5

NATIONALITY

A. Introduction

The nationality requirement in investment law

5.01 The investment protection regime is based on the principle that its protections extend to investors who are nationals of a contracting State other than the host State in which the investment is made. This is consistent with the essential character of investment treaty law as a series of bilateral promises made between States in respect of each other's nationals.[1] The nationality of the claimant thus determines, as a preliminary matter, whether it is entitled to take the benefit of treaty protections; this, in turn, determines the jurisdiction *ratione personae* of the investor–State arbitral tribunal.

[1] See A Bjorklund, 'The Emerging Civilisation of Investment Arbitration' (2009) 113 Penn St Int'l LR 1269, 1278–9.

5.02 Nationality requirements are typically defined in the relevant bilateral investment treaty (BIT), or multilateral investment treaty (MIT), or applicable international convention (such as the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention)).[2] As detailed further below in Section E, BITs (and MITs) usually define the nationality of a natural person as a person having the nationality of either Contracting Party. Some treaties have more specific criteria for establishing nationality than others; for example, some treaties deal expressly with the eligibility of dual nationals to bring claims. As regards juridical persons, the nationality of corporations generally depends on three criteria; namely, the State of incorporation, the management (seat) of the company and the nationality of those in control of the company.

5.03 The ICSID Convention's definition of nationality is particularly important, given the significant number of arbitrations that are submitted to it each year and the number of treaties that offer ICSID arbitration as a dispute-resolution mechanism. Article 25(2) of the Convention defines 'National of another Contracting State' as:

> (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and
> (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

5.04 Accordingly, the constituent elements of nationality as required by art 25(2) may be broken down in this way:

(1) *Natural persons*: A natural person must hold the nationality of a Contracting State other than the State party to the dispute. As for timing, an eligible natural person must hold this nationality on:
  (a) the date the parties consented to submit their disputes to arbitration; and
  (b) the date the dispute was registered.
(2) *Juridical persons*: There are two categories of eligible juridical persons.
  (a) Under the 'first limb' of art 25(2)(b), a juridical person must hold the nationality of a Contracting State other than the State party to the dispute. This person must hold such nationality on the date on which the parties consented to submit their disputes to arbitration.
  (b) Alternatively, under the 'second limb' of art 25(2)(b), a juridical person holding the nationality of the Contracting State that is party to the dispute may bring a claim if,

[2] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (signed 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 ('ICSID Convention') (Appendix 12 below).

because of foreign control, the parties have agreed that this person should be treated as a national of another Contracting State for the purposes of the arbitration.

5.05 Each of the above constituent elements of art 25(2) of the ICSID Convention is developed in this chapter.

5.06 In investor–State arbitration—particularly in ICSID arbitrations, where a BIT is to be interpreted together with the ICSID Convention—a *jurisprudence constante* of varying strengths may be discerned regarding the tests for determining the nationality of individuals (natural persons) and corporations (juridical persons). According to this jurisprudence, the tests, with certain notable exceptions, are formalistic.

5.07 In particular, there are two notable exceptions to this formalism, where more substantive tests for determining nationality have been developed:

(1) the first exception concerns the position of individuals who hold dual nationalities in non-ICSID cases; and
(2) the second exception concerns the test for 'foreign control' of host State corporations in ICSID art 25(2)(b) 'second limb' cases.

5.08 For each of these exceptions, specific reasons have driven the need for a more substantive approach. Regarding the first exception, the dual nationality of individuals in non-ICSID cases raises the issue of which nationality should prevail: should an investor's dual nationality matter at all, so long as he or she holds the nationality of at least one Contracting State but not the host State? Or should the investor's effective nationality be deemed the relevant nationality? Regarding the second exception, a substantive test is required because art 25(2)(b) of the ICSID Convention expressly requires a substantive test for foreign control (namely, that the 'parties have agreed that this person should be treated as a national of another Contracting State for the purposes of the arbitration'). This substantive test is in addition to, and different from, mere possession of a particular nationality. Nationality under investment law is governed by the terms of the relevant investment treaty, interpreted in accordance with the principles of treaty interpretation set out the Vienna Convention on the Law of Treaties,[3] and not by any other international instrument or—in the absence of extraordinary circumstances or unless the treaty so provides—a nationality requirement of customary law. Within the treaty framework, the Contracting States will typically permit each State to define, in accordance with its own law, who are its nationals, thus requiring a *renvoi* to national law in order to determine nationality.

5.09 Investment treaty arbitral tribunals have made it clear in recent years that although reference to diplomatic protection rules or 'the general method' for determining nationality in international law may, in certain limited circumstances, be applicable in deciding jurisdiction *ratione personae*, the 'principles of international law … 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'.[4] Thus, if the relevant investment

[3] Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

[4] *Hulley Enterprises Ltd v Russia* (Interim Award on Jurisdiction and Admissibility) PCA Case No AA 226, IIC 415 (UNCITRAL, 2009, Fortier P, Poncet & Schwebel) para 415.

treaty, such as the Energy Charter Treaty,[5] refers to the State of incorporation as defining the nationality of a company (which is also the 'most common method of defining the nationality of a company'), any other 'method of assessing the company's nationality is ruled out.'[6]

5.10 As the ICSID Tribunal in *KT Asia v Kazakhstan*[7] explained, in refusing to apply a rule of diplomatic protection ('real and effective nationality') under the Netherlands-Kazakhstan BIT, investor–State cases pose a significantly different context from diplomatic protection. While in both contexts a bond of nationality exists and there is a triangular relationship between the home State, the host State, and the home State's national, in investor–State cases, the bond of nationality is 'defined by the investment treaty. But for that bond, the investor would have no right to bring a claim against the other State. In that sense, there is a triangular relationship in investment treaty arbitration that is different from the one which exists in matters of diplomatic protection under customary international law.'[8] The treaty rule concerning nationality therefore must therefore prevail over an attempt to import a diplomatic protection rule.

5.11 However, the variety of circumstances in which investment treaty nationality rules must be applied has raised difficulties. In particular, the wide range of commercial arrangements to structure investments and the desire of investors to gain the benefits of certain protections in BITs and MITs have led to a number of cases in which the already flexible boundaries of investor status have been stretched. This has involved, for example, finding a claimant-individual with dual nationality (home and host State) as only having home State nationality at the relevant dates,[9] and characterising a host State corporation as under 'foreign control' when it arguably has a very tenuous relationship with the home Contracting State.[10]

5.12 In considering the leading cases on nationality issues (and the commentary on them), the prevailing jurisprudential approaches have been formalistic in the sense that, absent additional requirements in the relevant investment treaty, a juridical person's claim of nationality will be determined by reference to formal incorporation under the law of the home State. That is, unless qualified by the relevant treaty, a claimant corporation's State of incorporation will serve as the claimant's nationality, and an 'effective control' test will not be applied.[11] For natural persons who are not dual (home and host State) nationals, many if not most BITs simply provide for the contracting States' citizenship laws to govern the issue of the nationality of natural persons. Moreover, art 25(2)(a) of the ICSID Convention[12] does not

[5] Energy Charter Treaty (signed 17 December 1994, entered into force 16 April 1998) 2080 UNTS 100.

[6] *Hulley v Russia* para 416.

[7] *KT Asia Investment Group BV v Kazakhstan* (Award) ICSID Case No ARB/09/8, IIC 615 (2013, Kaufmann-Kohler P, Glick & Thomas) paras 127–8.

[8] ibid para 143.

[9] See *Siag v Egypt* (Decision on Jurisdiction and Partial Dissent) ICSID Case No ARB/05/15, IIC 288 (2007, Pryles P, Williams & Orrego Vicuña (dissenting)).

[10] See *Aguas del Tunari SA v Bolivia* (Decision on Jurisdiction) ICSID Case No ARB/02/3, IIC 8 (2005, Caron P, Álvarez & Alberro-Semerena (dissenting)) (*AdT v Bolivia*).

[11] eg *Ceskoslovenska Obchodni Banka AS v Slovakia* (Decision on Jurisdiction) ICSID Case No ARB/97/4, 5 ICSID Rep 300, IIC 49 (2000, Buergenthal P, Bernardini & Bucher), in which more than 65 per cent of the claimant's shares were owned by the Czech Republic, the Tribunal ruled that the claimant was a 'national of another Contracting State'.

[12] Article 25(2)(a) provides that nationality for natural persons must exist on the date on which the parties consented to ICSID arbitration, as well as on the date that ICSID registers the request for arbitration. The ICSID Convention further clarifies—by denying—arbitral jurisdiction in the case of natural persons who also hold the nationality on either date of the Contracting State party to the arbitration.

define the concept of nationality; it is primarily concerned with the matter of timing and dual nationality.

5.13 Issues of some intricacy may nonetheless arise in establishing whether a natural person qualifies as a national of the home Contracting State or whether a natural person is a national of both the home and host States.[13] Certain of these are considered below. The nationality of corporations is likely to remain a matter of considerable debate in international investment arbitration. The key principles and debates (including those involving individuals) are best approached through an examination of a number of cases, ICSID as well as non-ICSID arbitrations, analysed below. However, in order to place these decisions in context, this chapter first briefly identifies three key controversial issues. It then discusses (a) the role of 'precedent' and the role that nationality has played in the general international law of international claims; (b) the burden of proof and (c) the specific treatment of nationality in key investment treaties.

