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# Developments in the Legal Standing of Shareholders and Holding Corporations in Investor-State Disputes

*Martin J. Valasek\**  
*Patrick Dumberry\*\**

## INTRODUCTION

IN RECENT YEARS, THERE HAS BEEN a remarkable increase in the number of international arbitration cases involving disputes between foreign investors and States. By now, the statistics are becoming familiar to practitioners in this area of law. During the last five years, an average of 40 new investment treaty arbitration cases have been filed each year.<sup>1</sup> There are currently some 390 known investor-State arbitration cases pending.<sup>2</sup> These are dramatic figures

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\* Martin J. Valasek, Partner, Norton Rose OR LLP, Montreal, Canada.

\*\* Patrick Dumberry, Ph.D., Assistant Professor, University of Ottawa (Civil Law Section), Canada. The authors wish to thank Mr. Nick Gallus and Mr. Jean-François Hébert (Trade Law Bureau, Department of Foreign Affairs and International Trade, Canada) for their comments and suggestions on an earlier draft of this paper.

<sup>1</sup> UNCTAD, *Latest Developments in Investor-State Dispute Settlement*, IIA Monitor no. 1, at 1 (2008).

<sup>2</sup> UNCTAD, *Latest Developments in Investor-State Dispute Settlement*, IIA Issues Note no. 1, at 2 (2011). There are undoubtedly a large number of other investor-State disputes currently being settled by arbitration about which information is not publicly available. This is true for most cases where the UNCITRAL Arbitration Rules and other *ad hoc* arbitration rules apply. The UNCITRAL Arbitration Rules were adopted in 1976 by the United Nations Commission on International Trade Law (UNCITRAL) and the United Nations General Assembly. The UNCITRAL rules were updated in 2010. Unlike ICSID, UNCITRAL is not an arbitral institution.

considering that, in the first 30 years of the existence of ICSID, only one to two cases were registered each year.<sup>3</sup>

As a result of this trend, international investment law is evolving rapidly.<sup>4</sup> One area of international investment law where significant new developments have occurred concerns the legal standing of shareholders of corporations investing abroad, and of corporations within a chain of an investment structure, to submit arbitration claims to international arbitral tribunals constituted under treaties for the protection and promotion of investments (“investment treaties”).

The dramatic evolution of the rights of shareholders at international law is clear when one considers the *Barcelona Traction* case decided in 1970 by the International Court of Justice (“ICJ” or “Court”). In that case, at issue was whether the Belgian shareholders of Barcelona Traction, a corporation incorporated in Canada, could have Belgium espouse their claim against Spain for harm done to the corporation. The Court held that the nationality of a corporation is determined by its place of incorporation and where it has its registered office. Consequently, Belgium could not espouse the claim by Belgian shareholders against Spain. On the rights of shareholders under customary international law, the Court stated that:

Notwithstanding the separate corporate personality, a wrong done to the company frequently causes prejudice to its shareholders. But the mere fact that damage is sustained by both company and shareholder does not imply that both are entitled to claim compensation. . . . In such cases, no doubt, the interests of the aggrieved are affected, but

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<sup>3</sup>ICSID Caseload – Statistics, Iss. 2011–1 (2011), <http://icsid.worldbank.org>.

<sup>4</sup>Numerous books on the subject of international investment law have been published in the last few years alone. See, e.g., JESWALD W. SALACUSE, *THE LAW OF INVESTMENT TREATIES* (Oxford 2010); KATIA YANACA-SMALL, *ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES* (Oxford 2010); STEPHAN W. SCHILL, *INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW* (Oxford 2010); M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* (3<sup>rd</sup> ed., Cambridge 2010); JAN PAULSSON ET AL., *GUIDE TO ICSID ARBITRATION* (2<sup>nd</sup> ed., Kluwer 2010); CHRISTINA BINDER ET AL. (eds.), *INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER* (Oxford 2009); ANDREW NEWCOMBE & LUIS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT* (Kluwer 2009); CATHERINE A ROGERS & ROGER P. ALFORD (eds.), *THE FUTURE OF INVESTMENT ARBITRATION* (Oxford 2009); STEPHAN W. SCHILL, *THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW* (Cambridge 2009); ZACHARY DOUGLAS, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* (Cambridge 2009); CHRISTOPH SCHREUER ET AL. (eds.), *THE ICSID CONVENTION: A COMMENTARY* (2<sup>nd</sup> ed., Cambridge 2009); RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (Oxford 2008); PETER MUCHLINSKI ET AL. (eds.), *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* (Oxford 2008); AUGUST REINISCH, *STANDARDS OF INVESTMENT PROTECTION* (Oxford 2008); CAMPBELL MCLACHLAN ET AL., *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* (Oxford 2008).

not their rights. Thus whenever a shareholder's interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action; for although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed.<sup>5</sup>

The Court's holding suggests that foreign shareholders are not entitled to any international protection *independent* from that existing for a corporation affected by a wrongful act committed by a State.<sup>6</sup> As explained by one writer, the ruling imposes "a nearly insurmountable barrier to foreign shareholders hoping to protect their investment based on *general principles of international law*."<sup>7</sup> The Court's statement was made in the context of diplomatic protection, not involving any investment protection treaty.<sup>8</sup> In fact, the Court specifically explained that shareholders could have a remedy at international law whenever a breach of an investment treaty provision was involved.<sup>9</sup> The opening left by *Barcelona Traction* was used by the ICJ twenty years later. Faced with a bilateral

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<sup>5</sup> *Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain)*, Judgment, 1970 ICJ REP. 4, 35 (Feb. 5) [*Barcelona Traction*].

<sup>6</sup> The Court, however, recognised that there are some exceptions to that rule, for instance, when the shareholders' rights are directly affected, *id.* at 36, and when the corporation has ceased to exist where it was incorporated, *id.* at 40–41.

<sup>7</sup> Stephen A. Kubiawski, *The Case of Elettronica Sicula S.p.a.: Toward Greater Protection of Shareholders' Rights in Foreign Investments*, 29 COLUMBIA J. TRANSNAT'L L. 226 (1991) (emphasis added).

<sup>8</sup> See Francisco O. Vicuña, *The Protection of Shareholders under International Law: Making State Responsibility More Accessible*, in MAURIZIO RAGAZZI (ed.), INTERNATIONAL RESPONSIBILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER 165 (Brill 2005) ("[W]hatever the meaning the *Barcelona Traction* decision might have had was only relevant in connection with diplomatic protection as the prevailing mechanism for international claims at the time."). See *id.* at 163 ("[I]t was the absence of any such investment protection treaty between the parties that led the Court to decide the question under general international law. Had a treaty to this effect existed, probably the conclusion would have been different . . ."). Several ICSID tribunals have stated expressly that the findings of the ICJ in the *Barcelona Traction* case in the context of diplomatic protection are not applicable *per se* in the *different* context of investor-State disputes under an investment treaty. See *CMS Gas Transmission Co. v. Republic of Argentina*, ICSID Case No. ARB/01/8, Decision on Jurisdiction, paras. 43–44 (July 17, 2003), 42 I.L.M. 788 (2003) [*CMS Decision on Jurisdiction*] (this finding was approved by the *ad hoc* Committee in paragraph 69 of its Annulment Decision of September 25, 2007); *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentina*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, para. 50 (May 16, 2006); *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, para. 141 (Aug. 3, 2004), 44 I.L.M. 138 (2005).

<sup>9</sup> *Barcelona Traction*, *supra* note 5, at 47 ("[I]n the present state of the law, the protection of shareholders requires that recourse be had to treaty stipulations or special agreements directly concluded between the private investor and the State in which the investment is placed. States ever more frequently provide for such protection, in both bilateral and multilateral relations, either by means of special instruments or within the framework of wider economic arrangements. Indeed, whether in the form of multilateral or bilateral treaties between States, or in that of agreements between States and companies, there has since the Second World War been considerable development in the protection of foreign investments.").

treaty between the United States and Italy (the 1948 Treaty of Friendship, Commerce and Navigation) providing for protection of investments, the Chamber of the Court recognised the right of the United States to submit a claim on behalf of U.S. shareholders against Italy, the State of incorporation of the corporation involved.<sup>10</sup>

As a result of the tremendous developments of the last decade concerning investment treaties, the conclusion that “shareholders are powerless under international law, having no effective remedy for their injuries”<sup>11</sup> is no longer valid. Today, the legal protection for shareholders of corporations investing abroad is offered through the existence of a growing number of bilateral investment treaties (“BITs”)<sup>12</sup> and multilateral investment treaties, such as NAFTA.<sup>13</sup> Protection is also often found in *contracts* entered into directly between foreign investors and States (or State-owned entities) or in the *legislation* of the host State of the investment. Of particular importance in these instruments is the ability of foreign investors to resolve investment disputes by bringing claims *directly* against the States in which they invest.<sup>14</sup>

The focus of this paper is to systematically analyze the legal standing of shareholders before arbitral tribunals under modern investment treaties.<sup>15</sup> We will examine the legal standing of different categories of shareholders, including

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<sup>10</sup> *Elettronica Sicula S.p.A. (ELSI) (United States v. Italy)*, Judgment, 1989 ICJ REP. 15 (July 20). The evolution of the Court on the issue is examined in Vaughan Lowe, *Shareholders' Rights to Control and Manage: from Barcelona Traction to ELSI*, in NISUKE ANDO ET AL. (eds.), *I LIBER AMICORUM JUDGE SHIGERU ODA* 269 (2002); Brigitte Stern, *La protection diplomatique des investissements internationaux: de Barcelona Traction à Elettronica Sicula ou les glissements progressifs de l'analyse*, 117 J. DROIT INT'L 897 (1990).

<sup>11</sup> P.G. Lutz, *Diplomatic Protection of Corporations and Shareholders – Capacity of Government to Espouse Claims of Shareholders of a Foreign Corporation*, 1 CAL. W. INT. L.J. 148 (1970).

<sup>12</sup> According to UNCTAD, *Recent Developments in International Investment Agreements (2008 – June 2009)*, IIA Monitor no. 3 (2009), there were 2,676 treaties at the end of 2008.

<sup>13</sup> North American Free Trade Agreement (NAFTA), Can.–Mex.–U.S. (Dec. 17, 1992) (entered into force Jan. 1, 1994), 32 I.L.M. 605 (1993). Other important multilateral investment treaties include, *inter alia*, the Energy Charter Treaty (entered into force Apr. 16, 1998), 34 I.L.M. 373 (1995) and the Colonia Protocol on Promotion and Protection of Investments Coming from Non-MERCOSAUR State Parties, MERCOSAUR/CMC Dec. No. 11/94 (Jan. 17, 1994) (in the context of the Ascuncion Treaty creating Mercosur).

<sup>14</sup> Under these treaties, generally, an investor must opt between international arbitration and other venues under so-called “fork-in-the-road” provisions.

<sup>15</sup> In this paper, the term “shareholder” is used in its general meaning. It includes both physical persons as well as legal persons (*i.e.* corporations or partnerships) who own shares or otherwise participate in another corporation. We do not intend specifically to discuss so-called “portfolio investment,” which includes shares traded on stock markets. This issue is discussed in M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 227–28 (2<sup>nd</sup> ed., Cambridge 2004). The other related issue of bondholders will also not be examined. See Peter Griffin & Ania Farren, *How ICSID Can Protect Sovereign Bondholders*, 24(9) INT'L FIN. L. REV. 21–24 (2005); Michael Waibel, *Opening Pandora's Box: Sovereign Bonds in International Arbitration*, 101 AM. J. INT'L L. 711 (2007).

“minority” and “indirect” shareholders, as well as the controversial issue of the standing of intermediate corporations (also generally known as “holding,” “shell” or “mailbox” corporations) through which international investments are often conducted. One particularly controversial issue to be addressed in this article is the distinction between cases of illegitimate and legitimate “treaty shopping.” Finally, we will examine some of the concerns that capital-importing States have raised as a result of these developments, including the issue of remoteness of claims by minority and indirect shareholders.

## I. THE BASIC ELEMENTS OF JURISDICTION UNDER THE ICSID CONVENTION

In order fully to understand these new developments, the basic elements of the ICSID Convention<sup>16</sup> in relation to jurisdiction must be briefly set out. The ICSID Convention’s primary aim is the promotion of economic development and the facilitation of private international investments through the creation of an impartial and reliable system for the settlement of disputes between foreign investors and States. While the ICSID Convention does not contain substantive rules for the protection of investments, it has nevertheless made an important contribution by establishing a *procedure* for the settlement of investor-State disputes.

There are *three* basic requirements for submitting a claim to an arbitral tribunal under Article 25 of the ICSID Convention: (1) the parties must have consented to ICSID arbitration in writing; (2) the dispute must be “legal” and “aris[e] directly” out of an “investment”; and (3) the parties must be a “Contracting State” and a “national of another Contracting State.”

