REALIST CORPORATE NATIONALITY IN TRANSNATIONAL INVESTMENT LAW

Submitted by

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Statement of originality

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Abstract

This thesis addresses the notion of corporate nationality in modern international commerce and international investment disputes. It explores how corporate nationality rules were created and whether corporate structuring and the related practice of investor-state arbitration tribunals have embraced the principles of legal realism. It is argued that the main jurisdictional battleground concerning corporate nationality often arises in the broader context of transboundary business activities and transnational law. Based on these considerations, it is argued that the national identity of multinational corporations can no longer be determined by reference to structural, organizational, and operational features or its organizational structure since these aspects may no longer reflect the true national identity of a multinational organization. The creation of transnational law merged with the tradition of legal realism has influenced the rules and principles applicable to multinational corporations and their corporate nationality. It is established that corporate nationality in international investment only serves a purpose of simplicity and efficiency in making a foreign investment, enforcing contracts, and suing the host-state. However, the characteristics or the classical tests establishing corporate nationality, which existed in the 20th century, no longer correspond to the realities of a modern transnational corporation. It is, therefore, argued that the modern multinational corporation has a unique transnational capacity – adrift, mobile, and detached from national jurisdiction. Its activities are predominantly regulated by transnational law. Investment arbitration practice reflects this realist fluidity. Also, legal realist arbitrators are often enabled to apply such transnational legal principles since they belong to no national legal order and are, therefore, not bound to apply the substantive or choice of law rules of any jurisdiction. The modern principles governing corporate nationality are of such border-transgressing nature that they both undercut and surpass the territorial boundaries upon which various jurisdictional competences have been predicated.

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GENERAL INTRODUCTION

1. Introduction

In the relatively short history of investment arbitration, the issue of investor's nationality has provided fertile grounds for controversy, doubt and disagreement[1]. Although purposed to encourage, attract and facilitate foreign investment, the vast majority of multilateral and bilateral investment treaties set a high threshold for the investors to access protection provided in such international instruments.

The strict jurisdictional requirements of international investment agreements (IIA's) based on the nationality of the investor have facilitated an unwelcoming practice of corporate structuring (and incorporation of jurisdictional convenience) and the so-called *treaty shopping*, which is usually described as an abuse of rights by the Respondent host states[2]. Similarly, international investment tribunals are constantly faced with a dilemma – how should the tribunal determine whether an investor is entitled to treaty protection if lacking the requested nationality, even though the investment itself has been implemented and was legitimate? Should the tribunals introduce additional criteria, such as the requirement of substantial business activity in the state of incorporation, not provided in the law of the alleged corporate nationality or the BIT? Or should the tribunal assess the investor's nationality *de facto*, ignoring the *de jure* place of incorporation?

The International Court of Justice in the landmark *Barcelona Traction* case had noted that:

> "considering the important developments of the last half-century, the growth of foreign investments and the expansion of the international activities of corporations, in particular of holding companies, which are often multinational, and considering the way in which the economic interests of States have proliferated, it may at first sight appear surprising that the evolution of law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane."[3]

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[1] For example, *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, 17
Dec 2015 Award on Jurisdiction and Admissibility; *Amco Asia Corporation, Pan American Development Ltd. and P.t. Amco Indonesia v. The Republic of Indonesia*, Decision on Jurisdiction, ICSID case No. ARB/81/1; *Tokios Tokelés v. Ukraine*, Case No. ARB/02/18, 29 April 2004; *Saluka Investments B.V. v. The Czech Republic*, under UNCITRAL Rules, Partial Award 17 March 2006; *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3 and others.

[2] For example, *Mobil Corporation and Others v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27, June 10, 2010); *Yukos Universal Limited (Isle of Man) v The Russian Federation*, PCA Case No AA227, (Interim Award on Jurisdiction and Admissibility, 30 November 2009); *Phoenix Action v The Czech Republic*, ICSID Case No. ARB/06/5 (Award on Jurisdiction, 15 April 2009) and others.

[3] Case Concerning The Barcelona Traction, Light And Power Company, Limited, (New Application: 1962), (Belgium V. Spain), Second Phase, Judgment of 5 February 1970, para 89.

The notion of nationality and, mostly, corporate nationality was and still is a source of much discussion in public international law and international investment law. As one of the essential jurisdictional requirements in investment treaty arbitration, corporate nationality always attracts significant academic and practical debate[4]. Corporate nationality becomes even more critical in modern international commerce and international investment disputes where one of the parties, in most cases, is a multinational investor[5].

For example, in the recent investor-state dispute of *Philip Morris Asia Limited v. The Commonwealth of Australia* the investor was a multinational corporate investor (Philip Morris International Inc. (PMI)) which is one of the world's largest tobacco manufacturers. To manage its business in different regions worldwide, PMI owns numerous subsidiaries and affiliates, forming the so-called PMI Group.

The claimant, PM Asia, was a company based in Hong Kong that served as regional headquarters for PMI's operations. The investment, Philip Morris Australia (PM Australia), was a holding company registered under the laws of Australia that owned all shares of Philip Morris Limited (PML), a trading company that engaged in manufacturing, importing, marketing and distributing tobacco products for sale within Australia and regional export. A Switzerland-based company of the PMI Group owned PM Australia until February 23, 2011, when the ownership of the Australian subsidiaries was restructured. PM Asia acquired all shares of PM Australia and became the direct owner of the PMI Group's investment in the country. Moreover, PM Asia alleged it had managed and controlled the Australian subsidiaries since 2001. Thus, according to PM Asia, the restructuring of the Australian subsidiaries was part of a group-wide reorganization to "refine, rationalize and streamline PMI's corporate structure". Said differently, PM Asia alleged that the restructuring was unrelated to the plain packaging measures that formed the subject matter of the arbitration.

However, the tribunal concluded that Philip Morris committed an abuse of rights because it changed its corporate structure to gain BIT protection when a specific dispute against Australia over tobacco plain packaging was reasonably foreseeable. Therefore, it deemed all claims inadmissible and declined to exercise jurisdiction over the dispute, reserving the issue of costs for a final award.

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[4] Alexandrov, Stanimir A. "The "Baby Boom" of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as "Investors" and Jurisdiction Ratione Temporis'." *The Law and Practice of International Courts and Tribunals* 4.1 (2005): 19-59; Lyons, Katherine E. "Piercing the corporate veil in the international arena." *Syracuse J. Int'l L. & Com.* 33 (2005): 523; Chaisse, Julien. "The Treaty Shopping Practice: Corporate Structuring and Restructuring to Gain Access to Investment Treaties and Arbitration." *Hastings Bus. LJ* 11 (2015): 225 and others.

[5] A multinational corporate investor may be defined by its main characteristics: it has facilities and other assets in at least one country other than its home country, have offices and/or factories in different countries and usually have a centralized head office where they coordinate global management. Very large multinationals have budgets that exceed those of many small countries. Multinationals may also be referred to as transnational, international or stateless corporations.

It is accepted[6] that multinational corporations have advanced from the mere objects of protection under international law to actors with their own rights and responsibilities. While their status under international law continues to be disputed, they enjoy rights (investment protection) and have responsibilities (e.g., environmental or human rights) as actors on the international scene.

Furthermore, the sources that shape international investment law have multiplied and diversified as well. In particular, the number of investment protection treaties, both bilateral and multilateral, have grown exponentially. Modern FTA's cover an ever broader spectrum of matters, ranging from trade and tariffs to investment protection, human rights and the environment[7].

However, in the meantime, international rules on corporate nationality have continued to develop relatively slowly, mainly through judicial decisions rendered by international tribunals. Contemporary international investment law has itself brought newly formed rules on international personality and capacity, which merge both the municipal law and international law. The latter is reflected in investor-state arbitration, i.e. principles and rules on corporate nationality in international investment law were very much influenced not by the state actors, as was the case in the sphere of diplomatic protection, but by actors and instruments, which are a part of transnational law. This may allow one to conclude that rules on corporate nationality were also profoundly influenced by actors acting in investor-state arbitrations, such actors being parties to investment agreements or BITs, multinational corporations, counsels, and arbitrators acting in investor-state arbitration.

Based on the latter, it can be argued that corporate structuring and the related practice of the investor-state arbitration tribunals' have accepted the principles of legal realism. Legal realism operates on the premise that "the law", whatever that may be, is concerned with and is intrinsically tied to the real-world outcomes of particular cases. Accepting this premise moves jurisprudence or the study of law in the abstract, away from hypothetical predictions and closer to empirical reflections of fact. As proponents of legal realism say – realists are not concerned with what the law should or "ought to" be, but legal realism simply seeks to describe what the law is[8]. Realists use pragmatic legal reasoning – what Llewellyn called "Grand Style judging" – consisting of a mixture of argumentative techniques based on implied intent, morality, policy, precedent and liberality[9].

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[6] Muchlinski, Peter, and Peter T. Muchlinski. *Multinational enterprises and the law*. Oxford University Press, 2007.

[7] For example, the EU-Vietnam Free Trade Agreement, January 2016; the EU-Singapore Free Trade Agreement, May 2015 ('EUSFTA'). And other 'new-generation' free trade agreements, such as the EU-Republic of Korea and the EU-Canada Comprehensive Economic and Trade Agreement.

[8] Pound, Roscoe. "The call for a realist jurisprudence." *Harvard Law Review* 44.5 (1931): 697-711.; Hull, Natalie EH. *Roscoe Pound and Karl Llewellyn: Searching for an American Jurisprudence*. University of Chicago Press, 1997.

[9] Singer, Joseph William. "Legal Realism Now. Legal Realism at Yale: 1927-1960. By Laura Kalman." *Calif. L. Rev.* 76 (1988): 467-1377.; Wiseman, Zipporah Batshaw. "The Limits of Vision: Karl Llewellyn and the

As will be observed in this thesis, similar observations can be made when discussing the notion of corporate nationality in international investment law – there always were rules on corporate nationality in international investment agreements or municipal law. However, these rules did not evolve to meet new and complex conditions and forms of foreign investment in modern commerce.

The notion of corporate nationality was somewhat influenced by the changing nature of international law and international investment law, which is also evident in the expansion of jurisdictional issues faced by the investor-state tribunals. The classic paradigms of incorporation, the real effect principle and the notion of control which were firmly established in the past, do not adhere to the needs of the modern and global investment regime. In reality, the main jurisdictional battleground concerning corporate nationality is no longer just the incorporation or control issue. Instead, jurisdictional disputes regarding corporate nationality often arise in the broader context of transboundary business activities and transnational law.

Based on the above considerations, it may be argued that the national identity of multinational corporations can no longer be determined by reference to traditional conflict of law rules and structural, organizational and operational features or its organizational structure. These aspects may no longer reflect the true national identity of a multinational organization. The characteristics or the classical tests establishing corporate nationality which existed in the 20th century no longer correspond to the realities of a modern transnational corporation.

Therefore, it is evident that it is necessary to analyze how the notion of corporate nationality has coped with these changes and how it has developed in contemporary international investment law and arbitration.

2. Relevant scholarly work and practice of arbitral tribunals

Corporate nationality in international investment law and investor-state disputes is discussed extensively both in scholarly work and in arbitral awards. However, most of the scholarly works on the topic consider or report findings of international tribunals but do not address the issue of the establishment of corporate nationality of multinational investors in the context of transnational law and its development in investor-state disputes.

Merchant Rules." *Harvard Law Review* 100.3 (1987): 465-545.; Nyquist, Curtis. "Llewellyn's Code as a Reflection of Legal Consciousness."*New Eng. L. Rev.* 40 (2005): 419.

Most extensive scholarly works on the notion of corporate nationality were published by authors; Ricardo Astorga[10], Alexandrov, Stanimir A.[11] and Anthony C. Sinclair[12]. The notion of a multinational investor was addressed more extensively in the scholarly work of Robin F. Hansen[13] and Peter Muchlinski[14]. Multilateralization of international investment law, which is also very important for the considerations of transnational law in the context of corporate nationality, was addressed extensively by Stephan Schill[15].

On the other hand, the issue of actors and instruments, which play their part in the development of transnational law and their influence on the decision-making process in investor-state arbitration was considered extensively by Emmanuel Gaillard[16] and early authors on the issue such as Yves Dezalay and Garth Bryant[17]. The relevant works on legal realism, which are also of particular importance to the issues analyzed in this thesis, were produced by early authors Joseph William Singer[18], Karl Llewellyn[19] and Joseph Hutcheson Jr[20].

As for arbitral awards, the notion of corporate nationality is considered in almost every arbitral award rendered. However, the most significant ones and most important ones for the present thesis were given in the sphere of diplomatic protection (*Barcelona Traction*[21],

[10] Astorga, Ricardo Letelier. "Nationality of Juridical Persons in the ICSID Convention in Light of Its Jurisprudence, The." *Max Planck YBUNL* 11 (2007): 419.
[11] Alexandrov, Stanimir A. "The "Baby Boom" of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as "Investors" and Jurisdiction Ratione Temporis'." *The Law and Practice of International Courts and Tribunals* 4.1 (2005): 19-59.
[12] Anthony C. Sinclair; The Substance of Nationality Requirements in Investment Treaty Arbitration, ICSID Review - Foreign Investment Law Journal, Volume 20, Issue 2, 1 October 2005, Pages 357–388.
[13] Hansen, Robin F. "The Systemic Challenge of Corporate Investor Nationality in an Era of Multinational Business." *Journal of Arbitration and Mediation* 1.1 (2010); Hansen, Robin F. "The international legal personality of multinational enterprises: Treaty, custom and the governance gap." *Global Jurist* 10.1 (2010).
[14] Muchlinski, Peter. "Corporations and the Uses of Law: International Investment Arbitration as a'Multilateral Legal Order'." (2011).
[15] Schill, Stephan W. *The multilateralization of international investment law*. Vol. 2. Cambridge University Press, 2009; Schill, Stephan W. "System-building in investment treaty arbitration and lawmaking." *International Judicial Lawmaking*. Springer, Berlin, Heidelberg, 2012. 133-177.
[16] Gaillard, Emmanuel. *Legal theory of international arbitration*. Leiden: Martinus Nijhoff Publishers, 2010; Gaillard, Emmanuel. "The representations of international arbitration." *Journal of International Dispute Settlement* 1.2 (2010): 271-281; Gaillard, Emmanuel. "Sociology of international arbitration." *Arbitration International* 31.1 (2015): 1-17.
[17] Dezalay, Yves, and Bryant G. Garth. *Dealing in virtue: International commercial arbitration and the construction of a transnational legal order*. University of Chicago Press, 1996.
[18] Singer, Joseph William, and Laura Kalman. "Legal realism now." (1988): 465-544.; Leiter, Brian. "Rethinking legal realism: Toward a naturalized jurisprudence."*Tex. L. Rev.* 76 (1997): 267; Singer, Joseph William, and Laura Kalman. "Legal realism now." (1988): 465-544.
[19] Llewellyn, Karl Nickerson. *The common law tradition: Deciding appeals*. William S. Hein & Co., Inc., 1996; Llewellyn, Karl N. "Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed." *Vand. L. Rev.* 3 (1949): 395.
[20] Hutcheson Jr, Joseph C. "Judgment Intuitive: The Function of the Hunch in Judicial Decision." *Cornell lq* 14 (1928): 274.
[21] Case Concerning The Barcelona Traction, Light And Power Company, Limited, (New Application: 1962), (Belgium V. Spain), Second Phase, Judgment of 5 February 1970.

ELSI[22] and *Diallo*[23]), early investor-state arbitration cases (*SOABI v Senegal*[24], *Amco v. Indonesia*[25]) and more recent ones adopted under BITs, which significantly influenced the development of the practice of investor-state tribunals (*Tokios Tokeles v Ukraine*[26], *Mobil vs. Venezuela*[27], *Phillip Morris v Australia*[28] and others). All these significant cases on the issue of corporate nationality will be analyzed in detail in this thesis.

3. Objectives and scope of the study

a. The working hypothesis

The first step in the working hypothesis of this thesis is that the rules on corporate nationality in contemporary investment law and transnational law were influenced not by state actors, as was the case in the sphere of diplomatic protection, but by actors and instruments, which are a part of transnational law. The second step of the hypothesis is that rules on corporate nationality were deeply influenced by actors acting in investor-state arbitrations, such actors being parties to investment agreements or BITs, multinational corporations, counsels and arbitrators acting in investor-state arbitration. Based on the latter, the final goal of the working hypothesis is to affirm that corporate structuring and the related jurisprudence of investor-state arbitration tribunals have accepted the principles of legal realism. Therefore, this thesis seeks to affirm whether the main jurisdictional battleground concerning corporate nationality no longer rests on the incorporation or control tests, but rather that jurisdictional disputes on corporate nationality often arise in the broader context of transboundary business activities and transnational law, which is deeply influenced by non-state actors.

b. General objective

One of the effects of the emergence and indeed proliferation of the multinational corporation is a simplistic understanding of nationalism and national identity. The latter has been the sole driving factor behind the supremacy of nation-states in the international arena. This has

[22] Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy), 1989 I.C.J. 15 (July 20).
[23] Judgment on preliminary objections in Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) ('Diallo Case'), rendered on 24 May 2007.
[24] *Société Ouest-Africaine des Bétons Industriels (SOABI) v. the Republic of Senegal*, ICSID Case No. ARB/82/1.
[25] *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1).
[26] Tokios Tekeles v Ukraine, ICSID Case No ARB/02/18.
[27] Mobil Corporation, Venezuela Holdings BV, Mobil Cerro Negro Holding, Ltd, Mobil Venezolana de Petroleos Holdings, Inc, Mobil Cerro Negro, Ltd, and Mobil Venezolana de Petroleos, Inc v Bolivarian Republic of Venezuela, ICSID Case No ARB/07/27 (Decision on Jurisdiction, 10 June 2010).
[28] *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12.

exaggerated the problem of not taking into account the varied factors that influence the notion of a multinational corporation and, effectively, corporate nationality.

The complexity of the regulation of modern corporate nationality has its roots in the nature of such corporations in the globalized world. Whereas companies with offshore operations had their parent body incorporated in a country with which they could be identified, the nature of business has changed in the modern era with porous national borders. Such identification has become much more difficult. This, therefore, leads to municipal laws becoming ineffectual in attempting to regulate multinational corporations.

On the other hand, detachment from the municipal law and the emergence of transnational law provides numerous benefits for multinational corporations. It helps to avoid many of the difficulties produced by varying national requirements. However, the notion of transnational law is still to find its exact place in the fragile structure of the international legal system.

Therefore, the general objective of this thesis is to analyse how the notion of corporate nationality of the modern multinational investor has developed in the changing transnational environment. In particular, the emphasis is on the characteristics of a modern multinational corporation and its unique transnational capacity – adrift, mobile and detached from national jurisdiction. It is also asked whether the emergence of transnational law and the tradition of legal realism have influenced the rules and principles applying to multinational corporations and their corporate nationality in investor-state disputes.

c. Specific objectives

(i) The first objective of this thesis is to analyze how the multinational corporation and its corporate nationality coincide in the context of the development of transnational law and whether corporate nationality still plays an essential role in modern commerce.

(ii) The second objective is to analyze whether there is evidence that the rules on corporate nationality in international investment law were influenced or even formed by the tradition of legal realism and, effectively, by the decision-making processes of international arbitrators.

(iii) The third objective is to explain the evolution of the regulation of corporate nationality and to analyze the notion of corporate nationality in contemporary international investment law. In particular, this thesis aims to explain the principles and rules of corporate nationality that have evolved in international investment law and investor-state disputes.

(iv) The fourth objective is to analyze how the forms and types of international investment have changed over time and how the notion of corporate nationality has coped with such a change. This thesis aims to provide a more in-depth perspective of the corporate nationality issues which arise in modern international investment.

(v) Finally, the fifth objective is to address the legal realist decision making in the context of corporate nationality considerations and to inquire how the multi-nationality of investors and the conduct of investors' themselves have influenced the rules on corporate nationality.

4. Research questions

The following questions are addressed in this thesis:

(i) How the multinational corporation and the notion of corporate nationality coincide in the context of the development of transnational law?

(ii) Has the tradition of legal realism influenced and formed rules on corporate nationality in international investment law?

(iii) How the principles and rules of corporate nationality have been formed and evolved in international investment law and investor-state disputes?

(iv) How the forms and types of international investment have changed over time, and how the notion of corporate nationality has assessed such a change?

5. Research methodology

To carry out a comprehensive holistic study – mainly theoretical (doctrinal) and empirical (analytical jurisprudence) research methods were used.

First of all, to reveal the content of legal norms and investment arbitration awards, assess the legal doctrine, and structure arguments and conclusions, this thesis has widely used the logical method.

The historical method has been used mainly in Chapter II when analyzing the development of the rules of corporate nationality in international investment law and the basic principles governing the jurisdiction of the investor-state arbitration tribunal. A detailed historical analysis of the legal regulation of corporate nationality and the assessment of bilateral and multilateral investment agreements allowed to form a comprehensive view of historical trends, their assessment and the dominant position of investor-state tribunals.

Having said that, this thesis is based primarily on a normative analysis, empirical research, analysis of the interests and comparative analysis. For the following reasons, the normative analysis was used in the entire thesis. First, a tribunal constituted on the basis of the provisions of international investment agreements and this is the basis of investment

arbitration. Although it was observed that investment tribunals which engage in legal realism balance between the political considerations and interests of arbitral integrity, they could not deviate too far from the normative base, in particular when considering corporate nationality. The normative basis is the leading cause of the existence of investor-state tribunals. Second, the normative analysis of international investment agreements and the definition of investor helped to assess the usual meaning of the term and measure the extent of considerations given by investment tribunals. Third, a high level of legal reasoning also strengthens the authority of investor-state tribunals since the balancing between politics and private or integrity interests applied by the tribunals can only be done in the form of legal reasoning. The research of the legal methods used by investment agreement tribunals, including the realist decision making, has allowed greater insight on the potential strategies intended to examine the rulings on corporate nationality.

Based on the empirical research method, this thesis also analyses in detail the legal positions of investor-state tribunals on corporate nationality. In order to examine whether tribunals use legal realist methods when establishing corporate nationality and to what extent, attention was also focused on the *de facto* used interpretation methods, instead of only focusing on what tribunals declare to employ. Even if a tribunal states that it strictly complies with the applicable investment agreement, its award may prove to be a ruling based on policy considerations rather than on specific provisions of BITs. It is crucial what tribunals do, rather than what they say they do. For example, it cannot be said in an abstract way whether the awards of the tribunals on corporate nationality have the impact of precedent on investor-state arbitration and what the extent of these effects is. Empirical research of arbitration cases must be carried out in order to make relatively objective and reasonable conclusions. As for the arbitrators and their views, empirical research of the different opinions of arbitrators, their considerations are of utmost importance. Of course, an empirical analysis cannot provide sufficient evidence on the legal realist approach of arbitrators. However, at least it represents a greater probability of this theory being present in investor-state arbitration.

A survey of the recent works in this field showed that assessing the notion of corporate nationality in the emerging transnational law remains a contentious issue. Therefore, this study aims to join the ongoing debates by presenting a reasoned and critical analysis of investment arbitration, thus contributing to the academic discussions and the implementation of foreign investment policy in international investment law systems. The author of the thesis is not only a theorist but also a practitioner, specializing in the field of international investment law. Thus, his experience has allowed him to consider the issues universally and make suggestions that can be successfully applied in practice.

Practical issues concerning corporate nationality go to the heart of the problem analyzed in this thesis. That is where the theory of legal realism fits in perfectly. Legal realism helps to analyze the notion of corporate nationality *de facto* while also considering *de jure* implications. Similarly, as argued by Karl Popper, realism is, according to his own criteria,

an irrefutable metaphysical view about the nature and what we attempt in science is to describe (and so far as possible) explain reality[29].

6. Sources for the research

In the research conducted in preparation of this thesis, mainly international investment agreements and the awards of investor-state arbitration tribunals were used. The international investment agreements cited in the thesis are available at the UNCTAD database of international investment agreements (http://investmentpolicyhub.unctad.org/IIA) and the website on international treaties arbitration (http://italaw.com/).

Investor-state arbitration cases are available in the ICSID case database (https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx) and the comprehensive and free database on investment treaties, international investment law and investor-state arbitration (http://italaw.com/). The international treaties and cases referred to in the thesis are available and other sources as well.

Furthermore, links to legal documents as a primary source of the material used in the thesis are provided, especially primary sources (cases, agreements, regulations, rules, municipal ordinances and related government information). In addition, secondary sources (textbooks, treatises, monographs, articles, complaints, comments, and others) which are all accessible publicly – on governmental websites and online databases (International Law Reports; European Journal of International Law, International Court of Justice; HeinOnline, LexisNexis; Quicklaw, Westlaw).

Also, the opinions of other scientists and practitioners in the field of international investment law have been referred to based on the analyzed specific research issue in question. During the writing of this thesis, the author has conducted research as a visiting scholar at the Columbia law school in New York and the National University of Singapore.

This thesis also aims to provide not merely a traditional legal analysis, the so-called "letter of the law" (issues, rules, analysis, conclusions), but a qualitative approach to the determination of the relevant issues. This can help identify the gaps in scientific research and contribute to the accumulation of knowledge in this academic discipline.

It should also be noted that the investment tribunals usually refer to the following seven sets of rules (legal sources): (i) the ICSID Convention, (ii) multilateral investment agreements, (iii) bilateral investment treaties (including the separate investment chapters of "economic integration agreement"), (iv) customary international law, (v) general principles of law, (vi)

[29] Popper, Karl. *The logic of scientific discovery*. Routledge, 2005; also Popper, Karl. *Conjectures and refutations: The growth of scientific knowledge*. routledge, 2014; Popper, Karl. *Realism and the aim of science: From the postscript to the logic of scientific discovery*. Routledge, 2013.

specific agreements or awards and (vii) national legislation. The documents on the basis of which cases are referred to in investment arbitration often establish the applicable rules as well. Otherwise, Article 42 (1) of the ICSID Convention is applied: "The Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable." This thesis focuses on international investment law; hence it does not deal with attitudes of national courts when they interpret domestic legislation, administrative decisions or private contracts. In addition, the thesis analyzed the approaches of the tribunals when they establish the facts and apply the relevant investment law rules to them.

7. Structure of the thesis

This thesis is divided into four Chapters. Each of the Chapters consist of 2 Sections. Each Chapter and its Sections address the relevant research question.

Chapter I discusses how the legal fiction of multinational corporations and the legal fiction of corporate nationality coincide in the context of the development of transnational law. The further analysis considers whether there is evidence that rules of corporate nationality in international investment law were influenced by the tradition of legal realism. It is particularly examined whether international investment arbitration cases concerning corporate nationality provide a ground to argue that the philosophy of legal realism operates and influences rules on corporate nationality.

Chapter II analyses the evolution of the regulation of corporate nationality. It provides an analysis of the provisions and principles which regulated the establishment of corporate nationality in early international commerce and the sphere of diplomatic protection. Chapter II also addresses how the rules that have evolved in international investment law and discusses whether early principles and rules that evolved in customary international law have influenced the notion of corporate nationality in investor-state disputes.

Chapter III discusses how the forms and types of international investment have changed over time and how the notion of corporate nationality has addressed such a change. Chapter III takes a more in-depth perspective of the corporate nationality issues which arise in modern international investment.

Chapter IV analyses whether realist decision making and its main characteristics, such as the emphasis on intent, morality and policy, precedent and liberality, are present in investor-state arbitration. Chapter IV also asks how the multi-nationality of international investors and their conduct has influenced the rules of corporate nationality. Chapter IV also considers whether the lack of international regulation of multinational investors has also influenced the development of transnational law.

The final "Conclusions" section provides an overview of the main conclusions drawn up in this thesis and propositions about what could be addressed in further scholarly work on this topic.

8. Delimitation of the thesis

The notion of corporate nationality in contemporary international investment law is a complex legal issue, and, naturally, this thesis has its limitations. In particular, this thesis does not address the notion of the nationality of natural persons. This thesis also does not aim to extensively discuss the treaty shopping practice and abuse of international investment law. Instead, this thesis analyses the main legal, theoretical and policy reasons behind the treaty shopping practice. This thesis does not analyze in detail the development and place of transnational law in the hierarchy of international law but instead aims to analyze what implications the emergence of transnational law has on the development of corporate nationality rules. Finally, this thesis does not discuss the notion and development of the multinational corporation. Instead, it seeks to explain how the rise of multinational investors, corporate structuring and changing forms of foreign investment have influenced the development of corporate nationality rules in international investment law.

9. Principal conclusions

It was established in this thesis that contemporary international investment law has brought newly formed rules on international personality and capacity, which merge both the municipal law and international law principles. The latter was reflected mainly in investor-state arbitration. Rules on corporate nationality in international investment law are also influenced by the emerging transnational law, which is shaped by non-state actors and international instruments. Thus, the modern notion of corporate nationality now forms a part of transnational.

It was also established that corporate nationality in international investment only serves a purpose of simplicity and efficiency in making a foreign investment, enforcing contracts and suing the host-state. However, multinational corporations' national identity could no longer be determined by reference to structural, organizational and operational features or its organizational structure, since these aspects may no longer reflect the true national identity of a multinational organization. The characteristics of the classical tests establishing corporate nationality, which existed in the 20th century, no longer correspond to the realities of a modern transnational corporation.

It was found that corporate structuring and transnationality of corporations investing abroad had "transnationalized" the relationship between investors and host-states. This was also

reflected in investor-state disputes. Thus, principles that evolved in transnational law are particularly useful in the context of a multinational corporation and its corporate nationality.

Also, it was established that there is ample evidence that the views and methods proposed by legal realists are present in international investment law and its jurisprudence. The notion of corporate nationality in contemporary international investment law is the best example of the presence of legal realism. This conclusion is based on the fact that provisions on corporate nationality are too simplistic and do not adhere to the needs and realities of complex structures of multinational investors. It was concluded in this context that the functions, roles, and the respective positioning of the social actors acting in investor-state arbitration, the principles guiding their behaviour and their strategies do fit to the theory of legal realists, which claim that judicial decisions are controlled by the psychological make-up, social context, arbitrator's ideologies and professional consensus.

It was established that while arbitrators and counsel act in the jurisprudential philosophy of legal realism, this has had significant consequences for the development of international investment law and, in particular, the notion of corporate nationality. There is clear evidence of the realist perspective present in disputes concerning corporate structuring.

In the context of international investment provisions, it was found that provisions of BITs on investor's nationality were clearly influenced by the provisions of municipal law. However, the regulation of multinational investor by way of municipal law does not adhere to the contemporary international investment activity. This further emphasizes the influence of transnational law principles when governing corporate nationality. Even though the ICSID Convention, in certain circumstances, provides for an option to agree on how to establish corporate nationality, the latter does not change the fundamental notion of the ICSID Convention that the nationality of a legal person is established by way of incorporation, that is by municipal law.

On the other hand, it was found that when it comes to jurisdictional requirements of ICSID arbitration, the tribunals have vast discretionary interpretation powers. The tribunals may use exceptions to the classical concepts of nationality when juridical persons are under foreign control. This further proved the presence of legal realism in investor-state arbitration.

It was found that the discretionary power of arbitral tribunals to interpret international investment agreements based on their preferred views on corporate nationality is of utmost importance. However, it was observed that differential interpretation of the provisions of ICSID Convention, as well as provisions of BITs and multilateral investment agreements, resulted in contradictory awards on corporate nationality, in particular, as compared with the ones formed in the sphere of diplomatic protection. The latter can be explained not only by the discretionary interpretation power of arbitral tribunals but also by the complexity of applicable law in international investment law, where the municipal law and international law coincide.

It was also found that international investment law rests on pragmatism. International investment law contains ample resources permitting arbitrators to interpret paper rules while still appearing faithfully to be applying the strict treaty law. It was established that in some instances, the investor-state tribunal is enabled to fill the legal treaty gaps acting as a lawmaker.

Finally, it was found that the modern multinational corporation no longer rests on municipal law principles. The modern multinational corporation has a unique transnational capacity – adrift, mobile and detached from national jurisdiction. Its activities are mainly regulated by transnational law and not by municipal law. Legal realist arbitrators are often enabled to apply such transnational legal principles since they belong to no national legal order and are therefore not bound to apply the substantive or choice of law rules of any jurisdiction. The creation of this transnational law was influenced both by the tradition of legal realism and the activities of multinational corporations. Thus, municipal laws often become ineffectual in regulating multinational corporations and, effectively, corporate nationality. The modern principles governing corporate nationality are of such border-transgressing nature that they both undercut and surpass the territorial boundaries upon which various jurisdictional competences have been predicated.

CHAPTER I - CORPORATE NATIONALITY IN TRANSNATIONAL LAW

Introduction to Chapter I

The International Court of Justice in the landmark *Barcelona Traction* case noted that:

> "considering the important developments of the last half-century, the growth of foreign investments and the expansion of the international activities of corporations, in particular of holding companies, which are often multinational, and considering the way in which the economic interests of States have proliferated, it may at first sight appear surprising that the evolution of law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane."[30]

The notion of nationality and, in particular, corporate nationality was, and still is, a source of much discussion in the area of international customary law and international investment law. Corporate nationality always attracts academic and practical debate being one of the essential jurisdictional requirements in investment treaty arbitration. Corporate nationality becomes even more critical in modern international commerce and in international investment disputes where one of the parties, in most cases, is a multinational corporate investor. Therefore, rules on establishing corporate nationality have become one of the main issues to be decided in foreign investment disputes.

Since this thesis intends to explain the concept of corporate nationality in contemporary international investment law and the implications it has on the development of international investment law and international arbitration practice, it is, therefore, necessary to address the evolution and regulation of corporate nationality, which is one of the main objectives of this thesis.

It is now accepted that multinational corporations have advanced from mere objects of protection under international law to actors with their own rights and responsibilities. While their status under international law continues to be disputed, they enjoy rights (investment protection) and have responsibilities (e.g., environmental or human rights) as actors on the international scene.

The sources that shape international investment law have multiplied and diversified as well. In particular, the number of investment protection treaties, both bilateral and multilateral, have grown exponentially. Modern FTA's cover an ever-wider spectrum of matters that range from trade and tariffs to investment protection, human rights and the environment.

However, in the meantime, the notion of corporate nationality has developed slowly and, precisely, through interpretative decisions rendered by international tribunals. Contemporary

[30] *Case Concerning The Barcelona Traction, Light And Power Company, Limited*, (New Application: 1962), (Belgium V. Spain), Second Phase, Judgment of 5 February 1970, para 89.

international investment law has further brought newly formed rules on international personality and capacity, which merge both the municipal law and international law. The latter was evidenced in investor-state arbitration, i.e., rules on corporate nationality in international investment law are also influenced by the emerging transnational law shaped by non-state actors and international instruments. Thus, the modern notion of corporate nationality now forms a part of transnational. The latter may allow one to conclude that rules on corporate nationality were also profoundly influenced by non-state actors in investor-state arbitrations, such actors being parties to investment agreements, or BITs, arbitrators and other parties present in investor-state arbitration.

Based on the latter, it can be argued that corporate structuring and the related practice of investor-state arbitration tribunals have accepted the principles of legal realism. Legal realism operates on the premise that "the law", whatever that may be, is concerned with and is intrinsically tied to the real-world outcomes of particular cases. Accepting this premise moves jurisprudence, or the study of law in the abstract, away from hypothetical predictions and closer to empirical reflections of fact. As proponents of legal realism say – realists are not concerned with what the law should or "ought to" be, but legal realism simply seeks to describe what the law is[31]. As will be observed in this thesis, similar can be said about the notion of corporate nationality – there were always clear rules on corporate nationality in international investment agreements. However, these rules were, and still are too simplistic and do not adhere to the needs and realities of modern and complex structures of multinational investors.

The changing nature of international law and international investment law is also evident in the expansion of jurisdictional issues faced by the investor-state tribunals in respect of corporate nationality. The classic paradigms of incorporation, the real effect principle and the notion of control which were firmly established in the past, do not adhere to the needs of the modern and global investment regime. In reality, the main jurisdictional battleground concerning corporate nationality is no longer just the incorporation or control issue. Instead, jurisdictional disputes regarding corporate nationality often arise in the broader context of transboundary business activities and transnational law.

Considering the latter, Section I of this Chapter will examine how the legal fiction of multinational corporations and the legal fiction of corporate nationality coincide in the context of the development of transnational law. It will be considered whether corporate nationality still plays an essential role in modern commerce and the context of substantial protections.

Section II will focus on whether the rules on modern corporate nationality in international investment law were influenced and shaped by the tradition of legal realism and, effectively, by the decision-making processes of international arbitrators. It will be observed what the

[31] Pound, Roscoe. "The call for a realist jurisprudence." *Harvard Law Review* 44.5 (1931): 697-711.; Hull, Natalie EH. *Roscoe Pound and Karl Llewellyn: Searching for an American Jurisprudence*. University of Chicago Press, 1997.

fundamental axioms of legal realism are and if they are also present in international investment law. In particular, it will be asked whether international investment arbitration cases concerning corporate nationality provide grounds to argue that the philosophy of legal realism operates in the context of the establishment of corporate nationality.

SECTION I – TRANSNATIONAL CORPORATIONS IN TRANSNATIONAL LAW

1.1. Transnational law

International investment law is always faced with the complexity of applicable law where the municipal law and international law coincide[32]. The latter brings newly formed international investment law rules on international personality and capacity, which merge both - the municipal law and international law. Similarly, the notion of corporate nationality in international investment law is also a construct of both the municipal law and international law principles. It is precisely evident when we analyze inherent liberty to define corporate nationality under the ICSID Convention and provisions of the BITs, which are mainly formed by reference to municipal law. Thus, corporate nationality in investment law can be assigned a separate category - labeled "transnational." Such "transnational" investors obtain the benefits of a particular regime, more flexible and practical than the one provided in municipal law[33]. Effectively, rules on the establishment of corporate nationality have become more flexible and practical.

Another critical point is that transnational law itself transcends or crosses borders but may not be formally enacted by states. Beyond formal law enacted by the states, there are a variety of more "informal" forms of legal activity, including "private" tribunals that administer private international commercial arbitration proceedings and hybrid arbitration bodies, such as the ICSID Centre, which decides upon disputes between private investors and states, and the thousands of informal "networks" that have developed among both inter-governmental and non-governmental (NGO) bodies[34].

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[32] In *CSOB v Slovakia*, the tribunal's jurisdiction was derived from a contract. The tribunal held nevertheless that: The question of whether the parties have effectively expressed their consent to ICSID jurisdiction is not to be answered by reference to national law. It is governed by international law as set out in Article 25(1) of the ICSID Convention. However, in *Zhinvali v Georgia*, a case where the instrument of consent was a municipal investment protection statute, the tribunal opined that: … if the national law of Georgia addresses this question of 'consent', which the Tribunal finds that it does, then the Tribunal must follow that national law guidance but always subject to ultimate governance by international law. See *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4; *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1.

[33] Mustill, Sir Michael John. *the new lex Mercatoria: the first twenty-five Years*. 1987 cited in Bishop, R. Doak, James Crawford, and William Michael Reisman. *Foreign investment disputes: cases, materials, and commentary*. Kluwer Law International, 2005.

[34] Menkel-Meadow, Carrie. "Why and How to Study Transnational Law." *UC Irvine L. Rev.* 1 (2011): 97.

In this context, the definition of transnational law suggested by Judge Philip Jessup is particularly relevant – "transnational law includes all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories"[35]. In his view, national and international law would be part of it insofar as they contain these effects. Therefore, it could address both public (state and governmental) and private (non-governmental, civil society) actors[36]. "Transnational law," in Jessup's definition, includes domestic law and the rules of conflicts or the private international law. It also includes rules of public international law: rules found in treaties and customary international law[37].

Thus, considering treaty law or the BITs and other international investment agreements, they are a law which regulates actions and events that transcend national frontiers. In the absence of an international institution with legislative functions on international investment law, bilateral and multilateral investment agreements are virtually the only way international investment rules can be generated to keep up with the variety and complexity of transnational investment activity. Therefore, the definition of transnational law would encompass international investment law.

Thus, it can be observed that transnational law is not a "formal law" in its general sense, as a law enacted by a state or formal governmental body. However, in this context, transnational law must be included in the study of legal phenomena, including lawmaking processes, rules and legal institutions, that affect or have the power to affect behaviors occurring beyond a single state border. Transnational law, when properly called law, is an extension of national sovereign jurisdictions, or the creation (through recognized mechanisms of international law) of law by international agencies or through international instruments ultimately validated by the express or tacit authority of sovereign states[38].

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[35] Jessup, Philip Caryl. *Transnational law*. Yale University Press, 1956; Jessup, Philip Caryl. *A modern law of nations: an introduction*. Archon Books, 1968.; Koh, Harold Hongju. "Why Transnational Law Matters." *Penn St. Int'l L. Rev.* 24 (2005): 745.

[36] Tietje, Christian, and Karsten Nowrot. "Laying conceptual ghosts of the past to rest: the rise of Philip C. Jessup's 'Transnational Law'in the regulatory governance of the international economic system." *Philip C. Jessup's Transnational Law revisited–on the occasion of the 50th anniversary of its publication. Institut für Wirtschaftsrecht, Halle/Saale* (2006): 17-43.

[37] Other writers treat transnational law as conceptually distinct from national and international law, because its primary sources and addressees are neither nation state agencies or international institutions founded on treaties or conventions, but are private (individual, corporate or collective) actors involved in transnational relations. See for example, Menkel-Meadow, Carrie. "Why and How to Study Transnational Law." *UC Irvine L. Rev.* 1 (2011): 97. Zumbansen, Peer C. "Transnational law." *CLPE Research Paper* 09 (2008).; Zumbansen, Peer. "Neither 'Public'nor 'Private','National'nor 'International': Transnational Corporate Governance from a Legal Pluralist Perspective."*Journal of law and Society* 38.1 (2011): 50-75.; Zumbansen, Peer. "Defining the Space of Transnational Law: Legal theory, global governance, and legal pluralism." *Transnat'l L. & Contemp. Probs.* 21 (2012): 305; Calliess, Gralf-Peter, and Peer Zumbansen. *Rough consensus and running code: a theory of transnational private law*. Bloomsbury Publishing, 2010.

[38] Cotterrell, Roger, What Is Transnational Law? (March 13, 2012). Law & Social Inquiry, Vol. 37, No. 2, 2012; Queen Mary School of Law Legal Studies Research Paper No. 103/2012. Available at SSRN: <http://ssrn.com/abstract=2021088>.

Whether or not transnational law is a product of legal realism will be the subject of discussion in Section II of this Chapter. However, in this part of the discussion, it is essential to observe that the idea of the emergence of modern principles on corporate nationality coincides with the emergence of the principles of transnational law. In this thesis, the latter proposition works for two arguments: 1) rules on corporate nationality in international investment law are a product of the realist thinking, and 2) rules on contemporary corporate nationality are influenced not by state actors but by private international instruments and non-state actors, which are a part of transnational law – as a law that regulates actions or events that transcend national frontiers.

This aspect provides grounds to argue that rules on corporate nationality in international investment law, although initially subject of solely municipal law, are a product of non-state actors acting in investor-state arbitrations, such actors being parties to investment agreements or BITs, arbitrators and disputing parties in investor-state arbitration.

Consistent with Judge Philip Jessup's definition of transnational law is the notion that transnational law enables us to navigate among different systems of law to regulate actions or events that transcend national frontiers. Thus, in essence, transnational law enables practicality that is created by artificiality. Artificiality is a characteristic of both the notion of a multi-national corporation and corporate nationality. The latter is an important aspect which will be considered next.

1.2. Multinational corporations as artificial beings

In 1800, there were 310 for-profit corporations chartered by the states in the US. By 1819, there were 2,000. In that year, Chief Justice John Marshall declared that "A corporation is an artificial being … the mere creature of law, it possesses only those properties which the charter of its creation confers upon it…"[39].

While discussing the legal fiction of multinational corporations, and effectively, the legal fiction of corporate nationality, it must be first observed that the ICJ in *Barcelona Traction* discussed the effectiveness of the legal entity. It was declared that diplomatic protection rested on fiction and that corporate entity was itself in some respects a legal fiction. Nevertheless, when that fiction no longer corresponded to any reality whatsoever, when the legal entity no longer had any effectiveness, when it was "practically defunct", one had to

[39] *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819), was a landmark decision from the United States Supreme Court which dealt with the application of the Contract Clause of the United States Constitution, to private corporations. The case arose when the president of Dartmouth College was deposed by its trustees, leading to the New Hampshire legislature attempting to force the college to become a public institution, and thereby, place the ability to appoint trustees in the hands of the governor of New Hampshire. The Supreme Court upheld the sanctity of the original charter of the college, which pre-dated the creation of the State. The decision settled the nature of public versus private charters and resulted in the rise of the American business corporation and the American free enterprise system.

abandon fiction and revert to reality. The question was whether the corporation was, or was not, still in a position to act in pursuit of its rights and to defend its interests[40].

As will be observed, the idea of abandoning the fiction and reverting to reality also works for the contemporary corporate nationality in international investment law. For example, it could be rightly argued that in most of the cases discussed in this thesis, corporate nationality is often a fiction regulated by formal rules of BITs.

In some cases, which will be discussed in more detail, e.g., *Loewen v. United States of America*[41] or *Phoenix Action v. the Czech Republic*[42], the tribunal had decided to abandon fiction and revert to reality – to pierce the corporate veil, or to look further down the corporate chain. In others, the tribunals decided to stick to the fiction, e.g., *Tokios Tokelés v. Ukraine*[43], *Yukos v. Russia*[44] , or *Mobil v Venezuela*[45].

It must be noted, however, that before the evolution of the multi-nationality of corporations, a corporation was defined as a government-defined legal structure for doing business, i.e., mostly by municipal law. Thus, a corporation was created and defined by state legislatures to advance what the state deemed to be in the public interest[46]. Corporations as entities were government policy tools since only the government made incorporation possible. Unlike other associations or ways of doing business, a corporation could not exist by private arrangement. The latter worked for claims in diplomatic protection, whereas, as Brownlie put it, under the principle of diplomatic protection "the subject-matter of the claim is the individual and his property: the claim is that of the state" and Muchlinski affirmed – "this may be regarded as a legal fiction, given that the primary right giving rise to the claim is a right of the individual protected by international law."[47]

However, this is not so true in the context of transnational law when discussing multinational corporations investing abroad. A modern corporation's attributes include limited liability,

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[40] Yearbook of the International Law Commission 2003, United Nations Publications, 2010-02-01, p. 58.
[41] "Such a naked entity as Nafcanco, even with its catchy name, cannot qualify as a continuing national for the purposes of this proceeding." *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, 26 Jun 2003 Award, Para 237.
[42] *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5.
[43] *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18.
[44] *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 227.
[45] *Venezuela Holdings, B.V., et al v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27.
[46] *Panevezys-Saldutiskis Railway*, 1939 P.C.I.J. (ser. A/B) No. 76, at 16-18 (1939). As Brierly observes: There is a certain artificiality in this way of looking at the question. No doubt a state has in general an interest in seeking that its nationals are fairly treated in a foreign country, but it is an exaggeration to say that whenever a national is injured in a foreign state, his state as a whole is necessarily injured too. In practice, as we shall see, the theory is not consistently adhered to; for instance, the logic of the theory would require that damages should be measured by reference to the injury suffered by the state, which is obviously not the same as that suffered by the individual, but in fact the law allows them to be assessed on the loss to the individual, as though it were the injury to him which was the cause of action."
[47] Muchlinski, Multinational Enterprises and the Law (1995). See also - Access of Private Parties to International Dispute Settlement: A Comparative Analysis. Roberto Bruno. The Jean Monnet Center for International and Regional Economic Law & Justice, 16 May 1997, at: <http://jeanmonnetprogram.org/archive/papers/97/97-13.html >.

perpetual life (which was not formerly the case) and legal identification as a unitary actor (only for simplicity and efficiency in making and enforcing contracts), suing and being sued, and so on.

Similar observations can be made about corporate nationality in international investment law. Here corporate nationality also serves the purpose of simplicity and efficiency in making a foreign investment, enforcing contracts and suing the host-state. As will be observed, the purposes of corporate nationality, were at times, even controversial. For example, the *Pheonix action* tribunal stated:

> "International investors can of course structure upstream their investments, which meet the requirement of participating in the economy of the host State, in a manner that best fits their need for international protection, in choosing freely the vehicle through which they perform their investment. The decision in Tokios Tokelés v. Ukraine[48] comforts this analysis, as it precisely refused to disqualify the alleged investment because it did not find an abuse of procedure. The case involved a claim against Ukraine by a Lithuanian company owned by Ukrainian nationals and the issue was to determine whether such company could be considered as a foreign investor. In their decision, the two arbitrators forming the majority recognized that "none of the Claimant's conduct with respect to its status as an entity of Lithuania constitutes an abuse of legal personality … The Claimant manifestly did not create Tokios Tokelés for the purpose of gaining access to ICSID arbitration under the BIT against Ukraine, as the enterprise was founded six years before the BIT … entered into force. Indeed, there is no evidence in the record that the Claimant used its formal legal nationality for any improper purpose."[49]

Or, as it was indicated by the *Tidewater Inc v Venezuela* tribunal:

> "it is a perfectly legitimate goal, and no abuse of an investment protection treaty regime, for an investor to seek to protect itself from the general risk of future disputes with a host state in this way

[48] *Tokios Tokelés v. Ukraine,* ICSID Case No. ARB/02/18, Decision on Jurisdiction, April 29, 2004, para 56.
[49] *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, 15 Apr 2009, Award, Para 94; *Aguas del Tunari v Bolivia*: Although acknowledging that the corporate form could be abused, the majority found that this was not the case because (i) the entity was not simply a corporate shell set up to obtain jurisdiction; (ii) the joint venture was structured so that neither party had exclusive control; (iii) the entity had a portfolio of 8 contracts and real operations; and (iv) the restructuring was planned and executed before the events giving rise to the dispute. See also Topcan, Utku. "Abuse of the Right to Access ICSID Arbitration." *ICSID Review*29.3 (2014): 627-647; Kahale, George. "The new Dutch sandwich: The issue of treaty abuse." (2011); Kreindler, Richard. "Are Tribunals Setting New Limits on Access to International Jurisdiction?" *ICSID Review* 25.1 (2010): 37-43.

> [incorporation]. But the same is not the case in relation to preexisting disputes between the specific investor and the state."[50]

It can be observed that investor-state tribunals do accept the fact that the corporate nationality of multinational investors may be used legitimately for the purpose of protecting their investments. Such protection often includes having an entitlement to a claim against the host-state by way of corporate vehicle.

Another distinguishing feature of multinational investors, in the context of transnational law, is that the corporate nationality of multinational corporations frequently fluctuates and involves various different nationalities. For example, the group theory treated corporations in terms familiar to partnership law, because the corporate members had freely decided to come together to enter into an agreement. However, there were fundamental conceptual problems in attempting to adjust the partnership model to corporations. While the composition of a true partnership tends to remain stable, modern and multinational corporations have no such rigidity and memberships of different nationalities may fluctuate regularly[51]. Furthermore, unlike a partnership, where members are individually and severally responsible for the debts of the company, a corporation brings limited liability to its members. Also, in a partnership, members share in decision making. However, with the growth of large corporations and with the advent of stock exchanges for trading shares, shareholders have become mere investors and decision making has shifted to an elite corps of officers and directors[52].

The question is whether a claim may be presented on behalf of one partner (or participant in a joint venture) of qualifying nationality, in respect of an injury suffered as a result of the infringement of the rights of the partnership or joint venture, in circumstances where neither the partnership, the joint venture, or the other partners enjoy qualifying nationality. As will be assessed in the following Chapters, the protection of partnerships is an area of great uncertainty. One view from the sphere of diplomatic protection was that since a partnership is not a legal person distinct from the actual partners, protection can extend only to individual interests in partnerships and not to the partnership itself. Consequently, from this perspective, a state may present a claim on behalf of a partnership if all the partners have the nationality of the claimant state. If they do not, the claim must be limited to protecting individual partners with the nationality of the claimant state, to the extent of their interest in the partnership.

These issues have a significant impact on corporate nationality in international investment law. Very often, modern multinational corporations cannot be defined as being of a particular

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[50] *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, 8 Feb 2013, Decision on Jurisdiction, para 184.

[51] Schane, Sanford. *Language and the Law: With a Foreword by Roger W. Shuy*. Bloomsbury Publishing, 2006, p. 59.

[52] Ibid., see also Berle, Adolf Augustus, and Gardiner Gardiner Coit Means. *The modern corporation and private property*. Transaction publishers, 1991.; Aglietta, Michel. "Shareholder value and corporate governance: some tricky questions." *Economy and Society* 29.1 (2000): 146-159.

nationality since their corporate members – companies, subsidiaries, affiliates, shareholders and managers are often of different nationalities. They all have limited liability and minimal power of control, which directly contradicts the requirements of Article 25 of the ICSID Convention. Moreover, multinational corporations exist independently of its members. A corporation's members could have their own property and incur their own debts. The liabilities of the members are not coextensive with those of the corporation. Finally, as a legal entity, a corporation has the power to delegate responsibilities to its agents - the officers and directors.

As observed by the US Supreme Court: "[A corporate] name, indeed, cannot be an alien or a citizen; but the persons whom it represents may be the one or the other; and the controversy is, in fact and in law, between those persons suing in their corporate character **...** and the individual against whom the suit may be instituted".[53]

Moreover, modern multinational corporations may have their principal assets located in numerous countries. Their geographic source of earnings may also be anywhere in the world, in hundreds of locations, and their operational facilities may be also be located in different corners of the globe. Therefore, a multinational corporation's national identity could not be determined by reference to structural, organizational and operational features (such as the nature and geographic location of its principal assets, the geographic source of its earnings and its relationships with third-party contractors), or its organizational structure. These aspects no longer reflect the true national identity of a multinational organization. Even more so, these characteristics no longer define a transnational corporation and its nationality.

1.3. Transnational corporations

As argued above, a transnational corporation is, in many respects, borderless, rather than being based in its country of origin. It is a transnational entity - "adrift and mobile, ready to settle anywhere and exploit any state including its own, as long as the affiliation serves its own interest."[54]

Such a corporation draws its executives from countries all over the world, and this transnational class of executives who come from all corners of the world, who routinely cross borders and traverse the globe, who interact daily with co-workers from around the world, who may retain less and less allegiance to their countries and cultures or origins, and who inhabit the most multicultural and cosmopolitan cities in the world – exemplify the kind of international citizen who drives the transnational corporation. This transnational world retains elements of both a borderless singularity and a multiplicity of locations (each

[53] *Bank of the United States v. Deveaux*, 5 Cranch 61 1809, 9 *Deveaux*, 9 U.S. (5 Cranch) at 88. Id. at 86.
[54] Robertson, Roland. *Globalization: The nation-state and international relations*. Vol. 2. Taylor & Francis, 2003, p. 376.

corporation is embedded in various ways in hundreds of localities, forming a truly global network)[55].

Therefore, a transnational corporation has several distinct characteristics: “it sells its products in each of the main markets of the world and derives a substantial amount or even a majority of its revenues from activities outside of its home-country market. Many of its assets are located in foreign markets. It owns or controls foreign affiliates in each major economy. The transnational corporation has a nationally diversified workforce at every level, including management. Its managers typically rotate through different foreign postings. They are often strongly identified with the interests and culture of the companies they run, rather than with those of the various countries in which they reside or of which they are citizens. The activities of the various units of a transnational corporation are coordinated under a unified, global corporate strategy. There is no presumption in favor of the parent company's home market in its decisions regarding the location of particular operations. Instead, these decisions are based on the relative merits of potential sites. It sources its inputs of manpower, capital, raw materials, and intermediate products from wherever it is best to do so. In some cases, it replicates the full value-added chain in more than one national or regional market, so that it can continue to operate even if it ceases operations in the home market”[56].

Historically, the company that was most frequently held up as an example of the modern global corporation was Asea Brown Boveri (ABB). “Formed by the 1988 merger of the century-old Swedish engineering company, ASEA, and its Swiss competitor, Brown Boveri, ABB had operations throughout Europe, including Eastern Europe and in Asia. For example, a survey of "stateless" corporations, which listed ABB as a Swedish company, indicated that 85% of its sales were made outside Sweden and 50% of its shares were held outside of that country. ABB had 18,000 employees, working in 40 different countries. The company's official language was English, although only one-third of its employees spoke it as their native tongue. The company was run by a coordinating executive committee with members from eight countries and a cadre of 500 global managers who shifted through a series of different foreign assignments. The headquarters of the merged company was located in Zurich. At the same time, the headquarters’ staff of 171 people from 19 different countries was deliberately kept small to avoid the impression that ABB was a Swiss company”[57].

Therefore, when considering corporate nationality, it can be argued that the characteristics or the classical tests to establish corporate nationality, which were formed in the 20th century no

[55] Pearson, Nels, and Marc Singer, eds. *Detective fiction in a postcolonial and transnational world*. Ashgate Publishing, Ltd., 2009, p. 53; See also - Dicken, Peter. "Places and flows: situating international investment." *The Oxford handbook of economic geography* (2000): 275-291.; Flint, Colin, and Peter J. Taylor. *Political geography: world-economy, nation-state, and locality*. Pearson Education, 2007.

[56] See Barnet, Richard J., and John Cavanagh. *Global dreams: Imperial corporations and the new world order*. Simon and Schuster, 1995.; Sklair, Leslie. *Transnational practices and the analysis of the global system*. University of Oxford. Transnational Communities Programme, 1998.

[57] See also Powell, Walter W. "The capitalist firm in the 21st century: emerging patterns." *The 21st Century Firm: Changing Economic Organization in International Perspective* (2001).

longer correspond to the realities of a transnational corporation. This issue will be addressed further in the following section.

1.4. Do classic corporate nationality tests work for transnational corporations?

It is clear that first, the nationality of a corporate entity was, and still is, considered to be the place where it is incorporated or where it holds its principal offices or assets. The other related determination comes from the nationality of the directors or managers of the legal entity. The central idea of this test is called the "brain theory" of the corporate entity, i.e., the determination as to whose brain is, in fact working behind, or upon, the corporation. The third test is to look at the "locus" of the activity or activities of the legal entity. This is called the "locus theory." Based on the latter, 20th century corporate jurisprudence considered the following factors while determining the nationality of a corporation:

i. The state, place, island, non-state territory of incorporation. However, it was observed in the preceding sections that the test of incorporation no longer works to establish the corporate nationality of a multinational investor.

In this context, it may be noted that the deficiency of the incorporation test had already been observed at the beginning of the 19th century. For example, at the outbreak of World War I, the United States and the other Allied nations became concerned about threats to their security posed by firms with German ties operating within their borders. They responded by enacting laws prohibiting commercial transactions with "enemy alien" corporations and authorizing the seizure of their assets (so-called "trading with the enemy" statutes). The place of incorporation test was of little use in implementing these laws because the concept of corporate nationality was being used, in essence, to determine the character of an enterprise. That is, whether it was friendly or hostile. Recognizing that these qualities could be attributed only to natural persons, jurists devised a rule in which the enemy status of a corporation would be determined by reference to the character of the natural persons holding power to control the corporation's affairs. Using this approach, corporations that were owned or "controlled" by enemies (nationals, or residents of hostile countries, or persons otherwise subject to enemy control) were classified as "enemies" regardless of their place of incorporation. Thus, for the purpose of enforcing laws prohibiting transactions with the enemy, a company incorporated and headquartered in France, but whose shareholders and directors were predominantly German, generally, would be treated as a German company. Although under the pre-war rules, it would have been considered a French company[58].

[58] Lourie, Samuel Anatole. "Enemy" under the Trading with the Enemy Act and Some Problems of International Law." *Michigan Law Review* (1943): 383-408; Borchard, Edwin. "Treatment of Enemy Property." *Geo. LJ* 34 (1945): 389.; See also Caccamo, Emma. *Foreignness at Home: Enemy Alien Control during World War II*. Diss. Wesleyan University, 2013.

Incorporation criteria have lost much of its practical significance in modern commerce, as well. In the past, most corporate operations and decision-making functions were highly localized, due mainly to transportation and communications difficulties and corporate law requirements (such as prohibitions on non-citizen directors and requirements that shareholder and director meetings be held in the state of incorporation). The place of incorporation was indicative of a real and meaningful connection between the corporation and the authorizing state. Today, the fact that a corporation is organized under the laws of a particular jurisdiction does not indicate that the jurisdiction is the center of the corporation's economic activities or that the corporation is singularly or significantly identified with it.

ii. Nationality of shareholders. Most formulations of the control test focus on shareholders and, to a lesser extent, on officers, directors, and managers, as the persons most able to influence the corporation's affairs. However, as was argued above, the internationalization of a corporation's management undermines the assumption that persons in control of the corporation are likely to be motivated by personal citizenship ties when acting in their capacity as corporate decision-makers. As noted earlier, decision making in modern-day corporations with worldwide operations is increasingly vested in an international cadre of managers whose national identities may be diluted by the distinct culture of the firms they labor.