Key issues: jurisdiction *ratione personae*

Individuals—dual nationality

5.14 It is clear that the ICSID Convention precludes claims by dual nationals. However, as indicated above, dual nationality issues may arise even in ICSID arbitrations. For example, to what extent may a tribunal re-examine a Contracting State's nationality determination? And when are the relevant dates for the assessment of dual nationality? In the non-ICSID context, dual nationality is not per se precluded (unless the relevant investment treaty does so), and it has generally been thought that in this context the diplomatic protection 'real and effective' nationality test is applicable. But if that is the case, why is it applicable and how should tribunals apply it? And is there a sound international investment law basis for not applying any such test?

Corporations—'foreign control'

5.15 The settled issue regarding juridical persons is considered below in the analysis of the *Tokios Tokelés v Ukraine*[14] award: may a company that is registered in the home State pursue a claim against the host State even if it is owned or controlled by shareholders in the host State? *Tokios* and many other subsequent tribunals have answered this ICSID art 25(2)(b) 'first limb' question resoundingly in the affirmative. However, the 'second limb' of art 25(2)(b) is not nearly as settled: where the claim is brought on the basis that a host State company is 'controlled' by a national of another State party, is it sufficient that the foreign national has legal control, or must it also exercise factual or actual control? That is, should the home State's apparent control be investigated, including possible 'lifting of the corporate veil'? Are there both 'subjective' and 'objective' tests that should be applied in assessing the validity of jurisdiction *ratione personae* in this context?

[13] eg *Soufraki v United Arab Emirates* (Award) ICSID Case No ARB/02/7, IIC 131 (2004, Fortier P, El-Kohly & Schwebel); and *Champion Trading Co v Egypt* (Decision on Jurisdiction) ICSID Case No ARB/02/9 (2003, Briner P, Aynès & Fortier).

[14] *Tokios Tokelés v Ukraine* (Decision on Jurisdiction) ICSID Case No ARB/02/18, IIC 258 (2004, Weil P (dissenting), Bernardini & Price).

'Restructuring' nationality

Investment law recognises, in principle, the possibility of a corporation altering its nationality to take advantage of another State's treaty protections. Most investment treaties do not include any prohibition on such restructuring. However, may a company restructure and thereby claim new treaty protections when, at the time that it restructures, it knows of—or could reasonably foresee—the existence of a dispute with the host State? If the company is precluded from pursuing a claim in these circumstances, what is the legal basis for such refusal? **5.16**

B. The Role of Precedent

Is diplomatic protection relevant?

The nature of the nationality debate concerning claims against States has been transformed by the mechanism for claims by private parties that is a central feature of modern investment treaties. Before this development, the issue of nationality arose primarily in the context of whether a State wished to espouse the claim of an injured alien by way of diplomatic protection.[15] In this context, the rules of nationality exist in order to define the circumstances when the State may espouse a claim. In *Barcelona Traction*[16] the International Court of Justice (ICJ) emphasised the discretionary nature, as an initial matter, of the State's decision 'within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law'.[17] **5.17**

A State's decision on whether to invoke diplomatic protection and espouse a claim on behalf of a national of the State was only the commencement of the international claims process. The jurisdictional question that remained was whether the State was entitled, as a matter of international law, to espouse the claim on behalf of the particular natural or juridical person. That is, as a matter of international law, was the natural or juridical person a national of the espousing State? The foundation for nationality determinations was expressed in art 1 of the 1930 Convention on Certain Questions Relating to the Conflict of Nationality Laws: 'It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.'[18] This principle, that a State is sovereign in setting the rules for the determination of its nationals, also remains the cornerstone for the identification of qualifying investors under BITs, despite the *lex specialis* of BITs. **5.18**

In the non-BIT, and largely pre-BIT, realm of diplomatic protection, there was no firm consensus in international law on some of the more complex issues concerning the nationality of **5.19**

[15] ILC, 'Diplomatic Protection: Text of the Draft Articles with Commentaries thereto' (Dugard, Special Rapporteur) [2006] 2(2) YB ILC 23–55.

[16] *Barcelona Traction, Light and Power Co Ltd (New Application: 1962) (Belgium v Spain)* Second Phase (Judgment) [1970] ICJ Rep 3.

[17] ibid 44.

[18] Convention on Certain Questions Relating to the Conflict of Nationality Laws (signed 12 April 1930, entered into force 1 July 1937) 179 LNTS 89.

claims. A tendency nonetheless can be discerned in the jurisdiction *ratione personae* decisions of international courts and tribunals toward requiring a relatively high threshold for the espousing State to establish nationality. Several of these decisions continue to be discussed in investment arbitration cases, particularly raised by respondent States, in circumstances where the *lex specialis* of the BIT is silent and there is arguably an opportunity for the State to refer to diplomatic protection principles.

5.20 Perhaps the diplomatic protection decision of greatest continuing influence in the investment treaty context is the *Nottebohm Case*.[19] In *Nottebohm*, the ICJ stated international law regarding nationality of natural persons in the context of diplomatic protection as follows:

> According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred … is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national.[20]

5.21 Soon after the *Nottebohm* judgment, the Italian–US Conciliation Commission Tribunal[21] interpreted the 'genuine connection' test not as a general rule, but as a consideration that was limited to the facts of the particular case, such that only a State in the somewhat unusual position of Liechtenstein (where Mr Nottebohm had spent little time and had tenuous ties, compared to Guatemala, where he had lived for many years and carried out business) was required to show the existence of a 'genuine connection' between itself and the individual claimant. This is the position adopted by the International Law Commission (ILC) in its Articles on Diplomatic Protection with Commentaries, in which the 'genuine connection' rule has been rejected in art 4.[22] Instead, ILC art 4 effectively incorporates art 1 of the Convention on Certain Questions Relating to the Conflict of Nationality Laws, quoted above.

5.22 However, some thirty years after *Nottebohm*, the Iran—US Claims Tribunal addressed the question of nationality of claims in the context of dual nationality, and relied heavily on *Nottebohm*.

5.23 The specific context of claims between foreign investors and a State, and the need to interpret the terms of the Claims Settlement Declaration, may have been thought to distance

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[19] *Nottebohm Case (Liechtenstein v Guatemala)* (Second Phase) [1955] ICJ Rep 4.

[20] ibid 23.

[21] *Flegenheimer Claim* (1958) 25 ILR 91 (Italian–US Conciliation Commission, 1958, Sauser-Hall, Matturri & Sorrentino), 148.

[22] ILC, 'Diplomatic Protection: Draft Articles with Commentaries', art 4 commentary states, inter alia, at para 5:

> Moreover, it is necessary to be mindful of the fact that if the genuine link requirement proposed by *Nottebohm* was strictly applied it would exclude millions of persons from the benefit of diplomatic protection as in today's world of economic globalization and migration there are millions of persons who have moved away from their State of nationality and made their lives in States whose nationality they never acquire or have acquired nationality by birth or descent from States with which they have a tenuous connection.

the Iran–US Claims Tribunal's decision-making both from customary international law and diplomatic protection.[23] Nonetheless, the Iran–US Claims Tribunal did rely on its understanding of customary international law. In *Iran-United States*, Case No A/18 (6 April 1984)[24] the Claims Tribunal considered the issue of dual nationality—ie whether claims filed by persons who were both nationals of the United States and Iran were admissible. In a hotly contested award, which did not adopt the formulation of either the US or Iranian party disputants and which featured a Dissenting Opinion by Iranian Tribunal members and a concurring opinion by certain US Tribunal members, it was held that the text of the Claims Settlement Declaration did not permit an unequivocal answer, and recourse was had to general rules of international law.[25] The Convention on Certain Questions Relating to the Conflict of Nationality Law and a number of judicial decisions and early twentieth century arbitral awards were referred to by the Tribunal majority. But particular significance was also accorded to *Nottebohm*,[26] from which the Tribunal extracted the importance of the search for 'real and effective nationality', as opposed to an approach relying on more formalistic criteria. Accordingly, the Tribunal concluded that the international law rule was 'real and effective nationality', entailing a search for 'stronger factual ties between the person concerned and one of the States whose nationality is involved'.[27] When determining 'dominant and effective' nationality, the Tribunal stated that all relevant factors would be considered including 'habitual residence, center of interests, family ties, participation in public life and other evidence of attachment'.[28]

5.24 The rule on dual nationality of natural persons expounded in Case No A/18 remains a substantive principle of international law, one that is now expressly accepted in investment treaty drafting practice.[29] Of particular interest is the Tribunal's determination, in the case of natural persons, that an investigation of the factual background to establish actual relationships is necessary. While the law of diplomatic protection and of the Iran–US Claims Tribunal does not often impinge directly on the decision-making of investment treaty arbitral tribunals, it certainly does so when the issue is the dual nationality of claimant-individuals, discussed in Section E of this chapter. Moreover, the nationality principles set out in the ILC's Articles on Diplomatic Protection and some of the notable diplomatic protection cases—on corporate nationality (see below) as well as the nationality of natural persons—remain an important part of the discourse between parties and arbitrators in addressing

[23] See *Elettronica Sicula SpA (ELSI) (United States of America v Italy)* [1989] ICJ Rep 15, 64 and 79 (paras 106 and 132) where the ICJ, in interpreting the bilateral Treaty of Friendship, Commerce and Navigation between the USA and Italy (and therefore not concerned with the evaluation of customary international law), accepted that the narrower approaches in diplomatic protection will not necessarily apply for a treaty-based claim. See also ILC, 'Diplomatic Protection: Draft Articles with Commentaries', art 11 commentary para 11.

