arthur Cockfield & J. Scott Wilkie, *International taxation in Canada: Principles and practices* (Markham, Ontario: LexisNexis Butterworths, 2006) at 21.

improving upon the place of incorporation test in investment treaties and arbitrations.

1.1 MNEs

Appropriate allocation of corporate nationality exists within a wider challenge, namely, how to address the disconnect which exists between MNEs' legal characterization and their practices as economic actors. Despite the fact that MNEs may often act as centrally-controlled coordinated networks, executing strategies and policies across borders, they are not necessarily viewed as holistic legal units. Rather, MNEs are comprised of distinct individual corporations linked to each other by equity or other means.[12] Unless a corporate component's veil is pierced, the law tends to view each corporation within the MNE's ownership chain as being a distinct person. Specific regimes aside,[13] the MNE is not generally viewed under domestic or international legal systems as a unified whole, despite the fact that this type of business organization counts within its ranks many multinational firms, which are uncontroversially treated as such in business literature.[14]

The global cultural and economic prominence of some of the world's largest enterprises is indicative of this unified MNE business character.[15] While the practical cohesiveness seen within particular MNEs can range significantly, the legal personification of the MNE as being comprised of wholly distinct individual corporations is undeniably different from the public conception of many MNEs and is indeed divorced from the factual element of centralized control[16] which characterizes MNEs.

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12. *E.g.*, Phillip I. Blumberg, "Asserting Human Rights against Multinational Corporations Under United States Law: Conceptual and Procedural Problems" (2002) 50 Am. J. Comp. Law 493 at 493. Note that other organizational forms such as trusts and partnerships are also featured within MNE structures.
13. On bankruptcy see *Avi-Yonah infra* note 131.
14. *E.g.*, Fortune Magazine, "Fortune 500 Companies, Global Edition 2007- World's Largest Companies", <money.cnn.com/magazines/fortune/global500/>.
15. For instance, Coca-Cola's website boasts operations in "more than 200 countries". Unilever reports that *Knorr* products are sold in more than 80 countries. Perusal of the Nestle site reveals addresses in 104 countries. <http://www.thecoca-colacompany.com/ourcompany/index.html>; <http://www.unilever.com/brands/food/knorr.asp>; <www.nestle.com/common/headers/nestleaddresses.htm>.
16. Cynthia Wallace, *The Multinational Enterprise and Legal Control: Host State Sovereignty in an Era of Economic Globalization*, (The Hague: Martinus Nijhoff Publishers, 2002) at 156.

With their multiple corporate components, MNEs may possess claims to multiple nationalities.[17] MNEs must therefore take many national standards and regulations into account in their operations, and may also profit from differences in national regimes.[18] MNEs can also arrange their corporate structure to ensure cumulative efficiencies for the MNE as a whole.[19] MNEs' multiple nationalities and personalities can greatly complicate various elements of domestic regulation, as compared with strictly domestic companies.[20] Furthermore, the domestic sphere is still a far more important regulatory force in MNE activities than any initiatives in international law.[21]

Investment treaty negotiators and arbitrators are certainly not tasked with solving all questions of MNE nationality and personality, along with the jurisdictional challenges they entail. However, analysis of corporate nationality should be undertaken by arbitrators and treaty negotiators with the above complexities of MNEs in mind. While many investment treaties exist on a bilateral basis, global business often operates regionally or multinationally. Thus, a MNE which is economically based in a country which is not party to a particular bilateral investment treaty (BIT) may still have within its subsidiaries an entity with the nationality (as determined by place of incorporation) of a BIT state, potentially enabling the MNE access to the BIT's investor-state dispute mechanism.

17. *Ibid.* at 10.
18. See discussion of regulatory competition by Mathias Koenig-Archibugi in "Transnational Corporation and Public Accountability" (2004) 39:3-4 Government and Opposition 235 at 241.
19. MNEs' access to multiple nationalities is central to a number of high profile regulatory issues including the use of tax havens, transfer-pricing and flags of convenience. OECD, "List of Unco-operative Tax Havens", <http://www.oecd.org/document/57/0,2340,en_2649_33745_30578809_1_1_1_1,00.html>; On transfer-pricing see: Kavaljit Singh, *Why Investment Matters: The Political Economy of International Investments*, (FERN & The Corner House, Brussels: 2007) at 48 <http://www.thecornerhouse.org.uk/pdf/document/Investment.pdf>; On Flags of Convenience see: Randon H. Draper, "Resuscitating the Victims of Ship Pollution: the Right of Coastal Inhabitants to a Health Environment" (Spring 2004) 15 Colo. J. Int'l Envtl L. & Pol'y at 190.
20. It can be difficult to secure evidence from abroad, even if relevant to a domestic prosecution. The OECD's work on Hard Core Cartels notes the challenges of international information gathering. OECD, *Hard Core Cartels: Third Report on the Implementation of the 1998 Recommendation* (OECD, Paris: 2005) at 30, online <http://www.oecd.org/dataoecd/58/1/35863307.pdf>. The jurisdiction of domestic courts is limited by subject matter and personal jurisdiction, along with notions of comity and *forum non conveniens.* Trevor Farrow, "Globalization, International Human Rights, and Civil Procedure" (2003) 41:3 Alta. L. Rev. 671; *In Re: Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December 1984*, 809 F.2d 195 (2d Cir. 1987).
21. Peter Muchlinski, *Multinational Enterprises and the Law*, (Oxford: Blackwell, 1995) at 107.

Such activity merits reflection and resulting treaty nuance which is consistent with individual states' policy objectives vis-à-vis MNEs.

2. The public international law context

2.1 Corporate nationality in general public international law

Nationality is an important concept in international law since it represents how individuals are made to fit within the international law system. Mainstream public international law has traditionally only recognised states, and to some extent international organizations[22] as having legal personality. The principle of nationality is a bridging concept through which international law is able to recognize individuals.[23]

As regards natural persons, nationality is a comparatively settled area of international law. Various treaties are in force to address issues including dual nationality.[24] Furthermore, the ICJ addressed nationality of natural persons in detail in the 1954 *Nottebohm* decision, determining that nationality entailed the existence of a "genuine link" between person and state, and noting further the concept of "effective nationality" in instances of multiple nationalities.[25] While nationality is generally recognized as being initially attributed according to domestic law rules on the matter, nationality also has a strictly international law level of analysis.[26]

The nationality of corporations is a less settled area of international law than the nationality of natural persons. The most influential ICJ decision on corporate nationality, *Barcelona Traction*[27] accessed nationality in the context of diplomatic protection. In this case the ICJ held that the customary rule regarding diplomatic protection afforded the right of representation to the state of nationality of the corporation itself, and not the

22. *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, I.C. J. Reports 1949, p. 174 at 179.
23. Post World War II developments in human rights law and international criminal law have also seen direct allocation of rights and responsibilities to individuals.
24. *Convention on Certain Questions Relating to the Conflict of Nationality Laws*, 1930, 179 L.N.T.S. 89, (entered into force: 1 July 1937).
25. *Liechtenstein* v. *Guatemala (Nottebohm)* I.C.J. Reports, 1955, pp. 4-65. For a critique of this characterization see Robert D. Sloan, "Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality" (2009) 50:1 Harv. Int'l L.J. 1.
26. Pia Acconci, "Determining the Internationally Relevant Link between a State and a Corporate Investor" (2004) 5:1 J. World Investment & Trade 139 at 139.
27. *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain)* I.C.J. Reports 1970, 3 at 9, <http://www.icj-cij.org/docket/files/50/5387.pdf> [*Barcelona Traction*].

corporation's shareholders.[28] The ICJ noted place of incorporation, along with the concepts of company headquarters or *siège social*[29] as determining the state of nationality of the corporation. Nationality of corporation arose in various international law contexts prior to *Barcelona Traction* as well; some of these saw the assessment of corporate nationality according to factors additional to place of incorporation, including state of ownership or control.[30] It is also of note that in the 1989 *ELSI* case the United States was permitted by the ICJ to exercise diplomatic protection for two American companies which were shareholders in an Italian company at issue.[31]

Barcelona Traction concerned a Canadian-incorporated company with predominantly Belgian nationals as shareholders. The question of whether Belgium had the right to represent the shareholders internationally, and advance their case via diplomatic protection against Spain, was the central point at issue. The court was not unanimous, and there were a number of dissenting judgments. Briefly put, the court declined to pierce the corporate veil, citing domestic law practice on veil-piercing to the effect that it was an irregular event and not merited in the circumstances. The court continued with policy reasons for this decision, noting especially the problem of multiple representations of diplomatic protection which would be enabled if shareholders were permitted to have their claim advanced at international law (by Belgium), in addition to the company itself having its claim advanced (by Canada).[32]

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28. *Barcelona Traction*, *ibid.* at para. 70; See also, *Ahmadou Sadio Diallo (Guinea* v. *Congo)* Preliminary Objections (24 May 2007) at para. 64, <http://www.icj-cij.org/docket/files/103/13856.pdf> (permitting shareholder diplomatic protection and reasoning that "what amounts to the internationally wrongful act, in the case of associés or shareholders, is the violation by the respondent State of their direct rights in relation to a legal person, direct rights that are defined by the domestic law of that State, as accepted by both Parties").
29. *Barcelona Traction*, *ibid.* at para. 70.
30. See *e.g.*, William H Roberts, "Corporate Nationality in International Law" (1952) 10 Seminar Jurist 71 at 76-85 (profiling Art. 297 of the Treaty of Versailles, the "*I'm Alone*" arbitration and others, concluding at p. 86 that "the rights and privileges of a corporation are obviously from now on to be determined internationally by the national character of those who exercise control over it, i.e., by the nationality of those who actually decide to which nationality economy the benefits of the corporate activities will finally accrue."); see also *Canada* v. *U.S. ("I'm Alone" Case)* Reports of International Arbitral Awards, 30 June 1933 and 5 January 1935, vol. III, 1609-1618 at 1618, <http://untreaty.un.org/cod/riaa/cases/vol_III/1609-1618.pdf>.
31. *Elettronica Sicula S.p.A. (ELSI)*, 1989, I.C.J. Reports, p. 14.
32. See summary at 241-243 of Lawrence Jahoon Lee, "Barcelona Traction in the 21st Century: Revisiting its Customary and Policy Underpinnings 35 Years Later" (2006) 42 Stan. J. Int'l Law 237.