However, most formulations of the control test focus on shareholders as the ultimate source of control. It was established that identifying the nationality of individual shareholders is no easy task. The law generally does not require corporations to keep records indicating the nationality of their shareholders, and few corporations maintain such lists. In some cases, it may be impossible to determine the nominal identity of shareholders, let alone their nationality. The growing number of corporations that are involved in extensive networks of interrelated companies and whose shares are traded daily among stockholders around the globe, or are held by institutional investors, can make it difficult to pinpoint the identity of individual shareholders. Even if one can discern the identity and nationality of the company's shareholders, the complex voting structures and procedures of some foreign-based corporations can make it difficult to determine how much influence any particular shareholder or group of shareholders actually have over the conduct of corporate affairs.

Statutory formulations of the control test do not consider the nationality of corporate officers, directors and managers as frequently as that of shareholders. In large, publicly held enterprises, however, shareholders are a diverse and geographically dispersed group and may have little practical control. In this context, it is often argued that the will of management rather than that of the shareholders tends to govern the conduct of the corporation's affairs.

iii. Nationality of the management. The nationality of management may, also, not represent the corporate nationality of a multinational investor. The management-based approach is challenging to apply, mainly because of the difficulty of identifying the controlling management group. As a matter of corporate law, directors and principal officers have

ultimate authority over operational decisions (in other words, financial decisions as to significant acquisitions of competitors, expansion of the internal plant, dividend and reinvestment policy, labor matters, overall legal and financial organization). However, in reality, the heads of the corporation's various functional departments and lesser officials often have a significant influence on these matters. Indeed, no corporation can function efficiently unless these individuals have a certain degree of independent decision-making authority. However, notwithstanding the latter, these factors are of no help to determine corporate nationality, either.

The "real" persons controlling the business of the corporation line of argument was also dismissed by the recent *Yukos v Russia* tribunal:

> "Professor Crawford observes that the ECT requires only that the "investor" be organized under the laws of a Contracting State. Companies incorporated in Contracting Parties are embraced by the definition, regardless of the nationality of shareholders, the origin of investment capital or nationality of the directors or management. In several cases where companies have been registered in tax shelters, arbitral tribunals made no further enquiry to uncover their "real" nationality or found it unnecessary to go beyond the terms of the treaty definition of "investor."[59]

iv. Nationality of the overall investment/money. Money may be invested in, for example, oil refineries of the Kingdom of Saudi Arabia through companies incorporated in the Bahamas or the Isle of Man. However, as will be analyzed in more detail, tribunals do not really consider the origins of funds when establishing the corporate nationality of the investor and the investment.

It may be noted that creditors, for example, are rarely included in traditional formulations of the control test, even though they may be in a position to divest the shareholders of their standard legal control, replace management, and impose stipulations as to how the enterprise shall be run. For example, this would be the case for a company headquartered and incorporated in the United States, owned and managed entirely by U.S. nationals, that had formed a strategic partnership with a foreign-based firm that owns technology critical to the former's continued profitability. Such technological dependence gives a foreign-based corporation considerable power to influence the "American" company's affairs. In this example, a nationality test that focused exclusively on share ownership and management authority would conclude that the corporation was more closely identified with the United States than was, in fact, the case.

Indeed, the history of the development of the rules for determining corporate nationality suggests that early jurists recognized the problem of establishing corporate nationality.

[59] *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 227, 30 Nov 2009, Interim Award on Jurisdiction and Admissibility, para 222.

However, as it will be observed, the nationality of transnational corporations in international investment law becomes even more challenging to ascertain.

1.5. Transnational corporations and internationalization of foreign investment disputes

Another issue which must be discussed in this context is how international investment law was influenced by the emergence of multinational corporations, which, as was observed above, no longer fits within the classical legal entity norms, and, in particular, the rules on corporate nationality.

"As capital moves beyond the domestic sphere, so too does the regulatory relationship between investors and the state. As foreign ownership expanded and fragmented, so too did the risk that the exercise of public authority by the state would trigger an international claim. The practice of treaty-shopping, in particular, meant that investment treaties might protect more than actual flows of capital between the state parties, since actual flows did not necessarily correspond to legal arrangements for the ownership of assets. Rather, investment arbitration emerged as a broad-ranging adjudicative regime for the control of states and the protection of investors in general. An investor now can easily become foreign by establishing a holding company, or by a paper transfer of assets among entities within its corporate structure, without any commitment of new capital to the host economy"[60].

The above quote rightly highlights that the corporate structuring and transnationality of corporations investing abroad has "transnationalised" the relationship between investors and host-states, including investor-state disputes. The latter can be evidenced by the examples of transnationalisation of the early investor-state disputes. For example, following the revocation by Libya of several concessions granted to foreign oil companies, in the case of *Texaco Overseas Petroleum Co. v. Libyan Arab Republic, the* arbitrator held that "international law", rather than the general principles of law, was the governing law and that Libyan law would apply only to the extent that it would conform with international law. According to the arbitrator, additional evidence of the "internationalization" of the agreement was to be found in the arbitration machinery provided by the parties[61].

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[60] Van Harten, Gus, and Martin Loughlin. "Investment treaty arbitration as a species of global administrative law." *European Journal of International Law*17.1 (2006): 121-150. See also Burke-White, William W., and Andreas Von Staden. "Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations."*Yale Journal of International Law* 35 (2010): 283; Van Harten, Gus. "The Public—Private Distinction in the International Arbitration of Individual Claims against the State." *International and Comparative Law Quarterly* 56.02 (2007): 371-393.

[61] *Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic*, YCA 1979, at 177 et seq. (also published in: ILM, 1978, at 1 et seq.; Int'l L. Rep. 1979, at 389 et seq.; Clunet 1977, at 350 et seq.). See also Delaume, Georges R. "State Contracts and Transnational Arbitration." *American Journal of International Law* (1981): 784-819; Paulsson, Jan. "Arbitration unbound: award detached from the law of its country of origin." *International and Comparative Law Quarterly* 30.02 (1981): 358-387; Wildhaber, Luzius. "Asser Institute Lectures on International Law: Some Aspects of the Transnational Corporation in International Law." *Netherlands International Law Review* 27.01 (1980): 79-88.

Similarly, the agreement under which the dispute arose in the *Sapphire International*[62] case contained both a reference to cases of force majeure "if recognized as such by principles of international law" and a choice of governing law that read as follows:

> "In view of the diverse nationalities of the parties to this Agreement, it shall be governed by and interpreted and applied in accordance with principles of law common to Iran and the several nations in which the other parties to this Agreement are incorporated, and in the absence of such common principles, then by and in accordance with principles of law recognized by civilized nations in general, including such of those principles as may have been applied by international tribunals."[63]

The latter is a perfect example of how the claim of the investor may be "transnationalised". Similarly, if the agreement under which the dispute arises is transnational, then the jurisdictional rules of said agreement may also become transnational. For example, when considering the investment agreement of the parties, the *Tidewater Inc v Venezuela*[64] tribunal noted that it did not consider that national law must be disregarded entirely, but considered that logic implied that an act, which is both rooted in the national legal order and extends its effects in the international legal order, had to be interpreted by reference to both legal orders. Thus, according to this tribunal, "an ICSID tribunal determining its jurisdiction is not required to interpret the instrument of consent according to primarily to national law, but rather has to take into account the principles of international law."[65] Since the instrument of consent, i.e., private investment agreement or a BIT would usually include rules on the establishment of corporate nationality, the same rationale may also work on the result of transnationalisation of corporate nationality rules.

Another relevant example is the *Algiers Accords*, under which the United States agreed to terminate all legal proceedings in its courts involving claims of U.S. individuals and businesses against Iran and its State enterprises and to resolve such claims by international arbitration[66]. The parties, therefore, intended that claims previously filed before U.S. courts should be "transnationalised", i.e., transferred to another international forum, namely, an international arbitral tribunal established for this purpose. Consequently, the claims filed before this tribunal might be regarded as essentially the same as those previously before the U.S. courts. In other words, they were private law claims for the infringement of the private law rights of U.S. nationals and corporations. The tribunal was, therefore, seized of the

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[62] *Sapphire International Petroleums Ltd. v. National Iranian Oil Co*., 35 I.L.R. 136 (1967); 13 Int'l & Comp. LQ 1011 (1964).
[63] Ibid. See also Delaume, Georges R. "Sovereign immunity and transnational arbitration."*Arbitration International* 3.1 (1987): 28-45.
[64] *Tidewater Inc v Venezuela*, ICSID Case No ARB/10/5 Decision on Jurisdiction.
[65] Ibid.
[66] *Algiers Accords*, January 19, 1981, Declaration of the Government of the democratic and popular Republic of Algeria.

jurisdiction in disputes, which were private law disputes transferred to a transnational arbitral tribunal[67]. In another example, in *Oil Field of Texas, Inc. v. Iran*[68], the tribunal considered whether the National Iranian Oil Company was responsible to the claimant regarding the activities of the Oil Service Company of Iran. The tribunal answered the question in the affirmative and considered that public international law governed the issue of succession and not private law.

Another critical factor is that the scheme adopted by the parties to the *Algiers Accords* adhered to the nationality of claims rule – a rule of public international law applicable in cases of diplomatic protection. While it was arguable that the purpose of these provisions was merely to restrict qualifying claims and that the restrictions on qualification only resembled the nationality of claims rule, the tribunal's decisions suggest otherwise. In *Flexi-Van Leasing Co. v. Iran*[69], Chamber One made extensive reference to the nationality of claims issue in customary international law, State practice and international arbitral awards in laying down the principles to be applied in determining whether a claim on behalf of a U.S. company qualified for adjudication by the tribunal. In *Esphahanian v. Bank Tejarat*[70], a case where the claimant possessed the nationality of both Iran and the United States, Chamber Two applied the concept of dominant and effective nationality, which has developed in relation to the nationality of claims in public international law. Here, again, the Chamber relied heavily on decisions of international tribunals on questions of public international law and not the practice of any municipal law[71]. These examples fit perfectly to the notion of transnational law suggested by Judge Jessup, as provided above.

Is it also noted that Article VII of the *Algiers Accords* included the requirement of continuity of nationality – a requirement frequently encountered in instruments conferring jurisdiction on international tribunals, such as claims commissions. The close affinity of these procedural rules to those applicable in international arbitrations under public international law suggests that the US-Iran claims tribunal was also concerned with an exercise in diplomatic protection. Moreover, Article V of the *Algiers Accords*, which refers not only to international law but also to the choice of law rules and principles of commercial law, is, at first sight, difficult to reconcile with the notion of a tribunal charged to rule solely on questions of state responsibility.

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[67] See also Crook, John R. "Applicable Law in International Arbitration: The Iran-US Claims Tribunal Experience." *American Journal of International Law* (1989): 278-311; Jones, David Lloyd. "Iran-United States Claims Tribunal: Private Rights and State Responsibility, The." *Va. J. Int'l L.* 24 (1983): 259.

[68] *Oil Field of Texas, Inc. v. Government of Islamic Republic of Iran*, Award No. 258-43-1 [12 IRAN-U.S. C.T.R. 308] (8 Oct. 1986).

[69] *Flexi-Van Leasing, Inc. v. Iran*, 12 Iran-U.S. Cl. Trib. Rep. 335, 352-56 (1986).

[70] *Esphahanian v. Bank Tejarat*, Award No. 522-828-1, 21 October 1991, 27 Iran-US Claims Tribunal Reports 196.

[71] See also Mahoney, Peter E. "Standing of Dual Nationals before the Iran-United States Claims Tribunal, The." Va. J. Int'l L. 24 (1983): 695; Bederman, David J. "Nationality of individual claimants before the Iran-United states claims Tribunal." International and Comparative Law Quarterly 42.01 (1993): 119-136; Combs, Nancy Amoury. "Toward a New Understanding of Abuse of Nationality in Claims Before the Iran-United States Claims Tribunal." *Am. Rev. Int'l Arb.* 10 (1999): 27-559.

Thus, when analyzing the notion of corporate nationality in contemporary international investment law, the effect of internationalization of private law disputes is of utmost importance. In such a case, a private company comes within the area of transnational law where the municipal law does not necessarily play an important part or any part thereof. Similarly, when the relationship between a multinational investor and a host-state is transnationalised, as is the case in investor-state disputes, the municipal law, and rules on the establishment of corporate nationality may no longer govern this question. Instead, the rules of BITs and transnational law principles take over, further emphasized by the international tribunal jurisprudence.

Another critical issue when considering transnationalisation of investor-state disputes is the effect on minority shareholder claims. When one looks at the practice of the minority shareholders and indirect claims disputes in investor-state arbitration, one can observe that tribunals do find a way to establish the nationality link between the investor and the investment. However, this would not be possible if one were to consider corporate nationality in similar circumstances under municipal law[72].

For example, in *LANCO v. Argentina*[73] the tribunal's jurisdiction was based on the BIT between Argentina and the US. LANCO's claim was based on a minority participation in a consortium that had been granted a concession under a Concession Agreement to operate port facilities. The investor claimed that Argentina had damaged its investment by giving more favorable treatment to a competitor. Argentina argued that LANCO did not have an investment protected by the BIT, since it owned only about 18% of the capital stock of the local consortium. The Tribunal rejected this jurisdictional objection. It held that an investor was not required to have control over the company or have a majority share for its investment to be protected by the BIT. After quoting the definition of "investment" from the Argentina-US BIT, the Tribunal established that:

> "as regards shareholder equity, the ARGENTINA-U.S. Treaty says nothing indicating that the investor in the capital stock has to have control over the administration of the company, or a majority share; thus the fact that LANCO holds an equity share of 18.3% in the capital stock of the

[72] See also Sacerdoti, Giorgio. "The proliferation of BITs: conflicts of treaties, proceedings and awards." Proceedings and Awards (March 2007). Bocconi Legal Studies Research Paper 07-02 (2007); Wu, Elizabeth. "Addressing Multiplicity of Shareholder Claims in ICSID Arbitrations under Bilateral Investment Treaties: A 'Tiered Approach'to Prioritising Claims?." *Asian International Arbitration Journal* 6.2 (2010): 134-163. Gaukrodger, David. "Investment treaties as corporate law: Shareholder claims and issues of consistency." *David Gaukrodger (2013). "Investment treaties as corporate law: Shareholder claims and issues of consistency. A preliminary framework for policy analysis", OECD Working Papers on International Investment* 2013/3 (2013).

[73] *LANCO v. Argentina*, Decision on Jurisdiction, 8 December 1998, 5 ICSID Reports 367.

> Grantee allows one to conclude that it is an investor in the meaning of Article I of the ARGENTINA-U.S. Treaty."[74]

In another case of *CMS v. Argentina*[75], Argentina argued that CMS, as a minority shareholder in TGN, could not claim any indirect damage resulting from its participation in the Argentinean company. The Tribunal rejected this argument:

> "The Tribunal therefore finds no bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned, not even if those shareholders are minority or non-controlling shareholders. ... There is indeed no requirement that an investment, in order to qualify, must necessarily be made by shareholders controlling a company or owning the majority of its shares."[76]

On the other hand, in *Siemens v. Argentina*[77] Argentina objected to the Tribunal's jurisdiction on the ground that the shares in SITS, the company incorporated in Argentina to carry out the investment, were not held by Siemens, but by SNI (Siemens Nixdorf Informationssysteme AG) - another German company. This, in Argentina's view, meant that there was no direct relationship between Siemens and the investment. Siemens pointed out that it not only wholly-owned SNI, but that the latter was entirely integrated into Siemens. The Tribunal rejected Argentina's argument. It found that the Argentina-Germany BIT contained no explicit reference to direct or indirect investment. It noted that the BIT's definition of investment included "shares, rights of participation in companies and other types of participation in companies", and concluded:

> "The plain meaning of this provision is that shares held by a German shareholder are protected under the Treaty. The Treaty does not require that there be no interposed companies between the investment and the ultimate owner of the company. Therefore, a literal reading of the Treaty does not support the allegation that the definition of investment excludes indirect investments."[78]

The above practice examples indicate that minority shareholding or indirect shareholding, by way of an intermediate company, does not deprive the beneficial owner of its right to pursue claims for damage done to the company by the host State. In this context, it matters little whether the intermediate owner of the affected company's shares is incorporated in the claimant's home State, the host State, or in a third State.

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[74] *LANCO v. Argentina*, Decision on Jurisdiction, 8 December 1998, 5 ICSID Reports 367.
[75] *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8.
[76] Ibid, 17 JUL 2003, Decision of the Tribunal on Objections to Jurisdiction, para 48.
[77] *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8.
[78] Ibid, 3 AUG 2004 Decision on Jurisdiction, para 137.

However, and more importantly, the essential factor is that it would be difficult to find any municipal law rule or regulation, which would allow to effectively establish particular corporate nationality of a foreign investor by reference to its minority or indirect shareholding[79]. While such a result could not be possible to achieve by reference to municipal rules on corporate nationality, it becomes possible in transnational disputes regulated by transnational law and its principles.

Therefore, this is yet another example of transnational law being able to influence and form rules on corporate nationality, which, in turn, enable transnationalisation of corporate nationality rules in contemporary international investment law. These rules, as was observed, no longer correspond or adhere to the classical rules on the establishment of corporate nationality formed in the 20th century.

1.6. Implications of the rise of transnational law to corporate nationality

It was established in this Section that contemporary international investment law brought newly formed rules and principles on international personality and capacity, which often merge both municipal law and international law. The latter was reflected mainly in the investor-state arbitration. Rules on corporate nationality in transnational law were influenced and in some cases created not by the state actors but by private and public international law instruments, which are a part of transnational law.

It was also observed that corporate nationality in international investment serves a purpose of practicality and efficiency in making a foreign investment, enforcing contracts and suing the host-state. Multinational corporations' national identity could no longer be determined by reference to structural, organizational and operational features or by its organizational structure. These aspects may no longer reflect the national identity of a multinational organization. The characteristics or the classical tests establishing corporate nationality, which formed in the 20th century, no longer correspond to the realities of modern transnational corporations.

Corporate structuring and transnationality of corporations investing abroad have "transnationalised" the relationship between investors and host-states, including investor-state disputes. Thus, while taking into account that the authority of the international tribunal is derived from the arbitration agreement of the parties involved, transnational law and its implications thereof discussed in this Section may be equated to *lex mercatoria,* which offers many practical advantages. It applies uniformly and is independent of the peculiarities of each national law. It considers the needs of international relations and allows for a fruitful exchange between different legal systems. Thus, the principles that evolved in transnational

[79] See also Vanhonnaeker, Lukas. *Shareholders' Claims for Reflective Loss in International Investment Law*. Cambridge University Press, 2020.

law on corporate nationality are particularly useful in the context of multinational corporations and their international investments.

These aspects allow concluding that the rules on corporate nationality, although initially subject only to municipal law, have become a product of instruments and actors acting in transnational forums, such as investor-state arbitrations. These actors are usually the parties to investment agreements or BITs, arbitrators, and parties in investor-state arbitration. This issue will be addressed in more detail next.

SECTION II – CORPORATE NATIONALITY AND LEGAL REALISM

Introduction

It was observed in the previous Section that the principles of transnational law are particularly useful in the context of multinational corporations and corporate nationality thereof, which no longer corresponds to the classical municipal law characteristics. The legal fiction of multinational corporations and the legal fiction of corporate nationality coincide in the context of the development of transnational law.

It was observed that contemporary international investment law had brought newly formed rules on international personality and capacity, which merge both municipal law and international law concepts. The latter was reflected mainly in investor-state arbitration, i.e., rules on corporate nationality in transnational law were influenced and in some case created by non-state actors and instruments which are a part of transnational law. The latter also allowed to conclude that rules on corporate nationality were influenced by actors acting in investor-state arbitrations, such actors being parties to investment agreements or BITs, arbitrators, and parties in investor-state arbitrations.

In this Section, it will be argued that corporate structuring and the related jurisprudence of the investor-state arbitration tribunals have accepted the principles of legal realism. Legal realism operates on the premise that "the law", whatever that may be, is concerned with and is intrinsically tied to the real-world outcomes of particular cases. Accepting this premise moves jurisprudence or the study of law in the abstract, away from hypothetical predictions and closer to empirical reflections of fact. As proponents of legal realism say – realists are not concerned with what the law should or "ought to" be, but legal realism simply seeks to describe what the law is[80]. As will be observed in this Section, similar can be said about the notion of corporate nationality in contemporary international investment law. There were always relatively simple and clear rules on corporate nationality in international investment

[80] Pound, Roscoe. "The call for a realist jurisprudence." *Harvard Law Review* 44.5 (1931): 697-711.; Hull, Natalie EH. *Roscoe Pound and Karl Llewellyn: Searching for an American Jurisprudence*. University of Chicago Press, 1997.

agreements. However, these rules now do not correspond to the complex conditions and forms of foreign investment in modern commerce.

Therefore, in this Section, it will be considered whether there is evidence that the *de facto* rules on corporate nationality in international investment law were influenced or formed by the tradition of legal realism and, effectively, by the decision-making processes of international arbitrators.

This Section will start with the analysis of what the fundamental axioms of legal realism are and move to question if there is evidence of similar axioms in international investment law. In particular, it will be investigated whether international investment arbitration cases focusing on the corporate nationality issue provide a ground to argue that the philosophy of legal realism operates and influences the rules on corporate nationality.

1.7. Axioms of legal realism

To inquire whether there is evidence of the presence of methods and theory of legal realism in investment arbitration and, in particular, in the context of corporate nationality - axioms of legal realism must first be established. The latter will serve as a basis to determine whether the rules on corporate nationality were and still are influenced by actors acting in investor-state arbitrations.

Firstly, it is essential to note that realists proclaimed the uselessness of both legal rules and abstract concepts. The main argument of legal realists is that rules do not decide cases; they are merely tentative classifications of decisions reached, for the most part, on other grounds. They are, therefore, of limited use in predicting judicial decisions[81].

Realists emphasized the role of "idiosyncrasy" in judicial decision-making[82]. However, at the same time, they hoped to make judicial decision-making more predictable by focusing on both the specific facts of cases and social reality in general, rather than on the legal doctrine. They sought to organize judicial decisions around situations rather than legal concepts. By paying close attention to facts rather than abstract concepts, they hoped to discover what animated judicial decisions. By making connections between law and actual life experience, they sought to make the law less abstract and link it more closely to social

[81] Singer, Joseph William, and Laura Kalman. "Legal realism now." (1988): 465-544.; Leiter, Brian. "Rethinking legal realism: Toward a naturalized jurisprudence." *Tex. L. Rev.* 76 (1997): 267.
[82] Balkin, Jack M. "Some Realism About Pluralism: Legal Realist Approaches to the First Amendment." *Duke Law Journal* 1990.3 (1990): 375-430.; Tamanaha, Brian Z. "Understanding Legal Realism." *Tex. L. Rev.* 87 (2008): 731.

reality. Realists believed that this would enable them both to predict judicial decisions more accurately and to promote just social reforms[83].

Also, legal realists argued that lawyers could not use legal rules alone to predict judicial decisions. As the theory of legal realism provides, legal rules are often vague and therefore, ambiguous since these rules often contain abstract and contestable concepts, such as "reasonableness."[84] Thus, they are subject to a broad interpretation. According to realists, reasonable persons could disagree about what these concepts mean, and therefore, judges could not apply them mechanically. Realists also argue that judges cannot determine, in a nondiscretionary way, the holdings of decided cases because any case could be read in at least two ways. It could be read broadly to establish a general rule applicable to a wide range of situations, or it could be read narrowly to apply only to the specific facts of the case[85]. Also, because of the indeterminacy of abstract concepts and the manipulability of precedent, it was almost always possible to appeal to competing and contradictory rules to decide any interesting contested case[86].

The realists did not believe, however, that the indeterminacy of legal rules meant that all generalizations are meaningless and that decisions are controlled only by the psychological make-up of the judge. Social context, the facts of the case, judges' ideologies, and professional consensus all critically influence individual judgments and patterns of decisions over time[87]. For example, one of the famous legal realists, John Dewey, argued that judges must combine and balance two different goals. The first goal is to choose legal rules that have desirable social consequences. To some extent, this goal is independent of precedent and requires a type of reasoning characteristic of social science. The second goal is to enable persons in planning their conduct to foresee the legal import of their acts by judicial decisions that possess the maximum possible stability and regularity[88].

Similarly, another famous legal realist Karl Llewellyn argued that although precedent is highly manipulable, it substantially constrains judges' decision-making. A judge can almost always construct arguments for a ruling "on either side of a new case."[89] At the same time, "the judge must construct an argument based on existing principles of law, and there are not

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[83] Mikhael, Peter Maurice. *School of Global Affairs and Public Policy*. Diss. The American University in Cairo, 2015.

[84] Joseph William Singer, Legal Realism at Yale, (book review), 76 Calif. L. Rev. 465 to 76 Calif. L. Rev. 465, 499-500 (1988), see also Karl Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed, 3 VAND.L.REV. 395, 399-406 (1950).

[85] Singer, Joseph William, and Laura Kalman. "Legal realism now." (1988): 465-544.

[86] Steinman, Adam. "A Constitution for Judicial Lawmaking." *University of Pittsburgh Law Review* 65 (2004): 545. ; Engle, Eric. "Primer on Left Legal Theory: Realism, Marxism, CLS & PoMo, A." *Crit* 3 (2010): 64.; see also Karl Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed, 3 Vand.L.Rev. 395, 399-406 (1950).

[87] Mills, Linda G. *A penchant for prejudice: Unraveling bias in judicial decision making*. University of Michigan Press, 1999.

[88] John Dewey, *Logical Method and Law,* 10 Cornell L.Q. 17, 26 (1924).

[89] Llewellyn, Karl Nickerson. *The common law tradition: Deciding appeals*. William S. Hein & Co., Inc., 1996; Llewellyn, Karl N. "Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed." *Vand. L. Rev.* 3 (1949): 395.

so many that can be built defensibly. This is because it is not always possible to construct an argument that will be plausible and persuasive to other judges and lawyers familiar with the relevant precedents. To be persuasive, the argument must tie the proposed result to existing practice in a way that appears not to deviate from fundamental principles underlying prior law. This is determined partly by professional consensus, partly by community views, and partly by the substantive content and organization of existing law"[90].

Realists also argued that it is impossible to induce a unique set of legal rules from existing precedents. Llewellyn argued that it is always possible to generate both broad and narrow holdings from cases and to construct competing lines of precedent on either side of every controversial issue of law[91]. Legal realist Felix Cohen further argued that "every case was different from every other in some respect and that judges had no alternative but to engage in ethical inquiry to determine those differences between the case at hand and the prior case that mattered."[92]

Another important aspect is that realists argued against conceptualism. By arguing against the practice of deducing rules from abstractions, the realists hoped to focus attention on the facts of specific cases and to understand the development of the law in terms of situation-types. Effectively, the realist perspective is that "judges should make law based on a thorough understanding of contemporary social reality. Judges should not make value judgments in the abstract about the substantive content of the law. Rather, they should closely examine the social context in which those affected by legal rules operate. Understanding this social context would enable judges to adjudicate disputes through "situation- sense", meaning the ability to fit the law to social practice and to satisfy the felt needs of society to achieve a satisfying working result."[93]

Finally, the realists argued against formalistic, mechanical application of rigid rules regardless of their social consequences. The argument is that "judges should apply rules in light of their purposes, looking to the goals of the rules and their social effects. Moreover, they should also change or modernize rules to respond to changing social values and circumstances"[94].

While considering the views and methods proposed by legal realists, it can be argued that many of the realists' views and approaches to the law are present in international investment law and its jurisprudence. However, rules in international investment law are not too vague

[90] Ibid. K. Llewellyn, *supra* note 11, at 19, 59-61, 121-28, 213-19 (1960).
[91] Llewellyn, Karl N. "The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method." *The Yale Law Journal* 49.8 (1940): 1355-1400.; Llewellyn, Karl N. *The bramble bush: On our law and its study*. Quid Pro Books, 2012.
[92] Cohen, Felix S. "Field theory and judicial logic." *The Yale Law Journal* 59.2 (1950): 238-272; see also Engle, Eric. "Primer on Left Legal Theory: Realism, Marxism, CLS & PoMo, A." *Crit* 3 (2010): 64.
[93] Singer, Joseph William, and Laura Kalman. "Legal realism now." (1988): 465-544.
[94] Singer, Joseph William. "Legal Realism Now. Legal Realism at Yale: 1927-1960. By Laura Kalman" *Calif. L. Rev.* 76 (1988): 467-1377.

or ambiguous (save for notions such as fair and equitable treatment) but are often rather orthodox and too slow to develop to the changing needs of modern international investment[95]. In addition, as will be considered in the following Chapters, it is possible to induce a unique set of legal rules from existing precedents, in particular, those regarding corporate nationality in international investment law. Thus, there is a basis for making further inquiry into the practice of investor-state arbitration in order to analyze whether the characteristics and methods of legal realism are also evident in the sphere of investor-state arbitration.

1.8. Legal realism in investor-state arbitration

Firstly, it must be noted that many of the writings on the sociological aspects of international arbitration, including investor-state arbitration, provide some primary evidence of the presence of legal realism. For example, Professor E. Gaillard[96] argues that international arbitration and, in particular, investment arbitration, is a model which comprises a large number of players. "This is a model in which those players tend to occupy specific functions, as opposed to alternating between them, and in which certain social agents have become champions of certain causes that are not necessarily shared by other players in the field. In an arbitration context, which counts thousands of actors, a strategy of diversification has been successfully implemented by some social agents. Champions of certain causes have emerged, and the most strident of these have gained immediate notoriety"[97]. Prof. Gaillard observes that the pamphlet 'Profiting from Injustice'[98], which presents investment arbitration as the sole creature of lawyers pursuing their own personal gain, remains the best example of such strategy. "In an increasingly complex and polarised arbitration world, the distinction between functions and roles might prove a useful tool to understand the respective positioning of the social actors, the principles guiding their behaviour, and their strategies." Prof. Gaillard notes that the term 'function' refers to "the specific position occupied by the social actor, such as an expert witness, counsel, co-arbitrator or president of an arbitral tribunal. The term 'role' connotes the social activity consisting of defending specific values or beliefs. In investment arbitration, a given player may perceive his or her role as defending States, or defending the interests of foreign investors. Such a role will be performed throughout all the activities of that player, from academic writings to sitting as a party-appointed arbitrator or acting as the

[95] See Gordon, K. and J. Pohl (2015), "Investment Treaties over Time - Treaty Practice and Interpretation in a Changing World", OECD Working Papers on International Investment, 2015/02, OECD Publishing. http://dx.doi.org/10.1787/5js7rhd8sq7h-en - „Investment treaty law needs to adapt in order to respond to the evolving needs of both investors and treaty partners in a dynamic global economy. Pressures for adaptation may also emerge as the main actors in the system – governments, investors and the arbitration bar – learn how investment agreements are understood and used, especially in the context of dispute resolution."

[96] Gaillard, Emmanuel. "Sociology of international arbitration." *Arbitration International* 31.1 (2015): 1-17.

[97] Ibid.

[98] Eberhardt, Pia, and Cecilia Olivet. "Profiting from injustice." *Transnational Institute and Corporate Europe Observatory report, Nov* (2012).

chair of an arbitral tribunal. Because the role is grounded in a set of given values and beliefs, it is a social parameter which is less prone to change than functions for all social actors"[99].

It may be observed that Prof. Gaillard's analysis cited above is very relevant to the axioms of legal realism. The functions, roles and the respective positioning of the social actors, the principles guiding their behavior and their strategies in investment arbitration, do fit within the perspective of legal realists in the sense that decisions of arbitrators are controlled by the psychological make-up, social context, arbitrators' ideologies and professional consensus[100]. As noted by Prof. Brigitte Stern - "Arbitrators have to make choices to resolve the disputes, which are of course informed by their political standpoint."[101]

Prof. Stephan Schill also observed that what gives the arbitral system order are the arbitrators, who share basic norms and outlooks and who, in the process of deciding disputes, are, in many cases, also "making law" that supports their shared vision of how the world should be.[102] Furthermore, the legal anthropologists Yves Dezalay and Bryant Garth, were among the first to explore the emergence of a transnational elite of arbitrators in the 1990s. Suggesting that arbitration is a space between business and politics, while the role of formal law and formal procedures, the approach of arbitrators, the characteristics of arbitrators and the kind of decision making are all subject to enormous variations[103].

Thus, at least from the sociological point of view, it can be argued that there is evidence that decision-makers in international investment law, i.e. arbitrators and counsel, act in the jurisprudential philosophy of legal realism and this has had significant consequences for the development of international investment law. However, no such claim may be valid without any practical examples of the jurisprudence and, in particular, one relating to corporate nationality, which is the central theme of this thesis. Such examples will be analyzed next.

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[99] Gaillard, Emmanuel. "Sociology of international arbitration." *Arbitration International* 31.1 (2015): 1-17.

[100] As noted by Prof. Gaillard, the current trend in assessing conflicts of interests in international arbitration is to focus on functions. It is sometimes argued that a social agent routinely performing the function of counsel has a structural conflict of interest which should preclude him or her from acting as co-arbitrator, president or member of an ad hoc committee in ICSID arbitration. An analysis focusing on roles as defined above, rather than on functions, or at least in conjunction with the concept of function, might be a more fruitful exercise, as it is the role, not the function, which polarizes the field - Gaillard, Emmanuel. "Sociology of international arbitration." *Arbitration International* 31.1 (2015): 1-17.

[101] See Brigitte in Brazil, *Global Arbitration Review*, Volume 5, Issue 3 (2010). In the infamous report 'Profiting from Injustice' it was even argued that "Evidence shows that many of the arbitrators enjoy close links with the corporate world and share a businesses' viewpoint in relation to the importance of protecting investors' profits. Given the one-sided nature of the system, where only investors can sue and only states are sued, a pro-business outlook could be interpreted as a strategic choice for an ambitious investment lawyer keen to make a lucrative living." Eberhardt, Pia, and Cecilia Olivet. "Profiting from injustice." *Transnational Institute and Corporate Europe Observatory report, Nov* (2012).

[102] Yackee, Jason (2012) The Emerging System of International Arbitration, Summary of presentation during American Society of International Law 106th Annual Meeting.

[103] Dezalay, Yves and Garth, Bryant G. (1996) Dealing in Virtue. International Commercial Arbitration and the Construction of a Transnational Legal Order, Chicago and London p. 274.

1.9. Legal realism in the regulation of corporate nationality

Timing of the dispute

To test whether the theory of legal realism exists in the context of international investment law and, in particular, in the regulation of corporate nationality, the classical cases on corporate structuring must be analyzed first.

As it was argued, corporate structuring in investment arbitration has often provided for diverging views. There are numerous examples, which will be addressed in more detail, which prove that similar situations of corporate structuring were interpreted differently. Also that arbitrators came to the same conclusions regarding corporate nationality by different methods or that the legal dispute arising under the same broad definition of "investor" was decided based on the specific facts of the case. For example, *Tokios tokeles*[104] concerned restructuring, which took place six years before the entry into force of the BIT in question, *Phoenix action*[105], a downstream reorganization upon an already existing dispute.

When considering the validity of corporate structuring and the timing thereof, in international investment law, the jurisprudential philosophy of legal realism is particularly relevant. It may be observed from the case law on corporate structuring that specific rules on corporate nationality did not decide the matter. They were merely tentative classifications of decisions reached, for the most part, on other grounds.

In the context of the timing of corporate structuring with the purpose to acquire the needed nationality, the tribunal in *Pac Rim Cayman LLC v. The Republic of El Salvador*[106] held that the dividing-line occurs when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy. In the tribunal's view, *before* that dividing-line is reached, ordinarily, there will be no abuse of process; but, ordinarily, *after* that dividing-line is passed, there will be. In the tribunal's view, the answer in each case will, however, depend upon its particular facts and circumstances.[107] Furthermore, the tribunal established that where the alleged practice is a continuous act, this means that the practice started before the claimant's change of nationality and continued after such change. Although this analysis would find the basis of the tribunal's jurisdiction *ratione temporis,* under CAFTA, it would preclude the exercise of such jurisdiction on the basis of abuse of process. If the claimant had changed their nationality during that continuous practice, knowing of an actual or specific future dispute, they would

[104] *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18.
[105] *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5.
[106] *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, 1 Jun 2012, Decision on the Respondent's Jurisdictional Objections.
[107] Ibid, Para 2.99.

be manipulating the process under CAFTA and the ICSID Convention in bad faith to gain unwarranted access to international arbitration[108].

The issue of corporate restructuring has also arisen in the recent and high profile case of *Philip Morris Asia v Australia*[109], initiated in 2011 under the Australia–Hong Kong BIT concerning Australia's mandatory plain packaging of tobacco products. The relevant fact of the case was that in February 2011, the claimant investor, Philip Morris Asia Limited (PM Asia), purchased Philip Morris (Australia) Limited (PM Australia), which owned Philip Morris Limited (PML), which, in turn, owned the intellectual property relevant to the dispute. Australia had suggested that PM Asia purchased the shares in PM Australia when there was already a dispute between the Philip Morris group and the Government of Australia about the Government's decision to introduce plain tobacco packaging laws. Therefore, according to Australia, the dispute either fell outside the parameters of investor-State dispute settlement under the Australia–Hong Kong BIT, or that PM Asia's claim amounted to an abuse of the right to bring an investment claim under that treaty. Australia also contested PM Asia's control of PML and its assets.

The tribunal had issued an award on jurisdiction on 18 December 2015, where it held that it had no jurisdiction to determine the dispute. Although the award on jurisdiction will be analyzed in more detail in Chapter IV, it may be noted that the position of Australia prevailed. The tribunal upheld an objection by Australia that the Hong Kong subsidiary had only acquired an interest in Philip Morris' Australian business after the dispute had arisen and did so principally to bring the BIT claim. As such, the case was dismissed as an abuse of process.

However, arguments regarding the abuse of process and corporate structuring were clearly dismissed in cases such as *Yukos v Russian Federation*[110] and *Mobil v Venezuela*[111]. In the latter cases, the tribunals would only refer to the specific and relatively clear definitions of investors in the relevant BIT or the Energy Charter Treaty and would not refer to the notion of abuse when considering the jurisdictional issues concerning corporate nationality as did the tribunals in *Pac Rim Cayman LLC v. The Republic of El Salvador* and *Philip Morris Asia v Australia.*

The latter suggests that consideration and application of the doctrine of abuse of process rests upon the inherent discretionary power of an investment treaty tribunal. The latter is a perfect example of the jurisprudential philosophy of legal realism. Similar to such discretionary power of an investment treaty tribunal is the principal notion of legal realists that a judge or arbitrator can almost always construct arguments for a ruling or an award "on either side of a new case[112]" and that any case could be read in at least two ways. It could be read broadly

[108] Ibid, Para 2.107.
[109] *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12.
[110] *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 227, 30 Nov 2009, Interim Award on Jurisdiction and Admissibility.
[111] *Venezuela Holdings, B.V., et al v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27.
[112] Llewellyn, Karl N. "Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed." *Vand. L. Rev.* 3 (1949): 395.

to establish a general rule applicable to a wide range of situations, or it could be read narrowly to apply only to the specific facts of the case. A similar situation is evident in the context of the rules on corporate structuring.

The presence of realist methods may also be proved by several other examples. In *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*[113]*,* Peru raised several objections, including the argument that the corporate restructuring by which Ms. Levy acquired shares in Gremcitel was an abuse of process. In an award rendered on 9 January 2015, the tribunal determined that one of the claimants had acquired shares in a Peruvian company only for the purpose of obtaining treaty rights, in relation to a foreseeable dispute, and less than two weeks before the announcement of the state measures at issue in the case. The Tribunal considered it "*now well-established, and rightly so, that an organization or reorganization of a corporate structure designed to obtain investment treaty benefits is not illegitimate per se, including where this is done with a view to shielding the investment from possible future disputes with the host state.*"[114] It added, however, that corporate restructuring with the purpose of seeking treaty protection when a dispute is anticipated may constitute an abuse of process. In this regard, the tribunal endorsed the test from *Pac Rim Cayman LLC v. Republic of El Salvador,* analyzed above, that restructuring to obtain treaty protection will be an abuse of process if undertaken at a time when a specific future dispute is foreseeable as a very high probability and not merely as a possible controversy. In assessing the foreseeability of the dispute, the tribunal reasoned that whether the restructuring was an abuse of process turned not only on whether it had been completed before relevant state acts were published but whether it had been done after the threshold of foreseeability.

Furthermore, the tribunal referred to corporate documents, adduced by the claimants, that turned out to be "*untrustworthy, if not utterly misleading*."[115] The documents had been produced in support of the claimants' argument and rejected by the tribunal that Ms. Levy had acquired indirect ownership in Gremcitel in 2005[116]. For all these reasons, the tribunal upheld Peru's abuse of process objection and declined to exercise jurisdiction.

Similarly, it can be argued that the tribunal's decision in *Levy* might have been different if the tribunal would have only referred to the specific and relatively clear definition of the investors in the relevant BIT and would not refer to the notion of abuse when considering the jurisdictional issues concerning corporate nationality.

In comparison, however, on December 15, 2014, less than one month before the award in *Levy*, the tribunal in *Cervin Investissements S.A. & Rhone Investissements S.A. v. Republic*

[113] *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award, 9 January 2015.
[114] Ibid, Award, 9 January 2015, para 184.
[115] Ibid, para 194.
[116] It is clear from the Tribunal's Award that the Claimants' reliance upon these documents coloured its perception of the claimants' case more generally, saying that a "*global evaluation of the facts relating to the claimants' attempts to establish jurisdiction thus evinces a pattern of manipulative conduct that casts a bad light on their actions.*"

of Costa Rica[117] addressed similar allegations of investor's abuse of process by purportedly restructuring the investment for the sole purpose of asserting an ICSID claim. In this case, the investment was made through Dutch companies but was later restructured through Swiss companies, all controlled by the same Mexican parent.

Explaining that Costa Rica had the burden of showing that the claimants had restructured their investment for the sole purpose of obtaining an undue procedural advantage, the tribunal rejected the challenge based on the claimants' general statements that the restructuring was done to gain access to better funding sources and establish greater financial order in the company[118].

Nevertheless, other tribunals have taken an even less mechanistic approach to determine when a dispute begins. The tribunal in *Lucchetti*[119] set a test to delimit when one grievance can be legally distinct from another dispute: the critical element in determining the existence of one or two separate disputes is whether or not they concern the same subject matter. The tribunal considered that, whether the focus is on the 'real causes' of the dispute or its 'subject-matter,' it will in each instance have to determine whether or not the facts or considerations that gave rise to the earlier dispute continued to be central to the later dispute. Therefore, the *Lucchetti* example provides another approach, which focuses on the underlying set of facts giving rise to a grievance. If a single set of facts gives rise to two allegedly separate grievances, these would likely be considered part of the same dispute.

In another contrast, the tribunal in *Tokios Tokeles* referred to the jurisprudence of the Permanent Court of International Justice, defining a dispute as a 'disagreement on a point of law or fact, a conflict of legal views or interests between two persons.'[120] Therefore, it can be clearly observed that focusing on the disagreement, rather than the underlying facts, implies a distinction between the act that caused the parties to disagree and the subsequent formation of the disagreement, signifying the commencement of the dispute.

These different approaches to the distinction between the underlying facts and the disagreement between the parties lead to significant uncertainty and unpredictability, leaving much of the answer to the discretion of arbitrators in framing the boundaries of a given dispute. This is one of the examples and evidence of the realist perspective present in disputes concerning corporate structuring and, effectively, corporate nationality issues.

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[117] *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2.

[118] The tribunal was particularly persuaded by the fact that the investments would have had access to ICSID under either the Dutch or Swiss investment treaties with Costa Rica. The tribunal emphasized that this assumption was reinforced by the respondent's failure to show that the claimants received any advantage by using one treaty over the other. For example, the tribunal in Tidewater v Venezuela stated that investors 'could not have expected to obtain protection for preexisting disputes'. In *Gami Inv Inc v United Mexican States*, the tribunal held that 'NAFTA arbitrators have no mandate to evaluate laws and regulations that predate the decisions of a foreigner to invest'.

[119] *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. The Republic of Peru*, ICSID Case No. ARB/03/4 (also known as: Industria Nacional de Alimentos, A.S. and Indalsa Perú S.A. v. The Republic of Peru).

[120] *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18.

The examples referred to above evidence that the jurisprudential philosophy of legal realism influence the decision-making procedure in international investment law and, accordingly, the formation of rules on corporate nationality. Similar conclusions may also be inferred from other problematic spheres that are constant in the context of establishing corporate nationality. One other example is the practice of piercing the corporate veil addressed next.

Piercing the corporate veil

It will be evidenced in the next Chapter that there are many divergent opinions on the possibility of piercing the corporate veil in international investment law. This practice is particularly relevant in cases where the investor does formally fit into the incorporation requirements of BITs, e.g., as evidenced by the *Tokios tokeles* award.

A similar issue concerning the real persons standing behind an investment arose in the *Rompetrol Group NV v Romania*[121] dispute. Rompetrol was a company established in the Netherlands, owning shares in several Romanian companies and itself ultimately controlled by a Romanian citizen. The dispute arose out of anti-corruption investigations upon the privatization of Petromidia Rafinare SA (owner of one of the largest oil refineries on the Black Sea coast), in which Rompetrol held a controlling stake. When the investigations resulted in charges of fraud and tax evasion, Rompetrol initiated arbitration against Romania, asserting that the investigations were oppressive and in breach of the treatment to which Rompetrol was entitled. Romania raised various preliminary objections to the jurisdiction and the admissibility of the claims. It argued that the dispute was not brought by a foreign investor, nor did it arise out of foreign investment. It invited the tribunal to apply a real and effective nationality rule of international law, which would bring the tribunal to the conclusion that the dispute was, in effect, a domestic dispute falling under the jurisdiction of the Romanian courts.

The tribunal first acknowledged that the ICSID Convention did not define nationality comprehensively. It then looked at the nationality criteria in the BIT, which provided that the nationality of a legal person is determined either by its place of incorporation or by its legal control. The tribunal, therefore, concluded that Rompetrol, being validly incorporated in the Netherlands, qualified as an investor for the purposes of the BIT. It stressed that it was only bound to apply the criteria set out in the BIT, i.e., that no other international law of nationality was relevant.

However, in *TSA Spectrum v the Argentine Republic*[122], both the award and the dissenting opinion are notable for their conflicting views on whether ICSID tribunals are compelled to pierce the corporate veil in an effort to determine who, ultimately, controls the investment

[121] *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3.
[122] *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5.

under dispute. Two members of the three-person tribunal, Judge Hans Danelius and Professor Georges Abi-Saab, sided in favor of piercing the veil and going for the real control and nationality of the controllers. As argued by the arbitrators, given that ICSID is intended to settle disputes between foreign investors and the host states, this approach was particularly important when ultimate control is alleged to be in the hands of nationals of the host state, whose formal nationality is also that of the claimant corporation.

In the decision of Professor Georges Abi-Saab, he concurred that:

> "Article 25(2)(b) defines the ambit, and thus traces the objective outer limits of ICSID's jurisdiction. These are institutional limits that cannot be waived, changed or extended by *inter se* agreements between parties to the ICSID Convention, but only by a revision of the ICSID Convention itself. It is true that the second clause of Article 25(2)(b) does not define the "foreign control", "because" of which a juristic person holding the nationality of the host State can be "treated as a national of another Contracting State" and that States have some latitude in defining "foreign control" by agreement in their BITs or elsewhere. But as the Award points out, foreign control is an objective condition of jurisdiction, whose existence has to be established objectively by the Tribunal. The Parties cannot by agreement waive it away or reduce it to a mere semblance or formality."[123]

In contrast, in his dissenting opinion, Grant D. Aldonas rejected the notion that either the ICSID Convention or the Argentina-Netherlands BIT moved the tribunal to look beyond where TSA's parent company was incorporated, as "to do so would substitute our judgment for that of the two sovereign states…". Arbitrator Aldonas argued that the BIT was clear in its wording that it protected companies lawfully incorporated in the Netherlands, regardless of the nationality of the owner:

> "Far from supporting the majority's decision, a good faith interpretation of Article 25 in accordance with the ordinary meaning of its terms compels the opposite result. Article 25(2)(b) makes the determination of which juridical persons may gain access to ICSID jurisdiction by virtue of their "foreign control" expressly dependent on an agreement between "the parties," not some putative "objective" test.
>
> The Netherlands, on the other hand, will forfeit the right it bargained for in the context of the BIT if the majority's opinion stands. Based on the language of the BIT, it would appear that the Dutch government plainly foresaw the problem with which we are now confronted and provided a decisional rule to guide this Tribunal in vindicating the Netherlands' interest in ensuring that its companies, regardless of their ownership,

[123] *TSA Spectrum v the Argentine Republic*, 19 Dec 2008, Concurring Opinion of Arbitrator Georges Abi-Saab.

> would not be prejudiced by the actions of the Argentine government, which, over time, has established a considerable record of expropriation.
>
> We cannot ignore what the Dutch government sought to do to protect its interests. Nor can we ignore the fact that the Argentine government expressly agreed to the decisional rule that would offer the Dutch the protection they sought. To do so would substitute our judgment for that of the two sovereign states that formed an agreement that is controlling for purposes of the question before us. That, I am afraid, is precisely what the majority has done."[124]

The opinions of both concurring arbitrators and dissenting arbitrator seem to be legitimate and reasoned. The letter is a perfect example of how the issue of corporate structuring and, effectively, corporate nationality provides fertile soil for disagreement. However, and more importantly, concurring and dissenting opinions provide evidence of how decisions on corporate nationality may be influenced by the discretionary power of the arbitral tribunal.

Realists had similarly emphasized the role of "idiosyncrasy" in the judicial decision-making process observed above. The *TSA Spectrum v the Argentine Republic* case is an excellent example that any case could be read in at least two ways: it could be read broadly to establish a general rule applicable to a wide range of situations, or it could be read narrowly to apply only to the specific facts of the case. Also, based on the opinions provided in *TSA Spectrum*, it may be agreed with the realists that notwithstanding which of the arbitrators was right, it is always possible to appeal to competing and contradictory rules to decide this case anew.

Another useful example in the context of diverging views on piercing the corporate veil is the *National Gas v Egypt*[125] dispute. In the latter case, Egypt filed preliminary objections to the tribunal's jurisdiction, arguing that the tribunal lacked jurisdiction because National Gas did not qualify as a foreign investor under the ICSID Convention. National Gas was an Egyptian company 90% owned by several UAE entities, which in turn were owned by Mr. Ginena, a Canadian-Egyptian national.

The tribunal firstly noted that the jurisdiction of ICSID extends to any legal dispute arising directly out of an investment between a Contracting State of the Convention and a national of another Contracting State. However, Article 25(2)(b) of the ICSID Convention provided an exception to that rule – locally incorporated companies could qualify as a "national of another Contracting State" if it has been agreed, for example, through a bilateral investment treaty, to treat such companies as nationals of another Contracting State "because of foreign control." In this case, Article 10(4) of the BIT contained such an agreement between Egypt and the UAE. A similar point was argued by National Gas that it met the requirements of a

[124] *TSA Spectrum v the Argentine Republic*, 19 Dec 2008, Dissenting Opinion of Arbitrator Grant D. Aldonas.
[125] *National Gas S.A.E. v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7.

foreign investor under Article 25(2)(b) as the BIT contained an agreement to treat it as such due to its foreign control by UAE entities[126].

However, Egypt argued that it was not sufficient to rely on the definition of a foreign investor within the BIT to fulfill the requirements of Article 25(2)(b). Egypt argued that foreign control must be proven and that the tribunal should pierce the corporate veil to reveal the UAE companies as shell companies, ultimately owned by Mr. Ginena, a Canadian-Egyptian citizen. Therefore, this would mean that the claimant was ultimately controlled by an Egyptian national, making it ineligible to bring a claim against Egypt under the ICSID Convention.

On this point, the tribunal held that an agreement to treat the investor as a foreign investor in the BIT alone was not sufficient to establish jurisdiction and that the claimant must meet a "subjective" test of consent and an "objective" test of "foreign control" under Article 25(2)(b) of the ICSID Convention. It cited *Vacuum Salt v. Ghana*[127] and *Autopista v. Venezuela*[128] as examples where tribunals affirmed the need to take into account the genuine control relationship for purposes of the Convention.

Therefore, the Tribunal held that National Gas was an Egyptian company owned by UAE entities and thus met the "subjective" test of consent in the BIT. Nevertheless, the Tribunal accepted Egypt's argument that National Gas failed the "objective" test of "foreign control" because the UAE companies that owned National Gas were shell companies ultimately owned and controlled by Mr. Ginena, an Egyptian-Canadian national. The Tribunal found that if it accepted jurisdiction, it would be inconsistent with the object and purpose of the ICSID Convention[129].

National Gas v Egypt is not just a reminder that structuring investments to satisfy the jurisdictional requirements under the ICSID Convention and the applicable international investment agreement must be done with care. It is also yet another example of the discretionary power of the arbitral tribunal to arrive at a desired legal result, based on the "subjective" and "objective" tests. The application and interpretation of these tests is a choice that lies within the tribunal and its discretion.

Acknowledging the possible role of extra-legal factors in arbitral decision-making by no means entails a criticism that investment arbitration is a biased dispute resolution system or that this represents an accusation against the integrity of investment arbitration. Conversely,

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[126] Ibid, 3 APR 2014 Award, paras 121-213.

[127] *Vacuum Salt Products Ltd. v. Republic of Ghana*, ICSID Case No. ARB/92/1.

[128] *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5.

[129] Although National Gas invoked in the alternative to the Canada-Egypt Bilateral Investment Treaty, to argue that Mr Ginena's indirect holding in National Gas meant that the investment fulfilled the criteria of objective "foreign control" under Article 25(2)(b), because he was a Canadian national, the Tribunal dismissed this alternative argument by National Gas, holding that it was untimely (it was not in the request for arbitration), that Mr Ginena was not a party to the arbitration and that Canada was not a Contracting State to the Convention at the time National Gas filed its claim.

integrity itself requires that extra-legal factors would play a role. Also, what constitutes legal and extra-legal factors requires yet another discussion. However, the examples discussed above clearly evidence the notion of the legal realists that any legal interpretation is influenced by the interpreter. In a case where several different rules and principles are applied – the interpreter is rarely, if ever, completely tied up by the law, just as the arbitrator is rarely, if ever, completely free to come to whatever result he prefers.

In this context, Prof. Stavros Brekoulakis notes that "many studies depart from the behavioral assumption that arbitral decision-making is driven almost exclusively by extralegal factors, mainly policy preferences or financial incentives of arbitrators."[130] Thus, the next important issue to consider is the arbitral decision-making itself: the procedure of decision-making in arbitration, which is also an essential factor concerning the presence of legal realism.

1.10. Arbitral decision making from a realist perspective

Values

The realists argued that the intuitive judgments involved in judicial or arbitral decision-making were influenced by the values held by individual judges or arbitrators. Indeed, it was stated that: "We as arbitrators use values to judge the conduct of others in … cases and to determine what constitutes just cause"[131]. These values and their influence on arbitral intuitive judgments evolve along with changing mores in arbitral society.

Famous legal realist Judge Hutcheson has argued that the vital motivating impulse for judicial decision is often a "hunch," or intuition about what is right or wrong for the particular case. He went on to argue that, having reached a 'hunch' decision, the astute judge, having so decided, enlists his every faculty and belabors his laggard mind, not only to justify that intuition to himself but to make it pass muster with his critics[132]. As evidenced above, Judge Hutcheson's explanation of the opinion-writing process may also be relevant to those of arbitrators in investment arbitration. Other authors reiterated his recitation of this model of

[130] Brekoulakis, Stavros. "Systemic bias and the institution of international arbitration: a new approach to arbitral decision-making." *Journal of international dispute settlement* (2013): idt016.
[131] Malin, Martin H., and Monica Biernat. "Do Cognitive Biases infect Adjudication-A Study of Labor Arbitrators." *U. Pa. J. Bus. L.* 11 (2008): 175.
[132] Hutcheson Jr, Joseph C. "Judgment Intuitive: The Function of the Hunch in Judicial Decision." *Cornell lq* 14 (1928): 274.; See also Sylvester Garrett, *The Role of Lawyers in Arbitration*, *in* Arbitration and public policy, proceedings of the 14th annual meeting, national academy of arbitrators 102, 122 (Spencer D. Pollard ed., 1961) (citing Hutcheson, *The Judgment Intuitive: The Function of "Hunch" in Judicial Decisions*, 14 Cornell L.Q. 274, 285.

arbitral decision-making and observed that many arbitrators had expressly concurred with that model[133].

Professor Dworkin also argued on the existence of the discretion possessed by a decision-maker in social science:

> "When judgments rest simply on correlations between observed phenomena, there is necessarily an element of arbitrariness introduced by the choice of categories whose correlation is taken to be significant **....** The choice here is not restricted, as it is in physical science, by the requirements of a dominant mechanical model, or by the requirement to provide a substitute for the dominant model. That is a substantial difference between social science and the physical sciences that we must always bear in mind. It has a further consequence. When you lack a mechanical model, and you make judgments simply on correlations between observed phenomena, the kinds of techniques necessary to provide arguments for and against the hypothesis belong entirely to a very arcane subject, namely, statistics. The mathematical concepts of statistics are much more removed from the ordinary vocabulary of a trial judge than are the concepts of physics or chemistry that he might encounter in, for example, a complicated patent case. This accounts, I think, to a large degree, for the sense of distance and dependence a judge has when asked to consider complex causal hypotheses in social science"[134].

Thus, the argument of legal realists, which is particularly relevant to investment arbitration and, effectively, to the establishment of corporate nationality, is that arbitrators often make interpretive rather than causal judgments. They usually will not rely upon policy research to establish causal links in any scientific sense. Still, they can locate a particular phenomenon within a particular category of phenomena by specifying its meaning within the society in which it occurs – in case of investment arbitration – the legal order[135] and the legitimacy of investor-state disputes. The latter also works for another argument – interpretive judgments are based on conventions and shared understandings. In Professor Dworkin's view, this

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[133] Yablon, Charles M. "Justifying the Judge's Hunch: An Essay on Discretion."*Hastings LJ* 41 (1989): 231.; Rubin, Alvin B. "Does Law Matter? A Judge's Response to the Critical Legal Studies Movement." *Journal of Legal Education* 37.3 (1987): 307-314.

[134] Dworkin, Ronald. "Social sciences and constitutional rights-the consequences of uncertainty." *JL & Educ.* 6 (1977): 3.; Yudof, Mark G. "School desegregation: Legal realism, reasoned elaboration, and social science research in the Supreme Court." *Law and Contemporary Problems* 42.4 (1978): 57-110.

[135] In his *Legal Theory of International Arbitration* (2010) (page 39) Emmanuel Gaillard explains his conception of an arbitral legal order: "The term 'arbitral legal order' is only justified where it can describe a system that autonomously accounts for the source of the juridicity of international arbitration. Without the consistency offered by a system enjoying its own sources, there can be no legal order. Without autonomy vis-à-vis each national legal order, there can be no arbitral legal order. The reference to a system enjoying its own sources appears to postulate a coherent and consistent body of principles, independent of any particular national system, which exists or would find mutual acceptance among all those involved with arbitration across the world. See: Gaillard, Emmanuel. *Legal theory of international arbitration*. Martinus Nijhoff Publishers, 2010.

generally means that judges will make characterizations after the study of the standard legal materials and of the society, its practices, and its history:

> "What political theory can we describe such that, if we accepted the political theory, these cases would therefore be justified as a matter of political morality? What do we have to assume about political rights, political goals, political morality-what do we have to assume in order to suppose that these decisions are right as a matter of political principle? The political morality or principles will need to be drawn from constitutional law. But in large measure, the predicates for decision would not be causal hypotheses deriving from instrumentalist reformulations of constitutional entitlements. Needless to say, there is no reason to believe, a priori, that interpretive judgments are more certain, objective, and defensible than causal judgments."[136]

Although the purpose of this thesis is not to evidence that arbitrators, in general, are influenced by the jurisprudential philosophy of legal realism and whether this has significant consequences for international investment law, it can be rightly stated that there is evidence that awards can be treated as *post hoc* phenomena. There are instances where the rule is made and not found. The corollary is that the legal formula articulated in one case does not necessarily limit, in any meaningful way, the future decisions of arbitrators. The examples on corporate structuring and piercing the corporate veil discussed above provide evidence that the law is what the arbitrators decide it is. They are relatively unconstrained in the exercise of their decision-making power – the only limits being their preferences and perceptions[137].