[24] *Iran-United States*, Case No A/18 (1984) 5 Iran-USCTR 251. See GH Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (1996) 492 *et seq*. See also, to like effect, the Tribunal's earlier decision in *Nasser Esphahanian v Bank Tejarat* (1983) 2 Iran-USCTR 157.

[25] *Iran-United States*, Case No A/18, 259–60.

[26] *Nottebohm*, 22–4.

[27] *Iran-United States*, Case No A/18, 265.

[28] ibid 265.

[29] See, for example, 2012 US model BIT art 1 (definition of 'investor of a Party'—'a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality') (Appendix 6 below) (discussed at para 5.61 below); ILC 'Diplomatic Protection: Draft Articles with Commentaries', art 7 provides: 'A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the date of injury and at the date of the official presentation of the claim.'

jurisdiction *ratione personae* assertions and objections. To that extent, diplomatic protection principles have some relevance in the field of investment treaty arbitration, though such relevance must be characterised as limited.

5.25 Diplomatic protection principles and cases in relation to juridical persons claiming investment treaty protection arguably have even less direct relevance than is the case for natural persons. However, while the Iran–US Claims Tribunal exhibited substantial uncertainty about whether to prefer a formalistic test of incorporation or an investigation into actual control in order to assess the issue of corporate nationality, the formalistic test as considered in the diplomatic protection background reflects an approach that investment tribunals have largely adopted. But one of the key distinctions between diplomatic protection and international investment law in the treatment of juridical persons is the relative flexibility of investment law in according shareholders the opportunity to bring claims for alleged damages to their investments.

5.26 The ILC Articles on Diplomatic Protection address the question of a corporation's nationality in arts 9 to 12; the commentary discusses at some length the *Barcelona Traction* case and the controversies that have attended the judgment of the ICJ and the various opinions of the judges. Among the swirl of opinions, the ICJ's judgment appears to establish certain principles, a non-exhaustive summary of which may be extracted from FA Mann's famous critique of the case:

(1) Diplomatic protection cannot in general 'be exercised by the state of the shareholders who possess mere interests in the property of the corporation'.[30]
(2) However, an 'exception may arise if the corporation has suffered a "legal demise" ':
(3) 'A second exception may arise where the company's national state lacks capacity to act on its behalf, i.e. fails to have some "genuine connection" with it.'[31]
(4) 'No rule of customary international law has yet come into existence which would confer a right of diplomatic protection on a state merely by reason of the fact that the value of its nationals' shareholdings and thus its own economic resources suffer damage.'[32]
(5) 'It is likely that the shareholders' state has a right of diplomatic protection if the company is a national of the Respondent state'[33] (though such nationality does not arise from the fact that the respondent State has exercised bankruptcy jurisdiction).

5.27 The ILC has explained that *Barcelona Traction* required, for the purposes of diplomatic protection, 'incorporation and the presence of the registered office of the company in the State of incorporation', with incorporation being the most important criterion since most States require a registered office in the State if a company wishes to be incorporated in the State.[34] However, the ILC added that the ICJ also suggested that there was a further need for some 'permanent and close connection' between the State exercising diplomatic protection and the corporation. Thus, although *Barcelona Traction* did not confront the situation where a company had only a tenuous link with the State of incorporation but a close link with

[30] FA Mann, 'The Protection of Shareholders' Interests in the Light of the *Barcelona Traction* Case' (1973) 67 AJIL 259, 272–3.
[31] ibid 273.
[32] ibid.
[33] ibid.
[34] ILC, 'Diplomatic Protection: Draft Articles with Commentaries', art 9 commentary para 3.

another State, art 9 of the Articles on Diplomatic Protection provides for an exception to the 'formal' corporate nationality rule in these circumstances. This, the ILC notes, acknowledges the reality that a State will in practice be unwilling to exercise diplomatic protection for a corporation with only a tenuous connection to the State.[35] But it is an 'either/or' rule: either the State of incorporation or, if the required links are met, the State of control, will be entitled to exercise diplomatic protection (but not both).[36]

5.28 As for the other aspects of corporate nationality addressed (to some degree) in *Barcelona Traction*, the ILC's Articles devote substantial attention (arts 11 and 12) to the principle that diplomatic protection is accorded to a company based on the company's nationality, and not the nationality of the shareholders. However, there were some exceptions to this principle. For the ILC, the exceptions can be logically extended to the points set out at arts 11(a) and (b), in which case the nationality of shareholders may be relevant. The ILC makes its case not only on logic,[37] but on State practice, arbitral awards and doctrine,[38] particularly in circumstances where the corporation has been injured by the State of incorporation itself. Similarly, art 12 extends another *Barcelona Traction* point not fully discussed in that case to the status of a rule: 'direct injury' to shareholders entitles the State of nationality of such shareholders to exercise diplomatic protection.[39]

5.29 The ICJ confirmed the strict character of diplomatic protection requirements in *Case Concerning Ahmadou Sadio Diallo (Guinea v Democratic Republic of the Congo)*.[40] The Republic of Guinea brought proceedings seeking to exercise diplomatic protection in favour of Mr Diallo, a Guinean national who was the manager of two Congolese companies. Guinea argued that the Democratic Republic of the Congo (Congo) had violated Mr Diallo's international rights: the factual basis for this claim was the Congolese authorities' persistent failure to repay sums owed to the two companies. Guinea sought to exercise diplomatic protection in favor of the two companies by way of 'substitution', in reliance on the position of Mr Diallo as manager and shareholder of the two Congolese companies. Guinea argued that equitable considerations compelled the application of diplomatic protection rules in such a way as 'not to deprive foreign shareholders in a company having the nationality of the State responsible for the international wrongful act of all possibility of protection'.[41] The ICJ rejected Guinea's arguments, stating that its review of State practice and decisions, at least at the time of the decision, did not reveal 'an exception in customary international law allowing for protection by substitution'.[42] The Court considered that the fact that various international agreements, including investment agreements and the ICSID Convention, had established special regimes governing investment protection was not sufficient to show there had been a change in the customary rules of diplomatic protection. The existence of such agreements could equally show the contrary: that there was no change in the customary rules of diplomatic protection.[43] As such, the Court held that the traditional rule (ie that only

[35] ibid art 9 commentary para 4.
[36] ibid art 9 commentary para 6.
[37] ibid art 11 commentary para 6.
[38] ibid art 11 commentary para 9.
[39] ibid art 12 commentary para 1.
[40] *Diallo (Guinea v Democratic Republic of the Congo)* (Preliminary Objections) [2007] ICJ Rep 582.
[41] ibid 612, para 82.
[42] ibid 615, para 89.
[43] ibid 615, para 90.

the State of a corporation's nationality may exercise diplomatic protection in favour of that corporation) applied.[44] The companies in question had Congolese nationality and did not have Guinean nationality. Accordingly, art 11(b) of the ILC Draft Articles prevented Guinea from exercising diplomatic protection in favor of the Congolese companies.[45]

5.30 Although the Court's Preliminary Objections Judgment was left intact in its merits decision three years later,[46] there was strong dissent from some judges criticising the majority's strict approach. Judges Al-Khasawneh and Yusuf said that the majority's approach set a 'dangerous precedent for foreign investors unprotected by bilateral investment treaties'.[47] The dissenting judges were concerned that if the expropriating State also happened to be the State of the nationality of the company and 'hence in theory the protector State', there would be no possibility of redress for the investor.[48] In contrast, modern BITs gave corporations far greater protections against indirect expropriation carried out by the State of the corporation's nationality. The dissenting judges lamented that the Court had 'missed a chance to do justice to Mr Diallo, and at the same time, to bring the standard of protection of customary international law up to the standard of modern investment law'.[49]

5.31 The ILC was careful to note that the *ELSI* case, on which it relied for certain matters, did not expound rules of customary international law and was instead concerned with the interpretation of a treaty.[50] As noted above, the Iran–US Claims Tribunal was also required to interpret a treaty, and was not bound by the rules of diplomatic protection. Nonetheless, the Iran–US Claims Tribunal struggled with formalism. For example, in *The Management of Alcan Aluminium Ltd v Ircable Corp (Alcan)*,[51] the Tribunal stated that it 'may be shown that, at the appropriate time, such [US nationals] shareholders controlled the corporation in fact, regardless of the total proportion of their shares'.[52] Other decisions (*eg Sedco v National Iranian Oil Co*)[53] pointed towards the existence of 'ownership interests sufficient to control'.[54] However, as Brower and Brueschke observe, the *Sedco* comments were obiter dicta and under *Alcan* and *Sedco* there remained many unresolved questions, such as whether control can be exercised by more than one owner.[55]