ICSID arbitration, like all international arbitration, is founded on the principle of consent. In the case of ICSID, what is required is the consent of the parties (the investor and the host State of the investment), evidenced in writing, to have their dispute settled by an arbitral tribunal established under the ICSID Convention. The simple fact that the host State of the investment has ratified the Convention does not, in and of itself, constitute the host State’s consent to the Centre’s jurisdiction over a dispute. A more specific type of

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<sup>16</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Mar. 18, 1965) (entered into force Oct. 14, 1966), 575 U.N.T.S. 160; 4 I.L.M. 532 (1965) [“ICSID Convention”]. Since its adoption, the Convention has been signed and ratified by 147 States (10 other States have only signed the Convention, but not ratified it). In 1978, the ICSID Additional Facility Rules entered into force. The Additional Facility Rules are designed primarily to offer methods for the settlement of investment disputes where the host State or the State of the investor’s nationality, but not both, is a party to the ICSID Convention. These Rules can also apply in certain other circumstances where the jurisdictional requirements of the ICSID Convention are not satisfied.

consent is required. Such consent may be found either in (i) a direct agreement between the investor and the host State,<sup>17</sup> (ii) a provision of the domestic legislation of the host State or (iii) a provision of an investment treaty. In the case of domestic legislation and treaties, typically, the consent of the host State is offered unilaterally and generally to *any* investor that can meet the requirements of the law or the treaty.<sup>18</sup> An investor must also “accept” the offer of arbitration.<sup>19</sup>

In addition, in order for an arbitral tribunal established under the ICSID Convention to have *ratione materiae* jurisdiction over a dispute, it must be a “legal dispute arising directly out of an investment” made in the host State by a foreign investor. The term “investment” is not defined in the ICSID Convention. Over the years, ICSID tribunals have developed a set of conjunctive criteria to determine whether an investment was made within the meaning of the Convention.<sup>20</sup> It is left to the parties to define in a BIT (or in the applicable legislation or in a contract in which the parties have consented to arbitration) the kind of investments in relation to which disputes may be submitted to ICSID arbitration, provided that the definition of investment is consistent with the ICSID Convention.

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<sup>17</sup> In the case of a direct agreement (a contract), the consent is mutual from the start and is usually targeted to a specific investment.

<sup>18</sup> A BIT typically contains an arbitration clause whereby each State consents (in advance) to ICSID arbitration for claims that are submitted by nationals of the other State party to the treaty and that satisfy the requirements of the treaty. The consent to arbitration is offered by the host State to all foreign investors of the other party to the treaty investing in the host State.

<sup>19</sup> By starting ICSID proceedings, the investor accepts the host State’s offer and is deemed to have consented to ICSID arbitration.

<sup>20</sup> These criteria are: a financial contribution; a “certain duration of performance of the contract;” a “participation in the risks of the transaction;” and a contribution to the host State’s economic development. See *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, para. 52 (July 23, 2001); *Fedax NV v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, para. 43 (July 11, 1997). But see *M.C.I. Power Group L.C. and New Turbine, Inc. v. Ecuador*, ICSID Case No. ARB/03/6, Award, para. 165 (July 31, 2007) (stating that these criteria “must be considered as mere examples and not necessarily as elements that are required for its existence”); *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, paras. 310–18 (July 24, 2008). The Tribunal in *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, para. 114 (Apr. 15, 2009) [“*Phoenix Action Award*”], added two other criteria: the assets must be invested in accordance with the laws of the host State and the assets must be invested *bona fide*. In *LESI, S.p.A. and Astaldi, S.p.A. v. People’s Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Decision on Jurisdiction, para. 72 (July 12, 2006) the Tribunal decided that the contribution of the investment to the economic development of the host State was not a condition for the qualification of investment. However, the *ad hoc* Committee in *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Annulment Decision, para. 33 (Nov. 1, 2006), considered this criterion to be essential. This issue has been the subject of much controversy lately. See, e.g., *Malaysian Historical Salvors SDN BHD v. Malaysia*, ICSID Case No. ARB/05/10, Decision on Jurisdiction, paras. 130–31 (May 17, 2007) and Annulment Decision (Apr. 16, 2009); *Saba Fakes v. Turkey*, ICSID Case No. ARB/07/20, Award (July 14, 2010); *Malicorp Ltd. v. Egypt*, ICSID Case No. ARB/08/18, Award (Feb. 7, 2011).

Finally, two requirements concerning nationality must be fulfilled. First, the host State must be a contracting party to the Convention at the time the request for arbitration is filed by the investor. Second, the investor submitting a claim must be a “national of another Contracting State” to the Convention, both on the date when the parties consent to submit the dispute to arbitration and on the date when the request for arbitration is registered by the ICSID Secretary-General.<sup>21</sup> The determination of the proper “nationality” of a corporation is a controversial area which will be examined below.

## II. THE LEGAL STANDING OF DIFFERENT CATEGORIES OF SHAREHOLDERS AND INTERMEDIATE CORPORATIONS

As mentioned above, the question of the legal standing of shareholders in arbitration disputes is one area where arbitral tribunals have been particularly dynamic. It is also an area which has increasingly received the attention of scholars.<sup>22</sup> In a typical investment scenario, an investor, the so-called “parent” company (for instance, a corporation or a partnership), makes an investment in a foreign country *through another company*, its subsidiary. In many countries, foreign investments are in fact required to be channeled through *locally incorporated* companies. A good example is a consortium composed of foreign companies that invests in a country through a local corporation created for that purpose. In this case, the local corporation is incorporated in the State where the investment is made. Under this rather straightforward scenario, two distinct issues relating to the legal standing of corporations arise:

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<sup>21</sup> This investor must, however, *not* have the nationality of the host State against which it is submitting a claim. The only exception is for *foreign-controlled* corporations. ICSID Convention, art. 25(2)(b). This special case is discussed below.

<sup>22</sup> See, e.g., Stanimir A. Alexandrov, *The Baby Boom of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as Investors and Jurisdiction Ratione Temporis*, 4(1) L. & PRAC. INT’L COURTS & TRIBS. 19 (2005); Peter J. Turner, *Treaties as Agreements to Arbitrate, Issues of Scope: Parties, Ownership and Control*, in ALBERT JAN VAN DEN BERG (ed.), 13 ICCA CONGRESS 444 (Kluwer 2007); Francisco O. Vicuña, *supra* note 8, at 161–70; Ian A. Laird, *A Community of Destiny – The Barcelona Traction Case and the Development of Shareholder Rights to Bring Investment Claims*, in TODD WEILER (ed.), INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 77 (Cameron May 2005); E.C. Schlemmer, *Bilateral Investment Treaties, Protection of Shareholders, and ICSID: CMS Gas Transmission Company v. the Republic of Argentina*, 28 S. AFR. Y.B. INT’L L. 292 (2003); Christoph Schreuer, *Shareholder Protection in International Investment Law*, in PIERRE-MARIE DUPUY ET AL. (ed.), COMMON VALUES IN INTERNATIONAL LAW: ESSAYS IN HONOUR OF CHRISTIAN TOMUSCHAT 601 (Engel 2006) [“Schreuer, *Shareholder Protection*”]; R. Doak Bishop, *Multiple Claimants in Investment Arbitration: Shareholders and Other Stakeholders*, in MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION 239 (PCA ed., Oxford UP 2009).

1. Can the *locally incorporated corporation* bring a claim against the host State?
2. Can the foreign *parent* corporation bring a claim against the host State for damages sustained by the locally incorporated corporation?

Under the classic scenario just described, the locally incorporated corporation is fully owned by the “parent” corporation.

It is not unusual, however, for locally incorporated corporations to be controlled not by a single corporation, but by several foreign companies. In this case, a foreign corporation may hold the majority of the shares of the locally incorporated corporation, while another (or several others) will be a “minority” (non-controlling) shareholder. In these circumstances, two other questions arise:

3. Does a foreign corporation have standing to bring a claim against the host State in the event that it is a *majority shareholder* of the locally incorporated corporation?
4. Does a foreign corporation have standing in the event that it is a *minority shareholder* of the locally incorporated corporation?

Another slightly more complicated, but common, investment scenario is the following. A foreign investor (the “parent” corporation) does *not* make its investment in the host State directly with the locally incorporated corporation, but instead *indirectly* through *another* “intermediate” corporation (or, sometimes, through several such corporations). These intermediate corporations are often special-purpose “holding” or “shell” corporations. They may have the same nationality as that of the parent corporation or that of the locally incorporated corporation. Intermediate corporations will sometimes be incorporated in another jurisdiction to benefit from a tax treaty with the host State or for other reasons. Two legal issues further arise from this particular scenario:

5. Does a foreign corporation have standing to bring a claim against the host State in the event that it holds its interest in the locally incorporated corporation indirectly through an *intermediate* corporation? (And does it matter what the nationality of that intermediate corporation is?)
6. Can this *intermediate* corporation bring its *own* claim for damages sustained by the locally incorporated corporation? (And does it matter that the ultimate parent corporation has a different nationality than that of the intermediate corporation?)

In the following sections, we will examine the possibility of submitting arbitration claims by (A) locally incorporated companies, (B) parent corporations, (C) majority shareholders, (D) minority shareholders, (E) indirect shareholders, and (F) intermediate (“shell”) corporations.

### *A. Claims by Locally Incorporated Corporations*

In general, a locally incorporated corporation *does not* have standing to file a claim against the host State under the ICSID Convention for the foreign investment that has been made through that entity. The logic behind the rule is that, as a matter of principle, a legal dispute between a *local* corporation and the host State should be settled before the local courts of that country. In such circumstances, the locally incorporated corporation is not considered to be a “foreign” investor.

An exception to that principle, however, is set out in Article 25(2)(b) of the ICSID Convention. Where the element of foreign control is present, a locally incorporated corporation that possesses the host State’s nationality may nevertheless be deemed to be a national of *another* Contracting State and be allowed to submit a claim under the Convention. This standing is possible provided that two conditions are fulfilled:

1. There must be an agreement with the host State that reflects its undertaking to treat a locally incorporated corporation that is foreign-controlled as a national of the State whose national controls the corporation. Such agreement between the parties is usually found in a BIT or in a contract entered into directly between the foreign investor and the host State;<sup>23</sup> and
2. The locally incorporated corporation must be effectively controlled by nationals of another Contracting State. In other words, the objective element of “foreign control” must be present.<sup>24</sup>

These issues were recently discussed in *TSA Spectrum de Argentina SA v. Argentina*.<sup>25</sup> TSA Spectrum de Argentina SA (“TSA”), an Argentinean

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<sup>23</sup> See *Agua del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction (Oct. 21, 2005), 20 ICSID REV.—FILJ 450 (2005) [*“Agua del Tunari Decision on Jurisdiction”*].

<sup>24</sup> See *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction (Sept. 27, 2001), 16 ICSID REV.—FILJ 469 (2001).

<sup>25</sup> *TSA Spectrum de Argentina SA v. Argentina*, ICSID Case No ARB/05/5, Award (Dec. 19, 2008) [*“TSA Award”*].

corporation, commenced arbitration proceedings against Argentina under the Netherlands–Argentina BIT. TSA argued that it was a “foreign” investor because it was owned by a Dutch firm (TSI Spectrum International NV, or “TSI”) and that the BIT constituted an agreement to consider it as a Dutch corporation.<sup>26</sup>

The Tribunal considered that Article 25(2)(b) of the ICSID Convention “defines the ambit of ICSID’s jurisdiction,” “which cannot be extended or derogated from even by agreement of the Parties.”<sup>27</sup> For the majority of the Tribunal, the “existence and materiality of this foreign control have to be objectively proven” to establish jurisdiction.<sup>28</sup> The Tribunal decided that it should pierce the veil of the corporate entity to determine whether it was genuinely foreign controlled. For the Tribunal,

the reasons for piercing of the corporate veil up to the real source of control is *a fortiori* more compelling under the second clause of Article 25(2)(b) when ultimate control is alleged to be in the hands of nationals of the host State, whose formal nationality is also that of the Claimant corporation.<sup>29</sup>

The majority of the Tribunal therefore looked beyond the Dutch owner of the Argentine corporation TSA (*i.e.* TSI) and determined that an Argentine national was TSI’s *ultimate* owner. The Tribunal therefore concluded that it lacked jurisdiction over the case under the Convention because of the absence of genuine foreign control.

Whether a wholly owned local subsidiary can submit its own ICSID claim against the host State therefore depends on the particular circumstances of the case. It is precisely because a locally incorporated corporation will sometimes be precluded from submitting its own claim to an arbitral tribunal that it is important to examine the legal standing of “parent” corporations (and shareholders).

### *B. Claims by Parent Corporations*

The right of parent corporations to submit claims for damages sustained by their wholly-owned subsidiaries incorporated in the host State of the investment is well recognised by arbitral tribunals. One classic illustration is the case of *Amco*

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<sup>26</sup>The BIT provides protection not only for Dutch corporations incorporated in that country, but also for any corporation incorporated in any other country provided that it is “controlled directly or indirectly” by Dutch nationals (and has business activities in that country).

<sup>27</sup>*TSA Award*, *supra* note 25, para. 134.

<sup>28</sup>*Id.* para. 147.

<sup>29</sup>*Id.* para. 153.

*v. Indonesia* where the foreign parent corporation, Amco Asia Corporation (a U.S. corporation), carried out its investment in Indonesia through a locally incorporated subsidiary (P.T. Amco). In that case, the arbitral Tribunal held that *both* the parent corporation *and* the locally incorporated corporation could file claims under the applicable contract (which contained an ICSID arbitration clause):

Now, the goal of the arbitration clause was to protect the investor. How could such protection be ensured, if Amco Asia [the parent U.S. corporation] would be refused the benefit of the clause? Moreover, the Tribunal did find that PT Amco [the corporation incorporated in Indonesia] had this benefit, because of the foreign control under which it is placed: would it not be fully illogical to grant this protection to the controlled entity, but not to the controlling one? No doubt Amco Asia has understood the clause in this way. But Indonesia could not reasonably have understood it otherwise, nor reasonably have imagined that the clause would not grant protection to the investor himself, that is to say to Amco Asia.<sup>30</sup>

The right of parent corporations to submit claims for damages sustained by their wholly owned subsidiaries incorporated in the host State of the investment is also expressly recognised in NAFTA. While NAFTA Article 1116 permits an “investor of a Party” to bring a claim on its own behalf for loss or damage arising out of the breach of a NAFTA investment obligation by “another Party,” NAFTA Article 1117 extends a 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” for loss or damage arising from the breach of a NAFTA investment obligation by “the other Party.” 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. . . .”<sup>31</sup>

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<sup>30</sup> *Amco Asia Corp. and others v. Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, para. 24 (Sept. 25, 1983), 1 ICSID REP. 389 (1993), 23 I.L.M. 351 (1984).