Thus, arbitral approaches to decision-making have a strong flavor of legal realism. The creative and intuitive nature of decision-making in investment arbitration may be regarded as a counterpart to the judicial process in local courts, which investors seek to avoid. Acting differently than arbitrators, judges of local courts are not often driven to given results under challenging cases by various concepts of protection of legitimacy, logic, and language. Simultaneously, in investment arbitration, there is, almost always, a choice among several potentially applicable sets of principles.

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[136] Dworkin, Ronald. "Social sciences and constitutional rights-the consequences of uncertainty." *JL & Educ.* 6 (1977): 3.

[137] Some modern proponents of legal realism have carried these observations to the point of legal nihilism. For them there are no general principles; precedent and statutory and constitutional text are irrelevant to the judging process, and there is no principled way to prefer one set of values to any other. Law is essentially irrational. See Yudof, Mark G. "School desegregation: Legal realism, reasoned elaboration, and social science research in the Supreme Court." *Law and Contemporary Problems* 42.4 (1978): 57-110.

Selection of arbitrators

Another, and probably the most crucial factor evidencing the presence of legal realism in investment arbitration, is the mutual selection of arbitrators by the parties, which legitimizes the role of arbitral intuition and value judgments in the decision-making process. The parties typically recognize the arbitrator's wide range of discretion and the significant role that the arbitrator's personal perspective on specific business and legal notions, as being influenced by their background, career and ideological viewpoints. Consequently, the parties often pay attention to these matters when selecting an arbitrator.

It was already evidenced above that once selected to hear a case, an arbitrator has several options in handling the matter. The only meaningful restraints are those tacitly conveyed by the parties as to their actual pleadings and their expectations. "As arbitrator's reputations grow, a reciprocal conditioning comes into play. The parties are presumed to be familiar with the arbitrator's conduct, rulings and decisions and, by their selection, represent that the arbitrator's past performance is their expected standard for the current matter"[138]. The latter is a clear example of legal realism's jurisprudential philosophy.

Similarly, there is a link between the parties' selection process and the legitimate role of the arbitrator's values in resolving a grievance. As the authors argue: "In this process of competitive selection, his own brand was analysed and adopted by the parties as their own brand of justice, whatever may have been their respective expectations."[139]

However, it is clear that the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution. While parties adjudicate their differences before numerous bodies, including judges, juries, administrative agencies, and arbitrators, one of the most fundamental requirements of due process, i.e., that the adjudicators be free from bias, is considered to be best served within arbitration.

The selection of arbitrators, however, at the time of writing of this thesis, is a hotly debated issue, particularly in the context of the TTIP and CETA, and the reform in EU law moving from current *ad hoc* arbitration towards an Investment Court. While currently arbitrators in investment arbitration are chosen by the disputing parties (i.e., the investor and the host state) on a case-by-case basis, the current system is criticized because it does not preclude the same individuals from acting as counsel for investors. This situation gives rise to conflicts of interest. It is perceived that these individuals are not acting with full impartiality when acting as arbitrators.

[138] Malin, Martin H., and Monica Biernat. "Do Cognitive Biases infect Adjudication-A Study of Labor Arbitrators." *U. Pa. J. Bus. L.* 11 (2008): 175.
[139] See Martin H. Malin & Robert F. Ladenson, Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to Gilmer, 44 Hastings L.J. 1187, 1198-99 (1993).

It is clear that the *ad hoc* nature of appointment of arbitrators in investment arbitration ensures that the states, or the public, are not interfering in an arbitrator's ability to act independently. Although on the other hand, it is perceived that this provides financial incentives to arbitrators to multiply investment arbitration cases. However, as argued by Prof. Emmanuel Gaillard, "arbitrators differ from judges in that they do not administer justice as an organ, on behalf of, or in the name of any state. Arbitrators, not being an arm of the state, are not dependent on the municipal laws regulating their conduct as judges are"[140].

Another persistent criticism of international investment arbitration is that investment tribunals can get their decisions wrong. There is no corrective mechanism via an appeal, as is found in almost all legal systems. It is argued that the lack of an appellate mechanism also makes the system less predictable for governments and investors alike. Thus, the possibility of including an appellate mechanism was one of the issues which gained the broadest support in the public consultation on the TTIP and Investment Court[141].

The legal realists, however, argued that because of the indeterminacy of abstract concepts and the manipulability of precedent, it was almost always possible to appeal to competing and contradictory rules to decide any interesting contested case. Thus, from the realist perspective, the appeal mechanism would not serve its purpose, as any given case could be decided differently and following specific values and the perspective of decision-makers.

As argued by Prof. Gabrielle Kaufmann, the role of arbitrators depends on other factors, which are specific to the field in which they act: "In commercial arbitration, there is no need for developing consistent rules through arbitral awards, because the disputes are most often fact and contract-driven. The outcome revolves around a unique set of facts and upon the interpretation of a unique contract that was negotiated between private actors to fit their specific needs"[142]. Prof. Kaufman notes, for example, sports arbitration:

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[140] Gaillard, Emmanuel. "Sociology of international arbitration." *Arbitration International* 31.1 (2015): 1-17. ; Mance, Jonathan. "Arbitration - a Law unto itself?" *Arbitration International* (2016).

[141] Weaver, Mark. "The proposed transatlantic trade and investment partnership (TTIP): ISDS provisions, reconciliation, and future trade implications." *Reconciliation, and Future Trade Implications (October 24, 2014)* (2014). "The guiding thought was that the right of appeal must be part of any functioning judicial or quasi-judicial system, including for investment protection, where issues pertaining to public policy may be at stake. The TTIP negotiating directives from June 2013 are the first EU negotiating directives which explicitly mention an appellate mechanism. These state that "consideration should be given to the possibility of creating an appellate mechanism applicable to investor-to-state dispute settlement under the agreement". The Parliament's 2011 Resolution on the EU's International Investment Policy also contained a reference to the need to create the possibility for appeals (as did the Commission's Communication of 2010). In addition to ensuring correctness and predictability, an appellate mechanism can respond to the legitimacy concerns as regards the current ISDS system. A key element in that regard is the design of an appellate mechanism, and in particular how its members are designated, the qualifications which they are required to hold and the form of their remuneration. See Alvarez, Gloria Maria, et al. "A Response to the Criticism against ISDS by EFILA." *Journal of International Arbitration* 33.1 (2016): 1-36.; Concept Paper Investment in TTIP and beyond – the path for reform enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court, European Commission.

[142] Kaufmann-Kohler, Gabrielle. "Arbitral Precedent: Dream, Necessity or Excuse? The 2006 Freshfields Lecture." *Arbitration International* 23.3 (2007): 357-378.

> "there is a strong requirement of a level playing field and fairness to athletes, or in legal terms, equal treatment. In pragmatic terms, this requirement becomes strikingly obvious if one bears in mind that the athlete's performance on the playing field is measured by universal sports standards. The stopwatch is the same wherever and whenever a race takes place. The equality in front of the stopwatch must be replicated when it comes to the application of legal rules"[143]

Similarly, the authors argue that in arbitration, the *ad hoc* nature of arbitration and its finality and privacy militate against overall consistency. As yet, no general means exist to ensure that arbitral decisions are consistent. Nowadays, there is more openness in investment arbitration, but it too appears to be a field where decision-making by different tribunals may differ (on central points, such as, what is an investment? and what amounts to fair and equitable treatment?)[144].

Therefore, it is clear that arbitrators themselves recognize the axioms of legal realism. Arbitrators often decide disputes based on facts rather than concrete, applicable rules. Moreover, arbitrators may decide to level the playing field and move towards fairness and that equality must be replicated when applying legal rules.

Conclusions to Chapter I

It was established in this Chapter that contemporary international investment law had brought newly formed rules on international personality and capacity, which merge both municipal law and international law. The latter was reflected mainly by the investor-state arbitration, i.e., the rules on corporate nationality were very much influenced by transnational law, which in turn is was formed by non-state actors and international instruments.

Furthermore, it was also established that corporate nationality in international investment serves the purpose of simplicity and efficiency in making a foreign investment, enforcing contracts and suing the host-state. The national identity of multinational corporations could no longer be determined by reference to their structural, organizational and operational features or their organizational structure, since these aspects no longer reflect the true national identity of a multinational organization. The characteristics or classical tests establishing corporate nationality, which formed in the 20th century, no longer correspond to the realities of a modern transnational corporation.

It was found that corporate structuring and transnationality of corporations investing abroad had "transnationalised" the relationship between investors and host-states, including the investor-state disputes. Thus, while taking into account that the authority of the international

[143] Ibid.
[144] Mance, Jonathan. "Arbitration—a Law unto itself?" *Arbitration International* (2016).

tribunal is derived from the arbitration agreement of the parties involved, the transnational law and its implications thereof may be equated to *lex mercatoria*, which offers many practical advantages. It applies uniformly and is independent of the peculiarities of each national law. It considers the needs of international relations and allows for a fruitful exchange between systems, which are sometimes excessively attached to conceptual distinctions and systems, which seek a just and pragmatic solution to particular situations. Thus, the principles that evolved in transnational law on corporate nationality are particularly useful in the context of multinational corporations.

In addition, it was established that there is evidence that the views and methods proposed by legal realists are present in international investment law and its jurisprudence. It was argued that although the rules on corporate nationality are relatively straightforward and direct, they still allow for various and different interpretations. The functions, roles, and the respective positioning of the social actors, the principles guiding their behavior, and their strategies in investment arbitration do fit within the theory of legal realists. Decisions of arbitrators are controlled by aspects such as psychological make-up, social context, arbitrator's ideologies, and professional consensus.

It was established that while arbitrators and counsel act in the jurisprudential philosophy of legal realism, this has had significant consequences for the development of international investment law. There is clear evidence of the realist perspective present in disputes concerning corporate structuring and, effectively, the corporate nationality. It was also established that the jurisprudential philosophy of legal realism influences the decision-making procedure in international investment law.

CHAPTER II – EVOLUTION OF CORPORATE NATIONALITY

Introduction to Chapter II

As established in Chapter I, contemporary international investment law brought newly formed rules on international personality and capacity, which merged both the municipal law and international law. The latter was reflected mainly in investor-state arbitration, i.e., rules on corporate nationality in transnational law were influenced by non-state actors and private international instruments that are a part of transnational law. It was also established that corporate nationality in international investment serves a purpose of simplicity and efficiency in making a foreign investment, enforcing contracts, and suing the host-state. Multinational corporations' national identity could no longer be determined by reference to structural, organizational and operational features since these aspects no longer reflect the true national identity of a multinational organization. The characteristics or classical tests used to establish corporate nationality in the 20th century no longer correspond to the realities of a modern transnational corporation.

It was also argued that there is evidence that the views and methods proposed by legal realists are present in international investment law and its jurisprudence. The functions, roles, and the respective positioning of the social actors, the principles guiding their behavior and strategies in investment arbitration, fit within the theory of legal realists that decisions of arbitrators are also controlled by the psychological make-up, social context, arbitrator's ideologies, and professional consensus. It was established that while arbitrators and counsel act in the jurisprudential philosophy of legal realism, this issue has had significant consequences upon the development of international investment law.

Chapter II of this thesis aims to advance these arguments further. In order to establish whether a multinational corporation's national identity may no longer be determined by reference to its structural or organizational features and that the classical tests establishing corporate nationality no longer correspond to the realities of modern transnational corporation, Chapter II will look at the roots of the notion of corporate nationality. In particular, since this thesis aims to explain the notion of corporate nationality in contemporary international investment law and the implications it has upon the future development of international investment law, it is necessary to address the evolution of the regulation of corporate nationality. The latter can only be achieved through the analysis of the provisions and principles which regulated the establishment of corporate nationality in early international commerce and in the sphere of diplomatic protection (Section 1).

After finding what principles and regulations were used to establish corporate nationality in customary international law, the analysis will shift to the rules that evolved in international investment law (Section 2). It will be discussed whether early principles and rules which had evolved in customary international law had somehow influenced the practice in international investment law and investment treaty arbitration. In addition, it will be determined whether

this development was influenced by the decision-makers – the arbitrators in the jurisprudential philosophy of legal realism.

SECTION 1 – NOTIONS OF CORPORATE NATIONALITY IN CUSTOMARY INTERNATIONAL LAW

2.1. Early notions of nationality

Notions of nationality in international law begin with a territory of a state[145]. When the boundaries of a territory of the state become established, then a concept of nationality becomes the necessary legal link between individuals living between the boundaries of such a territory or businesses operating within such territory.[146] This link of nationality also means that the state, which is connected by the concept of nationality with certain natural or legal persons living or operating within its territory, is entitled to certain rights and obligations that this link provides. These rights and obligations, in their simplest terms, would amount to the prescription of law governing the state's nationals, the exercise of extraterritorial jurisdiction over them, espousal of claims on their behalf, and the incurrence of liability for their wrongs[147]. When considering the notion of nationality, the International Court of Justice (ICJ) noted in the *Nottebohm* case that "nationality was a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties."[148]

The codification of the nationality rules in international law had begun in the context of creating stateless persons, when totalitarian countries had denationalised masses of their citizens or given other persons two or more nationalities[149].

One of the early examples of this was the issue brought before the Permanent Court of International Justice (PCIJ) in the *Tunis-Morocco Nationality Decrees* case[150]. The court was asked whether the dispute between France and Great Britain as to the Nationality Decrees issued in Tunis and Morocco (French zone) and their application to British subjects, is or is

[145] Weis, Paul. *Nationality and statelessness in international law*. Vol. 28. Brill, 1979; Crawford, James R. *The creation of states in international law*. Oxford University Press, 2006; Malanczuk, Peter. *Akehurst's modern introduction to international law*. Routledge, 2002.
[146] Matten, Dirk, and Andrew Crane. "Corporate citizenship: Toward an extended theoretical conceptualization." *Academy of Management review* 30.1 (2005): 166-179.
[147] Sloane, Robert D. "Breaking the genuine link: The contemporary international legal regulation of nationality." *Harvard International Law Journal* 50 (2009): 08-27.
[148] The Nottebohm Case. (Liechtenstein v. Guatemala) ICJ Reports, 1955, pp. 4, 23; 22 ILR, pp. 349, 360.
[149] Bisschop, W. R. "Nationality in International Law." (1943): 320-325; Weis, Paul. *Nationality and statelessness in international law*. Vol. 28. Brill, 1979.
[150] Nationality Decrees Issued in Tunis and Morocco (French Zone), Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4, at 24 (Feb. 7).

not, by international law, solely a matter of domestic jurisdiction? The court found that nationality falls within the domain of legal competence reserved to internal law, although it may, in certain circumstances, be limited by treaty obligations:

> "[T]he question whether a certain matter is or is not solely within the jurisdiction of a State is essentially relative question; it depends upon the development of international relations. Hence, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain"[151]

In light of similar considerations, in 1924, the Council of the League of Nations appointed a Committee of Experts on the Progressive Codification of International Law in order to "prepare a provisional list of the subjects of international law the regulation of which by the international agreement would seem to be most desirable and realizable at the present moment."[152] The result of the workings of this Committee was one of the most important documents on the nationality of its time[153] – The Hague Convention of 1930 Concerning Certain Questions Relating to the Conflict of Nationality Laws[154]. This Convention adopted the main principles regulating the notion of nationality in international law, which had not changed much until present times. Article 1 of The Hague Convention of 1930 provided that "It is for each State to determine under its own law who are its nationals" and Article 2 provided that "Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State." It is noted that the 1930 Convention had not addressed the nationality of a legal person separately. Also, following the conclusion of the 1930 Convention, the number of international instruments containing provisions on nationality has grown considerably[155]. However, none of these new international instruments had explicitly addressed the issue of nationality of a legal person or corporation.

As regards to legal entities or legal persons, it is clear that, as in the case of an individual, the existence of the bond of nationality is necessary for the purposes of the application of

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[151] Ibid, 24.

[152] Report on Nationality, Including Statelessness by Mr. Manley O. Hudson, Special Rapporteur, Topic: Nationality including statelessness Extract from the Yearbook of the International Law Commission:- 1952 , vol. II, A/CN.4/50.

[153] During the fourth session of the International Law Commission it was stated that "the 1930 Convention was one of the most significant International instruments, "because it .. . had also "been followed "by a definite trend towards the amendment of national laws" (A/CNA/SR .160, paragraph 23).

[154] Convention On Certain Questions Relating To The Conflict Of Nationality Laws, The Hague - 12 April 1930, see also Weis, Paul. *Nationality and statelessness in international law*. Vol. 28. Brill, 1979.

[155] The other most important agreements included the 1948 Universal Declaration of Human Rights, the 1954 Convention relating to the Status of Stateless Persons, the 1961 Convention on the Reduction of Statelessness, the Optional Protocols to the 1961 Vienna Convention on Diplomatic Relations concerning Acquisition of Nationality, the 1963 Vienna Convention on Consular Relations, the 1964 Convention of the International Commission on Civil Status on the exchange of information concerning acquisition of nationality, the 1966 International Covenant on Civil and Political Rights, the 1969 American Convention on Human Rights, and the 1973 Convention of the International Commission on Civil Status to reduce the number of cases of statelessness.

international law in relation to a legal person[156]. When considering the rules of international law, the bond of nationality was required for the purposes of diplomatic protection, i.e., in the sphere of the law on aliens, state responsibility, or the laws on succession. Hence, legal persons were usually considered to possess the nationality of the state under the laws they had been incorporated and to which they owed their legal existence, insofar as it was a matter of municipal law to determine whether an entity had legal personality at all[157].

However, it must be noted that when considering the issue of legal persons instead of natural persons, the purpose of the notion of nationality is different. As was argued, the notion of a legal person is in itself an unavoidable legal fiction since the law is a construct and an attempt at formalizing reality[158]. This is what also makes the nationality of a legal person different from the notion of the nationality of a natural person. As rightly noted by the early writers on the issue:

> "[The] definition of "nationality" and "domicil" in the case of corporate bodies, inasmuch as practical experience has shown that is convenient to use these expressions, without suspecting that anyone could be so foolish as to gather from such use the assumption that they are intended to mean the same thing as in the case of natural persons"[159]

There was no rigid notion of nationality concerning legal persons, and different tests of nationality were used for different purposes and contexts and in different instruments. Namely, the notion of nationality was used *inter alia* in order to classify a corporation as local or alien to apply certain protectionist economic restrictions, to define an "enemy" corporation, to qualify a legal person for national treatment under commerce treaties or to enjoy special treatment under tax treaties[160]. For this reason, it was the usual practice of states to provide, expressly in a treaty or in their domestic laws, which legal persons could enjoy the benefits of treaty provisions reserved to "nationals" or to define "national" companies for the application of national laws in specific fields (fiscal law, labor law, etc.).[161] Therefore, the bond which would link a legal person to a particular nationality would usually be found

[156] Caflisch, "La nationalité des sociétés commerciales en droit international privé", pp. 119.
[157] Seidl-Hohenveldern, *Corporations in and under International Law*, pp. 29–38.
[158] Vermeer-Künzli, Annemarieke. "As If: The Legal Fiction in Diplomatic Protection." *European Journal of International Law* 18.1 (2007): 37-68.
[159] Ernest J Schuster. Correspondence, Dr. Baty on Trading Corporations. To Editor of International Law Notes, in International law notes, Volumes 3-4 ,1918, p. 51.
[160] Hadari, Yitzhak. "The choice of national law applicable to the multinational enterprise and the nationality of such enterprises." *Duke Law Journal* (1974): 1-57.
[161] First report on State succession and its impact on the nationality of natural and legal persons, by Mr. Vaclav Mikulka, Special Rapporteur. Topic: Succession of States with respect to nationality/Nationality in relation to the succession of States Extract from the Yearbook of the International Law Commission:- 1995, vol. II(1), A/CN.4/467 p. 167.

either in the national law of a state or in a particular international treaty concerning a particular legal matter[162].

For example, treaties regarding state succession can be referred to as indicative of the regulation of nationality in early international law instruments. Article 54, paragraph 3 of the Treaty of Versailles[163] provided that "juridical persons will also have the status of Alsace-Lorrainers, as shall have been recognized as possessing this quality, whether by the French administrative authorities or by a judicial decision." Similarly, Article 75 of the Peace Treaty of Saint-Germain-en-Laye[164] provided that "Juridical persons established in the territories transferred to Italy shall be considered Italian if they are recognized as such either by the Italian administrative authorities or by an Italian juridical decision."

Therefore, specific treaties concerning specific legal matters regulated the enjoyment of particular nationality under specific regulations. The latter envisages the basic principle of the notion of the nationality of a legal person in the early sphere of international law, which was also reflected in the rules of nationality in international investment law.

It can also be observed that separate definitions of corporate nationality purposed for different legal relationships might be regarded as a method of convenience and practicality. The latter was also referred to when discussing the notion of corporate nationality in transnational law.

2.2. Notions of nationality in the sphere of diplomatic protection

The notion of the nationality of a legal person has gained more attention in the sphere of diplomatic protection. In 1758 the Swiss jurist Emmerich Vattel expounded the fundamental principle of diplomatic protection when he wrote that "Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen."[165] Although this principle may be regarded as a more general means to regulate corporate nationality and not a practical means, as such, it must be noted that the affirmation of diplomatic protection evolved from the dominant positivist view that states were the only *subjects* of international law while individuals were only the *objects* of international law. As a result, "when a national of one state suffered an

[162] Some authors had referred to such a link as the one of 'attachment': "each state legal order is free to choose the point of points of attachment (domicile, nationality, ect.) it deems appropriate" Caflisch, "La nationalité des sociétés commerciales en droit international privé", pp. 123.
[163] Treaty of Versailles of 28 June 1919, at the end of World War I.
[164] Treaty of Saint-Germain-en-Laye (1919).
[165] E. Vattel, *The Law of Nations, or the Principles of Natural Law*, Classics of International Law, Book II, Chapter VI at 136 (ed. C. Fenwich transl. 1916)).

injury within the territory of another state, on the international law level, that injury was regarded as an injury to the former of the two states."[166]

The nationality of legal persons in the sphere of diplomatic protection was firstly regulated by one of the topics central to diplomatic protection – the nationality of claims. This principle required that from the time of the occurrence of the injury, until the making of the award, the claim continuously and without interruption must belong to a person or to a series of persons having the nationality of the State by whom it was put forward[167]. The principle was explained by the World Court, 1924, in the *Mavrommatis Palestine Concessions Case*[168], where the Court stated: "By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a state is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law."[169]

The Nottebohm case

In this context, an important case in the sphere of diplomatic protection is the *Nottebohm Case*[170]. Although this case concerned the nationality of a natural person, it had also provided a useful elaboration on the principles which indicated the rules of nationality, as used in the sphere of diplomatic protection[171]. This case concerned Nottebohm, a German citizen who had a business in Guatemala and applied for citizenship of Liechtenstein one month after the start of World War II. Although Liechtenstein approved the naturalisation application, on his return to Guatemala, Nottebohm was refused admittance, being deemed a German national. Liechtenstein brought an action before the ICJ to compel Guatemala to recognize Nottebohm as one of its nationals. However, Guatemala referred to the well-established principle that it is the bond of nationality between the State and the individual, which alone confers upon the State the right of diplomatic protection[172]. Liechtenstein considered itself to be acting in

[166] Borchard, Edwin Montefiore. *The Diplomatic Protection of Citizens Abroad, Or, The Law of International Claims*. Banks Law Pub., 1915; Amerasinghe, Chittharanjan Felix. *Diplomatic protection*. Oxford University Press, USA, 2008.
[167] Oppenheim's International Law 512 (Jennings, ed. 9th, 1992).
[168] the *Mavrommatis Palestine Concessions* case, PCIJ in 1924 , P.C.I.J. Ser. A, No.2 , p. 11-12.
[169] "This right is necessarily limited to intervention [by a State] on behalf of its own nationals because, in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection, and it is as a part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rules of international law must be envisaged." (Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I. J., Series A/B, No. 76, p. 16.).
[170] The Nottebohm Case. (Liechtenstein v. Guatemala) ICJ Reports, 1955, pp. 4, 23; 22 ILR, pp. 349, 360.
[171] See further Jones, J. Mervyn. "The Nottebohm Case." *International and Comparative Law Quarterly* 5.02 (1956). 230-244; Harris, David. "The Protection of Companies in International Law in the light of the Nottebohm case." *International and Comparative Law Quarterly* 18.02 (1969): 275-317; Brownlie, Ian. "Relations of Nationality in Public International Law, The." *Brit. YB Int'l L.* 39 (1963): 284.
[172] See further Vicuña, Francisco Orrego. "Changing Approaches to the Nationality of Claims in the Context of Diplomatic Protection and International Dispute Settlement."*ICSID REVIEW* 15.2 (2000): 340-361; Anaya,

conformity with this principle and contended that Nottebohm was, in fact, its national, by virtue of the naturalization conferred upon him. Thus, the Court considered whether the naturalization could be validly invoked against Guatemala and whether it bestowed upon Liechtenstein a sufficient title to exercise protection in respect of Nottebohm, as against Guatemala, and therefore entitled it to seize the Court of a claim relating to him.

While holding that the claim of Liechtenstein should be inadmissible, the Court found that nationality is within the domestic jurisdiction of the State, which settles, by its legislation, the rules relating to the acquisition of its nationality. However, the Court acknowledged that in some instances, States had conferred their nationality upon the same individual, which extended this situation to the international field, where international arbitrators or the Courts of third States which are called upon to deal with this situation, would, in order to resolve the conflict they have, need to give their preference to the real and effective nationality[173]. According to the Court, the latter should be based on stronger factual ties between the person concerned and one of these States whose nationality is involved. Such factual ties could be the habitual residence of the individual concerned, the center of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children and others.

What is particularly noteworthy is that the Court had acknowledged the role of international arbitrators and their discretionary power to assess the mentioned criteria. As it was observed, such discretionary power is, in itself, an important issue to assess when considering the development of rules on the establishment of corporate nationality.

It is also crucial that the Court had recognized that international law leaves it to each State to lay down the rules governing the grant of its own nationality, since no general agreement on the rules relating to nationality existed[174]. However, it was also stated that a State could not claim that the rules it has laid down are entitled to recognition by another State unless it has acted in conformity with a general aim of making the nationality granted, accord with an effective link between the State and the individual.

Therefore, it can be observed that the ICJ in the *Nottebohm* case, while acknowledging the prerogative of national laws to define their nationals, had established that in the sphere of international disputes, the State concerned may not solely base its position in respect of nationality upon municipal law. According to the Court's rationale in the *Nottebohm* case, in case of international dispute on nationality, preference should be given to the real and effective nationality.

S. James. "Capacity of International Law to Advance Ethnic or Nationality Rights Claims, The." *Iowa L. Rev.* 75 (1989): 837; Wang, Erik B. "Nationality of Claims and Diplomatic Intervention,"(1965)." *Can. Bar Rev.* 43: 136.

[173] Forcese, Craig. "Shelter from the storm: rethinking diplomatic protection of dual nationals in modern international law." *Geo. Wash. Int'l L. Rev.* 37 (2005): 469.

[174] Flournoy, Richard W. "Nationality Convention, Protocols and Recommendations Adopted by the First Conference on the Codification of International Law."*American Journal of International Law* (1930): 467-485.

The Barcelona Traction case

The nationality of legal persons was firstly considered, in length, in the landmark *Barcelona Traction* case[175]. The Barcelona Traction Company was a holding company incorporated under the laws of Canada, but in essence, controlled by Belgian shareholders. Due to certain restrictions on foreign currency imposed by Spain after World War II, which had eventually made the company bankrupt, Belgium submitted a claim to the ICJ on the grounds that it was entitled to exercise diplomatic protection on behalf of the Belgian shareholders of the company.

First, the ICJ took the view that the nationality of the company was Canadian since Canada was its place of incorporation:

> "In allocating corporate entities to states for purposes of diplomatic protection, international law is based, but only to a limited extent, on an analogy with the rules governing the nationality of individuals. The traditional rule attributes the right of diplomatic protection of a corporate entity to the state under the laws of which it is incorporated and in whose territory it has its registered office. These two criteria have been confirmed by long practice and by numerous international instruments. This notwithstanding, further or different links are at times said to be required in order that a right of diplomatic protection should exist. Indeed, it has been the practice of some states to give a company incorporated under their law diplomatic protection solely when it had its seat (siége social) or management or centre of control in their territory, or when a majority or a substantial proportion of the shares has been owned by nationals of the state concerned. Only then, it has been held, does there exists between the corporation and the state in question a genuine connection of the kind familiar from other branches of international law. However, in the particular field of the diplomatic protection of corporate entities, no absolute test of the "genuine connection" has found general acceptance."[176]

What is important in the context of corporate nationality is that the Court acknowledged, firstly, that when considering the nationality of a legal person in the sphere of diplomatic protection, analogies drawn from rules governing the nationality of natural persons could only be relied upon to a minimal extent. The latter confirms the view expressed above that rules on nationality of natural persons should not be paralleled to the rules of the nationality

[175] Case Concerning The Barcelona Traction, Light And Power Company, Limited, (New Application: 1962), (Belgium V. Spain), Second Phase, Judgment of 5 February 1970.
[176] Ibid, para 70.

of legal persons. Also, the Court had explicitly rejected the genuine link principle, provided in the *Nottebohm* case. According to the *Barcelona Traction* case, the rules arising in consideration of nationality of a natural person, which would enable the court to look beyond the formal incorporation criteria, i.e., such subjective matters as stronger factual ties between the [legal] person concerned and one of these States whose nationality is involved, their residence, the centre of interests, ties, and others – are not applicable when considering the nationality of a legal person.

Moreover, the ICJ determined that in the field of diplomatic protection that the Court should not make rules of international law dependent upon categories of municipal law, since international law has to recognize a corporate entity as an institution created by States in a domain, essentially, within their domestic jurisdiction. This rationale of the court confirms the argument that rules concerning the nationality of a natural person and rules concerning the nationality of a legal person are different in their objective and could not and should not be applied in the same manner.

Considering the statements provided in the *Nottebohm* and *Barcelona Traction* cases, it can be observed that, while in the sphere of international law, rules on nationality of a natural person may be based on both municipal law and international law. However, in cases regarding legal persons, the court may not deviate from municipal law[177].

Another important observation to be drawn from the *Barcelona Traction* case concerns the rules on piercing the corporate veil:

> "The law has recognized that the independent existence of the legal entity cannot be treated as an absolute. It is in this context that the process of "lifting the corporate veil' or "disregarding the legal entity' has been found justified and equitable in certain circumstances or for certain purposes. The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations... . However, it has also been operated from within, in the interest of - among others - the shareholders, but only in exceptional circumstances."[178]

What is important in this paragraph is the acknowledgment by the ICJ that the legal fiction of a legal person may, in particular, and very specific situations, be ignored to prevent the abuse of law. This approach by the Court is no different from the one found in the first paragraph cited above, since the ICJ introduced a principle found in municipal law instead

[177] Seidl-Hohenveldern, Ignaz. *Corporations in and under International Law*. No. 6. Cambridge University Press, 1987; Mann, Francis A. "International Corporations and National Law." *Brit. YB Int'l L.*42 (1967): 145; Staker, Christopher. "Diplomatic protection of private business companies: determining corporate personality for international law purposes." *British Yearbook of International Law* 61.1 (1991): 155-174.
[178] *Barcelona Traction*, p. 36.

of its reference to international law. However, it can be stated that the essence of the doctrine of piercing the corporate veil is not concerned with the nationality issue. On the other hand, some cases, such as tax avoidance or money laundering matters, could relate to matters concerning the establishment of nationality that could be used to provide some misuse of privileges or breach of creditors' rights.

Barcelona Traction also explained that reference to municipal law, when considering the nationality of a legal person, is also necessary because of the structure of the legal person itself[179]. As stated by the ICJ:

> "[I]t is well known that there are rights which municipal law confers upon the latter [shareholders] distinct from those of the company, including the right to any declared dividend, the right to attend and vote at general meetings, the right to share in the residual assets of the company on liquidation. Whenever one of his direct rights is infringed, the shareholder has an independent right of action."[180]

This statement of the ICJ can be interpreted as a confirmation that providing a reference to municipal law when establishing nationality of a legal person is also necessary for protection of shareholders rights since it is only the specific law of incorporation of a particular State that would refer to the content of rights possessed by shareholders of a company. Thus, a reference to municipal law, when considering the nationality of a legal entity, would ensure that shareholders receive protection and a right of action[181].

Insights from *Barcelona Traction* will be used throughout the thesis. However, in this part of the discussion, it can be observed that *Barcelona Traction* case had clearly and rightly identified the distinction between applicable methods when considering the nationality of a legal person, which must be different from those used when considering the nationality of a natural person. However, the Court's direction to refer to municipal law to find the right corporate nationality means that the ICJ had acknowledged that no internationally accepted principles existed, which would define corporate nationality.

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[179] Thomsen, Steen, and Torben Pedersen. "Nationality and ownership structures: The 100 largest companies in six European nations." *MIR: Management International Review* (1996): 149-166; Yip, George S., Johny K. Johansson, and Johan Roos. "Effects of nationality on global strategy." *MIR: Management International Review* (1997): 365-385. Pedersen, Torben, and Steen Thomsen. "European patterns of corporate ownership: A twelve-country study." *Journal of International Business Studies*(1997): 759-778; Perlmutter, Howard V. "Multinational Corporation." (2001).

[180] *Barcelona Traction*, para 47.

[181] Fisch, Jill E. "Measuring efficiency in corporate law: the role of shareholder primacy." *J. Corp. L.* 31 (2005): 637. Wood, Donna J. "Business Citizenship." *The Ruffin Series of the Society for Business Ethics* 3 (2002): 59-94.

The ELSI case

Another critical case on corporate nationality was the *Case Concerning Elettronica Sicula S.P.A. (ELSI)*[182], examined by the ICJ. ELSI was an Italian corporation wholly owned by the United States corporations Raytheon Company (Raytheon), which held 99.16 percent of the shares, and its subsidiary the Machlett Laboratories (Machlett), which held the remaining 0.83 percent. Since ELSI was in economic trouble, it prepared to close its plant in Italy. However, the Italian authorities pressed ELSI not to close the plant, and the Mayor of Palermo issued an order requisitioning ELSI's plant and related assets for six months. In 1974, the United States transmitted a note to Italy enclosing a claim on behalf of Raytheon, based on several alleged violations of the Treaty of Friendship, Commerce and Navigation, concluded between Italy and the United States. The essential circumstance is that, according to an agreement between the parties, the case was heard by the ICJ.

The *ELSI* case provides two crucial observations into the inquiry of the nationality of a legal person[183]. First of all, it must be noted that the *ELSI* case, besides the principles of diplomatic protection, also referred to the Treaty of Friendship, Commerce and Navigation, concluded between Italy and the United States. As was mentioned above, the notion of the nationality of a legal person may be defined and, accordingly, interpreted differently in different legal contexts, which consist of different legal instruments. As noted in *Barcelona Traction:*

> "Obligations [,] the performance of which is the subject of diplomatic protection [,] are not of the same category [as *Erga Omnes*] … [for] in order to bring a claim in respect of the breach of such an obligation, a State must first establish its right to do so. Responsibility is the necessary corollary of a right. *In the absence of any treaty on the subject between the Parties*, this essential issue has to be decided in the light of the general rules of diplomatic protection."[184] [emphasis added].

Therefore, although the *ELSI* case was decided by the ICJ, it can be argued that this case was also early investment case[185]since it was decided in accordance with both – the principles of

[182] Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy), 1989 I.C.J. 15 (July 20).
[183] Palenzuela, Alexander L. "International Court of Justice and the Standing of Corporate Shareholders under International Law: Elettronica Sicula v. Raytheon (US v. Italy), The." *U. Miami YB Int'l L.* 1 (1991): 292; Emberland, Marius. "The International Court of Justice and Companies: Is It Possible to Discern A" Structural Bias" at the Court Regarding Private Economic Enterprise?." *International Community Law Review* 9.2 (2007): 187-208.
[184] "The first is that the defendant State has broken an obligation towards the national State in respect of its nationals. The second is that only the party to whom an international obligation is due can bring a claim in respect of its breach." *(Reparation for Injuries Suflered in the Service of the United Nations, Advisory Opinion, I.C. J. Reports 1949,* pp. 181-182.).
[185] Murphy, Sean D. "ELSI Case: An Investment Dispute at the International Court of Justice, The." *Yale J. Int'l L.* 16 (1991): 391.

diplomatic protection and the Treaty of Friendship, Commerce and Navigation between Italy and the United States[186].

It is notable that in *ELSI* case, Italy had challenged the United States' standing in the case, based on the provisions of the FCN Treaty and the principles of customary international law. In Italy's view, the Treaty of Friendship, Commerce and Navigation between Italy and the United States had not provided foreign investors with any more rights than customary international law. Italy claimed that since ELSI was incorporated in Italy under the Italian law and the FCN Treaty determined the nationality of a subsidiary by its state of incorporation, it reasoned that the FCN Treaty did not protect the rights and interests of foreign investors in locally incorporated subsidiaries, concerning actions against those companies by the host government.

Although not expressly cited by the Court in its final ruling, Judge Oda's concurring opinion in *ELSI* also emphasized that rules on the establishment of the nationality of legal persons concerned the application and interpretation of provisions of the Treaty of Friendship, Commerce and Navigation:

> "Can it be presumed that any of these rights guaranteed to United States corporations under the 1948 FCN Treaty... are relevant to those of Raytheon and Machlett as shareholders of ELSI? The Treaty guarantees the right of the United States to hold as much as 100 per cent of the stock of an Italian company. Yet there is no reason to interpret the [U.S.-Italy] FCN Treaty as having granted to those nationals or corporations of one State party that hold shares in a corporation of the other State party any further rights in addition to those to which the same shareholders would have been entitled under Italian law as well as under the general principles of [municipal] company law."[187]

[186] A similar situation had arisen in *the Delagoa Bay Railway Arbitration* (United Kingdom and United States v Portugal, (1888-1889)). The arbitration concerned the question of what compensation was due from Portugal for its rescission of a railway concession and seizure of a railroad. Some authors argue that the tribunal's reasoning in the Delogoa arbitration is relevant to the law of the diplomatic protection of corporations in international law. However, the Award in the latter arbitration did not specify whether general principles of law were applicable, since the terms of the arbitration treaty had governed the arbitration proceedings. Thus the question as to whether the principles of diplomatic protection are applicable should be based on the text of the arbitration agreement, or agreement where the arbitration clause is contained. The latter could be similar to the substitution theory as noted by the ICJ in *Diallo* case - "the theory of protection by substitution seeks to offer protection to the foreign shareholders of a company who could not rely on the benefit of an international treaty and to whom no other remedy is available, the allegedly unlawful acts having been committed against the company by the State of its nationality. Protection by "substitution" would therefore appear to constitute the very last resort for the protection of foreign investments."

[187] Case Concerning Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy), 1989 I.C.J. 15, 88- 89 (Judgment of July 20) (Oda, J., concurring).

As can be observed, Judge Oda's concurring opinion references the law applicable to the legal person, which is the law of incorporation[188]. As explained in the Concurring opinion of Oda in *ELSI*, such a claim of diplomatic protection could be possible if the United States were to have based its claim, not on the provisions of the FCN Treaty, but customary international law:

> "Thus the United States could have espoused the cause of ELSI on the grounds of "denial of justice" if the judgment of the domestic court of Italy at the highest level had been found to be "manifestly unjust" in its application of the FCN Treaty."[189]

Therefore, although the *ELSI* case is often referred to as a case concerning diplomatic protection, which provided rules on the standing of foreign shareholders in espousing a claim against a State[190], it can be argued that the *ELSI* case is more critical in the sense that it applied specific terms of the Treaty of Friendship, Commerce and Navigation between Italy and the United States. The latter had its own rules on establishing nationality and, effectively, the standing of claimants. This case had also confirmed that reference to municipal law should be made first when inquiring into the nationality of a legal person.

The Diallo case

One of the latest cases on diplomatic protection examined by the ICJ, which had considered the nationality of a legal person, was the *Diallo* case[191]. The decision in the case is important in the context of the nationality of legal persons since "it completes and adjusts previous

[188] A different scenario would occur in cases when customary international law is invoked as a means to settle a dispute arising in the time of war. As it was observed in the *Interhandel* case "The Government of the United States submits that according to international law the seizure and retention of enemy property in time of war are matters within the domestic jurisdiction of the United States and are not subject to any international supervision. All the authorities and judicial decisions cited by the United States refer to enemy property; but the whole question is whether the assets of Interhandel are enemy or neutral property. There having been a formal challenge based on principles of international law by a neutral State which has adopted the cause of its national, it is not open to the United States to say that their decision is final and not open to challenge; despite the American character of the Company, the shares of which are held by Interhandel, this is a matter which must be decided in the light of the principles and rules of international law governing the relations between belligerents and neutrals in time of war", see Interhandel, Switzerland v United States, Preliminary Objections, Judgment, ICJ GL No 34, [1959] ICJ Rep 6, ICGJ 171 (ICJ 1959), 21st March 1959, International Court of Justice [ICJ].

[189] Oda, para 92.

[190] Staker, Christopher. "Diplomatic protection of private business companies: determining corporate personality for international law purposes." *British Yearbook of International Law* 61.1 (1991): 155-174; Gill, Terry D. "International Court of Justice--diplomatic protection--US-Italian Treaty of Friendship, Commerce and Navigation." *AJIL* 84 (1990): 249-973.

[191] Judgment on preliminary objections in Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) ('Diallo Case'), rendered on 24 May 2007.

judgments and decisions in matters of diplomatic protection covered by customary international law."[192]

In the *Diallo* case, the Republic of Guinea instituted a diplomatic protection claim against the Democratic Republic of the Congo ('DRC') because of the alleged violation of various international rights of one of its nationals, Ahmadou Sadio Diallo, who had established two companies under Congolese (Zairean) law. These companies were owed large sums of money by the Congolese public institutions. However, all attempts by Mr. Diallo to recover the sums owed were undermined by Congolese authorities.

The important objection in the *Diallo* case concerned an argument of the DRC that Guinea lacked standing to diplomatically protect Diallo's property because that property was owned by companies not possessing Guinean nationality. Although DRC accepted that a state has the right to diplomatically protect its nationals when there is an injury to the direct rights of shareholders in a corporate entity (*Barcelona Traction*), DRC contended, however, that Guinea was in fact seeking compensation for alleged violations of rights possessed by Diallo's companies, not its shareholders. Thus, as argued by the DRC, Diallo's direct rights were not violated.

What is essential in this part of the discussion is that the ICJ had firstly distinguished the *Diallo* case from the *Barcelona Traction* case, noting that *Barcelona Traction* involved a public limited company whose capital was represented by shares, while the *Diallo* case concerned a company whose capital was composed of parts *sociales*. Therefore, the ICJ established that to find the precise legal nature of companies in the *Diallo* case, the court needed to refer to the domestic law of the DRC. The court found that Congolese law accorded the companies concerned an independent legal personality, distinct from that of its *associés*, particularly, in that the property of the *associés* was completely separate from that of the company, and in that the *associés* were responsible for the debts of the company, only to the extent of the resources they have subscribed. Therefore, the company's debts were receivable from and owing to third parties related to its respective rights and obligations.

Furthermore, the ICJ stated that that the exercise by a State of diplomatic protection on behalf of a natural or legal person, who is *associé* or shareholder, having its nationality, sought to engage the responsibility of another State, for an injury caused to that person by an internationally wrongful act, committed by that State. Most importantly, the court noted that what amounts to the internationally wrongful act, in the case of *associés* or shareholders, is

[192] Knight, Stephen J., and Angus J. O'Brien. "Ahmadou Sadio Diallo-Republic of Guinea v. Democratic Republic of The Congo-Clarifying the Scope of Diplomatic Protection of Corporate and Shareholder Rights." *Melb. J. Int'l L.* 9 (2008): 151; Alvarez-Jimenez, Alberto. "Minimum Standard of Treatment of Aliens, Fair and Equitable Treatment of Foreign Investors, Customary International Law and the Diallo Case before the International Court of Justice." (2008).

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[193].

Therefore, the ICJ established that diplomatic protection of the direct rights of *associés* of the companies in Diallo, or shareholders of a public limited company, is not to be regarded as an exception to the general legal regime of diplomatic protection for natural or legal persons, as derived from customary international law.

Thus, when considering the objection to the precise legal nature of Mr. Diallo's companies and their legal dependence, the ICJ referred exclusively to the domestic law of the state of incorporation, i.e., Congolese law, and found that the companies were independent legal personalities distinct from that of their shareholders. The court also noted that the right of the shareholders' state of nationality, to seek diplomatic protection on behalf of affected shareholders, is an essential element of the customary legal regime of diplomatic protection. Thus, the court stated that Guinea had a standing since its action sought to protect the shareholder rights of its national, Mr. Diallo.

As can be observed, the court's rationale in the *Diallo* case is quite similar to the arguments provided by Judge Oda in his concurring opinion in the *ELSI* case. The ICJ, in the *Diallo* case, confirmed that in order to establish the precise legal nature of companies while considering their nationality in disputes concerning diplomatic protection, the court needs to refer to the domestic (municipal) law. The latter is also necessary when inquiring whether individual shareholders of a company have a standing in diplomatic protection. The latter can only be established by the reference to the law of incorporation of a company concerned, i.e., the municipal law of the country, which is also consistent with the findings of the court in the *Barcelona Traction* case. Thus, arguments that "the *Barcelona Traction* case no longer represents the rules of diplomatic protection of legal persons in customary international law"[194] do not seem accurate when considering the conclusions brought in both the *ELSI* and *Diallo* cases.

Draft Articles of Diplomatic Protection

The ICJ in the *Diallo* case had, for the first time, referred to the 2006 International Law Commission (ILC) Draft Articles on Diplomatic Protection[195]. The drafting of ILC Articles

[193] Juratowitch, Ben. "Diplomatic protection of shareholders." *British Yearbook of International Law* (2011): brr009; Parlett, Kate. "Role of Diplomatic Protection in the Protection of Foreign Investments." *The Cambridge Law Journal* 66.03 (2007): 533-535.

[194] Lee, Lawrence Jahoon. "Barcelona Traction in the 21st Century: Revisiting Its Customary and Policy Underpinnings 35 Years Later." *Stan. J. Int'l L.* 42 (2006): 237.

[195] Text adopted by the International Law Commission at its fifty-eighth session, in 2006, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report, which also contains commentaries on the draft articles, appears in Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10).

on Diplomatic Protection was initially seen as belonging to the study of state responsibility[196]. Currently, ILC Articles largely codify existing customary international law on the protection of nationals abroad by means of diplomatic protection[197].

What is important in this part of the discussion is that these ILC Articles also provided the jurisdictional clause on the state of nationality of a corporation in Article 9:

> "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."[198]

As can be observed, while endorsing the basic principle of the place of incorporation, which was confirmed in the *Barcelona Traction* case, Article 9 of the ILC Articles also confirms the right of diplomatic protection of corporations and shareholders in corporations (in the *ELSI* and *Diallo* cases). However, it also provides an exception in a particular situation, where there is no other significant link or connection between the State of incorporation and the corporation itself. Where significant individual connections exist with another State, that other State is to be regarded as the State of nationality for the purposes of diplomatic protection. The latter can be regarded as an endorsement of the genuine link theory, borrowed from the *Nottebohm* case. The commentary on the Draft Articles provides that:

> "an exception in a particular situation where there is no other significant link or connection between the State of incorporation and the corporation itself, and where certain significant connections exist with another State, in which case that other State is to be regarded as the State of nationality for the purpose of diplomatic protection. Policy and fairness dictate such a solution."[199]

Therefore, although the commentary of Draft Articles takes note of the Court's dictum in the *Barcelona Traction* case that "in the particular field of the diplomatic protection of corporate entities, no absolute test of the 'genuine connection' has found general acceptance"[200], the

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[196] Although a number of reports were submitted by the Rapporteur, the conviction gradually grew that it was undesirable to confine the subject of state responsibility to that for injury to aliens. From 1962 onwards, the ILC accordingly proceeded to codifying secondary rules pertaining to state responsibility in general, which entailed that the earlier subject of responsibility for injury to aliens was left aside. See Zieck, Marjoleine. "Codification of the Law on Diplomatic Protection: The first eight draft articles." *Leiden journal of international law* 14.01 (2001): 209-232.

[197] Dugard, John. *First report on diplomatic protection*. International Law Commission, 2000.

[198] Article 9, the 2006 International Law Commission (ILC) Draft Articles on Diplomatic Protection.

[199] Commentaries on the draft articles, Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10).

[200] *Barcelona Traction*, p. 42.

Draft Articles still provide for an alternative test of a genuine link. Inclusion of the latter may be regarded as an impact of the civil law tradition for countries whose municipal law, in some instances, expressly require the real seat, or effective management criteria, to be satisfied, as will be observed in the following Sections.

Therefore, the State of nationality with the right to exercise diplomatic protection is either the State of incorporation or, if the required conditions are met, the State of the seat of management and financial control of the corporation.

Furthermore, Article 11 of the Daft ILC Articles also provides a separate provision on protection of shareholders:

> "The State of nationality of shareholders in a corporation shall not be entitled to exercise diplomatic protection in respect of such shareholders in the case of an injury to the corporation unless:
>
> (a) The corporation has ceased to exist according to the law of the State of incorporation for a reason unrelated to the injury; or
>
> (b) The corporation had, at the date of injury, the nationality of the State alleged to be responsible for causing the injury, and incorporation in that State was required by it as a precondition for doing business there."[201]

This provision reinforces the principle of diplomatic protection that a corporation is to be protected by the State of the nationality of the corporation, and not by the State or States of the nationality of the shareholders. This principle was established by *Barcelona Traction*. Article 11 also provides a very limited basis, where the State of the nationality of shareholders may be entitled to exercise the diplomatic protection in cases where it is impossible, or it would not be reasonable to act in the name of a corporation.

Finally, Article 12 of the Draft Articles defines the case when there is a direct injury to shareholders (*ELSI* and *Diallo* cases), in which case, the State of the nationality of any such shareholders is entitled to exercise diplomatic protection in respect of its nationals[202].

[201] Article 11, the 2006 International Law Commission (ILC) Draft Articles on Diplomatic Protection.

[202] It is noted, that the ICJ in *LaGrand* confirmed that individual rights exist, and that diplomatic protection is the proper mechanism for claiming these rights without pretending that they are in reality a state's own rights. However, the Court in *Avena* dismissed the exercise of diplomatic protection and treated the protection on behalf of the Mexican nationals as a claim based on direct injury (LaGrand Case (Germany v. United States) I.C.J. 2001 I.C.J. 466; Case Concerning Avena and other Mexican Nationals (Mexico v. United States of America) 2004 I.C.J. 1 (Mar 31).

2.3. Implications of the rules on diplomatic protection

It can be stated that the notion of the nationality of legal persons in customary international law was strongly influenced by the regulation of the nationality of natural persons. However, nationality rules on legal persons or corporations were different, depending on the legal context and legal relationships involved. Different nationality rules concerning legal persons were found in different national and international legal instruments, such as the rules of accession and rules on enemy corporations, trade, subsidies, and diplomatic protection.

The latter entails that the main principle which has evolved from the early international law is that the state or states, when in bilateral or multilateral relationship, can define for themselves who their nationals are, for a specific purpose and in a specific legal context. This can also be referred to as the attribution of nationality. For example, a legal person may be considered as having nationality of a particular state for the purposes of law on enemy corporations but may not be considered as having a specific nationality for the purposes of tax law[203]. However, that is not the case in the sphere of diplomatic protection, where the basis of finding the right corporate nationality is through reference to municipal law.

In any case, it may be argued that, when it comes to determining the nationality of a legal person, general determinations may not be applied. There is no uniform rule. For example, one cannot apply nationality rules concerning legal persons from regulation concerning tax to a legal relationship arising in the sphere of diplomatic protection. As provided by the ICJ in the *Panevezys-Saldutiskis Railway* case, a state's right of intervention, in the context of diplomatic protection is only possible where a specific law or treaty exists, which governs a particular legal relationship:

> "This right is necessarily limited to intervention [by a State] on behalf of its own nationals because, in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection, and it is as a part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rules of international law must be envisaged."[204]

Similarly, the ICJ in *Barcelona Traction* observed that only "in the absence of any treaty on the subject between the Parties, this essential issue has to be decided in the light of the general rules of diplomatic protection."[205]

This explains the importance of the ICJ's rationale in the *Barcelona Traction* case that when a State admits foreign investments or foreign nationals into its territory, whether they are

[203] See Article 36 of the Trading With The Enemy Act of 1917 of USA; Act Oct. 6, 1917, CH. 106, 40 STAT. 411.
[204] Panevezys-Saldutiskis Railway, Judgment, *1939,* P.C.I. J., Series *A/B,* No. 76, p. 16.
[205] *Barcelona Traction*, p. 36.

natural or legal persons, it is bound to extend to them the protection of the law and assume obligations concerning the treatment to be afforded to them. This is a reference to a specific legal relationship and not an "absolute or unqualified obligations of a State towards the international community as a whole," such as *erga omnes* obligations. Therefore, obligations, the performance of which are the subject of diplomatic protection, are not of the same category as *erga omnes* obligations. Similarly, the rules concerning access to the observance of such specific obligations must also be based on specific rules of accessibility, i.e., in our case, the specific rules of a legal person's nationality. As explained by the ICJ, in *Barcelona Traction*:

> "[I]n order to bring a claim in respect of the breach of such an obligation, a State must first establish its right to do so, for the rules on the subject rest on two suppositions, the first is that the defendant State has broken an obligation towards the national State in respect of its nationals. The second is that only the party to whom an international obligation is due can bring a claim in respect of its breach."[206]

Therefore, when considering the notion of the nationality of a legal person in customary international law and not necessarily in the sphere of diplomatic protection, one must first establish and define a specific legal relationship and individual legal instruments from which such a specific legal relationship had arisen, or where it is defined. Only then the rules of access or admissibility could be found, which would lead the interpreter to the specific rules on the nationality of a legal person. As observed above, only in a case of the absence of a specific treaty or legal instrument defining the nationality of a legal person could general rules of customary international law and rules of diplomatic protection be applied.

Secondly, it can be stated that the principles on the establishment of a legal person's nationality provided in the *Barcelona Traction* case would not apply where a breach of a treaty provision is involved. The treaty itself would provide rules on the establishment of nationality. The latter explains the fact that in the presence of customary international law, States can create treaties that define the rights of their nationals, such as shareholders in foreign corporations.

Thirdly, it was observed that the main principle of establishing the nationality of a legal person, at least one concerning the issues on diplomatic protection, is a reference to the national (municipal) law of the country. The latter was explained by the ICJ in *Barcelona Traction,* where it was stated that:

> "if the Court were to decide the case in disregard of the relevant institutions of municipal law it would, without justification, invite serious legal difficulties. It would lose touch with reality, for there are no corresponding institutions of international law to which the Court could

[206] Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C. J. Reports 1949, pp. 181-182.

resort. Thus the Court has, as indicated, not only to take cognizance of municipal law but also to refer to it."[207]

2.4. Principles of diplomatic protection and international investment law

Since the adoption of the Draft Articles on Diplomatic Protection, it was argued that the rules concerning this sphere of customary international law had been settled. In fact, now the ICJ had a set of rules which summarised all the results of the prominent Court cases on diplomatic protection and the deliberations contained therein.

However, it is well known that international investment law, which is the main object of this thesis, had evolved into separate rules of law, which, although in some cases are similar, remain separate from the law on diplomatic protection. As some authors argue, international investment law should be considered as one of the two main branches of international economic law, which also includes the international trade regulation: "As economic and social phenomena, international trade and investment law are inextricably linked. Yet like twins separated at birth, the regulation of these economic areas has been entrusted to discrete legal systems, with different characteristics"[208].

When considering the separation of international investment law into a separate set of rules and principles, one should refer to the Havana Charter and the negotiations surrounding the International Trade Organization (ITO) [209]. During the ITO negotiations, articles on investment protection with provisions for national treatment, most-favoured-nation (MFN) treatment, and just compensation for expropriation were introduced. However, since the States were unable to agree on the standards, the Havana Charter never came into force and the ITO was never established. Thus, the General Agreement on Tariffs and Trade (GATT) was applied provisionally, without an overarching ITO framework, and with an absence of international investment provisions. The latter meant that international trade and investment started to develop independently of one another.

Considering the latter, the next section will refer to the rules of international investment law and the bilateral and multilateral investment treaty provisions, which have evolved into a separate system of law. It will be analyzed whether international investment law endorses the rules and principles, which have evolved in customary international law and, primarily, the rules of diplomatic protection on the establishment of the nationality of legal persons[210]. Also,

[207] Barcelona Traction, para 50.
[208] Roberto Echandi, Pierre Sauvé. Prospects in International Investment Law and Policy: World Trade Forum, Cambridge University Press, 2013, p. 140; see also See M. Trebilcock & R. Howse, *The Regulation of International Trade*, 3rd edn (London: Routledge, 2005) at 439-446.
[209] *Havana Charter for an International Trade Organization*, 24 Mar. 1948, UN Conference on Trade and Employment, U.N. Doc. E/CONF.2/78, Sales No. 1948.II.D.4.
[210] Douglas, Zachary. "The hybrid foundations of investment treaty arbitration."*British Yearbook of international law* 74.1 (2004): 151-289.

whether international investment law, with the help of arbitrators, has created its own, separate, and distinct rules concerning the nationality of legal persons will be considered.

SECTION 2 – NATIONALITY OF LEGAL PERSONS IN INTERNATIONAL INVESTMENT LAW

2.5. Early generation bilateral investment agreements

Early international investment law and principles thereof had evolved from private investment agreements and international investment treaties, such as 'Friendship, Commerce and Navigation Treaties' (or FCN Treaties) and 'bilateral investment protection treaties' (or BITs). Disputes arising under private investment agreements and international bilateral investment agreements had also addressed the notion of the nationality of legal persons or so-called corporate investors.

Friendship, Commerce and Navigation Treaties were mainly promoted by the USA[211]. These treaties had addressed a wide range of issues, including those of human rights, trade, intellectual property, immigration, shipping, taxation, investment protection, and others. Some authors even considered that US treaties had shaped the modern BIT regime[212].

As far as the jurisdictional clauses are concerned, and especially those related to the nationality of legal persons, these treaties referred to the nationality of legal persons without regulating how nationality should be determined. For example, the Friendship, Commerce and Navigation Treaty signed by the Federal Republic of Germany and the United States in 1954[213], which represents the early model law USA treaty, provided that, "Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party." However, this treaty also enabled contracting states to deny "to any company in the ownership or direction of which nationals of any third country or countries have directly or indirectly the controlling interest, the advantages" of the treaty.

[211] On 6 February 1778, the United States concluded the first treaty of this kind, with France, as a treaty of amity and commerce. It established trade between the two countries on the basis of the most-favoured-nation principle, and provided for generous treatment of neutral shipping in time of war. Similar treaties with the Netherlands, Sweden, Prussia, Morocco, and the United Kingdom, followed. In the 19th century, the US concluded further treaties with Latin American States, China, Japan, and the International Association of the Congo.

[212] Alschner, Wolfgang. "Americanization of the BIT Universe: The Influence of Friendship, Commerce and Navigation (FCN) Treaties on Modern Investment Treaty Law." *Goettingen Journal of International Law, Forthcoming* (2013).

[213] Germany Friendship, Commerce, and Navigation Treaty Federal Republic Of Germany Friendship, Commerce and Navigation Treaty with protocol and exchanges of notes Signed at Washington October 29, 1954; Accessed on 2018-07-23, <http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005344.asp>.

This provision was also an early example of a 'denial of benefits' clause, which will be referred to in other parts of this thesis. Another example of a treaty concerning Commerce and Navigation signed between the Netherlands and Japan in 1912[214] defined legal persons as "Joint-stock companies or other companies and commercial and industrial associations, which are or which may be organized in conformity with the law of either of the high contracting parties and which are located in the territories and possessions of that party".