The new context of investment treaties

5.32 The landscape shifted substantially with the advent and proliferation of investment treaties. The ILC Draft Articles provide in art 17 that they 'do not apply to the extent that they are inconsistent with special rules of international law, such as treaty provisions for the protection of investments'. The commentary to art 17 notes that the field of foreign investment is today largely regulated by BITs, which may abandon or relax certain requirements

[44] ibid 616, para 94.
[45] ibid 616, para 93.
[46] (Merits) [2010] ICJ Rep 639.
[47] (Joint Dissenting Opinion, Al-Khasawneh and Yusuf) 76.
[48] ibid 66.
[49] ibid 76.
[50] ILC 'Diplomatic Protection: Draft Articles with Commentaries', art 12 commentary para 2, citing *ELSI*.
[51] *Alcan Aluminium v Ircable Corp* (1983) 2 Iran-USCTR 294 (*Alcan*).
[52] ibid 297.
[53] *Sedco Inc v National Iranian Oil Co* (Interlocutory Award) (1985) 9 Iran-USCTR 248; (Interlocutory Award) (1986) 10 Iran-USCTR 180; and (Award) (1987) 15 Iran-USCTR 23.
[54] *Sedco* (Interlocutory Award) (1985) 9 Iran-USCTR 248, 259.
[55] CN Brower and JD Brueschke, *The Iran-United States Claims Tribunal* (1998) 108–9.

of diplomatic protection. In the investment arbitration context, the claimants are private, and the dispute resolution provisions 'offer greater advantages to the foreign investor than the customary international law system of diplomatic protection'.[56] In specific relation to jurisdiction *ratione personae*, numerous investment tribunals have commented that rules that relate to the right of diplomatic protection do not apply where special agreements are in place between States and such agreements include, for example, an incorporation test for nationality without any reference to 'control' or 'genuine connection'.

5.33 Although nationality no longer serves the function of defining when a home State may espouse a claim, the threshold jurisdictional question of nationality—like the threshold question of 'investment'—looms large as the basis for potential objections to jurisdiction by respondent States. Respondent States have evinced a threefold concern when raising objections to jurisdiction *ratione personae*: (i) seeking to ensure that, pursuant to a specific request for arbitration, the tribunal is jurisdictionally competent to hear the claim (ie seeking to ensure that the putative claimant has the right to invoke the protections of a particular treaty); (ii) seeking to ensure that any compensation that may ultimately be paid is to a *foreign* investor; and (iii) seeking to ensure that, as a matter of international law and future interpretation of the nationality requirement, States will not have previously acceded to the blurring of remaining boundaries, despite the proliferation of investment vehicles and the increasingly complex cross-border structure of investments.

5.34 Among the cluster of nationality questions that have driven the current jurisdictional challenges before international investment tribunals, the new context of investment treaties has raised the following:

(1) How many nationality tests must be satisfied, and in what order—BIT plus ICSID, or ICSID plus BIT? What if the ICSID Convention does not govern because the arbitration proceeds under, for example the United Nations Commission on International Trade Law (UNCITRAL) Rules? Does the BIT, then, provide the only test to be addressed?
(2) Which substantive test for nationality governs—place of incorporation versus place of effective control; place of dominant nationality in the case of dual nationals—and when does the test apply?
(3) When must nationality be determined? Is it the time at which the claim arises or the time of lodging the claim? Must nationality be maintained continuously from the date of injury through to the date of the tribunal's award?
(4) Is there a basis under international investment law for restricting the restructuring of corporate nationality to take advantage of treaty protections? How do denial of benefits provisions act as a safeguard to prevent nationals of third States, who might technically satisfy the nationality obligations of a BIT or MIT, from obtaining the benefits of protection since these nationals were never intended by the Contracting States to be beneficiaries of these treaties?

Customary law in treaty interpretation

5.35 Underlying the consideration by tribunals of these and other *ratione personae* issues has been an ongoing controversy over the relevance and application of the rules of nationality

[56] ILC 'Diplomatic Protection: Draft Articles with Commentaries', art 17 commentary para 2.

developed in the context of the customary international law of diplomatic protection. As discussed below, tribunals have variously applied principles developed in the diplomatic protection field to the specific problems of investment treaties, or rejected them. Thus, a determination of the guidance that can properly be taken from the law of diplomatic protection provides an important element of the doctrinal context for the broader policy debate as to whether nationality can be treated as a purely formal matter determined by reference to home State law, or whether it is to be controlled by substantive criteria imposed by tribunals. There is also a continuing controversy as to the extent that an investment treaty tribunal may make its own assessment as to the correctness of a State's application of its own nationality rules.

5.36 In considering the impact of general international law on the construction of the investment treaty criteria, the complex interplay between the definition of 'investment' and that of 'nationality' in such treaties should not be forgotten. As discussed above, the customary international law of diplomatic protection gives priority to the State of incorporation in determining the nationality of a corporation in most cases.[57] It also strictly limits the extent to which a shareholder may pursue a claim against the host State for injuries done to the company in which he has invested.[58] Taken together, these two rules strictly limit the potential claims to nationality that may be made. By contrast, as explained in Chapter 6 below, the much broader notion of 'investment' in investment treaties permits claims by shareholders against the host State for losses occasioned by the (indirect) reduction in the value of the shareholding caused by damage to the company. One consequence of the treaty-based approach to investment is to widen the range of potential claimants, and thus the number of potentially relevant claims to nationality. In turn, as the awards discussed in paragraphs 5.83 to 5.158 below demonstrate, nationality has been relied upon by respondent States to perform a limiting function: to exclude claims where it is said that the claim to nationality is formal and not substantive.

5.37 It is important to remember, as the Tribunal in *Société Générale in respect of DR Energy Holdings Ltd v Dominican Republic* explained, that the new context of investment treaties does not mean that investment arbitration has yet become a separate legal order:

> It is necessary to keep in mind that investment law has meant in some respects a departure from the law governing diplomatic protection and the traditional law of international claims, this is correct largely to the extent that applicable treaties and conventions have so established by providing rules different from those of diplomatic protection. While many such treaties, like the one now before the Tribunal, provide for rules on the definition of who is a national entitled to its protection, seldom do they provide for a rule establishing the moment at which such nationality is required. The rules governing issues not addressed by the specific language of the treaty may sometimes be provided by the law of diplomatic protection, which apply as customary international law, and thus, provides for a residual role for at least some aspects of the law of diplomatic protection.[59]

The Tribunal further commented that questions of nationality set a limit to the application of investment treaties: the basic principle that the claimant must have the nationality of the

[57] *Barcelona Traction* 42; ILC 'Diplomatic Protection: Draft Articles with Commentaries' art 9.

[58] *Barcelona Traction* 48–50; ILC 'Diplomatic Protection: Draft Articles with Commentaries' arts 11–12.

[59] *Société Générale v Dominican Republic* (Decision on Jurisdiction) LCIA Case No UN 7927, IIC 366 (UNCITRAL, 2008, Orrego Vicuña P, Bishop & Cremades) para 108.

relevant Contracting Party at the time of the treaty breach still exists unless a different rule is expressed, and it will apply whether the claim is 'introduced directly by the individual or company concerned or by the State of nationality on its behalf'.[60] In short, investment treaties have introduced flexibility in respect of older rules of diplomatic protection, but the flexibility has limits—limits imposed by customary law.

5.38 In the first instance, it is crucial, both in examining an individual case and in attempting to extract substantive principles, to consider the provision controlling nationality in a particular BIT or MIT[61] that may be applicable, as well as the language in art 25 of the ICSID Convention (in cases where that Convention applies). Section D below provides a detailed discussion of the treatment of nationality requirements in these texts, as well as other investment treaties. In considering these texts, it is worth bearing in mind that the terms of all such treaties must be interpreted pursuant to the Vienna Convention on the Law of Treaties.[62]

Investment awards as precedents

5.39 In the context of addressing threshold matters of jurisdiction, particularly nationality and jurisdiction *ratione personae*, investment treaty tribunals have set out, in recent cases, three clear and distinct positions on parties' reliance on previous awards and decisions. All arbitrators and all tribunals accept that precedent, in the common law sense of the binding authority of previous case law, does not exist in investment law. However, arbitrators take different positions on whether a *jurisprudence constante* in relation to nationality has developed or should even be a goal of investment law.