<sup>31</sup> *Utd. Parcel Serv. of America (UPS) v. Canada*, NAFTA (UNCITRAL), Award on the Merits, para. 35 (May 24, 2007). UPS’s NAFTA claims on behalf of UPS Canada were brought under Article 1116, not Article 1117, which led to an objection from Canada. The Tribunal denied Canada’s objection, holding that where the subsidiary (*i.e.* the “enterprise”) is wholly owned by the parent, the distinction between claiming under Article 1116 or Article 1117 “is an almost entirely formal one.” *Id.* See also *Pope & Talbot, Inc. v. Canada*, NAFTA (UNCITRAL), Award in Respect of Damages, paras. 74–80 (May 31, 2002)

### C. Claims by Majority Shareholders

Modern BITs typically contain a broad definition of the term “investment” that includes shares or other forms of participation in corporations within its scope. In such cases, tribunals have had no difficulty accepting that participation by a corporation in a locally incorporated corporation is an investment and is protected under the treaty. For instance, the arbitral Tribunal in the ICSID case of *Goetz v. Burundi* recognised the right of a foreign national who owns shares in a locally incorporated corporation to submit its *own claim* under the ICSID Convention.<sup>32</sup>

Another illustration of this recognition is the case of *Gas Natural v. Argentina*.<sup>33</sup> In 1992, Gas Natural SDG S.A. (“Gas Natural”), a Spanish corporation, took part in a tender organised by the Argentine government as part of the privatization of its gas sector. Gas Natural participated in a consortium that purchased 70% of the shares of Gas Natural BAN, S.A., an Argentine corporation, and formed another Argentine corporation, Invergas S.A. The Spanish corporation was therefore a majority shareholder in the investment vehicle (an Argentine corporation). Gas Natural filed an arbitration claim under the Spain–Argentina BIT.<sup>34</sup> Argentina objected to the jurisdiction of the Tribunal based, *inter alia*, on the ground that the Claimant could not qualify as an investor under the BIT since it was merely a shareholder of the Argentine corporation that had suffered damage.

In its Decision, the Tribunal found that the Claimant came within the definition of an investor under the BIT. In support of its Decision, the Tribunal made the following observation about the modern mode of foreign investment and the legal standing of corporations under BITs:

[T]he standard mode of foreign direct investment, followed in the present case and in the vast majority of transnational transfers of private capital, is that a corporation is established pursuant to the laws of the

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(arriving at a similar conclusion in relation to the distinction between claims under Articles 1116 and 1117, and ultimately holding that a parent company can bring a claim on behalf of its wholly-owned subsidiary).

<sup>32</sup> *Antoine Goetz and others v. Republic of Burundi*, ICSID Case No. ARB/95/3, Award, para. 89 (Feb. 10, 1999). Other cases include: *American Mfg. & Trading, Inc. v. Democratic Republic of the Congo*, ICSID Case No. ARB/93/1, Award (Feb. 21, 1997), 36 I.L.M. 1531 (1997), 5 ICSID REP. 11 (2002); *Alex Genin, Eastern Credit Ltd., Inc. and A.S. Baltoil v. The Republic of Estonia*, Award (June 25, 2001), 6 ICSID REP. 241 (2004); *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, Partial Award (Sept. 13, 2001) [“CME Award”].

<sup>33</sup> *Gas Natural SDG S.A. v. Argentina*, ICSID Case No. ARB/03/10, Decision on Jurisdiction (June 17, 2005) [“*Gas Natural* Decision on Jurisdiction”]. The case is discussed in Schlemmer, *supra* note 22.

<sup>34</sup> It alleged that measures taken by Argentina pursuant to the emergency law during the economic and financial crisis of 1999–2001 breached several aspects of the BIT.

host country and the shares of that corporation are purchased by the foreign investor, or alternatively, that the shares of an existing corporation established pursuant to the laws of the host country are acquired by the foreign investor. The scheme of both the ICSID Convention and the bilateral investment treaties is that in this circumstance, the foreign investor acquires rights under the Convention and Treaty, including in particular the standing to initiate international arbitration.<sup>35</sup>

Following a review of decisions of other ICSID tribunals, the Tribunal concluded:

[T]he assertion that a claimant under a Bilateral Investment Treaty lacked standing because it was only an indirect investor in the enterprise that had a contract with or a franchise from the state party to the BIT, has been made numerous times, never, so far as the Tribunal has been made aware, with success.<sup>36</sup>

The Tribunal therefore decided that it had jurisdiction over the dispute.<sup>37</sup>

It is also recognised in ICSID decisions that the right of a majority shareholder to bring a claim is *independent* of that of the locally incorporated corporation. A good illustration is the case of *Suez v. Argentina*.<sup>38</sup> The French corporation Suez (then known as Lyonnaise des Eaux) and the Spanish corporation, AGBAR,<sup>39</sup> had joined together with three Argentine companies<sup>40</sup> to form a consortium to bid for the concession to operate water distribution and waste water systems in the Argentine Province of Santa Fe. The consortium was awarded the concession and it formed another Argentine corporation (Aguas Provinciales de Santa Fe S.A. or “APSF”) to hold and operate the concession. The investment was affected by the Argentine financial crisis. At the time the request for arbitration was filed, the French and Spanish corporations were majority shareholders in the Argentine corporation, APSF.<sup>41</sup>

<sup>35</sup> *Gas Natural* Decision on Jurisdiction, *supra* note 33, para. 34.

<sup>36</sup> *Id.* para. 50.

<sup>37</sup> As of May 2011, the case was still pending (pursuant to the parties’ agreement, the proceedings have been suspended).

<sup>38</sup> *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentina*, ICSID Case No. ARB/03/17, Decision on Jurisdiction (May 16, 2006) [*“Suez Decision on Jurisdiction”*].

<sup>39</sup> Sociedad General de Aguas de Barcelona S.A.

<sup>40</sup> Banco de Galicia y Buenos Aires S.A., Sociedad Comercial del Plata S.A., and Meller S.A.

<sup>41</sup> Suez was holding 51.69% of APSF’s shares and AGBAR was holding 10.89%. Another Spanish corporation (InterAguas Servicios Integrales del Agua S.A.) was holding 14.92% of APSF’s shares.

Argentina argued that the Claimants, as mere shareholders of APSF, did not have standing to bring claims for alleged injury to that corporation. Argentina's argument was summarised as follows by the Tribunal:

In support of this position, the Respondent, drawing analogies to domestic corporation law, argues that any injury to the shareholders is derivative of the alleged injury to the company in which they hold shares, as opposed to a direct injury to the shareholders themselves. The alleged injury is done to the corporation, not to the shareholders whose shares, because of an alleged wrongful action done to the corporation, may have diminished in value. Thus, the shareholders have no right to bring an action on grounds that they have sustained a direct injury by virtue of the alleged wrongful actions of the Respondent. The right to bring an action for any alleged injury lies with the corporation itself, not its shareholders.<sup>42</sup>

The Tribunal first determined that the Claimants' shares in APSF qualified as an "investment" under both the France–Argentina BIT and Spain–Argentina BIT and that the Claimants therefore had standing to bring their claims. Furthermore, the Tribunal held that APSF's withdrawal of its own claim did not prejudice the ability of the foreign shareholders of APSF to bring their *own independent claims* for damages under international law:

The Tribunal believes that the discontinuance of these proceedings with respect to APSF does not affect the rights of the Shareholder Claimants to bring a claim in ICSID arbitration under the two BITs in question. The Claimant Shareholders would have had a right to bring such claims independently without the participation of APSF in first instance.<sup>43</sup>

The Tribunal therefore decided that it had jurisdiction over the dispute.<sup>44</sup>

#### *D. Claims by Minority Shareholders*

ICSID decisions show that there is no material distinction between majority and minority shareholders for jurisdictional purposes. Accordingly, a shareholder having a minority participation in a locally incorporated corporation can submit

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<sup>42</sup> *Suez* Decision on Jurisdiction, *supra* note 38, para. 46.

<sup>43</sup> *Id.* para. 51.

<sup>44</sup> The Tribunal issued a Decision on Liability on July 30, 2010, finding that Argentina had denied the Claimants' investments fair and equitable treatment under the BIT. The Tribunal postponed its decision on damages. As of May 2011, the case was still pending.

a claim before an ICSID arbitral tribunal.<sup>45</sup> We will briefly examine three such cases.

In the case of *Lanco v. Argentina*, a U.S. corporation, Lanco International, Inc., had a minority participation of 18.3% in a consortium which had been granted a concession to operate port facilities in Argentina.<sup>46</sup> The investor claimed that Argentina had damaged its investment by giving more favourable treatment to a competitor. The Tribunal held that an investor was not required to have control over the corporation or to control a majority of its shares for its investment to be protected by the applicable BIT:

[A]s 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 Grantee allows one to conclude that it is an investor in the meaning of Article I of the Argentina-U.S. Treaty.<sup>47</sup>

The Tribunal therefore decided that it had jurisdiction over the dispute.<sup>48</sup>

In *CMS v. Argentina*,<sup>49</sup> CMS Gas Transmission Co. (“CMS”), a U.S. corporation, held 29.42% of the shares in the corporation Transportadora de Gas del Norte (“TGN”), an Argentine gas transportation corporation which had been privatized.<sup>50</sup> Argentina argued that as a shareholder in a local corporation, CMS was not entitled under the ICSID Convention and the Argentina–U.S. BIT to bring a claim independently from the local Argentine corporation. Argentina also argued that it could not submit a claim since it was only a minority shareholder in that corporation. The Tribunal rejected these arguments based on its analysis of State practice in the context of other international claims mechanisms:

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<sup>45</sup> The possibility of claims by minority shareholders was first implicitly recognised in the 1990 case of *Asian Agric. Products Ltd. v. Sri Lanka*, ICSID Case No. ARB/87/3, Award (June 27, 1990). In that case, the Hong-Kong-based company AAPL was a minority shareholder (48%) in Serendib, a Sri Lankan company, whose property had been destroyed by Sri Lankan security forces. The status of AAPL’s shareholding as an investment was never challenged by the Respondent.

<sup>46</sup> *Lanco Int’l, Inc. v. Argentina*, ICSID Case No. ARB/97/6, Decision on Jurisdiction, para. 10 (Dec. 8, 1998), 5 ICSID REP. 367 (2002).

<sup>47</sup> *Id.* para. 10.

<sup>48</sup> The proceedings were subsequently discontinued at the request of the Claimant.

<sup>49</sup> *CMS* Decision on Jurisdiction, *supra* note 8.

<sup>50</sup> CMS submitted a claim on the basis of the U.S.–Argentina BIT alleging that a number of measures taken by Argentina as a result of the economic and financial crisis had an adverse impact on its investment in TGN and constituted violations of the BIT.

Besides accepting the protection of shareholders and other forms of participation in corporations and partnerships, the concept of limiting it to majority or controlling participations has given way to a lower threshold in this respect. Minority and non-controlling participations have thus been included in the protection granted or have been admitted to claim in their own right. Contemporary practice relating to lump-sum agreements, the decisions of the Iran-United States Tribunal and the rules and decisions of the United Nations Compensation Commission, among other examples, evidence increasing flexibility in the handling of international claims.<sup>51</sup>

More specifically on the status of minority shareholders, the Tribunal concluded that it “finds no bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned, not even if those shareholders are minority or non-controlling shareholders.”<sup>52</sup> The Tribunal came to the same conclusion having examined the ICSID Convention.<sup>53</sup> The Tribunal therefore held that it had jurisdiction over the dispute.<sup>54</sup>

Other tribunals have also confirmed both the admissibility of claims by minority shareholders<sup>55</sup> and that this right to claim compensation is independent from that of the local subsidiary directly affected by the actions of the host

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<sup>51</sup> CMS Decision on Jurisdiction, *supra* note 8, para. 47 (footnotes omitted).

<sup>52</sup> *Id.* para. 48.

<sup>53</sup> *Id.* para. 56 (“There is no bar to the exercise of jurisdiction in light of the 1965 Convention and its interpretation as reflected in its drafting history, the opinion of distinguished legal writers and the jurisprudence of ICSID tribunals.”).

<sup>54</sup> In a final Award of May 12, 2005, 44 I.L.M. 1205 (2005), the Tribunal held that Argentina had breached the BIT and ordered Argentina to pay compensation in the amount of US\$ 133.2 million. Argentina submitted a request for the annulment of the Award. The *ad hoc* Committee rendered its Annulment Decision on September 25, 2007. The Committee only annulled the portion of the Tribunal’s Award concerning the “umbrella clause.” The *ad hoc* Committee specifically approved the reasoning of the Tribunal on the standing of minority shareholders to submit claims under the BIT:

The Committee observes in particular that, as regard shareholder equity, the BIT contains nothing which indicates that the investor in capital stock has to have a majority of the stock or control over the administration of the company. Investments made by minority shareholders are covered by the actual language of the definition, as also recognised by ICSID arbitral tribunals in comparable cases. One must add that whether the locally incorporated company may itself claim for the violation of its rights under contracts, licenses or other instruments, in particular under Article 25(2)(b) of the ICSID Convention, does not affect the right of action of foreign shareholders under the BIT in order to protect their own interests in a qualifying investment, as recognised again in many ICSID awards.

CMS Annulment Decision, paras. 73–74.

<sup>55</sup> For instance, the arbitral Tribunal in the case of *Enron Creditors Recovery Corp. (formerly Enron Corp.) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, para. 49 (Jan. 14, 2004) [“*Enron* Decision on Jurisdiction”] (which is discussed below) stated that “claims made by investors that are not in the majority or in control of the affected corporation when claiming for violations of their rights under . . . [the U.S.–Argentine BIT] are admissible.”