Barcelona Traction did note that some states looked at a corporation's economic connection as well as its *siège social* in their consideration of whether to assert diplomatic protection.[33] However, the court attributed most weight to the fact that corporations are created under a given country's domestic law. It demurred to what it perceived to be domestic law treatment of the corporate veil and held that national laws did not tend to pierce the veil save for exceptional circumstances, listing fraud as an example of such a circumstance.[34] It then declined to pierce the veil in the case before it.

Perhaps foreshadowing the debate to come, the dissenting opinion of Judge Jessup, and others, disputed the formalistic approach of the majority and held rather that "the Court was not bound by formal conceptions of corporation law but instead had to look at the economic reality of the relevant transactions and identify the overwhelmingly dominant feature."[35]

Barcelona Traction was notably revisited by the United Nations International Law Commission (ILC) in 2003. A Special Rapporteur was tasked with reporting on the subject of diplomatic protection and his work was discussed at the 55th ILC Session. The Rapporteur characterized the ICJ in *Barcelona Traction* as having "expounded the rule that the right of diplomatic protection in respect of an injury to a corporation belonged to the State under whose laws the corporation was incorporated and in whose territory it had its registered office, and not to the State of nationality of the shareholders."[36] While this was thought to be a settled rule of diplomatic protection, the implicit issue of corporate nationality drew much debate in the ILC plenary session.

While *Barcelona Traction* was noted as embodying the customary rule on diplomatic protection for corporations, there was not unanimous support for incorporation as an exclusive test of nationality.[37] Discussion

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33. *Barcelona Traction*, *infra* note 35 at 184.
34. *Ibid.* at 39.
35. *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain)* (Separate Opinion of Judge Jessup) I.C.J. Reports 1970, 3 at 9, <http://www.icj-cij.org/docket/files/50/5401.pdf> at paras. 170-1. Cited in Markus Burgstaller, "Nationality of Corporate investors and International Claims against the Investor's Own State" (2006) 7:6 J. World Investment &Trade 857 at 861.
36. U.N. International Law Commission, "Chapter V: Diplomatic Protection" *Report of the Fifty-Fifth session*, (2003) at para. 70, <http://untreaty.un.org/ilc/reports/2003/2003report.htm>.
37. In the words of one observer, "While some members felt uneasy departing from what they felt was central to Barcelona Traction's holding, an emerging consensus was in favour of the broader view. In addition to the State of incorporation, also States with a

was wide-ranging and included recognition of the fact that mere incorporation as a guide for nationality would indirectly encourage tax havens.[38]

After subsequent reporting by the Special Rapporteur, new *Draft Articles on Diplomatic Protection* were adopted by the ILC Drafting Committee in 2006.[39] Article 9 of the articles, entitled "State of nationality of a corporation" reads as follows:

> For the purposes of the diplomatic protection of a corporation, the State of nationality means the State under whose law the corporation was incorporated. However, when the corporation is controlled by nationals of another State or States and has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality.[40]

The ILC's draft articles show a development in nationality determination in the context of diplomatic protection. The articles support the view that, while the state of incorporation remains the norm for initial determination of nationality, this determination can be rebutted by evidence of a lack of substantial connection between the corporation and the state of incorporation. A holistic approach, cognizant of economic indicators, is thus encouraged.

In support of this approach, commentary to Section 213 of the *(3rd) Restatement of the Foreign Relations Law of the United States*, supports the view that a state's domestic conferral of nationality is not sufficient to guarantee recognition of such nationality in an international law context:

> The traditional rule stated in this section [...] treats every corporation as a national of the state under the laws of which it was created. [...] As in the case of an individual, a state may refuse to treat a corporation as a national

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genuine legal link to a corporation should be entitled to exercise diplomatic protection on its behalf." Martti Koskenniemi & Christopher C. Mosley, *The Work of the International Law Commission at its Fifty-Fifty Session*, Erik Castrén Institute of International Law and Human Rights (2003) at 5, <http://www.helsinki.fi/eci/Publications/MILC.pdf>.

38. U.N. International Law Commission, "Chapter V: Diplomatic Protection" *Report of the Fifty-Fifth session*, *supra* note 36 at para. 84.
39. International Law Commission, *Fifty-eighth Session, Draft articles on Diplomatic Protection adopted by the Drafting Committee on second reading*, Art. 9, A/CNA/L.684 (2006), <http://daccessdds.un.org/doc/UNDOC/LTD/G06/615/21/PDF/G0661521.pdf?OpenElement>.
40. *Ibid.*

> of the state that created it, and reject diplomatic protection by that state where there is no "genuine link" between them.[41]

There thus exists international law support for nationality determination which looks beyond the state of incorporation. In instances where nationality is not defined in an investment treaty, an arbitral tribunal may look to general public international law to support an approach to corporate nationality that is cognizant of the factors of corporate ownership and control in addition to the state of incorporation alone. Notably, the International Law Commission's *Draft articles on Diplomatic Protection* and the *(3rd) Restatement of the Foreign Relations Law of the United States* support the view that nationality claimed on the basis of incorporation alone may be refuted by evidence that the corporation is controlled from abroad and lacks a genuine connection with the state of incorporation.[42]

2.2 Investment treaties and public international law

Investment treaty awards reveal a tension within such arbitrations as being both (1) *ad hoc* application of specific treaties and (2) interpretations of commonly recognized international economic law principles. This duality stems from investment treaty arbitrations' status under public international law. First, the precise treaty terms themselves create a *lex specialis* regime, or a "pocket" of legal norms which exist in some isolation from public international law.[43] However, notwithstanding this treaty specificity, each investment treaty exists within the customary international law framework of treaty interpretation, as encapsulated by Art. 31 of the *Vienna Convention of the Law of Treaties*.[44] Customary international law requires that a treaty be interpreted in good faith in the light of its object and purpose. Where there are gaps in the terms of a treaty, tribunals turn to international law rules of interpretation.[45]

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41. *Restatement of the Law (3d) Restatement of Foreign Relations Law of the United States*, Section 213, excerpted in Barry E. Carter, Phillip R. Trimble & Curtis A. Bradley, *International Law*, 4th ed., (New York: Aspen, 2003) at 765.
42. International Law Commission, *Fifty-eighth Session, Draft articles on Diplomatic Protection adopted by the Drafting Committee on second reading*, *supra* note 39; *Restatement of the Law (3d) Restatement of Foreign Relations Law of the United States*, *supra* note 41 at Section 213.
43. Annie Leeks, "The Relationship Between Bilateral Investment Treaty Arbitration and the Wider Corpus of International Law: The ICSID Approach" (2007) 65:2 U.T. Fac. L. Rev 1 at 11; see also, *International Law Commission, Report of the 55th Session*, *supra* note 36 at para. 125.
44. *Vienna Convention on the Law of Treaties*, 23 May 1969, 8 I.L.M. 679, (entered into force 27 Jan. 1980).
45. *E.g.*, *Tokios Tokelès* v. *Ukraine* (ICSID ARB/02/18), Jurisdiction (29 Apr. 2004), <http://ita.law.uvic.ca/documents/Tokios-Jurisdiction_000.pdf> at 27; *Mondev Inter-*

In addition to international law rules of treaty interpretation, investment treaties' contents draw upon existing customary international law rules governing state responsibility toward foreign nationals. Topics such as expropriation and the minimum standard of treatment of foreign nationals have a longstanding history in international law, and BITs and other instruments have sought to codify and build upon customary principles.[46]

Where investment treaty arbitrations are different from most sources of international law is in the way that arbitral tribunals face pleadings from investor claimants espousing particular interpretations of international law principles. Investor-state arbitrations represent a genre of treaty-based dispute settlement in which private parties' pleadings are held on par with states.[47] Investor pleadings are thus positioned to have a direct effect on the interpretation of international law concepts, to the extent that such concepts are developed in arbitral awards. While investor-state arbitrations have been held under clauses in investment contracts since at least the late 1960s,[48] investor-state treaty arbitrations derive their legal foundation not from specific contracts or domestic investment statutes, but from investment conventions.[49] Furthermore, such treaties are increasingly treated by arbitrators and commentators as comprising one body of international investment law, whereby concepts as applied in one dispute context are applied in another, despite the presence of a different treaty framework with gives each investment arbitration its legitimacy.[50]

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national Ltd. v. *United States of America* (ICSID ARB(AF)/99/2), Award, (11 Oct. 2002) 42 I.L.M. 85 (2003), at para. 43; *Maffezini* v. *Spain* (ICSID ARB/97/7), Jurisdiction (25 Jan. 2000) at para. 27, <http://ita.law.uvic.ca/documents/Maffezini-Jurisdiction- English_001.pdf>; *Waste Management, Inc.* v. *United Mexican States* (ICSID ARB(AF)/98/2), Award (2 June 2000), 40 I.L.M. 56 (2001) at n. 2.