Interestingly, in the US practice, the issue of the nationality of a legal person, in the context of FCN treaties, was the object of discussion in the sphere of employment law[215]. A key provision of the US FCN treaties negotiated since the end of World War II gave investors the right to control and manage enterprises they established or acquired in the host country. Another critical aspect of these treaties was the right of nationals and companies to engage managerial, professional, and other specialized personnel of their choice in the host country. Thus, the question arose as to whether FCN treaties exempted foreign companies operating in the United States from federal employment discrimination laws. In particular, this challenged the absolute right of wholly-owned subsidiaries of Japanese corporations, incorporated within the United States, to hire managerial personnel of their choice, irrespective of local employment laws. In the United States Supreme Court's case, *Sumitomo Shoji America, Inc. v. Avagliano*[216]*,* the court held that a Japanese company's wholly-owned subsidiary, incorporated under the laws of New York, was a company of the United States and, therefore, could not directly assert rights under the United States-Japan FCN Treaty as a defense to an employment discrimination suit. In reaching its decision, the Supreme Court interpreted the phrase "companies of either Party" in the FCN Treaty to apply only to companies of the United States or Japan, operating in the other country. Although *Sumitomo* claimed to be a company of Japan, an examination of the term "companies" convinced the Court that the parties to the FCN Treaty intended the place of incorporation to determine a company's nationality. Since *Sumitomo* was constituted under the applicable laws and regulations of New York, the Court concluded that it was a company of the United States, and not of Japan.

In contrast to American Treaties of Navigation and Commerce, European states had started to negotiate Bilateral Investment Agreements (BITs). BITs were short, simple and focused on investment protection only. The US itself shifted from FCN to BITs in the early 1980s.

The first BIT was concluded between Germany and Pakistan in 1959. The latter provided that:

> "the term "companies" shall comprise, in respect of the Federal Republic of Germany, any juridical person, any commercial company or any other

[214] Treaty of Commerce and Navigation Between the Netherlands and Japan The American Journal of International Law, Vol. 8, No. 3, Supplement: Official Documents (Jul., 1914), pp. 228-236.
[215] Lewis, John Bruce, and Bruce L. Ottley. "Title VII and Friendship, Commerce, and Navigation Treaties: Prognostications Based upon Sumitomo Shoji." *Ohio St. LJ* 44 (1983): 45.
[216] *Sumitomo Shoji Am., Inc. v. Avagliano*, 102 S. Ct. 2374 (1982).

> company or association, with or without legal personality, having its seat in the territory of the Federal Republic of Germany and lawfully existing in accordance with its legislation … in respect to Pakistan, any juridical person or any company or association, incorporated in the territory of Pakistan and lawfully existing in accordance with its legislation."[217]

As will be observed in the next sections of this thesis, provisions of BITs on investor's nationality were influenced by the provisions of municipal law. The latter is also evident from the first Germany – Pakistan BIT referred to above since both states agreed on different nationality rules regarding those states. In respect of Germany, the juridical person should not only be constituted in accordance with the laws of Germany but also have its seat in the territory of Germany, while Pakistan only required incorporation.

2.6. The ICSID Convention

One of the most important documents which must be referred to in this part of the discussion is the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the ICSID Convention)[218]. Under the provisions of the ICSID Convention, to be entitled to file an investment claim before the ICSID Centre, and in order for the tribunal to have jurisdiction to decide an investor's claim, the investor must pass the jurisdictional clause provided in Article 25 of the ICSID Convention. Article 25 of the ICSID Convention also provides for the definition of the 'National of another Contracting State,' whereas, in respect of the legal persons' Article 25(2)(b), provides that the National of another Contracting State is defined as:

> "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."

As can be observed, Article 25(2)(b) of the ICSID Convention only requires that a juridical person would have the nationality other than the State party to the dispute or they may be a national of a Contracting State, on the condition that the parties have agreed to treat such a legal entity as foreign, for the purposes of ICSID jurisdiction, because of foreign control.

[217] Treaty for the Promotion and Protection of Investments between Pakistan And Federal Republic Of Germany (with Protocol and exchange of notes). Signed at Bonn, on 25 November 1959, 24 United Nations – Treaty Series 1963.
[218] 1965-03-18 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Washington Convention, 17 UST 1270, TIAS 6090, 575 UNTS 159.

Therefore, the ICSID Convention does not provide any rules on how nationality should be determined[219]. The absence of rules directs the interpreter to refer to the investment agreement, where the parties have agreed to submit the dispute to the ICSID Centre (usually a BIT, FTA, or multilateral agreement that contains the ICSID arbitration clause). As will be observed therein, the vast majority of investment protection agreements (such as BITs and FTAs) make reference to the incorporation requirement or, in other words, to the national law of the state concerned.

Another critical aspect of Article 25(2)(b) of the ICSID Convention is the agreement of the parties to treat legal persons as foreign nationals for the purposes of the ICSID Centre's jurisdiction. Such agreements can be found in the vast majority of investment protection treaties. For example, Article 26(7) of the multilateral investment protection agreement, the Energy Charter Treaty[220] (ECT), provides that:

> "an Investor other than a natural person which has the nationality of a Contracting Party to the dispute on the date of the consent in writing … and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contracting Party, shall for the purpose of Article 25(2)(b) of the ICSID Convention be treated as a "national of another Contracting State."

Similarly, Article 9 of the Netherlands Model BIT[221] provides that "a legal person which is a national of one Contracting Party and which before such a dispute arises is controlled by nationals of the other Contracting Party shall, in accordance with Article 25(2)(b) of the Convention, for the purpose of the Convention be treated as a national of the other Contracting Party". Article 8(2) of the United Kingdom Model BIT, also provides, that "a company which is incorporated or constituted under the law in force in the territory of one Contracting Party and in which before such a dispute arises the majority of shares are owned by nationals or companies of the other Contracting Party shall in accordance with Article 25(2)(b) of the Convention be treated for the purposes of the Convention as a company of the other Contracting Party." [222]

Therefore, even though the ICSID Convention, in certain circumstances, such as those referred to above, provides an option to agree on the definition of a legal person, the latter circumstance does not change the fundamental notion of the ICSID Convention that the

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[219] As Mr. Broches explained, the purpose of Article 25(2)(b) is not to define corporate nationality but to: "…indicate the outer limits within which disputes may be submitted to conciliation or arbitration under the auspices of the Centre with the consent of the parties thereto. Therefore, the parties should be given the widest possible latitude to agree on the meaning of 'nationality' and any stipulation of nationality made in connection with a conciliation or arbitration clause which is based on a reasonable criterion." In Aron Broches, "The Convention on the Settlement of Investment Disputes between States and Nationals of Other States," 136 Recueil Des Cours 331, 359-60 (1972-II).

[220] Energy Charter Treaty, 1994-12-17. 2080 UNTS 95; 34 ILM 360 (1995).

[221] Douglas, Zachary. *The international law of investment claims*. Cambridge University Press, 2009., appendix 8, p. 547.

[222] Ibid, Appendix 10, p. 560.

nationality of a legal person is established by way of incorporation. The latter can be explained by the fact that while the ICISD Convention enables parties to agree on how to treat locally incorporated companies, the next step is still a reference to the law of incorporation of the controlling investors, which controls such a local entity. The latter is similar to the test established under most investment protection treaties - the place of incorporation.

2.7. Early investor-state arbitrations

The first investor-state cases were brought under private investment agreements, rather than BITs. Although not extensively, these had also dealt with the issue of an investor's nationality. For example, in two early cases, such as *SOABI v Senegal*[223] (1984) and *Vacuum Salt v Ghana*[224] (1994), the tribunals had decided to pierce the successive corporate layers to identify foreign control and the nationality of those holding control.

The Tribunal in *SOABI v. Senegal* was constituted under the ICSID arbitration clause in the private investment agreement. The tribunal found that SOABI, a company incorporated in Senegal, was controlled by a Panamanian company, Flexa, which in turn was controlled by Belgian nationals. Thus, SOABI needed to convince the Tribunal to go beyond the first level of control, since Panama was not a Contracting State, whereas Belgium was a Contracting State under the ICSID Convention. The Senegalese Government disputed the jurisdiction of the tribunal, arguing that Panama was not a Contracting State; hence, the nationality requirements of Article 25 of the ICSID Convention were not met. The Tribunal stated that the ICSID Convention was not only concerned with direct control over a locally incorporated company. The Tribunal referred to the purpose of Article 25(2)(b) of the ICSID Convention in facilitating foreign investments through locally incorporated companies while still retaining their standing before the ICSID tribunal. In that spirit, the Tribunal went beyond the direct control exercised by the Panamanian company and found that SOABI was, in fact, controlled by Belgian nationals[225].

However, in *Amco v. Indonesia*[226] (1983), another early ICSID arbitration case constituted under the ICSID arbitration clause found in a private investment agreement, the Tribunal also discussed the possibility of examining control beyond the first level. The Indonesian Government argued that PT Amco, the local company, was not controlled by Amco Asia, a company owned by a national of the United States of America, since Amco Asia was, in turn, controlled by a Hong Kong company owned by a Dutch citizen. The Tribunal refused to

[223] *Société Ouest-Africaine des Bétons Industriels (SOABI) v. the Republic of Senegal*, ICSID Case No. ARB/82/1.
[224] *Vacuum Salt Prod., Ltd. v. Ghana*, ICSID Case No. ARB/92/1.
[225] *SOABI v. Senegal*, Decision on Jurisdiction, 1 August 1984, 2 ICSID Reports 182/3; see further UNCTAD "Requirements ratione personae", UNCTAD/EDM/Misc.232/Add.3.
[226] *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1).

search for indirect control beyond the first level of control and found that it was restricted to the immediate control exercised by the parent company of the local company[227].

These two early examples already indicate a somewhat conflicting pattern, where the examination of corporate layers or refusal to examine such corporate layers often rests on the discretion of the tribunal. As it was already argued, the use of the discretionary power of an arbitral tribunal provides evidence of the methods used by legal realists. That is an important finding when discussing the notion of corporate nationality in international investment law.

However, as far as this section of the thesis is concerned, it must be mentioned that these early cases had not dealt with a BIT claim and, effectively, with nationality requirements under any BIT. Since these cases were brought under private investment agreements, the only source of the relevant rules on nationality of corporate investors in these cases were the provisions of the ICSID Convention, i.e., Article 25 of the ICSID Convention. This was a sole jurisdictional requirement related to nationality. Article 25(2)(b) of the ICSID Convention only requires that a juridical person have the nationality of a Contracting State other than the State party to the dispute. This must exist when the parties consented to submit such a dispute to conciliation or arbitration. Also, a juridical person who had the nationality of the Contracting State party to the dispute on that date, should, because of foreign control, and under the parties' agreement, be treated as a national of another Contracting State.

Although provisions of the ICSID Convention require establishing nationality based on the nationality of the Contracting State, they do not provide any guidance on how this nationality should be established, i.e., by reference to the law of incorporation of a particular legal entity, or by principles of international customary law. For instance, such as those found in the sphere of diplomatic protection.

Thus, it is essential to note that while referring to the nationality issue, the Tribunal in *Amco v Indonesia* had referred to a 'classical concept of nationality':

> "To take this argument into consideration, the Tribunal would have to admit first that for the purpose of Article 25(2)(b) of the Convention, one should not take into account the legal nationality of the foreign juridical person which controls the local one, but the nationality of the juridical or natural persons who control the controlling juridical person itself: in other words, to take care of a control at the second, and possibly third, fourth or xth degree. Such a reasoning is, in law, not in accord with the Convention. Indeed, the concept of nationality is there a classical one, based on the law under which the juridical person has been incorporated, the place of incorporation and the place of the social seat. An exception is brought to this concept in respect of juridical persons having the

[227] *Amco v. Indonesia*, Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 396, see also *Autopista Concesionada de Venezuela CA (Aucoven) v Venezuela*, ICSID Case No ARB/00/5 , Aguas del Tunari, S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3.

> nationality, thus, defined, of the Contracting State party to the dispute, where said juridical persons are under foreign control. But no exception to the classical concept is provided for when it comes to the nationality of foreign controller, even supposing – which is not at all clearly stated in the Convention – that the fact the controller is the national of one or another foreign state is to be taken into account."[228]

As can be observed, the 'classical concept of nationality' is, according to the tribunal, similar to that found in the rules on diplomatic protection, which were expressed in cases of the ICJ, in *Barcelona Traction*, *ELSI,* and later in *Diallo*. However, when it comes to the jurisdictional requirements of ICSID arbitration, the tribunal uses an exception to the classical concept of nationality in cases where juridical persons are under foreign control. However, no such rule is provided in the ICSID Convention. This is also true in both the *SOABI v. Senegal* and *Amco v Indonesia* cases, where the tribunals used such an exception based on Article 25(2)(b) of the ICSID Convention. The *Amco v Indonesia* tribunal's decision regarding the nationality of legal persons is quite different from the one established in *Barcelona Traction,* where the ICJ had separated the standing of a company itself and its shareholders.

Thus, it can be observed that provisions of the ICSID Convention do influence the rules on the establishment of the nationality of a legal person in investor-state disputes, as compared to the rules formed in the sphere of diplomatic protection. These differences do have a significant impact when considering the tribunal's jurisdiction. This is a consequence of the ICSID arbitration clause, which directs the tribunal to the provisions referred to by the parties' agreement. If no agreement on corporate nationality exists, the tribunal uses its discretionary power to decide one.

The importance of the parties' agreement was also considered in the *Holiday Inns v Morocco*[229] case, where a private investment agreement containing the ICSID arbitration clause did not expressly state that the Moroccan subsidiaries were to be treated as foreign entities because they were under the 'foreign control' of the parent companies. The tribunal held that Article 25(2)(b) made no exception to the general rule that the ICSID Convention did not apply to disputes between the Contracting States and one of its nationals, and that, under the circumstances, one would expect that an agreement regarding the foreign control of a local company should be explicit[230].

Thus, it is vital that the parties do agree in their private investment contracts how nationality must be established. For example, in *MINE v Guinea*[231], the issue concerned the nationality of MINE, because MINE was a Liechtensteinian company. However, the ICSID arbitration

[228] *Amco v. Indonesia*, Decision on Jurisdiction; para 14.
[229] Holiday. Inns SA and others v Kingdom of Morocco (ICSID Case. No. ARB/72/1).
[230] However, the *Amco v Indonesia* tribunal held that the Convention did not require that the agreement of the parties as to the 'foreign control' of locally incorporated company be stated in a formal fashion. For example, a provision in a contract referring to the 'establishment of foreign business', would be sufficient for the purposes of the agreement required, under Article 25(2)(b) of the ICSID Convention.
[231] *MINE v Republic of Guinea* (ICSID Case No ARB/84/4).

clause provided that "The parties hereby precise that the investor is Swiss." Since Switzerland had ratified the ICSID Convention, but Liechtenstein had not, MINE's nationality was decisive for the ICSID jurisdiction. Although none of the parties had raised objections about MINE's nationality, the tribunal accepted MINE's Swiss nationality. Thus, in this case, the parties' agreement on nationality was decisive[232].

The latter provides that in ICSID arbitration proceedings, the parties have the liberty to agree on the rules of the establishment of the nationality of legal persons in their private investment agreements. Such liberty is enabled by the ICSID arbitration clause, which, under its Article 25(2)(b), enables the parties to create a contract to decide for themselves what the nationality of a specific legal person would be, i.e., a party to the private investment agreement. This liberty is quite significant if compared with the rules established in the sphere of diplomatic protection, where no such liberty exists.

Another relevant observation is that the ICSID arbitration clause and Article 25(2)(b) combined had created a rule concerning the protection of shareholders and their legal standing before the ICSID tribunal. The source of this is different from the one found in the sphere of diplomatic protection. It can be explained by the fact that, while enabling the parties to agree that a party will be considered as being of a particular nationality because of foreign control, the ICSID Convention had enabled the parties to agree that shareholders within such a company will be entitled to standing before the ICSID tribunal, instead of the party incorporated in the host country[233].

When compared to the reasoning in the *Barcelona Traction* or *Diallo* cases, the difference is quite significant. In diplomatic protection cases, the right of the shareholders' standing before a tribunal comes from the domestic law of the state concerned. In ICSID arbitration, however, the source of shareholders' rights comes from the ICSID Convention and the parties' agreement.

Therefore, it can be argued that the role of municipal law, in the context of corporate nationality in ICSID arbitration, may be diminished, and the principles of transnational law are emphasized. As the parties may agree on the specific nationality of a party to an investment agreement for the purposes of ICSID arbitration, arguably, there is no difference for the ICSID tribunal where such an entity is incorporated or where it has its seat as was the case in *MINE v Guinea*. Thus, the municipal law in ICSID arbitration may play only a

[232] Schreuer, Christoph H. *The ICSID Convention: a commentary*. Cambridge University Press, 2009, p. 285.
[233] This is similar to the scenario analysed in *Amco v. Indonesia,* where the Tribunal found that PT Amco, the local company, was controlled by Amco Asia, and based on the latter, found that it was restricted to the immediate control exercised by the parent company of the local company, i.e. the shareholder or the local company. Therefore, the legal protection for shareholders of corporations investing abroad is offered not through the existence of bilateral and multilateral investment treaties or private investment agreements, but by the provisions of the ICSID Convention, i.e. Article 25(2)(b). Thus, the statement in the *Diallo* case that in "contemporary international law" the question of the protection of the rights of shareholders is "essentially governed" by investment treaties, could be adjusted to mean that the question of the protection of the rights of shareholders is "essentially governed" by the ICSID Convention, since it is not the investment treaties which had made the difference, but the provisions of ICSID Convention.

secondary role, such as to establish the nationality of the claimant or investment vehicle which represents the real investor.

However, this still does not diminish the discretionary interpretation powers of the arbitral tribunal. For example, the tribunal in *Amco v Indonesia* found that PT Amco had the nationality of Indonesia, due to its place of incorporation and the place of its registered seat and its actual seat[234]. In *SOABI v. Senegal,* the claimant was a joint-stock company with its head offices in Dakar, which under local law, made it a national of Senegal. The tribunal had confirmed in general terms that the criteria of the location of the head office or the place of incorporation were decisive for corporate nationality[235]. Still, the nationality of the real investors, i.e., those who had *de facto* controlled the investment, could be subject to the parties' agreement under Article 25(2)(b) of the ICSID Convention.

The latter just confirms that in early arbitrations, a reference to municipal law, as to the nationality of a legal person, was not always significant in respect of the investor's nationality. The main issue always concerns the jurisdictional requirements of ICSID Centre. It was observed that the jurisdiction of the tribunal (*ratione personae*) might be at the liberty of the parties themselves. In this context, it is essential that Article 25(2)(b) of the ICSID Convention does not even require that the nationality which the parties had agreed to assign to a specific investor for jurisdictional purposes should at least be relevant to the nationality of the real *de facto* controllers of the investment. It only requires that the investor would be a national of *another Contracting State.*

2.8. The Golden Generation BITs

As was mentioned, the Treaties of Navigation and Commerce were 'modernized' into European style bilateral investment treaties (BITs). BITs were short and only focused on investment protection. One of the most successful model BITs was the Netherlands Model BIT, or the so-called "Dutch gold standard model BIT." The latter was followed by most of the European States when concluding their first BITs[236].

Provisions on the nationality of investors were also short and simple. For example, the Netherlands Model BIT of 1997[237] provided that 'the term "nationals" shall comprise with regard to either Contracting Party … (ii) legal persons constituted under the law of that Contracting Party; (iii) legal persons not constituted under the law of that Contracting Party but controlled, directly or indirectly', by natural persons, or by legal persons of the other

[234] *Amco v Indonesia, Decision on Jurisdiction, 25 September 1983, para 14.*
[235] *The ICSID Convention: a commentary*, p. 298.
[236] Lavranos, Nikos. "The New EU Investment Treaties: Convergence towards the NAFTA Model as the New Plurilateral Model BIT Text?." *Available at SSRN 2241455* (2013).
[237] Douglas, Zachary. *The international law of investment claims*. Cambridge University Press, 2009., appendix 8, p. 547.

contracting party. The definition of a national, like the one provided in the Netherlands BIT, can be seen to use similar wording to most of the European BITs that still remain in force.

Other model BITs provide for similar definitions of the legal person or a corporate investor, focusing on the law of incorporation of such an investor and, in some instances, also adding the seat or the head office requirement. For example, the China Model BIT of 1997[238] provided that the term "investor" meant "legal entities including companies, associations, partnerships, and other organizations, incorporated or constituted under the laws and regulations of either Contracting Party and have their seats in that Contracting Party". The France Model BIT of 2006[239] provided that the term "company" referred to any legal person constituted on the territory of one Contracting Party under the legislation of that Party and having its head office on the territory of that Party, or controlled directly or indirectly, by the nationals of one Contracting Party, or by legal persons having their head office in the territory of one contracting Party and constituted under the legislation of that Party. The German model BIT of 2005[240], similarly, provided that the term "investors" should mean any juridical person and any commercial, or other company or association, with or without legal personality, which is founded according to the law of the Federal Republic of Germany, or the law of a Member State of the European Union, or the European Economic Area, and is organized pursuant to the law of the Federal Republic of Germany, registered in a public register in the Federal Republic of Germany. The Turkey Model BIT of 2000[241] defined corporate investors as "corporations, firms or business associations incorporated or constituted under the law in force of either of the Parties and having their headquarters in the territory of that Party." The United Kingdom Model BIT (2005, with 2006 amendments)[242] provided that "companies" mean corporations, firms, and associations incorporated or constituted under the law in force in any part of the United Kingdom'. Finally, the United States of America Model BIT of 2004[243] provided that "enterprise" should mean any entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including a corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organization; and a branch of an enterprise, while the "enterprise of a Party" should mean an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there.

Therefore, it can be observed that most of the BITs, which comprise a large part of the whole investment treaty network, provide for quite similar definitions of the legal person or the corporate investor. It can be rightly said that the vast majority of the world's BITs refer the concept of nationality to the local law of the state and provide for the incorporation criteria when defining the nationality of a legal person. In addition to the incorporation criteria, many

[238] Ibid, appendix 5, p. 525.
[239] Ibid, appendix 6, p. 537.
[240] Ibid, Appendix 7, p. 540.
[241] Ibid, Appendix 9, p. 553.
[242] Ibid, Appendix 10, p. 560.
[243] Ibid, Appendix 11, p. 569.

BITs also require that investors should have their seat, headquarters, or *siege social* in the place of their incorporation.

Although the Model BITs mentioned above represent the vast majority of BITs currently in force, BITs also exist that contain additional requirements, such as the Czech Republic and the Italian Republic BIT, which provides that the term "legal person" shall mean: “any entity incorporated or constituted in accordance with, and recognized as a legal person by, its laws, having its permanent seat in the territory of one of the Contracting Parties.” [244] This treaty requires not only incorporation but also recognition under national law, as well as a permanent seat in the contracting state. Another illustrative example is the Chile – Austria BIT[245], which also provides for the effective economic activity requirement, that “any juridical person or partnership, including companies, corporations, business associations and other legally recognized entities, which are constituted or otherwise duly organized under the laws of either Contracting Party and have their seat together with effective economic activities in the territory of that same Contracting Party.”

Another type of BIT also provides for the control requirement, together with that of incorporation. For example, the Austria – India BIT[246] defines an investor as any juridical person, partnership, or any other entity, constituted or incorporated under the laws of a third State, and which is controlled by investors incorporated in a contracting state, meaning that these investors can exercise decisive influence over the management and operation of the mentioned entity. This is demonstrated, expressly, by way of (i) ownership of at least 51 % of shares or voting rights, or (ii) the ability to exercise decisive control over the composition of the Board of Directors making or having made an investment in the territory of the other Contracting Party.

Although it would not be practical to provide every possible example of the definition of a legal person or corporate investor found in BITs, it can still be concluded that the vast majority of BITs, firstly, provide for the incorporation requirement, while the seat, control or the management requirements can be considered as additional. Furthermore, since most of the BITs refer the interpreter to the national law of the country by way of the incorporation requirement, as far as nationality is concerned, additional requirements such as the seat, or effective management, can be regarded, solely, as requirements of the treaty and not of national law. This aspect makes the definition of a legal person found within BITs dependent, not only on the national law of the state party but also on the treaty requirements, which are

[244] Agreement Between The Czech Republic And The Italian Republic for the Promotion And Protection of Investments of 1996, UNCTAD International Investment Agreements Navigator online.
[245] Agreement Between The Republic Of Chile And The Republic Of Austria For The Promotion And Reciprocal Protection Of Investment The Republic Of Chile And The Republic Of Austria, 22/10/2000, UNCTAD International Investment Agreements Navigator online.
[246] Agreement between the Government of the Republic of Austria and the Government of the Republic of India for the Promotion and Protection of Investments of 2001, UNCTAD International Investment Agreements Navigator online.

to be interpreted in accordance with international law principles. The latter issue will be analyzed in more detail in the following sections.

2.9. Practice of the BIT-ICSID tribunals

Arbitral tribunals constituted under the BITs are constantly challenged with the issue of corporate nationality. Standard and short definitions of a corporate investor found in modern BITs provide fertile soil for discussion on how to assess the incorporation of convenience, which helps the investors to artificially fall under the jurisdiction of the tribunal.

It is common within the language of the BITs to distinguish between foreign shareholders in local companies, in accordance with Article 25(2)(b) of ICSID Convention, and those companies themselves. Since the foreign shareholding is, by definition, an "investment" when considered under BIT, it was the tribunals' rationale that a shareholder was automatically an "investor" because of the definition of "investment." The latter point provided much practice regarding minority shareholders' claims made under ICSID arbitration, which will also be addressed thereinafter.

Although many of the first ICSID arbitrations constituted under bilateral investment treaties did not find significant obstacles in establishing the nationality of a legal person based on the foreign control principle[247], there were also many cases that addressed 'marginal' aspects of the issue of corporate nationality.

For example, the Annulment committee in the *Vivendi v Argentine*[248] case dealt with a transfer of control of a local company from a shareholder of one nationality to a shareholder of another nationality. The committee found that in such a case, the relationship between the temporal requirements for nationality in the BIT and Article 25 of the ICSID Convention should determine the answer. The committee concluded that the only relevant time for testing

[247] In the *Aucoven v Argentine* arbitration, the tribunal was asked to address the issue of foreign control of a company with the nationality of the host State. The Tribunal emphasised the role of the consent of the parties and their ability to condition jurisdiction to the acquisition of the majority of the shares by a national of a Contracting State. The nationality of the company that acquired the majority of the shares was determined as per the most common criterion, i.e., place of incorporation (see *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, No ARB/00/5, award of September 27, 2001). The tribunal in *Wena Hotels v. Egypt* also agreed that "Article 25(2)(b) of the ICSID Convention – and provisions like Article 8 of the United Kingdom's model bilateral investment treaty - are meant to expand ICSID jurisdiction by "permitting parties to a dispute to stipulate that a subsidiary of a 'national of another contracting state' which is incorporated in the host state (and therefore arguably a 'local national') will be treated as itself a 'national of another contracting state." (see *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Summary Minutes of the Session of the Tribunal held in Paris on May 25, 1999).

[248] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Jul 3, 2002, Decision on Annulment.

the nationality of the claimant is the date specified in Article 25 of the ICSID Convention, i.e. 'the date on which the arbitration proceedings are deemed to have been instituted'[249].

Another important case that had addressed the issue of the establishment of the proper nationality of the claimant was *CMS Gas v. Argentina*[250]. The case dealt with a situation concerning a national of one Contracting state that owned a minority (non-controlling) shareholding interest in a corporation that was a national of the other Contracting State. The respondent had invoked its municipal law and argued that corporate legal personality is distinct and separate from that of the shareholders. However, it is essential that the tribunal had expressly denied the applicability of the municipal law for the jurisdictional purposes of the ICSID arbitration, stating that 'the applicable jurisdictional provisions are only those of the Convention and the BIT, not those which might arise from national legislation.'[251] Also, the tribunal denied the applicability of the *Barcelona Traction* case or any of the rules of diplomatic protection because 'Barcelona Traction is not directly relevant to the present dispute, although it marks the beginning of a fundamental change of the applicable concepts under international law and State practice.' Such an approach was also observed in most other awards where the *Barcelona Traction* rules were invoked[252].

However, the tribunal found that the standing of the shareholders, including those a holding minority of shares, was based not on the rules on nationality, but on the provisions concerning investment, i.e., Article 25(1) of ICSID Convention and the control requirement, i.e., Article 25(2)(b) of the Convention. According to the tribunal, because the Convention did not define "investment", it did not purport to define the requirements that investment should meet to qualify for ICSID jurisdiction. In addition, there was no requirement that investment, in order to qualify, must necessarily be made by shareholders controlling a company or owning the majority of its shares. Therefore, the reference that Article 25(2)(b) makes to foreign control, in terms of treating a company of the nationality of the Contracting State party as a national of another Contracting State, "was precisely meant to facilitate agreement between the parties, so as not to have the corporate personality interfering with the protection of the real interests associated with the investment."[253] Furthermore, according to the tribunal, the majority of the BITs defined shareholding as an investment. Thus, there was no doubt that the provisions of the respective BIT had fitted perfectly within the tribunal's rationale.

Thus, once again, it can be observed that in ICSID arbitrations, the main principles on the establishment of nationality for jurisdictional purposes are those found in Article 25 of the

[249] Ibid, para 50; However, some authors argue that the tribunal in the Vivendi case should have found that the Argentine company could only have a standing as a claimant against the Argentine state in ICSID arbitration proceedings, based upon the France/Argentina BIT, if it satisfied the requirements of both. Article 25(2)(b) of the ICSID Convention and provisions of the BIT, see further: Zachary Douglas. The International Law of Investment Claims, Cambridge University Press, 2009, p. 294.
[250] *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Jul 17, 2003, Decision of the Tribunal on Objections to Jurisdiction.
[251] Ibid, para 42.
[252] See for example, AWG Group Ltd. v. The Argentine Republic, UNCITRAL; Camuzzi International S.A. v. The Argentine Republic, ICSID Case No. ARB/03/2.
[253] *CMS Gas Transmission Company v. The Republic of Argentina*, para 51.

ICSID Convention. Although the treaty provisions also play an essential part, however, when it comes to finding nationality and standing of the claimant, it is the ICSID Convention which provides the legal basis for a tribunal's jurisdiction. The municipal law, as it was observed, in some cases, is even denied applicability and relevance.

Furthermore, the tribunal in *CMS Gas v. Argentina* did not see it as essential that Article 25(2)(b) required control of the local entity, which would entail that minority shareholders would not qualify since they neither controlled a company nor owned the majority of its shares. Thus, it seems that in practice, the requirement of control found in 25(2)(b), which is very clear and should be interpreted in good faith following the ordinary meaning to be given to the terms of the treaty, as required by Article 31 of the Vienna Convention. However, in cases of ICSID arbitrations, the is control requirement is preceded by Article 25(1) of the Convention requiring investment, but not defining what should amount to an investment. Therefore, these examples indicate that the nationality of the investor, which would be established if the control requirement preceded the notion of investment, does not seem to be of significance when finding jurisdiction for the ICSID tribunal.

2.10. Non-ICSID arbitrations

There are also many investor-state disputes brought in accordance with UNCITRAL or SCC, ICC, or LCIA rules. Also, there were many arbitrations conducted in accordance with UNCITRAL rules and the provisions of multilateral investment agreements, such as NAFTA, which will be discussed later. Although the real number of 'solely UNCITRAL' arbitrations is not publicly available, the practice of non-ICSID tribunals is also important in respect of the establishment of corporate nationality. These arbitrations are not influenced by the provisions of ICSID Convention and, in particular, Article 25(2)(b).

When it comes to 'solely UNCITRAL' or similar investor-state arbitrations, the tribunal's jurisdiction is also solely defined by the terms of the investment treaty, i.e., the BIT. This is also true on the issue of the establishment of an investor's nationality, the rules for which are also found only in the treaty.

For example, the UNCITRAL tribunal in *Société Générale v. The Dominican Republic*[254] was constituted under the France – Dominican Republic BIT, which defined corporate investors as "all legal entities incorporated in the territory of one of the parties, in conformity with its legislation and where its headquarters are located…". It can be observed that provisions of the France – Dominican Republic BIT did not provide any provisions as to the control requirement, as found in the ICSID Convention. However, the tribunal was faced with the indirect and complicated structure of the claimant's investment, which involved

[254] *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S. A.v. The Dominican Republic, UNCITRAL*, LCIA Case No. UN 7927.

several subsidiaries and joint ventures with different nationalities. The government argued that the unusually complex and multilayered corporate structure used by the claimant to hold its investment should disqualify the company's treaty claim. The government argued that the tribunal should consider a cut-off point, after which claims by indirect investors are too tenuous or too remote in terms of their connection to the affected company and, effectively, the nationality at issue. In other words, the government claimed that its commitment to arbitrate disputes under a BIT should not extend to an indefinite chain of partial or indirect investors, who, above all, did not possess the right nationality.

However, while exploring whether there should be some limits to the chain of investors who could invoke the BIT, the tribunal stressed that the France-DR treaty covered indirect and minority forms of equity interest. Thus, there could be several layers of intermediate companies or interests intervening between the claimant and the investment[255]. Although the complex structuring of the claimant's investments did not deprive them of potential protection under the treaty, the structuring did pose some problems for the claimant when it came to demonstrating the requisite French nationality of the entire investment. As was mentioned, the government had raised questions as to whether different corporate entities in the corporate chain of ownership qualify as protected French investors for the purposes of the BIT.

The tribunal had analyzed the corporate ownership chain and found that the few companies which did not possess French nationality had owned stakes in the claimant's investment. Accordingly, the tribunal determined that the claimant's investment and its claim under the French BIT was not entirely of French nationality. Thus, some of the 50% of interest asserted by the claimant in its investment did not fall under the tribunal's jurisdiction, on account of the lack of French nationality.

In the context of corporate nationality, the findings in the S*ociété Générale v. The Dominican Republic* case are important in several aspects. First of all, almost every BIT that is a part of the global investment treaty net does cover indirect and minority forms of equity interest. The latter is found in the definition of investment. This purports that the majority of BITs in force do protect indirect and minority forms of equity interest and, effectively, several layers of intermediate companies or interests with different nationalities intervening between the original claimant and the investment. Such layers of intermediate companies with interests would usually mean layers of shareholders and their interests. Therefore, according to the tribunal's rationale, although BIT definitions of investor do not cover indirect shareholders, when read together with the definition of investment, they effectively provide protection to direct and indirect shareholders. Thus, the result is that the notion of investor and investment is merged for the purposes of the tribunal's jurisdiction.

[255] Katia Yannaca-Small. Arbitration Under International Investment Agreements: A Guide to the Key Issues, Oxford University Press, 2010, p. 241.

Therefore, such an interpretation technique, when adopted by the tribunal under its discretionary power, provides for a similar result to the one found in ICSID arbitration, where Article 25(2)(b) also enables the protection of direct and indirect shareholders by way of the control requirement. Thus, the sole difference in finding jurisdiction under the 'UNCITRAL-BIT' arbitration for shareholders, as compared with ICSID arbitration, becomes the notion of ownership, while ICSID requires control. Effectively, in 'ICSID-BIT' arbitration, the tribunal should find both ownership under the respective BIT and control under ICSID Article 25(2)(b).

In the corporate world, however, the difference between 'ownership' and 'control' is relevant since the shareholder's ownership does not necessarily imply control. There might also be various structures of shareholding and types of shares with different controlling mechanisms. Thus, a majority of shareholders may not always have an effective say over the running of the company. Theoretically, shareholders own the company and, hence, the company ought to be run according to the dictates of the shareholders. However, in practice, there would be significant differences of opinion among shareholders, and this leads to a situation where arriving at a consensus is not possible. Thus, ambiguous provisions of BITs that refer to ownership or control may be subject to very different interpretations by tribunals. These are the types of issues that arbitrators almost certainly approach with a legal realist philosophy. Legal realism, as compared to a purely formal approach, enables the arbitrator to look beyond the formal rules of ownership and control and arrive at very different conclusions.

Furthermore, different interpretations of notions of ownership and control could also be at odds with some of the requirements of BITs, such as 'the real seat', 'effective management', or siege social, which basically means the effective and real management. The latter can typically be achieved by ownership of a majority of shares or, in some instances, by way of corporate management rules[256]. This aspect would also seem to be at odds with the definition of the investment itself since tribunals require that 'investment' would be associated with specific characteristics, such as risk, long term commitment.[257] However, the satisfaction of such characteristics would not seem possible where the minority shareholder would not even have a right to influence decisions related to investment. Thus, the notion of 'control' would seem significant, in particular, because of Article 25(2)(b) of the ICSID Convention, which requires to establish 'control'. However, as was observed above, ICSID tribunals tend to

[256] However, the tribunal in *CMS v Argentina* did not seem to regard this material with significance – "notwithstanding the variety of situations in ICSID's jurisprudence noted by the Republic of Argentina, the tribunals have in all such cases been concerned not with the question of majority or control but rather whether shareholders can claim independently from the corporate entity" in *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Jul 17, 2003, Decision of the Tribunal on Objections to Jurisdiction.

[257] *Salini Costruttori SpA & Anor v Kingdom of Morocco* (ICSID Case No ARB/00/4, Decision on Jurisdiction, 23 July 2001: see para 52). The four elements of the *Salini* test are: (i) a contribution in money or other assets; (ii) a certain duration over which the project is implemented; (iii) an element of risk; and (iv) a contribution to the host State's economy.

interpret the control requirement in various ways and in favor of the requirement of investment, i.e., shareholding.

Another critical aspect of the 'control' issue is that the control requirement would necessarily direct the tribunal to municipal law since only by reference to municipal law could the tribunal establish effective control under provisions of the relevant company law. This aspect would provide guidance on whether the requirement of control is satisfied due to a certain percentage of shares or allocation of voting rights. As referred to in a previous section, the latter was confirmed by the ICJ in the *Barcelona Traction* case, where the court referred to municipal law to find that "rights which municipal law confers upon the shareholders are distinct from those of the company". Similarly, in the *Diallo* case, the court referred to Congolese law to inquire about the rights possessed by the *associés.* In contrast to ICJ cases, the application of municipal law may be denied in ICSID arbitration when considering the jurisdiction of the tribunal[258].

Thus, the practice of the investment treaty tribunals constituted under the auspices of the ICSID and solely under the provisions of BITs (i.e., UNCITRAL arbitrations) provide that, based on the discretionary power of interpretation by arbitral tribunals, minority shareholders do have the standing to bring treaty claims against host governments[259]. Minority shareholders may also have different nationalities to those compared with majority shareholders, and there may be cases where only a small part of the overall investment may possess the nationality required under the BIT for jurisdictional purposes. There might be cases where most of the investment may not possess the nationality, which would enable it to claim a breach of the treaty.

In any case, the examples provided above clearly evidence the power of the interpreter and the arbitrator. Based on this state of affairs, different results may occur in similar situations, or vice versa, similar results in different situations. This is an example of legal realist theory being present within investor-state arbitration.

[258] *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Jul 17, 2003, Decision of the Tribunal on Objections to Jurisdiction; However, as Professor Schreuer notes: "[d]efinitions of corporate nationality in national legislation or in treaties providing for ICSID's jurisdiction will be controlling for the determination of whether the nationality requirements of Article 25(2)(b) have been met."10 He adds, "[a]ny reasonable determination of the nationality of juridical persons contained in national legislation or in a treaty should be accepted by an ICSID commission or tribunal." In H. Schreuer, The ICSID Convention: A Commentary 290 (2001), at 361.

[259] *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3; *Lanco International Inc. v. The Argentine Republic*, ICSID Case No. ARB/97/6; *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8; *Champion Trading Company, Ameritrade International, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic*, ICSID Case No. ARB/02/1.

2.11. Treaty shopping

The issues addressed above may be regarded as one of the leading causes of the so-called "*treaty shopping*" practice, which is a practice of structuring a multinational investment in a way that takes advantage of a more favorable BIT available in certain jurisdictions. Investors that reside in home countries that do not have a BIT with the host country where the investor invests can establish an operation in a third country that has a more favorable BIT in order to get access to investor-state arbitration. The vast network of international investment agreements has enabled investors to structure and take advantage of specific investment treaties, which secure their objectives in the host country by using a shell, or the so-called 'mailbox companies'. However, this practice has brought a lot of controversy and conflicting views. Host countries frequently object to the jurisdiction of the tribunal in cases where companies have brought claims under BITs while being controlled by nationals or companies incorporated in other non-treaty states. There have also been cases when corporate nationality was used as a tool to bring claims under BIT by nationals of the host state.

The latter was the case in the famous *Tokios Tokeles v Ukraine*[260]. In *Tokios Tokeles* arbitration, notwithstanding that 99 percent of the Lithuanian company's shares were controlled by Ukrainian nationals, the majority of arbitrators had accepted the jurisdiction of the tribunal in ICSID arbitration, stating that the incorporation requirement found in the Lithuania – Ukraine BIT was fully fulfilled.

The tribunal found that the Claimant was an "investor" of Lithuania under the BIT, because it was an entity established in the territory of the Republic of Lithuania in conformity with its laws and regulations. According to the tribunal, this method of defining corporate nationality was consistent with modern BIT practice and satisfied the objective requirements of Article 25 of the ICSID Convention. The tribunal had found no basis in the BIT, or the ICSID Convention, to analyze the definition of corporate nationality with respect to investors of either party, in favor of a test based on the nationality of the controlling shareholders.

The main argument of the respondent was the control test, which would effectively rule out the possibility of Ukrainian nationals claiming a breach of the treaty. This was based on the argument that the object and purpose of Article 25(2)(b) were not to limit jurisdiction but to set its "outer limits". The tribunal based its rationale on the circumstance that the control test, which was included in Article 25(2)(b) of the ICSID Convention, could only be used if there was an agreement between the parties under Article 25(2)(b). This may be in contrast with the *CMS Gas v. Argentina*, where it was stated that the reference that Article 25(2)(b) makes to foreign control 'was precisely meant to facilitate agreement between the parties, so as not to have the corporate personality interfering with the protection of the real interests associated with the investment'. However, it seems that in the *Tokios Tokeles* case, such real interests would be of Ukrainian nationality, but not of Lithuanian. On the other hand, there was indeed

[260] Tokios Tekeles v Ukraine, ICSID Case No ARB/02/18.

no Ukrainian company alleging a treaty breach, either in its own right or by its shareholders. The latter would be precisely the situation that would allow the tribunal to impose the application of Article 25(2)(b). However, since no such company existed, the imposition of Article 25(2)(b) of ICSID Convention was irrelevant.

However, it could not be entirely agreed with the argument expressed in *Tokios Tokeles* in respect of Article 25(2)(b) that the "use of a control-test to define the nationality of a corporation to restrict the jurisdiction of the ICSID Centre would be inconsistent with the object and purpose of Article 25(2)(b)."[261] As was observed, Article 25(2)(b) is only relevant in situations regarding companies incorporated in host-states[262]. Thus, Article 25(2)(b) should not be applied when considering nationality requirements if there are no issues related to locally incorporated companies. This would be consistent with Mr. Broches' statement that the purpose of the control-test of Article 25(2)(b) is to expand the jurisdiction of the ICSID Centre[263]. However, in the *Tokios Tokeles* case, Article 25(2)(b) and the "outer limits" argument was applied in a situation that had no relevance to the "outer limits" issue and was used to deny the control test. Arguably, the control test would have been relevant if the tribunal referred to the municipal law of the state of incorporation.

Notably, the presiding arbitrator in *Tokios Tokeles* stated in his dissenting opinion that the tribunal did not give "effect to the object and purpose of the ICSID Convention."[264]

Another case which had dealt with the *treaty shopping* issue was the case of *Mobil vs. Venezuela*[265]. The dispute arose when the government of Venezuela increased income tax, royalty rates and extraction taxes to oil producers. In addition, the nationalization of various oil and gas industry projects followed. These projects also included projects owned by the Mobil Corporation. Therefore, Mobil (Venezuela Holdings) and its subsidiaries instituted investment arbitration under the Netherlands–Venezuela BIT and the ICSID Convention. What is important in this case and in the context of treaty shopping is that Venezuela objected on the grounds of jurisdiction, stating that Venezuela Holdings was a "corporation of convenience", created in anticipation of litigation against the Republic of Venezuela for the

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[261] *Tokios Tekeles v Ukraine*, para 46.

[262] The tribunal in *Wena Hotels* held that Article 25(2)(b) of the ICSID Convention is meant to expand ICSID jurisdiction, by permitting parties to a dispute to stipulate that a subsidiary of a 'national of another contracting state', which is incorporated in the host state (and therefore arguably a 'local national'), will be treated, itself, as a 'national of another contracting state'. Wena Hotels Limited v. Arab Republic of Egypt (ICSID Case No. ARB/98/4).

[263] [t]here was a compelling reason for this last provision. It is quite usual for host States to require that foreign investors carry on their business within their territories through a company organised under the laws of the host country. If we admit, as the Convention does implicitly, that this makes the company technically a national of the host country, it becomes readily apparent that there is need for an exception to the general principle that that the Centre will not have jurisdiction over disputes between a Contracting State and its own nationals. If no exception were made for foreign-owned but locally incorporated companies, a large and important sector of foreign investment would be outside the scope of the Convention; Broches at 358-59.

[264] Ibid, dissenting opinion of Prosper Weil. (Decision on Jurisdiction, 29 April 2004), para 25.

[265] Mobil Corporation, Venezuela Holdings BV, Mobil Cerro Negro Holding, Ltd, Mobil Venezolana de Petroleos Holdings, Inc, Mobil Cerro Negro, Ltd, and Mobil Venezolana de Petroleos, Inc v Bolivarian Republic of Venezuela, ICSID Case No ARB/07/27 (Decision on Jurisdiction, 10 June 2010).

sole purpose of gaining access to ICSID jurisdiction. The respondent argued that "this abuse of the corporate form and blatant treaty-shopping should not be condoned."[266] In response, Mobil did not hide the fact that their investments were restructured in 2004-2006, through a holding company in the Netherlands. As they contested, the process began in late 2004, immediately after the Respondent increased the royalty rate for one of Mobil's projects and was completed in 2006. This was done well before the Republic of Venezuela made announcements that it intended to nationalize one of Mobil projects. Also, the corporation argued that Venezuela Holdings was not a "corporation of convenience" created for the sole purpose of gaining access to ICSID jurisdiction. Similarly, as in the *Tokios Tokeles* case, Claimants argued that there was no legal basis for imposing nationality requirements extraneous to the BIT or for disregarding nationality of those holdings[267].

When discussing the treaty shopping allegations, the tribunal analyzed the concept of abuse of right in international law. It argued that abuse of right is to be determined in each case, taking into account all the circumstances of the case[268]. The tribunal stated that the main, if not the sole purpose of the restructuring, was to protect Mobil investments from adverse Venezuelan measures in getting access to ICSID arbitration through the Dutch–Venezuela BIT[269]. Most importantly, they concluded that the protection of investments against breaches of their rights by the Venezuelan authorities to gain access to ICSID arbitration through the BIT was a perfectly legitimate goal[270]. However, it is important to note that the tribunal also argued that the timing of such restructuring must also be taken into account since the tribunal would only have jurisdiction over future disputes, i.e., the ones that occurred after the restructuring[271]. Therefore, an essential aspect of the analysis of *treaty shopping* is that such practice was admitted and declared as legitimate and rational. In addition, it can be argued that the tribunal admitted that treaty shopping practice is a standard method of international business.

In contrast to the *Tokios Tokeles* case, the *Mobil vs. Venezuela* tribunal found that Venezuela Holdings (Netherlands) owned 100% of it's US and Bahamian subsidiaries, which were also claimants in arbitration. Since those subsidiaries were controlled directly, or indirectly, by a "legal person constituted under the law" of the Netherlands, accordingly, the tribunal found that they were deemed to be Dutch nationals under the BIT[272]. However, the Respondent

[266] Ibid, para 27.
[267] Idib, para 40;
[268] Idib, para 177.
[269] Ibid, para 190.
[270] Idib, para 204.
[271] The later argument, as some authors argue, could cause problems because it would be difficult to find an answer in the case of a 'composite breach' of an investment treaty standard, such as the guarantee of indirect expropriation which begins prior to a treaty shopping restructuring, but only culminates after the reorganisation has taken place, see Access and advantage expanded: Mobil Corporation v Venezuela and other recent arbitration awards on treaty shopping. Paul Michael Blyschak. Journal of World Energy Law and Business, 2011, Vol. 4, No. 1; p. 36.
[272] Article 1 of the Dutch – Venezuela BIT provided that: "For the purpose of this Agreement [...] "(b) The term "nationals" shall comprise with regard to either Contracting Party:

submitted that Article 25(2)(b) of the ICSID Convention excluded the use of the control test to determine a corporation's nationality, as was, similarly, argued by the tribunal in the *Tokios Tokeles* case.

The tribunal, however, argued that Article 25(b)(i) did not impose any particular criteria of nationality (whether the place of incorporation, siège social or control), in the case of juridical persons not having the nationality of the Host State. Thus, according to the tribunal, the parties to the Dutch-Venezuela BIT were free to consider both the legal persons constituted under the law of one of the parties and those constituted under another law, as nationals, but controlled by such legal persons, which they did within their BIT.

Thus, it can be observed that in the case of *Mobil vs. Venezuela,* the tribunal used the control test found in the BIT, even though no such test was directly provided in the BIT. Thus, it seems that the issue of treaty shopping is solely defined by the terms of the respective BIT and the terms of the ICSID Convention. It falls under the tribunal's discretion to decide whether Article 25 does play an important role in establishing the so-called "mailbox" companies. While taking the latter into account, it can be suggested that it is not only the language of BITs that acts as the primary facilitator of the treaty shopping practice but also the discretionary power of interpretation by the tribunal.

Again, these cases confirm that much of the answer to such complex questions rests on the legal rationale of the tribunal. Arbitrators have the discretion to decide which option and rationale to choose. There might be different approaches by different tribunals to treaty shopping and structuring for corporate nationality. This proves that much of the outcome rests on the path of interpretation, chosen by arbitrators.

2.12. Multilateral agreements

Another type of investment protection treaties is multilateral investment protection agreements. One of the most important treaties in the modern international investment era was the North American Free Trade Agreement (NAFTA)[273], which had shaped many of the standards and principles used in international investment law. NAFTA (Chapter 11) provides for the "investor-to-state" dispute resolution provisions.

As for the definition of legal persons, NAFTA Article 201 provides that enterprise means any entity constituted or organized under applicable law, whether or not for profit, and

(i) national persons having the nationality of that Contracting Party;
(ii) legal persons constituted under the law of that Contracting Party;
(iii) legal persons not constituted under the law of that Contracting Party, but controlled, directly or indirectly, by natural persons as defined in (i) or by legal persons as defined in (ii) above".

[273] 1992-12-17 (1994-01-01) The North American Free Trade Agreement (NAFTA), International Legal Materials (ILM) at 32 I.L.M. 289 (1993).

whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture, or other association. In addition, "Enterprise of a Party" means an enterprise constituted or organized under the law of a Party. Moreover, Article 1139 of NAFTA provides that "Enterprise of a Party" means an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there. Thus, similarly to most BITs, NAFTA also endorses the incorporation criteria as the main one to define the nationality of a legal person.

NAFTA Article 1116 permits an investor to present a claim for loss or damage suffered by the investor, while Article 1117, by contrast, permits an investor to present a claim on behalf of an enterprise that it owns or controls, for loss or damage suffered by the enterprise:

> "An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that another Party has breached an obligation . . . and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach."[274]

Another provision relevant to the issue of ownership and control is Article 1139, which defines the "investment of an investor of a Party" as follows: "[I]nvestment of an investor of a Party means an investment owned or controlled directly or indirectly by an investor of such Party."[275]

As explained by the *Mondev v United States*[276] tribunal, NAFTA distinguishes between claims by investors on their own behalf (Article 1116) and claims by investors on behalf of an enterprise (Article 1117). Under Article 1116, the foreign investor can bring an action in its own name for the benefit of a local enterprise which it owns and controls. By contrast, in a case covered by Article 1117, the enterprise is expressly prohibited from bringing claims on its own behalf. Thus, there is no possibility for derivative actions by foreign shareholders[277].

As it may be observed, Article 1117 of NAFTA defines a similar situation to Article 25(2)(b) of ICSID, where it is the one controlling local company who can bring a claim on behalf of a local company. Thus, the control test in NAFTA does hold much importance when deciding the eligibility of a claim. Still, the investor who brings a claim must be 'an investor of a Party', and the latter refers the interpreter to the incorporation criteria, effectively, the municipal law.

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[274] NAFTA Article 1117.
[275] NAFTA Article 1139.
[276] *Mondev . United States* (2002) 6 ICSID Rep. 211-213, at para 79.
[277] See also Zachary Douglas, Joost Pauwelyn, Jorge E. Viñuales. The Foundations of International Investment Law: Bringing Theory into Practice, Oxford University Press, 2014, p. 514.

Another significant multilateral agreement that includes investors' protection provisions is the Energy Charter Treaty (ECT)[278]. In Article 1(7), the ECT defines the investor as a company or other organization organized in accordance with the law applicable in that Contracting Party. Similarly, the ECT does not provide any other criteria except the incorporation that would define the nationality of a legal person or corporate investor.

A recent case, where the tribunal had analyzed the notion of investor's nationality and where the host country accused the claimant of treaty shopping under the ECT, was the *Yukos vs. Russia*[279] arbitration under the UNICTRAL arbitration rules. The interim award on jurisdiction in the context of treaty shopping is of utmost importance since the final award of USD 50 billion in damages made it one of the largest awards in investment arbitration history[280].

The main argument brought by the Russian Federation was that the tribunal lacked jurisdiction *ratione personae,* because the claimants were shell companies[281]. Also, the respondent argued that the Russian oligarchs effectively owned and controlled the claimants' (Yukos Universal Limited) nominal investment in Yukos[282]. Furthermore, the Russian Federation argued that Yukos Universal Limited was totally dominated by the Russian oligarchs through multiple off-shore shells and that one of the principal purposes of the complex legal structure adopted at the Russian oligarchs' behest was to render opaque, but preserve, the oligarchs' continuing de facto ownership and control of the Yukos shares. Consequently, the respondent stated that a shell company dominated and controlled by host state nationals had no right to bring a claim against the host state. Therefore, the main argument of the above was that the real owners and controllers of the investment in question were not the Yukos Universal Limited, which was incorporated in the United Kingdom, but private Russian nationals.

The claimant responded that they were organized in accordance with the law applicable in the Isle of Man (UK) and therefore met the requirements of Article 1(7)(a)(ii) of the ECT[283], where the investor is defined to mean "(ii) *a company or other organization organized in accordance with the law applicable in that Contracting Party*". In addition, Yukos Universal Limited argued that express treaty language could not be overridden by alleged general principles of law, and it is not for the tribunal to ignore the express language of the treaty itself, though in any event reference to the state of incorporation is the most common method of defining the nationality of corporate entities under modern BITs and international law[284].

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[278] 1994-12-17 The Energy Charter Treaty , 2080 UNTS 95; 34 ILM 360 (1995).
[279] Yukos Universal Limited (Isle of Man) v The Russian Federation, PCA Case No AA227, In the Matter of an Arbitration before a Tribunal Constituted in Accordance with art 26 of the Energy Charter Treaty and the UNCITRAL Arbitration Rules 1976 (Interim Award on Jurisdiction and Admissibility, 30 November 2009).
[280] Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. AA 227, Jul 18, 2014, Final Award.
[281] Ibid, p. 28, para 42.
[282] Ibid, p. 28, para 43.
[283] Ibid, p. 33, para 21.
[284] Ibid, p. 33-34, para 22.

The tribunal was in favor of Yukos' arguments. It stated that the ECT contained no requirement other than that the claimant company should be duly organized in accordance with the law applicable in a Contracting Party. The tribunal also argued that the claimant was organized "in accordance with the law applicable" in a contracting party and, accordingly, qualified as a company, so organized, in the instant case. Thus, according to the tribunal, it was not entitled by the terms of the ECT to find otherwise[285]. As for the argument that the real owners of the investment were Russian oligarchs, the tribunal held that the claimant was organized "in accordance with the law applicable" in the Isle of Man and owned shares of Yukos. Thus, the claimant owned an "Investment" protected by the ECT, and so the tribunal found[286].

2.13. Piercing the corporate veil and clean hands doctrine

As was argued by the Russian Federation, in *Yukos vs. Russia,* the tribunal should look beyond the corporate structure or nationality of the corporation to find the real beneficiaries of the investment. Thus, the question of control or the real owners arises frequently in such cases. As was mentioned above, in *Tokios Tokeles vs. Ukraine*, 99% of the shareowners were Ukrainian nationals. The problem seems similar in both the *Yukos vs. Russia* and the *Tokios Tokeles vs. Ukraine* cases – it was alleged that the real beneficiaries were nationals of the host country.

Similar arguments, i.e., a request to *pierce the corporate veil,* were also expressed in the *Barcelona Traction* case, where the ICJ stated that the veil should be lifted in order to prevent the misuse of the privileges of legal personality, as in some instances of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or obligations.

Similarly, the *unclean hands doctrine,* as claimed in the *Yukos* case, by the respondent, i.e., that the claimant had "unclean hands" and that claimant's corporate personality should be disregarded because it was an instrumentality of a "criminal enterprise" is, by its rationale, similar to the doctrine of piercing the corporate veil.

However, neither the *Tokios Tokeles* nor the *Yukos* tribunals had applied these instruments. The *Yukos* tribunal had even established that "unclean hands" does not exist as a general principle of international law, which would bar a claim by an investor[287]. In *Barcelona Traction*, the Court had, similarly, stated that practice accumulated on the subject, in municipal law, indicates that the veil is lifted only in limited circumstances. Thus, it would seem that the finding of the real interests or the real controllers of the investment is only

[285] Ibid, p. 151, para 413.
[286] Ibid, p. 159, para 435.
[287] Yukos, Final award, para 1363.

possible by reference to municipal law since there are no such concepts or instruments that have evolved in international law.

On the other hand, this is not entirely true since other international tribunals had denied the use of corporate nationality in order to utilize privileges of international instruments, such as corporate nationality. For example, the *U.S.-Mexican Claims Commission,* in the claim of *Monte Blanco Real Estate Corp. (U.S. v. Mexico),* denied the claim of Monte Blanco because it found that Mexican nationals had formed the claimant corporation for the sole purpose of seeking diplomatic protection from the United States, against Mexico[288]. A similar result was reached in a case involving the sinking of the "*I'm Alone*" (a British Ship of Canadian registry) by the United States[289]. At the time of the sinking, the "*I'm Alone*" was formally registered in Nova Scotia and owned by a Canadian company, all of whose shareholders were nominally British. However, despite the ostensible Canadian and British ownership of the "*I'm Alone*", the United States argued that ultimately, the American owners of the shipping company "abused the privilege of both Canadian registry and Canadian incorporation". The Commission agreed, finding that the ship was "de facto owned, controlled, and at the critical times, managed, and her movements directed and her cargo dealt with and disposed of, by a group of persons acting in concert."[290]

Another example of using the doctrine of *piercing the corporate veil* can be brought by the *Loewen*[291] case. In the latter case, the tribunal refused to find jurisdiction for the claimant by piercing the named claimant's corporate veil and also expressed limits to transferring treaty claims by an investor. In this case, a Canadian claimant declared bankruptcy during arbitral proceedings and, immediately before going out of business, assigned its treaty claim to a newly-created Canadian corporation whose sole asset was its claim against the United States. This new company was wholly-owned and controlled by the U.S. enterprise that had emerged from the earlier bankruptcy proceedings. However, even though the claim remained in possession of a Canadian enterprise, the *Loewen* tribunal held that the "assignment of the claim changed the nationality of the claimant from Canadian to U.S. nationality."[292]

The tribunal also held that the requirement of continuous nationality was a principle of international law that could be waived only expressly. Since the NAFTA did not include contracting states' clear intention in this connection and referred to the date of the submission of the claim only regarding the requirement of nationality in general, the tribunal decided to apply customary international law to solve the problem. Then, the tribunal concluded that,

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[288] Monte Blanco Real Estate Corp., Decision No. 37-B (Am.-Mex. Cl. Comm'n of 1942), reprinted in a Report to the Secretary of State 191, 195 (1948); see also Principles of Public International Law, Ian Brownlie, Q.C., Oxford University Press, USA, Feb 15, 2009 at 489 – "international law has a reserve power to guard against giving effect to ephemeral abusive and simulated creations".

[289] (S.S. "I'm Alone" (Can. v. U.S.), (Special Agreement, Convention of Jan. 23, 1924) 3 R.I.A.A. 1610, 1617-18 (1935)).

[290] Ibid, at 1617-18.

[291] Loewen Group, Inc. and Raymond R. Loewen v. United States of America. Case No. ARB /AF)/98/3, Award of 26 June 2003.