State.<sup>56</sup> One recent example is the NAFTA case of *Gami Investments, Inc. v. Mexico*.<sup>57</sup> In this case, GAMI, a U.S. company, had a 14.18% interest in GAM, a Mexican corporation, and brought a claim against Mexico under NAFTA. The Tribunal held that “the fact that GAMI is only a minority shareholder does not affect its right to seek the international arbitral remedy.”<sup>58</sup>

In fact, decisions of several ICSID tribunals also show that minority and majority shareholders can each submit their *own distinct claims* in connection with the same events. This last point is illustrated by the cases of *Sempra v. Argentina*<sup>59</sup> and *Camuzzi v. Argentina*.<sup>60</sup> The two disputes arose from the same set of events: an investment made in the 1990s by two foreign investors, Camuzzi (from Luxemburg) and Sempra (a U.S. corporation), in two Argentine natural gas distribution corporations.<sup>61</sup> The majority shareholder (Camuzzi) and the minority shareholder (Sempra) each filed a *separate* request for arbitration at about the same time. The two investors agreed with Argentina that a single tribunal would hear both claims. In both cases, the Tribunal concluded that minority shareholders could submit their own claims under the respective BITs.<sup>62</sup>

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<sup>56</sup>This is clearly stated by the *Enron* Tribunal: “[T]here is nothing contrary to international law or the ICSID Convention in upholding the concept that shareholders may claim independently from the corporation concerned, even if those shareholders are not in the majority or in control of the company.” *Id.* para. 39. The Tribunal added: “Whether the locally incorporated company may further claim for the violation of its rights under contracts, licences or other instruments, does not affect the direct right of action of foreign shareholders under the [BIT] for protecting their interests in the qualifying investment.” *Id.* para. 49.

<sup>57</sup>*GAMI Investments, Inc. v. Mexico*, NAFTA (UNCITRAL), Award (Nov. 15, 2004).

<sup>58</sup>*Id.* para. 37.

<sup>59</sup>*Sempra Energy Int’l v. Argentina*, ICSID Case No. ARB/02/16, Decision on Jurisdiction (May 11, 2005) [“*Sempra* Decision on Jurisdiction”].

<sup>60</sup>*Camuzzi Int’l S.A. v. Argentina*, ICSID Case No. ARB/03/2, Decision on Jurisdiction (May 11, 2005) [“*Camuzzi* Decision on Jurisdiction”].

<sup>61</sup>Camuzzi owned 56.91% of the shares of the two Argentine corporations (Sodigas Sur S.A. and Sodigas Pampeana S.A.) while Sempra owned the remaining 43.09%. In turn, these two Argentine corporations held large stakes in two other Argentine corporations (Camuzzi Gas del Sur S.A. and Camuzzi Gas Pampeana S.A.) which were granted licenses by Argentina to supply and distribute natural gas in several Argentine provinces.

<sup>62</sup>In the context of the claim submitted by the *minority* shareholder corporation, the *Sempra* Tribunal held:

There is no question that . . . [the term “investment” in the U.S.–Argentina BIT has] a broad definition, as its intent is to extend comprehensive protection to investors. Quite a few arbitration tribunals, acting under both the ICSID and the UNCITRAL Rules, have recognised this import in the context of the same treaty and have concluded that, in the light of the very terms of the provision, it encompasses not only the majority shareholders but also the minority ones, whether they control the company or not . . . This Tribunal has no reason not to concur with that conclusion, even though some of the elements of fact in each dispute may differ in some respects.

*Sempra* Decision on Jurisdiction, *supra* note 59, para. 93. The *Camuzzi* Tribunal also held that the “comprehensive protection to investors” under the Belgo-Luxembourg-Argentina BIT “not only includes

In both cases, the Tribunal held that it had jurisdiction over the disputes.<sup>63</sup>

### *E. Claims by Indirect Shareholders*

One common method of investment is for a foreign investor to have an interest in a locally incorporated corporation *indirectly* through its participation in *another corporation* (an intermediate corporation), which, in turn, has an interest in this local corporation. Arbitral tribunals have recognised the right of a foreign investor to submit a claim for damages suffered by a local corporation in the host State even if its interest in such corporation is held indirectly.<sup>64</sup> The intermediate corporation may have the nationality of the claimant investor, the host State, or even a third State. Each of these scenarios of indirect investment will now be examined.

The first situation is well illustrated by the case of *Siemens v. Argentina*.<sup>65</sup> The company Siemens A.G. (“Siemens”), a German corporation, owned 100% of the shares of Siemens Nixdorf Informationssysteme A.G. (“SNI”), another German corporation. SNI created and controlled Siemens IT Services S.A. (“SITS”), a corporation incorporated in Argentina for the purpose of carrying out the investment. Following the commencement of ICSID arbitration by Siemens, Argentina objected to the Tribunal’s jurisdiction on the ground that the shares in SITS were not held by Siemens but by SNI. Argentina argued that there was no direct relationship between Siemens and the investment. The Tribunal found that the express language of the Argentina–Germany BIT did not exclude claims by indirect investors:

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

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majority shareholders, but also minority or indirect shareholders, whether or not the latter control the company.” *Camuzzi* Decision on Jurisdiction, *supra* note 60, para. 60.

<sup>63</sup> In May 2011, the *Camuzzi* case was still pending (the proceedings were suspended pursuant to the parties’ agreement). The *Sempra* Tribunal rendered a final Award on September 28, 2007 in favour of the Claimant in the amount of more than US\$ 128 million. In 2008, Argentina commenced an annulment proceeding against the Award. The Award was annulled by the *ad hoc* Committee on June 29, 2010. On November 12, 2010, the ICSID Secretary-General registered a request for resubmission of the dispute to a new Tribunal, which was constituted on April 21, 2011.

<sup>64</sup> See Markus Perkams, *Piercing the Corporate Veil in International Investment Agreements: The Issue of Indirect Shareholder Claims Reloaded*, in AUGUST REINISCH & CHRISTINA KNAHR (eds.), *INTERNATIONAL INVESTMENT LAW IN CONTEXT* 93 (Eleven Int’l 2008).

<sup>65</sup> *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (Aug. 3, 2004), 44 I.L.M. 138 (2005).

Treaty does not support the allegation that the definition of investment excludes indirect investments.<sup>66</sup>

The Tribunal therefore decided that it had jurisdiction over the dispute.<sup>67</sup>

The second situation is where the intermediate corporation has the nationality of the *host State* of the investment.<sup>68</sup> One illustration is the case of *Enron v. Argentina*. It deals with the claim of a U.S. corporation, Enron, concerning its participation in an Argentine corporation, Transportadora de Gas del Sur (“TGS”), involved in the transportation and distribution of gas produced in Argentina.<sup>69</sup> Enron’s stake in TGS involved a number of other local corporations and several layers of ownership.<sup>70</sup> Enron was an indirect minority shareholder (owning indirectly some 35% of the shares) of the locally incorporated Argentine corporation, TGS. The Tribunal analyzed the definition of “investment” set out in the U.S.–Argentina BIT and concluded that it was “apparent that [it] does not exclude claims by minority and non-controlling shareholders.”<sup>71</sup> The Tribunal decided that it had jurisdiction over the dispute.<sup>72</sup>

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<sup>66</sup> *Id.* para. 137.

<sup>67</sup> The Tribunal rendered its final Award on February 6, 2007 in favour of the Claimant in the amount of close to US\$ 220 million. The same year, Argentina commenced an annulment proceeding against the Award. In 2008, Argentina filed a request for revision of the Award (the parties agreed to suspend the annulment proceeding). The parties agreed in August 2009 to discontinue both annulment and revision proceedings.

<sup>68</sup> These distinctions are discussed in Schreuer, *Shareholder Protection*, *supra* note 22.

<sup>69</sup> *Enron* Decision on Jurisdiction, *supra* note 55. Another example is the case of *LG&E v. Argentina*, ICSID Case No. ARB/02/1, Decision on Jurisdiction, para. 63 (Apr. 30, 2004).

<sup>70</sup> The complex structure of the ownership was described as follows by the Tribunal:

The Claimants own 50% of the shares of CIESA, an Argentine incorporated company that controls TGS by owning 55.30% of its shares; the Claimants’ participation in CIESA is held by two wholly-owned companies, EPCA and EACH. The Claimants, through EPCA, EACH and ECIL, another corporation controlled by the Claimants, also own 75.93% of EDIDESA, another Argentine corporation that owns 10% of the shares of TGS; and they also have acquired an additional 0.02% of TGS through EPCA. The investment as a whole, it is explained, amounts to 35.263% of TGS.

*Enron* Decision on Jurisdiction, *supra* note 55, para. 21.

<sup>71</sup> *Id.* para. 44. The Tribunal added:

This Tribunal must accordingly conclude that under the provisions of the Bilateral Investment Treaty, broad as they are, claims made by investors that are not in the majority or in the control of the affected corporation when claiming for violations of their rights under such treaty are admissible. Whether the locally incorporated company may further claim for the violation of its rights under contracts, licences or other instruments, does not affect the direct right of action of foreign shareholders under the Bilateral Investment Treaty for protecting their interests in the qualifying investment.

*Id.* para. 49.

<sup>72</sup> The Tribunal rendered its final Award on May 22, 2007 in favour of the Claimant in the amount of US\$ 106.2 million. The Tribunal rendered its Decision on Claimants’ Request for Rectification and/or Supplementary Decision on October 25, 2007. In 2008, Argentina commenced an annulment proceeding

On the question of Enron's indirect investment in TGS, the Tribunal ultimately decided that it had jurisdiction over the dispute, but nevertheless expressed some concern about the consequences of allowing indirect shareholders to submit claims (a point examined below in the concluding section).

Third, the right of a foreign investor to submit a claim for damages suffered by a local corporation has also been recognised in cases where the intermediate corporation had neither the nationality of the investor nor that of the host State, but the nationality of a *third State*. This situation was considered in the NAFTA Chapter 11 case of *Waste Management, Inc. v. Mexico*, which involved a concession agreement entered into between the city of Acapulco (Mexico) and a Mexican corporation, Acaverde.<sup>73</sup> The Claimant, Waste Management Inc., a U.S. corporation, owned the locally incorporated corporation (Acaverde) through a holding corporation (AcaVerde Holdings Ltd.) and another corporation (Sun Investment Co.), both incorporated in the Cayman Islands (United Kingdom).<sup>74</sup> The Tribunal indicated that while Article 1113 of NAFTA<sup>75</sup> addresses the situation where the substantial control or ownership of a U.S. corporation would be in a non-NAFTA country and where such U.S. corporation would have no substantial business activities in the U.S., the Treaty does not expressly address the different situation where a U.S. corporation invests in a NAFTA country through an intermediate corporation located in a *non-NAFTA country*.<sup>76</sup> The Tribunal further explained that:

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against the Award and it was annulled on July 30, 2010. However, the *ad hoc* Committee upheld the reasoning of the Tribunal on claims by indirect shareholders. The dispute was registered for resubmission on October 18, 2010.

<sup>73</sup> *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004), 43 I.L.M. 967 (2004) [*“Waste Management II Award”*].

<sup>74</sup> In fact, prior to the signing of the concession agreement, the ultimate owner of Acaverde was another U.S. company, Sanifill Inc. Subsequently, Sanifill merged with USA Waste Services Inc. and the merged company adopted the name Waste Management Inc.

<sup>75</sup> NAFTA, *supra* note 13, art. 1113 states:

1. A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such Party and to investments of such investor if investors of a non-Party own or control the enterprise and the denying Party: (a) does not maintain diplomatic relations with the non-Party; or (b) adopts or maintains measures with respect to the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments. 2. Subject to prior notification and consultation in accordance with Articles 1803 (Notification and Provision of Information) and 2006 (Consultations), a Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such Party and to investments of such investors if investors of a non-Party own or control the enterprise and the enterprise has no substantial business activities in the territory of the Party under whose law it is constituted or organized.

<sup>76</sup> *Waste Management II Award*, *supra* note 73, para. 80 (“There is no hint of any concern that investments are held through companies or enterprises of non-NAFTA States, if the beneficial ownership at relevant times is with a NAFTA investor.”).

If the NAFTA Parties had wished to limit their obligations of conduct to enterprises or investments having the nationality of one of the other Parties they could have done so. Similarly they could have restricted claims of loss or damage by reference to the nationality of the corporation which itself suffered direct injury. No such restrictions appear in the text. It is not disputed that the time the actions said to amount to a breach of NAFTA occurred, Acaverde was an enterprise owned or controlled indirectly by the Claimant, an investor of the United States. The nationality of any intermediate holding companies is irrelevant to the present claim.<sup>77</sup>

The Tribunal therefore rejected the objection raised by Mexico that Waste Management could not be considered an “investor” under NAFTA Chapter 11 because it invested through corporations incorporated in a third State.

Another similar example is the case of *Azurix Corp. v. Argentina*, where the investment was made through several intermediate corporations, some having the nationality of a third State.<sup>78</sup> The complex ownership structure of the investment can be summarized as follows: Azurix, a U.S. corporation, invested in three Argentine corporations (AAS, OBA and ABA) through several intermediate corporations incorporated in the U.S. and the Cayman Islands (United Kingdom). Ultimately, Azurix indirectly owned 90% of the shares of ABA.<sup>79</sup> Based on the “wide meaning of investment in the definition” in the U.S.–Argentina BIT, the Tribunal held that it had jurisdiction over the dispute since Azurix was the “investor that made the investment through indirectly

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<sup>77</sup> *Id.* para. 85.

<sup>78</sup> *Azurix Corp. v. Argentina*, ICSID Case No ARB/01/12, Decision on Jurisdiction (Dec. 8, 2003), 43 I.L.M. 262 (2004).