46. The precise relationship between customary and treaty standards remains the subject of debate. See *e.g.*, Muthucumaraswamy Sornarajah, "The Fair and Equitable Standard of Treatment: Whose Fairness? Whose Equity?" in Federico Ortino et al., eds., *Investment Treaty Law: Current Issues II* (British Institute of International and Comparative Law: 2007) 167.
47. Noemi Gal-Or, "NAFTA Chapter Eleven and the implications for the FTAA: the institutionalization of investor status in public international law" (2005) 14:2 Transnational Corporations 121 at 123.
48. The 1967 *Sapphire* dispute arose out of a concession agreement. *Sapphire International Petroleum Ltd.* v. *National Iranian Oil Co.* (1967) 35 I.L.R. 136, 171-73. See also, *Holiday Inns S.A. and others* v. *Morocco* (ICSID ARB/72/1), Registered: Jan. 13, 1972, <http://icsid.worldbank.org>.
49. The Iran – U.S. Claims Tribunal was also based on a treaty, but this treaty was different than BITs in that it stated in advance the factual context which was to be the subject of arbitration. *1981 Algiers Accords* 20 ILM 223 (1981); *General Declaration*, 20 ILM 224 (1981), <http://www.iusct.org/general-declaration.pdf>.
50. For example, the tribunal in *Eureko*, established pursuant to a Dutch-Poland BIT, appeared to express that it was bound to consider an earlier BIT decision heard before

Despite the lack of *stare decisis* in international law, investment awards have commonly turned to preceding investment treaty awards as support for their decisions.[51] The *Canadian Cattlemen for Fair Trade* NAFTA award for instance characterized recourse to arbitral awards as a supplementary means of treaty interpretation recognized by the *Vienna Convention of the Law of Treaties*, at Articles 31 and 32.[52] Principles common to many investment treaties such as rules on compensation for expropriation have been nuanced by successive awards.[53] Despite a willingness to follow previous arbitral decisions, areas of controversy have emerged, and particular tribunals have interpreted treaty language in highly divergent fashions.[54]

Another legal consideration in investor-state arbitrations are the selected arbitration rules. While the most commonly known venue for such arbitrations is the World Bank's International Centre for Settlement of Investment Disputes (ICSID), it is not certain what percentage of total treaty claims are arbitrated at this centre. Those claims which proceed under the ICSID rules are subject to the *ICSID Convention* in addition to the investment treaty at issue.[55] One interesting result of investment

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a tribunal established pursuant to an Argentina-France BIT: "It is clear to this Tribunal that the decisions of the *ad hoc* Committee in *Vivendi*, as applied to the facts of the case now before this Tribunal **authorizes and indeed requires,** this Tribunal **to consider** whether the acts of which Eureko complains... constitute breaches of the Treaty." (bold added) *Eureko* v. *Poland*, Partial Award on Liability (19 Aug. 2005), at paras 112-113, <http://ita.law.uvic.ca/documents/Eureko-PartialAwardand Dissenting Opinion.pdf>; Award referred to was: *Aguas del Aconquija S.A. and Vivendi Universal* v. *Argentina* (ICSID ARB/97/3), Decision of the ad hoc Committee on the Request for Supplementation and Rectification of its Decision Concerning Annulment of the Award (28 May 2003), <http://ita.law.uvic.ca/documents/vivendi-suppEN.pdf>.

51. On precedent in investor-state treaty arbitration, see *e.g.*, Christopher S. Gibson & Christopher R. Drahozal, "Iran-United States Claims Tribunal Precedent in Investor-State Arbitration" (2006) 23:6 J. Int'l Arb. 512 at 525-528.
52. *Vienna Convention on the Law of Treaties*, *supra* note 44; *Canadian Cattlemen for Fair Trade* v. *United Sates*, Jurisdiction (28 Jan. 2008), <http://ita.law.uvic.ca/documents/CCFT-USAAward_000.pdf> at paras. 182-189.
53. See generally Jeffery P. Commission, "Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence" (2007) 24: J. Int'l. Arb. 129.
54. The scope of the Most Favoured Nation obligation is one such flashpoint, as tribunals have interpreted this principle divergently. For example, the Energy Charter Treaty case *Plama* v. *Bulgaria* refuted the MFN reasoning of *Maffezini* v. *Spain* (decided pursuant to a Spain-Argentina BIT). *Plama Consortium Ltd.* v. *Bulgaria* (ICSID ARB/03/24), Decision on Jurisdiction (8 Feb. 2005), paras 203 et seq. <http://ita.law.uvic.ca/documents/plamavbulgaria.pdf>; see generally Stephan W. Schill, "Most-Favored-National Clauses as a Basis of Jurisdiction in Investment Treaty Arbitration – Arbitral Jurisprudence at a Crossroads" (2009) 10:2 J. World Investment & Trade 189.
55. *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Mar. 18, 1965, (entered into force Oct. 14, 1966), <http://www.jus.

treaty arbitrations having been held at ICSID is that the line between treaty-based ICSID arbitrations and non-treaty based ICSID (*i.e.*, investment contract) arbitrations has become blurred in some instances. Treaty awards on occasion cite ISCID awards which were not issued pursuant to an investment treaty, but were rather held as a result of an investment contract or domestic foreign investment laws.[56]

In summary, the pool of legal authorities available for investment arbitrators to refer to is not strictly contained and includes non-treaty investment arbitrations as well as recognized sources of public international law, including customary international law and of course the relevant investment treaty itself.

3. Nationality's role in the investment treaty system

Investor nationality is critical to determining the scope of host states' consent to arbitrate investment treaty disputes. As is the case with diplomatic protection, it is the investor's connection with its home state which makes it a participant in the international law system. Without a patron state, an investor is a mere individual with limited personality under international law.

When a state ratifies a treaty with an investor-state dispute settlement mechanism, the state simultaneously expresses the consent to arbitrate needed for any future investment arbitrations to proceed. Conversely, an investor's consent to arbitration is expressed when the claim is initiated. Simply put, each contracting state consents to arbitration *with the other state's investors* and not investors of any nationality worldwide. For the legal foundation which underpins investor-state treaty arbitration to remain intact, arbitrations cannot operate in excess of initial state consent to arbitrate.

In addition to focusing the scope of state consent to arbitrate, nationality is central to legitimating the empowerment of investors to initiate treaty claims. If investors are regarded as exercising treaty rights on their own behalf, rather than their home state's, it is still the possession of nationality which serves as the legal conduit granting them such treaty rights. From the converse theoretical perspective, investors may be

uio.no/lm/settlement.of.investment.disputes.between.states.and.nationals.of.other.states.convention.washington.1965/>.

56. For instance *Autopista* has been cited in BIT cases even through it was an ICSID arbitration held pursuant to a concession contract. *Autopista Concesionada de Venezuela, C.A.* v. *Venezuela* (ICSID ARB/00/5), Jurisdiction Award (27 Sept. 2001). Cited at n. 28 in *Tokios Tokelès* v. *Ukraine*, *supra* note 45.

seen as not themselves the primary recipients of rights under such treaties, but rather as private enforcers of their home state's treaty rights.[57] If the rationale of investor – state arbitration is that it represents the enforcement of states' treaty rights, then investors' legitimacy in participating is predicated squarely on their meaningful link to the state whose rights they are enforcing.[58] Put otherwise, if the investment treaty system is fundamentally one of state rights and obligations, investors have no rights in and of themselves to enter this treaty system. Rather, their nationality is the legal thread which connects home state treaty rights to investor standing. If this link of nationality is not sound, investors have no legitimate role in the operation of an investment treaty framework.

If state of incorporation (or even branch presence) in and of itself determines BIT access, instead of bilateral agreements governing two states, BITs can become an access point for freestanding international law dispute settlement available to any investor with the means to create a subsidiary of a desired nationality. Behaviour associated with this vulnerability has been termed "treaty shopping".[59] Such practices put investment treaties at risk of changing from bilateral foreign investment agreements into vaguely defined investor rights mechanisms. States that ratify treaties containing weak or imprecise investor nationality requirements may render themselves unduly prone to treaty-shopping claimants, including sham or shell corporations. Not only does such behavior broaden the scope of the dispute settlement facilitated by BITs, but it exacerbates the risk that corporations may use BITs to avoid national court jurisdiction once a dispute has arisen.

