Corporations as Investors: The Interaction of International Law and Domestic Law

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International investment law does not exist in clinical isolation from …domestic law.

- Article 42(1) of the ICSID Convention –
  - "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."
- TPP Art 9.25 (1) (Investment)
  - [T]he tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law [fn34]"
  - Fn34 "For greater certainty, this provision is without prejudice to any consideration of the domestic law of the respondent when it is relevant to the claim as a matter of fact."

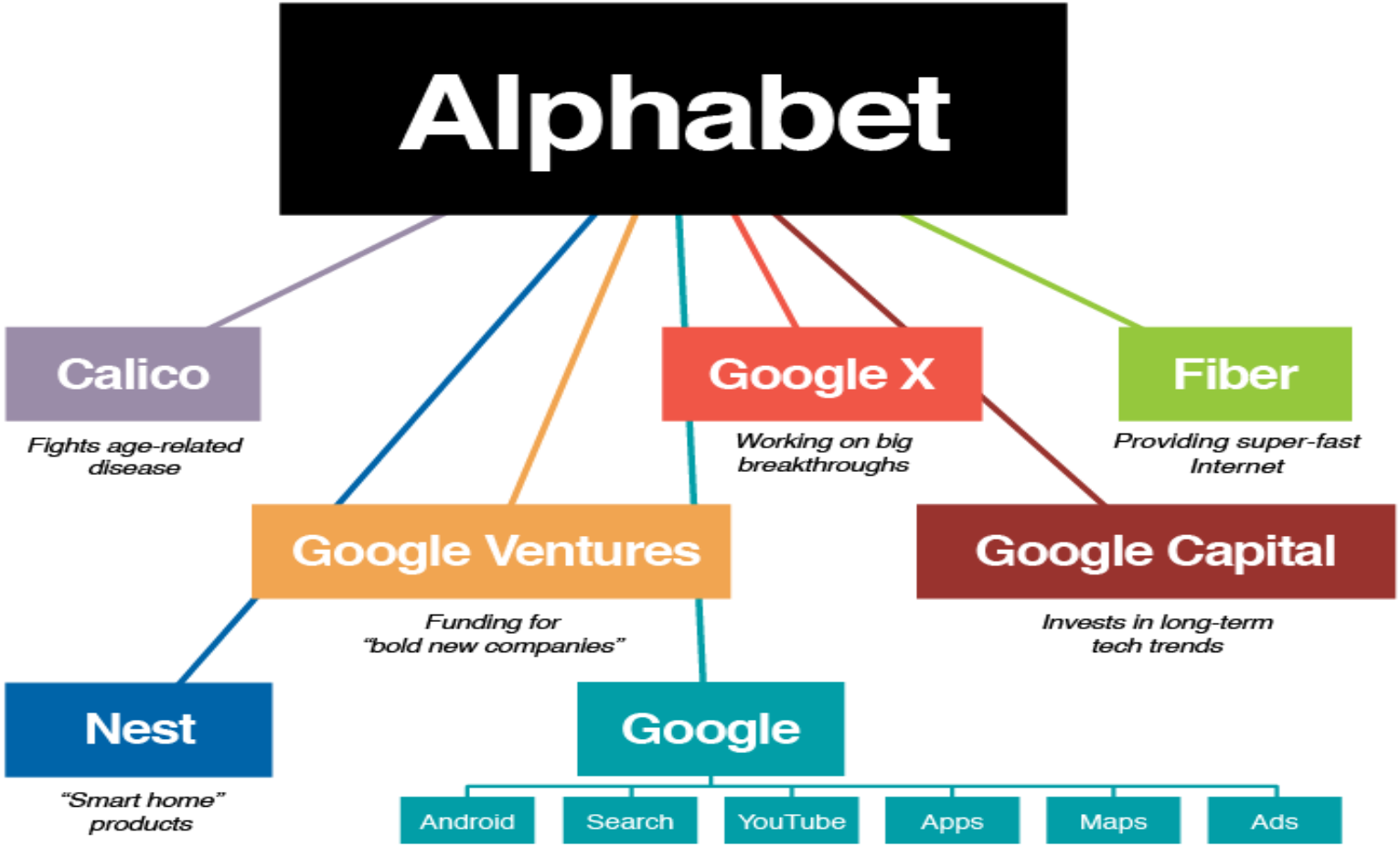
- “The notion of a self-contained regime is not helpful because it does not tell you about the problems and how they may be resolved.”

Pathologies

1. Distrust of domestic law and courts was the very reason for the creation of BITs. [law]
2. Investment tribunals are comprised of international arbitrators not domestic lawyers. [forum]
3. Increasingly public international lawyers are involved instead of commercial arbitration practitioners who may be more familiar with domestic company law. [epistemic community]

Corporations as Investors

- Most investors bringing ISDS claims today are corporations and many of them are part of complex MNC structures.
- These structures are set up for three reasons:
  1. Efficient production/management;
  2. Tax efficiency/avoidance; and
  3. Trade and investment law advantages.



Graphic: CNNMoney; Source: Company filings

Relevance of domestic corporate law

- At least two issues:
  1. Whether the relevant corporate investor is indeed “incorporated or constituted or otherwise duly organised under the law in force in force of a Contracting Party” as required in the definition of investor for most IIAs; and
  2. Whether the “investor” bringing the claim is an appropriate plaintiff and the injury the capacity in which the plaintiff is bringing the claim.