<sup>79</sup> *Id.* para. 65. The Tribunal described the ownership structure as follows:

The bid offer was made by two companies of the Azurix group of companies established for this specific purpose, Azurix AGOSBA S.R.L. (hereinafter “AAS”) and Operadora de Buenos Aires S.R.L. (hereinafter “OBA”). AAS and OBA are indirect subsidiary companies of Azurix [a corporation incorporated in the State of Delaware, U.S.]. AAS is registered in Argentina and is 0.1% owned by Azurix and 99.9% owned by Azurix Argentina Holdings Inc. (a company incorporated in Delaware), which in turn is 100% owned by Azurix. OBA, also registered in Argentina, is 100% owned by Azurix Agosba Limited which is registered in the Cayman Islands, and which is in turn 100% owned by Azurix Agosba Holdings Limited, also registered in the Cayman Islands. Azurix owns 100% of the shares in Azurix Agosba Holdings Limited. Having successfully won their bid, AAS and OBA incorporated ABA in Argentina to act as concessionaire.

*Id.* paras. 21–22.

owned and controlled subsidiaries.”<sup>80</sup> Other tribunals have also reached similar conclusions in the context of intermediate corporations having the nationality of a third State.<sup>81</sup>

This case law suggests that in the absence of any explicit exclusion in an investment treaty, tribunals will generally consider “indirect” investments to be a protected form of investment.<sup>82</sup> This conclusion applies notwithstanding the actual nationality of the intermediate corporation.

### *F. Claims by Intermediate (“Holding”) Corporations*

Until now, we have been examining investment claims through the lens of the shareholders (and the parent corporation), namely the investor that typically has a beneficial interest in the investment, however complex the intermediate holding structure. What happens when the focus shifts to claims brought not by the ultimate beneficial owner of the investment, but by the intermediate corporation through which the investment is made in another State? Such intermediate corporations are sometimes referred to as “holding,” “shell” or “mailbox” corporations. These corporations are typically incorporated in favourable tax jurisdictions. They usually have no significant assets or operations and are established for the sole purpose of owning shares of other corporations. The question examined in this section is whether these intermediate corporations can submit their own claims to arbitration.

Tribunals have allowed intermediate corporations direct access to arbitration whenever faced with a treaty definition of an “investor” limited to the incorporation under the laws of one of the parties to the BIT. They only

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<sup>80</sup> *Id.* paras. 73–74. The Tribunal rendered a final Award on July 14, 2006 in favour of the Claimant in the amount of US\$ 165 million. In 2006, Argentina commenced an annulment proceeding against the Award. The Decision of the *ad hoc* Committee on Annulment was issued on September 1, 2009. The application for annulment was rejected.

<sup>81</sup> For instance, this situation arose in the case of *EnCana v. Ecuador*, LCIA Case No. UN3467, Award, para. 115 ff (Feb. 3, 2006). In this case, the Canadian corporation EnCana submitted a claim alleging that Ecuador’s denial of VAT refunds to its two Barbados-based subsidiaries through which it made its investment violated its rights under the Canada–Ecuador BIT. In this case, four contracts for the exploration of oil and gas had been concluded by the two subsidiaries with the state oil agency, Petroecuador. Based on a particular provision of the BIT, the Tribunal recognised the legal standing of the parent company to claim for *its own* damage (but not for those of the Barbados-based subsidiaries). The Tribunal nevertheless rejected the claims based on other grounds. See also *Lauder v. The Czech Republic*, UNCITRAL, Award (Sept. 3, 2001) [*“Lauder Award”*].

<sup>82</sup> This is, for instance, the conclusion reached by the Tribunal in *Tza Yap Shum v. Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction, paras. 106–07 (June 19, 2009). See also ILA German Branch, Subcommittee on Investment Law, Working Group, *The Determination of the Nationality of Investors under Investment Treaties: A Preliminary Report* 69 (Inst. Econ. L., Martin Luther Univ. Halle-Wittenberg, Dec. 2009).

have enquired beyond the corporate structure of the claimant, by piercing the corporate veil, when the treaty expressly defined “investor” in relation to the notion of control.<sup>83</sup>

A good illustration of this trend is the case of *Saluka v. Czech Republic* decided under the UNCITRAL Arbitration Rules.<sup>84</sup> This case involved the investment made by the Japan-based Nomura Group in the corporation IPB (a Czech bank), through a U.K.-based subsidiary, Nomura Europe plc (“Nomura Europe”). The Claimant in this arbitration was a Dutch corporation, Saluka, which was wholly controlled by Nomura Europe. As explained by the Tribunal, Saluka was created “for the sole and express purpose of holding the shares in IPB which Nomura Europe was at the time in the process of purchasing.”<sup>85</sup> In other words, Saluka was a “shell” corporation.

In defence, the Czech Republic’s main argument was that the “real” claimant in this arbitration was not Saluka, which was a mere shell corporation, but Nomura Europe. It argued that U.K.-based Nomura Europe had no standing under the Netherlands–Czech Republic BIT. The Czech Republic requested the Tribunal to pierce the corporate veil to discover the real interest behind the Dutch-based holding corporation.<sup>86</sup> The Tribunal first acknowledged the “closeness of the relationship” between Nomura Europe and Saluka, but noted that “the companies concerned ha[d] simply acted in a manner which is commonplace in the world of commerce.”<sup>87</sup> The Tribunal held that, based on the broad definition of “investor” contained in the BIT, “any legal person constituted under their laws is entitled to invoke the protection of the Treaty.”<sup>88</sup> The Tribunal further explained that it was “beyond [its] powers . . . to import into the definition of ‘investor’ some requirement relating to such a relationship having the effect of excluding from the Treaty’s protection a company which the language agreed by the parties included within it.”<sup>89</sup> The Tribunal also stated that although it would “in some circumstances be permissible . . . to look behind the corporate structures of companies involved in proceedings before

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<sup>83</sup> Rachel Thorn & Jennifer Doucleff, *Disregarding the Corporate Veil and Denial of Benefits Clauses: Testing Treaty Language and the Concept of “Investor”*, in MICHAEL WAIBEL ET AL. (eds.), *THE BACKLASH AGAINST INVESTMENT ARBITRATION* 11–12 (Kluwer 2010); ILA German Branch Report, *supra* note 82, at 45; McLACHLAN ET AL., *supra* note 4, at 191.

<sup>84</sup> *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award (Mar. 17, 2006) [*“Saluka Partial Award”*].

<sup>85</sup> *Id.* para. 226.

<sup>86</sup> *Id.* para. 227.

<sup>87</sup> *Id.* para. 228.

<sup>88</sup> Thus, the Tribunal noted that “[t]he parties to the Treaty could have included in their agreed definition of ‘investor’ some words which would have served, for example, to exclude wholly-owned subsidiaries of companies constituted under the laws of third States, but they did not do so.” *Id.* para. 229.

<sup>89</sup> *Saluka Partial Award*, *supra* note 84, para. 229.

it,” in the instant case, however, the “alleged fraud and malfeasance have been insufficiently made out to justify recourse to a remedy which, being equitable, is discretionary.”<sup>90</sup>

Another argument raised by the Respondent was that Saluka did not have “*bona fide*, real and continuous links to the Netherlands” and therefore could not claim under the Netherlands–Czech Republic BIT.<sup>91</sup> In other words, it was argued that Saluka was not really a Dutch corporation. The Tribunal noted that it had

some sympathy for the argument that a company which has no real connection with a State Party to a BIT, and which is in reality a mere shell company controlled by another company which is not constituted under the laws of that State, should not be entitled to invoke the provisions of that treaty.<sup>92</sup>

For the Tribunal, “such a possibility lends itself to abuses of the arbitral procedure, and to practices of ‘treaty shopping’ which can share many of the disadvantages of the widely criticized practice of ‘forum shopping.’”<sup>93</sup> However, the Tribunal concluded that:

The parties had complete freedom of choice in this matter, and they chose to limit entitled “investors” to those satisfying the definition set out in Article 1 of the Treaty. The Tribunal cannot in effect impose upon the parties a definition of “investor” other than that which they themselves agreed. That agreed definition required only that the claimant-investor should be constituted under the laws of (in the present case) The Netherlands, and it is not open to the Tribunal to add other requirements which the parties could themselves have added but which they omitted to add.<sup>94</sup>

Similar arguments were raised by the Respondent in the case of *ADC v. Hungary*.<sup>95</sup> In that case it was argued that the Tribunal had no jurisdiction over the dispute because the Claimants were, in fact, “shell” corporations which had been established by Canadian investors in Cyprus.<sup>96</sup> The Tribunal simply noted

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<sup>90</sup> *Id.* para. 230.

<sup>91</sup> *Id.* para. 239.

<sup>92</sup> *Id.* para. 240.

<sup>93</sup> *Id.* para. 240.

<sup>94</sup> *Id.* para. 241.

<sup>95</sup> *ADC Affiliate Ltd. and ADC & APMC Mgmt. Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award (Oct. 2, 2006) [“*ADC Award*”].

<sup>96</sup> Since Canada was not a contracting party to the ICSID Convention at the time of the proceedings,

that under the Cyprus–Hungary BIT, a Cypriot “investor” protected by that treaty includes any “legal person constituted or incorporated in compliance with the law” of Cyprus, which had been established for both Claimants. The Tribunal concluded that:

As the matter of nationality is settled unambiguously by the Convention and the BIT, there is no scope for consideration of customary law principles of nationality, as reflected in *Barcelona Traction*, which in any event are no different. In either case inquiry stops upon establishment of the State of incorporation, and considerations of whence comes the company’s capital and whose nationals, if not Cypriot, control it are irrelevant.<sup>97</sup>

The Tribunal also observed that the principle of “piercing the corporate veil” “only applies to situations where the real beneficiary of the business misused corporate formalities in order to disguise its true identity and therefore to avoid liability.”<sup>98</sup> For the Tribunal, the principle was inapplicable to the instant case because “Hungary was fully aware of the use of Cypriot entities and manifestly approved it.”<sup>99</sup>

In the present authors’ view there is nothing inherently wrong with “shell” corporations being able to submit arbitration claims provided, of course, that the treaty supports such a conclusion. A corporation’s access to arbitration under a BIT is determined by the treaty definition of “investor” (and “investment”). There are no reasons why a holding corporation should not have access to arbitration in cases where the definition of “investor” does not include any requirements other than that of incorporation (such as, for instance, the requirement that a corporation be controlled by nationals of the State of incorporation or have substantial business activities in that State).<sup>100</sup> Thus, a tribunal “cannot read more into [a] BIT than one can discern from its plain text.”<sup>101</sup> Also, as explained by the *Saluka* Tribunal, “it is not open to [a] Tribunal to add other requirements [in a BIT] which

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the Respondent alleged that the Claimants (considered to be “Canadians”) were therefore not “nationals of another Contracting State” under Article 25 of the Convention.

<sup>97</sup> *ADC Award*, *supra* note 95, para. 357.

<sup>98</sup> *Id.* para. 358.

<sup>99</sup> *Id.*

<sup>100</sup> See *Mobil Corp. and others v. Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, paras. 156–57 (June 10, 2010) [*Mobil* Decision on Jurisdiction]. But see Engela Schlemmer, *Investment, Investor, Nationality and Shareholders*, in MUCHLINSKI ET AL., *supra* note 4, at 79–81 (stating that the “control test” should be used by tribunals to determine the nationality of a corporation).

<sup>101</sup> *ADC Award*, *supra* note 95, para. 359.

the parties could themselves have added but which they omitted to add.”<sup>102</sup> In other words, it is clearly not for a Tribunal to cure any perceived treaty “defect” by adding *other* nationality criteria to the ones expressly mentioned in the treaty. No principle of international law requires tribunals to adopt such liberal interpretation.<sup>103</sup>

This feature of modern investment treaties is said to facilitate the phenomenon of “treaty shopping.”<sup>104</sup> The “shopping” involves a foreign investor organising its corporate structure by creating shell companies in a “home country of convenience” that has entered into a BIT with the host State of investment. In our view, this is perfectly legitimate and acceptable in the context modern investment treaties.<sup>105</sup> Thus, as explained by Rudolf Dolzer and Christoph Schreuer, “nationality planning or ‘treaty shopping’ is not illegal or unethical as such.”<sup>106</sup> A corporation usually chooses a place of incorporation based not only on the overall favourable legal and business environment, but also in regard to some other specific advantages. One such common advantage is a low level of taxation. Another increasingly recognised advantage is the incorporation of a corporation in a jurisdiction having a wide network of investment treaties with other States. In particular, prudent investors should ensure the existence of wide procedural and substantive protections offered under a BIT entered into with the host State where an investment is made. It is only natural for a foreign investor to structure its investment vehicle in a way

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<sup>102</sup> *Saluka* Partial Award, *supra* note 84, para. 241. See also *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Jurisdiction, para. 85 (Apr. 18, 2008) [“*Rompetrol* Decision on Jurisdiction”], where the Tribunal stated:

The Tribunal would in any case have great difficulty in an approach that was tantamount to setting aside the clear language agreed upon by the treaty Parties in favour of a wide-ranging policy discussion. Such an approach could not be reconciled with Article 31 of the Vienna Convention on the Law of Treaties (which lays down the basic rules universally applied for the interpretation of treaties), according to which the primary element of interpretation is ‘the ordinary meaning to be given to the terms of the treaty.

<sup>103</sup> *Hulley Enter. Ltd. (Cyprus) v. The Russian Federation*, PCA Case No. AA 226, UNCITRAL, Interim Award on Jurisdiction and Admissibility, para. 415 (Nov. 30, 2009) [“*Hulley* Interim Award”] (“The Tribunal knows of no general principles of international law that would require investigating how a company or another organization operates when the applicable treaty simply requires it to be organized in accordance with the laws of a Contracting Party. The principles of international law, which have an unquestionable importance in treaty interpretation, do not allow an arbitral tribunal to write new, additional requirements—which the drafters did not include—into a treaty, no matter how auspicious or appropriate they may appear.”).