While some may argue that the rights of investors, regardless of nationality, deserve protection, or that states may employ vague nationality definitions to be broadly facilitative of investment,[60] such views ignore the legal foundations of international investment treaties to the

57. See *e.g.*, Stephan W. Schill, "Arbitration Risk and Effective Compliance: Cost-Shifting in Investment Treaty Arbitration" (2006) 7:5 J. World Investment & Trade 563 at 682; See also, Zachary Douglas, "The Hybrid Foundations of Investment Treaty Arbitration" (2003) 74 Brit. Y. Int'l L. 151 at 182.
58. *E.g.*, *Loewen Group, Inc. and Raymond L. Loewen*, *infra* note 98 at para. 233.
59. See *e.g.*, John Savage, "Investment Treaty Arbitrations and Asia: Survey and Comment" (2005) 1:1 Asia Int'l Arb. J. 3 at 45. See also William Lawton Kirtley, "The Transfer of Treaty Claims and Treaty Shopping in Investor-State Disputes" (2009) 10:3 Journal of World Investment and Trade 427.
60. The relationship between inward foreign direct investment and investor-state arbitration remains the subject of debate. See generally, Karl P. Sauvant and Lisa E. Sachs, *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows* (Oxford: Oxford University Press, 2009).

point of estrangement from such treaties' legal rationale and historic purpose. In addition to the aforementioned consent and treaty right issues, international investment arbitration can devolve into *de facto* domestic investment arbitration if nationality requirements are poorly defined. Nationals can, via a "foreign" investment vehicle, sue their own state in arbitration, leading to a situation in which the customary international law foundations of foreign investment protection are clearly deviated from.

The basic reason for diplomatic protection, for state responsibility regarding the treatment of aliens, is that there is a risk that foreigners will be treated in a worse fashion than locals by state authorities; diplomatic protection and state responsibility were borne from a perceived need to address this risk of adverse treatment of foreigners. If BIT protection is permitted for *de facto* locals, it becomes estranged from this conceptual grounding. Taking the *alien* requirement out of diplomatic protection, and the treaties which have expanded upon this customary principle, leads to a highly questionable interpretation of international law's function.

4. Nationality's treatment in treaties and awards

An investment treaty may not contain a distinct nationality test, *per se*, but rather may contain a definition of investor which refers to "nationals" of a relevant state. In such instances there may be some flexibility offered to arbitrators to determine, by referring to public international law guidance, which entities are nationals and which are not. As discussed above, the place of incorporation is one consideration in the determination of corporate nationality under general public international law, but it is not the only consideration. Other factors including a company's headquarters or *siège social*[61] have been mentioned by the ICJ as considerations in the determination of nationality, and emerging norms elucidated by the ILC suggest that evidence of effective control from abroad can be taken into account in the determination of nationality.[62] There will, however, be considerable pressure on arbitrators to accept the place of incorporation as an adequate proof of appropriate nationality given the common view that *Barcelona Traction* supports the bestowal of diplomatic protection rights to the state of incorporation.[63] For an arbitrator to be seen to go against this holding, even in the presence of other supporting evidence and weighted factors, would be controversial but in my view defensible in some circumstances.

61. *Barcelona Traction*, *supra* note 27 at 184.
62. International Law Commission, *Fifty-eighth Session, Draft articles on Diplomatic Protection adopted by the Drafting Committee on second reading*, Art. 9, *supra* note 39.
63. *Ibid.*

Other BITs directly stipulate the place of incorporation as the test for nationality,[64] such as the BIT between Sierra Leone and the United Kingdom of 2000,[65] or the BIT between Belgium, Luxembourg and Pakistan of 1998.[66] While a low threshold test for nationality may be interpreted as part of a broader investment attraction policy, such wording does not address instances of *de facto* domestic control of a corporate investor, nor other problematic issues outlined in the above paragraphs. Investment attraction policy, as it is carried out through BIT creation, ought to be pursuable in a manner that addresses, in specific text, the uncertainties that can arise in nationality determination.

Some treaties have included, in addition to place of incorporation, other requirements for the determination of investor nationality. The location of the head office is a determinative nationality factor under the 2002 BIT entered into by France and Uganda.[67] The 1998 BIT between Chile and Turkey includes reference to both corporate headquarters and effective economic activities of a corporate investor.[68] Article 72 of the Japan – Singapore Free Trade Agreement provides a further example of a narrow definition of investor, excluding enterprises dominantly owned or controlled by third state nationals as one of the few such treaties to do so.[69] Such wording presents a significant improvement upon treaties

64. A 2006 UNCTAD report, "Numerous BITs concluded since 1995 use the place of incorporation as sole criterion [of nationality]." UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking*, UNCTAD/ITE/IIT/2006/5, (2006), <http://www.unctad.org/en/docs/iteiia20065_en.pdf> at 15 [*Trends*].

65. *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Sierra Leone for the Promotion and Protection of Investments*, 13 Jan. 2000 (entered into force on 20 Nov. 2001), <http://www.unctad.org/sections/dite/iia/docs/bits/uk_sierraleone.pdf> at Art. 1. Cited in *Trends*, *ibid.*

66. *Agreement on the Reciprocal Promotion and Protection of Investments between the Islamic Republic of Pakistan and the Belgo-Luxembourg Economic Union*, 23 Apr. 1998, <http://www.unctad.org/sections/dite/iia/docs/bits/pakistan_belgo_lux.pdf> at Art. 1. Cited in *Trends*, *supra* note 64.

67. *Agreement between the Government of the Republic of France and the Government of the Republic of Uganda on the Reciprocal Promotion and Protection of Investments*, 2002, at Art. 1, <http://www.unctad.org/sections/dite/iia/docs/bits/france_uganda.pdf> Cited in *Trends*, *supra* note 64 at 16.

68. *Tratado entre la Republica Argentina y la Republica de Chile sobre promocion y proteccion reciproca de inversiones*, 2 Aug. 1998, <http://www.unctad.org/sections/dite/iia/docs/bits/chile_argentina_sp.pdf> at Art. 1. Cited in *Trends*, *ibid.* at 16. Cited in *Trends*, *supra* note 64 at 16.

69. *Agreement between the Republic of Singapore and Japan for a New-Age Economic Partnership*, entry into force: 30 Nov. 2002, <http://www.iesingapore.gov.sg/wps/portal/FTA>. The term investor is qualified in the following fashion: "(e) the term "investor of the other Party" means any natural person of the other Party or any enterprise of the other Party; ... (h) the term "enterprise of the other Party" means any

which either do not specify nationality requirements, or cite place of incorporation only. It offers clearer guidance for arbitrators and limits nationality in a way that reduces the likelihood of both *de facto* domestic claims and pursuit of treaty-shopping via shell corporations. This sophistication in treaty text enables investment agreement practice to remain supported by its legal foundations, both in terms of states' prior consent to arbitrate, and in terms of maintaining the truly foreign element required for investor claims to find basis in international law.

In addition to the diversity seen in treaty definitions of investor, there is divergence between treaties which contain "denial of benefits" clauses and those which do not. "Denial of benefits" clauses, such as Art. 17(1) of the Energy Charter Treaty, NAFTA Art. 1113(2) or Art. 17(2) of the U.S. Model BIT hold that state parties to the treaty may deny benefits to investors who are controlled by third party state nationals, and who are thus not the intended beneficiaries of the regime.[70] It should be mentioned that many treaties do not contain a denial of benefits clause.[71] Furthermore, such clauses tend to be drafted in a fashion that requires states to give notice of a denial of benefits[72] with respect to particular

enterprise duly constituted or otherwise organised under applicable law of the other Party, except an enterprise owned or controlled by persons of non-Parties and not engaging in substantive business operations in the territory of the other Party; and (i) an enterprise is: (i) "owned" by persons of non-Parties if more than 50 percent of the equity interest in it is beneficially owned by persons of non-Parties; and (ii) "controlled" by persons of non-Parties if such persons have the power to name a majority of its directors or otherwise to legally direct its actions". Citation by John Savage, "Investment Treaty Arbitrations and Asia: Review of Developments in 2005 and 2006" (2007) 3:1 Asia Int'l Arb. J. 1 at 23.

70. The Energy Charter Treaty holds at Art. 17(1): "Each Contracting Party reserves the right to deny the advantages of this Part to a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized." *The Energy Charter Treaty (Annex 1 to the Final Act of the European Energy Charter Conference)*, 17 December 1994, <http://www.encharter.org/fileadmin/user_upload/document/EN.pdf>. See also Loukas A. Mistelis & Crina Michaela Baltag, "Denial of Benefits and Article 17 of the Energy Charter Treaty" (2009) 113 Penn St. L. Rev. 1301.

71. For instance, the Ukraine-Argentina BIT and Netherlands-Venezuela BIT do not contain denial of benefits clauses. As reference in *Tokios Tokelès* v. *Ukraine*, *supra* note 45 at para. 36; *Aguas del Tunari, SA.* v. *Republic of Bolivia* (ICSID ARB/02/3), Decision on Respondent's Objections to Jurisdiction (21 Oct. 2005), <http://ita.law.uvic.ca/documents/AguasdelTunari-jurisdiction-eng_000.pdf>. Jagusch and Sinclair report that "In a survey of 550 bilateral investment treaties (BITs) conducted by the authors, just thirty-one contained a denial of benefits clause." Stephen Jagusch and Anthony Sinclair, "Denial of advantages under Article 17(1)" in Graham Cooper and Clarisse Ribeiro, eds., *Investment Protection and the Energy Charter Treaty* (Huntington NY: Jurisnet, 2008) 17-45 at 23 [internal footnotes excluded].

72. NAFTA Art. 1113 grants states the right to deny benefits but appears also to include a prior notification requirement. NAFTA 1113.

investors before the initiation of a treaty claim. In other words, such clauses do not operate automatically within the treaty, but require states to announce the denial of benefits of a particular investor or group of investors in order for such benefits to be deemed to have been denied.