Treaty Shopping

- ICSID – the objective is to set up a fair adjudicative system which would improve the investment climate in a county and globally [ICSID Executive Directors' Report]
- If so, what's wrong with treaty shopping if it allows more investors to access the system?
  - Concerns about reciprocity and free riding;
  - Round tripping; and
  - "Unfairness"

Doctrines to Limit Treaty Shopping

- Barcelona Traction, ELSI – ICJ diplomatic protection
- *Rationae temporis* – seems to be focused on when the dispute was "foreseeable" to determine if the restructuring was *bona fide*
  - Phoenix Action v Czech Republic
  - Mobil v Venezuela
  - Pac Rim Cayman v El Salvador
  - Tidewater v Venezuela
- Abuse of rights/process – seems to be focused again on a temporal test though not clear where the line is
  - Philip Morris v Australia
  - Transglobal Green Energy v Panama

Less about treaty shopping

- Defining the nationality of the investor – seems to be focused on a “lifting the corporate veil” approach
  1. Amco v Indonesia
  2. Tokios Tokeles v Ukraine
  3. ADC v Hungary
  4. Aguas v Bolivia

Purpose rather than Time

- “incorporated or constituted or otherwise duly organised under the law in force in force of a Contracting Party”
  - Allows for a lifting the corporate veil exercise
  - Allows for a abuse of right exercise
  - Rather than a Temporal Test we should focus on the Purpose of the [re]structuring – was it only to get access to ISDS or were there legitimate reasons such as tax or management efficiency.

Shareholder Rights

- Some IIAs allow for shareholders of a company or shareholders of shareholders ad infinitum to qualify as a relevant investor.
- This is appropriate if State Parties agree to it.
- Absent this consent by State Parties, if the relevant investor is only a shareholder of a company, the question is whether that shareholder has the right to claim on behalf of a company.
- A shareholder in most domestic jurisdictions strictly speaking only has a right to claim against a breach of his rights qua shareholder unless he is given the right to a derivative action to bring it on behalf of a company to prevent:
    1. Double recovery; and
    2. Irregular corporate governance (proper plaintiff rule)

Capacity and Claim

- The capacity in which the shareholder is bringing the claim must match the claim.
- I do not suggest that a claim cannot be brought but rather that tribunals taking into account the relevant domestic law should determine if:
  1. the shareholder has a right to claim on behalf of a company; and if not
  2. whether the shareholder pursuant to the relevant domestic law can claim for rights that are not qua shareholder rights.

In what capacity?

- Many tribunals focus on the absence of a requirement for majority ownership to allow a shareholder to bring a claim
  - Lanco v Argentin, Vivendi v Argentina
  - Teinver v Argentina – derivative claim doctrine is alien to ICSID arbitration and Argentina could not define “investment” using domestic law
  - Sempra v Argentina, CMS v Argentina, El Paso v Argentina
  - Hoctief v Argentina – double recovery not a problem
  - GAMI v Mexico – US A 1128 opinion that a minority shareholder should only assert claim for direct injury and not injuries to the corporation was rejected

Problem

- Walter Bau v Thailand
  - Prior negotiated settlement
  - Minority shareholder claimed for reflective loss
  - Damage was actually caused by the BoD agreeing to the settlement
  - Should have sued the BoD on behalf of the company at domestic law first by way of a derivative action – then if not given then maybe a breach of FET

Canada-Czech Republic BIT, Art X(5)(b)

- If an investment is held indirectly through an investor of a third state by an investor of one Contracting Party in the territory of the other Contracting Party, the investor of a Contracting Party may not initiate or continue a proceeding under this Article if the investor of the third state submits or has submitted a claim with respect to the same measure or series of measures under any agreement between the other Contracting Party and the third state.

EU-Vietnam FTA

Bringing a claim on behalf of a locally incorporated company's losses

Prevention of double recovery

Section 3 - Article 8 - Other Claims

2. A claimant acting on its own behalf may not submit a claim to the Tribunal if any person who, directly or indirectly, has an ownership interest in or is controlled by the claimant has a pending claim before this Tribunal or any other domestic or international court or tribunal concerning the same measure as that alleged to be inconsistent with the provisions referred to in Article 1(1) (Scope) and the same loss or damage, unless that person withdraws such pending claim.

3. A claimant acting on behalf of a locally established company may not submit a claim to the Tribunal if any person who, directly or indirectly, has an ownership interest in or is controlled by the locally established company has a pending claim before this Tribunal or any other domestic or international court or tribunal concerning the same measure as that alleged to be inconsistent with the provisions referred to in Article 1(1) (Scope) and the same loss or damage, unless that person withdraws such pending claim.

4. Before submitting a claim the claimant shall provide:

(a) evidence that it and, where relevant pursuant to paragraphs 2 and 3, any person who, directly or indirectly, has an ownership interest in or is controlled by the claimant or the locally established company, has withdrawn any pending claim referred to in paragraphs 1, 2, and 3.

(b) a waiver of its right, and where applicable, of the locally established company, to initiate any claim referred to in paragraph 1.

Conclusion

- Corporations set up a variety of structures for many different reasons – taxation, efficient production chains and even access to FTAs or IIAs.
- None of these reasons are by themselves problematic but in specific situations they could create problems of round tripping or undermine good corporate governance.
- At the end of the day, states need to provide clarity about which ones are appropriate and which ones are not. This is a policy question and not a legal question.
- Subject to political considerations, all host states want and desire FDI regardless of origin.