[292] Kirtley, William Lawton. "The Transfer of Treaty Claims and Treaty-Shopping in Investor-State Disputes." *The Journal of World Investment & Trade* 10.3 (2009): 427-461.

according to applicable rules of international law, corporate nationality had to be indeed continuous through the resolution of the dispute. The tribunal denied that claimants had proved a contrary development of international law in this connection. However, the tribunal totally disregarded the fact that contemporary investment treaties, either bilateral or multilateral, do not include the requirement of continuous nationality through the resolution of the claim. Thus "the tribunal applied the alleged customary rule, which at any rate chiefly regarded investors as physical rather than corporate persons. The Tribunal deemed the silence of the NAFTA as clear ground for applying such a rule"[293].

Furthermore, while the tribunal denied that it pierced the claimant's corporate veil, in fact, this is precisely what it did. The tribunal did not consider it necessary to deal with the issue of determining the real equitable owner of the claim, as requested by the U.S. However, in practice, it applied the lifting of the corporate veil doctrine by deciding that, due to the change of the parent company's nationality, there was no longer any NAFTA disputing party. Although the tribunal stated that Nafcanco was a catchy name, it considered that, rather than Nafcanco, the new US Corporation should be considered as 'real' claimant[294].

Therefore, it can be observed that the tribunal's decision in *Loewen* is a very much legal realist award. Tribunal's considerations are based on discretionary powers of the tribunal and often based on general principles rather than concrete NAFTA provisions. Similarly, the exercise of piercing the corporate veil done in *Loewen* very much reflects the notion of legal realists – even if a tribunal states that it strictly complies with the applicable investment agreement, its award may prove to be a ruling based on policy considerations rather than on specific provisions of BITs. It is essential what tribunals do, rather than what they say they do.

Barcelona Traction had emphasized that the doctrine of *piercing the corporate veil* should only be used to escape fraud or misuse. Thus, it is crucial to define what can constitute fraud, or misuse, in the context of international investment. It can be argued that the latter depends on the circumstances of each case and, again, on the discretion of the tribunal. For example, in *Phoenix Action v. Czech Republic*[295], the tribunal found that the Claimant made an "investment", not to engage in economic activity, but for the sole purpose of bringing international litigation against the Czech Republic. The tribunal held that this kind of transaction was not a *bona fide* transaction and could not be a protected investment under the ICSID system[296].

How the situation in *Phoenix Action v. Czech Republic* is different from the one in *Mobil v Venezuela, Loewen, Tokios Tokeles,* or the *Yukos* arbitrations depends upon the discretion of the tribunal. One might argue that similar restructuring, as occurred in *Loewen* and *Mobil v*

[293] Acconci, P. "Is There Room for Customary Law in International Investment Law?(The Requirement of Continuous Corporate Nationality in the Loewen Case)." *Transnational Dispute Management (TDM)* 2.3 (2005).
[294] *The Loewen Group*, *Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3) para 237.
[295] *Phoenix Action Ltd v. Czech Republic* (ICSID Case No. ARB/06/5).
[296] Ibid, para 152.

Venezuela, in terms of acquiring the necessary nationality, should not be treated differently, or that there was no real investment in both the *Phoenix Action v. Czech Republic* and *Yukos* cases. Some authors also argue that it is crucial if the host state is aware of the actual legal personality/nationality of the investor because it appears unlikely that investors who do not attempt to conceal their national identity from the state will be found to have acted fraudulently, or with malfeasance, in regard to the treaty[297]. However, it is doubtful if a party to a BIT, such as the Isle of Man, in the *Yukos* case, really had any interest in finding out what the real identities of *Yukos* shareholders were.

Also, a relevant question raised by a number of authors is whether arbitrators' jurisdiction encompasses lifting the corporate veil in the absence of an explicit authorization to do so[298]. The answer would again depend upon the discretion and upon the way in which one would interpret the investment treaty provisions. However, while it is clear that investment treaty provisions are instruments of international law, whether or not the doctrine of piercing the corporate veil[299] has its foundations in international law or municipal law is not clear. If it is a principle of international law, arbitrators can use such a doctrine because such power is vested on them under the general principles of international law and by the rules of arbitration applicable to the dispute, i.e., Article 42 of the ICSID Convention or Article 26(6) of ECT. If, on the other hand, the doctrine of piercing the corporate veil is a concept found in municipal law, then it could only be applied by reference to the law of incorporation or the law of the private investment contract[300].

The application of the "wrong" law could be regarded as an excess of power in annulment proceedings. For example, the question of the excess of power held by the tribunal was dealt with in *Industria Nacional de Alimentos SA v Peru*[301], where the *ad hoc* committee argued that the requirement in Article 52(1)(b) of the ICSID Convention is not only that the tribunal has exceeded its powers, but that it has done so, "manifestly."[302] However, the committee

[297] Michael Waibel , Asha Kaushal , et al. (eds), The Backlash against Investment Arbitration, (2010), p. 19.
[298] Martin, Antoine, International Investment Disputes, Nationality and Corporate Veil: Some Insights from Tokios Tokelés and TSA Spectrum De Argentina (March 24, 2011). Transnational Dispute Management, Vol. 8, No. 1, February 2011, p. 1.
[299] As an alternative to the doctrine of piercing the corporate veil, some authors suggest that states may wish to consider building into the tender process, or the terms of an investment license, the requirement that the investor disclose the ownership structure of the investment and seek approval for changes in the upstream corporate structure or nationality. Seeking approval could be a more legitimate practice than lifting the corporate veil and would be more advantageous for the host country. The host state could control the changes in the investor's corporate structure and prohibit practices, which would not be in accordance with the purpose of the investment agreement, see Michael Waibel , Asha Kaushal , et al. (eds), The Backlash against Investment Arbitration, (2010), p. 27.
[300] Some authors found a more universal view of the relationship between the general international law and the investment treaty law, which states that 'general principles of law common to civilised nations' may be informed not only by common principles of domestic law, but also by general principles of international law itself, thus, custom is informing the content of the treaty right; and state practice under investment treaties is contributing to the development of general international law' –see McLachlan, Investment Treaties and General International Law, ICLQ 58. (2008).
[301] *Industria Nacional de Alimentos SA v Peru*, Ad Hoc Committee Decision of 5 September 2007, ICSID Case No. ARB/03/4.
[302] Ibid, para 100.

also found that treaty interpretation is not an exact science. It is frequently the case that there is more than one possible interpretation of a disputed provision, sometimes even several[303]. Although the committee held that the tribunal should interpret treaty provisions according to the Vienna Convention, it also held that in order to conclude that the tribunal exceeded its powers, there must be a basis to show that the tribunal disregarded a significant element of the well-known and widely recognized international rules of treaty interpretation[304].

Therefore, it can be argued that treaty shopping and corporate structuring, although seen in practice, is not a frequently reoccurring practice. If it were to be a constant practice, then such doctrines as piercing the corporate veil, or 'unclean hands' would have evolved into doctrines recognized by international law and, effectively, by international tribunals. This, again, leaves room for interpretation to the tribunals.

However, one of the instruments which have the potential to address the treaty shopping practice and be used as a tool to find the proper nationality of corporate investor is the denial of benefits clause, which will be addressed next.

2.14. Denial of benefits

First of all, it must be noted that it is always for States to determine how wide their door will be for treaty shopping[305]. There are ways by which States can pre-empt treaty shopping practice and exclude individual investors of treaty protections. One of these is the inclusion of the 'denial of benefits' clause in the private investment agreement, the BIT, or multilateral investment agreement. The denial of benefits clause is the most legitimate way to object to jurisdiction *ratione personae,* because it is included in the agreement of the parties in relatively straightforward terms. Thus, the terms of the agreement and party autonomy principle are respected.

On the other hand, as will be observed, the denial of a benefits clause is still subject to broad interpretation and leaves much room for the tribunal to arrive at its own conclusions on the application of this clause.

This clause can be used on several occasions. For instance, where the investors from non-contracting parties to the treaty own or control the investment in question[306]. Denial of benefits clause can be found in many international investment agreements. Article 17(1) of the ECT provides that: "*Each Contracting Party reserves the right to deny the advantages of*

[303] Ibid, para 112.
[304] Ibid, para 116.
[305] Muchlinski, Peter, Corporations and the Uses of Law: International Investment Arbitration as a 'Multilateral Legal Order' (May 5, 2011). Oñati Socio-Legal Series, Vol. 1, No. 4, 2011, p. 22.
[306] Andrew Newcombe and Lluís Paradell , Law and Practice of Investment Treaties: Standards of Treatment, (Kluwer Law International 2009), p. 481.

this Part to: (1) a legal entity if citizens or nationals of a third State own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized"[307].

The denial of benefits clause is also found in many BITs. For example, Article I(c) of the Sweden-Bulgaria BIT provides, with respect to the definition of an investor, that: "*each Contracting Party reserves the right to deny to any legal person the advantages of this Agreement if nationals of any third State control such legal person and the said legal person is established on the territory of one of the Contracting Parties with the only or predominant purpose to invest in the territory of the other Contracting Party.*"[308] Therefore, it can be observed that if such a clause had been found in the Lithuania – Ukraine BIT, then jurisdictional problems may have been avoided in the *Tokios Tokeles v Ukraine* case.

However, in the *Yukos* arbitration, where the respondent argued that the real owners of the investment were Russian oligarchs, the respondent also invoked the denial of benefits clause found in the ECT. The Tribunal held that the denial of benefits provision in Article 17(1) of the ECT did not affect the dispute resolution mechanism in the ECT and could not be exercised as to defeat the investors' legitimate expectation of substantive treaty protection. The Tribunal held that Article 17(1) does not constitute an automatic denial of benefits. Instead, it confers a right that must be exercised in order to produce an effect, i.e., the denial of benefits clause does not deny, simpliciter, the advantages of ECT to a legal entity, if the citizens or nationals of a third State own or control such an entity and if that entity has no substantial business in the Contracting Party in which it is organized. In the tribunal's opinion, it instead 'reserves the right' of each Contracting Party to deny the advantages to such an entity. Thus, to effect denial, the Contracting Party must exercise the right.

Furthermore, the *Yukos* tribunal found that a 'third State' under the denial of benefits provision refers to a non-Contracting State. Therefore, this does not include the State hosting the investment, i.e., that ECT distinguishes between a Contracting Party (and a signatory), on the one hand, and a third State, which is a non-Contracting Party, on the other, and that as a consequence, the Russian Federation, for purposes of Article 17 of the ECT, was not a third State.

This explanation by the *Yukos* tribunal clearly indicates the interpretative power which rests on the discretion of the tribunal when it makes an assessment of the application and effect of the denial of benefits clause. The issue of the third state may be explained by the fact that the denial of benefits clause was initially used in the early FNC Treaties in order to ensure that there would be no interests associated with the third country 'enemy' companies[309]. Thus, on

[307] Article 17(1) of the Energy Charter Treaty.
[308] See the Sweden-Bulgaria BIT (1994) at Art. 1(c), cited by Emmanuel Gaillard, "Investments and Investors Covered by the Energy Arbitration Treaty"*, op. cit.,* p. 71. in Investment Arbitration and the Energy Charter Treaty (Clarissa Ribero, ed., 2006).
[309] "From the historical perspective of the international law on foreign investment, the purpose of the "denial of benefits" clause was to exclude third parties from claiming the benefits of the Treaty without assuming the

the other hand, it could be argued that the denial of benefits clause does not really fit, by its original purpose, into the modern investment treaty regime, and that is why it does not successfully deny claims, as in cases such as *Yukos* or *Tokios Tokeles*.

The downside of the denial of benefits clause was confirmed by a number of other tribunals where this clause was relied on by the host states. The tribunals took a rigorous approach and included additional requirements for the host countries to be able to rely on such a clause. This, again, confirms that the application and effect of this clause rests on the discretion of the tribunal.

As many argue, the denial of benefits clause is not effective in practice because it generally requires states to notify investors in advance of investment claims[310]. The *Plama v. Bulgaria*[311] arbitration can be seen as another example of the application of the denial of benefits clause, and of its rejection, due to the notification requirement. In the latter case, after receiving the claimant's request for arbitration, the Bulgarian government in a letter to ICSID exercised its right in accordance with Article 17(1) ECT to deny the advantages of the ECT to the claimant. The government argued the lack of evidence as to ownership and control, stating that the claimant was a "mailbox company" that had no substantial business activities in the Republic of Cyprus where it was incorporated. It failed to establish that it was owned or controlled by nationals of the ECT Contracting state[312]. However, the tribunal argued that the existence of a "right" is distinct from the exercise of that right. Thus, a contracting party has a right under Article 17(1) ECT to deny a covered investor the advantages, but it is not required to exercise that right, and it may never do so[313]. In addition, the tribunal stated that the application of such a clause would necessarily be associated with publicity or another notice so as to become reasonably available to investors and their advisers. While taking into account the latter, the contracting state must exercise its right before applying it to an investor and be seen to have done so[314]. Simply put, the tribunal stated that the host state must notify individual investors that it would use the denial of benefits clause before any dispute actually arose[315].

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obligations therein: such prohibition was specifically directed at "enemy companies." Originally used to deny diplomatic protection, the clause was later imported into the treaties concerning protection of foreign investments", see Mistelis, Loukas A., and Crina Michaela Baltag. "Denial of Benefits and Article 17 of the Energy Charter Treaty." *Penn St. L. Rev.* 113 (2008): 1301.

[310] The International Legal Personality of Multinational Enterprises: Treaty, Custom and the Governance Gap. Robin F. Hansen. Global Jurist. Advances. Volume 10, Issue 1 2010, Article 9, p. 35.

[311] Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005.

[312] Ibid, para 31.

[313] Ibid, para 155.

[314] Ibid, para 157.

[315] Another important aspect to consider while analysing the denial of benefits clause was raised in the *Yukos vs Russia* arbitration. Here, the tribunal agreed with the argument of the claimant, that once exercised, the right of denial only operates prospectively. More specifically, it was held that denial of benefits clause can only operate prospectively and cannot have a retroactive effect, *i.e.* it can only have effect on new wrongful acts occurring after the date on which the reserved right has been effectively exercised, as opposed to the mere

Since this 'advance notice' requirement is not usually found in the BIT language, this rationale seems to be based on the discretion of the tribunal. However, it could also be argued that the tribunal should have taken into consideration the fact that the investor also has a right to commence an arbitration against the host state, but also that it can never use that right. Therefore, both parties to the agreement and their rights should be similarly weighted. If a state must notify individual investors in advance that it would use the denial of benefits clause against individual investors, then the host state should also have a right to know in advance whether individual investors would commence arbitration proceedings. Secondly, the requirement of publicity was already fulfilled when the parties signed the agreement because the denial of benefits clause is a part of the ECT, which had become publicly available since its adoption. Another argument, brought in *Plama v. Bulgaria,* was that the denial of benefits clause relates to the merits of the dispute. However, as it is argued by academics, such reasoning is fallacious because the denial of benefits clause must be invoked at the start of the proceedings in order to see whether the claim is actually admissible[316].

One of the successful examples of applying the denial of benefits clause was under Chapter 10 of the US-Dominican Republic-Central America Free Trade Agreement (CAFTA) in *Pac Rim Cayman LLC v Republic of El Salvador*[317]. In the latter case, the claimant invested in mineral exploration activities in El Salvador. Its claims arose from the respondent's failure, between December 2004 and March 2008, to grant the necessary environmental permit and mining concession. Until December 2007, the claimant was a Canadian company. Canada was not a party to CAFTA or the ICSID Convention. However, On 13 December 2007, the claimant changed its nationality to become a US company, at which point it became entitled to invoke CAFTA investor protections. The claimant commenced ICSID arbitration, alleging breaches of CAFTA obligations.

The respondent formally invoked its right under Article 10.12.2 to deny all benefits to the claimant and challenged the tribunal's jurisdiction. The respondent argued that the proceedings were an abuse of process because the claimant, originally a Canadian company with no rights under CAFTA, had changed nationality to secure CAFTA protections. The tribunal held that it lacked jurisdiction to hear the CAFTA claims on the basis that, as a result of the respondent's denial of benefits, the claimant was not entitled to any protection under the provisions of CAFTA. However, the objections based on abuse of process and jurisdiction *ratione temporis* were rejected.

In respect of the denial of benefits clause, the tribunal found CAFTA Article 10.12.2 required the respondent to establish that the claimant had no substantial business activities in the territory of the USA. This involved looking at the business activities of the claimant itself,

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continuation of previous wrongful acts. It can be argued that, although brought in different form, the foundation of the later argumentation is similar to the notification requirement, because the result would be the same – a state can only rely on the denial of benefits clause once it had notified certain investor of the use of such clause. See *Yukos vs Russia, p. 35, para 31; p. 167, para 458.*

[316] Zachary Douglas. The International Law of Investment Claims (Cambridge Univ. Press 2009), pp. 469-470.

[317] *Pac Rim Cayman LLC v Republic of El Salvador* (ICSID Case No. ARB/09/12).

rather than of the group of companies to which the claimant belonged. On the evidence, the tribunal found that this condition was established, principally because the claimant was a passive actor in the USA both before and after December 2007, with no material change following its change of nationality. Furthermore, the tribunal was satisfied that the claimant was owned or controlled by persons of a non-CAFTA state party (Canada) because the claimant was wholly owned by its Canadian parent company. The tribunal also found that there could be no objection to the timing of the denial of benefits[318].

Therefore, as it can be observed, the tribunal in *Pac Rim Cayman LLC v Republic of El Salvador* approach the denial of benefits clause on somewhat different arguments as discussed in *Plama* or *Yukos* cases analyzed above. Although the denial of benefits clauses were quite similar in their wording, however, much of the answer depended on the approach taken by the tribunal.

Consequently, it can be argued that the denial of benefits clause could be one of the main instruments for the host states to defend from the claims brought by the so-called "mailbox" companies. However, to work, this clause must act as a barrier for the admission of claims and must be exercised before the merits phase. Also, the notification requirement adds an additional requirement, which does not help the host country or the investor. It brings uncertainty for the investor because it could not know whether the host country would use such a clause. This would not be a problem if the notification requirement did not exist, and the terms of the agreement would be enough for the investor to know that such a clause exists and, thus, the denial of benefits clause would work as a warning for the treaty shopping practice. In the end, as in most of the cases concerning the establishment of corporate nationality, much rests on the interpretation of the tribunal.

2.15. Modern era free trade agreements

As compared with typical BITs, which were based on the so-called European or the Dutch Model, the NAFTA and the ECT treaties are much more detailed and comprehensive. However, recently, NAFTA model agreements have greatly influenced typical BIT drafting practice, and the NAFTA's free trade agreement model is now spreading around the globe[319]. More and more states are concluding bilateral or multilateral free trade agreements (FTAs) instead of BITs. FTAs also provide investment protection provisions. However, FTAs also cover trade, environmental, regional economic integration, and sustainable economic development provisions.

[318] See further PLC Arbitration. Denial of benefits precludes CAFTA claims (ICSID), 13 Jun 2012. Available: https://uk.practicallaw.thomsonreuters.com/1-519-8260?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1

[319] Lavranos, Nikos. "The New EU Investment Treaties: Convergence towards the NAFTA Model as the New Plurilateral Model BIT Text?." *Available at SSRN 2241455* (2013).

FTAs were endorsed by the new strongly developing economies such as Singapore, South Korea, India, Australia, New Zealand, and the traditional capital-exporting countries such as the USA, the EU and Japan. These agreements are also crucial in order to establish how states define the legal person and corporate nationality.

The ASEAN-Australia-New Zealand Free Trade Agreement[320] (Chapter 11) provides that a "juridical person means any entity duly constituted or otherwise organized under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship, association or similar organization" and that the "juridical person of a Party means a juridical person constituted or organized under the law of that Party." Similarly, the ASEAN Comprehensive Investment Agreement[321] provides that "juridical person means any legal entity duly constituted or otherwise organized under the applicable law of a Member state."

The Japan-Mexico FTA[322] also defines a legal person as an "entity constituted or organized under applicable law, whether or not for profit, and whether privately owned or governmentally-owned, including any corporation, trust, partnership, joint venture, or other association or sole proprietorship" and the "enterprise of a Party" as enterprise "constituted or organized under the law of a Party." The Singapore - Australia Free Trade Agreement (SAFTA)[323] also refers to an "enterprise" as any corporation, company, association, partnership, trust, joint venture, sole-proprietorship or other legally recognized entity that is duly incorporated, constituted, set up, or otherwise duly organized under the law of a party.

Similar definitions can be found in the vast majority of the modern FTAs, which also provide for the incorporation criteria. Therefore, it can be observed that, as far as the definition of the legal person or corporate nationality is concerned, modern FTAs have not changed the incorporation criteria and are even more liberal in comparison to some BITs. What is meant by the latter is that majority of FTAs do not require any additional requirements for what the legal person should possess in order to be recognized as of particular nationality, e.g., *siege social* or the seat of administration. Thus, some of the older BITs seem to be even stricter in terms of the definition of a legal person.

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[320] The AANZFTA agreement entered into force on 1 January 2010 for (and between) the following countries: Australia, Brunei, Malaysia, Myanmar, New Zealand, Singapore, the Philippines, and Vietnam. It entered into force for Thailand on 12 March 2010; for Laos and Cambodia on 1 and 4 January 2011 respectively; and for Indonesia on 10 January 2012.

[321] The ASEAN Comprehensive Investment Agreement (ACIA) entered into force on March 29, 2012, aiming to create a free and open investment environment through the consolidation and expansion of existing agreements between the ASEAN member countries in replacing its two precursors, the ASEAN Investment Area (AIA) and ASEAN Investment Guarantee (AIG) agreements.

[322] Agreement Between Japan and the United Mexican States for the Strengthening of the Economic Partnership. The Japan-Mexico free-trade agreement came into force on April 1, 2005. Agreement provides for liberalisation of trade in goods over 10 years and covers investment protection, competition law, bilateral safeguard measures and dispute settlement.

[323] The Singapore-Australia Free Trade Agreement (SAFTA) became operational following an exchange of third person notes in Singapore on 28 July 2003.

Although at the time of writing this thesis, the hotly debated Transatlantic Trade and Investment Partnership (TTIP) agreement between the EU and the USA[324] has not yet been concluded, it also provides for definitions of corporate entities. For example, it defines "juridical person" as any legal entity duly constituted, or otherwise organized under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association.

TTIP also defines a "juridical person of the EU" or a "juridical person of the US" as a juridical person set up under the laws of a Member State of the European Union, or the US, and engaged in substantive business operations in the territory of the EU, or of the US, respectively. TTIP also defines what is meant by "substantive business operations", which is paralleled with the concept of "effective and continuous link"[325], with the economy of a Member State of the European Union. Accordingly, for a juridical person set up in accordance with the laws of the US, and having only its registered office or central administration in the territory of the US, the EU shall only extend the benefits of this agreement if that juridical person possesses an effective and continuous economic link with the territory of the US. It can be observed that the notion of the economic link may have the potential to become one of the important tools of defense available to the host states against the treaty shopping practice and claims by "mailbox companies". This is because the latter provision of TTIP endorses some of the characteristics of the denial of benefits clause and the continuous link theory found in the diplomatic protection sphere.

Conclusions to Chapter II

It was found in this Chapter that the notion of the nationality of legal persons or corporate investors in customary international law was strongly influenced by the regulation of nationality of natural persons. However, nationality rules concerning legal persons or corporations differed depending on the legal context and legal relationships involved. Different nationality rules concerning legal persons were found in different national and international legal instruments. The latter entails that the main principle, which has evolved from early international law, is that states, when in a bilateral or multilateral relationship, themselves define who their nationals are, for a specific purpose and in a specific legal context. This can also be referred to as the attribution of nationality. As was argued, a specific legal person may be considered as having the nationality of a specific state for the purposes of law on enemy corporations but may be considered as having a different nationality for the

[324] Leaked Text - Draft TTIP Text (Limited) – Trade in Services, Investment and E-Commerce (2 July 2013) (as released by the German weekly DIE ZEIT on Febr. 27, 2014 ZEIT-Artikel "Freihandelsabkommen: Endlich wird öffentlich gestritten" (28.2.2014)).

[325] In line with EU notification of the Treaty establishing the European Community to the WTO (WT/REG39/1).

purposes of tax law. Therefore, when it comes to the determination of corporate nationality, general determinations may not be applied.

It was also found that general rules of customary international law, such as the principles of diplomatic protection, could be referred to only in case of absence of a specific treaty or legal instrument defining the corporate nationality. The main principle of establishing the corporate nationality is by reference to the national (municipal) law of the country. However, definitions of nationality in municipal law are intended to relate to particular local objectives and may be of limited use in international investment law. Thus, when applying rules found in municipal law to corporate nationality, the interpreter should take into account that they may be irrelevant for the purpose of defining an investor's nationality in connection with an international tribunal's jurisdiction.

In the context of international investment provisions, it was found that provisions of BITs were influenced by the provisions of municipal law. However, notwithstanding the fact that the ICSID Convention, in certain circumstances, provides for an option to agree on a particular corporate nationality, the latter does not change the fundamental notion of the ICSID Convention that nationality of a legal person is established by way of incorporation.

On the other hand, when it comes to jurisdictional requirements of ICSID arbitration, the tribunals have vast discretionary interpretation powers. The tribunals may use an exception to the classical concept of nationality in cases where juridical persons are under foreign control. The latter provides that in ICSID arbitration, the parties have the liberty to agree on the rules of the establishment of corporate in their private investment agreements. Therefore, it can be argued that in such cases, the role of municipal law in the context of corporate nationality is diminished.

It was also found that the discretionary power of arbitral tribunals and Article 25 of the ICSID Convention may play a significant role in determining the nationality of an investor. Although treaty provisions also play an essential part, however, when it comes to finding the right nationality of the claimant, it is the ICSID Convention which provides the legal basis for a tribunal's jurisdiction. The municipal law, as it was observed, in some cases, is even denied applicability and relevance.

Another important conclusion is that in investor-state arbitration and jurisdictional requirements thereof, the difference between ownership and control is diminished, which is essential in corporate law. The latter is the primary facilitator of the treaty shopping practice. Doctrines such as piercing the corporate veil or 'unclean hands' lack recognition in international law and, effectively, recognition by international tribunals. Similarly, the denial of the benefits clause does not fit, by its original purpose, into the modern investment treaty regime.

Consequently, the discretionary power of arbitral tribunals to interpret international investment agreements based on their preferred views on corporate nationality is of utmost importance. The interpretation of the provisions of ICSID Convention and the provisions of

BITs and multilateral investment agreements resulted in different rules on the establishment of nationality compared with those formed in the sphere of diplomatic protection.

The latter can be explained not only by the discretionary interpretation power of arbitral tribunals but also by the complexity of applicable law in international investment law, where municipal law and international law coincide. As was argued in Chapter I, this brings newly-formed rules in international investment law on international personality and capacity, which merge both the municipal law and international law. It can be argued that liberty under the ICSID Convention and the terms of BITs influenced by municipal law had created rules which are applied to a type of corporation that can be assigned a separate category, labeled "transnational". Such "transnational" investors obtain benefits of a particular regime, more flexible and practical than the one provided in municipal law. Effectively, rules on the establishment of corporate nationality have become more flexible and practical.

CHAPTER III – CORPORATE NATIONALITY IN CONTEMPORARY INTERNATIONAL INVESTMENT

Introduction to Chapter III

As it was observed in Chapter II, the notion of corporate nationality in international investment law has evolved towards separate and self-sustained rules that are often detached from municipal law. These rules have been influenced by interpreters – arbitrators, and by rules that have evolved within the sphere of diplomatic protection, customary international law and transnational law principles. Rules on the establishment of corporate nationality in international investment law are now found in BITs, FTA's, multilateral investment agreements and the ICSID Convention.

The ICSID Convention was drafted in 1965 and at that time, there were no disputes arising under the BITs. The ICSID Convention was intended to provide a forum for international investment disputes arising under private investment contracts, such as the early oil production sharing contracts, concessions and similar arrangements with the host-states.

However, at present times, the main investor-state disputes arise under the BITs or multilateral investment agreements. This is because, over time, the forms and types of international investment have changed. In early international commerce, international investment was mainly governed by private or concession contracts[326]. Nowadays, international investment is primarily protected by international investment treaties[327]. This is important to the notion of corporate nationality in international investment law.

Furthermore, different types and forms of international investment also provide for the necessity of various means and rules to establish corporate nationality. Modern, globalized commerce and multi-nationality in international investment created issues related to corporate nationality, which were not envisaged before. As already discussed in previous Chapters, nowadays, the nationality of a corporate investor is often different from the nationality of the real interests standing behind the investment. Similarly, the true stakeholders may be of totally different nationalities than those formally possessed by the investment vehicle. Furthermore, the real interests behind the investors of a specific corporate nationality may, in reality, be the interests of the financing institution or even of other sovereigns. These issues also pose a more substantial question – is the nationality of the investor or the investment vehicle still important in international investment law? In

[326] Berger, Klaus Peter. "Renegotiation and Adaption of International Investment Contracts: The Role of Contract Drafters and Arbitrators." *Vand. J. Transnat'l L.*36 (2003): 1347. Talus, Kim, Scott Looper, and Steven Otillar. "Lex Petrolea and the internationalization of petroleum agreements: focus on Host Government Contracts." *The Journal of World Energy Law & Business* (2012): jws017.

[327] Salacuse, Jeswald W. "BIT by BIT: The growth of bilateral investment treaties and their impact on foreign investment in developing countries." *The International Lawyer* (1990): 655-675. Egger, Peter, and Michael Pfaffermayr. "The impact of bilateral investment treaties on foreign direct investment." *Journal of comparative economics* 32.4 (2004): 788-804.

particular, should it be so substantial to the jurisdiction of the investor-state tribunal in modern international commerce?

Chapter III will analyze all these issues. The first section of this Chapter will analyse how forms and types of international investment have changed over time and how the notion of corporate nationality has dealt with such a change. The second section of this Chapter will provide a more in-depth perspective concerning the corporate nationality issues which arise in modern international investment, where corporate nationality often only formally serves the interests of real and genuine stakeholders of the investment.

SECTION I – CORPORATE NATIONALITY IN DIFFERENT TYPES AND FORMS OF FOREIGN INVESTMENT

3.1. Corporate nationality and legal realism

When one looks at the history of foreign investment, the evolution of the rules in the sphere of diplomatic protection and bilateral and multilateral rules on foreign investment, one can observe that the regulation of corporate nationality, although strictly implemented and observed in early BIT arbitrations, had in fact, become more of a formality; rather than an essential axiom in the context of international investment law.

As has been argued, this is because the practice of corporate structuring and the multi-nationality of foreign investment had evolved more rapidly in comparison to the rules on corporate nationality. Simply put, the notion of corporate nationality in international investment law was too slow to evolve into rules that would regulate corporate structuring in international investment law and the related foreign investment disputes[328].

That, therefore, is the reason why corporate structuring and the related practice of the investor-state arbitration tribunals had accepted the principles of legal realism[329]. Legal realism operates on the premise that "the law", whatever that may be, is concerned with, and is intrinsically tied to, the real-world outcomes of particular cases. Accepting this premise moves jurisprudence, or the study of law in the abstract, away from hypothetical predictions and closer to empirical reflections of fact. As proponents of legal realism say - it is not

[328] See Muchlinski, Peter. "Corporations and the Uses of Law: International Investment Arbitration as a 'Multilateral Legal Order'." *Onati Socio-Legal Series* 1.4 (2011); Duchesne, Matthew S. "Continuous-Nationality-of-Claims Principle: Its Historical Development and Current Relevance to Investor-State Investment Disputes, The." *Geo. Wash. Int'l L. Rev.* 36 (2004): 783.

[329] Green, Michael Steven. "Legal Realism as Theory of Law." *William & Mary Law Review* 46 (2005): 1915-2000; Gilmore, Grant. "Legal realism: Its cause and cure." *Yale Law Journal* (1961): 1037-1048.

concerned with what the law should or "ought to" be, but that legal realism simply seeks to describe what the law is[330].

Similar observations can be made about the notion of corporate nationality. There were always rules on corporate nationality in international investment agreements. However, these rules do not conform to the real and complex conditions and forms of foreign investment. As will be observed next, the latter is evidenced by the evolution of the various types and forms of foreign investment.

3.2. Evolution of different types and forms of foreign investment

True foreign investment, or so-called foreign direct investment, as it is understood in modern commerce, originated with American firms. Many of its characteristics, as we know them today, developed predominantly in American companies. Some authors point to the antecedents of foreign investment far back in history:

> "in 2500 B.C., Sumerian merchants found in their foreign commerce that they needed men stationed abroad to receive, to store, and to sell their goods...the East India Company, chartered in London in 1600, established branches overseas...In the mid-seventeenth century, English, French, and Dutch mercantile families sent relatives to America and to the West Indies to represent their firms. So too, in time, American colonists found in their own foreign trade that it was desirable to have correspondents, agents, and, on occasion, branch houses in important trading centers to warehouse and to sell American exports."[331]

As can be logically implied from the example above, and was also analyzed in Chapter II, the rules on corporate nationality at the time of the "antecedents" of foreign investment had only existed in particular contexts and in specific legal relationships.

When considering a modern foreign investment in the context of corporate nationality, one may observe that significant investment linkages have developed between countries that had longstanding historical ties, e.g., between France and North African and West African nations. Many industrial countries have developed programs to encourage investment in developing countries, where they had built strong commercial or political links[332].

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[330] Leiter, Brian. "Rethinking legal realism: Toward a naturalized jurisprudence." *Tex. L. Rev.* 76 (1997): 267.
[331] Wilkins, Mira, The Emergence of Multinational Enterprise: American Business Abroad from the Colonial Era to 1914, Cambridge, MA, Harvard University Press, 1970, p. 1) cited in Foreign direct investment and the operations of multinational firms: Concepts, History, and Data. Robert E. Lipsey, Working Paper 8665, Accessed at 2018-07-23 <http://www.nber.org/papers/w8665>.
[332] See Blomström, Magnus, Steven Globerman, and Ari Kokko. "The determinants of host country spillovers from foreign direct investment: review and synthesis of the literature." *Inward investment, technological change and growth* 1 (2001): 34-65.

Furthermore, it was usual that different countries dominated different foreign investment sectors. For example, U.S. firms are dominant in oil and chemicals, electronics, and motor vehicles. UK firms are important in the food processing, pharmaceutical, and service sectors. German firms are predominant sources of engineering. Over time, these dominant countries and their foreign investment activities had encouraged the rise and development of large multinational investors. The latter was due to the fact that, in order to increase the efficiency of their global operations, multinational corporations have increasingly broken their production processes into discrete functions[333].

In modern global commerce, companies typically obtain their input from worldwide sources, assemble the products in another location and then export these products to customers around the world. To support these new production and distribution systems, many multinational companies have established regional and product headquarters' outside their home countries[334].

Therefore, the primary forms of foreign investment have changed over time. The same can be said about the foreign investment sectors. While most investments before World War II was in natural resources and infrastructure, manufacturing investment became the predominant form of foreign investment in the post-war period. Today, services are the most important sector for foreign investment, and therefore, even the shift in the investment sectors may also influence the forms and types of foreign investment[335]. Notwithstanding the latter, setting up a new company in a foreign country has become the predominant way to serve overseas markets. Thus, the types of foreign investment have diversified for the purpose of both efficiency-seeking and asset-seeking strategies. As will be observed next, these issues are also important when considering the problems which arise in the context of corporate nationality.

3.3. Corporate nationality in joint-ventures

In the context of foreign investment, foreign-domestic ownership arrangements are constantly changing and depend upon the industry and other related forms of foreign investment. One of the most popular forms of foreign investment in the oil and gas industry are joint ventures. Joint ventures have been common within developing nations for a long

[333] Kogut, Bruce. "Designing global strategies: Comparative and competitive value added chains." *Sloan management review* 26.4 (1985). Dicken, Peter, and Nigel Thrift. "The organization of production and the production of organization: why business enterprises matter in the study of geographical industrialization." *Transactions of the Institute of British geographers* (1992): 279-291. Geringer, J. Michael, and Louis Hebert. "Control and performance of international joint ventures." *Journal of international business studies* (1989): 235-254.

[334] Birkinshaw, Julian, et al. "Why do some multinational corporations relocate their headquarters overseas?." *Strategic Management Journal* 27.7 (2006): 681-700. Pauly, Louis W., and Simon Reich. "National structures and multinational corporate behavior: enduring differences in the age of globalization."*International Organization* 51.01 (1997): 1-30.

[335] Alfaro, Laura. "Foreign direct investment and growth: Does the sector matter."*Harvard Business School* (2003): 1-31.

time. More importantly, in many countries, setting up a joint venture was the only way foreign concerns were allowed to invest[336]. The development of natural resources, particularly oil and gas exploration and production, was one major field of foreign investment. In the late-Nineteenth and early-Twentieth centuries, governments often awarded substantial concessions to multinationals to explore for and produce oil.

For example, in 1939, the Ruler of Abu Dhabi granted a 75-year concession covering the entire country to a consortium composed of five major oil companies: BP plc, Royal Dutch Shell plc, Exxon Mobil Corp., Total SA, and Portugal's Patex Oil and Gas. The onshore oil concessions were managed by the Abu Dhabi National Oil Company (ADNOC) through its ad hoc subsidiary, the Abu Dhabi Company for Onshore Oil Operations (ADCO). ADCO was a joint venture between ADNOC, which held a 60-percent interest in the subsidiary and super-majors BP, French Total, ExxonMobil and Anglo-Dutch Shell, which had a 9.5-percent stake each, together with Lisbon-based Partex, which held a 2-percent stake[337]. The ADCO joint venture is a clear example of the new form of international investment, through which the oil industry functions in the oil-exporting countries and which had replaced the concession agreements.

What is essential in the context of corporate nationality is that, generally, a joint venture corporation is formed when two or more corporations desiring to be "partners" in some activity organize and hold the shares of a new corporation. The resulting joint venture corporation is considered "international" when its organizers and shareholders are of different nationalities or when the nationality of the joint venture corporation differs from that of its shareholders[338]. While taking the latter into account, it could be argued that a joint venture corporation should be considered "international" if all or most of its activities are abroad, even though all of the shareholders are "nationals" of the country of incorporation. ARAMCO - Arabian American Oil Company was, for example, one of the most important joint venture corporations which operated on an international basis. It was, however, incorporated in Delaware and all of its shareholders were American corporations[339].

Another important aspect to consider is the fact that it is often necessary or desirable to include a government or a wholly government-owned corporation as one of the participants in the joint venture. This is often the sole reason for choosing the joint venture corporation as the organizational form. The constant presence of the directors of the state entity at board

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[336] Waelde, Thomas W. "International energy investment." *Energy LJ* 17 (1996): 191., Maniruzzaman, A. F. M. "The issue of resource nationalism: risk engineering and dispute management in the oil and gas industry." *Texas Journal of Oil, Gas, and Energy Law* 5.1 (2009): 79-108.

[337] See Taib, Mowafa. "The mineral industry of the United Arab Emirates." *Minerals Yearbook, 2009, V. 3, Area Reports, International, Africa and the Middle East* (2011): 48., Barnes, Philip M. "Oil and Gas in the UAE: the Foundation for Growth and Stability." *Perspectives on the United Arab Emirates. London: Trident Press Ltd* (1997): 234-253.

[338] See also Charney, Jonathan I. "Transnational corporations and developing public international law." *Duke Law Journal* (1983): 748-788.

[339] See Cattan, Henry. *The Evolution of Oil Concessions in the Middle East and North Africa*. Published for the Parker School of Foreign and Comparative Law [by] Oceana Publications, 1967., Sornarajah, M. "Power and Justice in Foreign Investment Arbitration." *Journal of International Arbitration* 14.3 (1997): 103-140.

meetings of the joint venture corporation provides the means of securing an adequate airing of the state's policy on the direction the joint venture should take[340].

The nature of the control that the foreign investor may be able to exert also varies with the project's nature. Where there is high technology involved and access can be gained only through the foreign partner, the local partner's role will generally be a passive one. Continued utility to the project, as a supplier of finance and technology and as a means of access to markets abroad, is the key to the control that the foreign investor can exert. Therefore, the next question which naturally arises in this context is – whose nationality should be considered decisive, within international companies – the one who fully controls the investment or the one who just acts as an agent or the non-controlling partner?

First, it must be noted that the situation in which the multinational corporation invests through the formation of a joint venture in the host state party requires an in-depth assessment of the corporate structure of the investment. One of the most important aspects is that the foreign party may have to be the minority shareholder who will not, therefore, have control over the joint-venture corporation. If the shares of the minority foreign shareholders are affected through the procedures prescribed in the internal constitutional documents of the joint-venture company, in accordance with the laws of the host state, then there can be little protection given through investment law[341]. However, the fact that a bilateral investment treaty provides protection for shareholdings by including them in its definition of investments may provide an avenue for such protection. In *AAPL v. Sri Lanka*[342], the tribunal decided that an appropriately worded bilateral investment treaty would confer protection on a minority shareholder in a joint venture. Such a treaty protects the shares and other interests in the joint venture company, but possibly not the assets of the company. It was held that the physical assets of a company incorporated in a host state are not protected by a bilateral investment treaty as the assets belong to a national of the host state. In such circumstances, the foreign investor can only rely on shareholder protection.

Secondly, more problems may arise when the control in a joint venture is exercised jointly by shareholders of several nationalities and from the different Contracting States to the ICSID Convention. In that case, it is, however, possible to consider the local company as being under foreign control for the purposes of the second clause of Art. 25(2) (b) of the ICSID Convention. Even if the nationals of one Contracting State cannot be said to be in a control position, it would be sufficient if they can exercise control together with nationals of other Contracting States. Moreover, the agreement on nationality may take this situation into account. Also, the mere existence of nationals of non-Contracting States or nationals of the

[340] Beamish, Paul. *Multinational Joint Ventures in Developing Countries (RLE International Business)*. Routledge, 2013., Geringer, J. Michael. "Strategic determinants of partner selection criteria in international joint ventures." *Journal of international business studies* (1991): 41-62.
[341] Sornarajah, Muthucumaraswamy. *The international law on foreign investment*. Cambridge University Press, 2010, p. 199.
[342] *Asian Agricultural Products Ltd. v. Republic of Sri Lanka,* ICSID Case No. ARB/87/3, Award, 21 June 1990, 4 ICSID Rep 246.

host state among the shareholders would not by itself oust the ICSID Centre's jurisdiction. However, it must be shown that the combined influence of the nationals of the Contracting States, other than the host state, can be described as controlling[343]. Indeed, such an approach may look simple, but investment treaty arbitration can present difficulties.

Tribunals in the related cases of *Cammuzi v Argentine*[344] and *Sempra v Argentine*[345], discussed the circumstances in which a company incorporated in the host state might be considered to be foreign-controlled and, in particular, the possibility of foreign control deriving from the joint interests of multiple parties of different foreign nationalities[346].

In *Sempra v Argentine*[347], the problem arose regarding the case of foreign investors of different nationalities who were acting under different treaties. The tribunal agreed with the Argentine's argument that the consent to arbitrate is expressed in each treaty individually, with a different personal and normative import. In such a way, that the combination of various participations could result in situations that the consent might not have intended to include. The tribunal noted that in such an alternative, the control could not be exercised jointly for the purposes of the ICSID Convention and of the BIT, and would have to be measured on the basis of the individual intents. In addition, the tribunal rejected the assertion of the claimant that the shareholders' nationality was not relevant since they were nationals of a State that is a Contracting party to the ICSID Convention. The tribunal found that this could, for instance, result in a shareholder protected by a treaty adding his participation to that of another shareholder who is a national of a State that is a party to the ICSID Convention but does not have a bilateral treaty with the host State that would protect him. On the other hand, the tribunal noted that if the context of the initial investment or other subsequent acquisitions result in particular foreign investors operating jointly, it is then presumable that their participation has been viewed as a whole, even though they are of different nationalities and are protected by different treaties. In such a case, it would be entirely feasible for these participations to be combined for the purposes of control or to make the whole the beneficiary[348].

Thus, it can be observed that the *Camuzzi v Argentine* and *Sempra v Argentine* tribunals also practiced legal realism and based their considerations on corporate nationality on their power of discretionary interpretation. Although no such rules were provided in the relevant treaties, the tribunals had recognized that it might be shown that different shareholders of different nationalities had collaborated from the outset in making and operating their investment. On

[343] Schreuer, Christoph H. *The ICSID Convention: a commentary*. Cambridge University Press, 2009, p. 200.
[344] *Camuzzi International S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/2.
[345] *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16.
[346] See also Mjoen, Hans, and Stephen Tallman. "Control and performance in international joint ventures." *Organization science* 8.3 (1997): 257-274., Hymer, Stephen Herbert. *The international operations of national firms: A study of direct foreign investment*. Vol. 14. Cambridge, MA: MIT press, 1976. Schreuer, Christoph H. *The ICSID Convention: a commentary*. Cambridge University Press, 2009, p. 200.
[347] *Sempra*, Decision on Objections to Jurisdiction, 11 May 2005, paras 52-54.
[348] Ibid, para 54.

that basis, it may be possible to find out that the locally incorporated claimant is "foreign-controlled" and, thus, "a national of other Contracting State" by reference to consolidated interests of its shareholders, notwithstanding their different nationalities[349]. It may also be noted that *Cammuzi* and *Sempra* had entered into their investment together, under a shareholders' agreement that reflected their joint venture. Under such circumstances, the tribunals held that it was possible to consider two foreign nationalities together in order to establish foreign control in a company incorporated in the host-state without identifying one of the other nationality as controlling.

Therefore, it can be argued that in the case of joint ventures, the issue of finding corporate nationality diminishes since it is the "joint foreign control" which becomes essential. However, as was observed, the investors who control the whole joint venture may still be precluded from the relevant investment protection treaty if they could not establish privity to the investment made and entitlement under particular BIT.

Another important case in the context of joint ventures and the relevant corporate nationality was the *Impregilo v. Pakistan*[350] dispute. In that case, Impregilo had acted as the leader of a joint venture formed under Swiss law (GBC). In this function as the leader, Impregilo had concluded two contracts with a Pakistani authority. It brought the action against Pakistan under the BIT between Pakistan and Italy, stating that it was acting on its own behalf and on behalf of the joint venture, as well as the other joint venture members, which were nationals of Germany and of Pakistan. However, the arbitral tribunal ruled that it had no jurisdiction in respect of claims on behalf of, or losses incurred by, either GBC itself or any of Impregilo's joint venture partners.

The critical aspect was that the tribunal considered claims under the Pakistan-Italy BIT. The tribunal found that the treaty did not extend to claims by nationals other than those of Italy. Tribunal found that under that treaty, Pakistan had not accepted to arbitrate claims by German or Swiss entities, nor any claims of Pakistani entities. In the tribunal's view, the fact that Impregilo was empowered to represent GBC under the provisions of the JVA did not change this analysis. The tribunal argued that this must be so since it remains a fundamental proposition that the scope of the BIT cannot be expanded by a municipal law contract to which Pakistan was not a party:

> "If not a claim "on behalf of GBC", then Impregilo's claim for "the entirety of the damages suffered by GBC" is in reality a claim on behalf of its joint venture partners, i.e. Ed. Züblin AG of Germany, Saadullah Khan & Brothers of Pakistan, and Nazir & Company (Private) Limited of Pakistan."[351]

[349] See Schreuer, p. 319.
[350] *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3.
[351] *Impregilo*, 22 Apr 2005, Decision on Jurisdiction, Para 140.

In the tribunal's view, Impregilo could not advance claims on behalf of the other participants in GBC. Of the three joint venture partners, none was a protected "investor", i.e., did not have the requested corporate nationality within the ambit of the BIT, and two of the three were not nationals "of another Contracting State", for the purposes of Article 25(1) of the ICSID Convention.

As it can be observed, this approach is different from the *Sempra* cases, where the tribunal had accepted the notion that other participants in the joint venture need not be required to be foreign nationals if joint control could be established. This again proves the presence of the principles of legal realism and the importance of the impact of the discretionary power of arbitral tribunals.

Another important question raised in *Impregilo* was if a party, which does fall within the ambit of a BIT and the ICSID Convention, may act in arbitration proceedings in a representative capacity in order to advance claims on behalf of other entities who do not so qualify[352]. In the tribunal's view, this issue turned upon the precise scope of the parties' respective consent to the jurisdiction of ICSID and found that the scope of Pakistan's consent to ICSID was, correspondingly, limited. Pakistan had consented to the ICSID jurisdiction of disputes arising out of investments made by Italian nationals in Pakistan. Tribunal argued that there was nothing in the BIT to extend this to claims of nationals of any other state, even if advanced on their behalf by Italian nationals. The tribunal also cautioned that any other interpretation would obviously expose Pakistan to claims by nationals of any state worldwide. Another critical circumstance was Impregilo's reliance on the terms of the JVA and its contractual rights and obligations as "Leader". The tribunal argued that the fact that Impregilo was empowered to advance claims on behalf of its partners was an internal contractual matter between the participants of the Joint Venture and cannot, of itself, impact upon the scope of Pakistan's consent as expressed in the BIT[353].

Nevertheless, another different approach was reached in the case of *Niko Resources (Bangladesh) Ltd. v. Bangladesh*[354], where arbitration was based not on a treaty but on a contract subject to the law of Bangladesh. The tribunal noted, firstly, that the jurisdictional requirements under the ICSID Convention are governed by public international law, which does not, however, necessarily apply to the question of entitlement to contractual claims and to their pursuit in arbitration. Therefore, the tribunal argued that it must turn to the GPSA, as the contract which governs the relations between the Buyer and the Seller and the JVA, which

[352] See Voss, Jan Ole. *The impact of investment treaties on contracts between host states and foreign investors*. Vol. 4. Martinus Nijhoff Publishers, 2010.

[353] However, in the *Asian Agricultural Products Ltd. v. Sri Lanka*, the tribunal awarded damages to a shareholder in a corporation established pursuant to a joint venture agreement for an injury suffered by that corporation. In addition, in *American Manufacturing & Trading Inc. v. Democratic Republic of the Congo*, the tribunal acknowledged that a 94% shareholder in a company whose properties were harmed by the respondent government "acts in its own name and in its own capacity as an American enterprise having invested in Zaire," and rejected objections to jurisdiction.

[354] *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla")*, ICSID Case No. ARB/10/19.

regulates the relations between the Joint Venture Partners. In this case, the JVA did not provide that the Joint Venture has a separate personality, nor did it contain any provision indicating that an entity distinct from that of the parties was being formed. Furthermore, it did not contain any provision on the manner in which the joint venture must act or be represented. The tribunal argued that these provisions confirm the conclusion that it reached when examining the GPSA and the meaning of the term "Seller" in that agreement, that: the Joint Venture is not an entity separate from the contracting parties with distinct legal personality; instead, it is a contract for the cooperation of the two parties[355]. Therefore, according to the tribunal, since the ICSID Convention and its Article 25 provide for arbitration between a Contracting State and a national of another Contracting State, these requirements were met – neither Article 25 of the Convention or the "purpose of the Convention" excluded that an award in favor of a foreign national may also benefit nationals of the defendant Contracting State[356].

Therefore, joint venture corporations in which the foreign investor, as well as the host Government or a local investor, participate may be explicitly designed to exclude foreign control over the enterprise. In this situation, it is necessary that the foreign shareholder and not just the joint venture corporation is a party to the agreement containing the ICSID clause.

As can be observed, when considering corporate nationality in the case of joint ventures, issues of privity, consent and control coincide. Thus the form and legal structure of the investment becomes of utmost importance. Where the parent company may be of the corporate nationality requested; however, some tribunals require privity of the parent company to the investment made. It is a different situation when different subsidiaries of different nationalities form a joint venture. In such a case, it may be possible to determine that the locally incorporated claimant is "foreign-controlled" and, thus, "a national of other Contracting State". This is done by reference to the consolidated interests of its shareholders, notwithstanding their different nationalities. This again raises problems when considering the matter of consent, i.e., that, usually, there is nothing in the BITs to extend claims of nationals of any state, even if advanced on behalf by nationals which have the relevant BIT with the host state.

Therefore, it can be argued that corporate nationality, if analyzed through the prism of corporate structuring and different forms of investment, is only relevant for entitlement purposes, i.e., that the requirement of specific corporate nationality becomes relevant when the investor brings a claim under the BIT. However, often it is not relevant when the claim is brought under a private investment contract. In the latter case, the only circumstance that must be proven is the "foreign" and joint control over the investment, i.e., the requirement under the ICSID Convention. This again raises issues when considering what can be

[355] *Niko Resources*, 19 Aug 2013, Decision on Jurisdiction, para 553.
[356] Ibid, para 573.

considered a "foreign" investment and what sort of control is required. This is particularly relevant when considering other forms of investment, such as portfolio investments.

3.4. Portfolio investments and corporate nationality

In the late 1990s, in the aftermath of the Asian economic crisis, mergers and acquisitions proliferated in the emerging markets, as foreign investors bought local assets whose prices had fallen dramatically. The most important regions for M&A activity were Latin America (especially Brazil through privatization) and Asia, particularly in telecommunications, banks, financial services and utilities[357].

As was observed above, investors use many different ways of holding assets in foreign countries. Which of these are considered direct investment and which investment firms are considered multinational enterprises, depends on the definition of a "foreign direct investment entity". What constitutes a foreign direct investment entity has been defined differently, mainly for the balance of payments purposes and for studies of firm behaviour[358]. It has also been defined in different ways by different countries. The definition has changed over time. The definition of foreign direct investment as a capital flow and a capital stock, has also changed correspondingly[359].

What is important is that "the dominant definition of a direct investment entity, prescribed for balance-of-payments compilations, avoids the notion of control by the investor in favour of a much vaguer concept – direct investment. The category of international investment reflects the objective of a resident entity in one economy obtaining a lasting interest in an enterprise that is resident in another economy (the resident entity is the direct investor and the enterprise is the direct investment enterprise)"[360]. The aspect of a lasting interest implies the existence of a long-term relationship between the direct investor and the enterprise and a significant degree of influence by the investor upon the management of the enterprise. While the concept is vague, the recommended implementation is specific: direct investment enterprise is defined as an incorporated or unincorporated enterprise in which a direct investor, who is resident in another economy, owns 10 % or more of the ordinary shares or

[357] Noel, Michel, and Wladyslaw Jan Brzeski. *Mobilizing private finance for local infrastructure in Europe and Central Asia: an alternative public private partnership framework*. World Bank Publications, 2005.
[358] Lipsey, Robert E. *Foreign direct investment and the operations of multinational firms: Concepts, history, and data*. No. w8665. National Bureau of Economic Research, 2001., Calvet, Augustin L. "A synthesis of foreign direct investment theories and theories of the multinational firm." *Journal of International Business Studies*(1981): 43-59.
[359] Desai, Mihir C., C. Fritz Foley, and James R. Hines Jr. *Foreign direct investment and the domestic capital stock*. No. w11075. National Bureau of Economic Research, 2005. Albuquerque, Rui. "The composition of international capital flows: risk sharing through foreign direct investment." *Journal of International Economics* 61.2 (2003): 353-383.
[360] International Monetary Fund. Foreign Direct Investment Trends and Statistics: A Summary Prepared by the Statistics Department In consultation with other departments. Carol S. Carson, October 28, 2003.

voting power (for an incorporated enterprise), or the equivalent (for an unincorporated enterprise)[361].

Indeed, modern forms and types of foreign investment are mainly focused on portfolio investments and foreign direct investment. In portfolio investment, the form of investment was mainly concerned with buying foreign shares, bonds or other instruments. It is noted, however, that the general view was that portfolio investment was not protected by customary international law. Customary international law protected the foreign direct investment – the physical property of the foreign investor and other assets directly invested through principles of diplomatic protection and state responsibility.

The latter would presuppose that if the portfolio investment were not protected by customary international law, then corporate nationality would not play its part in portfolio investment at all. This can be compared to direct foreign investment, where nationality *is* taken into account, either through the continuous link theory or the notion of the foreign nationality of the investor in modern BIT arbitrations. However, in this context, another substantial circumstance must be considered – that BITs *do* protect portfolio investments. The latter is explained by the fact that portfolio investments are now included in foreign direct investments. BITs defining investment always include shares in the definition of foreign investment[362].

For example, in *Alex Genin v. Estonia*[363]*,* jurisdiction was based on the BIT between Estonia and the United States. The BIT's definition of "investment" included "a company or shares of stock or other interests in a company or interests in the assets thereof." The claimants, who were nationals of the United States, were the principal shareholders of EIB, a financial institution incorporated under the law of Estonia. The claims arose, principally, from the revocation of EIB's license by the Estonian authorities. The Tribunal rejected the respondent's argument that the claim did not relate to an "investment", as understood in the BIT:

> "The term "investment" as defined in Article I (a)(ii) of the BIT clearly embraces the investment of Claimants in EIB. The transaction at issue in the present case, namely the Claimants' ownership interest in EIB, is an investment in "shares of stock or other interests in a company" that was "owned or controlled, directly or indirectly" by Claimants."[364]

[361] The OECD Benchmark Definition of Foreign Investment and the IMF Balance of Payments Compilation Guide, IMF, 1993, p. 86
[362] Mortenson, Julian Davis. "The Meaning of Investment': ICSID's Travaux and the Domain of International Investment Law." *Harvard International Law Journal*51.1 (2010).
[363] *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia,* ICSID Case No. ARB/99/2.
[364] *Alex Genin,* 25 Jun 2001 Award, para 324.

Also, the *Mobil v Venesuela*[365] tribunal found that there is no explicit reference to direct or indirect investments in the BITs. As in the vast majority of BITs, the definition of investment given in the relevant BIT was very broad. It included "every kind of assets" and enumerated specific categories of investments as examples. One of those categories consisted of "shares, bonds or other kinds of interests in companies and joint ventures." The tribunal observed that the plain meaning of this provision was that shares or other kinds of interests held by Dutch shareholders in a company or in a joint venture, having been invested on Venezuelan territory, are protected under the BIT. Furthermore, the tribunal noted that the BIT did not require that there be no interposed companies between the ultimate owner of the company or of the joint venture and the investment[366]. As can be observed, a literal reading of the BITs does not support the allegation that the definition of investment excludes indirect investments. Therefore, this entails that corporate nationality does play its part in portfolio investments, as well. However, this also raises a number of issues when discussing how to determine the nationality of a corporate investor in the sphere of portfolio investment.

For example, Prof. Sornarajah argues that a better view is that portfolio investment is not protected. This is because portfolio investments can be made on stock exchanges virtually anywhere in the world. Since the host state cannot know to whom linkages are created through the sale of shares on these stock exchanges, so there can be no concrete relationship that creates responsibility. On the other hand, this is not the case regarding foreign direct investment, where the foreigner enters the host state with the express consent of the host State and takes resources out of his home state, which could, otherwise, have been used to advance the economy of the home state[367].

While considering Prof. Sornarajah's suggestion, it must be noted that the linkages to the investor are one of the most critical aspects of the investor-state arbitration tribunal. The tribunal must always establish a link between the investment in the host state and the specific investor. This also concerns privity. Thus, if the tribunal cannot establish a proper link between the investor and the investment and, accordingly, to apply a particular bilateral treaty, then it would not have jurisdiction because of the lack of establishment of a particular corporate nationality. The latter seems to the problem arising in portfolio investment.

In this context, it is essential to note that the ownership that defines the scope of the direct investment relationship includes *indirect* as well as *direct* ownership. Direct investment enterprises include branches of a parent investor, subsidiaries, defined as incorporated enterprises, more than 50 % owned by the direct investor, and associates, defined as incorporated enterprises owned by 10-50 %. A subsidiary, or an associate of a subsidiary, is also a direct investment enterprise of the parent, as is a subsidiary of an associate, even though the parent's interest could be below 10 %. An associate of an associate is not part of the

[365] *Venezuela Holdings, B.V., et al v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27.
[366] *Mobil v Venesuela, 10 Jun 2010, Decision on Jurisdiction,* para 165.
[367] Sornarajah, Muthucumaraswamy. *The international law on foreign investment*. Cambridge University Press, 2010, p. 9.

parent's direct investment enterprise, although it is part of the first-tier associate's enterprise. Moreover, a single "direct investment enterprise" can be part of several different multinational firms, possibly from several countries[368]. Thus, it is apparent that Prof. Soranrahajan's suggestion is logical since the host state cannot, in reality, know to whom linkages are created, through such participants as branches of a parent investor, subsidiaries and associates[369].

The tribunal in *Continental Casualty v. Argentine Republic*[370] was also faced with a similar issue. The question, in this case, was whether under a BIT a controlling or even a minority foreign shareholder can bring a suit for the damages suffered by the local company in which it holds shares, caused by expropriation or other measures, that directly affect the economic rights of the shareholders.