Despite the advantages of "denial of benefits" clauses in clarifying the nationality of permitted investor claimants, such clauses have not always been expansively interpreted. In fact, in the *Plama* v. *Bulgaria* Energy Charter Treaty (ECT) arbitration, it was held that such a clause must be invoked *before* an investor's claim arises. A letter from Bulgaria to the claimant, denying benefits on the basis of ECT Article 17 was not sufficient to stop the arbitral proceedings. The tribunal opined that a general announcement in a country's *Gazette* or other legal record, would be sufficient to meet the advance notice requirements that Bulgaria had not met in that case.[73]

On a final note, in investment treaty arbitrations between ICSID members, the *ICSID Convention*[74] presents a deliberate departure, in some instances, from the aversion to veil-piercing seen in *Barcelona Traction.* Article 25(2) b provides for veil piercing, in the presence of prior state party consent, in cases when this would permit an eligible claimant national to be identified.[75] In *TSA Spectrum* v. *Argentina*, this provision was interpreted such that an Argentinean-incorporated company owned by a Dutch company, in turn owned by an Argentinean national, was not permitted to claim against Argentina under an Argentina – Netherlands BIT.[76] The reasoning seen in this award contrasts with several other awards profiled in the next section.

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73. *Plama Consortium Limited* v. *Republic of Bulgaria*, *supra* note 54.
74. *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* Mar. 18, 1965, (entered into force 14 Oct. 1966), <http://www.jus.uio.no/lm/settlement.of.investment.disputes.between.states.and.nationals.of.other.states.convention.washington.1965/>.
75. *Ibid.* The article extends jurisdiction under the Washington Convention to "(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."
76. *TSA Spectrum* v. *Argentina* (ICSID ARB/05/5), Decision on Jurisdiction (19 December 2008), <http://ita.law.uvic.ca/documents/TSAAwardEng.pdf> paras. 159-160.

4.1 Disregard for controlling corporate nationality

A theme which emerges through review of awards which address nationality is that most tribunals, in their interpretation and application of investment treaty text, do not look beyond the state of incorporation to examine state of control or other criteria for nationality. As described below, this may be due to the fact that the relevant treaty defines corporate nationality by reference to state of incorporation, without reference to other factors. Notable claims where the investor's veil has not been pierced to reveal other elements in the corporate ownership chain and a particular corporate investor's nationality have not been determined by factors additional to the place of incorporation, include the following: *Tokios Tokelès* v. *Ukraine, ADC Affiliate* v. *Hungary, Saluka* v. *Czech Republic, Aquas* v. *Bolivia, Rompetrol* v. *Romania* and *Mobil* v. *Venezuela*.[77]

Tokios Tokelès v. *Ukraine*, decided under a Lithuanian – Ukraine BIT, aroused controversy when the tribunal found jurisdiction over a claim against Ukraine made by a Lithuanian incorporated company whose shareholders were 99 % Ukrainian nationals.[78] The President of the three member tribunal resigned, stating that the decision was antithetical to the investment protection regime and the ICSID program itself.[79] However, the remaining two members ruled that the BIT clearly held that Lithuanian-incorporated investors were to be covered by the BIT. They cited the *Vienna Convention on the Law of Treaties*[80] in the

77. *Tokios Tokelès* v. *Ukraine*, *supra* note 45; *Aguas del Tunari, SA.* v. *Republic of Bolivia, supra* note 71 at para. 332, <http://www.worldbank.org/icsid/ cases/AdT_Decision-en.pdf>; *Saluka Investments BV* v. *Czech Republic* (UNCITRAL), Decision on Jurisdiction over the Czech Republic's Counterclaim (7 May 2004), online <http://ita.law.uvic.ca/documents/Saluka-DecisiononJurisdiction-counterclaim.pdf>; *Saluka Investments BV* v. *Czech Republic* (UNCITRAL), Partial Award (17 Mar. 2006), <http://ita.law.uvic.ca/documents/Saluka-PartialawardFinal.pdf>; *ADC Affiliate Limited and ADC & ADMC Management Limited* v. *Republic of Hungary* (ARB/03/16), Award (2 Oct. 2006), <http://ita.law.uvic.ca/documents/ADCvHungary Award.pdf>; *Rompetrol* v. *Romania* (ICSID ARB/06/3), Award on Jurisdiction (18 Apr. 2008), <http://ita.law.uvic.ca/documents/RomPetrol.pdf>; *Mobil* v. *Venezuela* ((ICSID ARB/07/27), Award on Jurisdiction, 10 June 2010, <http://ita.law.uvic.ca/documents/MobilvVenezuelaJurisdiction.pdf> (at para. 204 the tribunal notes, "the aim of the restructuring of their investments in Venezuela through a Dutch holding was to protect those investments against breaches of their rights by the Venezuelan authorities by gaining access to ICSID arbitration through the BIT. The Tribunal considers that this was a perfectly legitimate goal as far as it concerned future disputes.").
78. *Tokios Tokelès* v. *Ukraine*, *supra* note 45.
79. *Tokios Tokelès* v. *Ukraine* (ICSID ARB/02/18), Dissenting Opinion of Prosper Weil (29 Apr. 2004).online <http://ita.law.uvic.ca/documents/tokios-dissenting_opinion_000.pdf>.
80. *Vienna Convention on the Law of Treaties*, *supra* note 44.

course of their interpretation of the treaty, and took guidance from *Barcelona Traction's* reticence to engage in veil-piercing.[81] They did not cite contrasting ICJ cases such as the ELSI which did permit veil-piercing.[82]

In *Rompetrol* v. *Romania*, a dispute in which the jurisdiction award was issued in 2008, an approach similar to the majority jurisdiction decision in *Tokios Tokèles* was followed.[83] A claim by a Dutch incorporated company was permitted under a Romania-Netherlands BIT, regardless of the fact that the company was owned and controlled by a Swiss holding company, which was in turn owned and controlled by a Romanian national. The relevant BIT at Article 1(b), defined investors to include, "ii. legal persons constituted under the law of that Contracting Party."[84]

In *ADC Affiliate* v. *Hungary*[85] the state's claims that the genuine country of nationality of the investor was Canada and not Cyprus, were dismissed by the tribunal. While the tribunal noted the risks of abuse of the corporate form, it determined that the terms of the BIT required that it look no further than the state of incorporation in determining the nationality of the investor.[86]

Similarly, in *Saluka* v. *Czech Republic*,[87] the Japanese bank Nomura set up a "special-purpose vehicle"[88] in the Netherlands, a subsidiary which then brought a claim under a Netherlands – Czech Republic BIT. The Czech Republic disputed the nationality of Saluka, arguing that it did not have a *bone fide* economic connection to the Netherlands. The tribunal refused to challenge Saluka's nationality, holding that it was not able to read nationality requirements into the BIT which were not already contained therein.[89]

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81. *Tokios Tokelès* v. *Ukraine*, *supra* note 45 at para. 54.
82. *Elettronica Sicula S.p.A. (ELSI)*, *supra* note 31.
83. *Rompetrol* v. *Romania*, *supra* note 77.
84. *Rompetrol* v. *Romania*, *supra* note 77 at paras. 41 & 98.
85. *ADC Affiliate Limited and ADC & ADMC Management Limited* v. *Republic of Hungary*, *supra* note 77.
86. The relevant treaty language is described at para. 357:
    > [...] in its Article 1(3)(b) Cyprus and Hungary have agreed that a Cypriot "investor" protected by that treaty includes a "legal person constituted or incorporated in compliance with the law" of Cyprus, which each Claimant is conceded to be. Nothing in Article 25(2)(b) of the ICSID Convention militates otherwise, as it grants standing to "any juridical person which had the nationality" of Cyprus as of the time the Parties consented to this arbitration.

    Ibid. at para. 357-358.
87. *Saluka Investments BV* v. *Czech Republic*, Partial Award, *supra* note 77.
88. *Ibid.* at para. 71.
89. The tribunal noted that, "That agreed definition required only that the claimant-investor should be constituted under the laws of (in the present case) The Netherlands, and it is not open to the Tribunal to add other requirements which the parties

In *Aquas* v. *Bolivia*, awarded under a Netherlands – Bolivia BIT, the tribunal rejected Bolivia's complaint that the investor claimant did not have a significant economic presence in the Netherlands, but was actually controlled by the U.S. corporation, Bechtel.[90] The tribunal pronounced that nothing would be wrong with such treaty-shopping investor conduct:

> 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", such treaties serve in many cases more broadly as portals through which investments are structured, 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 investments is entirely in keeping with the purpose of the instruments and the motivations of the state parties**.[91]

Despite holding that the contracting states' intentions were to permit a low nationality threshold in order to encourage investment, the tribunal found no direct sources from the *travaux préparatoires* or other records related to the Netherlands – Bolivia BIT which directly supported this holding. Upon reviewing the available record, the tribunal instead concluded that "This sparse negotiating history thus offers little additional insight into the meaning of the aspects of the BIT at issue, neither particularly confirming nor contradicting the Tribunal's interpretation."[92] The tribunal interpreted the states' lack of specificity regarding national-

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could themselves have added but which they omitted to add." *Ibid.* at para. 241. It is worth noting the claim resulted from alleged harm to Saluka's investment, namely shares it held in a Czech bank.

90. The tribunal was tasked with interpreting Article 1 which provided that "national" included "legal persons constituted in accordance with the law of that Contracting Party" as well as "legal persons controlled directly or indirectly, by nationality of that Contracting Party, but constituted in accordance with the law of the other Contracting Party". The later clause presents a regime similar to that engendered by Article 25(2)b of the *ICSID Convention.* The dispute claimant was the Bolivian incorporated subsidiary itself and the tribunal's discussion focused upon the meaning of "controlled directly or indirectly." The BIT in question did not contain a denial of benefits clause. *Aguas del Tunari, SA.* v. *Republic of Bolivia*, *supra* note 71 at para. 217. *Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Republic of Bolivia* (1992), <http://www.unctad.org/sections/dite/iia/docs/bits/netherlands_bolivia.pdf>.