<sup>104</sup> GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* 113–17 (Oxford 2007).

<sup>105</sup> Potential problems arising from treaty shopping in the different context of diplomatic protection are discussed in ILA German Branch Report, *supra* note 82, at 34.

<sup>106</sup> Dolzer & Schreuer, *supra* note 4, at 54. See also Stephan W. Schill, *supra* note 4, at 234–35 (indicating that to allow this form of treaty shopping is preferable on policy grounds).

which is likely to maximize its legal protection when dealing with the host State of the investment.<sup>107</sup> This is, after all, the very goal of BITs.<sup>108</sup>

Other forms of treaty shopping are, however, clearly condemnable. One example of illegitimate treaty shopping is, for instance, whenever a corporation chooses a place of incorporation for the *sole purpose* of commencing arbitration proceedings under a specific BIT. In general, one indicia of non-*bona fide* treaty shopping would be, for instance, if a holding corporation was created in a particular jurisdiction just *shortly before* an arbitration claim is launched.

This is precisely the allegation that was raised by the Respondent in the case of *Aguas del Tunari v. Bolivia*.<sup>109</sup> This case involved Aguas del Tunari S.A. (“AdT”), a company incorporated in Bolivia, that entered into a concession agreement with Bolivia and which commenced arbitration proceedings alleging treaty breaches of the Netherlands–Bolivia BIT. The corporate structure of AdT is complex, but can be summarized as follows: it is a Bolivian company, which was partially owned by some Dutch holding companies, which were in turn owned by Bechtel, a U.S. corporation.<sup>110</sup> Bolivia argued that AdT could not rely on the Netherlands–Bolivia BIT, under which a corporation incorporated in Bolivia can nevertheless be deemed as a “Dutch” investor provided that it is controlled “directly or indirectly” by Dutch entities. Bolivia argued that AdT was not really “controlled” by Dutch companies because they were themselves owned by *non-Dutch* companies. The Tribunal ultimately held that it had jurisdiction over the claim pursuant to the Netherlands–Bolivia BIT.<sup>111</sup>

In doing so, the Tribunal examined Bolivia’s contention that these Dutch companies were mere “shells” that did not in fact “control” the Claimant.<sup>112</sup> The Tribunal also examined the charge that the corporate ownership structure had been changed (and Dutch holding companies created) precisely to allow

<sup>107</sup> Dolzer & Schreuer, *supra* note 4, at 54.

<sup>108</sup> On this point, see Kenneth J. Vandeveld, *Case Comment: Aguas del Tunari, S.A. v. Republic of Bolivia*, 101(1) AM. J. INT’L. L. 179 (2007).

<sup>109</sup> *Aguas del Tunari* Decision on Jurisdiction, *supra* note 23.

<sup>110</sup> The complex ownership structure of AdT after the December 1999 restructuring was described by the Tribunal, *id.* para. 71, as follows: four Bolivian companies each owned 5%, a Uruguayan company owned 25% and a Luxembourg company owned the remaining 55%. The Luxembourg company was a wholly-owned subsidiary of a Dutch company (International Water (Tunari) B.V.) which in turn was wholly owned by another Dutch company (International Water Holdings B.V.). This Dutch company was co-owned by yet another Dutch company (Baywater Holdings B.V.) and Edison S.p.a., a large Italian energy company. Baywater Holdings B.V., the highest Dutch company in the ownership chain, was in turn a wholly-owned subsidiary of Bechtel Holdings Inc., a U.S.-incorporated engineering and construction company. Ultimately, Bechtel owned 55% of AdT’s shares.

<sup>111</sup> A settlement was later agreed to by the parties.

<sup>112</sup> *Aguas del Tunari* Decision on Jurisdiction, *supra* note 23, para. 208.

access to arbitration under the Netherlands–Bolivia BIT.<sup>113</sup> The majority of the Tribunal observed that it was perfectly legitimate that an intermediate shell corporation be inserted into a chain of ownership precisely for the purpose of securing legal protection of an investment under a specific BIT: “It is not uncommon in practice, and—absent a particular limitation—not illegal to locate one’s operations in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for examples, of taxation or the substantive law of the jurisdiction, including the availability of a BIT.”<sup>114</sup>

The majority of the Tribunal noted, however, that some forms of treaty shopping should not be acceptable: “corporate form may be abused and that form may be set aside for fraud or other grounds.”<sup>115</sup> For the majority of the Tribunal, however, the transfer of ownership in the instant case was not a “fraudulent or abusive device to assert jurisdiction under a BIT”<sup>116</sup> since the Dutch corporations were “not simply a corporate shell set up to obtain ICSID arbitration over the present dispute.”<sup>117</sup> The Tribunal alluded to “reasons of taxation” to explain why the entities were established in the Netherlands.<sup>118</sup> The Tribunal noted that the corporate structuring and the transfer of ownership took place in December 1999, *i.e. before* the alleged treaty breach which occurred in the spring of 2000.<sup>119</sup> The Tribunal also noted that the “severity” of the events which later erupted in the spring of 2000 (major violent protests against the concession agreement) was not foreseeable at the time when the corporate structuring was done. This last conclusion has been disputed by some writers pointing out that at the time of the structuring, many problems had already arisen with the investment and that it was therefore foreseeable that arbitration

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<sup>113</sup> Thus, at the time when the concession agreement was signed, the U.S. had not entered into a BIT with Bolivia. The U.S.–Bolivia BIT was signed on April 17, 1998 and came into force on June 6, 2001.

<sup>114</sup> *Aguas del Tunari* Decision on Jurisdiction, *supra* note 23, para. 330(d). The Tribunal also stated:

[T]his case makes clear that which has been clear to negotiating states for some time, namely, that through the definition of “national” or “investor”, such treaties serve in many cases more broadly as portals through which investments are structured, organized and, most importantly, encouraged through the availability of a neutral forum. The language of the definition of national in many BITs evidences that such national routing of investment is entirely in keeping with the purpose of the instruments and the motivations of the state parties.

*Id.* para. 332.

<sup>115</sup> *Id.* para. 245.

<sup>116</sup> *Id.* para. 330.

<sup>117</sup> *Id.* para. 321.

<sup>118</sup> *Id.* para. 330.

<sup>119</sup> *Id.* paras. 329–30.

proceedings could be undertaken to find redress.<sup>120</sup> The request for arbitration was filed by the Claimant in November 2001.

The *Aguas del Tunari* case suggests that any corporate restructuring done *after* a treaty breach should be considered as illegitimate treaty shopping. This is clear since, as a matter of principle, a claimant commencing arbitration proceedings must have the nationality of the relevant Contracting Party at the time of the breach. *A contrario*, any restructuring done *prior* to the commission of a treaty breach by the host State should be legitimate. The Tribunal's reasoning would also seem to imply, perhaps surprisingly, that such restructuring could even be done *after* problems have actually arisen with the investment. In our view, such a "last minute" corporate restructuring situation may raise some reasonable grounds of suspicion about its legitimacy. This is especially the case if arbitration proceedings are launched *soon after* the incorporation in the new jurisdiction. In fact, a respondent will be more likely to convince a tribunal of the existence of illegitimate treaty shopping when only a limited amount of time elapses between corporate restructuring and the moment when a request for arbitration is filed.

The fact that legitimate corporate restructuring may be done *after* problems have actually arisen with the investment but must, in any event, be effected *before* any actual treaty breach, is confirmed by the recent case of *Mobil v. Venezuela*.<sup>121</sup> This case involves Mobil Corporation, a U.S. corporation, which initially wholly owned intermediary companies incorporated in the United States and in the Bahamas, which in turn had a participation in two local Venezuelan companies involved in two projects. In 2005, Mobil restructured its investments through the creation of an intermediary Dutch entity (called Venezuela Holdings, BV), which in 2006 acquired all shares of the already existing U.S. and Bahamas intermediary companies. The Dutch entity was therefore inserted in the corporate chain that invested in two projects in Venezuela.<sup>122</sup> In 2007, several companies in this corporate chain filed a request for arbitration under, *inter alia*, the Netherlands–Venezuela BIT. Venezuela contended that this BIT did

<sup>120</sup> William L. Kirtley, *The Transfer of Treaty Claims and Treaty-Shopping in Investor-State Disputes*, 10(3) J. WORLD INV. & TRADE 450–52 (2009); Alexandre de Gramont, *After the Water War: The Battle for Jurisdiction in Aguas Del Tunari, S.A. v. Republic of Bolivia*, 3(5) TRANSNAT'L DISP. MGMT. 24 (2006).

<sup>121</sup> *Mobil* Decision on Jurisdiction, *supra* note 100, para. 186 ff.

<sup>122</sup> The Tribunal described the corporate chain as follows:

As a result of this restructuring, Mobil (Delaware) owns 100% of Venezuela Holdings (Netherlands), which owns 100% of Mobil CN Holding (Delaware), which owns 100% of Mobil CN (Bahamas), which finally owns a 41 2/3% interest in the Cerro Negro Association. Venezuela Holdings (Netherlands) also owns 100% of Mobil Venezolana Holdings (Delaware), which owns 100% of Mobil Venezolana (Bahamas), which finally owns a 50% interest in the La Ceiba Association.

*Id.* paras. 21–22.

not provide a basis for ICSID jurisdiction over the dispute. Thus, it argued that some of the Claimants were not Dutch nationals and that the Dutch Claimant (Venezuela Holdings) was a “corporation of convenience” created in anticipation of litigation with Venezuela for the sole purpose of gaining access to ICSID jurisdiction. The Tribunal first held that Venezuela Holdings and its wholly owned U.S. and Bahamian subsidiaries were all Dutch nationals under Article 1(b)(iii) of the BIT. The Tribunal then addressed the argument of abuse of right submitted by the Respondent.

It is important to note that the restructuring took place *after* there were pending disputes with the host State relating to royalties and income tax, but *before* nationalization measures were taken (in 2007) by the Venezuelan authorities. The Tribunal admitted 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.”<sup>123</sup> However, the Tribunal considered that “this was a perfectly legitimate goal as far as it concerned *future disputes*” related to nationalization measures.<sup>124</sup> The Tribunal made it clear that to “restructure investments only in order to gain jurisdiction under a BIT for [pre-existing] disputes” would constitute an abusive manipulation of the ICSID system and the BIT.<sup>125</sup> The Tribunal therefore held that it had jurisdiction under the BIT over claims submitted by Venezuela Holdings and its wholly owned U.S. and Bahamian subsidiaries, but only for disputes which arose *after* the Dutch holding company was created and had acquired shares of these intermediary companies.<sup>126</sup>

One common reason why an investor may wish to choose a specific place of incorporation for the *sole purpose* of commencing arbitration proceedings under a BIT is to avoid the application of one well-known general principle of international law. Thus, in general, nationals of one State are not allowed to submit claims against that State in international fora.<sup>127</sup> International arbitration is not the proper forum to resolve disputes between a State and its domestic investors.<sup>128</sup> In principle, such domestic disputes should be settled before national courts. In the context of investment treaties, the question arises when a national of one State (State A) establishes a holding company in another State (State B), which then makes an investment in State A: should that shell

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<sup>123</sup> *Id.* para. 190.

<sup>124</sup> *Id.* para. 204 (emphasis added).

<sup>125</sup> *Id.*

<sup>126</sup> As of May 2011 the case was still pending.

<sup>127</sup> Markus Burgstaller, *Nationality of Corporate Investors and International Claims against the Investor's Own State*, 7(6) J. WORLD INVEST. & TRADE 857 (2006).

<sup>128</sup> See, however, Article 25(2)(b) of the ICSID Convention providing for one exception to that rule for locally incorporated corporations that are *foreign-controlled*.

company (controlled by a national of State A) be allowed under a BIT between State A and B to bring a claim against State A?

This issue arose in the context of *Tokios Tokelés v. Ukraine*.<sup>129</sup> This case involves a claim filed against Ukraine under the Lithuania–Ukraine BIT by Tokios, a Lithuanian corporation which was 99% owned by Ukrainian nationals. The majority of the Tribunal ruled that Tokios could bring a claim against Ukraine because the BIT defined a Lithuanian “investor” as “any entity established in the territory of the Republic of Lithuania in conformity with its laws and regulations,” without any requirement that such entity be controlled in any way by Lithuanian natural persons.<sup>130</sup> The president of the Tribunal, Prosper Weil, dissented and argued that the “ICSID arbitration mechanism [was] meant for *international* investment disputes, that is to say, for disputes between States and *foreign* investors.”<sup>131</sup> He also argued that foreign investors should not be allowed “to use a foreign corporation, *whether pre-existent or created for that purpose*, as a means of evading the jurisdiction of their domestic courts and the application of their national law.”<sup>132</sup> In his view, the Tribunal should have examined the origin of capital and, therefore, considered Tokios as a Ukrainian corporation and denied it access to arbitration under the BIT.

Other subsequent tribunals,<sup>133</sup> as well as the vast majority of authors,<sup>134</sup> have supported the conclusion reached by the majority of the Tribunal based on the explicit definition of “investor” under the BIT. Most importantly for the purpose of the present discussion, the majority of the *Tokios* Tribunal rightly concluded that the Claimant was not engaged in any form of illegitimate forum shopping. Thus, Tokios was *not* created for the purpose of gaining access to ICSID arbitration under the Lithuania–Ukraine BIT. In fact, the incorporation took place *six years before* the entry into force of the BIT.<sup>135</sup> In other words, at the time of Tokios’ incorporation in Ukraine, the owners could not have even envisaged arbitration proceedings since they did not know that a treaty would eventually be signed.

Another recent case where a similar situation arose is *Rompetrol v. Romania*, involving a claim submitted against Romania under the Netherlands–Romania

<sup>129</sup> *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction (Apr. 29, 2004) [“*Tokios* Decision on Jurisdiction”].