The tribunal noted that it was widely recognized that, traditionally, home countries have relied on BITs as a mechanism to ensure protection for their investments in developing countries. In contrast, developing countries have entered into BITs as part of their strategies to attract foreign direct investment. The tribunal emphasized that investment is considered direct when the investor's share of ownership is sufficient to allow control of the company, while an investment that provides the investor with a return but not control over the company is generally considered to be a portfolio investment. Because an investor may be able to control a company with less than the majority of the stock, the degree of ownership required for an investment to be regarded as direct may vary with the circumstances. In some instances, an investment may be defined as direct if it is to be of lasting duration. Besides a contribution of capital resources, FDI usually entails that a transfer of managerial skills, as well as of proprietary commercial and technical know-how, takes place. Therefore, according to the tribunal, although portfolio investments are not excluded from the coverage of a BIT, the specific listing within it of various "associated activities," which typically pertain to FDI,

[368] The OECD Benchmark Definition of Foreign Investment and the IMF Balance of Payments Compilation Guide, IMF, 1995, pp. 150-151.

[369] In this context, the interesting aspect is that the *Continental* tribunal observed that it did not deny the relevance of the separate legal personality of the U.S. investor on the one hand, which is a U.S. corporation, and of its subsidiary in Argentina on the other hand, namely CNA ART, a company established and organised under the laws of Argentina, and which represented the investment of Continental. According to the tribunal, these two entities were clearly separate legal entities having different, though inter-connected rights which were relevant to the dispute. The claims of Continental could not be defined as indirect claims (or "derivative" claims), if Continental was claiming on behalf, or in lieu of CNA, in respect of rights granted to the latter by the laws of Argentina. It was, therefore, irrelevant that such claims would be inadmissible under the laws of Argentina and that they would not be amenable in any case to the jurisdiction of an ICSID arbitral tribunal. In this respect, the tribunal recalled the important statement of the ICJ in the *ELSI* case, also referred too in this thesis: "Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of treaty may be lawful in municipal law and what is unlawful in the municipal law may be fully innocent of violation of a treaty provision." See *Continental,* 22 Feb 2006, Decision on Jurisdiction, para 88.

[370] *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9.

indicates that in the case of an acquisition of a company established in the other country, the scope of its application is not merely limited to the ownership of the shares[371].

A similar rationale may also be found in the decision on jurisdiction in the *Enron* case. The arbitral tribunal based itself on similar reasoning as to shareholder's rights under the BIT. It concluded that whether the locally incorporated company may further claim for the violation of its rights under contracts, licenses, or other instruments, does not affect the direct right of action of foreign shareholders under the BIT for protecting their interest in the qualifying investment[372].

Therefore, these tribunals concluded that they had jurisdiction, even while assuming that the measures taken by host states were addressed and affected primarily, or essentially, the assets, investments, and activities of the wholly-owned subsidiaries.

However, the *El Paso v. Argentina*[373] tribunal verified if the Argentinian companies qualified as protected investors under the relevant treaty. The tribunal concluded that they did not qualify. The tribunal reasoned that if the domestic companies were not protected investors, their assets could not be considered protected investments. In the words of the tribunal: "[…] El Paso owns no contractual rights to be protected, as it has signed no contract with Argentina. […] It is thus the conclusion of the Tribunal that none of the contracts the interference with which is complained of by the Claimant are protected investments under the ICSID Convention and the BIT." In summarising its conclusion regarding the definition of the protected investment for the purpose of the tribunal's jurisdiction, the *El Paso v. Argentina* tribunal stated that what is protected are the shares, all the shares, but only the shares.[374]

Similarly, the *ST-AD v. Bulgaria*[375] tribunal clearly established that its jurisdiction was limited to the claimant's shareholding in the domestic company – which was, in fact, a protected investment under the treaty – as opposed to the assets belonging to the local company in which the claimant owned shares. While the *ST-AD* tribunal held conclusively that an investor whose investment consists of shares could not claim, for example, that the assets of the company are its property and ask for compensation for interference with these assets, it also clarified that such an investor could, however, claim for any loss of value of its shares resulting from interference with the assets or contracts of the company in which it owns the shares."[376]

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[371] *Continental,* 22 Feb 2006, Decision on Jurisdiction, para 81.
[372] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, 14 Jan 2004, Decision on Jurisdiction, para 49.
[373] *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15.
[374] *El Paso v. Argentina,* 27 Apr 2006, Decision on Jurisdiction, para 64.
[375] *ST-AD GmbH v. Republic of Bulgaria*, UNCITRAL, PCA Case No. 2011-06, 18 Jul 2013, Award on Jurisdiction.
[376] Similarly, in *Urbaser v. Argentina,* the tribunal accepted jurisdiction over the claims raised by the claimants under the relevant treaty "for damage suffered by them arising from their investment in the form of shares in

Therefore, when considering the notion of corporate nationality, it can be observed that the shareholders, who hold the specific corporate nationality which would enable them to claim protection for the host state actions under the relevant BIT, could only claim damages in respect of the decrease of the value of shares. However, it is also true that, in the case of portfolio investment, corporate nationality would play a significant part since it would enable the investors to claim damages through their investment vehicle, which may be just an intermediate, associate or subsidiary of the parent. All that is needed is the relevant BIT, which provides protection to individual corporate nationality investors.

Thus, it is also true that portfolio investment is protected and, since portfolio investments can be made on stock exchanges virtually anywhere in the world, even if the host state cannot know to whom linkages are created through the sale of shares on these stock exchanges, corporate nationality and the relevant BIT creates a concrete relationship that entails responsibility. This also provides that corporate nationality enables the portfolio investor to enter the host state without the host state's express consent.

This also effectively entails that no real and effective principle regarding the nationality of foreign investment may currently exist. As rightly held by the tribunal in *Rompetrol*[377]*,* which rejected the application of the real and effective nationality principle to jurisdiction, under a BIT and the ICSID Convention:

> "[T]he Tribunal cannot find any trace of justification for an argument that international law deprives the States concluding a particular treaty – whether a multilateral Convention like ICSID or a bilateral arrangement like a BIT – of the power to allow, or indeed to prescribe, the place and law of incorporation as the definitive element in determining corporate nationality for the purposes of their treaty. In the light of these conclusions, the Tribunal is clear in its mind that there is simply no room for an argument that a supposed rule of 'real and effective nationality' should override either the permissive terms of Article 25 of the ICSID Convention or the prescriptive definitions incorporated in the BIT."[378]

Again, this confirms the conclusion, which was also reached in Chapter II, that corporate nationality in international investment law is a construct of an agreement. It may also be found in an investment agreement, such as a concession or a bilateral investment treaty or

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AGBA, an Argentine company that operated a concession for the provision of public services in Buenos Aires. In its decision, the tribunal emphatically noted that, pursuant to claimants' own case, their investment was bound to claimants' shares in the domestic company and their claims were limited to the protection of rights arising from said shares. In the words of the tribunal: "Claimants repeatedly have stated that their claim is not based on […] a hypothetical legal title that would allow a shareholder to raise in its own name a claim that is based on a relationship to which the company alone is party, and not the shareholders." See *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, 19 Dec 2012, Decision on Jurisdiction.

[377] *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3.

[378] *Rompetrol, 18 Apr 2008,* Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility*,* Para 92.

ICSID Convention. No other considerations may be given when considering the corporate nationality for the purposes of establishing the jurisdiction of an investor-state tribunal.

3.5. How different forms of investment affect corporate nationality

Corporate nationality does play an important part when considering different forms and types of foreign investment. The type of foreign ownership of the investment may play a major part when considering if the investor may claim protection under the relevant BIT.

It may also be noted that there is no bright dividing line between portfolio and direct investment. Instead, there is overlap and integration. There are also doubts regarding the point at which a portfolio investment becomes direct. As was observed above, this circumstance is important when considering the notion of corporate nationality and its impact. There can be more than one investor exerting control over investment. For instance, a partnership or joint venture provide familiar examples. It can be argued that the point at which the investor gains some real measure of influence over the operation of the investment is the point where he crosses the line from portfolio to direct investment. That point will vary with each different type of business structure and each different investment within that structure[379].

Inevitably, a better approach would be to ask whether the investor has a say in the running of the investment. However, as was observed, the international investment law, as it stands right now, does not pose such a question. It is not indicated in the agreement to arbitrate. Since it is the agreement that eventually confers the jurisdiction to the investor-state tribunal, it can be suggested that corporate nationality, if analyzed through the prism of corporate structuring and different forms of the investment, is only relevant for entitlement purposes. The requirement of particular corporate nationality becomes relevant when the investor brings a claim under the BIT. This is not so when the claim is brought under a private investment contract. In the latter case, the only circumstance that must be proven is the "foreign" and joint control over the investment, i.e., the requirement under the ICSID Convention.

[379] There have been cases where a 5% holding was enough to give control over certain major decisions about an enterprise, and therefore conferred direct investor status. The single "golden share" held after some privatisations also gives rights to the holder over certain major decisions, and therefore must be considered more than a portfolio investment; i.e., a direct investment.

SECTION II – CORPORATE NATIONALITY OF TRUE STAKEHOLDERS OF FOREIGN INVESTMENT

Introduction

As has been discussed, when one considers the corporate nationality of the investor and its implications regarding the jurisdiction of the arbitral tribunal, one would most certainly consider issues concerning the multi-nationality of the investor, especially in today's globalized economy.

Issues concerning the multi-nationality of the investor would usually evolve around the company's incorporation, structure, siege social, shareholders, place of economic activity, place of the actual operation, place of administration and various other factors. However, this part of the discussion will focus more on the notion of the multinational company itself and its operation in relation to investment. For instance, how should one assess the real stakeholders and the true corporate nationality of the investment? Can one consider an investment and, respectively, an investor as foreign if the investor who invests abroad (e.g., purchase of shares of a local company) also borrows abroad? Therefore, to solve this dilemma, the object and purpose of "foreign" investment will be assessed, followed by an analysis of the funding arrangements and capitalization requirements.

3.6. Definition and purpose of foreign investment

According to the UNCTAD, there are some 100,000 multinational companies worldwide, with 1000,000 foreign affiliates. These companies play a significant and growing role in the world economy. For example, exports by foreign affiliates of multinationals are estimated to account for about a third of total world exports of goods and services[380].

Interestingly, as will be discussed in this section, most of the foreign investment of such multinational companies is financed by the financial institutions of the host-state. This permits multinational firms to substitute parent-provided debt for local borrowing in countries with underdeveloped capital markets[381].

However, as has already been discussed, the ICSID Convention and most of the preambles of the BITs provide that they are purposed to encourage only and solely "foreign" investment. The facilitation of foreign investment was also emphasized by Prof. Weil in the famous

[380] UNCTAD World Investment Report 2009 - Transnational Corporations, Agricultural Production and Development (UNCTAD/WIR/2009), 17 Sep 2009, 312 page(s), 6530.0 KB.

[381] Desai, Mihir A., C. Fritz Foley, and James R. Hines. "Capital controls, liberalizations, and foreign direct investment." *Review of Financial Studies* 19.4 (2006): 1433-1464; Hymer, Stephen. *The international operations of national firms: A study of direct foreign investment*. Vol. 14. Cambridge, MA: MIT Press, 1976.

Tokios Tokeles case where the presiding and dissenting arbitrator urged others to look at the political and economic reality - "When it comes to mechanisms and procedures involving States and implying, therefore, issues of public international law, economic and political reality is to prevail over legal structure"[382].

In addition, A. Broches, the founding father of the ICSID Convention, stated that the nationality of investment was more important than that of the investor. He emphasized that the ICSID Convention should [accordingly] apply in cases where the funds invested came from outside the country, rather than from foreigners residing in the country, out of local capital, owned by them, since the aim of the Convention was to encourage the flow of foreign funds. Moreover, A. Broches pointed out that in case funds were not foreign in origin, the host state would be entirely justified in treating the resident investor on the same footing as its own national investor[383].

The Oxford Dictionary of Business (1996) defined "investment" as 1) The purchase of capital goods, such as plant and machinery in a factory in order to produce goods for future consumption. This is known as *capital investment*; the higher the level of capital investment in an economy, the faster it will grow, and 2) The purchase of assets, such as securities, works of art, bank and building society deposits, etc., with a primary view to their financial return, either as income or capital gain. This form of *financial investment* represents a means of saving. The level of financial investment in an economy will be related to such factors as the rate of interest, the extent to which investments are likely to prove profitable, and the general climate of business confidence.

Similarly, the OECD provides that direct investment is a category of cross-border investment made by a resident in one economy (the direct investor) with the objective of establishing a lasting interest in an enterprise (the direct investment enterprise) that is resident in an economy other than that of the direct investor[384]. This definition is in line with the wording of the vast majority of BITs, which provide that the term "investments" means every kind of asset and more particularly rights derived from shares, bonds and other kinds of interests in companies and joint ventures[385].

Therefore, foreign investment, in a general sense, would mean: 1) The transfer of capital from one country to another; 2) The representation of entry into national industry by a firm

[382] *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Apr 29, 2004, Dissenting Opinion (Chairman Prosper Weil).
[383] Amazu A. Asouzu. International Commercial Arbitration and African States: Practice, Participation and Institutional Development, Cambridge University Press, 2001, p. 232.
[384] OECD Benchmark Definition of Foreign Direct Investment - 4th Edition, OECD 2008, Accessed at 2018-07-23 <http://www.oecd.org/fr/daf/inv/statistiquesetanalysesdelinvestissement/fdibenchmarkdefinition.htm>.
[385] Agreement On Promotion And Protection Of Investments Between The Government Of The Kingdom Of Bahrain And The Government Of The Kingdom Of The Netherlands.

established in a foreign market[386]. This model of foreign investment has always been the basis of the jurisprudence that evolved so far international investment law.

3.7. Corporate nationality and funding of investment

However, the economic reality, as indicated above, suggests that usually, the real transfer of capital from one country to the other does not really happen. In the majority of cases, it is the locally borrowed capital which is invested by the investor who is incorporated in another country:

> "Direct investment used to be thought of by economists as an international capital movement…. But economists trying to interpret direct investment as a capital movement were struck by several peculiar phenomena. In the first place, investors often failed to take money with them when they went abroad to take control of a company; instead they would borrow in the local market. Capital movement would take place gross…but not net. Or the investment would take place in kind, through the exchange of property-patents, technology, or machinery against equity claims, without the normal transfer of funds through the foreign exchange associated with capital movements."[387]

Also, in his famous treatise, Canadian scholar and economist Stephan Hymer observed that American-controlled enterprises operating in foreign countries borrow substantial amounts abroad: "In fact, the total American investment of $11.8 billion is only slightly more than half of the total assets of these enterprises"[388]. Hymer also compared the Standard Oil Company of New Jersey with Royal Dutch Petroleum Company, another large oil company at the time, and found that these two companies in the same industry, one American and other Dutch, both invested and borrowed in each other's countries[389].

In today's modern commerce, this issue of local borrowing is even more substantial. While acquiring investment in the host country, investors would usually use project loans that were often collateralized by the assets of the specific project assets and with a claim on the revenue

[386] Caves, Richard E. "International corporations." *International Business: Theory of the multinational enterprise* 1 (2002): 19.
[387] Kindlebernger, Charles P. *American Busines Abroad: Six Lectures on Direct Investment*. Yale University Press, 1969; see also Lipsey, Robert E. *Foreign direct investment and the operations of multinational firms: Concepts, history, and data*. No. w8665. National Bureau of Economic Research, 2001.
[388] Hymer, Stephen. *The international operations of national firms: A study of direct foreign investment*. Vol. 14. Cambridge, MA: MIT press, 1976, p. 13.
[389] Ibid, p. 15.

stream of the project[390]. This is the process of financing a particular economic unit, in which the lender is satisfied to look initially to the cash flows and earnings of that economic unit as the source of funds from which a loan will be repaid and to the assets of the economic unit as collateral for the loan[391]. These would usually be raised from local banks, from a branch of a locally incorporated bank or a foreign bank.

As found by an IMF study, in recent years, bank credit in the emerging regions of Asia and Latin America has grown strongly and in line with substantial investment. While total bank credit in advanced economies and emerging parts of Europe has stagnated, credit in other emerging economies, in particular, in emerging Asia and Latin America, has risen significantly[392]. Therefore, while taking into account that most of the investment comes from advanced economies, such as Europe and the US to Asia and Latin America, this development also suggests that investments in those emerging countries were also financed locally.

Furthermore, economic research suggests that borrowers using local banks may have little access to other funding sources, even when banking markets are open to foreign investment. Consequently, shocks to the banking sector have a disproportionate effect on investment by local bank borrowers in emerging markets[393]. It has also been noted that in recent years direct investors have extensively channeled funds to and for borrowing funds from third countries and for the purpose of holding ownership interests in direct investment enterprises[394].

In practice, there might be many variations of local borrowing and investment. For instance, a foreign investor incorporated in country B may borrow from a local bank in country A and acquire shares in a manufacturing company in country A. In this scenario, country A would have no foreign equity inflows and country B would have no equity outflows. Clearly, the latter would evidence that investment of "foreign" funds never happened. In another scenario, an investor incorporated in country A may receive a loan from its parent company incorporated in country B to purchase an investment in country C. In this scenario, country C would receive equity inflow. However, it would not receive it directly from the investor incorporated in country A, since these funds would in fact come from country B. These are

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[390] Foreign Direct Investment In Emerging Market Countries. Report of the Working Group of the Capital Markets Consultative Group, September 2003, IMF, Accessed at 2018-07-23 <http://www.imf.org/external/np/cmcg/2003/eng/091803.pdf>.

[391] Nagla Nassar, Project Finance, Public Utilities, and Public Concerns: A Practioner's Perspective, 23 FORDHAM INT'L L.J. 60, 60 (2000); ; William M. Stelwagon, Financing Private Energy Projects in the Third World, 37 CATH . LAW. 45, 46 (1996); Alexander F. H. Loke, Risk Management and Credit Support in Project Finance, 2 SING. J. INT'L & COMP. L. 37, 38 (1998).

[392] Investment and its Financing: A Macro Perspective Annex to the G-20 Surveillance Note Meetings of G-20 Finance Ministers and Central Bank Governors, February 15–16, 2013, IMF; see also Duchin, Ran, Oguzhan Ozbas, and Berk A. Sensoy. "Costly external finance, corporate investment, and the subprime mortgage credit crisis." *Journal of Financial Economics* 97.3 (2010): 418-435; Giuffra Jr, Robert J. "Investment Bankers' Fairness Opinions in Corporate Control Transactions." *Yale LJ* 96 (1986): 119.

[393] Paravisini, Daniel. "Local bank financial constraints and firm access to external finance." *The Journal of Finance* 63.5 (2008): 2161-2193.

[394] OECD Benchmark Definition of Foreign Direct Investment - 4th Edition, OECD 2008, Accessed at 2018-07-23 <http://www.oecd.org/fr/daf/inv/statistiquesetanalysesdelinvestissement/fdibenchmarkdefinition.htm>.

only a few examples of the issues arising when one considers the origins of funds to acquire investment.

In the practice of arbitral tribunals, the issue of the origins of funds and, respectively, of a tribunal's jurisdiction, has also provided fertile soil for debates. For example, in *Chartered Bank v. United Republic of Tanzania*[395], the tribunal analysed questions related to indirect investments made through a chain of intermediary companies. This dispute concerned a UK company - claimant, who owned a Hong Kong entity, holding loans to a Tanzanian borrower. The relevant credit was initially granted by a consortium of Malaysian banks and then purchased by the Hong Kong entity with its own funds. With respect to the Tanzanian loans, the UK claimant, by virtue of its equity ownership of the Hong Kong entity sought the benefits of protection as an investor pursuant to the UK-Tanzania BIT.

Although the tribunal admitted that an investment might be made indirectly, for example, through an entity that serves to channel investor's contribution into the host state and, indeed, special purpose vehicles have long facilitated cross-border investment. The tribunal emphasized that to constitute the claimant's status as a treaty investor, so that the loans may be considered investments "of" the claimant. It implicated the claimant as doing something as part of the investing process, either directly or through an agent or entity, under the investor's direction[396].

More importantly, the tribunal established that an investment of a company or an individual not only implied the abstract possession of shares in a company that holds title to some piece of property. Instead, as argued by the tribunal, for an investment to be of an investor, some activity of investing was needed, which implicated the claimant's control over the investment or action of transferring something of value (money, *know-how*, contacts or expertise) from one treaty-country to the other[397]. Thus, based on its interpretative power and acting in traditional realist method, the arbitral tribunal created a rule, that in order to benefit from the BIT, the claimant needed to demonstrate that the investment was made at the claimant's direction, that the claimant funded the investment or that the claimant controlled the investment in an active and direct manner[398].

These conclusions are important when discussing the issue of investing locally obtained funds. First of all, the approach taken by this arbitral tribunal is similar to the view of economists who provide that something other than money capital is (or may be) involved in international direct investment. This might simply be informal managerial or technical guidance. On the other hand, it could incorporate the dissemination of valuable knowledge and/or entrepreneurship in the form of research and development, production technology, marketing skills, managerial expertise[399]. Secondly, the tribunal defined foreign investment

[395] *Standard Chartered Bank v. United Republic of Tanzania* (ICSID Case No. ARB/10/12, Award, 2 November 2012).
[396] Ibid, para 198.
[397] Ibid, para 231.
[398] Ibid, para 230.
[399] Dunning, John H., Studies in International Investment, London, George Allen & Unwin, Ltd., 1970.

as an investor's contribution to the host state. Thus, in cases where it is not the investor who directly funds the investment, but a host state's bank, in economic reality, it would be challenging to establish that it was the contribution of the investor rather than a contribution of the host state's financial institution.

Moreover, it could also be argued that the mere conclusion of a credit agreement by the investor and a local bank, in relation to the purchase of an investment in a host-state, would not usually be sufficient to establish that the claimant controlled the investment in an active and direct manner. In particular, in cases when the investor acquires a project loan for the purchase of an investment, such investment and substantial revenue stream of the project would, in reality, be held by the financing bank in the form of a mortgage. In relation to the latter, the tribunal's conclusion in *TSA Spectrum v. Argentina*[400], is also relevant. In this case, the tribunal found that "existence and materiality of foreign control have to be objectively proven" to establish jurisdiction[401]. Therefore, the Tribunal pierced the veil of the corporate entity in order to determine the ultimate control of the investment and concluded that it lacked jurisdiction when it found that the investment was actually controlled by an Argentine national.

Thus, in a hypothetical case of local financing and mortgaging of the investment, it would be difficult to establish that the investor directly funded the investment, or that it was the investor who had control over the investment or that is was the investor who had transferred something of value from his home state to the host-state.

Another dispute which is relevant for the purposes of the issue analyzed in this part of the discussion is the *Berschader v. Russian Federation*[402] arbitration. In this case, the claim was brought under the Belgium/Luxembourg – USSR BIT. The tribunal was faced with a question regarding the indirect ownership of the investment, namely, the indirect investment by Belgian claimants through a Belgian company called BI, into the Russian Federation. What is important is that the tribunal found that assets [shares] fell within the categories of properties protected under the respective BIT. However, this fact alone did not warrant the conclusion that these assets qualified as investments under the treaty. Since BI was a company incorporated and established under the laws of Belgium, the tribunal found that claimants' shareholding in BI was an investment in a Belgian company and, as such, could not be considered as an investment in the territory of the Russian Federation. On the other hand, property rights of buildings located in the Russian Federation held by BI had constituted investments in the territory of the Russian Federation. However, the tribunal emphasized that all investments in the Russian Federation were made by BI, which was a separate legal entity from the claimants[403].

[400] *TSA Spectrum de Argentina SA v. Argentina*, ICSID Case No ARB/05/5, Award (Dec. 19, 2008).
[401] Ibid, para 134.
[402] Vladimir Berschader and Moïse Berschander v. The Russian Federation, SCC Case No. 080/2004, Apr 21, 2006, Award.
[403] Ibid, para 122;

The claimants raised an argument regarding the economic reality behind the investments made, which also is an argument developed in this discussion. The claimants contended that the "real" investment of capital was made by the claimants and the mere fact that such investment was made through the vehicle of BI should not, according to the claimants, preclude protection under the Belgium/Luxembourg – USSR BIT. However, the tribunal argued that the protection offered by the treaty could not extend beyond the terms agreed between the contracting parties. Moreover, the tribunal established that the reason why the claimants and not the BI were bringing a claim under the treaty was that the claimants no longer controlled BI, since that company was declared bankrupt. The tribunal indicated that it was not the purpose of the treaty to help shareholders overcome this kind of obstacle[404].

The reasoning of the tribunal in this dispute is useful when considering the issue of the origins of the funds in the investment. As was observed, this tribunal, based on its discretionary power, had established that the economic reality, in principle, cannot override the legal reality behind certain transactions for the purposes of establishing jurisdiction under the BIT. This would contradict the argument that one would need to establish the real origins of the investment or the real origins of the funds invested.

However, there were several arbitral awards which had recognised that a treaty claim could be brought by indirect owners of the investment[405]. For example, the tribunal in *Cemex v. Venezuela* held that "when the BIT mentions investments of nationals of the other Contracting Party… this does not imply that they must be 'directly' owned by those nationals"[406]. Similarly, the claimant in *CMS v. Argentina*[407] had successfully presented a claim for violations of the US-Argentina BIT, as a shareholder in an Argentine incorporated company. One of the major arguments raised by CMS related to the fact that due to Argentine's regulation, the investor could not repay its project debts. In fact, the investor financed its investment by debt, which was to be amortized over the life of the project. The total debt of the investor, both domestic and external, amounted to US$ 590 million. In regard to the latter, the Argentine Government argued that the investor had not chosen wisely from the options available to it as an investor seeking sources of financing the project. It further argued that the investor could not now attempt to transfer the consequences of these financing decisions to the Government[408].

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[404] Ibid, para 149;
[405] *Amco Asia Corp. and others v. Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, (Sept. 25, 1983); *Utd. Parcel Serv. of America (UPS) v. Canada*, NAFTA (UNCITRAL), Award on the Merits, (May 24, 2007); *Antoine Goetz and others v. Republic of Burundi*, ICSID Case No. ARB/95/3, Award, para. 89 (Feb. 10, 1999); *American Mfg. & Trading, Inc. v. Democratic Republic of the Congo*, ICSID Case No. ARB/93/1, Award (Feb. 21, 1997); *Alex Genin, Eastern Credit Ltd., Inc. and A.S. Baltoil v. The Republic of Estonia*, Award (June 25, 2001); CME Czech Republic B.V. (The Netherlands) v. The Czech Republic, Partial Award (Sept. 13, 2001);
[406] *Cemex Caracas Investments B.V. and Cemex Caracas II Investments B.V. v. Venezuela* (ARB/08/15), Decision on jurisdiction, 30 December 2010, para. 157;
[407] *CMS Gas Transmission Company v. Argentina* (ARB/01/8), Decision on jurisdiction, 17 July 2003;
[408] Ibid, para 78.

In this connection, it is also important to consider the financial institutions that had financed the investment and their standing as indirect claimant under the BIT. Could a bank that had financed the acquisition of the investment and held control of the investment under credit and mortgage file a damages claim as a creditor against the host-state?

First of all, as was evidenced above, the main requirement for the claimant to prove their standing to bring an indirect claim against the host-state is to prove that it had substantial control over the investment. Therefore, it could be argued that if a financial institution, such as a lending bank, had financed nearly 99% of the investment and had control over the investment under a mortgage, then it could establish the actual and real control over the investment. Secondly, some investment treaties, such as NAFTA Article 1116, permit an "investor of a Party" to bring a claim on their own behalf, for loss or damage arising out of the breach of a NAFTA investment obligation, by "another Party." NAFTA Article 1117 extends the NAFTA tribunal's jurisdiction over claims brought by an "investor of a Party" on behalf of an "enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly."[409] Thirdly, there were indicative examples of bank claims before investment tribunals due to losses arising from the financing of investment. For example, a group of seven foreign banks signaled that they would proceed with international investment treaty arbitrations against the Government of India in relation to alleged losses arising out of their financing of the failed Dabhol power plant project[410]. The seven banks - Credit Suisse First Boston, Standard Chartered Bank, Erste Bank Der Oesterreichischen Sparkassen AG, Calyon SA, BNP Paribas, ANZEF Ltd. V. India and ABN Amro N.V. hailed from five different European nations. The banks alleged that the Government of India had failed to protect their loans in the Dabhol project and was liable for damages under investment treaties concluded by India with the UK, Switzerland, Austria, France and the Netherlands. Although these cases were settled in 2004, they are a good example that it is not only the corporate vehicle that could claim damage in relation to the investment but the actual source of funds of the investment, e.g., the funding bank.

Therefore, based on the above, it may be observed that in cases where the investment was financed by financial institutions, such institutions, mainly commercial banks, could in essence, stand as direct or indirect investors under the respective BITs and claim damages in

[409] For example, in the NAFTA case UPS v. Canada, the Tribunal allowed United Parcel Service, the U.S. parent company, to bring claims against Canada on behalf of its wholly owned Canadian subsidiary, UPS Canada. The Tribunal held: "UPS is the sole owner of UPS Canada. As such, it is entitled to file a claim for its losses, including losses incurred by UPS Canada. . . . Whether the damage is directly to UPS or directly to UPS Canada and only indirectly to UPS is irrelevant to our jurisdiction. . . . (*Utd. Parcel Serv. of America (UPS) v. Canada*, NAFTA (UNCITRAL), Award on the Merits, para. 35 (May 24, 2007).

[410] See Note, "Looking Beyond the Dabhol Debacle: Examining its Causes and Understanding its Lessons," 41 Vanderbilt Journal of International Law (2008); "Seven banks start arbitration vs India over Dabhol", Reuters News, Dec.10, 2004 "US Government mounts arbitration against India over failed power plant project", INVEST-SD News Bulletin, Nov.29, 2004; "European Banks move to BIT arbitration against India in Dabhol dispute", INVEST-SD News Bulletin, Dec.17, 2004, available on-line at: <http://www.iisd.org/pdf/2004/investment_investsd_dec17_2004.pdf>.

relation to investments which were funded by them. Arguably, such a conclusion may have significant implications upon the notion of corporate nationality in international investment law.

3.8. Implications of local funding on the notion of corporate nationality

As was evidenced above, the multi-nationality of investment raises complex questions concerning the jurisdiction of the arbitral tribunal in investor-state disputes. The tribunal must use its discretionary interpretation power to solve these complex situations. In particular, the notion of corporate nationality, as it stands in most of the BITs in force, may fall short regarding the analysis of the use of corporate vehicles and funding to finance the acquisition of an investment.

Financing is a crucial aspect of any investment transaction. In fact, many investments are made in the process of privatisation of a state's property. In such cases, the investors would usually be required to provide evidence of the funding that has been arranged. For example, comfort letters would usually be submitted together with an investor's bid. The proof of ample funds to finance the acquisition of investment was an issue raised by the respondent in *Generation Ukraine v Ukraine*[411]. It was argued that any investment could not be proven without actual evidence of the funds available to finance the acquisition of the investment.

However, based on the analysis above, it may no longer be clear who is entitled to claim damages against the host-state. As argued above, the financing of investment by financial institutions, especially when considering the project loans, may provide a right of claim for totally different and separable players in relation to the investments made.

In a traditional sense, foreign investment would amount to the transfer of capital from one country to another and the representation of entry into a national industry by a firm established in a foreign market. However, in cases where the investment is funded by borrowed money, the nationality of the investment, and, respectively, the investor becomes a problematic assessment. In cases where the acquisition of investment is financed by a local financial institution, it could be alleged that such investment is not of foreign origin at all. Conversely, one could argue that since the origin of funds is local, then the investment operation should be considered to be of a local nature. Therefore, foreign investment does not occur. The latter would be in line with the A. Broches view that in case funds were not foreign in origin, the host state would be entirely justified in treating the resident investor on the same footing as its own national investor.

Similarly, the case may be that an investment operation, although conducted through a specific corporate vehicle, is funded by a third party national or a financial institution of a third country. In such a scenario, one could allege that the investment was "foreign" in nature.

[411] *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Sep 16, 2003 Award.

However, it would not have been executed by a national of the respective BIT. The latter would also cause problems when considering the jurisdiction of the arbitral tribunal.

Moreover, as was evidenced by India's Dabhol power plant project, certain investment transactions could be funded by numerous banks with different nationalities. The latter would also raise questions in regards to the notion of an investor's nationality, as well as the issue of group claims in investment arbitration. The possibility to file mass claims in investor-state arbitration was already evidenced by the *Abaclat and v The Argentine Republic*[412] dispute, where the tribunal decided by a majority that it held jurisdiction to hear 'mass claims' brought by over 60,000 Italian bondholders. However, the notion of the nationality of investment in the Dabhol power plant project case would have even more complexities due to the different nationalities of the banks involved.

As was evidenced above, the notion of control is also of the utmost importance when assessing the *ius standi* of a possible entitlement to claim for a breach under the BIT. There were examples where tribunals used the notion of control to provide an entitlement to indirect claimants. However, the question to be answered is: Are the use of project loans entitling a claim on the revenue stream of the project *de facto* when held by a bank and not by an investor themself? As was argued at the outset, the issue of the investment of borrowed funds only makes up a fraction of legal challenges concerning the notion of nationality in contemporary international investment law. The latter is just additional evidence that the notion of nationality no longer reflects the modern needs of a globalized economy and that a change to the approach to the issue of nationality is needed.

3.9. Nationality of true stakeholders

The complex corporate structure of investments and the challenge to find the true stakeholders and true corporate nationalities behind such investments have no universal answer. As was observed, this issue must be assessed on a case-by-case basis[413].

The definition of "true" or "real" investor also depends on the perspective. Usually, when we consider foreign investments and their protection under the relevant BIT, we consider that the "true" or "real" investor should come from one of the contracting states to the BIT. That is the proper definition to explain what one considers "true" or "real" investors in the context of corporate nationality in investor-state disputes.

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[412] *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5 (formerly *Giovanna a Beccara and Others v. The Argentine Republic*).

[413] See also Matten, Dirk, Andrew Crane, and Wendy Chapple. "Behind the mask: Revealing the true face of corporate citizenship." *Journal of Business Ethics* 45.1-2 (2003): 109-120., Waibel, Michael. *The backlash against investment arbitration: perceptions and reality*. Kluwer Law International, 2010. Muchlinski, Peter. "Corporations and the Uses of Law: International Investment Arbitration as a'Multilateral Legal Order'." *Onati Socio-Legal Series* 1.4 (2011).

In that regard, however, the one axiom which must be discussed is the need to find a "cut off" point where claims by corporate investors are too tenuous or remote in terms of their connection to the investment. The corporate nationality link, as discussed in previous sections, is one of the critical aspects which should determine the investor's entitlement to the relevant BIT protection[414]. Yet again, the establishment of a "cut off" point clearly rests on the tribunal's discretionary power.

For example, as has already been mentioned in previous Chapters, a complex and multi-layered corporate structure was considered in the *Société Générale v Dominican Republic*[415] UNCITRAL case. The Claimant, in this case, was Societe Generale, a company registered in France, which claimed in respect of DR Energy Holdings Limited ("DREH"), a company organized under the laws of the Cayman Islands and Empresa Distribllidora de Electricidad del Este, S. A., ("EDE Este"). This was a joint venture created in the Dominican Republic in 1999 between the Republic and the foreign investor AES Distribucion Dominicana Limited, which later sold its interest to the claimant. While citing the decision by a panel of arbitrators in the *Enron v. Argentina*[416] arbitration at ICSID, the DR government argued that arbitrators should consider "a cut-off point" after which claims by indirect investors are too tenuous or remote, in terms of their connection to the affected company at issue. In other words, a government's commitment to arbitrate disputes under BIT should not extend to an indefinite chain of partial or indirect investors[417].

The three arbitrators in the *Societe General* case in exploring whether there should be some limits to the chain of investors who might invoke the France-DR treaty acknowledged that Societe General had not been solicited to invest by the DR government. Nonetheless, the tribunal added that meetings had taken place between the claimant and the respondent, thus, suggesting an awareness on the part of the DR government as to Societe Generale's plans. The tribunal also stressed that the France-DR treaty does cover indirect and minority forms of equity interest, thus, implying that there may be one, or several layers of intermediate companies or interests, intervening between the claimant and the investment. Notwithstanding its structuring, the tribunal was, accordingly, of the view that indirect investments by Societe Generale should fall under the treaty's rubric[418].

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[414] Schreuer, Christoph. "Shareholder Protection in International Investment Law."*URL: http://www. univie. ac. at/intlaw/pdf/csunpublpaper_2. pdf(дата обращения–01 июня 2014 г.)* (2005)., Wu, Elizabeth. "Addressing Multiplicity of Shareholder Claims in ICSID Arbitrations under Bilateral Investment Treaties: A 'Tiered Approach'to Prioritising Claims?." *Asian International Arbitration Journal* 6.2 (2010): 134-163.

[415] *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic*, UNCITRAL, LCIA Case No. UN 7927.

[416] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3.

[417] *Societe Generale*, Award on Preliminary Objections to Jurisdiction 19 Sep 2008, para 49. In the *Enron* case, the tribunal placed particular emphasis on the fact that Argentina had specifically solicited the investment by Enron in its electrical industry, thus, reinforcing the impression that Argentina"s consent to arbitrate disputes under the US-Argentina BIT should encompass Enron notwithstanding the fact that the US company had structured its investments in Argentina through several layers of corporate entities.

[418] For its part, Societe Generale had sought to short-circuit the debate as to whether it held investments over which the tribunal had jurisdiction, by virtue of invoking the seemingly broader definition of investments

Although complex structuring of Societe Generale's investments did not deprive them of protection under the treaty, the structuring did pose some problems for the claimant when it came to demonstrating the requisite French nationality of the entire investment. The DR Government raised questions regarding if different corporate entities in the corporate chain of ownership qualified as protected French investors for the purposes of the BIT. Notably, the tribunal's closer study of the corporate ownership chain revealed that two companies not entitled to French nationality owned some stakes in Dominican Energy Holdings LP (itself the ultimate owner of 50% of EDE Este). Accordingly, the tribunal signaled that Societe Generale's claim, under the French BIT, did not encompass the entirety of the 50% stake in EDE Este, held by Dominican Energy Holdings LP. Thus, some 50% of the interest asserted by Societe General did not fall under the tribunal's jurisdiction.

Therefore, it may be observed that although the investors are not precluded from using complex corporate structuring when investing abroad, the terms of the agreement, i.e., the BIT and, respectively, the corporate nationality requirement, must still be observed when considering the jurisdiction of the tribunal[419].

The other issue, which is also of utmost importance, is the transparency of the investor's corporate structure. For example, in *Plama v Bulgaria*[420], the respondent State argued that there was confusion over the ownership of Plama, so that it was impossible to find, with adequate assurance that Plama was even present in the arbitration. The claimant contended that it was owned and controlled by Mr. Jean-Christophe Vautrin, a national of France. However, as was argued by the respondent, this uncertainty made it impossible to satisfy the requirements of Article 25 of the ICSID Convention because it could not be found, with adequate assurance, that Plama has consented to submit the present dispute to ICSID arbitration. If arbitration was allowed to proceed, according to the respondent, and it was ultimately found that Mr. Vautrin did not actually own Plama. Bulgaria stood exposed to the risk of another claim by the true owners for the same events alleged in arbitration.

In particular, the respondent argued that Mr. Vautrin's resistance to fully and openly disclose the ownership of Plama, raised serious doubts as to the credibility and reliability of the information he has given as to ownership. Reference was made to pledge agreements produced by the claimant, which also provided doubt upon the ultimate ownership of Plama. The respondent argued that even if the arbitral tribunal were to find that Mr. Vautrin was the ultimate owner of Plama, the claimant obtained the right to acquire its investment in Bulgaria,

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contained in another treaty concluded by the DR: the Central American Free Trade Agreement (CAFTA). Specifically, Societe Generale argued that the Most-Favoured Nation (MFN) provision of the France-DR BIT should entitle the French firm to the more-favourable definition of investments in CAFTA. However, the tribunal rejected this effort, holding that the MFN clause only extended to "treatment" accorded to investments, not to the definition of investment itself. The tribunal also accepted the DR Government"s view that an exclusion clause in the BIT prevented the MFN clause from reaching into a free trade agreement such as the CAFTA.

[419] See also Scherer, Andreas Georg, Guido Palazzo, and Dorothée Baumann. "Global rules and private actors: Toward a new role of the transnational corporation in global governance." *Business Ethics Quarterly* 16.04 (2006): 505-532.

[420] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24.

by intentionally misleading the Bulgarian government regarding the ownership of Plama, in order to obtain the consent of its Privatisation Agency. Bulgaria objected to jurisdiction on the ground that none of the protections of the ECT, the Cyprus-Bulgaria BIT, or the ICSID Convention could be used by the claimant that obtained its investments through fraudulent misrepresentations[421]. However, the tribunal stated that whatever the eventual merits of the respondent's "misrepresentation" case, the situation remained that the claimant was an "investor" under Article 1(7) ECT. Most importantly, the tribunal stated that it was irrelevant who owned or controlled the claimant at any material time. In the tribunal's view, the issue raised by the respondent should be dismissed on two cumulative grounds. First, the relevant exercise and consent were made by the claimant acting through its duly appointed corporate organs of management and duly authorized attorney. It was not performed by the claimant's shareholders or persons purporting to act as shareholders. The claimant's board of directors was granted the general power to manage the claimant, including the right to bring legal or arbitration proceedings in the company's name. That power was not granted to the claimant's shareholders and, accordingly, any dispute over the claimant's share ownership was irrelevant to the legal validity of the acts undertaken in the claimant's name by its duly authorized and appointed managers and agents. Second, the litigation over the claimant's share ownership remained unresolved, and those unresolved disputes could not, by themselves, invalidate the otherwise valid acts of the claimant's managers and attorneys[422].

Thus, based on the above, it can be rightly stated that when it comes to corporate structuring, the tribunal does not have any obligation to go beyond the corporate nationality of the claimant, even if there might be some concerns about the true stakeholders behind the investment vehicle. A similar conclusion was reached by the *Aguas del Tunari*[423] case, where the tribunal rejected Bolivia's argument that the term "control" required a fact-intensive inquiry into the identity of the ultimate corporate parent, or an affirmative showing of actual control by other nationality investors over claimant's day-to-day affairs. Rather, the tribunal held that it was sufficient for the purposes of invoking the protections of the Netherlands-Bolivia BIT in order to prove that a Dutch investor possessed the legal capacity to control the (Bolivian investment vehicle) claimant. The tribunal's test of corporate "control" was simple: "[S]ubject to evidence of particular restrictions on the exercise of voting rights, such legal capacity is to be ascertained with reference to the percentage of shares held."[424] The tribunal also held that where an entity has both majority shareholdings and ownership of a majority of the voting rights, control as embodied in the operative phrase "controlled directly or indirectly," exists. No more particularised or unique showing of control is necessary. Thus, the fact that the claimant's Dutch parents indirectly held 55% of the Claimant's voting stock,

[421] *Plama*, 8 Feb 2005, Decision on Jurisdiction, para 88.
[422] *Plama*, 8 Feb 2005, Decision on Jurisdiction, para 136. See also Ribeiro, Clarisse, ed. *Investment arbitration and the energy charter treaty*. JurisNet, 2006., Mistelis, Loukas A., and Crina Michaela Baltag. "Denial of Benefits and Article 17 of the Energy Charter Treaty." *Penn St. L. Rev.* 113 (2008): 1301.
[423] *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3.
[424] *Aguas del Tunari,* 21 Oct 2005, Decision on Respondent's Objections to Jurisdiction, para 264.

standing alone, was sufficient evidence to prove that the claimant was "controlled indirectly by both Dutch companies."[425]

Aguas del Tunari represents a pragmatic recognition that BITs are to be construed to promote certainty in the investment market. The BIT is intended to stimulate investment by the provision of an agreement on how investments will be treated and that treatment includes the possibility of arbitration before the ICSID. If an investor cannot ascertain if their ownership of a locally incorporated vehicle for the investment will qualify for protection, then the effort of the BIT to stimulate investment will be frustrated. Thus, the *Aguas del Tunari* majority intimated that there might be limits to a purposive interpretation of the BIT if an entity is inserted into the corporate ownership chain, after-the-fact, to create ICSID jurisdiction. The Tribunal warned that it had the power to "protect [its] integrity" and decline ICSID jurisdiction if facts emerged to substantiate Bolivia's accusation that the Claimant's Netherlands holding companies had been inserted as a "fraudulent or abusive device to assert jurisdiction under the BIT."[426]

It is, therefore, clear that host States will raise objections when a large company incorporates its subsidiaries in the BIT-advantaged States, such as the Netherlands, and thereby obtains BIT rights that might not otherwise have been available to its ultimate stockholders. However, as it was also indicated by the *Aguas del Tunari* tribunal, even when a host-state views the corporate parent as a mere formality, this formality is the fundamental building block of the global economy. It is also clear that when observing the growing web of BITs, it has been clear to negotiating States, for some time, that through the definition of a national or an investor, in many cases, such treaties serve more broadly, as portals through which investments are structured, organized, and most importantly, encouraged, through the availability of a neutral forum. In many BITs, the language used in the definition of a national provides evidence that national routing of investment is entirely in keeping with the purpose of the instruments and the motivations of the State parties[427].

In this context, it may also be useful to refer to the *KT Asia v Kazakhstan*[428] tribunal's argument, where the tribunal noted that "if one bears in mind that in twenty-four Kazakh BITs the respondent has agreed to the same test as in the present one, the place of incorporation, while in ten other BITs it has added a requirement that the *siège social* or place of business be placed or "real economic activities", be conducted there. When negotiating this BIT, Kazakhstan could have insisted on a more demanding wording of Article 1(b)(ii) of the BIT. For example, it could have required additional links to the State of incorporation or insisted on the inclusion of a "denial of benefits" clause. However, it did not. Kazakhstan

[425] Ibid, para 323.
[426] Ibid, para 246. See also Vandevelde, Kenneth J. "Aguas del Tunari, SA v. Republic of Bolivia. ICSID Case no. ARB/02/3. Jurisdiction. 20 ICSID Review: Foreign Investment Law Journal 450 (2005)." *American Journal of International Law* (2007): 179-184.
[427] See also Skinner, Matthew, Cameron A. Miles, and Sam Luttrell. "Access and advantage in investor-state arbitration: The law and practice of treaty shopping." *The Journal of World Energy Law & Business* (2010): jwq007.
[428] *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8.

has, therefore, accepted that the nationality of Dutch legal persons is determined by their place of incorporation"[429].

Accordingly, the tribunal agreed with the claimant that if, for instance, it was to require KT Asia to conduct its activities in the Netherlands, it would erode the difference between the various corporate nationality tests in BITs concluded by the respondent. Furthermore, by suggesting that KT Asia must demonstrate further connections with the Netherlands, the respondent was effectively asking the tribunal to apply a different nationality test to the one embodied in the BIT, a test that it has included in some of its BITs, but not in the one in the dispute. Thus, in this respect, the tribunal agreed with the claimant that the nationality of a corporation is a legal construct, and in the absence of any obligatory test for the nationality of corporations in international law, it fell to the Contracting States of the relevant investment treaty to define the nationality of a corporation, as they see fit[430].

It can be agreed, with the tribunal, that the legal limitations governing the function of international courts and tribunals in matters concerning corporate nationality may be stated both in terms of the nationality of the claimant and in terms of the nationality of the claim[431]. While legal scholarship and arbitral jurisprudence have not consistently distinguished between these two approaches, they are conceptually distinct and lead to a different legal characterization of the problem. While the former approach states the issue in terms of jurisdiction, the latter states it in terms of admissibility. Therefore, "the bond of nationality" that provides the foundation of the nationality of claims rule supplies the link between the state and the injured foreign national[432].

It can be rightly suggested that when host-states conclude BITs themselves, they certainly know about the modern corporate structuring, which was and is still happening in all modern commerce, especially in the sphere of foreign investment. Thus, it can be effectively argued that corporate nationality is no longer an important issue in relation to the true owners and true stakeholders of the investment. Usually, the tribunal would not look beyond what was

[429] *KT Asia,* 17 Oct 2013, Award, para 123. See also Weiniger, Matthew, and Elizabeth Kantor. "KT Asia Investment Group BV v Republic of Kazakhstan: Ratione Personae and Ratione Materiae." *ICSID Review* (2015): siv024.

[430] Ibid, para 128.

[431] See Duchesne, Matthew S. "Continuous-Nationality-of-Claims Principle: Its Historical Development and Current Relevance to Investor-State Investment Disputes, The." *Geo. Wash. Int'l L. Rev.* 36 (2004): 783. Bowett, Derek William. "Estoppel before international tribunals and its relation to acquiescence." *Brit. YB Int'l L.* 33 (1957): 176.

[432] Ibid, para 142. As noted by the tribunal, there is no triangular relationship in investment treaty arbitration, where the claimant investor asserts its own claim against the respondent State. As a result, there is no basis to introduce a rule of admissibility to require a bond of nationality between the claimant and its claim. There is no doubt that it is the investor which asserts its claim in investment arbitration, which distinguishes the latter from diplomatic protection. Yet, that does not mean that there is no bond of nationality in investor-state arbitration. There is a bond defined by the investment treaty. But for that bond, the investor would have no right to bring a claim against the other state. In that sense, there is a triangular relationship in investment treaty arbitration that is different from the one which exists in matters of diplomatic protection under customary international law. The existence of a triangular relationship where the bond of nationality is defined by the treaty is another reason why the treaty rule should prevail.

agreed in a certain BIT, i.e., the definition of an investor. Taking into account that the states are also most certainly aware of this issue, it can be concluded that even the host-states, themselves, do not see it as a material circumstance to find the true owners or true stakeholders of the investment. This issue only arises when the dispute is initiated, and it is only a matter of argument for the jurisdiction of the tribunal. However, in general, it is true that in reality, the host-states, i.e., before any dispute arises, do not attach much importance to the corporate nationality of certain investors.

3.10. Capitalisation and equity

Many host-states require that a foreign investor seeking entry should bring in all the capital or a certain percentage of it from overseas. A state's interest in ensuring that capital is brought from outside by the foreign investor is to prevent him from raising capital on the local markets, as discussed above. "If the investors were permitted to do so, local savings that could be utilized for home-grown projects of benefit to the state would be absorbed in serving the interests of the foreign investor. The attraction of local investors to invest in shares in a project with a large foreign corporation will divert investment funds that could have gone to finance local entrepreneurs or local projects. There are economic reasons for justifying such discriminatory treatment. The obvious one is that an assumed benefit of foreign investment – that it leads to capital flows from outside into the host state – will be nullified if the investor raises his capital on the local markets"[433].

In the dispute of *Amco v. Indonesia*[434], one of the conditions on which the foreign investor was permitted to participate in the project in Indonesia for building a tourist complex in a joint venture with an Indonesian partner was that it would bring an agreed sum of capital into the country from abroad to capitalize the venture. Under the law, the investor would have had to obtain certificates from the Bank of Indonesia to show that such capital had in fact been brought into the country. It was alleged that the investor had not brought in such capital, and this was used as one of the grounds for the cancellation of the agreement by the administrative agency. The initial ICSID tribunal found in favor of the foreign investor, but the award was annulled on the grounds that the tribunal had not given sufficient consideration to the issue relating to capitalization. A fresh tribunal later found in favor of the foreign investor, on the grounds that a proper procedure had not been followed in the cancellation of

[433] Sornarajah, Muthucumaraswamy. *The international law on foreign investment*. Cambridge University Press, 2010, p. 108., Emole, Chijioke E. "Nigeria's LNG Venture: Fiscal Incentive-Investment-Protection Schemes and ICSID Arbitration." *Afr. J. Int'l & Comp. L.* 8 (1996): 169., Shaw, Frank C. "Reconciling Two Legal Cultures in Privatizations and Large-Scale Capital Projects in Latin America." *Law & Pol'y Int'l Bus.* 30 (1998): 147.

[434] *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1.

the foreign investor's privileges to operate in the country, as the decision to cancel was not taken according to due process[435].

In this context, the argumentation of Prof. Prosper Veil may be remembered. He, too argued that the *Tokios Tokeles*[436] majority decision rested on the idea that the Ukrainian origin of the capital, invested by Tokios Tokele's in Taki spravy and the Ukrainian nationality of Tokios Tokeles' shareholders and managers, was irrelevant to the application of both the ICSID Convention and the BIT. What was relevant and decisive, according to the majority decision, was the fact that the investment was made by a corporation of Lithuanian nationality, whatever the origin of its capital and the nationality of its managers. According to Prof. Veil, the decision dismissed any "origin-of-capital requirement," which was plainly absent from the text of the relevant instruments and was inconsistent with the object and purpose of the Treaty, which was to provide broad protection to investors and their investments in the territory of either party[437].

Thus, since the origin of the capital is not relevant to the existence of an investment, the same could be said in respect of the definition of an investor. It is clear that the origins of capital, or the nationality of capital, do not have any impact on the notion of corporate nationality. As the ICSID Convention does not require an 'investment' to be financed from the capital of any particular origin, the origin of the capital used to acquire assets is not relevant to the question of jurisdiction under the ICSID Convention. This again confirms that the nationality of true stakeholders is not as important[438].

On the other hand, there was a rapid divestment of shares in existing foreign investment companies so that local shareholding targets could be achieved, e.g., when indigenization measures in states like Nigeria, were announced. In Malaysia, too, for reasons of ethnicity, shareholding structures were imposed on company shareholdings. The role of ethnicity in shaping policies of foreign investment is largely reflected in the types of company structures that are mandated. Foreign investment must conform to these structures when it enters a country, ensuring that its corporate vehicle is designed in accordance with the policies mandated by the state. Often, the legislation would specify the percentage of the shares that

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[435] Sornarajah, p. 108.

[436] *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18.

[437] *Tokios Tokelés*, 29 Apr 2004, Dissenting Opinion (Chairman Prosper Weil), para 11.

[438] For example, the *Vecchi v. Egypt* tribunal had found, that the fact claimants managed their investment through the medium of companies incorporated under Egyptian law, does not exclude the claimants from falling within the definition of "investment" of the BIT. The Tribunal found that the situation was no different in the case and agreed with the conclusions reached by the *Tokios Tokeles* tribunal. The terms of the BIT did not impose any "origin of capital" requirement. (*Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15). See also Garcia-Bolivar, Omar E. "The issue of a foreign company wholly owned by national shareholders in the context of ICSID arbitration." *Transnational Dispute Management* (2006).

had to be divested and detail the stages and the timeframe within which such divestment was to be effected[439].

Thus, the investor's true origins of funds must be transparent and in accordance with the local law. For example, in the *Fraport AG v. Republic of the Philippines*[440] case, the respondent challenged the tribunal's jurisdiction on the basis that the claimant's investment was not accepted in accordance with the laws of the Philippines, as required under Article 1(1) of the BIT. The Terminal 3 concession was a public utility subject to the nationality restrictions of the Philippine Constitution and the prohibitions imposed by the Anti-Dummy Law (ADL). Fraport openly sought to evade the nationality requirement limiting foreign ownership of the capital of a public utility to 40%, through the device of "indirect" ownership, coupled with the secret shareholder agreements. In this case, however, the tribunal agreed with the respondent. It observed that the Philippine Constitution and ADL, prohibited foreign investors from the managerial control of a public utility. Fraport's ostensible purchase of shares in the Terminal 3 project concealed a different type of unlawful investment, but not an "investment" which was covered by the BIT. It also held that the secret shareholder agreements evidenced that Fraport elected to proceed with the investments by secretly violating Philippine law. In other words, the investor planned and knew that its investments were not "in accordance" with Philippine law. The respondent was not stopped from raising violations of its own law as a jurisdictional defense since there was no indication in the record that the respondent knew, should have known, or could have known of the covert arrangements, which were not in accordance with Philippine law when Fraport first made its investment[441].

However, in modern foreign investment, equity requirements are being relaxed in many states in order to achieve other advantages. Increasingly, states permit foreign investors, who are prepared to locate in certain underdeveloped regions of the State or are willing to export larger percentages of their manufactured products, to set up wholly-owned enterprises, or to increase their equity ownership considerably. The many States also permit wholly-owned enterprises in industries that are new to them and which they prefer to attract. The latter, again, proves that the corporate nationality is not seen as such an essential aspect for the host-States when trying to attract foreign investment.

However, as was observed above, where such requirements that are related to equity capital still exist, there are always efforts to circumvent these requirements. The usual method is to hold shares through a nominee who has the necessary qualifications to satisfy the requirements of local participation. As it was observed from the examples of *Vecchi v. Egypt*

[439] Sornarajah, p. 113., Wang, Pien, Chow Hou Wee, and Peck Hiong Koh. "Establishing a successful Sino-foreign equity joint venture: The Singapore experience." *Journal of World Business* 34.3 (1999): 287-305. Johnson, Louis T. Wells Herbert F. *Making Foreign Investment Safe: Property Rights and National Sovereignty: Property Rights and National Sovereignty*. Oxford University Press, 2006.
[440] *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25.
[441] *Fraport,* 16 Aug 2007, Award, para 347.

and *Tokios Tokeles*, these avenues for circumventing the law are legal. A foreign national who circumvents the BIT requirement has a legitimate remedy through BIT[442]. Surely, the *Fraport v. Philippines* example also warns that foreign investments, made in transgression of the host state's laws, are not entitled to any protection under international law, but this case was not concerned with the corporate structuring issue, but rather, with the issue of managerial control of the public utility.

Foreign investors may themselves prefer joint ventures or may be legally required to enter their investment in such a way. However, since the joint venture entity would always be locally incorporated, problems of corporate nationality and shareholder protection do constantly arise at the jurisdictional phase of an investor-state dispute. As argued, the case may be that investment operation, although conducted through a certain corporate vehicle, is funded by a third party national or a financial institution of a third country. In such a scenario, one could allege that the investment was "foreign" in nature. However, it was not executed by a national of the respective BIT. The latter would also cause problems when considering the jurisdiction of the arbitral tribunal.

Furthermore, the situation concerning true stakeholders and capitalization requirements represents the issue of corporate nationality, which was also found in Section I of this Chapter. The nationality requirements in BITs are not construed to promote certainty in the investment market. The BITs, although intended to stimulate investment by the provision of an agreement on how investments will be treated, including the possibility of arbitration before ICSID, however, have a discouraging effect. The investors cannot ascertain whether their ownership of a locally incorporated vehicle for the investment will qualify for protection, and the effort of the BITs to stimulate investment is frustrated.

Nevertheless, modern commerce and modern foreign investment prove that the issue of the true owners or true stakeholders of the investment is only an issue which is posed to the investor-state tribunal. The host-states do not see the corporate nationality issue as so important and substantial when the investment is made, or even throughout the entire life of the investment. Thus, it may also be argued that corporate nationality has, in reality, lost its importance in modern international investment law.

The next question, which must be addressed in the following Chapter, is whether the requirements of certain corporate nationality in international investment law are still so important as to be kept in the BITs at all. In addition, this matter must be looked at through the prism of the still-developing transnational law, which suggests that nationality loses its importance.

[442] See also Schreuer, Christoph. "Nationality of Investors: Legitimate Restrictions vs. Business Interests." *ICSID review* 24.2 (2009): 521-527. Karakas, Edin. "Investment Treaty Arbitration: Jurisdictional Aspects of Investment Arbitration." *Croat. Arbit. Yearb.* 15 (2008): 61-299.

Conclusions to Chapter III

It was found in this Chapter that the rules on corporate nationality do not conform to the real and complex conditions and forms of foreign investment. The latter is evidenced by the evolution of the various types and forms of foreign investment. Corporate nationality does play an important part when considering different forms and types of foreign investment. However, the type of foreign ownership within the investment may play a significant part when considering if the investor may claim protection under the relevant BIT.

It was found that there is no clear dividing line between portfolio and direct investments. Instead, there is overlap and integration. This circumstance is important when considering the notion of corporate nationality and its impact. There can be more than one investor exerting control over an investment – a partnership or joint venture are familiar examples. Thus, the point where the investor gains some real measure of influence over the operation of the investment may be the point where he crosses the line from portfolio to direct investment. That will vary with each different type of business structure and each different investment within that structure.

Thus, a better approach would be to ask if the investor has a say in the running of the investment. The international investment law, as it stands, does not pose such a question when considering the notion of corporate nationality. Since it is the agreement that eventually confers jurisdiction to the investor-state tribunal, it was found that that corporate nationality, if analyzed through the prism of corporate structuring and different forms of the investment, is only relevant for the entitlement purposes. This is not so when the claim is brought under a private investment contract.

It was also found that the origin of the capital is not always relevant to the existence of an investment and the same could be said in respect of the definition of an investor. The origins of capital or nationality of capital, in some cases, does not have any impact on the notion of corporate nationality. As the ICSID Convention does not require an 'investment' to be financed from the capital of any particular origin, the origin of the capital used to acquire assets is not relevant to the question of jurisdiction under the ICSID Convention. This again confirms that the nationality of true stakeholders is not as important.