5.40 The position in favour of the development of *jurisprudence constante*, which also suggests that, in certain respects, a *jurisprudence constante* has developed regarding nationality, is expressed by the majority in *Quiborax v Bolivia*[63] and by all the arbitrators sitting in *KT Asia*.[64] The *Quiborax* Tribunal, in discussing the respondent's objections to jurisdiction, noted that both parties had relied on previous arbitral decisions or awards in support of their positions (including, in certain instances by the State, submissions on why such awards should be departed from). Although the Tribunal noted that it was not bound by prior decisions, it stated that it 'is of the opinion that it must pay due consideration to earlier decisions of international tribunals. Specifically, it deems that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It further deems that, subject to the specifics of the Treaty and of the circumstances of the actual case, it has a duty to contribute to the harmonious development of investment law, with a view to meeting the legitimate expectations of the community of States and investors towards the certainty of the rule of law.'[65]

5.41 An almost identical passage on the Tribunal's duty to contribute to the harmonious development of investment law appears a year later in the *KT Asia* award, in the Tribunal's discussion

[60] ibid para 109.

[61] Such as North American Free Trade Agreement (adopted 17 December 1992, entered into force 1 January 1994) CTS 1994 No 2 ('NAFTA'); or the Energy Charter Treaty.

[62] Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

[63] *Quiborax SA v Bolivia* (Decision on Jurisdiction) ICSID Case No ARB/06/2, IIC 563 (2012, Kaufmann-Kohler P, Lalonde & Stern) paras 45–6.

[64] *KT Asia Investment Group BV v Kazakhstan* (Award) ICSID Case No ARB/09/8, IIC 615 (2013, Kaufmann-Kohler P, Glick & Thomas).

[65] *Quiborax* para 46.

of the respondent's objections to jurisdiction *ratione personae*.[66] There the Tribunal also indicated, in rejecting the application of a diplomatic protection rule regarding nationality in investment treaty arbitration, that its conclusion was confirmed by a review of relevant decisions: 'The Tribunal concurs with the wide consensus that emerges from case law according to which rules of customary international law applicable in the context of diplomatic protection do not apply where they have been varied by the *lex specialis* of an investment treaty.'[67]

5.42 Thus, according to this first or 'case law' position, there should be an attempt—indeed, arbitrators have a *duty*—to develop consistent solutions regarding nationality issues in investment treaty arbitrations. Part of that duty entails attempting to discern a consistent direction in previous cases dealing with similar nationality issues, and then fashioning a determination in the case before the tribunal that is in line with that direction. Moreover, in certain respects, such as the inapplicability of diplomatic protection rules, the conclusion of the *KT Asia* Tribunal is that the case law has clearly spoken, and should be a driver, if not the main driver, in the tribunal's decision in the case before it. A corollary of this view is that previous dissenting opinions on nationality issues, if not part of a discernible and substantial counter-trend, should carry little or no weight with subsequent tribunals and may effectively be disregarded, in the same way that an award diverging from 'consistent cases' would not be influential.

5.43 This case law approach, however, is not how the entire Tribunal in *Quiborax* approached the question of the relevance of previous decisions. The passage quoted above, on the duty of the tribunal to contribute to the harmonious development of investment law, contains a final sentence: 'Arbitrator [Brigitte] Stern does not analyze the arbitrator's role in the same manner, as she considers it her duty to decide each case on its own merits, independently of any apparent jurisprudential trend.'[68] This is a significant difference in opinion: a prominent investment treaty arbitrator holds the view that case law trends are irrelevant to her decision-making. According to this position, previous decisions on nationality, while they may be taken into account, should not drive the determinations to be reached by a tribunal in the particular case before it. Additionally, the 'legitimate expectations' of the investment community, as considered by Stern, do not include the development of predictable investment law rules.

5.44 A third or 'comity' position is set out in the *Tulip v Turkey* award on jurisdiction, in March 2013.[69] The *Tulip* Tribunal commented that both sides in the case had made references to previous ICSID and treaty awards and statements in ICJ judgments: 'Although not bound by such citations, the Tribunal accepts that, as a matter of comity, it should have regard to earlier decisions of courts (particularly the ICJ) and of other international dispute tribunals engaged in the interpretation of the terms of a BIT.'[70]

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[66] *KT Asia* para 83.

[67] ibid para 129.

[68] *Quiborax* para 46.

[69] *Tulip Real Estate Investment and Development Netherlands BV v Turkey* (Decision on Bifurcated Jurisdictional Issue) ICSID Case No ARB/11/28, IIC 583 (2013, Griffith P, Jaffe & Knieper).

[70] ibid para 45, citing *AES Corp v Argentina* (Decision on Jurisdiction) ICSID Case No ARB/02/17, 12 ICSID Rep 308, IIC 4 (2005, Dupuy P, Bello Janeiro & Böckstiegel) paras 30–2; and *Saipem SpA v Bangladesh* (Decision on Jurisdiction) ICSID Case No ARB/05/7, IIC 280 (2007, Kaufmann-Kohler P, Otton & Schreuer) para 67.

In *Tulip*, the Tribunal also had to address the parties' contesting submissions on the hierarchy of prior authority regarding jurisdictional issues. The State sought to place International Court of Justice judgments at the apex, while the claimant contended that the awards of previous ICSID tribunals should hold pride of place, on the grounds that such awards concern investment treaty law, not general principles of international law. The Tribunal declined to engage in the hierarchical analysis of 'precedent', but commented that it accorded deference to relevant statements by the International Court as to general principles on construction of the terms of a treaty, as those principles may apply to the construction of a BIT. On the other hand, since there was no precedential order in regard to previous decisions on the construction of BITs, 'the relevant enquiry remains for the Tribunal to interpret and apply the terms of the BIT itself. Prior decisions may inform that enquiry, but it is for this Tribunal to make its own interpretation of Article 8(2) [of the BIT], informed by the rigor and persuasiveness of relevant analysis and statements by decisions of earlier tribunals.'[71] **5.45**

Pursuant to the 'comity' position, then, previous BIT awards on jurisdictional questions such as nationality should be considered, and they are potentially valuable sources of guidance, depending on the strength of their individual analyses. In outlining the 'comity' position, the *Tulip* Tribunal appears to be less interested than the *KT Asia* Tribunal in identifying case law trends, though an overwhelming number of cases in one direction would presumably be difficult to disregard as a tribunal seeks to assess prior decisions for guidance. **5.46**

Each of the three positions outlined above would place primary emphasis on the need for a tribunal, unconstrained by precedent and given the absence of an obligatory substantive test for the nationality of corporations and individuals in international law, to make nationality determinations on the basis of the relevant investment treaty (or treaties, in ICSID cases). However, it is apparent that two of the three positions—*KT Asia*'s 'case law' and *Tulip*'s 'comity' approaches—also place heavy reliance, at least for purposes of guidance, on previous *ratione personae* decisions. In most aspects of this particular area of investment law, the weight of 'consistent cases' has become so substantial that very well-reasoned dissenting opinions, such as those by Aldonas in *TSA Spectrum v Argentina*[72] and Orrego Vicuña in *Siag v Egypt*[73], are now rarely mentioned, much less addressed and genuinely considered, in subsequent awards. That is unfortunate for the enterprise of legal analysis, but it is a practical consequence of the enterprise of investor–State arbitration. **5.47**

The same fate has enveloped Weil's elegant dissent in *Tokios* regarding 'real' or 'effective' nationality.[74] That dissent has had little influence on the development of investment law, and now plays no successful part—though some States still advance it[75]—in arbitrations under the first limb of art 25(2)(b) of the ICSID Convention or in non-ICSID cases involving corporate claimants that have, as a matter of home State law, the nationality of the home State.[76] **5.48**

[71] *Tulip v Turkey* para 47.

[72] *TSA Spectrum de Argentina SA v Argentina* (Award) ICSID Case No ARB/05/5, IIC 358 (2008, Danelius P, Abi-Saab & Aldonas (dissenting)). Aldonas dissented regarding the proper interpretation of the second limb of art 25(2)(b) of the ICSID Convention.

[73] *Siag v Egypt* (Dissenting Opinion, Orrego Vicuña); regarding the proper interpretation of dual nationality under art 25(2)(a) of the ICSID Convention.

[74] *Tokios Tokelés v Ukraine*.

[75] *KT Asia*.

[76] *Hulley v Russia* (Interim Award on Jurisdiction and Admissibility).

C. Burden of Proof

5.49 There is no provision in the ICSID Convention or the ICSID Arbitration Rules regarding the burden of proof on nationality issues. Some tribunals state that ICSID follows general international law on this matter, and note, accordingly, that a party asserting a fact carries the burden of proving that fact.[77] However, assessing nationality at the jurisdictional phase of proceedings raises a particular set of burden of proof problems that a number of tribunals in recent cases have addressed, with varying degrees of explanatory detail in view of the circumstances of individual cases.