91. *Aguas del Tunari, SA.* v. *Republic of Bolivia*, *supra* note 71 at para. 332 (bold added).

92. *Ibid.* at para. 274. The tribunal also reviewed the wider BIT practice of the contracting states generally, but concluded that "The BIT practice of the Netherlands and Bolivia is necessarily of limited probative value to the task of interpreting the BIT between the Netherlands and Bolivia." *Ibid.* at para. 314.

ity requirements, seen in this dispute in the form of reference only to the place of incorporation,[93] as indicating an intention to be broadly facilitative of investor claims.

States should take measures to ensure that their "silence" is interpreted accurately. The above awards suggest that without contrasting treaty language, tribunals tend to take an investor's corporate nationality at face value, by reference to the state of incorporation alone, despite demonstrable third state or domestic control. This is true even in instances where tribunals have expressed "sympathy"[94] for states facing the risk of shell company claims, as well as when tribunals have acknowledged that a company with no real connection to a BIT State party should not be entitled to invoke the provisions of that treaty, due to the possibility of abuses of the arbitral procedure and forum shopping.[95] Despite awareness of the risks posed by the determination of nationality according to the state of incorporation alone, tribunals have nonetheless felt bound to apply what they perceive to be the terms of the treaty before them.[96]

Intriguingly, tribunals have not uniformly approached the nationality of natural person investors with the inclusiveness of nationality seen in the corporate investor cases listed above. In *Soufraki* v. *United Arab Emirates*, an investor's claim was not accepted under an Italy – United Arab Emirates BIT because it was found that he had lost his Italian citizenship (under Italian law) at the time he commenced the investment. Despite the fact that he presented attestation of Italian nationality, since recovered, the tribunal maintained that the claim required that he possess the requisite nationality at the time the investment was made.[97]

The *Loewen*[98] claim against the United States under NAFTA Chapter 11 provides a further interesting interpretation of investor nationality.

93. Specifically, the BIT contained this language, "legal persons constituted in accordance with the law of that Contracting Party". *Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Republic of Bolivia*, *supra* note 90 at Art. 1(b)ii.
94. *Saluka Investments BV* v. *Czech Republic*, Partial Award, *supra* note 77 at para. 240.
95. *Ibid.*
96. *Ibid.* at para. 241. The *ADC* award similarly held "the matter of nationality is settled unambiguously by the [ICSID] Convention and the BIT, there is no scope for consideration of customary law principles of nationality [...]". *ADC Affiliate Limited and ADC & ADMC Management Limited* v. *Republic of Hungary*, *supra* note 77 at para. 357.
97. *Hussein Nauman Soufraki* v. *United Arab Emirates*, (ISCID ARB/02/7) Decision on Jurisdiction, (7 July 2004) <http://ita.law.uvic.ca/documents/Soufraki_000.pdf> at para. 55.
98. *Loewen Group, Inc. and Raymond L. Loewen* v. *United States* (ICSID ARB(AF)/98/3), Award on Merits, (26 June 2003). <http://ita.law.uvic.ca/documents/Loewen-Award-2.pdf>.

The claim failed first on the grounds that the investor had not exhausted local remedies in addressing the grievance at issue (a jury trial damages award). The tribunal then continued to dismiss the case on the grounds that the investor was no longer eligible for NAFTA protection as it had been re-organized (due to looming bankruptcy) as a U.S. corporation in the time since the NAFTA claim filing. Looking to the principle of continuous nationality found in customary international law, the tribunal held that the investor, in reorganizing, had lost its standing under NAFTA.[99]

In sum, apart from *Loewen* and *TSA Spectrum*, noted above, and *Phoenix Action, Ltd.* v. *Czech Republic*,[100] discussed below, corporate investors do not tend to lose substantive arbitration claims or be denied access to investor-state dispute settlement on the basis of inappropriate nationality. Instead, there have been contrasting examples which suggest that investment treaty arbitration may facilitate nationals launching claims in arbitration against their own states. Furthermore, it is evident that BITs which define nationality in vague terms, or define it merely by reference to the state of incorporation, may facilitate treaty-shopping by permitting corporate groups to gain access to investment treaty dispute settlement merely by incorporating a subsidiary or affiliate in the state, without committing significant economic activities to the particular country.

Notably, even when they have disregarded third state or domestic control of investors, electing not to see past an investor's corporate veil, some tribunals have suggested that in some circumstances arbitrators might not recognize nationality solely on the basis of place of incorporation, even in seeming deviation from relevant treaty language. Tribunals have suggested that egregious corporate behaviour might lead a tribunal to reject corporate nationality as determined by place of incorporation, using the language of "abuse of legal personality"[101] or use of personality for "improper purpose".[102] For example, the majority award in *Tokios Tokelès* v. *Ukraine* indicated that it would have looked through the Lithuanian holding company had the corporation been incorporated for the *sole purpose* of bypassing the jurisdiction of Ukrainian courts.[103] Such

99. *Ibid.*
100. *Phoenix Action, Ltd.* v. *Czech Republic* (ICSID ARB/06/5) (Israel/Czech Republic BIT), Award (15 April 2009) <http://ita.law.uvic.ca/documents/PhoenixAward.pdf>.
101. *Tokios Tokelès* v. *Ukraine*, *supra* note 45 at para. 56.
102. *Tokios Tokelès* v. *Ukraine*, *supra* note 45 at para. 56. The tribunal in *Aguas* noted that it did not find "a sufficient basis in the present record to support an allegation of abuse of corporate form or fraud." See also *Aguas del Tunari, SA*. v. *Republic of Bolivia*, *supra* note 71 at para. 331.
103. *Tokios Tokelès* v. *Ukraine*, *supra* note 45 at 56.

awards appear to draw their reasoning from the holding in *Barcelona Traction*,[104] that abuse of the corporate person (*i.e.*, through fraud) may justify piercing of the corporate veil.[105] The tribunal in *Phoenix Action, Ltd.* v. *The Czech Republic* did not assume jurisdiction over the corporate investor's claims, holding that "...if the sole purpose of an economic transaction is to pursue an ICSID claim, without any intent to perform any economic activity in the host country, such transaction cannot be considered as a protected investment."[106]

While useful principles in their own right, abuse of the corporate form and fraud are not substitutes for comprehensive definitions of corporate nationality, since such doctrines will likely be triggered only in egregious situations, such as when a corporate group restructures to bring an existing dispute within the purview of an investment treaty's dispute settlement. Corporate motives and even corporate intentions are challenging legal concepts generally speaking, making the notion of corporate criminality still controversial in some states.[107] Furthermore, any nationality determination which relies upon the establishment of a bad faith motive on the part of the investor sets the bar with respect to burden of proof quite high. Abuse of the corporate form will likely prove in practice to be difficult to demonstrate legally and factually, particularly due to a lack of any evidence beyond the circumstantial. Reliance on the principle of abuse of the corporate person to limit corporate investor nationality thus does not present a comprehensive policy or legal response to this important issue. Nationality tests which look to objective economic indicators, rather than constructions of corporate motive, likely present more reliable and practical approaches.

Overall, the problem with relying on abuse of right to narrow nationality coverage is that it does not address the fundamental question of how much economic commitment to a state is needed before a corporation may be regarded as a national of that state under public international law. Abuse of right doctrine allows nationality to be disregarded in certain circumstances, but it does not contribute to a positively described notion of corporate nationality in the 21st century, one that addresses the phenomenon of MNEs.

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104. *Barcelona Traction*, *supra* note 27.
105. *Barcelona Traction*, *supra* note 27 at 39 (para. 56).
106. *Phoenix Action, Ltd.* v. *Czech Republic*, *supra* note 100 at para. 93.
107. *E.g.*, Anita Ramasastry & Robert C. Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law A Survey of Sixteen Countries* (Oslo: FAFO, 2006) at 13, <http://www.fafo.no/pub/rapp/536/536.pdf>.

In other words, a nationality system that relies on state of incorporation alone grants corporations investment claim standing without any requirement of an economic contribution to the relevant treaty state. This approach effectively leaves investment treaties as portals for all corporate investors which hold the relevant nationality of convenience, gained through incorporation. Abuse of right does not substantially alter that fact, nor does it attempt to frame MNEs within an operational investment law definition.

Why many states have thus far avoided moving beyond the state of incorporation approach to nationality, in the face of the widespread phenomenon of MNEs, and the resulting risk of double recovery and parallel proceedings, is unclear from an outside observer's perspective. State of incorporation is likely supported for its simplicity and predictability, but these attributes do not need to be wholly sacrificed in a definition that looks beyond only the corporate veil of incorporation. The ILC's definition of corporate nationality at Art. 9,[108] noted above, which uses the approach of a rebuttable presumption offers one useful and clear example of an alternative approach. Furthermore, in order to reduce the risk of parallel proceedings and double recovery, a definition of nationality that takes corporate control into account is optimal.

4.2 Veil-piercing to permit investor claims

It may be viewed as ironic that one policy reason for the *Barcelona Traction* decision was the desire to avoid a multiplicity of diplomatic claims.[109] One byproduct of a reticence to pierce a corporate veil to judge control, along with a willingness to accept nationality strictly based on incorporation, is the creation of multiple classes of BIT claimants within a particular MNE.