On the other hand, it was argued that host-states themselves, when concluding BITs, certainly know about modern corporate structuring, which was and is still happening in the sphere of foreign investment. Thus, it was argued that corporate nationality is no longer an important issue, as regards the true owners and true stakeholders of the investment. Taking into account that states are most certainly aware of this issue, it was concluded that even the host-states themselves do not see finding the true owners or true stakeholders of the investment as a material circumstance.

CHAPTER IV - MULTINATIONAL INVESTOR AND CREATION OF REALIST TRANSNATIONAL LAW

Introduction to Chapter IV

As was observed in Chapters I, II and III, there is evidence that the basic axioms of legal realism exist in international investment law. In particular, it was argued that international investment arbitration cases concerning corporate nationality evidence that the philosophy of legal realism operates and influences the creation of modern rules on corporate nationality.

In Chapter IV, it will be further explored whether the methods and theory of legal realism have also evolved in the decision-making processes in investor-state disputes. The overall objective of this Chapter IV is to analyze further the presence of legal realism in investment arbitration, as well as the diminishment of nationality requirements in contemporary international investment law.

As was already noted, realists criticized formalism widely, although not entirely, in the context of developing arguments about the role that law played in the market. In so doing, the legal realists sought to base legal reasoning on pragmatism. Pragmatic legal reasoning - what Llewellyn called "Grand Style judging" – consisted of a mixture of argumentative techniques based on implied intent, morality, policy, precedent and liberality[443]. Most importantly, conclusions based on policy considerations, rather than formal treaty rules, will determine the array of cases that are deemed worth arbitrating and the array that never gets through the jurisdictional phase. The gap between formal or "paper" rules and policy rules will, thus, determine the entire landscape of the international investment law[444].

Therefore, in Section I of Chapter IV, the main question is – what are those policy rules that are distinct from the paper-formal treaty rules? How are they developed? In this context, the intent, morality and policy, precedent and liberality, as notions of realist decision-making, will be addressed in the light of the decision-making of investor-state tribunals.

On the other hand, in Section II, it will be analyzed how the multi-nationality of international investors and the conduct of investors themselves influenced the rules on corporate nationality. In particular, it will be asked if multinational companies had themselves impacted the creation of the rules on corporate nationality and transnational law. Since transnational

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[443] Singer, Joseph William. "Legal Realism Now. Legal Realism at Yale: 1927-1960. By Laura Kalman." *Calif. L. Rev.* 76 (1988): 467-1377.; Wiseman, Zipporah Batshaw. "The Limits of Vision: Karl Llewellyn and the Merchant Rules." *Harvard Law Review* 100.3 (1987): 465-545.; Nyquist, Curtis. "Llewellyn's Code as a Reflection of Legal Consciousness."*New Eng. L. Rev.* 40 (2005): 419.

[444] When clear treaty rules or applications of standard techniques of legal reasoning are not outcome determinative, the effect will be felt far outside the domain of arbitrated cases. If the realist contention about the relative importance of "real" rules and the relative unimportance of paper ones is sound, therefore, that contention will have effects on one's understanding of international investment law. See Kruse, Katherine R. "Getting Real About Legal Realism, New Legal Realism and Clinical Legal Education." *New York Law School Law Review* 56 (2011): 295.

law governs the activity of multinationals in modern commerce and transnational investment, Section II will analyze a hypothesis that the lack of international regulation on the conduct of multinational investors had made way for the creation of transnational law. This argument is also relevant for legal realism in the sense that the arbitrators and other actors in international investment have themselves impacted the creation of transnational law to provide basic principles that now govern the relationships in international investment law. These principles, as has been observed, also include rules on corporate nationality.

SECTION I – PRAGMATISM AND REALISM IN INTERNATIONAL INVESTMENT LAW

Introduction

As was argued in previous Chapters, legal realism is understood as the pragmatic movement in law. Pragmatism is necessary in international investment law because of the lack of modern regulation for multinational corporate investors acting in global commerce.

As has been observed, realists criticised formalism, largely although not entirely, in the context of developing arguments about the role that law played in the market. In so doing, the legal realists sought to base legal reasoning on pragmatism. Pragmatic legal reasoning - what Llewellyn called "Grand Style judging" – consisted of a mixture of argumentative techniques based on implied intent, morality, policy, precedent and liberality[445].

While taking into account that rules on corporate nationality date back to the 17th century, it is obvious that there was always a need for arbitrators' interpretation. From the cases analyzed in this thesis, it can be argued that in many instances, like legal realists, arbitrators in investor-state disputes decide disputes on corporate nationality, not on the basis of a principled analysis of prior doctrine, but primarily on "hunches" arising from an intuitive sense of right and wrong under the circumstances. There were many examples analysed where the tribunals rejected jurisdiction on the basis that investors intended to abuse the procedure of investor-state arbitration[446]. Arbitrators would then use legal reasoning to rationalize these intuitive conclusions[447].

There was also evidence that in investment arbitration, as in the jurisprudential philosophy of legal realists, reasons recited by arbitrators in arbitral awards were largely *post hoc*

[445] Singer, Joseph William. "Legal Realism Now. Legal Realism at Yale: 1927-1960. By Laura Kalman." *Calif. L. Rev.* 76 (1988): 467-1377.; Wiseman, Zipporah Batshaw. "The Limits of Vision: Karl Llewellyn and the Merchant Rules." *Harvard Law Review* 100.3 (1987): 465-545.; Nyquist, Curtis. "Llewellyn's Code as a Reflection of Legal Consciousness."*New Eng. L. Rev.* 40 (2005): 419.

[446] See for example, *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5.

[447] See also Frank, Jerome. *Law and the modern mind*. Transaction Publishers, 1930. Frank adopted the "hunch" theory of judicial decisionmaking from the work of Joseph Hutcheson. See Hutcheson Jr, Joseph C. "Judgment Intuitive. The Function of the Hunch in Judicial Decision." *Cornell lq* 14 (1928): 274.

rationalisations for the results the arbitrators wanted to reach, rather than the real reasons that motivated the decisions[448]. For example, the *Yukos v Russia*[449] or *Mobil v Venezuela*[450] tribunals had similar facts before them on the issue of corporate nationality. However, they had placed more emphasis on the breach of investors' rights and formal treaty language rather than on the substantial jurisdictional objections. Thus they had reached a decision in the legal realist style.

Other important circumstances that welcomed the realist approach are the legal gaps or just the lack of internationally accepted rules on corporate nationality. The realists and their precursors believed that legal gaps were to be filled by judges acting as lawmakers[451]. Judges inclined to depart from the paper rule for non-legal reasons could do so without appearing to be departing from the law. Thus, according to realists, whenever a court relies on the principle of desuetude to nullify the force of a statute remaining officially on the books, it still uses another method to apply what looks like law, to reach a result other than the one seemingly indicated by the law as it is written down[452]. Some examples of this, as regards to the regulation of corporate nationality, are the cases analysed in Chapters II and III: even if the investors did meet the exact definition of the investor under relevant BIT, if they had structured their corporate nationality only for the purpose of bringing an international investment claim, arbitrators would find a way to dismiss jurisdiction on grounds which are not indicated in the written law, i.e., the relevant BIT.

These examples suggest, as also argued by realists, that departures from paper rules are common, and international investment law contains ample resources permitting arbitrators to avoid paper rules while still appearing to be applying the treaty law faithfully[453]. This conclusion does not address the question of just how often arbitrators do this or the extent to which such escape routes are routinely available, but it does suggest that the avoidance of the most immediately applicable paper rule is not unusual. There are multiple methods of

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[448] As argued by legal realists – "appellate cases were of limited pedagogical use, because they provide no insight into "the transcendent importance of the facts of cases." The Langdellian case method's focus on appellate decisions, misleads students into thinking that "the difficulty of predicting decisions stems largely from uncertainty in or about the rules." However, the greatest perils of prediction do not lie primarily in uncertain rules, but in "the obstacles to guessing what the trial courts will guess to be the facts" of a case". See Kruse, Katherine R. "Getting Real About Legal Realism, New Legal Realism and Clinical Legal Education." *New York Law School Law Review* 56 (2011): 295.

[449] *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 227.

[450] *Mobil Corporation and Others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27.

[451] "Undergirding this picture of law in its non-litigated everyday application is the premise that the easiness of easy cases or, more accurately, the easy application of the law - is typically determined by the meaning of the language of the pertinent legal rule, and that the indications of the meaning are ordinarily followed by judges. The consequence is the hypothesis that most disputes or events clearly falling under a rule's language are ones in which one party, with little hope of prevailing, would rarely pursue litigation." See Schauer, Frederick. "Legal Realism Untamed." *Tex. L. Rev.* 91 (2012): 749.

[452] Schauer, Frederick. "Legal Realism Untamed." *Tex. L. Rev.* 91 (2012): 749.; Dagan, Hanoch. "The realist conception of law." *Available at SSRN 608383*(2004).; Twining, William. *Karl Llewellyn and the realist movement*. Cambridge University Press, 2012.

[453] See also Franck, Susan D. "The legitimacy crisis in investment treaty arbitration: privatizing public international law through inconsistent decisions." *Fordham Law Review* 73 (2005): 1521.

accomplishing this end, and that the lack of regulation of incorporation is a significant part of the international investment legal environment.

Undoubtedly, legal realism and the notion of corporate nationality may not be limited to questions about lack of regulation. If arbitrators sometimes, or often, depart from paper rules, even when they are clear, then it may not be disputed that predicting arbitral outcomes can no longer be based on treaty rules alone. Sound predictions will then be based on the 'principles' or *de facto* considerations. Most importantly, predictions based on 'principles' or *de facto* considerations, rather than treaty rules, will determine the array of cases that are deemed worth arbitrating and the array that never gets through the jurisdictional phase[454].

Therefore, the next question is – what are those 'principles' or *de facto* considerations that are distinct from the paper-treaty rules? How have they developed? In this context, intent, morality and policy, precedent and liberality seem to be particularly relevant as notions of the realist "Grand Style judging".

4.1. Implied intent in determining corporate nationality

As has been argued, pragmatic legal reasoning, or "Grand Style judging" consisted of a mixture of argumentative techniques based on implied intent, morality, policy, precedent, and liberality[455]. One of the main issues that are often analyzed by the tribunals when considering if a certain investor should be entitled to treaty protection is, of course, the definition of investor and, in particular, the intent of the contracting parties when agreeing on this definition.

It is often the case that the tribunal would analyze the history of the negotiation of the certain BIT in order to discover the real intention of the parties when defining and agreeing upon which investors would be entitled to bring a treaty claim, i.e., what characteristics should they possess, etc. In that regard, it may first be argued that the definitions of the treaty should, primarily, be regarded as definitions and only later as requirements of the jurisdiction. Definitions of the treaty are all standards of protection that the treaty provides. What this means is that one cannot interpret definitions in isolation. It is really impossible to analyze and apply the definitions of "investor" and "investment" separately from other provisions of the treaty. One has to remain within the broader confines of what is usually understood to be

[454] When clear treaty rules or applications of standard techniques of legal reasoning are not outcome determinative, the effect will be felt far outside the domain of arbitrated cases. If the realist contention about the relative importance of "real" rules and the relative unimportance of paper ones is sound, therefore, that contention will have effects on one's understanding of international investment law. See Kruse, Katherine R. "Getting Real About Legal Realism, New Legal Realism and Clinical Legal Education." *New York Law School Law Review* 56 (2011): 295.

[455] Singer, Joseph William. "Legal Realism Now. Legal Realism at Yale: 1927-1960. By Laura Kalman." *Calif. L. Rev.* 76 (1988): 467-1377.; Wiseman, Zipporah Batshaw. "The Limits of Vision: Karl Llewellyn and the Merchant Rules." *Harvard Law Review* 100.3 (1987): 465-545.; Nyquist, Curtis. "Llewellyn's Code as a Reflection of Legal Consciousness."*New Eng. L. Rev.* 40 (2005): 419.

an investment or an investor and what is usually covered and addressed in BIT. For example, the *Salini test*[456], which is used to interpret the definition of investment, was never included and is not included in any definition of investment found in BITs that are currently in force. The tribunal applying the *Salini test* should be regarded as remaining in the broader confines of what is usually understood to be an investment[457].

Similarly, one has to remain within the broader confines of what is usually understood to be an investor – national of the contracting state. Nothing more, since any other additional requirements, as may be included in a specific treaty, are to be regarded as additional requirements or as additional burdens, which the most-favored-nation treatment would effectively prohibit. Such an approach may be based on Article 31 of the Vienna Convention, which requires that a treaty be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty.

Without definitions, the arbitral tribunal interpreting the treaty would not know what the treaty means. Thus, the definition of an investor is itself a treatment since the definition itself informs and shapes the standards of treatment. Standards of treatment only become meaningful in terms of the operation of the treaty in conjunction with the provision of the investor.

Therefore, it is important that, while negotiating specific BITs and terms thereof, each state defines what characteristics the natural or juridical person should possess in order to be considered as an investor for the purposes of a specific BIT. In other words, the contracting states themselves define who should be afforded protection established in a specific BIT. It was observed that requirements for natural persons do not differ in most of the BITs[458]. However, when it comes to juridical persons, some BITs may provide for less (i.e., not require a seat in contracting state) or additional requirements (i.e., control[459]) for the juridical persons to be afforded protection under BIT.

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[456] In *Salini Costruttori, S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (July 23, 2001) the Tribunal considered the criteria (the *Salini test*) which must be identified to establish that there was an investment. Those were: (i) existence of contribution, (ii) certain duration and risk participation and, additionally, (iiii) the operation should contribute to the development of the host State, as provided by the ICSID Convention's preamble. The tribunal in *Phoenix v. The Czech Republic* added two more elements – (iv) assets invested in accordance with the law of the host State and (v) assets invested *bona fide.*

[457] The *Salini* approach was followed in other cases: *IBM World Trade Corp. v. Republic of Ecuador*, ICSID Case No. ARB/02/10, Decision on Jurisdiction (Dec. 22, 2003); *L.E.S.I., S.p.A. v. R´epublique alg´erienne d´emocratique et populaire*, ICSID Case No. ARB/05/3, Decision on Jurisdiction (July 12, 2006); *Mitchell v. Congo*, ICSID Case No. ARB/99/7, Decision on Annulment (Nov. 1, 2006); *Joy Mining v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (Aug. 6, 2004).

[458] Article 25(2) of the ICSID Convention; See also Van Harten, Gus, and Martin Loughlin. "Investment treaty arbitration as a species of global administrative law." *European Journal of International Law* 17.1 (2006): 121-150; Sornarajah, Muthucumaraswamy. *The international law on foreign investment*. Cambridge University Press, 2010; Metzger, Stanley D. "Nationality of Corporate Investment Under Investment Guaranty Schemes--The Relevance of Barcelona Traction." *The American Journal of International Law* 65.3 (1971): 532-543.

[459] For example, the Agreement between the Government of the Republic of Costa Rica and the Government of Canada for the Promotion and Protection of Investments, requires (h) "investor" to be enterprise incorporated, or duly constituted in accordance with applicable laws of one Contracting Party; who owns or controls an investment made in the territory of the other Contracting Party.

Since the BIT and the definition of investor are products of bilateral negotiations and agreement by the contracting states, it seems totally legitimate for the states to define the investor in certain terms and add, or omit to add, any additional requirements the investor should possess to be afforded protection guaranteed by the BIT.

For example, as was stated by the tribunal in *Saluka Investments v Czech Republic*:

> "The Tribunal cannot in effect impose upon the parties a definition of "investor" other than that which they themselves agreed. That agreed definition required only that the claimant-investor should be constituted under the laws of (in the present case) The Netherlands, and it is not open to the Tribunal to add other requirements which the parties could themselves have added but which they omitted to add."[460]

Similarly, the majority of the tribunal in *Tokios Tokeles* argued that it is not for tribunals to impose limits on the scope of BIT not found in the text, much less limits not evident from the negotiating history. As argued by the *Tokios Tokeles* majority tribunal, an international tribunal of defined jurisdiction should not reach out to exercise jurisdiction beyond the borders of the definition. But equally, an international tribunal should exercise, and indeed is bound to exercise, the measure of jurisdiction with which it is endowed.

Contracting parties are free to define their consent to jurisdiction in terms that are broad or narrow. They may employ a control-test or reserve the right to deny treaty protection to claimants who otherwise would have recourse under the BIT. Once that consent is defined, tribunals should give effect to it unless doing so would allow the ICSID Convention to be used for purposes for which it was clearly not intended. Therefore, the majority of the tribunal in *Tokios Tokeles* reasoned that by respecting the definition of corporate nationality in the Ukraine-Lithuania BIT, the tribunal fulfilled the parties' expectations, increased the predictability of dispute settlement procedures, and enabled investors to structure their investments to enjoy the legal protections afforded under the treaty[461].

On the other hand, in a more recent case, *CEAC Holdings Limited v. Montenegro*[462] , the arbitral tribunal had to decide if *CEAC Holdings Limited* was a protected investor within the meaning of the applicable Cyprus–Serbia and Montenegro BIT. Under Article 1 of the said BIT an investor was: *"a legal entity incorporated, constituted or otherwise duly organized in accordance with the laws and regulations of one Contracting Party, having its seat in the territory of that Contracting Party (...)"*[463]. The main point of contention, therefore, was if CEAC really had "its seat" in the Republic of Cyprus. The claimant insisted on a low threshold of a mere "registered office," while the respondent asserted that the threshold that

[460] *Saluka Investments B.V. v. The Czech Republic,* UNCITRAL, Mar 17, 2006, Partial Award, paras 240-241.
[461] *Tokios Tekeles v Ukraine*, ICSID Case No ARB/02/18, Award, paras 36-41.
[462] *Central European Aluminium Company (CEAC) v. Montenegro*, ICSID Case No. ARB/14/8, Award, 26 July 2016.
[463] Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, Article 1.

must be met is a high one, involving "management and control". The tribunal, however, found that the evidence presented by CEAC – who bore the burden of proof – did not satisfy even the lower threshold proposed by itself, since it failed to show that it had, e.g., any premises of its own at the claimed address which had been open to the public.

In making its decision, the tribunal avoided express renvoi to municipal law but took it into account as a background to its interpretation, as other tribunals had done previously[464]. The tribunal stated:

> "if it is to be considered to be a company's registered office (…) (a) It must consist of a physical premises – a vacant plot will not do; (b) The company must have some right (by way of ownership, lease or license) to use the property or part thereof (…); (c) The premises must be accessible to the public (for at least two hours on each business day) for inspection of the various books and registers (…) and for service of documents and notices upon the company; (d) The books and registers that a company must by law maintain in its registered office should actually be held there; and (e) The relevant company's name should be painted or affixed on the outside of the office."[465]

Surely, such a test for "the seat" was not included in the relevant BIT. However, the standard of proof required by the tribunal was "sufficient and persuasive evidence."[466] Given, however, that the alleged premises of CEAC appeared empty and were *inter alia* inaccessible for courier delivery, the tribunal decided that the claimant failed to meet its burden of proof. For these reasons, the tribunal ultimately held that it lacked jurisdiction to deal with the case.

This approach needs to be compared with BITs, which merely provide that a qualified investor is one who has his place of incorporation in the territory of the home state. For instance, in *Tokios Tokeles* case, the tribunal recognized that the claimant was an investor, based solely on its state-of-incorporation.[467]

These two divergent views show that in one case (e.g., *Tokios tokeles*), great attention must be paid to the text actually used in the applicable treaty. As the tribunal in *Saluka Investments v. The Czech Republic*[468] has stated that:

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[464] *Tenaris S.A. and Talta-Trading e Marketing Sociedade Unipessoal LDA v. Venezuela* (ARB/11/26, Award 29 January 2016, para. 169).
[465] *(CEAC) v. Montenegro*, Award, para. 171.
[466] Ibid, para. 183.
[467] In such cases, a mere certificate from the respective trade register will suffice as proof of corporate nationality (*Tokelės v. Ukraine*, para. 43) contrary to the situation in *CEAC v. Montenegro* where the panel opined that such certificates "constitute only *prima facie* evidence." (*supra*, para. 155).
[468] *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL.

> "the Tribunal must always bear in mind the terms of the Treaty under which it operates. Those terms expressly give a legal person constituted under the laws of The Netherlands – such as, in this case, Saluka – the right to invoke the protection of the Treaty. To depart from that conclusion requires clear language in the Treaty, but there is none."[469]

However, in another (*CEAC),* the tribunal may impose a burden of proof which is non-existent in the treaty. Clearly, it would be logical and reasonable to suggest that when the parties to the BIT have merely referred to the place of incorporation of the investor, it is not then for the tribunal to retrospectively replace their expressed will by importing interpretations requiring additional proof.

However, that is not what the realist approach envisages for investor-state disputes. Rather, it is often the case, and it was observed throughout previous Chapters, that when determining the relevant threshold, due regard is placed on the particulars of the respective corporate claimant (e.g., whether its chosen corporate form presupposes lesser on-site activity), or additional requirements such as "real economic activities", that are often transposed to cases in which the applicable provisions merely require the place of incorporation. On the other hand, there are cases where the tribunal rejects any imposition of additional requirements. For example, in *ADC Affiliate v. Hungary*[470]*,* 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 risk 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. Similarly, in *Saluka v. Czech Republic*[471], the Japanese bank, Nomura, set up a "special-purpose vehicle" 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. However, 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. The tribunal noted that the agreed definition required only that the claimant investor should be constituted under the laws of the Netherlands, and it was not open to the tribunal to add other requirements which the parties could have added themselves, but which they omitted to add[472].

These divergent cases provide an excellent example of the pragmatic and discretionary realist approach of investor-state tribunals when considering and interpreting the definition of the investor in the relevant BIT.

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[469] *Saluka Investments v. The Czech Republic*, Partial Award, 17 March 2006, para. 229.
[470] *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16.
[471] *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL.
[472] Ibid.

Another important circumstance is that, in most cases, contracting states intend to permit a low nationality threshold in order to encourage investment. Upon its discretion, the tribunal may find other sources from the *travaux préparatoires* or other records related to BIT, which would indirectly confirm the tribunal's chosen interpretation. Moreover, these examples show, as also argued by realists, that departures from BIT language are common, and international investment law contains ample resources permitting arbitrators to avoid BIT wording while still appearing to be faithfully applying the treaty law[473]. Based on the discretionary powers of the investor-state tribunal, these routes are routinely available, and there are multiple methods of accomplishing this end.

Finally, as argued above, a significant issue is the existence of the 'principles' or *de facto* considerations, which are a substantial part of the international investment legal environment. States may not be sure their "silence" in the BIT is interpreted accurately. The above cases suggest that, without contrasting treaty language, tribunals tend to take investors' corporate nationality at either face value, by reference to the state of incorporation alone, or add their own additional requirements, such as a demonstrable third state or domestic control. This is true particularly in instances where tribunals have expressed "sympathy" for States facing the risk of shell company claims and where the 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.

Therefore, as the realist approach suggests, if arbitrators sometimes, or often, depart from paper rules, even when they are clear, then it is indisputable that predicting arbitral outcomes can no longer be based on treaty rules alone.

4.2. Morality and policy concerns when determining corporate nationality

An important aspect of the realist "Grand style judging" is the morality and policy concerns. Usually, this would revolve around the question of whether an investor intended to abuse the procedure of investor-state arbitration or even such vague notions as "fairness".

For example, in his dissent in *CEAC Holdings Limited v. Montenegro*[474]*,* Prof. W. Park noted that there was no uniformly accepted "ordinary meaning" of the corporate seat under international law. However, he disagreed with the majority's decision that the term "seat" in the BIT requires an entity to comply with the list of criteria stipulated by the respondent's legal expert. He pointed out that, while failure to comply with one or more of the criteria may result in a financial penalty, it did not make the office disappear. Prof. W. Park stated that the

[473] See also Franck, Susan D. "The legitimacy crisis in investment treaty arbitration: privatizing public international law through inconsistent decisions." *Fordham Law Review* 73 (2005): 1521.
[474] *(CEAC) v. Montenegro*, Award, Separate Opinion of William W. Park.

tribunal would be "assum[ing] a policy-making mission in excess of their authority" by adopting the list of criteria test for "seat."[475]

A policy-making mission, in excess of authority, is particularly relevant when one considers legal realism in investor-state disputes. As was explained, a true legal realist would always take into account policy and morality concerns when deciding a dispute. It is also true that the principle of "good faith" in assessing the initiation of investment treaty claims has manifestly become an important rule of international investment arbitration. The notion of 'good faith corporate nationality' is, of course, absent in treaty language. From a procedural perspective, "good faith" played a significant role at the jurisdictional stage of international arbitral proceedings for questions relating to whether the investment was acquired in "good faith" or whether an investor's initiation of a claim is made in "good faith" in order to avoid abuse of the arbitral process.

Moreover, although not provided in the BIT language, acts of corruption by investors have emerged as a potentially viable state defense in investor-state arbitration as well. Many cases brought corruption-related issues to the forefront of investor-state arbitration. For example, the *World Duty Free v. Republic of Kenya*[476] and *Metal-Tech Ltd v. the Republic of Uzbekistan*[477] resulted in ICSID tribunals accepting the corruption defense, invoked by the host states and the allegations of corruption, as proven. No matter how outrageous the host states' conduct toward the investors in the above-mentioned cases, the fact of the investors' involvement in corruption to procure and win government contracts deprived the investors of the favorable award and appropriate protection of their rights. The host states were able to evade any potential liability for investment violations, and in fact, took profit from their violation of international investment law. Similarly, the tribunal in *Plama Consortium Limited v. Bulgaria*[478] held that there was an implied requirement of "clean hands" in order to bring a claim under the ECT. However, the *Plama* tribunal did not refer to the "clean hands" doctrine in explicit terms. The tribunal relied on the general principle incorporated in international law that tribunals will not assist investors who have engaged in illegal activities.

These examples embody tribunals' quest to focus attention on the facts of specific cases and to interpret the cases in terms of situation-types. Similarly, as with the realist view, arbitrators in investor-state arbitration aim to make law based on a thorough understanding of contemporary social reality, i.e., not to make value judgments in the abstract about the substantive content of the law. Rather, they choose to carefully examine the social context in which those affected by legal rules operate. Understanding this social context enables arbitrators to adjudicate disputes through "situation- sense", meaning the ability to fit the law to social practice and to satisfy the felt needs of society to achieve a satisfying working

[475] Ibid.
[476] *World Duty Free Company v Republic of Kenya*, ICSID Case No. Arb/00/7.
[477] *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3.
[478] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24.

result[479]. The realists argue that judges should apply rules in light of their purposes, looking to the goals of the rules and their social effects, i.e., that judges should change or modernize rules to respond to changing social values and circumstances[480].

A similar situation is observed with respect to corporate nationality. Notably, even when they have disregarded third state or domestic control of investors, electing not to see past an investor's corporate veil, tribunals have suggested that in some circumstances, arbitrators might not recognize nationality solely on the basis of the place of incorporation, even in a seeming deviation from relevant treaty language. Tribunals have suggested that egregious corporate behavior might lead a tribunal to reject corporate nationality as determined by place of incorporation, using the language of "abuse of legal personality" or use of personality for "improper purpose". The tribunal in *Phoenix Action, Ltd. v. The Czech Republic*[481] 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."[482]

However, as was noted in previous Chapters, while useful principles in their own right, abuse of the corporate form and fraud are not substitutes for definitions of corporate nationality. Such doctrines are likely to be triggered only in egregious situations, such as when a corporate group restructures in order to bring an existing dispute within the purview of an investment treaty's dispute settlement. "Good faith" and "abuse of process" were used at various levels in international investment law and constitute, generally, important principles in general international law and investment law. As noted by the tribunal in *Phoenix Action*:

> "the principle of good faith has long been recognized in public international law, as it is also in all national legal systems. This principle requires parties "to deal honestly and fairly with each other, to represent their motives and purposes truthfully, and to refrain from taking unfair advantage. This principle governs the relations between States, but also the legal rights and duties of those seeking to assert an international claim under a treaty. Nobody shall abuse the rights granted by treaties, and more generally, every rule of law includes an implied clause that it should not be abused."[483]

Furthermore, as was argued, any determination of nationality that relies upon the establishment of a bad faith motive on the part of the investor sets the bar with respect to the

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[479] Singer, Joseph William, and Laura Kalman. "Legal realism now." (1988): 465-544.
[480] Singer, Joseph William. "Legal Realism Now. Legal Realism at Yale: 1927-1960. By Laura Kalman" *Calif. L. Rev.* 76 (1988): 467-1377.
[481] *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5.
[482] Ibid, Award 15 Apr 2009, para 93.
[483] Ibid, Award 15 Apr 2009, para 107.

burden of proof quite high, but this aspect is not even present in the treaty language. Abuse of the corporate form, in practice, is difficult to demonstrate legally and factually, particularly due to a lack of any evidence beyond the circumstantial[484]. Reliance on the principle of abuse of the corporate form to limit corporate investor nationality may 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 would be likely to present more reliable and practical approaches. Furthermore, as it was argued in previous Chapters, 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. The 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[485].

The most recent case example, which must be addressed in this context, is the famous *Phillip Morris v Australia*[486] arbitration. The award on jurisdiction and admissibility[487] dealt with two preliminary objections by Australia: 1) the "Non-Admission Objection" – Australia argued that *Phillip Morris Asia's* investment in *Phillip Morris Australia* was not properly admitted in accordance with Australian law and, therefore, fell outside the subject-matter jurisdiction (*ratione materiae*) of the tribunal; 2) the "Temporal Objection" – Australia argued that there was a pre-existing dispute between *Phillip Morris International* and the Australian Government concerning the plain packaging proposals, and *Phillip Morris Asia's* investment in *Phillip Morris Australia* post-dated this dispute, so it did not fall within the temporal jurisdiction (*ratione temporis*) of the tribunal. Australia supplemented this jurisdictional objection with an admissibility objection: even if the tribunal had jurisdiction over the claim, it should not exercise its jurisdiction because *Phillip Morris Asia's* claim under the treaty amounted to an abuse of process[488].

Phillip Morris Asia's primary response to the Temporal Objection was that it had controlled *Phillip Morris Australia* prior to the restructuring, through the exercise of management functions and strategic and budgetary decisions, since 2001. The treaty definition of an "investment" included assets "*owned or controlled*" by an investor, and so *Phillip Morris Asia* argued that it was eligible for the protections afforded by the treaty long before its formal acquisition of *Phillip Morris Australia*[489].

The tribunal undertook a brief analysis of the case law on the distinction between ownership and control and found that *Phillip Morris Asia's* involvement in the approval of expenditures

[484] Hansen, Robin F. "The Systemic Challenge of Corporate Investor Nationality in an Era of Multinational Business." *Journal of Arbitration and Mediation* 1.1 (2010).
[485] Ibid.
[486] *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12.
[487] Award on Jurisdiction and Admissibility, 17 Dec 2015.
[488] Ibid, para 400.
[489] Ibid, para 568.

and dividends, its role in branding and marketing strategy, and its supervision of *Phillip Morris Australia's* staff, were insufficient to amount to "control" in circumstances where *Phillip Morris Asia's* actions were undertaken in accordance with *Phillip Morris International* global policies and procedures. Therefore, they were ultimately subject to *Phillip Morris International* approvals[490].

Having determined that *Phillip Morris Asia's* only eligible investment was its acquisition of *Phillip Morris Australia,* in February 2011, the tribunal, therefore, needed to ascertain whether it had jurisdiction and, if so, whether there was any reason for it to refuse to exercise that jurisdiction. While referring to the *Gremcitel* case[491], the tribunal held that whenever a cause of action is based on a treaty breach, the test for *ratione temporis* is whether the claimant made the protected investment before the moment when the alleged breach occurred. In that case, the tribunal had found that the critical date on which the breach crystallized was when the relevant legislative measures were adopted, notwithstanding the fact that this may have been "*the culmination of a process or sequence of events which may have started years earlier.*"[492] In *Phillip Morris Asia's* case, it was the enactment of the Tobacco Plain Packaging Act in December 2011 that allegedly breached the treaty, and so *Phillip Morris Asia's* investment in February 2011, pre-dated the breach. Accordingly, the tribunal found that it did have jurisdiction over *Phillip Morris Asia's* claim.

Moving on to the question of admissibility, the tribunal undertook an analysis of the arbitral case law on abuse of process. Drawing on several prominent cases, the tribunal emphasized that the mere fact of restructuring an investment to obtain the protection of an investment treaty is not *per se* illegitimate and that the threshold for finding an "*abusive manipulation of the system of international investment protection*" is high[493]. Applying the *Tidewater*[494] and *Mobil*[495] judgments, the tribunal determined that the key question concerned if there was a "*pre-existing*" dispute at the time the restructuring was carried out. The tribunal grappled with the various formulations adopted in *Gremcitel*[496], *Lao Holdings*[497] and *Pac Rim*[498], and held that the initiation of a treaty claim constitutes an abuse of process when an investor "*has changed its corporate structure to gain the protection of an investment treaty at a point when a specific dispute was foreseeable.*"[499] Rather than adopting the test of foreseeability, articulated in *Pac Rim,* as "*a very high probability and not merely a possibility*", the tribunal held, instead, that a dispute is foreseeable when there is a

[490] Ibid, para 507.
[491] *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17.
[492] *Philip Morris,* Award on Jurisdiction and Admissibility, 17 Dec 2015, Para 530.
[493] Ibid, para 554.
[494] *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5.
[495] V*enezuela Holdings, B.V., et al v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27.
[496] *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17.
[497] *Lao Holdings N.V. v. Lao Peoples Democratic Republic*, ICSID Case No. ARB(AF)/12/6.
[498] *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12.
[499] *Philip Morris,* Award on Jurisdiction and Admissibility, 17 Dec 2015, Para 554.

"*reasonable prospect… that a measure which may give rise to a treaty claim will materialise*"[500].

Applying this test to the facts, the tribunal noted that *Phillip Morris International's* objection to the Government's proposals, as early as 2009, including specific references to the deprivation of property rights and possible legal challenges. The tribunal also emphasised the fact that, while it took a considerable time for the legislation to pass and there was a degree of uncertainty as to whether the Government could obtain the parliamentary majority needed to pass the legislation, the intention of the Government had remained relatively clear since April 2010, and so there was at least a "reasonable prospect" of the legislation being passed from that point onwards.

Notwithstanding these findings, the tribunal acknowledged that the commencement of a claim shortly after a corporate restructuring might not necessarily amount to an abuse of process where the restructuring was justified "*independently of the possibility of bringing a claim.*"[501] Regarding the facts, the tribunal was unconvinced by *Phillip Morris Asia's* insistence that the restructuring was part of a broader group-wide process, was needed to align ownership with pre-existing management control, helped minimize *Phillip Morris Asia's* tax liabilities, and helped to optimize cash flow. In particular, the tribunal noted the failure of *Phillip Morris Asia* to present any witnesses who were directly familiar with the rationale for the restructuring and the lack of "*contemporaneous corporate memoranda or other internal correspondence sufficiently explaining the business case for the restructuring in detail.*"[502]

The tribunal also placed significant emphasis on the volume and timing of legal advice from *Phillip Morris International's* advisors concerning potential investment treaty claims. As part of the production phase of the arbitration, the parties agreed to exchange privilege logs listing any documents that they wished to withhold on the grounds of privilege or political sensitivity. Following objections from both parties, the tribunal ordered the production of many of those documents. While the award itself contains heavy redactions in relation to privileged and commercially sensitive documents, it is evident that the subject headings of emails passing between *Phillip Morris International* and its legal advisors (for example, "*Australia-HK BIT*", "*Arbitration under the HK BIT*") gave a clear indication that *Phillip Morris International* was being advised on potential investment treaty claims from as early as July 2010. Critical email exchanges also coincided precisely with the internal approval of the restructuring and the finalization of the notice of claim.

In such circumstances, the tribunal was satisfied that the passage of the offending legislation was not only foreseeable but actually foreseen. The tribunal concluded that "*the main and*

[500] Ibid, para 585.
[501] Ibid, para 570.
[502] Ibid, para 582.

determinative, if not sole, reason for the restructuring was the intention to bring a claim under the Treaty, using an entity from Hong Kong,"[503] Since this was carried out "*at a time when there was a reasonable prospect that the dispute would materialize*" it was deemed to be an abuse of process[504]. Accordingly, the tribunal declared the claim inadmissible, precluding it from exercising jurisdiction over the dispute.

Therefore, the example of *Phillip Morris* and other cases suggests that the role played by both the principles of "good faith" and the derived concept of "abuse of process" is of high relevance in contemporary international investment arbitration. Although these concepts and doctrines are not provided in treaty language, increasingly, states and arbitral tribunals explicitly resort to these concepts, respectively, to challenge and assess claims that have been brought by foreign investors in breach of the jurisdictional requirements of investment tribunals, essentially to gain access to investment arbitration.

The cases discussed show that the concepts of "good faith" and "abuse of process" can, and do, play a substantial role in assessing investment treaty claims. Therefore, they are aimed at preserving the current system of investment arbitration from abuses. This is clearly evidenced by the numerous references by arbitral tribunals for the need to prevent an abuse of the system of investment arbitration in applying the principles of "good faith" and "abuse of process". In view of the increasing use and, thus, potential abuses of the system, these principles will most probably continue to play an important role in maintaining the viability of the current system of investment arbitration.

This circumstance, once again, proves the realist approach of the investor-state tribunals to interpret the cases in terms of situation-types, considering their purposes, looking to the goals of the rules, and their social effects. Similarly, as to the realist view, arbitrators in investor-state arbitration aim to make law based on contemporary social reality, i.e., to make value judgments, while at the same time ensuring the protection principles of "good faith" and discouraging "abuse of process".

4.3. The use of precedent

As mentioned in Chapter I, legal realists argued that judges could not determine, in a non-discretionary way, the holdings of decided cases because any case could be read in at least two ways: it could be read broadly to establish a general rule, applicable to a wide range of situations, or it could be read narrowly, to apply only to the specific facts of the case[505]. In addition, realists argued that, because of the indeterminacy of abstract concepts and the manipulability of precedent, it was almost always possible to appeal to competing and

[503] Ibid, para 584.
[504] Ibid, para 588.
[505] Singer, Joseph William, and Laura Kalman. "Legal realism now." (1988): 465-544..

contradictory rules to decide any contested case[506]. For example, one of the famous legal realists, John Dewey, argued that judges must combine and balance two different goals. The first goal is to choose legal rules that have desirable social consequences. To some extent, this goal is independent of precedent and requires a type of reasoning characteristic of social science. The second goal is to enable persons, in planning their conduct, to foresee the legal importance of their acts by judicial decisions that possess the maximum possible stability and regularity[507]. Similarly, Karl Llewellyn argued that although precedent is highly manipulable, it substantially constrains judges in decision-making. A judge can almost always construct arguments for a ruling "on either side of a new case."[508] At the same time, the judge must construct an argument based on existing principles of law, and there are not so many that can be built defensibly. This is because it is not always possible to construct an argument that will be plausible and persuasive to other judges and lawyers who are familiar with the relevant precedents. To be persuasive, the argument must tie the proposed result to existing practice in a way that appears not to deviate from fundamental principles underlying prior law[509]. Realists also argue that it is impossible to induce a unique set of legal rules from existing precedents. Llewellyn argued that it is always possible to generate both broad and narrow holdings from cases and to construct competing lines of precedent on either side of every controversial issue of law[510]. Legal realist Felix Cohen further argued that every case was different from every other, in some respect, and that judges had no alternative but to engage in ethical inquiry to determine those differences between the case at hand and the prior case that mattered[511].

It is clear that the primary function of the arbitrator is to adjudicate disputes. In investment disputes, arbitrators rarely rule *ex aequo et bono* and, most often, decide on the basis of the applicable law, i.e., the BIT or multilateral investment agreement. In so doing, the arbitrator interprets the legal rule of the relevant BIT. However, the arbitrator is not a machine that distributes arbitral awards[512]. As it was argued, in investor-state disputes, arbitrators enjoy freedom in the exercise of their duties.

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[506] Steinman, Adam. "A Constitution for Judicial Lawmaking." *University of Pittsburgh Law Review* 65 (2004): 545. ; Engle, Eric. "Primer on Left Legal Theory: Realism, Marxism, CLS & PoMo, A." *Crit* 3 (2010): 64.; see also Karl Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed, 3 Vand.L.Rev. 395, 399-406 (1950).

[507] John Dewey, *Logical Method and Law,* 10 Cornell L.Q. 17, 26 (1924).

[508] Llewellyn, Karl Nickerson. *The common law tradition: Deciding appeals*. William S. Hein & Co., Inc., 1996; Llewellyn, Karl N. "Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed." *Vand. L. Rev.* 3 (1949): 395.

[509] Ibid. K. Llewellyn, *supra* note 11, at 19, 59-61, 121-28, 213-19 (1960).

[510] Llewellyn, Karl N. "The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method." *The Yale Law Journal* 49.8 (1940): 1355-1400.; Llewellyn, Karl N. *The bramble bush: On our law and its study*. Quid Pro Books, 2012.

[511] Cohen, Felix S. "Field theory and judicial logic." *The Yale Law Journal* 59.2 (1950): 238-272; see also Engle, Eric. "Primer on Left Legal Theory: Realism, Marxism, CLS & PoMo, A." *Crit* 3 (2010): 64.

[512] Guillaume, Gilbert. "The use of precedent by international judges and arbitrators." *Journal of International Dispute Settlement* 2.1 (2011): 5-23.

"This freedom, however, cannot become a license. If judicial decisions are never fully predictable, they should never be arbitrary. Any system of law requires a minimum of certainty and any dispute settlement system, a minimum of foreseeability. Furthermore, these systems assume that persons in comparable situations are treated as comparable. Precedent plays an irreplaceable role in this respect. For the parties, it is the guarantor of certainty and equality of treatment"[513].

The International Court of Justice has exclusively cited its own judgments and advisory opinions for a long time. In the *Barcelona Traction*, it even refused to refer to invoked arbitral decisions, noting that they could not "give rise to generalization going beyond the special circumstances of each case."[514] In 1953, however, the ICJ relied, for the first time, on the decisions rendered a century earlier, on the *Alabama Claims*[515], which it credited with establishing the principle from which all tribunals have "competence-competence". In recent years, these references have multiplied. Thus, one may observe that all the decisions cited by the ICJ concern interstate disputes and that it has never made reference to decisions rendered in other sectors, such as commercial arbitration or investment arbitration[516].

However, in investor-state arbitration, the role of precedent is different, especially when compared to the ordinary state court system. For example, in *Saipem S.p.A. v. Bangladesh*[517], after stating that it was not bound by previous decisions, the tribunal asserted that the decisions rendered by previous tribunals that constitute "a series of consistent cases" should be followed, unless the tribunal has "compelling contrary grounds" not to do so. As noted in the decision:

> "The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law."[518]

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[513] Ibid.
[514] Heinze, Eric, and Malgosia Fitzmaurice, eds. *Landmark cases in public international law*. Vol. 3. Martinus Nijhoff Publishers, 1998.
[515] Alabama Claims Arbitration (1872) 1 Moore Intl Arbitrations 495.
[516] Rivkin, David W. "The Impact of International Arbitration on the Rule of Law: The 2012 Clayton Utz/University of Sydney International Arbitration Lecture." *Arbitration International* 29.3 (2013): 327-360.; Kaufmann-Kohler, Gabrielle. "Arbitral Precedent Dream, Necessity or Excuse? " *Arbitration International* 23.3 (2007): 357.
[517] *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07.
[518] *Saipem S.p.A. v. The People's Republic of Bangladesh,* Decision on Jurisdiction of March 21, 2007, para. 67.

The role of investor-state arbitration is different because arbitral tribunals have greater control and responsibilities than courts. Courts derive their authority from the constitutional structure of the state, which often entrusts the judicial arm of government with elaborating the law for the entire society. However, an investor-state tribunal derives its authority from the relevant BIT or from requests by disputing parties. "No other participant in the global community has consented to the jurisdiction of the tribunal, or delegated it the authority to elaborate the law for the community."[519] In that regard, authors argue that "because constituting international investment law exceeds the formal mandate that tribunals obtain from arbitration agreements, arbitrators should render awards with a high degree of circumspection concerning potentially constitutive portions of their awards."[520]

"Arbitral tribunals adjudicating over investment treaty disputes also differ from arbitrators in private commercial disputes to the extent that investment treaty arbitrations are not confidential. As a result, their awards may have a constitutive effect on international investment law if third-party observers adjust their strategies in anticipation that future similar disputes will lead to similar outcomes. Thus, there is a need to avoid deviating dramatically from existing laws and precipitating costly shifts in investment plans"[521]. There is also a need to avoid prescribing law that will lead to substantively bad outcomes in investment disputes and other unrelated investment arrangements. "By comparison, to the extent that commercial arbitrations are confidential, their awards will not generally have a constitutive effect on commercial transnational law. If third parties cannot discover a confidential arbitral award, they will not adjust their strategies, and the consequences of that award will be limited to the parties to the dispute"[522].

The investor-state tribunals, acting in the legal realism fashion, consider precedents as a supplementary means of interpretation. In the case of *Caratube International Oil Company LLP v. Kazakhstan*[523], the arbitral tribunal relied on legal rules to confer legal effects on previous decisions. However, it stated that arbitrators are not bound by past decisions. The tribunal considered that previous decisions could be applied as supplementary means of interpretation, in the sense of Article 32 of the Vienna Convention, to the extent that, according to the tribunal, Article 38(1)(d) of the Statute of the ICJ lists judicial decisions and awards as subsidiary means "for the interpretation of public international law":

> "On the other hand, Article 32 VCLT permits recourse, as supplementary means of interpretation, not only to a treaty's 'preparatory work' and the

[519] Ripinsky, Sergey. *Investment Treaty Law: Current Issues. Remedies in international investment law emerging jurisprudence of international investment law. III*. Vol. 3. BIICL, 2009.
[520] Cheng, Tai-Heng. "Precedent and Control in Investment Treaty Arbitration." (2007).
[521] Ripinsky, Sergey. *Investment Treaty Law: Current Issues. Remedies in international investment law emerging jurisprudence of international investment law. III*. Vol. 3. BIICL, 2009.
[522] Ibid.
[523] *Caratube International Oil Company LLP v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12.

> ‘circumstances of its conclusion’, but indicates by the word ‘including’ that, beyond the two means expressly mentioned, other supplementary means of interpretation may be applied in order to confirm the meaning resulting from the application of Article 31 VCLT. Article 38(1)(d) of the Statute of the International Court of Justice provides that judicial decisions and awards are applicable for the interpretation of public international law as ‘subsidiary means’. Therefore, these legal materials can also be understood to constitute ‘supplementary means of interpretation’ in the sense of Article 32 VCLT.”[524]

It is noted that pursuant to Article 31(3)(b) of the Vienna Convention, there shall be taken into account, together with the context, any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation. However, “Article 31(3)(b) does not qualify “subsequent practice” as state practice only. For this reason, it may be recognised that the practice of organs of international organisations may be taken into account for the purposes of interpreting a treaty provision. However, in order to meet the requirements of Article 31(3)(b), the subsequent acts of an international organisation in the application of a treaty must establish the agreement of the parties regarding its interpretation. Decisions rendered by arbitral tribunals do not seem to meet such requirements. While arbitrators are vested with the authority conferred on them by the disputing parties to apply and, therefore, to interpret the treaty provisions applicable to the dispute, the states who are a party to the treaty do not participate in the decision-making process, and arbitrators do not exercise their adjudicatory function as representatives of the states that are party to the treaty. The authority of arbitral tribunals is to apply the provisions of the treaty to a particular case, and not to give an authoritative and abstract interpretation of its provisions”[525].

Likewise, “to the extent that the decisions rendered by arbitral tribunals do not qualify as a source of the intention of the states party to the treaty, they may not be used in the interpretation of the treaty in the sense of Article 32 of the Vienna Convention. Under the general rule of treaty interpretation, the purpose of treaty interpretation is the search for the intention of the parties to the treaty, in order to give effect to the consent of the parties to be bound by the treaty”[526].

Therefore, the reality in investor-state arbitration is that arbitrators rely upon arbitral awards only as supplementary means of interpretation. The elaborate and highly technical arguments that are necessary for the reinterpretation of Article 38 of the ICJ Statute to resemble reality

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[524] *Caratube ,* Decision on Provisional Measures of July 31, 2009, para. 73.

[525] Roberto Castro de Figueiredo*, 'Previous Decisions in Investment Arbitration',* Kluwer Arbitration Blog, December 23 2014.

[526] Jonas, David S., and Thomas N. Saunders. "The object and purpose of a treaty: Three interpretive methods." *Vand. J. Transnat'l L.* 43 (2010): 565.; Hylton, Daniel N. "Default breakdown: The Vienna Convention on the law of treaties' inadequate framework on reservations." *Vand. J. Transnat'l L.* 27 (1994): 419.; Klabbers, Jan. "How to Defeat a Treaty's Object and Purpose Pending Entry into Force: Toward Manifest Intent." *Vand. J. Transnatl. L.* 34 (2001): 283.

draw attention to the gulf between rhetoric and reality. The insurmountable task of closing this gap in accordance with codified rules of treaty interpretation indicates that departure from formalism into realism is necessary to fully appreciate how precedent actually operates in investment treaty arbitration.

Since arbitrators exercise a high degree of appreciation in determining which prior decisions are relevant to disputes before them, the awards, particularly those on corporate nationality studied throughout this thesis, demonstrate that arbitrators would usually seem to be persuasive and would construct their arguments in a way that appears not to deviate from the fundamental principles underlying prior law. However, they are able to generate both broad and narrow holdings from former cases and to construct competing lines of precedent on either side of every controversial issue, such as corporate nationality. Furthermore, it may be observed that any changes in the regulation of corporate nationality have not tended to be evolutionary, and isolated awards exist which have ignored shared norms of legal reasoning that have found limited support from subsequent tribunals. In investment treaty arbitration, other forms of legal reasoning operate only in conjunction with precedent. Investment treaty arbitrations often begin and end with the treaty under which the dispute arises. Tribunals, generally, turn first to the words of the treaty obligations in dispute and interpret them in accordance with the rules of treaty interpretation, contained in Article 31 of the Vienna Convention. Where other tribunals have also examined similar protections, the system of precedent then operates alongside only to assist, but not to bind the tribunal, in its determinations.

However, it may be argued that, as the needs of the international community change, international investment law must develop to address those needs. The rising sophistication of investors and host states have created new demands on international investment law, and that is where a legal realist approach has provided a helping hand. Arbitrators acting in their discretionary power have helped this field of international law to evolve from its customary origins to be able to provide a comprehensive regulatory framework for global investments that balances the interests of all participants in this global system. Given the high transaction costs of treaty negotiations, it is not practical for states to continually renegotiate their investment treaties, but legal realism has helped international investment law to keep pace with the expansion of the fields of economic cooperation into novel industries and novel forms of investment. Arbitrators in investment treaty disputes, acting in the spirit of legal realism, help to adapt existing international treaties and customs to the novel demands of foreign investors and host states. Although the lack of binding precedent may not prevent deviations in treaty law, legal realism helps to keep it sufficiently stable for members of the international investment and also to help plan their affairs and anticipate the legal consequences of their plans. Arbitrators make decisions within the scope of their authority, and their discretionary power helps them to correct deviations caused by abuses.

4.4. Use of liberal interpretation methods

Pragmatic legal reasoning, or the "Grand Style judging" consists of yet another component, that is – liberal argumentative technique[527]. As it was observed, international investment law contains ample resources permitting arbitrators to avoid paper rules while still appearing to be faithfully applying the treaty law. This could not be done without the method of liberal interpretation.

Arbitration awards are always based on substantive rules of law that are applicable to the relationship between the parties. The ICSID Convention does not provide those substantive rules. It just establishes a procedural framework for the settlement of disputes. However, Article 42 of the ICSID Convention sets forth a mechanism, in accordance with which the tribunal is to select the appropriate rules of law for the particular dispute. This mechanism combines flexibility with liberality. Flexibility is provided by granting the parties the freedom to choose the applicable law. Liberality is provided by ensuring that, if the parties fail to make that choice, the tribunal is free to find appropriate rules in order to solve the dispute (the host state's law in conjunction with international law).

Prof. Thomas Wälde, in one of his writings, pointed out that "tribunals often do not practice what they preach. Reference to the Vienna Rules is now mandatory, but such reference does not mean the Vienna Rules are taken and applied seriously", and "it is difficult to find a tribunal which formally and properly applied the Vienna Rules step by step."[528] Michael Reisman and Mahnoush Arsanjani also note that the "provisions of the Vienna Convention have become something of a clause de style in international judgments and arbitral awards: whether routinely and briefly referred to or solemnly reproduced verbatim, they are not always systematically applied."[529]

Thus, on the one hand, a reference to the Vienna Convention may actually evidence the legal realist decision-making process. Arbitrator wishing to base its decision on a policy rather than treaty rules may potentially refer to Article 31(1) of the Vienna Convention and claim that he puts emphasis on the object and purpose of the treaty. On the other hand, the reluctance of arbitrators to base their decisions by referring solely to the interpretation rules of the Vienna Convention may be explained by the conclusions found in previous sections. Arbitrators, acting in the spirit of legal realism, often base their decisions on commercial reality or, when needed, adopt their decisions while referring to the goals and values they seek to protect. The

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[527] Singer, Joseph William. "Legal Realism Now. Legal Realism at Yale: 1927-1960. By Laura Kalman." *Calif. L. Rev.* 76 (1988): 467-1377.; Wiseman, Zipporah Batshaw. "The Limits of Vision: Karl Llewellyn and the Merchant Rules." *Harvard Law Review* 100.3 (1987): 465-545.; Nyquist, Curtis. "Llewellyn's Code as a Reflection of Legal Consciousness."*New Eng. L. Rev.* 40 (2005): 419.

[528] *Interpreting Investment Treaties: Experiences and Examples*, in International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer, Oxford University Press, 2009, at 730 and 746.

[529] Arsanjani, Mahnoush H., and W. Michael Reisman. "Interpreting Treaties for the Benefit of Third Parties: The "Salvors" Doctrine" and the Use of Legislative History in Investment Treaties." *American Journal of International Law* 104.4 (2010): 597-604.

misapplication of the general rule of treaty interpretation was also heavily criticized by Prof. Jan Paulsson, in his dissenting opinion, given in the case of *Hrvatska Elektroprivreda d.d. v. Slovenia*[530]. Indeed, Paulsson accuses the tribunal of relying on a "commercial logic" in disregard of the general rule of treaty interpretation:

> "As far as I can discern, the majority's Decision proceeds in ignorance of this fundamental and much-discussed constraint on the freedom of international judges and arbitrators to interpret treaties. […]. They seem to ignore that they are allowed to refer only to the context of the terms of the Treaty, i.e. the internal consistency of the text as one whole. This fundamental error, it seems, has freed the majority to impose its vision of commercial reasonableness on the entire history of Krsko NPP. This is not what States submit themselves to when concluding a Treaty. The majority's vision of commercial logic leads them to all manner of reading between the lines of the Treaty and of various more or less related, more or less contemporaneous, and more or less superseded documents."[531]

Paulsson's rationale seems to fit perfectly with the findings of this thesis, that arbitrators, acting in the spirit of legal realism, tend to be liberal in their interpretation of investment treaties and rather refer to commercial reasonableness. However, to call it a "fundamental error" would seem unjustly harsh.

In most cases, the application of the Vienna Convention may, itself, lead to divergent views and different results by different arbitrators. Article 31(1) of the Vienna Convention provides that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." This is the so-called *textual approach*, according to which treaty interpretation should be primarily based on the actual terms employed in the treaty, as the main source of the parties' intention, which must be assumed to have been employed in their ordinary meaning. However, the term "context" may be understood to mean that a treaty may be interpreted in accordance with its historical or political context or the circumstances surrounding its conclusion. One may also refer to the context of the terms — not of the treaty — in order to ensure a consistent interpretation of the treaty as a whole. In addition, the reference to the object and purpose may be regarded as an autonomous source of the parties' intention and may be used to override the text of the treaty. This was, similarly, argued by Prof. Veil *Tokios Tokeles*. However, as can be observed from the example of Paulsson above, he would probably argue that the reference to the object and purpose may not be regarded as an autonomous source of the parties' intention and may not be used to override the text of the treaty.

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[530] *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24.
[531] *Hrvatska*, Dissenting Opinion to the Decision on the Treaty Interpretation Issue of June 12, 2009, at para. 44.

It would seem that the proper application of the general rule of treaty interpretation is not something theoretical and without practical effects, no matter how it appears in investor-state arbitration. However, in the context of the ICSID Convention, one could argue that a decision that asserts or denies the jurisdiction of the center over a dispute based on a misapplication of the general rule of treaty interpretation is subject to annulment for manifest excess of the power of the tribunal. One could also argue that the decision is subject to an annulment on the grounds of manifest disregard of the law if the tribunal misapplies the general rule of treaty interpretation in construing the provisions of an investment treaty in deciding the merits of the dispute[532]. However, it is clear that, depending on the circumstances of each case, the arbitral tribunal has a very high margin and power of interpretation with respect to the applicability of each of the rules of domestic law and of the rules of international law.

The *ad hoc* Committee in *Wena*[533] emphasised the ICSID tribunals' degree of discretion in the determination of the proper law. While referring to the *Klockner*[534] and *Amco*[535] decisions, as well as the view according to which international law is applicable in instances of a collision with norms of *jus cogens*, the Committee argued that some of these views share common ground through the fact that they are aimed at restricting the role of international law and highlighting that of the law of the host state. However, conversely, the view that calls for a broad application of international law aims at restricting the role of the law of the host state. In the Committee's view, there is no single answer as to which of these approaches is the correct one. The circumstances of each case may justify one or another solution[536].

It is important to note that Article 42(1) of the ICSID Convention uses the word "may" in the second sentence of this provision. This indicates that the ICSID Convention also does not draw a sharp line for the distinction of the respective scope of international and domestic law and, correspondingly, this has the effect of conferring upon the tribunal a high margin of, and power for, interpretation. In line with this rationale, the arbitral tribunal in *Aucoven v. Venezuela*[537] recognised its discretion in determining whether or not the rules of international law were applicable in the circumstances of the case. Indeed, the role of international law in ICSID practice is not entirely clear. It is certainly well-settled that international law may fill lacunae when national law lacks rules on certain issues (so-called complementary

[532] Roberto Castro de Figueiredo*, 'Interpreting Investment Treaties',* Kluwer Arbitration Blog, October 21st, 2014; Wälde, Thomas W. "Interpreting investment treaties: experiences and examples." *International Investment Law for the 21st Century–Essays in Honour of Christoph Schreuer* (2009): 724-781.; Roberts, Anthea. "Power and persuasion in investment treaty interpretation: the dual role of states." *American Journal of International Law* 104.2 (2010): 179-225.
[533] *Wena Hotels Ltd v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Decision of the Ad Hoc Committee on the Application for Annulment (5 February 2002).
[534] *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2.
[535] *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1.
[536] *Wena Hotels*, Decision of the Ad Hoc Committee on the Application for Annulment (5 February 2002), para 39.
[537] *Fedax N.V. v. The Republic of* Venezuela, ICSID Case No. ARB/96/3.

function)[538]. It is also established that it may correct the result of the application of national law when the latter violates international law (corrective function).[539]

Furthermore, the tribunals themselves have recognised that Article 44 empowers a tribunal to fill a specific gap regarding the conduct of specific proceedings. As the tribunal in *Abaclat et al. v. Argentina*[540] explained:

> "Article 44 [is an] expression of the inherent power of any tribunal to resolve procedural questions in the event of lacunae. As a matter of principle, the power of a tribunal is limited to the filling of gaps left by the ICSID Convention and the Arbitration Rules. In contrast, a modification of existing rules can only be effected subject to the parties' agreement, in accordance with minimum standards of fair procedure and to the extent that the rules to be modified are not mandatory (in the sense that they restate mandatory provisions of the Convention). A tribunal's power is further limited to the filling of gaps left by the ICSID framework in the specific proceedings at hand, and a tribunal's role is not to complete or improve the ICSID framework in general. As such, a tribunal's power to fill gaps will usually be limited to the design of specific rules to deal with specific problems arising in the proceedings at hand."[541]

However, as it was observed, in reality, the tribunal would also fill the legal gaps acting as a lawmaker[542]. Arbitrators may depart from the paper rule for non-legal reasons (e.g., policy) and could do so without appearing to be departing from the law. Examples of the latter were clearly observed where there is a lack of modern rules and principles on corporate nationality in international investment law. That is why arbitrators welcomed the realist approach, i.e., no matter if the investors did fit within the definition of the investor under the relevant BIT – if they had structured their corporate nationality only for the purpose of bringing an

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[538] Begic, Taida. *Applicable law in international investment disputes*. Eleven International Publishing, 2005.; Elcin, Mert. *The Applicable Law to International Commercial Contracts and the Status of Lex Mercatoria-With a Special Emphasis on Choice of Law Rules in the European Community*. Universal-Publishers, 2010.