<sup>130</sup> *Id.* para. 28. The Tribunal also concluded that Tokios was a “national of another Contracting State” under Article 25 of the ICSID Convention. *Id.* para. 71.

<sup>131</sup> Dissenting opinion of Prosper Weil, para. 5 (emphasis in original).

<sup>132</sup> *Id.* para. 30 (emphasis added).

<sup>133</sup> For instance, the Tribunal in *The Rompetrol Group N.V. v. Romania*, Decision on Jurisdiction, *supra* note 102, para. 85, indicated that the view expressed by Weil had “not been widely approved in academic and professional literature, or generally adopted by subsequent tribunals.” See also *ADC Award*, *supra* note 95, para. 360.

<sup>134</sup> See, e.g., MCLACHLAN ET AL., *supra* note 4, at 151–52. But see Burgstaller, *supra* note 127, at 874–81.

<sup>135</sup> *Tokios* Decision on Jurisdiction, *supra* note 129, para. 56.

BIT by a holding corporation incorporated in the Netherlands, but ultimately controlled by a Romanian national.<sup>136</sup> Romania argued, *inter alia*, that the Claimant was not a “foreign investor,” but a Romanian national who had merely incorporated a shell company in the Netherlands.<sup>137</sup> According to Romania, relying on Weil’s dissenting opinion in *Tokios*, “[t]o allow claims by own nationals through the device of a foreign shell company would be a radical change from established international law and have a wide impact on the network of BITs.”<sup>138</sup> The Claimant denied having been engaged in any “treaty shopping” since the holding company was incorporated in the Netherlands *six years before* the arbitration claim was filed and for reasons unrelated to arbitration (including “good corporate governance laws, a favourable tax treaty and a good infrastructure”).<sup>139</sup>

The Tribunal concluded that it had jurisdiction over the claim because the Claimant met the formal requirements of the ICSID Convention and the BIT.<sup>140</sup> The Tribunal noted that the parties had the “sole authority to determine the criteria by which juridical persons with a defined status under each other’s law may enjoy the protections of their BIT.”<sup>141</sup> Thus, the parties were free to choose incorporation “as a necessary and also sufficient criterion of nationality for purposes of ICSID jurisdiction without requiring in addition an examination of ownership and control, of the source of investment funds, or of the corporate body’s effective seat.”<sup>142</sup> The Tribunal also denied that allowing jurisdiction would be an abuse of the ICSID mechanism.

The *Tokios* and *Rompetrol* cases suggest that the actual goal for the creation of a shell corporation is what truly matters when deciding whether a certain set of facts represent non-*bona fide* treaty shopping. It must be shown that the aim of incorporation in a certain jurisdiction (in the example above, State B) is not solely to gain access to international arbitration. *Bona fide* corporate structuring would include, for instance, cases (i) when the incorporation of a holding company in State B is done *before* any BIT even *exists* between States A and B, (ii) when the incorporation is done *many years before* any arbitration proceedings are actually launched against State A,<sup>143</sup> and (iii) when the corporate

<sup>136</sup> *Rompetrol* Decision on Jurisdiction, *supra* note 102.

<sup>137</sup> *Id.* para. 50.

<sup>138</sup> *Id.* para. 52.

<sup>139</sup> *Id.* para. 67.

<sup>140</sup> *Id.* para. 98. Article 1(b) of the Netherlands–Romania BIT reads, in part, as follows: “(b) the term ‘investors’ shall comprise with regard to either Contracting Party: . . . ii. legal persons constituted under the law of that Contracting Party . . . .”). As of May 2011 the case was still pending.

<sup>141</sup> *Id.* para. 81.

<sup>142</sup> *Id.* para. 83.

<sup>143</sup> See, e.g., *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, para. 326 (July 29, 2008) (noting that the Claimant companies existed for many years before the dispute arose and before any arbitration proceedings were undertaken).

structuring is undergone for reasons that are clearly unrelated to eventual arbitration proceedings.<sup>144</sup>

One recent example of a clear situation of abusive treaty shopping arose in the case of *Phoenix Action, Ltd. v. Czech Republic*.<sup>145</sup> Phoenix Action (“Phoenix”) is an Israeli corporation wholly owned by a Czech national, Mr. Beno. In 2002, Phoenix purchased two Czech corporations, Benet Praha (“BP”) and Benet Group (“BG”) both incorporated in the Czech Republic. These two corporations were ultimately owned by members of Mr. Beno’s close family. At the time of the transaction, both BG and BP were involved in legal disputes in the Czech Republic. In fact, BP was under a criminal investigation in the Czech Republic over alleged customs duty evasion. This investigation had led Mr. Beno, an executive officer of BP, to leave the country for Israel in 2001. Soon after, he established Phoenix under Israeli law. Merely two months after Phoenix’s purchase of BG and BP, the Israeli corporation commenced arbitration proceedings against the Czech Republic alleging breach of the Israel–Czech Republic BIT. In 2008, Phoenix sold BP back to its original owner for the same price paid in 2002.

For the Tribunal, the question at the heart of the dispute was not the undisputed fact that Phoenix was an Israeli company and that it was allowed to submit an arbitration claim under Article 1(3) of the BIT.<sup>146</sup> The real question was whether the dispute was connected with *any investment*. In its Award, the Tribunal emphasized the importance of the principle of good faith. For the Tribunal, its mission was to “prevent an abuse of the system of international investment protection under the ICSID Convention, in ensuring that only investments that are made in compliance with the international principle of good faith and do not attempt to misuse the system are protected.”<sup>147</sup> The Tribunal concluded that Phoenix’s purchase of the two corporations was an abuse of rights. Thus, “all the damages claimed by Phoenix had already occurred and were inflicted on the two Czech companies, when the alleged investment was made.”<sup>148</sup> For the Tribunal, “the unique goal of the ‘investment’ was to transform a pre-existing domestic dispute into an international dispute subject to ICSID arbitration under a bilateral investment treaty.”<sup>149</sup> In other words, the ultimate aim behind the “investment” made by Phoenix in the Czech Republic was to benefit, as an Israeli corporation,

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and, therefore, that they “have certainly not been created for treating-shopping purposes”).

<sup>144</sup> Kirtley, *supra* note 120, at 45–50.

<sup>145</sup> *Phoenix Action Award*, *supra* note 20, paras. 142–44.

<sup>146</sup> Article 1(3) of the Israel–Czech Republic BIT defines the term “Israeli investor” as follows: “(b) legal entities incorporated or constituted in accordance with Israeli law and having their permanent seat in the territory of the State of Israel.”)

<sup>147</sup> *Phoenix Action Award*, *supra* note 20, para. 113.

<sup>148</sup> *Id.* para. 136.

<sup>149</sup> *Id.* para. 142.

from the Israel–Czech Republic BIT and to launch international arbitration proceedings against the Czech Republic. The Tribunal concluded that this was “not a *bona fide* transaction” which “cannot be a protected investment under the ICSID system.”<sup>150</sup> For the Tribunal, the claim was “an abusive manipulation of the system of international investment protection under the ICSID Convention and BITs.”<sup>151</sup> The Tribunal further described the “abusive manipulation” that such treaty shopping would represent for the ICSID system:

If it were accepted that the Tribunal has jurisdiction to decide Phoenix’s claim, then any *pre existing national dispute* could be brought to an ICSID tribunal by a transfer of the national economic interests to a foreign company in an attempt to seek protections under a BIT. Such transfer from the domestic arena to the international scene would *ipso facto* constitute a “protected investment”—and the jurisdiction of BIT and ICSID tribunals would be virtually unlimited. It is the duty of the Tribunal not to protect such an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs. It is indeed the Tribunal’s view that to accept jurisdiction in this case would go against the basic objectives underlying the ICSID Convention as well as those of bilateral investment treaties. The Tribunal has to ensure that the ICSID mechanism does not protect investments that it was not designed for to protect, because they are in essence domestic investments disguised as international investments for the sole purpose of access to this mechanism.<sup>152</sup>

A similar situation arose in the case of *Cementownia v. Turkey*.<sup>153</sup> Cementownia “Nowa Huta” S.A. (“Cementownia”) is a Polish company which commenced arbitration proceedings against Turkey under the Energy Charter Treaty over Turkey’s termination of concession agreements granted to two Turkish electricity corporations (Çukurova Elektrik A.S. (“CEAS”) and Kepez Elektrik Türk A.S. (“Kepez”). Cementownia claimed to have acquired shares in these two Turkish corporations. Importantly, Cementownia and these two companies were controlled by Mr. Uzan, a Turkish national. The Tribunal declined jurisdiction over the dispute based on lack of evidence that Cementownia ever owned shares in the two Turkish corporations and described

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<sup>150</sup> *Id.*

<sup>151</sup> *Id.* para. 144.

<sup>152</sup> *Id.* (emphasis added).

<sup>153</sup> *Cementownia “Nowa Huta” S.A. v. Turkey*, ICSID Case No. ARB(AF)/06/2, Award (Sept. 17, 2009).

the claim as “a mere artifice” to “fabricate international jurisdiction where none should exist.”<sup>154</sup> On the question of treaty shopping, the Tribunal first observed that prior to the date of the alleged purchase by Cementownia of shares of these Turkish corporations this was a purely Turkish *domestic* dispute:

Being a Turkish national holding shares in CEAS and Kepez, under the Energy Charter Treaty, Mr. Kemal Uzan could not bring an international claim against his own State. This could only occur if a person holding foreign nationality owned or controlled the investment. [Cementownia] possessed foreign nationality and, in particular, the nationality of another State party to the Energy Charter Treaty [Poland]. This meant that if [Cementownia] actually acquired an interest in the two companies, *prima facie* it would have the right to take what until that point of time had been a purely local grievance arising under local law, subject to resolution in the local courts, and in respect of matters occurring after the date of acquisition it could submit a claim to an international arbitration applying international law.<sup>155</sup>

The Tribunal had no hesitation in describing the situation as “unabashedly treaty shopping” and added that:

As other tribunals have found, treaty shopping *per se* is not in principle to be disapproved of, but in some instances it has been found to be a mere artifice employed to manufacture an international dispute out of purely domestic dispute. Given the dispute’s history and the temporal aspects of the case . . . had the Tribunal found that the share transfers actually *did* occur . . . , it would have held that this case fell within the category of an artifice.”<sup>156</sup>

The *Phoenix* and *Cementownia* cases show that in the context of a dispute that has *already arisen* between the parties, the creation of a holding company in a certain jurisdiction for the *sole purpose* of commencing arbitration proceedings under a specific BIT would be considered to be illegitimate treaty shopping. Clearly, corporate restructuring should not be allowed when its very goal is to artificially transform a purely domestic dispute into an international one.

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<sup>154</sup> *Id.* para. 117.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

Another form of illegitimate “treaty shopping” is related to the assignment of shares or claims from one entity to another.<sup>157</sup> As explained by the Tribunal in *Société Générale v. Dominican Republic*, the transfer of investments “has become a normal feature of a global economy” and is “not as such disqualified from treaty protection.”<sup>158</sup> This is clearly the case, for instance, when the transfer of shares is done prior to any dispute between the parties about the investment.<sup>159</sup> More troubling is the situation where a foreign investor from a State (State A) that has *not* enacted a BIT with the host State of investment (State C) decides, *after the commission of the alleged treaty breach*, to assign its shares (or even to assign its claim) to *another already-existing* company incorporated in a third State (State B) which entered into a BIT with the host State of investment.<sup>160</sup> In such a case, the assignment is for the sole purpose of commencing arbitration proceedings against the host State. It is an attempt to gain access to jurisdiction in the absence of treaty relationship between the investor’s State of origin (State A) and the host State (State C). Tribunals have held that such an assignment would be illegitimate treaty shopping. For instance, the Tribunal in the *Société Générale* case clearly indicated that a transfer of rights must be a *bona fide* transaction “not devised to allow a national of a State not qualifying for protection under a treaty to obtain an inappropriate jurisdictional advantage otherwise unavailable by transferring its rights *after-the-fact* to a qualifying national.”<sup>161</sup>

The abusive nature of this form of treaty shopping is even more obvious when shares are assigned to a company that has *just been incorporated* in a third State *only for the purpose* of gaining access to international arbitration. This issue arose in the case of *Banro American Resources et al. v. Democratic Republic of the Congo*.<sup>162</sup> Banro Resource, a Canadian corporation, was party to a mining contract with Congo that included an arbitration clause providing for ICSID arbitration. Congo declared the contract null and void and seized the offices

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<sup>157</sup> The question of assignment has been discussed in few cases. See, e.g., *Mihlaly Int’l Corp. v. Sri Lanka*, ICSID Case No. ARB/00/2, Award, para. 14 ff (March 15, 2002); *African Holding Co. of America, Inc. & Société Africaine de Construction au Congo S.A.R.L. v. Democratic Republic of Congo*, ICSID Case No. ARB/05/21, Award (July 29, 2008) [“*African Holding Award*”].

<sup>158</sup> *Société Générale In respect of DR Energy Holdings Ltd. and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic*, LCIA Case No. UN7927, Award on Preliminary Objections to Jurisdiction, para. 44 (Sept. 19, 2008) [“*Société Générale Award on Jurisdiction*”].

<sup>159</sup> See, e.g., *Autopista Concesionada de Venezuela CA v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction (Sept. 27, 2001).

<sup>160</sup> See Kirtley, *supra* note 120.

<sup>161</sup> *Société Générale Award on Jurisdiction*, *supra* note 158, paras. 109–10 (emphasis added).