5.50 In *Tulip v Turkey*, the Tribunal restated the general international law rule: the burden lies with the party asserting a fact, and further remarked that the claimant must satisfy the burden of proof required at the jurisdictional phase.[78] This remained the case, the Tribunal added, even though the respondent had raised a jurisdictional objection: 'the onus remains on the claimant to establish that the requirements of Article 8(2) [of the Netherlands-Turkey BIT] have been satisfied and that the Tribunal has jurisdiction.'[79] The Tribunal's reliance on the general rule, in this instance, enveloped the burden-shifting realities of the particular case—the respondent had raised a plausible jurisdictional objection, which the claimant then had to overcome. In *Arif v Moldova*[80] and *Lao Holdings*,[81] however, the nature of the jurisdictional objection meant that there was no burden-shifting back to the claimant. In *Arif v Moldova*, the Tribunal stated that it would not overturn the French authorities' decision to grant French nationality to Mr Arif absent a convincing showing by the respondent that the acquisition of nationality was fraudulent or resulted from material error: 'casting doubt' on the claimant's nationality was not sufficient.[82] In *Lao Holdings*, the State accepted that it had to prove that the legal dispute arose before the date on which the claimant acquired Dutch nationality.[83]

5.51 The discussions of burden of proof and the issue of ' dual nationality' of natural persons under ICISD Convention art 25(2)(a) are set out in useful detail in, among other cases, *Ambiente v Argentina* and *Siag v Egypt*. In *Ambiente*, the issue was whether the claimants held dual Italian-Argentinean nationality; if so, jurisdiction *ratione personae* would be unavailable under the ICSID Convention's preclusion of claims by individuals holding the nationality of the home State as well as the host State.[84] The respondent State argued that the claimants carried the burden of proving all aspects of nationality, whereas the claimants contended that they only needed to prove their Italian nationality, and the respondent bore the burden of proving Argentinean nationality.[85] The Tribunal noted the well-settled international law

[77] *Ambiente Ufficio SpA v Argentina* (Decision on Jurisdiction and Admissibility) ICSID Case No ARB/08/9, IIC 576 (2013, Simma P, Böckstiegel & Torres Bernárdez (dissenting)) paras 309–11.

[78] *Tulip v Turkey*.

[79] ibid para 48.

[80] *Arif v Moldova* (Award) ICSID Case No ARB/11/23, IIC 585 (2013, Cremades P, Hanotiau & Knieper).

[81] *Lao Holdings NV v Lao People's Democratic Republic* (Decision on Jurisdiction) ICSID Case No ARB (AF)/12/6, IIC 633 (ICSID (AF), 2014, Binnie P, Hanotiau & Stern).

[82] *Arif v Moldova* para 357, citing *Micula v Romania* (Decision on Jurisdiction and Admissibility) ICSID Case No ARB/05/20, IIC 339 (2008, Lévy P, Alexandrov & Ehlermann) paras 94–5.

[83] *Lao Holdings* paras 66–8 (*ratione temporis*).

[84] *Ambiente v Argentina*.

[85] ibid para 308.

principle, described by the ICJ, that a litigant seeking to establish the existence of a fact bears the burden of proving it.[86] On this basis, the Tribunal adopted the claimants' position regarding the jurisdictional phase: the burden of showing that the claimants were Italian fell on the claimants (for which photocopied certificates were sufficient), while the burden to 'disprove the negative elements'—ie prove that the claimants were Argentinean—fell on the respondent.[87]

5.52 Prior to *Ambiente, Siag v Egypt* had adopted a different approach to the question of whether the claimant had to prove that it was not a national of the host State at the relevant times under ICSID Convention art 25(2)(a). Although the test was similarly helpful to the claimant, it arguably lacks the clarity of *Ambiente*'s identification of where particular burdens should lie. The *Siag* Tribunal stated that, in relation to a jurisdictional objection, the claimant did not have to disprove Egyptian nationality (and that Egyptian law did not provide the relevant jurisdictional test).[88] Rather, the applicable test was that stated by Judge Higgins in the *Oil Platforms Case* (1996). Under that test, the Tribunal should determine whether, on the facts alleged by the claimant, the respondent's actions might violate the treaty in question.[89] Since the determination of an actual treaty breach was for the merits phase and should not impinge on jurisdiction, the relevant jurisdictional question was whether the facts alleged by the claimant, if established, were capable of coming within provisions of BIT that had been invoked.[90]

5.53 The Annulment Committee in *Duke v Peru* gives a clearer explanation of Judge Higgins' separate opinion in *Oil Platforms*.[91] The Committee noted that the *Oil Platforms* decision is often misinterpreted as endorsing a '*prima facie* standard' for jurisdictional challenges.[92] Yet this expression should not be taken to mean as suggesting that the determination of jurisdiction *ratione personae* is entirely a prima facie inquiry. The correct approach is that where an issue relates *exclusively* to jurisdiction and not to the merits, as in the case of establishing a claimant's nationality, the tribunal has to determine the issue finally, and *not* on a prima facie basis. However, there is an important distinction between the *overall burden of proof* (which remains with the claimant to establish his or her identity) and *two subsidiary questions*, namely:

(1) the burden of proof that would arise (on the part of the respondent) if the respondent alleges that the claimant also has the nationality of the host State; and
(2) an evidentiary burden (carried by the claimant) to establish particular facts relating to nationality that the respondent may choose to put in issue.

5.54 Accordingly, there is no *general* shift of the burden of proof from the claimant to the respondent in establishing nationality, and no change to the requirement that the claimant demonstrate the tribunal's jurisdiction to hear the case in the first place.

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[86] ibid paras 309–11.
[87] ibid paras 312, 314 and 319.
[88] *Siag v Egypt* para 138.
[89] ibid para 139, citing *Oil Platforms (Iran v United States of America)* [1996] ICJ Rep 803, 847 (separate opinion, Judge Higgins).
[90] ibid paras 139–41.
[91] *Duke Energy International Peru Investments No 1 Ltd v Peru* (Decision on Annulment) ICSID Case No ARB/03/28, IIC 483 (2011, McLachlan P, Hascher & Tomka).
[92] ibid para 117.

5.55 A helpful illustration of the second subsidiary question (namely, the claimant's evidentiary burden to establish facts relating to nationality that the respondent may choose to put in issue) is *Soufraki v United Arab Emirates*. In that case, the Tribunal held that Soufraki carried the burden of establishing he possessed Italian nationality on the pertinent dates.[93] If he failed to do so, then the Tribunal would not have jurisdiction to decide the case at all. Soufraki submitted to the Tribunal certificates of his Italian nationality, which the Tribunal accepted as prima facie evidence of the existence of Soufraki's Italian nationality. At this point, the burden of proving the contrary would have fallen on the respondent. However, Soufraki's evidence did not pass the prima facie evidentiary burden. Certain factual aspects caused the Tribunal to doubt the accuracy of the certificates Soufraki provided, including textual gaps and inconsistencies between the certificates which Soufraki could not give an explanation for. These inconsistencies, among other factors, undermined the probative value of the certificates. Accordingly, Soufraki failed to discharge his burden of proving Italian nationality on the pertinent dates.

5.56 In assessing a challenge under ICSID Convention art 25(2)(b), the 'first limb', to a corporation's assertion that it held the nationality of the home State, the *Quiborax* Tribunal began by promulgating a burden-of-proof approach that resembled that of the *Oil Platforms Case*, but concluded with a specific statement on shifting burdens that arguably provides more structure.[94] At the jurisdictional stage, the Tribunal stated, the claimants must establish '(i) that the jurisdictional requirements of Article 25 of the ICSID Convention and of the relevant BIT are met, which includes proving the facts necessary to meet these requirements, and (ii) that they have a prima facie cause of action under the Treaty, that is that the facts they allege are susceptible of constituting a breach of the Treaty *if* they are ultimately proven. The Tribunal finds that this test strikes a proper balance between a more exacting standard which would call for examination of the merits at the jurisdictional stage, and a less exacting standard which would confer excessive weight to the Claimants' own characterization of their claims.'[95] However, in relation to shifting burdens, the Tribunal added that assuming the claimants have discharged their burden of proving they are investors, the question then would become whether the Respondent has 'disproven or raised sufficient doubts on the Claimants' allegations that they are "investors". Finally, on the basis of this overall analysis, [the Tribunal] will conclude whether or not the Claimants are investors.'[96]

5.57 The *Caratube* Tribunal has been particularly helpful in setting out a burden of proof regime regarding foreign control issues under the 'second limb' of ICSID Convention art 25(2)(b).[97] Here, the key question is whether the putative claimant, a host State corporation, bears the burden of showing that it is under the control of a person or entity holding home State nationality, and, if so, what showing the putative claimant must make. The Tribunal's starting point was that the claimant bears the burden to establish the Tribunal's jurisdiction *ratione personae*.[98] The Tribunal recognised Schreuer's view that, under the ICSID Convention, an

[93] *Soufraki v United Arab Emirates* para 109.

[94] *Quiborax SA v Bolivia* (Decision on Jurisdiction) ICSID Case No ARB/06/2, IIC 563 (2012, Kaufmann-Kohler P, Lalonde & Stern).

[95] ibid para 54.

[96] ibid para 114.

[97] *Caratube International Oil Company LLP v Kazakhstan* (Award) ICSID Case No ARB/08/12, IIC 562 (2012, Böckstiegel P, Griffith & Hossain).