[539] Bjorklund, Andrea K., ed. *Yearbook on International Investment Law and Policy 2012-2013*. Oxford University Press, USA, 2014. The ICSID Ad Hoc Committee in *Wena Hotels Ltd. v. Arab Republic of Egypt* accepts the possibility of a broad approach to the role of international law, and that the arbitral tribunal has a "a certain margin and power of interpretation" (ICSID Case Nr. ARB/98/4, 41 I.L.M. 933 (2002), Nr. 39 p. 941).

[540] *Abaclat et al. v. Argentina*, ICSID Case no. ARB/07/5.

[541] *Abaclat*, Decision on Jurisdiction August 4, 2011, para. 527, *paras. 521-523.*

[542] "Undergirding this picture of law in its non-litigated everyday application is the premise that the easiness of easy cases or, more accurately, the easy application of the law - is typically determined by the meaning of the language of the pertinent legal rule, and that the indications of the meaning are ordinarily followed by judges. The consequence is the hypothesis that most disputes or events clearly falling under a rule's language are ones in which one party, with little hope of prevailing, would rarely pursue litigation." See Schauer, Frederick. "Legal Realism Untamed." *Tex. L. Rev.* 91 (2012): 749.

international investment claim, then arbitrators would find a way to dismiss jurisdiction on grounds which are not indicated in the written law, i.e., the relevant BIT.

Therefore, it must be inquired in the next section how this freedom of interpretation coincides with the rise of transnational law, where arbitral tribunals operate in a new transnational legal environment, rather than the traditional international law environment[543].

SECTION II – THE IMPACT OF REALISTS IN THE CREATION OF TRANSNATIONAL LAW

4.5. Transnational law created by the legal realists?

The traditional legal understanding of the law of international business transactions, as well as that of foreign investment, considers that transactions are regulated by a legal framework of a multiplicity of different, often overlapping state jurisdictions with which a transaction has contacts. Under this framework, a number of different legal regimes might have claims to regulate such transactions, both as between the parties and as between transacting parties and third parties. These legal regimes include both public laws and regulations and applicable rules of private law, such as tort and contract[544].

However, as argued by authors, "in contemporary globalization this traditional understanding has been disturbed by the increasing ability of transnational business actors to achieve a *"liftoff"* from the terrain of national regulation."[545] There are numerous ways in which global economic and social processes have reconfigured national legal practices, and the emergence of international investment law is no exception. In particular, at the procedural level, one focus is on the increase in dispute resolution by means of international arbitration, rather than state-based litigation[546]. At the substantive level, the emphasis is made on the importance of

[543] Dezalay, Yves, and Bryant G. Garth. *Dealing in virtue: International commercial arbitration and the construction of a transnational legal order*. University of Chicago Press, 1998.
[544] See Wai, Robert. "Transnational Liftoff and Juridicial Touchdown: The Regulatory Function of Private International Law in an Era of Globalization." *Colum. J. Transnat'l L.* 40 (2001): 209.
[545] Ibid, see also Cutler, A. Claire, Virginia Haufler, and Tony Porter, eds. *Private authority and international affairs*. Suny Press, 1999; Börzel, Tanja A., and Thomas Risse. "Public-Private Partnerships: Effective and legitimate tools of international governance." *Complex Sovereignty: Reconstructing Political Authority in the Twenty First Century, edited by Edgar Grande and Louis W. Pauly* (2005): 195-216.
[546] For example, Dezalay and Garth identify a tension between two principal groups of supporters of arbitration. The "grand old men" typically are an older generation that includes more Europeans, academics, generalists, and supporters of a more informal, diplomatic vision of arbitration as part of a larger international order. In contrast, the "new technocrats" are a younger generation that includes more Americans, specialists, practitioner-litigators, and supporters of arbitration as a commercially efficacious and economically valuable service for clients. Although these and other groups compete with each other for arbitration business, they also have acted cooperatively to promote the increased use of arbitration by business actors and to persuade state

the growth of *lex mercatoria* and transnational law*,* both of which are delocalized laws that are based on the customs of international trade and other forms of non-traditional rules in the regulation of transnational business conduct and dispute resolution. Thus, state laws no longer have, and probably never had, a normative monopoly on transnational conduct and non-state based norm systems may have become the more significant force in global commerce[547].

This view is relevant for the realist and liberal internationalist argumentation in private international law. The ability to reconcile conflict among the contrasting interests and ideas of international order through liberal internationalist visions of international cooperative benefit may partly explain how tensions were bridged between the visions of "grand old men" and the "new technocrats" in Dezalay and Garth's view of international arbitration. Liberal internationalists also aimed to bridge tensions between state actors, such as national judges, and private actors, such as arbitrators or international businesses[548].

However, as was evidenced in the context of negotiations on the TTIP, the concern about the protection of national regulatory interests is increased by recent debates on the construction of the new international investment arbitration regime[549]. Notwithstanding the latter, it may be argued that transnational business networks which use arbitration and transnational law take on lawmaking and law-generating character and engage participants to look only to values from within that system as their binding laws. Similar arguments are made when discussing values in the law-making process. For example, Justice Blackmun in *Mitsubishi Motors,* summarised the policy reasons for the majority of the court by noting that:

> "[C]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreements, even assuming that a contrary result would be forthcoming in a domestic context."[550]

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actors to accept the use of arbitration, instead of courts, for international dispute-resolution among business actors. See Dezalay, Yves, and Bryant G. Garth. *Dealing in virtue: International commercial arbitration and the construction of a transnational legal order*. University of Chicago Press, 1998; See also Rogers, Catherine A. "The vocation of international arbitrators." *American University international law review* 20 (2005): 06-5.

[547] See Petsche, Markus A. "International commercial arbitration and the transformation of the conflict of laws theory." *Mich. St. U. Coll. LJ Int'l L.* 18 (2009): 453.

[548] See Wai, Robert. "Countering, branding, dealing: using economic and social rights in and around the international trade regime." *European journal of international law* 14.1 (2003): 35-84.; Wai, Robert. "Transnational Liftoff and Juridicial Touchdown: The Regulatory Function of Private International Law in an Era of Globalization." *Colum. J. Transnat'l L.* 40 (2001): 209.

[549] See Akhtar, Shayerah Ilias, and Vivian C. Jones. "Transatlantic Trade and Investment Partnership (TTIP) Negotiations." Library of Congress, Congressional Research Service, 2014.; Ikenson, Daniel J. "A compromise to advance the trade agenda: purge negotiations of investor-state dispute settlement." *Cato Institute Free Trade Bulletin* 57 (2014).

[550] Mitsubishi Motors Corp. v. Soler-Chrysler Plymouth Inc., 473 U.S. at 638-39. See also Wai, Robert. "Transnational Liftoff and Juridicial Touchdown: The Regulatory Function of Private International Law in an Era of Globalization." *Colum. J. Transnat'l L.* 40 (2001): 209.

Therefore, in order for international business networks to free themselves from the regulation of domestic private law, doctrinal reforms have been required in a number of subjects of private international law. Especially in the past two decades, treaties, legislation, and court decisions have instituted reforms in private international law that have facilitated the increased autonomy of transnational business dispute resolution. These reforms have highlighted the process of the constitution of a global legal regime and some of its unanticipated or overlooked consequences. These include consequences for regulatory objectives. "The result is transnational law without a state, in which systems of transnational commerce and multinational corporations, as well as transnational systems of human rights and labor actors, challenge the supremacy of state-based legal systems for the production of legal norms."[551]

Thus, it can be argued that transnational law, which also contains rules on corporate nationality, was developed by a symbiosis of both the emergence of multinational corporations, which no longer depended on municipal legislation and the philosophy of legal realism, which acted more as a tool of decision making in international cases, including international investment arbitration. Thus, the next issue which will be discussed is the notion of multinationals in the context of the creation of transnational legal rules.

4.6. Future of multinational investors

Multinational corporations and multinational investors are often treated as something different or potentially different from domestic economic enterprises, irrespective of the form of their legal organisation. International institutions have contributed in significant ways to the fostering of academic interest in multinational corporations. For example, the UNCTAD has been gathering data on multinational corporations for a number of years[552]. What is relevant for the notion of corporate nationality is that these studies on multinational corporations illustrate the way in which the transnational realities of corporate operation have affected the assumptions of regulatory home, away from the state and toward transnational or international institutions. The legal definition of multinational corporations now overrides domestic law with respect to the legal autonomy of corporations that are related to each other through shared ownership[553].

In the past, the state of the corporation's nationality regulated the activity of multinational corporations in two ways. First, laws of the state of incorporation governed the internal affairs

[551] See Joerges, Christian, Inger-Johanne Sand, and Gunther Teubner, eds. *Transnational governance and constitutionalism*. Bloomsbury Publishing, 2004.
[552] See Corporations, Transnational. "The Universe of the Largest Transnational Corporations." UNCTAD. (2007).
[553] See Morgera, Elisa. "OECD Guidelines for Multinational Enterprises." *The Handbook of Transnational Governance: Institutions and Innovations* (2011): 314.; Plaine, Daniel J. "The OECD Guidelines for multinational enterprises." *The International Lawyer* (1977): 339-346.

of the corporations. These affairs included matters such as the relationships between its managers and its shareholders, the conduct of meetings, and the nature of the fiduciary duties owed by those vested with corporate powers. These, of course, are matters which cannot be subject to the conflicting or inconsistent rules of different countries without causing considerable confusion. Second, the state of incorporation had a right to command the allegiance of its corporate, as well as its individual nationals, even when they ventured outside its territory. International law, thus far, has had little impact on individual national arrangements. As noted in previous Chapters, existing case law has revolved around the peripheral question of assigning nationality to a corporation for purposes of deciding what country is entitled to prosecute an international claim on its behalf. The only major advance, chiefly via bilateral investment treaties, has been to assure local subsidiaries of foreign investors against departures from national treatment and against expropriation.

However, modern multinationals now often operate in one country as a "foreign" corporation that is organised in another. The parent corporation normally operates through subsidiary corporations, each organised in the state where it is to operate. The legal prerequisites of such a system are that the parent corporation must have the power to own shares of the stock of another corporation, and it must be possible for the shares of the subsidiary to be owned by one corporation to an extent sufficient to confer effective control. Thus, it is clear that, in most cases, the national origin of a multinational investor is largely irrelevant, and it may be equated to any other entity from anywhere else. In addition, "modern multinationals have substantial leeway in decision making and may develop into a supranational institution. Effectively, its management, rising above the regulations of the nation-state, can exercise corporate statesmanship at a global level"[554].

Thus, corporate regulation shows the evolution of the transnational – that is, the transformation of a regulatory issue, from one exclusively centered within the nation-state to one involving at least three actors: nation-states, international public law institutions, and private law actors (transnational corporations) and institutions (associations of private or transnational civil society actors). It also highlights the difficulty of asserting a monopoly of regulatory power by any system of domestic, international, public, or private law system. "This points to a reality of governance in the current age through multiple and overlapping hierarchies."[555]

In addition, unlike domestic corporations, multinational corporations form webs of economic relationships well beyond the control of any state. As a result, the perception has grown that

[554] See also Jones, Geoffrey. *Nationality and multinationals in historical perspective*. Division of Research, Harvard Business School, 2006.

[555] Scherer, Andreas Georg, Guido Palazzo, and Dorothée Baumann. "Global rules and private actors: Toward a new role of the transnational corporation in global governance." *Business Ethics Quarterly* 16.04 (2006): 505-532.; Charney, Jonathan I. "Transnational corporations and developing public international law." *Duke Law Journal* (1983): 748-788.; Backer, Larry Catá. "Private actors and public governance beyond the state: the multinational corporation, the Financial Stability Board, and the global governance order." *Indiana Journal of Global Legal Studies* 18.2 (2011): 751-802.

states lose the power to effectively direct the character of corporate actions, as well as their responsibility and that the institutionalization of systems of economic transactions produced by globalisation now tend to favour only foreign owners while allocating all risk domestically[556].

This situation is the reason for the prophesied future for multinational corporations, who may well develop into truly non-national, autonomous entities. This theory suggests that "multinational corporations will transact their transnational affairs as a neutral, specialized agency, free from the incubus of home country ties. This would involve the dissolution of one of the most important links - the corporation would no longer have a country of incorporation"[557]. Another effect of the loss of the incorporation link is that multinational corporations will widely disperse their business activities so as not to be predominantly in any one "home" country. The shareholders will also be distributed over many countries. The process of internationalising shareholdings has already begun with some dispatch, particularly in the case of companies raising their funds abroad, as observed in previous Chapters of this thesis. The internationalisation of management will also require the home countries to relinquish claims to govern multinational investors' conduct outside of its territories on the grounds that it is controlled by certain nationalities. Surely, there are yet to be obvious questions raised about the feasibility of such a truly autonomous multinational investor[558].

Such freedom for multinational investors may also lead to an alternative to the stateless, footloose multinational investor, that is - the internationally regulated multinational corporation. The creation of this model would, at least, require an international agency that represented the nation-states that would control the activities of such international investors. Alternatively, the nations might acquire some part of such a multinational investor. Thus, a more likely development is that multinational investors will share in the costs and benefits of increasingly international regulation, based on some alternative jurisdictional principle.

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[556] It has become common to hear arguments suggesting that multinational corporations can allocate risk within their global operations in a way that might make it harder for any one jurisdiction to provide effective remedies to its citizens in accordance with their own political tastes, or to implement policies in aid of economic development, especially in the least developed states. See Backer, Larry Catá. "Multinational Corporations, Transnational Law: Corporate Social Responsibility as International Law." *Colum. Hum. Rts. L. Rev.* 37 (2006): 287.

[557] For example, George Ball proposed that the major multinationals should be subject to international rather than national incorporation. However, his approach was viewed unenthusiastically by the business community. As one might expect, such a response was a function of the nation-states' fear of power-loss and the business leaders' resistance to change. In addition to the multinational's lack of interest, other groups, such as academia and interest groups, were similarly unenthusiastic. See Duruigbo, Emeka. "Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges." *Nw. UJ Int'l Hum. Rts.* 6 (2007): 222. ; Goldberg, Paul M., and Charles P. Kindleberger. "Toward a GATT for investment: a proposal for supervision of the international corporation." *Law & Pol'y Int'l Bus.* 2 (1970): 295.

[558] See Vagts, Detlev F. "The multinational enterprise: A new challenge for transnational law." *Harvard Law Review* (1970): 739-792.; Sassen, Saskia. *Losing control?: sovereignty in the age of globalization*. Columbia University Press, 1996.; Nowak, G. Philip. "Multinational Corporation as a Challenge to the National State: A Need to Coordinate National Competition Policies." *Vand. L. Rev.* 23 (1969): 65.

Notwithstanding the latter, multinational investors are to become remote, unapproachable and arbitrary in their decision-making process. Multinational investors are to emerge without any concrete corporate nationality. Investors would make their decisions in light of international economic factors that might vary sharply with national welfare, as conceived by nation-states. Thus, another critical question in this context is the activity and the influence of multinational corporations in the creation of a transnational regime, in particular, one relating to international investment law.

4.7. Law-making by multinationals

As was evidenced in previous Chapters, actors operating in international investment arbitration, i.e., arbitrators and counsel, have highly influenced and still influence the creation of rules of international investment law. This was particularly evidenced while analysing the rulings on corporate nationality. Such creation or modification of rules in the decision-making process is a characteristic usually found in the jurisprudential philosophy of legal realism.

However, it was also argued that the activity and the influence of multinational corporations might also play a role in the creation of a transnational regime, particularly one relating to international investment law. Because multinational investors are usually corporate personalities and have substantial power at their disposal, discussion about whether they participate in the law-making process is also significant. For example, authors argue that "multinationals' influence upon, and accountability to, rules of international law, appear to be a function of the extent to which they may directly participate in the international legal process."[559]

Sir Lauterpacht argued that the evolution of international law had been overwhelmingly dependent upon the progressive adoption and modification of rules in response to changed international conditions: "[i]f, as is an indubitable fact of modem international practice, corporations play an increasingly important and frequent part in international transactions to which states are parties, it is for the science of international law to interpret this phenomenon against the broader background of modem international economic activities."[560] Lauterpacht contended that the definition of an international legal personality has dramatically expanded to include international organisations and individuals because international law has expanded beyond issues of state to state relations. For international law to stay viable, the personality

[559] Nowrot, Karsten. "New approaches to the international legal personality of multinational corporations towards a rebuttable presumption of normative responsibilities." *Journal of Global Legal Studies* (1993): 9.; Slaughter, Anne-Marie, Andrew S. Tulumello, and Stepan Wood. "International law and international relations theory: a new generation of interdisciplinary scholarship." *American Journal of International Law* (1998): 367-397.

[560] See Lauterpacht, Hersch. "The Subjects of the Law of Nations." Law Quarterly Review 63.252 (1947): 438-460.

of its subjects must expand. This, in turn, represents a challenge to the sovereignty of nation-states[561].

Under the classic model, international legal norms were made by the states, for the states. The community of states, though larger than it was a mere generation ago, consisted of very few members compared to the number of natural and legal persons that existed in a single state, let alone in the world. This community of states, thus, resembled a club, and compliance with the rules of international law was thought of as the price of membership. Moreover, the substantive rules of international law, for the most part, bound only those states that had agreed to them. This was particularly true of treaty-based norms since there exist many proposals to contemplate the establishment of obligations for corporations through treaties[562], it is appropriate to focus on this form of international law, as well.

The status of multinational corporations in international law is not yet clearly established. However, it is also argued that if international law withholds legal status from multinational corporations, the latter may result in a legal vacuum, undesirable both in practice and principle. This argument also fits with the argument expressed in Section I regarding the lack of modern rules on the notion of corporate nationality. However, the prevailing classical view, which, as yet, excludes corporations as subjects of international law, contradicts the character of international law as a "realistic legal system" since "nation states aside, multinational corporations are the most powerful actors in the world today and not to recognize that power would be unrealistic."[563] Rather, the traditional subject's doctrine also forestalls the realisation of community interests being at the centre of the current international legal order, and, as suggested by some authors, is a kind of still "living" but nevertheless, not worth protecting, "fossil" originating from the so-called "Westphalian system" which contravenes the evolving perception of international law, as a "comprehensive blueprint of social life."[564]

In this context, it may also be noted that, traditionally, the core of substantive international law has been the management of characteristics, such as territory and population. Only recently has international law started managing less tangible subjects such as economic relations. International rules in this new frontier have been primarily motivated by the mutual economic interests of, and benefits to, nation-states. Thus, it is also clear that, since the rise of the economic power of multinational investors, the rules regarding the behavior of multinational corporations also play a large part in international behavior. Notwithstanding these new legal frontiers, modern international law is still built on the foundation of territory

[561] Ibid.
[562] Vázquez, Carlos M. "Direct vs. Indirect Obligations of Corporations Under International Law." *Colum. J. Transnat'l L.* 43 (2004): 927.
[563] Nowrot, Karsten. "New approaches to the international legal personality of multinational corporations towards a rebuttable presumption of normative responsibilities." *Journal of Global Legal Studies* (1993): 9.
[564] Friedrichs, Jörg. "The neomedieval renaissance: global governance and international law in the new Middle Ages." *Governance and International Legal Theory*. Springer Netherlands, 2004. 3-36. Also Nowrot, Karsten. "New approaches to the international legal personality of multinational corporations towards a rebuttable presumption of normative responsibilities." *Journal of Global Legal Studies* (1993): 9.

and population, and it is still difficult for multinationals to exercise substantive rights and duties in the same manner as nation-states[565].

Although nation-states have sought to maintain exclusive control over the development of international legal norms that increasingly address the behavior of corporate persons[566], there exists an increasing debate regarding whether multinationals have an international legal duty to follow international norms. However, when considering international investment law, it is clear that compliance with international law standards is a necessity, e.g., for *bona fide* investment requirement, in many host-states. In addition, multinationals are required by domestic laws or political-economic decisions to follow international norms, even though their role in the norm development process is limited to lobbying individual host-states. The latter can be defined as a quasi-legislative negotiation process that is aimed at producing international agreements, resolutions, and legal norms that are the primary sources of the body of law. FTA's can be a perfect example of the latter.

Thus, while host-states aim to minimize the interests of multinational investors, favoring instead their own economic and political power, such forums related to the new FTA's produce constructive interaction between multinationals and the host-states. It is clear that when the FTA is adopted, it contains new international legal norms. Moreover, since such international agreements also provide for the establishment of an international tribunal, it also creates international bodies that possess the authority to decide on such binding legal principles, as established in the FTA. As a result, it also provides independent power for many multinationals.

Therefore, the notion that multinationals also participate in the international law-making process does not seem so remote[567]. Although positivists would probably consider this conclusion contradictory because they contend that only nation-states have the right to

[565] For example, authors stress „the functional distinctions between the territorial and non-territorial actors on the international plane: underlying any analysis of this sixth continent of non-territorial is one fundamental factor. The variable of communication/transportation speed and capacity. Basically constant for a million or two years of human history, it has increased exponentially since the first successful attempts early last century to install steam engines in ships and in locomotives. The system of territorial actors developed in the first phase with spatial contiguity as a basic and undisputed assumption. That the ensuing exponential growth of transportation/communication should lead to the emergency of non-territorial actors is hardly strange..... This impact of territoriality on the interrelations of territorials as distinct from non-territorials is clear. Territorial space is finite and clearcut; if a new territorial actor is to be carved out, it will be at the expense of somebody else's power over the slice of territory. But non-territorial space is without limitation". See Charney, Jonathan I. "Transnational corporations and developing public international law." *Duke Law Journal* (1983): 748-788; Galtung, Johan. "The Non-Territorial System: Non-Territorial Actors." (1982): 98-112.

[566] As expressed by Professor Vernon, "[N]ation-states have come to give credence to some of the more uninhibited projections of the future which picture the multinational enterprise as the overwhelmingly dominant vehicle of the world's business." Professor Vernon predicts a "painful and complex" process of accommodation, one in' which the mulinational enterprise may have to learn to live with a measure of control coordinated among sovereign -states and to abandon its customary position that if the enterprise is a "good citizen" of each country in which its subunits function; the enterprise has fulfilled its public duty. See Vernon, Raymond. "Economic sovereignty at bay." *Foreign Affairs* 47.1 (1968): 110-122.

[567] See Koh, Harold Hongju. "Trasnational Legal Process." *Neb. L. Rev.* 75 (1996): 181.; Krisch, Nico, and Benedict Kingsbury. "Introduction: global governance and global administrative law in the international legal order." *European journal of international law* 17.1 (2006): 1-13.

conclude binding international agreements, it is, however, clear that agreements, such as FTA's, are international legal norms that are lobbied by multinationals and made by states for multinationals[568].

In the latter context, it should be noted that a classical view, with regard to the prerequisites of international subjectivity, asserts that it solely takes into account the explicit recognition by states through the granting of specific rights and obligations under international law to the entity in question, does not work for the modern multinational corporation. While considering the modern notion of a multinational investor, such a classical view does not fit with new considerations about the central purposes of the international legal order and the importance of *de facto* influence in the international system, that also constitutes the basis of the new approach argued for in this Section.

Another argument by positivists is that the term "multinational corporation" is in itself misleading because it implies the existence of a legal entity, which does not, in fact, exist[569]. The argument is that "multinational corporate" commonly refers to entities that are not, in a legal sense, really international corporations and are nothing more than a group of separate legal entities that are incorporated in, and subject to, the laws of the countries in which they operate[570].

However, such an approach would also deny the subjectivity of a nation-state in international law. For example, H. Kelsen noted that the state, as a subject of international law, is, in fact, simply a juristic person. Thus, when international law obligates and authorises states, it means that international law obligates and authorises those human individuals who are state organs. But international law regulates the behavior of these individuals, indirectly, through the

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[568] Hollis, Duncan B. "Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty." *BC Int'l Comp. L. Rev.* 25 (2002): 235.

[569] "Free international commerce can easily be reconciled with restrictions on the rights of establishment. Firms entering a country would simply be required to establish subsidiaries inside the country. The subsidiaries would be governed by the laws within the country. Capital ("ownership") moves freely, but the rights of the owners (relative to those of others) and their obligations would be governed by the laws of the host country. If the view conveyed in the previous section is taken, then all corporations operating within a country would be domestic corporations, and all that would be required is that corporations within the country all be treated the same-there would be no discrimination against a corporation (or any business for that matter) as a result of ownership. The problem is that the bilateral agreements go well beyond this". See Stiglitz, Joseph E. "Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Framework in a Globalized World Balancing Rights with Responsibilities." *Am. U. Int'l L. Rev.* 23 (2007): 451.

[570] A multinational corporation may be (and has been) defined as a corporation holding substantial foreign investment but with a predominant home base; or a corporation with sales abroad about equal to domestic sales; or a corporation that has lost its national identity through wide international ownership. Yet, another definition rejects the notion that what is to be defined is the "multinational corporation"; the relevant term is held to be the "multinational enterprise," which is then defined as "a cluster of corporations of diverse nationality joined together by ties of common ownership and responsive to a common management strategy." It would seem that there is a good deal of sense in the use of the term "enterprise", with its transnational implications, to embrace the whole animal, and to reserve the use of the term "corporation" for the constituent parts with their varying national identities. Such an approach puts into sharper focus the areas of accord and disaccord between the multinational enterprise and the political economic interests of the nation-states of the world. See: Forrow, Brian D. "The Multinational Corporation in the Enlarged European Community." *Law and Contemporary Problems* 37.2 (1972): 306-317.

medium of the national legal order. Thus, when international law imposes an obligation upon a state, it only determines what ought to be done in the name of one state and what may be done in the name of the other; however, it is not determined who has to fulfill the obligation stipulated by international law[571].

Furthermore, there is ample, further evidence that multinational corporations have international legal personality and have participated in the international legal system for some time[572]. Examples of such participation include the application of public international law to contracts with state entities, and the participation in dispute settlement forums, established, either by treaty or intergovernmental organisations. Some principles of public international law have become so widely accepted that they have been viewed as binding on the multinational corporations' activities. Even more, multinationals also advise international organisations when their interests are at stake, and it is clear that they play a direct role in influencing national behaviour on relevant international matters[573]. All these characteristics of multinational investors give them a supranational point of view.

4.8. The supremacy of transnational law over municipal law

The supranational point of view discussed above gives rise to another important aspect, which leads to one of the essential conclusions of this thesis.

As has been observed throughout, the development of the notion of corporate nationality was at first highly influenced by municipal law, which solely defined the corporate nationality and the law regulating the corporation's activity. However, it was also found that the modern multinational corporation no longer rests on municipal law. The modern multinational corporation has a unique transnational capacity – adrift, mobile and detached from national jurisdiction. Its activities are mainly regulated by transnational law. The creation of transnational law was influenced by both the tradition of legal realism and the activities of multinational corporations.

One of the effects of the emergence of a multinational corporation is that the simplified understanding of nationalism and national identity becomes the sole driving factor behind the supremacy of nation-states in the international arena. This increases the problem of not being

[571] Kelsen, Hans. *General theory of law and state*. Vol. 1. The Lawbook Exchange, Ltd., 1945.
[572] Alvarez, José E. "Are corporations subjects of international law." *Santa Clara J. Int'l L.* 9 (2011): 1.
[573] Some commentators have suggested ignoring the fiction of "juridical actors." They argue that since the real actors are those natural persons who have both a stake in and the power to affect the decisions, it is immaterial what fictional entity has formal international personality. On the basis of this analysis, many TNCs, or at least their leaders, have always been and will continue to be participants in the international legal system. See Charney, Jonathan I. "Transnational corporations and developing public international law." *Duke Law Journal* (1983): 748-788.

able to correctly identify the varied factors that influence multinational corporations and, effectively, corporate nationality.

The complexity of the regulation of modern corporate nationality has its roots in the nature of such corporations in the globalised world. Whereas companies with offshore operations had their parent body incorporated in a country with which they could be identified, the nature of business has changed in the modern era with porous national borders such identification has become much more difficult. This essentially leads to municipal laws becoming ineffectual in attempting to regulate multinational corporations and, effectively, corporate nationality[574]. For example, the authors note that:

> "through the globalization of companies, the nature of the transnational companies has changed. Originally there was a clear demarcation with production occurring at the headquarters and secondary activities occurring in the subsidiary branches. Now the companies can be truly global, with the headquarters merely being a convenient site for strategic decision-making. Global communications are so efficient and sales can be so widely spread that production does not need to be located at the headquarters."[575]

Detachment from municipal law and the emergence of transnational law provides numerous benefits for multinational corporations and helps to avoid many of the difficulties produced by varying national requirements. However, the notion of transnational law is still to find its clear place in the fragile structure of the international legal system[576].

Transnational law itself sits on the fringes of those systems traditionally classified as systems of law and is considered, at best, to be a rudimentary legal system that lacks the basic elements identified by positivists, and found in all nation-state domestic legal systems[577]. As argued by authors, "despite the presence of a body of international law, the international legal

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[574] "Global enterprise and communication networks will continue to produce rules and procedures for transnational activities, many of which, like the *lex mercatoria*, will have only a limited link to national and international law. We can expect a greater mix and overlap of public and private international law with the line between them rather blurred. Movements toward democracy—liberal or populist—manifested through civil society will also influence international responses and add to human rights law and to principles of collective recognition. There will probably be new international "persons" and new conceptions of property and equity entering into international law. State may be declining in power, but the horizons of international law continue to expand." See Schachter, Oscar. "Decline of the Nation-State and its Implications for International Law, The." *Colum. J. Transnat'l L.* 36 (1998): 7.

[575] Willetts, Peter. "Transnational actors and international organizations in global politics." *The globalization of world politics* 2 (2001).

[576] Aptly characterised as a battle between 'transnationalists' (those embracing the emergence of a self-producing legal order among commercial actors) and 'traditionalists' (emphasising the continuously important role of the state in enforcing arbitral awards), the dispute over *lex mercatoria* exposed the vulnerability and burdens of a practice/theory-based challenge to 'official' law, being those state-made norms and statutes, embedded in an institutionally sound enforcement environment. See Zumbansen, Peer C. "Transnational law." *CLPE Research Paper* 09 (2008).

[577] Charney, Jonathan I. "Transnational corporations and developing public international law." *Duke Law Journal* (1983): 748-788.

system's ability to procure conformance is less than that found in the more advanced domestic legal systems. One reason for this is that domestic legal systems benefit from the nationalism of their subjects. Not only does the international arena not benefit from such national allegiance, it suffers because national sovereignty encourages the subjects of international law to give that allegiance to state interests, rather than to those of the international community"[578].

However, transnational law prompts the legal imagination of a wealth of untraditional, alternative forms of border-crossing activity through regulatory and judicial networks. It also sparks a rediscovery of the informal, unofficial, contractual *lex mercatoria* of the medieval merchants[579]. Additionally, transnational law must also be seen as shaping and informing a much wider field of work on legal concepts. While public international law struggles for de-ideologisations and reformalisations, transnational law arises as an alternative to the continuously state-centered oppositional theoretical framework that informs international law – and sometimes dominates international law[580].

In this context, it is important to note that transnational law may also be defined as denationalised commercial law, and since multinational investors, as it was observed in this Section, have also denationalised, transnational law represents a resurgence and restatement of the very problem of the lack of regulations on such multinational corporations. In this way, transnational law reconnects with both municipal law notions (e.g., freedom of contract, duress, consumer protection) and international law (e.g., *pacta sunt servanda*, *bona fide* investment, jurisdiction *ratione personae*). In a normative sense, transnational law creates a regulatory regime that can accommodate public and private claims evolving from privatized and deregulated frameworks of formerly public administration. Thus, transnational law allows for a parallel view on the allegedly separated spheres of domestic and international legal struggles[581].

Therefore, the question is – how transnational law regulates corporate nationality? Firstly, it is important that multinational corporations are administered centrally and from within inter-firm networks. Trans-territorialized, globe-spanning company activities bring together a multitude of autonomous organisational and economic actors that can easily exhaust the traditional regulatory aspirations of nation-states and other political bodies. However, transnational law comprises of the law governing the global business corporation through a multi-level and multipolar legal regime of hard and soft law, statutes and recommendations,

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[578] Ibid, see also Nowrot, Karsten. "Legal consequences of globalization: The status of non-governmental organizations under international law." *Indiana Journal of Global Legal Studies* (1999): 579-645.; Calliess, Gralf-Peter, and Peer Zumbansen. *Rough consensus and running code: a theory of transnational private law*. Bloomsbury Publishing, 2010.

[579] Dezalay, Yves, and Bryant Garth. "Merchants of law as moral entrepreneurs: Constructing international justice from the competition for transnational business disputes." *Law and Society Review* (1995): 27-64.

[580] Zumbansen, Peer C. "Transnational law." *CLPE Research Paper* 09 (2008).

[581] See also Zumbansen, Peer C. "Transnational law, evolving." (2011).; Gaillard, Emmanuel. "Transnational Law: A Legal System or a Method of Decision Making?." *Arbitration International* 17.1 (2001): 59-72.

command–control structures of mandatory rules as opposed to an ever more expanding body of self-regulatory rules.

In this context, Vagts suggests that either an autonomous space should be allowed for such corporations, outside state control, enabling individual states to perform the regulatory functions in accordance with their municipal laws, or there should be the creation of an international agency, for the purpose of such monitoring, along the lines of the WTO. The alternative would be to continue with the current system of checks and balances and pursue the same more vigorously. In the opinion of Vagts, the second solution may yet to be found more suitable, as the municipal laws can seldom be seen to have an extraterritorial application, and in any case, such a major issue of locating the country in which the corporation is based does not get addressed through the former method. The problem of continuing with the current system has been established already and needs no reiteration[582].

Increasingly, the modern principles governing corporate nationality are of such border-transgressing nature that they both undercut and surpass the territorial boundaries upon which various jurisdictional competences have been predicated. While it cannot be claimed, yet, that such principles apply naturally, as is the case with the universally binding norms of international law, however, regardless of whether or not states have transposed these principles into their domestic legal regime, cases involving investor's claims against host-states, also, do not yet build on such binding international law.

These modern principles governing corporate nationality reflect an idea of the assertion of the autonomy and supremacy of international law over domestic law by imposing international law standards through private law, thereby making state acceptance of those standards less relevant to implementation. Rather, these modern principles arising from transnational law are implemented by arbitral tribunals.

4.9. Should transnational law surpass or adjust municipal law?

In this context, it is also important to observe that transnational law, in its current state, should act, rather, as an intermediary between municipal law and international public law. This is relevant, particularly when discussing corporate nationality.

It is clear that, currently, there exists no statutory provision in international public law that would clearly regulate the nationality of multinational corporations. Tribunals still, to date, refer to municipal law, i.e., the law of incorporation. The *Phillip Morris v Australia*[583] dispute is a recent example. It is clear that the *Phillip Morris* corporation is a truly transnational

[582] Vagts, Detlev F. "Global Corporation and Internatioonal Law, The." *J. Int'l L. & Econ.* 6 (1971): 247.; Vagts, Detlev F. "Reforming the" Modern" Corporation: Perspectives from the German." *Harvard Law Review* (1966): 23-89.
[583] *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12.

corporation which may be incorporated in any country in the world and which may have its headquarters, also, in any country of the world. Notwithstanding the latter, the *Phillip Morris v Australia* dispute clearly suggests that municipal law, i.e., the law of incorporation, still has the final say when finding corporate nationality.

However, this problem is an opportunity for transnational law. In the case of multinationals, transnational law may evolve and become an intermediary between the municipal law and international public law. As argued above, municipal laws can seldom be seen to have an extraterritorial application, and in any case, the major issue of locating the country in which the corporation is based does not get addressed through the former method. Therefore, transnational law, and principles arising thereof, could govern corporate nationality since they are of such a border-transgressing nature that they both undercut and surpass the territorial boundaries upon which various jurisdictional competences are based. Regardless of whether or not states have transposed these principles into their domestic legal regime, cases involving investor's claims against host-states also do not yet build on such binding international law. Thus, transnational law may serve as denationalised commercial law and reconnect with both municipal law notions and international law. Transnational law could create a regulatory regime that accommodates public and private claims evolving from privatised and deregulated frameworks of, formerly, public administration and allows for a parallel view on the allegedly separated spheres of domestic and international legal struggles. Thus, it is of utmost importance for the notion of the corporate nationality of multinationals since transnational commercial law is still a product of endeavors for harmonization. For the establishment of corporate nationality for the future multinational investor, transnational law is not meant as a substitute for the actual domestic law.

The overwhelming majority of rulings which analyse the issue of corporate nationality remain under the same municipal (incorporation) rules as they are at present. However, transnational law could take the place of the rules of the conflict of laws or establish corporate nationality under the relevant soft law rules or the relevant conventions. In addition, the application of transnational law might mean that the law, thus to be applied for the establishment of corporate nationality, might be that of any foreign country, which is different in different cases. Therefore, transnational law might even evolve to be uniform and limited in scope to multinational investors for tactical reasons. There are a great variety of ways in which transnational law might be used where the municipal or treaty law does not provide for an answer.

This argument is also in line with the theory of legal realism because transnational theorists, in similarity with realists, tend to focus on practice. Transnational legal theorists look to the processes through which national law and local private practices interact with international and transnational legal norm-making[584]. What interests transnational legal theorists is "normative settlement" across levels of social organisation to constitute a transnational legal

[584] Walker, Neil. *Intimations of global law*. Cambridge University Press, 2014.

order and not simply aspiration[585]. Thus, transnational theorists' focus on practices and effects has a more legal realist orientation.

As has been observed throughout this thesis, the practical approach to modern corporate nationality is the answer which transnational law provides to issues of nationality, which may no longer be effectively regulated by municipal law. Thus, transnational law may evolve and become a needed intermediary between municipal law and international public law.

4.10. Arbitral process in the context of transnational law

The principle of arbitral autonomy is in stark contrast to the general rule, where the laws of a country are implanted in the decisional framework of international private arbitration. This principle allows an international arbitral tribunal, set-up under a treaty, to refer only to the constitutive elements of its organisation, to apply contract terms and transnational law. The arbitral autonomy principle may come into play in two situations. These are in respect of government projects submitted to international arbitration, including ICSID arbitrations and arbitrations instituted by international treaty. As mentioned, in such fora, the arbitral tribunal might rely on "general principles of international law" to override local laws as part of transnational law[586].

Thus, international arbitral tribunals operate in a new transnational legal environment, rather than the traditional international law environment[587]. Transnational law itself becomes a hybrid of international and domestic law. Therefore, the transnational legal process is "a blend of the domestic and international legal process which internalizes norms" from the interaction of international and domestic lawmaking authority[588]. Even private law and rulemaking are increasingly transnational, as multinational corporations develop codes of conduct, or best practice codes, by which they promise to be governed. These new forms of less formal regulations, often expressed in aspirational terms, include statements of best practices from international bodies, subnational governmental agencies, industry-wide codes and corporate entity codes.

Arbitrators, acting in the spirit of legal realism, are enabled to apply such transnational legal principles since they belong to no national legal order and are, therefore, not bound to apply

[585] Halliday, Terence C., and Gregory Shaffer, eds. *Transnational legal orders*. Cambridge University Press, 2015.
[586] See Banifatemi, Yas. "The Law Applicable in Investment Treaty Arbitration."*Arbitration under international investment agreements: a guide to the key issues* (2010).
[587] Dezalay, Yves, and Bryant G. Garth. *Dealing in virtue: International commercial arbitration and the construction of a transnational legal order*. University of Chicago Press, 1998.
[588] See Stevens, Caleb J. "Hunting a Dictator as a Transnational Legal Process: The Internalization Problem and the Hissène Habré Case." *Pace Int'l L. Rev.* 24 (2012): 190.

the substantive or choice of law rules of any one jurisdiction[589]. As argued by scholars, there is "a strong tendency in arbitral case law to examine the existence and validity of the arbitration agreement exclusively by reference to transnational substantive rules, in keeping with the transnational nature of the source of the arbitrators' powers."[590] In this regard, arbitrators may apply any law or the rule of law, which they consider to be appropriate in determining their own jurisdiction and in discharging their duty to comply with the fundamental requirements of justice.

In this context, it is noted that the concept of 'transnational public policy' reflects such a development. Arbitrators prefer to rely on the "international public order of most states" to give weight to certain norms or fundamental rights in the context of international arbitration[591]. The concept of 'transnational public policy' encompasses such a phenomenon. For example, as argued by J. E. Alvarez:

> "[T]oday, investor-state arbitral awards, ever more abundant, are building, atop the slender common language of the "international minimum standard" or "FET", an elaborate body of global principles of "good governance" that the international community is increasingly coming to expect from states that purport to adhere to the rule of law. The investment regime, along with other contemporary human rights regimes, is constructing a global administrative law. These tribunals are now elaborating a cluster of common normative principles (…) requiring states to respect the legal values of stability, predictability and consistency, to protect legitimate expectations, grant procedural and administrative due process and avoid denials of justice, require transparency, and insist on reasonableness and proportionality when deploying the power of the state."[592]

[589] See Gaillard, Emmanuel. "Transnational Law: A Legal System or a Method of Decision Making?." *Arbitration International* 17.1 (2001): 59-72.; Von Mehren, Arthur T. "Rise of Transnational Legal Practice and the Task of Comparative Law, The." *Tul. L. Rev.* 75 (2000): 1215.

[590] Fouchard, Philippe, et al. *Foucahrd Gaillard Goldman on International Commercial Arbitration*. Kluwer law international, 1999.

[591] For example, the arbitral tribunal in the *Calenergy's Himpurna California Energy Ltd*. case: "The members of (an) Arbitral Tribunal do not live in an ivory tower. Nor do they view the arbitral process as one which operates in a vacuum, divorced from reality. … The arbitrators believe that cronyism and other forms of abuse of public trust do indeed exist in many countries, causing great harm to untold millions of ordinary people in a myriad of insidious ways. They would rigorously oppose any attempt to use the arbitral process to give effect to contracts contaminated by corruption". *Himpurna California Energy Ltd. v PT. (Persero) Perusahaan Listruik Negara*, UNCITRAL Ad Hoc-Award of 4 May 1999. Final award of 4 May 1999.

[592] See, J. E. Alvarez, "Common Language, Common Challenges: The Evolving International Investment Regime", speech at the International Law Weekend, New York, 23 November 2009, p. 2.

Conclusions to Chapter IV

It was found that international investment law rests on pragmatism. Pragmatic legal reasoning, or the realist "Grand Style judging" - a mixture of argumentative techniques based on implied intent, morality, policy, precedent and liberality, are also present in investor-state disputes. International investment law contains ample resources permitting arbitrators to avoid paper rules while still appearing faithfully to be applying the treaty law.

In addition, it was found that arbitrators, particularly when considering corporate nationality, would often consider morality and policy concerns. Usually, the latter would revolve around the question of whether an investor intended to abuse the procedure of investor-state arbitration. On the other hand, arbitrators often provide awards with a high degree of circumspection concerning potentially constitutive portions of their awards.

It was also established that the tribunal would not only fill the gaps in treaty law but would also act as a lawmaker. Arbitrators would depart from the paper rule for non-legal reasons (e.g., policy) and could do so without appearing to be departing from the law. Examples of the latter were clearly observed where there was a lack of concrete rules and principles on corporate nationality. Thus, it was argued that arbitrators welcomed the realist approach, i.e., that no matter if the investors did fit into the definition of an investor under the relevant BIT - if they had structured their corporate nationality purely for the purpose of bringing an international investment claim, then arbitrators would find a way to dismiss jurisdiction on the grounds which are not indicated in the written law, i.e., the relevant BIT.

Furthermore, it was found that the multi-nationality of international investors and the conduct of investors themselves had deeply influenced the rules on corporate nationality. In particular, it was observed that multinational companies had themselves impacted the creation of rules on corporate nationality and transnational law. The lack of international regulation on the conduct of multinational investors had made way for the creation of transnational law. While considering the lack of concrete rules and principles on corporate nationality in international investment law, pragmatism and the realist approach was also deemed to be necessary.

Modern multinationals now often operate in one country as a "foreign" corporation organized in another. Thus, it was argued that in most cases, the national origin of a multinational investor is largely irrelevant and may be equated to any other entity, from anywhere else. Modern multinationals have substantial leeway in decision making and may develop into a supranational institution. The definition of an international legal personality has dramatically expanded to include international organizations and individuals because international law has expanded beyond issues of state-to-state relations. The freedom of the multinational investor also led to an alternative to the stateless, footloose multinational investor, that is, the internationally regulated multinational corporation.

Finally, it was found that the modern multinational corporation no longer relies on municipal law. The modern multinational corporation has a unique transnational capacity – adrift, mobile and detached from national jurisdiction. Its activities are mainly regulated by transnational law. Legal realist arbitrators are often enabled to apply such transnational legal principles since they belong to no national legal order and are, therefore, not bound to apply the substantive or choice of law rules of any jurisdiction. The creation of this transnational law was influenced both by the tradition of legal realism and the activities of multinational corporations. Thus, municipal laws often become ineffectual in attempting to regulate multinational corporations and, effectively, corporate nationality. The modern principles governing corporate nationality are of such a border-transgressing nature that they both undercut and surpass the territorial boundaries upon which various jurisdictional competences have been predicated.

GENERAL CONCLUSIONS

Introduction

The considerations provided in this thesis prove that corporate investor's nationality is a complex issue. Although the vast majority of multilateral and bilateral investment treaties provide rules on corporate nationality, however, these rules were and still are too formal and simplistic for the real and complex conditions and forms of foreign investment in modern commerce. They are also out-dated for the fast-changing nature of international law and international investment law. It was found that the classic paradigms of incorporation, the real effect principle and the notion of control still play an important role when considering the nationality of the investor. However, more often, jurisdictional disputes on corporate nationality arise in a much broader context of transboundary business activities and transnational law.

The national identity of multinational corporations can no longer be determined by reference to traditional conflict of law rules and structural, organizational and operational features or its organisational structure. These aspects may no longer reflect the true national identity of a multinational organisation. The classical tests establishing corporate nationality no longer correspond to the realities of a modern transnational corporation.

The key findings in this thesis confirm the main thesis hypothesis. It was found that the rules on corporate nationality in contemporary investment law and transnational law were influenced or, in some aspects, even created by actors and instruments, which are a part of transnational law. It was also confirmed that rules on corporate nationality were deeply influenced by non-state actors acting in investor-state arbitrations, such actors being parties to investment agreements or BITs, multinational corporations, counsels and arbitrators. It was also affirmed that corporate structuring and the related jurisprudence of the investor-state arbitration tribunals had accepted the principles of legal realism. This again confirms that the main jurisdictional battleground concerning corporate nationality is no longer just the incorporation or control issue. Jurisdictional disputes on corporate nationality arise in the broader context of transboundary business activities.

This conclusion leads to another important observation – the emergence of the multinational corporation has also complicated the understanding of nationalism and national identity. It has exacerbated the problem of not being able to correctly identify the varied factors that influence the notion of a multinational corporation and, effectively, corporate nationality. Such complexity has its roots in the nature of such corporations in the globalized world. Offshore operations, parent body incorporated in a foreign country, porous national borders essentially led municipal laws becoming ineffectual in attempting to regulate multinational corporations. However, it was found that this detachment from the municipal law and the

emergence of transnational law provided numerous benefits for multinational corporations and helped to avoid many of the difficulties produced by varying national requirements. Now a modern multinational corporation has a unique transnational capacity – adrift, mobile and detached from national jurisdiction.

In addition, it was found that such transnational capacity, which is basically a legal fiction of multinational corporation and the legal fiction of corporate nationality perfectly coincide in the context of the development of transnational law. In particular, corporate nationality in international investment serves a purpose of simplicity and efficiency in making a foreign investment, enforcing contracts and suing the host-state. It was found that corporate structuring and transnationality of corporations investing abroad had "transnationalized" the relationship between investors and host-states, including investor-state disputes.

Next, it is important to address the key findings and conclusions of this thesis based on the research questions.

1. **How the multinational corporation and its corporate nationality coincide in the context of the development of transnational law?**

One of the first objectives of this thesis was to analyse how the multinational corporation and its corporate nationality coincide in the context of the development of transnational law and whether corporate nationality is still important at all in modern commerce.

After a thorough analysis of the provisions and principles which regulated the establishment of corporate nationality in the early international commerce and in the sphere of diplomatic protection, this thesis also addressed the rules that evolved in international investment law. It was discussed whether the early principles and rules which had evolved in customary international law had somehow influenced the practice in international investment tribunals. It was established that contemporary international investment law had brought newly formed rules on international personality and capacity, which merged both municipal law and international law. The latter was reflected mainly by the investor-state arbitration. Rules on corporate nationality in transnational law were influenced by non-state actors and international instruments, which are part of transnational law.

It was also established that corporate nationality in international investment only serves the purpose of simplicity and efficiency. The national identity of multinational corporations could no longer be determined by reference to their structural, organisational and operational features, or their organisational structure, since these aspects may no longer reflect the true national identity of a multinational organisation. The characteristics or classical tests establishing corporate nationality, which existed in the 20th century, no longer correspond to the realities of a modern transnational corporation.

It was found that corporate structuring and transnationality of corporations investing abroad had "transnationalised" the relationship between investors and host-states, including the

investor-state disputes. Thus, while taking into account that the authority of the international tribunal is derived from the arbitration agreement of the parties involved, the transnational law and its implications thereof may be equated to *lex mercatoria*, which offers many practical advantages. It applies in a uniform fashion and is independent of the peculiarities of each national law. It takes into consideration the needs of international relations and allows for a fruitful exchange between systems, which are sometimes excessively attached to conceptual distinctions and systems, which seek a just and pragmatic solution to particular situations. Thus, the principles that have evolved in transnational law on corporate nationality are particularly useful in the context of multinational corporations, which no longer possesses the classical characteristics of a legal entity.

Furthermore, it was found that multinational companies had themselves influenced the creation of rules on corporate nationality and transnational law. The lack of international regulation on the conduct of multinational investors had made way for the creation of transnational law, as well. While considering the lack of modern rules and principles on corporate nationality in international investment law, pragmatism and the realist approach was also deemed to be necessary.

It was argued that in most cases, the national origin of a multinational investor is largely irrelevant and may be equated to any other entity, from anywhere else. It was observed that modern multinationals have substantial leeway in decision-making and may develop into a supranational institution. The definition of an international legal personality has dramatically expanded to include international organisations and individuals because international law has expanded beyond issues of state-to-state relations. The freedom of the multinational investor also led to an alternative to the stateless, footloose multinational investor, internationally regulated multinational corporation.

Finally, it was found that legal realist arbitrators are often enabled to apply transnational legal principles since they belong to no national legal order and are, therefore, not bound to apply the substantive or choice of law rules of any jurisdiction. The creation of this transnational law was influenced both by the tradition of legal realism and the activities of multinational corporations. Thus, municipal laws often become ineffectual in attempting to regulate multinational corporations and, effectively, corporate nationality. The modern principles governing corporate nationality are of such a border-transgressing nature that they both undercut and surpass the territorial boundaries upon which various jurisdictional competences have been predicated.

2. **Has the tradition of legal realism influenced and formed rules on corporate nationality in international investment law? If yes, how and in what ways has the tradition of legal realism formed rules on corporate nationality in international investment law?**

The second objective of this thesis was to inquire whether there is evidence that the rules on corporate nationality in international investment law were influenced and formed by the tradition of legal realism and, effectively, by the decision-making processes of international arbitrators. It was also considered whether realist decision making and its characteristics such as the emphasis on intent, morality, and policy, precedent and liberality are present in the decision-making of investor-state tribunals.

It was first found that international investment law rests on pragmatism. Pragmatic legal reasoning, or the realist "Grand Style judging" - a mixture of argumentative techniques based on implied intent, morality, policy, precedent and liberality, are also present in investor-state disputes. International investment law contains ample resources permitting arbitrators to avoid paper rules while still appearing faithfully to be applying the treaty law. The tribunal would not only fill the gaps in treaty law but would also act as a lawmaker.

In addition, it was found that arbitrators, particularly when considering corporate nationality, would often consider morality and policy concerns. Usually, the latter would revolve around the question of whether an investor intended to abuse the procedure of investor-state arbitration. On the other hand, arbitrators often provide awards with a high degree of circumspection concerning potentially constitutive portions of their awards.

There is ample evidence that the views and methods proposed by legal realists are present in international investment law and its jurisprudence. Legal rules in international investment law are often too formal and out-dated, often they contain abstract and contestable concepts. The functions, roles and the respective positioning of the social actors, the principles guiding their behaviour and their strategies in investment arbitration do fit the theory of legal realists that decisions of arbitrators are controlled by the psychological make-up, social context, arbitrator's ideologies and professional consensus. While arbitrators and counsel act in the jurisprudential philosophy of legal realism, this has had significant consequences for the development of international investment law. There is evidence of the realist perspective present in disputes concerning corporate structuring and, effectively, the corporate nationality.

The discretionary power of arbitral tribunals to interpret international investment agreements based on their preferred views on corporate nationality is of utmost importance. Interpretation of the provisions of ICSID Convention, as well as the provisions of BITs and multilateral investment agreements, resulted in different rules on nationality establishment, as compared with the ones formed in the sphere of diplomatic protection. The latter can be explained not only by the discretionary interpretation power of arbitral tribunals but also by the complexity

of applicable law in international investment law, where the municipal law and international law coincide.

Finally, it was found that arbitrators would often depart from the paper rule for non-legal reasons (e.g., policy) and could do so without appearing to be departing from the law. Examples of the latter were clearly observed. Thus, it was argued that arbitrators welcomed the realist approach, i.e., that no matter whether the investors did fit into the definition of an investor under the relevant BIT - if they had structured their corporate nationality purely for the purpose of bringing an international investment claim, then arbitrators would find a way to dismiss jurisdiction on the grounds which are not indicated in the written law, i.e., the relevant BIT.

3. How have the principles and rules on corporate nationality formed and evolved in international investment law and investor-state disputes?

The third objective of this thesis was to explain the evolution of regulation of corporate nationality and to analyse the notion of corporate nationality in contemporary international investment law. In particular, this thesis aimed to explain the principles and rules of corporate nationality that evolved in international investment law and investor-state disputes.

It was found that the notion of the nationality of legal persons or corporate investors in customary international law was strongly influenced by the regulation of nationality of natural persons. However, nationality rules concerning legal persons or corporations were different, depending on the legal context and legal relationships involved. Different nationality rules concerning legal persons were found in different national and international legal instruments. The latter entails that the main principle, which has evolved from early international law, is that states, when in a bilateral or multilateral relationship, themselves define who their nationals are, for a specific purpose, and in a specific legal context. This can also be referred to as the attribution of nationality.

It was also found that definitions of nationality in municipal law were intended to relate to special local objectives and would be of limited use in the international sphere. They were devised for the purpose of different laws and regulations, ones not concerned with international investment. Thus, when applying rules found in municipal law to corporate nationality, the interpreter should take into account that they may be irrelevant for the purpose of defining an investor's nationality in connection with an international tribunal's jurisdiction.

In the context of international investment provisions, it was found that provisions of BITs, on investor's nationality, were influenced by the provisions of municipal law. However, notwithstanding the fact that the ICSID Convention, in certain circumstances, provides for an option to agree on a certain corporate nationality, the latter does not change the basic notion of the ICSID Convention, that the nationality of a legal person is established by way

of incorporation. On the other hand, when it comes to jurisdictional requirements of ICSID arbitration, the tribunals have vast discretionary interpretation powers. The tribunals may use an exception to the classical concept of nationality in cases where juridical persons are under foreign control. The latter provides that in ICSID arbitration, the parties have the liberty to agree on the rules of the establishment of corporate in their private investment agreements. Therefore, it was argued that in such cases, the role of municipal law in the context of the corporate nationality in ICSID arbitration is diminished.

Another important conclusion is that in investor-state arbitration and jurisdictional requirements, the difference between ownership and control is diminished, which is of importance in corporate law. The latter is the main facilitator of the treaty shopping practice. In this context, it was found that doctrines, such as piercing the corporate veil, or 'unclean hands' lack recognition in international law and, effectively, recognition by international tribunals. Similarly, the denial of the benefits clause does not fit, by its original purpose, into the modern investment treaty regime.

Consequently, the discretionary power of arbitral tribunals to interpret international investment agreements based on their preferred views on corporate nationality is of utmost importance. The interpretation of the provisions of ICSID Convention, as well as the provisions of BITs and multilateral investment agreements, resulted in different rules on the establishment of nationality, as compared with those formed in the sphere of diplomatic protection.

4. **How the forms and types of international investment have changed over time, and how the notion of corporate nationality has coped with such a change?**

The fourth objective of this thesis was to analyse how the forms and types of international investment have changed over time and how the notion of corporate nationality has coped with such a change. The thesis aimed to provide a deeper perspective of corporate nationality issues, which arise in modern international investment.

It was found that the rules on corporate nationality were, and still are, too formal and out-dated for the real and complex conditions and forms of foreign investment. The latter is evidenced by the evolution of the various types and forms of foreign investment. It was found that there is no clear dividing line between portfolio and direct investments; instead, there is overlap and integration. This circumstance is important when considering the notion of corporate nationality and its impact. There can be more than one investor exerting control over an investment – a partnership or joint venture are familiar examples. Thus, the point where the investor gains some real measure of influence over the operation of the investment is the point where he crosses the line from portfolio to direct investment. That will vary with each different type of business structure and each different investment within that structure.

It was also established that a better approach would be to ask if the investor has a say in the running of the investment. However, the international investment law, as it stands now, does

not pose such a question when considering the notion of corporate nationality. Since it is the agreement that eventually confers jurisdiction to the investor-state tribunal, corporate nationality, if analyzed through the prism of corporate structuring and different forms of the investment, is only relevant for entitlement purposes. The requirement of certain corporate nationality becomes relevant when the investor brings a claim under the BIT. This is not so when the claim is brought under a private investment contract.

It was also found that the origin of the capital is not always relevant to the existence of an investment and the same could be said in respect of the definition of an investor. The origins of capital or nationality of capital do not have an impact on the notion of corporate nationality. As the ICSID Convention does not require an 'investment' to be financed from the capital of any particular origin, the origin of the capital used to acquire assets is not relevant to the question of jurisdiction under the ICSID Convention. This again confirmed that the nationality of true stakeholders is not as important.

On the other hand, it was argued that host-states themselves, when concluding BITs, certainly are aware of the modern corporate structuring, which was and is still happening throughout modern commerce, and especially in foreign investment. Thus, it was argued that corporate nationality is no longer an important issue, as concerns the true owners and true stakeholders of the investment. Even the host-states themselves do not see finding the true owners or true stakeholders of the investment as a material circumstance (until the dispute arises).

Delimitation of the thesis - any other issues that could be addressed further?

As can be observed from the overview of the conclusions indicated above, the notion of corporate nationality in contemporary international law is a very complex legal issue, and, naturally, this thesis has its own limitations.

This thesis does not discuss the doctrine of piercing the corporate veil *per se*, but rather a decision-making process of arbitrators when inquiring on the corporate nationality. Discussing the doctrine of piercing the corporate veil would require an assessment of specific factual and legal questions surrounding specific cases, but this would not serve the purpose of answering the research questions of this thesis.

Based on the findings of this thesis, further and deeper analysis could be made on the issue of treaty shopping practice. In particular, it may be important to inquire whether legal realism, in some aspects as the cause of the development of rules on corporate nationality in international investment law, could also offer solutions to solve the problem of treaty shopping. For example, it may be important to ask: if realist legal thinking looks at the practical aspect of corporate nationality, maybe legal realism could also offer a solution, such

as newly formed rules or guidelines on the establishment of corporate nationality based on new characteristics of a multinational and translational corporation.

In addition, further analysis may be made into the question of who actually is the legislator or creator of transnational law and its main principles? Is it nation-states or actually judges, arbitrators or even disputing parties? As it was observed in this thesis, rules on corporate nationality were deeply influenced by actors acting in investor-state arbitrations. Therefore, naturally, the next question to ask is whether the same applies to other spheres of international law, such as international trade law, international maritime law and others.

Furthermore, it may be useful to inquire further whether municipal law should play a role in the establishment of the nationality of both natural persons and legal persons. As it was observed in this thesis, the role of municipal law is diminishing, as least as far as corporate nationality is concerned. Therefore, it may be useful to inquire if the role of municipal law is also diminishing in other areas of international law the establishment of nationality is one area, but there may be many others, such as property rights, intellectual property and others.

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