In addition to direct corporate investors themselves, indirect corporate investors have had standing in their own right in a good number of investment treaty arbitrations.[110] Such arbitrations have validated the

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108. International Law Commission, *Fifty-eighth Session, Draft articles on Diplomatic Protection adopted by the Drafting Committee on second reading*, Art. 9, *supra* note 39.

109. *International Law Commission, Report of the 55th Session*, *supra* note 36 at para. 71.

110. *Société Générale, in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A.* v. *The Dominican Republic* (LCIA Case No. UN 7927), Jurisdiction Award (19 Sept. 2008) at paras. 115-121, <http://ita.law.uvic.ca/documents/SGJurisdiction.pdf>; See *e.g.*, *Noble Energy Inc. and Machalapower CIA Ltd. A.V. Ecuador and Consejo Nacional de Electricidad* (ICSID

rights of either direct or indirect shareholders to make claims in relation to investments (*i.e.*, shareholders at various levels of a corporate ownership chain). This is largely because of common BIT language that includes "share" within the terms of what constitutes an investment, without further qualification such as the requirement of direct ownership.[111]

This can be characterized as having "more than one bite at the apple" in the pursuit of investment claims, in the words of Lawrence Lee.[112] Since different entities along a corporate shareholding ownership chain are regarded as distinct nationals, each has potential claim capacity under the BITs available to it. This multiplicity of claims scenario raises issues of *res judicata* in the sense that one set of circumstances can be tried by different arbitral tribunals, with different investor claimants and under different treaty terms. Such was the problem seen in the *CME* and *Lauder* cases, where Mr. Lauder, an investor, made an unsuccessful claim under a U.S. – Czech Republic BIT, while his company CME made a successful claim under a Netherlands – Czech Republic BIT, and was awarded almost $270 million in damages.[113]

The multiplicity of claims issue has been dealt with in another context through consolidation proceedings, specifically under the NAFTA. While Canada – U.S. lumber company claims were successfully consolidated, Mexico – U.S. claims related to corn syrup were not.[114] Unfortu-

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ARB/05/12), Jurisdiction Award (5 March 2008), at 77-83, <http://ita.law.uvic.ca/documents/Noblev.EcuadorJurisdiction.pdf>; see also Stanimir A. Alexandrov, "The "Baby Boom" or Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as "Investor" and Jurisdiction Ratione Temporis" (2005) 4 Law & Practice of Int'l Tribunals 19 at 27-34.

111. John Savage (2007), *supra* note 69 at 16. At lease 161 of 192 UN member states have ratified investment treaties which define investment as including shares. See Robin Hansen, "The International Legal Personality of Multinational Enterprises: Treaty, Custom and the Governance Gap" (2010) 10:1 *Global Jurist* (Advances), Article 1, 1 at 90. See generally Bottini, *supra* note 8.

112. Lawrence Jahoon Lee, "Barcelona Traction in the 21st Century: Revisiting its Customary and Policy Underpinnings 35 Years Later" (2006) 42 Stan. J. Int'l Law 237 at 270.

113. *Ronald Lauder* v. *Czech Republic* (UNCITRAL Rules), Award (Sept. 2001), <http://ita.law.uvic.ca/documents/LauderAward.pdf>; *CME Czech Republic B.V.* v. *Czech Republic* (UNCITRAL Rules), Partial Award (13 Sept. 2001), <http://ita.law.uvic.ca/documents/CME-2001PartialAward.pdf>; *CME Czech Republic B.V.* v. *Czech Republic* (UNCITRAL Rules), Final Award (14 Mar. 2003), <http://ita.law.uvic.ca/documents/CME-2003-Final_001.pdf>.

114. *Canfor Corp.* v. *United States & Tembec et al.* v. *United States & Terminal Forest Products Ltd.* v. *United States*, Order of the Consolidation Tribunal (7 Sept. 2005), <http://naftaclaims.com/Disputes/USA/Softwood/Softwood-ConOrder.pdf>; *Corn Products International, Inc.* v. *Mexico & Archer Daniels Midland and Tate & Lyle*

nately, this model of consolidation will likely not be transferable to multiple claims such as seen in *Lauder* and *CMS*, given that different treaties are at issue, and tribunals will likely not have the authority to create unified proceedings, even if investors are related by equity or otherwise, and the claims arise out of the same events. Treaty developments which more specifically delineate the standing of indirect shareholders before BIT tribunals may go some way to address the multiplicity of claims issue, as would treaty definitions of nationality that would take corporate control into account and permit MNEs one nationality for investments claims, presumably that of an MNE's controlling parent company.

Various cases have seen the claims of direct and indirect investment shareholders arbitrated, notably *Azurix Corp.* v. *Argentina, Enron Corp. and Ponderosa Assets LP* v. *Argentina, Waste Management Inc.* v. *Mexico* and *Siemens AG* v. *Argentina*.[115] Majority ownership, and investment control has not been a requirement for such claims, as seen in *Lanco International Inc.* v. *Argentina, CMS Gas Transmission Co.* v. *Argentina* and *LG&E Energy Corp.* v. *Argentina*.[116] This right of indirect, or partial shareholder standing has been moderated by the fact that damages awarded have been limited to the proportion of the shareholder's interest in an investment.[117]

In *Sedelmayer* v. *Russia* the corporate veil was pierced by the tribunal to provide investor protection to a shareholder, not according to the strict terms of the BIT, but under the "control" concept of corporate

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Ingredients Americas, Inc. v. *Mexico* (ICSID ARB(AF)/04/5), Consolidation Tribunal Award Rejecting Consolidation (20 May 2005) <http://naftaclaims.com/Disputes/Mexico/CPI/CPI-ADM-Consolidation_Tribunal_Award-20-05-05.pdf>.

115. *Azurix Corp* v. *Argentina* (ICSID No ARB/01/12), Decision on Jurisdiction (8 Dec. 2003), at para. 67, <http://ita.law.uvic.ca/documents/Azurix-Jurisdiction.pdf>; *Enron Corp and Ponderosa Assets LP* v. *Argentina* (ICSID ARB/01/3), Decision on Jurisdiction (14 Jan. 2004) at para. 37, <http://ita.law.uvic.ca/documents/Enron-Jurisdiction.pdf>; *Waste Management Inc.* v. *Mexico*, (ICSID ARB(AF)/00/3) Final Award (30 Apr. 2004), at para. 77, <http://ita.law.uvic.ca/documents/laudo_ingles.pdf>; *Siemens AG* v. *Argentina* (ICSID ARB/02/8) Decision on Jurisdiction (3 Aug. 2004), at para. 122, <http://ita.law.uvic.ca/documents/SiemensJurisdiction-English-3August2004.pdf>.

116. *Lanco International Inc.* v. *Argentina* (ICSID ARB/97/6), Jurisdiction (8 Dec. 1998), at para. 9, <http://ita.law.uvic.ca/documents/Lanco-Final.pdf>. *CMS Gas Transmission Co* v. *Argentina* (ICSID ARB/01/8), Jurisdiction (17 July 2003), para. 43, <http://ita.law.uvic.ca/documents/cms-argentina_000.pdf>; *LG&E Energy Corp., LG&E Capital Corp and LG&E International Inc.* v. *Argentina* (ICSID ARB/02/1), Jurisdiction (30 Apr. 2004), at para. 50, <http://ita.law.uvic.ca/documents/lge-decision-en.pdf>.

117. *Impregilo S.p.A.* v. *Pakistan* (ISCID ARB/03/3), Decision on Jurisdiction (22 Apr. 2005), <http://ita.law.uvic.ca/documents/impregilo-decision.pdf>.

identity.[118] The tribunal noted the ICJ *ELSI*[119] decision, in which the veil was pierced to permit diplomatic protection, and held that silence on this issue in the treaty in fact permitted the "control" principle to be invoked, and Mr. Sedelmayer's claim to be heard.[120]

To summarize, it appears that investment treaty language and interpreting awards have generally adopted a narrow interpretation of investor nationality which holds that the state of incorporation is the state of nationality. The corporate veil has generally not been pierced to permit scrutiny of corporate control, but it has been commonly pierced to include shareholders within an investment protection regime. This means that states can be exposed to multiple BIT claimants from one corporate ownership chain (*i.e.*, the *Lauder* and *CMS* cases[121]). One way to address this exposure to multiple claims is to specify in a BIT the extent to which indirect shareholders may hold *juris standi* before a BIT arbitral tribunal. It would also prove useful to draft treaty language which either contains a denial of benefits clause (preferably without an advance notice requirement), or a detailed definition of investor and investor nationality, including reference to corporate control.

5. Conclusion

If states' chosen investment treaty policy is to bestow nationality without the requirement of national economic activity, and to not acknowledge that commonly-controlled MNE ownership chains are now semi-global with multiple sites of incorporation, then states should arguably be clear in so doing, in the interests of transparency, clarity and consistency. States might thus publicize the fact, thereby providing guidance to arbitrators, that they are intentionally granting nationality for the purposes of investment claims without requiring an economic commitment to the state, in a similar fashion to the practices of open registry flag states. Conversely, if a state intends for its investment treaties to establish targeted and less open-ended dispute settlement, with comprehensively delineated investor standing, and to deliberately address the fact that international commerce is characterized by commonly controlled, complex corporate group structures, then the place of incorporation

118. *Franz Sedelmayer* v. *Russia* (Stockholm Chamber of Commerce Rules), Award (7 July 1998), at 57-59, <http://www.investmentclaims.com/decisions/Sedehnayer-Russia-JurisdictionandFinalAward7Ju11998.pdf>.
119. *Elettronica Sicula S.p.A. (ELSI)*, *supra* note 31.
120. *Ibid.*
121. *Ronald Lauder* v. *Czech Republic*, Award, *supra* note 113; *CME Czech Republic B.V.* v. *Czech Republic*, Partial Award, *supra* note 113. *CME Czech Republic B.V.* v. *Czech Republic*, Final Award, *supra* note 113.

approach to nationality should be supplemented by additional treaty language going forward.