[98] ibid para 364.

agreement on nationality and foreign control that is apparent from the relevant BIT and is asserted by the claimant 'would create a strong presumption in favour of foreign control that should be discarded only if it amounts to an unreasonable selection of the facts'.[99] This would effectively mean that the burden would fall on the respondent State, in this case Kazakhstan, to show that the claimant had not met the condition of the relevant BIT regarding foreign control. However, the *Caratube* Tribunal declined to follow the approach advanced by Schreuer.[100] Instead, the Tribunal ruled that the burden was on the claimant to show that it fulfilled the BIT's criteria for control by another Contracting State: no presumption existed in favour of the claimant on this issue, though the burden could shift to the respondent based on an initially persuasive showing of foreign control—both subjective and objective—by the claimant.[101]

D. Investment Treaties

Bilateral investment treaties

Individuals ('natural persons')

5.58 The definition of a 'national', or an individual 'investor', for the purpose of the BIT may be the same overarching definition for both contracting States, or may include a more specific definition for one or both States.

5.59 The 2006 France model BIT offers an example of a single definition: 'The term "nationals" means physical persons possessing the nationality of either Contracting Party.'[102]

5.60 The China model BIT defines investor as 'natural persons who have nationality of either Contracting Party in accordance with the laws of that Contracting Party.'[103] The 2012 US, 2008 UK, and 2008 Germany model BITs also define 'nationals' specifically by reference to the law in force in their respective countries, so the counter Contracting Party would have the opportunity to do the same.[104]

5.61 The 2012 US model BIT has been developed to include two separate definitions of 'national', specifically incorporating the Iran–United States Claims Tribunal's test for dual nationality. Therefore, while a 'national' is defined by 'Title III of the Immigration and Nationality Act' (ie by reference to US domestic law), the definition in art 1 of an 'investor of a party' specifically determines that 'a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality'.[105]

5.62 The Sri Lanka–Iran BIT sets forth only the single definition of 'national', but qualifies this definition to exclude those who share dual nationality with the other contracting party. The Sri Lanka–Iran BIT applies to 'natural persons who, according to the laws of one

[99] Ibid para 365, citing Schreuer 313, para 815.
[100] *Caratube v Kazakhstan* para 365.
[101] ibid paras 367–8.
[102] 2006 France model BIT (Appendix 10 below) art 1(2)(a).
[103] China model BIT art 1(2), reprinted in N Gallagher and W Shan, *Chinese Investment Treaties: Policies and Practice* (2009) Appendix IV.
[104] 2012 US model BIT (Appendix 6 below) art 1; 2008 UK model BIT (Appendix 4 below) art 1(c)(i); 2008 Germany model BIT (Appendix 7 below) art 1(3)(a).
[105] 2012 US model BIT (Appendix 6 below) art 1.

Contracting Party, having its nationality and are not nationals of the other Contracting Party'.[106] Framed differently, but having the same effect, the China-Cameroon BIT provides that, 'This Agreement shall not apply to investments made by natural persons who have nationality of both Contracting Parties.'[107]

5.63 Some BITs require the additional criterion of residence or domicile. For example, Israel requires that Israeli 'nationals' be 'permanent residents of the State of Israel' under the Germany–Israel BIT,[108] and similar requirements are set out in the Netherlands–Chile BIT[109] and the Italy–Argentina BIT.[110]

5.64 It was once common for socialist States to exclude natural persons, and limit the protection afforded in the treaty to, for instance, 'Romanian economic units having legal personality and which, under the law of Romania, are entitled to trade abroad or undertake international economic cooperation activities'.[111]

5.65 However, with the transition to market economies, such treaties have been reconsidered and include 'natural persons who, according to the law in force in Romania, are considered to be its citizens'.[112]

Corporations ('juridical persons')

5.66 The nationality of companies in the model BITs may comprise three criteria, referring to the state of incorporation, management (seat) of the company, or control.

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[106] Agreement on Reciprocal Promotion and Protection of Investments (Iran-Sri Lanka) (signed 25 July 2000) art 1(2)(a). The Agreement for the Reciprocal Promotion and Protection of Investments (Israel-Romania) (signed 3 August 1998, entered into force 27 July 2003) also contains a qualification in respect of dual nationals. In the section addressing Israel's definition of 'investor', art 1 provides: 'With respect to physical persons—an individual who possesses both Israeli and Romanian citizenship, who invests in Israel shall not be considered a Romanian investor, for the purposes of this Agreement.'

[107] Agreement for the Promotion and Protection of Investments (Colombia-China) (signed 22 November 2008, entered into force 2 July 2013) art 2.2.

[108] Treaty concerning the Encouragement and Reciprocal Protection of Investments (Israel-Germany) (signed 24 June 1976, entered into force 14 April 1980) art 1(3)(b).

[109] Agreement on Encouragement and Reciprocal Protection of Investments (Netherlands-Chile) (signed 30 November 1998). The Protocol provides:

> 1. ad Article 1
>
> a) Natural persons defined in Article 1, b, (i) who, at the time their investment is made, for more than five years have had their residence in the territory of the Republic of Chile in which their investment is located, may only invoke the rights granted under Article 4 and 8 of this Agreement if their investment constituted a capital inflow from outside the respective territory.
>
> b) Natural persons as defined in Article 1, b, (i) of Kingdom of the Netherlands who are holding their investment in the territory of the Republic of Chile through a legal person located in a third State (i.e. nationals within the meaning of Article 1, b, (iii) of this Agreement) shall not be entitled to submit a dispute to international arbitration in accordance with the provisions of Article 8 of this Agreement, unless such persons have at the time their investment was made and ever since been domiciled in the territory of the Kingdom of the Netherlands.

[110] Agreement for the Promotion and Protection of Investment (Italy-Argentina) (signed 22 May 1990, entered into force 14 October 1993).

[111] Agreement on the Mutual Promotion and Protection of Investments (Romania-UK) (signed 19 March 1976, entered into force 22 November 1976, terminated 10 January 1996) art 2(3)(a).

[112] Agreement for the Promotion and Reciprocal Protection of Investments (Romania–UK) (signed 13 July 1995, entered into force 10 January 1996) art 1(c)(ii).

The incorporation approach is adopted by the 2008 UK model BIT, whereby UK companies are 'corporations, firms and associations incorporated or constituted under the law in force in any part of the United Kingdom'.[113] **5.67**

This conception is invoked by the 2012 US model BIT, with the additional criterion that 'a branch [is] located in the territory of a Party and carrying out business activities there'.[114] **5.68**

Prior to the 2008 Germany model BIT, certain BITs entered into by Germany defined juridical persons by reference to their seat. For example, in the China-Germany BIT, 'investor' (in respect of Germany) includes 'any juridical person as well as any commercial or other company or association with or without legal personality having its seat in the territory of the Federal Republic of Germany, irrespective of whether or not its activities are directed at profit.'[115] ('Seat' is not expressly defined in the text of the China–Germany BIT.) In contrast, the 2008 Germany model BIT determines the nationality of a company by reference to German and European Union requirements for incorporation/registration.[116] **5.69**

The Sri Lanka–Iran BIT requires both that the legal entity be 'formed and incorporated under the laws of one Contracting Party and have their seat together with their substantial economic activities in the territory of that same Contracting Party'.[117] **5.70**

The 2004 Netherlands model BIT requires either incorporation or control, affording protection to both those 'legal persons constituted under the law of that Contracting Party' (ie incorporated) and those 'legal persons not constituted under the law of that Contracting Party but controlled, directly or indirectly, by natural persons as defined in (i) or by legal persons as defined in (ii)'.[118] **5.71**

By way of example, the Netherlands–Argentina BIT deals with the issue of foreign control by reference to factors including affiliation and percentage shares held.[119] The term 'investor' is defined, in art 1(b)(iii), as including 'legal persons, wherever located, controlled, directly or indirectly, by nationals of that Contracting Party.' The Protocol to the BIT details that **5.72**

[113] 2008 UK model BIT (Appendix 4 below) art 1(d)(i).

[114] 2012 US model BIT (Appendix 6 below) art 1 (definition of 'enterprise of a Party').

[115] Agreement on the Encouragement and Reciprocal Protection of Investments (Germany-China) (signed 1 December 2003, entered into force 11 November 2005) art 1(2)(a). Similarly, the China model BIT art 1(2)(b) defines 'investor' as including 'legal entities, including companies, associations, partnerships and other organizations, incorporated or constituted under the laws and regulations of either Contracting Party and have their seats in that Contracting Party'.

[116] 2008 Germany model BIT (Appendix 7 below) art 1(3)(a) defines a corporate investor as including:

> any juridical person and any commercial or other company or association with or without legal personality which is founded pursuant to the law of the Federal Republic of Germany or the law of a Member State of the European Union or the European Economic Area and is organized pursuant to the law of the Federal Republic of Germany, registered in a public register in the Federal Republic of Germany or enjoys freedom of establishment as an agency or permanent establishment in Germany pursuant to Articles 43 and 48 of the EC Treaty.

[117] Sri Lanka–Iran BIT art 1(2)(b).

[118] 2004 Netherlands model BIT (Appendix 8 below) art 1(b)(ii) and (iii).