<sup>162</sup> *Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema S.A.R.L. v. Democratic Republic of the Congo*, ICSID Case No. ARB/98/7, Award (Sept. 1, 2000), 17 ICSID REV.—FILJ 382 (2002) (excerpts).

of SAKIMA, a locally incorporated corporation set up under the contract, which was 99% owned by Banro Resource. Since Canada was not a party to the Convention, Banro Resource was prevented from commencing ICSID arbitration proceedings against Congo. In order to circumvent this problem, a U.S. corporation was created, Banro American Resources, and 93% of Banro Resource's shares in SAKIMA were transferred to that new corporation. A few days later this newly created U.S. corporation filed a request for arbitration with ICSID. The Tribunal pierced the corporate veil of that corporation to identify its owner. The Tribunal held that it lacked jurisdiction because the requirement that the claimant had to be a national of a Contracting State was not met.<sup>163</sup>

## CONCLUSION

Ultimately, the legal standing of corporations (and their shareholders) to submit arbitration claims against a host State depends on the wording of the applicable legal instrument under which the arbitral tribunal is constituted. Modern investment treaties generally provide shareholders investing abroad with unprecedented substantive and procedural legal protection against interference with their investments by the governments of the States in which they invest. As summarised by Stanimir Alexandrov, “it is beyond doubt that shareholders have standing in ICSID to submit claims separate and independent from the claims of the corporation” and “this principle applies to all shareholders, no matter whether or not they own the majority of the shares or control the corporation.”<sup>164</sup> Arbitral tribunals have also recognised the right of a foreign investor to submit a claim for damages suffered by a local corporation incorporated in the host State even when such interest is only *indirect* through an intermediate corporation. Typically, this right exists independently of the actual nationality of the intermediate corporation. Finally, arbitral tribunals have also recognised the right of intermediate (“shell”) corporations to submit their *own* claims to arbitration. These developments have even led some authors to suggest the existence of a new “rule” of customary international law providing shareholders with a procedural “right” to bring arbitration claims against the State where they make the investment.<sup>165</sup> These are undoubtedly overall positive developments

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<sup>163</sup> *Id.* paras. 23–26. The Tribunal concluded that Banro Resource could not assign more rights to another company, Banro American Resources, than those it had under the mining contract. *Id.*

<sup>164</sup> Alexandrov, *supra* note 22, at 30. *But see* Gabriel Bottini, *Indirect Claims under the ICSID Convention*, 29(3) U. PA. J. INT'L L. 563 (2008).

<sup>165</sup> Laird, *supra* note 22, at 86, 96. For a rebuttal to this proposition, see Patrick Dumberry, *The Legal Standing of Shareholders before Arbitral Tribunals: Has Any Rule of Customary International Law Crystallised?*, 18(3) MICH. ST. J. INT'L L. 353 (2010).

for the protection of foreign investors. This evolution nevertheless gives rise to several legitimate concerns from the perspective of capital-importing States that have entered into numerous BITs.

The first area of concern relates to the fact that BITs typically do not distinguish between minority and majority shareholders which can submit *separate* claims from that of the corporation. As a matter of principle, all shareholders, big and small, should receive legal protection under a BIT that does not expressly distinguish between them. This situation nevertheless raises some concerns where a corporation's share capital is divided between numerous shareholders each holding a very small percentage of the total number of shares (imagine, for instance, 100 different shareholders each owning a mere 1% of the corporation's shares). Nothing (apart, of course, from the high costs of pursuing international arbitration) would prevent all these different shareholders from *filing their own separate claims* against the host State for the same treaty breach. Another area of concern is related to the protection offered to indirect investments made through *multiple layers* of intermediate corporations. Again, under a typical BIT, *each* holding company in a long chain of ownership could file *its own* separate claim against the host State for the same treaty breach.<sup>166</sup>

As a result, capital-importing countries having entered into a significant number of BITs will increasingly run the risk of being respondents in multiple (and often simultaneous) arbitration claims filed by different entities included in the increasingly sophisticated and complex corporate structure of foreign investors. Such multiple claims will clearly result in very high legal costs for respondent States. They will also increase the likelihood of inconsistent arbitral decisions.

This possibility is not merely theoretical, as shown by the Lauder saga.<sup>167</sup> Mr. Lauder, a U.S. national, was the ultimate beneficiary of an investment he made in the Czech Republic through an intermediate corporation (CME, a Dutch corporation). Mr. Lauder commenced an arbitration claim under the U.S.–Czech Republic BIT, while CME, 6 months later, started its own proceeding before a different arbitral tribunal under the Netherlands–Czech Republic BIT. Both claims arose from the *same facts*. It should be noted that the Czech Republic refused to consolidate the proceedings as requested by the Claimants. The disturbing aspect of these two parallel arbitration cases is

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<sup>166</sup> Provided, of course, that the host State has entered into BITs with the State of incorporation of each of these intermediate corporations and that the BIT contains broad language.

<sup>167</sup> See Judith Gill, *Inconsistent Decisions: An Issue to Be Addressed or a Fact of Life?*, in FEDERICO ORTINO ET AL. (eds.), 1 INVESTMENT TREATY LAW: CURRENT ISSUES 23 (Brit. Inst. of Int'l & Comp. L. 2006); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005); Bernardo M. Cremades & Ignacio Madalena, *Parallel Proceedings in International Arbitration*, 24(4) ARB. INT'L 507 (2008).

that one Tribunal concluded that the Czech Republic had expropriated the investment and awarded \$360 million in damages to the Claimant,<sup>168</sup> while the other Tribunal rejected the claim.<sup>169</sup>

The scenarios envisaged above also raise the issue of *remoteness* between a shareholder and the actual investment. Consider, for instance, the situation of a 1% minority shareholder of one corporation investing in the host State through a long chain of, say, a dozen different holding companies.<sup>170</sup> This issue was addressed by the *Enron* Tribunal, which summarized a concern raised by Argentina as follows:

The Argentine Republic has rightly raised a concern about the fact that if minority shareholders can claim independently from the affected corporation, this could trigger an endless chain of claims, as any shareholder making an investment in a company that makes an investment in another company, and so on, could invoke a direct right of action for measures affecting a corporation at the end of the chain.<sup>171</sup>

The *Enron* Tribunal concluded that such concern raises the “need to establish a cut-off point beyond which claims would not be permissible as they would have only a remote connection to the affected company.”<sup>172</sup> For the *Enron* Tribunal, the establishment of a “cut-off point” beyond which claims by indirect shareholders would not be allowed should be based on “the extent of the consent to arbitration of the host State”:<sup>173</sup>

If consent has been given in respect of an investor and an investment, it can be reasonably concluded that the claims brought by such investor are admissible under the treaty. If the consent cannot be considered as extending to another investor or investment, these other claims should then be considered inadmissible as being only remotely connected with the affected company and the scope of the legal system protecting that investment.<sup>174</sup>

The Tribunal emphasized that in the instant case, the participation of the Claimants in the investment “was specifically sought” by the host State and that

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<sup>168</sup> *Lauder Award*, *supra* note 81.

<sup>169</sup> *CME Award*, *supra* note 32.

<sup>170</sup> A similar scenario is mentioned in Brigitte Stern, *Treaties as Agreements to Arbitrate: Comments*, in ALBERT JAN VAN DEN BERG (ed.), 13 ICCA CONGRESS 569, 575 (Kluwer 2007).

<sup>171</sup> *Enron* Decision on Jurisdiction, *supra* note 55, para. 50.

<sup>172</sup> *Id.* para. 52.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

“they are thus included within the consent to arbitration given by the Argentine Republic.”<sup>175</sup>

The issue of remoteness of claims is likely to be one of the most contentious in the future. While some authors have criticized the *Enron* Tribunal’s reasoning on the “cut-off point” as lacking any “legal foundation,”<sup>176</sup> recent awards have acknowledged the seriousness of the issue.<sup>177</sup> As explained by the *Phoenix* Tribunal, “some concern has indeed been voiced by international tribunals, and is shared by this Tribunal, that not any minor portion of indirectly owned shares should necessarily be considered as an investment.”<sup>178</sup> For good reasons, tribunals will, however, be reluctant to establish in each case where exactly should be the cut-off point. Indeed, no consensus exists on what “too remote” really means in practical terms. Recently, the *Noble Energy* Tribunal suggested that two intermediate layers was not too remote.<sup>179</sup> Similarly, the *Société Générale* Tribunal alluded to the fact that there would be no need to established any cut-off point when there exists “one or several layers of intermediate companies or interests intervening between the claimant and the investment.”<sup>180</sup>

States do not have to be passive bystanders with regard to these new developments. They can include language in their BITs to prevent any remoteness issues.<sup>181</sup> The following are some of the possibilities that can be envisaged by States in the context of negotiating *future* investment treaties:

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<sup>175</sup> *Id.* para. 56 (“The Claimants cannot be considered to be only remotely connected to the legal arrangements governing the privatization, they are beyond any doubt the owners of the investment made and their rights are protected under the Treaty as clearly established treaty-rights and not merely contractual rights related to some intermediary. The fact that the investment was made through CIESA and related companies does not in any way alter this conclusion.”).

<sup>176</sup> Christoph Schreuer, *Shareholder Protection in International Investment Law*, 2(3) TRANSNAT’L DISP. MGMT. 13–14 (June 2005).

<sup>177</sup> *African Holding Award*, *supra* note 157, para. 100 (“Comme le tribunal l’a fait remarquer dans l’affaire *Enron c. Argentine*, il y a lieu d’établir une limite à ce processus, car il risquerait d’aller tellement loin que même des investisseurs éloignés pourraient devenir des demandeurs protégés.”).

<sup>178</sup> *Phoenix Action Award*, *supra* note 20, para. 122 (emphasis added).

<sup>179</sup> *Noble Energy, Inc. and Machalapower Cía. Ltda. v. Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Decision on Jurisdiction, para. 82 (Mar. 5, 2008) (“This Tribunal does not disagree with the statement made by the *Enron* tribunal. There may well be a cut-off point somewhere, and future tribunals may be called upon to define it. In the present case, the need for such a definition does not arise. Indeed, the cut-off point, whatever it may be, is not reached with two intermediate layers. The relationship between the investment and the direct shareholder, on the one hand, and the indirect shareholder, on the other, is not too remote.”).

<sup>180</sup> *Société Générale Award on Jurisdiction*, *supra* note 158, paras. 49–50 (emphasis added).

<sup>181</sup> This is further discussed in Anthony C. Sinclair, *The Substance of Nationality Requirements in Investment Treaty Arbitration*, 20 ICSID REV.—FILJ 378 ff (2005). See also Pia Acconci, *Determining the Internationally Relevant Link between a State and a Corporate Investor, Recent Trends Concerning the Application of the “Genuine Link” Test*, 5 J. WORLD INV. & TRADE 139 (2004).

- A BIT can exclude any protection of indirect investments made through intermediate corporations by requiring that an investment be made directly in the host State.
- A BIT can also exclude the possibility of claims by holding companies by requiring that the investor corporation not only be incorporated in a contracting party, but also that it be *controlled* by nationals of the contracting party in which it is incorporated. Another related possibility is to require the investor corporation to have substantial business activities in its country of incorporation.
- In addition, States can include a “denial of benefits” clause in their BITs.<sup>182</sup> Such a clause typically allows a party to a BIT to deny the benefits of the treaty protection to an investor when its investment is ultimately owned or controlled by a national of a non-party and where the claiming investor has no substantial business activities in the territory of the other party to the treaty. This is, for instance, the case under the NAFTA,<sup>183</sup> the Energy Charter Treaty,<sup>184</sup> recent BITs concluded by Canada<sup>185</sup> and the U.S. Model BIT.<sup>186</sup>
- Another lesser known option to reduce the possibility of future claims by shell corporations is to limit the geographical scope of application of a BIT. For instance, a notable exception to China’s 130 BITs is the treaty recently signed (but not yet entered into force) with Russia, which expressly excludes from its scope of application the territories of Hong Kong and Macau (and even Taiwan).<sup>187</sup> One could envisage a situation where treaty negotiations between two States could lead to the exclusion of some jurisdictions which are typically used as “tax shelters.”

<sup>182</sup> See Thorn & Doucleff, *supra* note 83; Sinclair, *supra* note 181, at 378 ff.

<sup>183</sup> NAFTA, *supra* note 13, art. 1113.

<sup>184</sup> Energy Charter Treaty, *supra* note 13, art. 17(1). The effect of this clause was discussed by the Tribunal in *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24 (ICSID), Decision on Jurisdiction, para. 146 ff (Feb. 8, 2005). See also *Hulley Interim Award*, *supra* note 103, para. 436 ff.

<sup>185</sup> Canada–Peru BIT, art. 18; Canada–Costa Rica BIT, art. 1(h); Canada Model FIPA, art. 18.

<sup>186</sup> U.S. Model BIT, art. 17 (a State may deny the benefits of the treaty if: (i) the company is owned or controlled by nationals of a third country with which the United States does not maintain normal economic relations, and (ii) the company has no substantial business activities in the United States).

<sup>187</sup> This question is discussed in Nils Eliasson, *Investor-State Arbitration and Chinese Investors: Recent Developments in Light of the Decision on Jurisdiction in the Case Mr. Tza Yap Shum v. The Republic of Peru*, 2 CONTEMP. ASIA ARB. J. 347, 366–67 (2009).

Finally, where a BIT is already in force, it is also possible for the contracting States to amend it to limit its scope or even to issue an official interpretation or understanding of a sensitive treaty provision to clarify its meaning.<sup>188</sup>

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<sup>188</sup> Thorn & Doucleff, *supra* note 83, at 26. Thus, Article 31(3)(a) of the Vienna Convention on the Law of Treaties indicates that the interpretation of a treaty shall take into account “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.” According to ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 191 (Cambridge 2000), “given that the parties can agree later to modify the treaty, they can also subsequently agree on an authoritative interpretation of its terms.” For instance, the NAFTA Free Trade Commission issued a Note of Interpretation of Certain Chapter 11 Provisions on July 31, 2001, in which the Contracting Parties reiterate, *inter alia*, that “Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.” NAFTA Article 1131(2) expressly provides that “an interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal.”