Specifically, the ILC's Draft Articles on Diplomatic Protection definition of nationality,[122] which employs a rebuttable presumption approach, triggered by lack of economic presence and external control, presents a useful model for investment treaty corporate nationality definitions. In addition, nationality definitions that take into account control of a corporation offer advantages; the allocation of one head of nationality per centrally-controlled corporate group will reduce the risk of parallel proceedings and possible double recovery. Finally, steps might be taken to ensure that denial of benefits clauses function systematically within a treaty, such as by removing the prior notice requirement which is commonly needed for their function.

It is likely that arbitrators will be increasingly faced with corporate investor claimants within international MNE ownership chains. In the interests of clarity and consistency, it would be helpful if the extent to which third country control of a corporate investor is permissible was directly addressed by states in treaty language or subsequently issued joint statements of treaty interpretation. This treaty nuance will also aid states in ensuring clarity and transparency in their pursuit of public policy, policy executed in the form of investment treaty negotiation and ratification. Corporate nationality plays a vital role in determining the contours of state commitments in investment treaties and states owe it to their citizens to be specific in the extent to which they are both exposing themselves to the treaty claims of investors, and are granting investors standing to make claims against other states.

In addition, the question of how many levels of indirect ownership are permissible before an investor's treaty claim becomes too remote also merits clear treaty delineation if corporate nationality is to be outlined with precision.[123] Arbitrators are tasked with interpreting the rules established by states and it is inappropriate to place the burden of solv-

122. International Law Commission, *Fifty-eighth Session, Draft articles on Diplomatic Protection adopted by the Drafting Committee on second reading*, Art. 9, *supra* note 39.

123. For example, the updated Canada – Czech Republic Foreign Investment Protection and Promotion Agreement does not specify the number of degrees of ownership separation which might undermine a shareholding investor's standing. The treaty does contain a denial of benefits clause, however, although this provision contains a prior notification requirement. *Agreement between Canada and the Czech Republic for the Promotion and Protection of Investments*, (6 May 2009) Art. I(d) & (e), Art. XV, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/CzechFIPA-eng.pdf>.

ing such legal and policy questions on arbitrators' shoulders without adequate guidance.

In instances where there is a lack of treaty specificity, arbitrators do have some international law encouragement, as seen in the aforementioned ILC's *Draft Articles on Diplomatic Protection*[124] and the *Restatement of the Law on Foreign Relations*[125] to deny nationality based on incorporation alone to corporations which do not appear to be genuinely linked to the state of nationality that they are claiming. Some recent investment awards may also contain further useful precedent. In the *Canadian Cattlemen*[126] and *Bayview Irrigation*[127] awards, issued under the NAFTA, tribunals have read unwritten requirements into a treaty in order to preserve its "fabric".[128] Should an instance of *de facto* domestic control of a corporate investor arise, or treaty-shopping via a shell corporation, arbitrators could similarly look to the spirit of the treaty they are interpreting and find the corporate investors to be outside of the intended jurisdiction of the treaty.

In public international law, the shadow cast by *Barcelona Traction* is long, but it may have been distorted to the extent that it is held to stand for the notion that incorporation exclusively and finally determines a corporation's country of nationality. As Pia Acconci notes, the ICJ decision did make reference to the fact that the company had a connection with Canada, in terms of its history and its office location, factors separate from the state of incorporation.[129] Discussion at the ILC in 2003 also made note of the fact that the *Barcelona Traction* case was not directly concerned with nationality, but rather with the scope of diplomatic protection, suggesting that the nationality rule taken from this decision may have not been entirely intended.[130]

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124. International Law Commission, *Fifty-eighth Session, Draft articles on Diplomatic Protection adopted by the Drafting Committee on second reading*, Art. 9, *supra* note 39.
125. *Restatement of the Law (3d) of Foreign Relations Law of the United States*, Section 213, *supra* note 41.
126. *Canadian Cattlemen for Fair Trade* v. *United Sates*, *supra* note 52.
127. *Bayview Irrigation District et al.* v. *Mexico* (ICSID ARB(AF)/05/1), Award, (19 June 2007), <http://ita.law.uvic.ca/documents/bayview.pdf>.
128. *Ibid.* at para. 124; *Canadian Cattlemen for Fair Trade* v. *United Sates*, *supra* note 52 at para. 111. In those cases the Tribunals read a territoriality requirement into Articles 1101 and 1102 of the NAFTA.
129. Pia Acconci, "Determining the Internationally Relevant Link between a State and a Corporate Investor" (2004) 5:1 J. World Investment & Trade 139 at 170.
130. International Law Commission, *Fifty-eighth Session, Draft articles on Diplomatic Protection adopted by the Drafting Committee on second reading*, Article 9, *supra* note 39.

Indeed the view of corporations that *Barcelona Traction* is said to stand for is increasingly divorced from reality. The idea that companies are legally unrelated to each other is now refuted in areas of domestic legislation which routinely pierce the corporate veil.[131] The view that corporate behavior is irrelevant to nationality once incorporation is established is increasingly difficult to accept. MNE companies are connected by capital and control, and such connections cannot be indefinitely underplayed by the law.

Although some authors appear to downplay corporate nationality's importance in contemporary times,[132] in my view corporate nationality undoubtedly remains a vital issue – and its meaningful determination remains an invaluable exercise. Since corporate regulation still occurs primarily at the national level, under national jurisdiction, the determination thereof is critically important. States are pursuing this task in various sectors including through the conclusion of tax treaties and other instruments which seek to carve MNE activities up into manageable national regulatory portions. States should be similarly deliberate in developing analytical systems to identify which states possess nationality ties to MNE corporations for the purposes of treaty arbitration claims.

Given the complexity of present-day economic globalization, international law must offer precision in its judging of corporate nationality. Viewing nationality as more than what can be held by a shell corporation is consistent with the foundational international law principle of good faith. Good faith, a general principle of law, also finds expression in the *Vienna Convention on the Law of Treaties*[133] as a part of customary international law. States' customary international law obligation to operate in good faith would suggest that, in bestowing nationality and granting investors the keys to the international investment law system, states are obliged not to propagate instances of "sham" nationality.

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131. Bankruptcy and taxation laws enable veil-piercing under U.S. law. Reuven S. Avi-Yonah, "National Regulation of Multinational Enterprises: an Essay on Comity, Extraterritoriality, and Harmonization" (2002) 42 Colum. J. Trans. L. at 20 & 23.

132. See *e.g.*, Robert Wisner & Nick Gallus, "Nationality Requirements in Investor-State Arbitration" (2004) 5:6 J. of World Investment & Trade 926 at 944. Wisner and Gallus write "capital has become significantly more mobile, to the point where it is artificial to talk of capital belonging to any particular nation".

133. *Vienna Convention on the Law of Treaties*, *supra* note 44. On good faith in investment treaty arbitration see *Phoenix Action Ltd.* v. *Czech Republic* (ICSID ARB/06/5), Award (15 Apr. 2009) paras. 100-111, <http://ita.law.uvic.ca/documents/PhoenixAward.pdf>. In this dispute the tribunal held that the investor was not permitted to purchase companies of useful nationality merely for the purposes of initiating investor-state treaty arbitration with respect to a *pre-existing* dispute.

Investment treaty arbitration constitutes the most significant interaction that MNEs currently have with the international law system.[134] Such arbitration is unavoidably shaping ideas of what the MNE is in other areas of international law. It is thus imperative that it not be permitted to develop in an under-planned fashion, since it will likely have its ramifications felt in broader developments concerning MNEs under public international law.[135]

134. MNEs are at times disputing equals in arbitrations with states. *E.g.*, *IBM World Trade Corporation* v. *Republic of Ecuador* (ICSID ARB/02/10), Decision on Jurisdiction (22 Dec. 2003), <http://ita.law.uvic.ca/documents/IBMvsRDE.pdf>; *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal* v. *Argentina* (ICSID ARB/97/3), Award (21 Nov. 2000), <http://ita.law.uvic.ca/documents/Eaux-Award.pdf>; *Siemens* v. *Argentina* (ICSID ARB/02/8), Decision on Jurisdiction (3 Aug. 2004), <http://ita.law.uvic.ca/documents/SiemensJurisdiction-English-3August2004.pdf>; *Mobil Investments and Murphy Oil Corporation* v. *Canada*, Notice of Arbitration (1 Nov. 2007), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/MobilMurphy.pdf>.

135. For instance the future may see further cooperative developments relevant to MNEs in the area of anti-corruption initiatives. See *e.g.*, *United Nations Convention against Corruption*, 31 October 2003, in GA Res. 58/4, UN GAOR, 58th Sess., UN. Doc. A/RES/58/4 (2003), <http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf> (entered into force 14 December 2005) (reprinted in 43 I.L.M 37).