[119] Agreement on Encouragement and Reciprocal Protection of Investments (Netherlands-Argentina) (signed 20 October 1992, entered into force 1 October 1994).

the following factors (among others) would be accepted as evidence of the requisite control: (i) being an affiliate of a legal person of the other Contracting Party; and (ii) having a direct or indirect participation in the capital of a company higher than 49 per cent or the direct or indirect possession of the necessary votes to obtain a predominant position in assemblies or company organs.

5.73 In another BIT entered into by the Netherlands with Bosnia and Herzegovina, control is defined in a different way.[120] Under art 1(b)(iii), 'nationals' include legal persons that are controlled, directly or indirectly, by natural legal persons. The Protocol to the BIT elaborates that indirect control of an investment means 'control in fact, determined after an examination of the actual circumstances in each situation'. Relevant factors determining control include: (i) financial interest, including equity interest, in the investment; (ii) ability to exercise substantial influence over the management and operation of the investment; and (iii) ability to exercise substantial influence over the selection of members of the board of directors or any other managing body. The Protocol also makes clear that the investor claiming such control has the burden of proving that such control exists.

5.74 In another example, art 1.6.1 of the 2015 India model BIT distinguishes between control and ownership of an enterprise in this way:

> 1.6.1 For the purposes of this Treaty, an Enterprise will be considered as:
>
> (i) 'Controlled' by the Investor, if such Investor has the right to appoint a majority of the directors or senior management officials or to control the management or policy decisions of such Enterprise, including by virtue of their shareholding, management, partnership or other legal rights or by virtue of shareholders agreements or voting agreements or partnership agreements or any other agreements of similar nature.
> (ii) 'Owned' by the Investor, if more than 50% of the capital or funds or contribution in the Enterprise is directly or beneficially owned by such Investor, or by other companies or entities which are ultimately owned and controlled by the Investor.[121]

Multilateral Investment Treaties

NAFTA

5.75 The nationality requirements under NAFTA are as follows for the individual: 'a natural person who is a citizen or permanent resident of a Party and any other natural person referred to in Annex 201.1'.[122]

5.76 Annex 201.1 offers specific definitions, for the purpose of the treaty, by reference to the domestic Mexican and US laws on citizenship, respectively arts 30 and 34 of the Mexican Constitution and the 'existing provisions of the [United States] *Immigration and Nationality Act*'.[123]

5.77 The nationality of a company is conferred upon an enterprise 'constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there'.[124]

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[120] Agreement on Encouragement and Reciprocal Protection of Investments (Netherlands–Bosnia and Herzegovina) (signed 13 May 1998, entered into force 1 January 2002).

[121] 2015 India model BIT available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3560>.

[122] NAFTA art 201.

[123] ibid Annex 201.1.

[124] ibid arts 201 and 1139.

A denial of benefits provision in art 1113(2), however, permits a Contracting Party to deny the benefits of the investment chapter of NAFTA where the enterprise is owned or controlled by investors of a non-Party and the enterprise has no substantial business activities in the territory of the Party under whose law it is constituted or organised. **5.78**

Energy Charter Treaty

The Energy Charter Treaty defines as an 'investor' both 'a natural person' by reference to the contracting party's 'applicable' domestic law, and 'a company or other organization organized in accordance with the law applicable in that Contracting Party'.[125] However, like NAFTA, this broad application of the treaty to companies and organisations is qualified: art 17(1), in the context of a denial of benefits inquiry, requires consideration of whether the company's connection with the State in which it is incorporated or organised is substantial. Specifically, art 17(1) permits a Contracting Party to deny the benefits of the treaty to a legal entity 'if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized'. **5.79**

Association of Southeast Asian Nations

Under the Comprehensive Investment Agreement of the Association of Southeast Asian Nations Agreement (ACIA), 'investor' is defined as a 'natural person of a Member State or a juridical person of a Member State that is making, or has made an investment in the territory of any other Member State'.[126] In turn, the ACIA defines 'juridical person' as 'any legal entity duly constituted or otherwise organised under the applicable law of a Member State'.[127] **5.80**

As a comparison, it is worth noting that art 9.1 of the Trans-Pacific Partnership Agreement[128] (TPPA) adopts a similar definition of enterprise to the 2012 US model BIT. The TPPA defines 'enterprise of a Party' as 'an enterprise constituted or organised under the law of a Party, or a branch located in the territory of a Party and carrying out business activities there'.[129] Similarly, art 1 of the US model BIT defines 'enterprise' as 'any entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including a corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organization; and a branch of an enterprise'. The European Union–Canada Comprehensive Economic and Trade Agreement takes a different approach. It defines 'investor' as including an 'enterprise of a Party'.[130] An enterprise of a **5.81**

[125] Energy Charter Treaty art 1(7). As noted, art 1(7) is qualified by art 17(1) for corporate investors: see A Sinclair, 'The Substance of Nationality Requirements in Investment Treaty Arbitration' (2005) 20 ICSID Rev-FILJ 357, 378–387.

[126] ASEAN Comprehensive Investment Agreement (signed 26 February 2009, entered into force 29 March 2012) ('ACIA') art 4(d) (Appendix 3 below).

[127] ibid art 4(e) continues '... whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any enterprise, corporation, trust, partnership, joint venture, sole proprietorship, association, or organisation'.

[128] Trans-Pacific Partnership Agreement 2016 (signed 6 February 2016, not yet in force) (Appendix 11 below).

[129] A footnote to this definition explains: 'For greater certainty, the inclusion of a "branch" in the definitions of "enterprise" and "enterprise of a Party" is without prejudice to a Party's ability to treat a branch under its laws as an entity that has no independent existence and is not separately organised.'

[130] European Union–Canada Comprehensive Economic and Trade Agreement (signed 6 July 2016, not yet in force) art X.3.

Party includes 'an enterprise that is constituted or organised under the laws of that Party and has substantial business activities in the territory of that Party'.

ICSID Convention Article 25

5.82 As already set out at the beginning of this chapter, art 25(2) of the ICSID Convention defines the nationality of natural persons or individuals, and juridical persons in this way:

> (2) 'National of another Contracting State' means:
> (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and
> (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.[131]

With the Convention silent on the method to be employed, early ICSID awards, such as *Amco v Indonesia*, applied the requirements for nationality as being the 'place of incorporation' and the 'place of its registered seat'.[132] As Schreuer has explained: 'The overwhelming weight of the authority … points towards the traditional criteria of incorporation or seat for the determination of corporate nationality under Art. 25(2)(b). It follows that the reference to foreign control in Art. 25(2)(b) does not impose a further general requirement upon investors having the requisite foreign nationality in order for them to submit a dispute to ICSID … The question of the corporate investor's nationality may be clarified through an agreement between the host State and the investor.'[133]

E. Awards on the Nationality of Individuals

General Principles

5.83 The established principle relevant to both ICSID (per art 25(2)(a)) and non-ICSID cases is that where dual nationality is not at issue,[134] the diplomatic protection 'effective nationality' test is not applicable.[135] Nationality simply has to be acquired in conformity with the law of

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[131] See C Schreuer, 'Commentary on the ICSID Convention: Article 25' (1997) ICSID Rev-FILJ 59, 68–78 for a detailed analysis.

[132] *Amco Asia Corp v Indonesia* (Decision on Jurisdiction) ICSID Case No ARB/81/1, 1 ICSID Rep 376 (1983, Goldman P, Foighel & Rubin) 394.

[133] See *Tokios Tokelés v Ukraine*. See C Schreuer, 'Commentary on the ICSID Convention: Article 25' 84. For further analysis see Schreuer 283 paras 707–8.

[134] That is, the claimant-individual is not a national of both the home and host States.

[135] See eg *Arif v Moldova* (Award) ICSID Case No ARB/11/23, IIC 585 (2013, Cremades P, Hanotiau & Knieper).

the home State, which is sovereign in establishing the legal conditions that must be fulfilled by an individual in order to be vested with the State's nationality.[136] Moreover, a home State's determination of nationality of an individual will not be disturbed, unless the respondent State adduces clear and convincing evidence of fraudulent acquisition of nationality or that the acquisition resulted from a material error.[137]

5.84 The jurisdictional decision in *Fakes v Turkey*,[138] an ICSID case brought under the Netherlands–Turkey BIT, is helpful in explicating the principle stated above. The claimant held both Dutch and Jordanian nationalities. The respondent State argued that the effective nationality test as set out by the ICJ in the *Nottebohm* case was applicable.[139] Under this test, according to the respondent, the claimant did not submit evidence of the effectiveness of his Dutch nationality and instead there was evidence that he held an effective Jordanian nationality, disqualifying him from claiming under the BIT. The claimant countered that effective nationality has no relevance in ICSID arbitration, and that his dual nationality did not concern the nationality of Turkey pursuant to the terms of the BIT.[140] Accordingly, under both the BIT and art 25(2)(a) of the ICSID Convention, he qualified as an investor.

5.85 The Tribunal held that the claimant had established jurisdiction *ratione personae*. Under the ICSID Convention, there was no reference to the effectiveness of an investor's nationality.[141] Moreover, the Convention did not exclude claims of dual nationals per se, where the dual national held the nationality of at least one Contracting State but not the host State.[142] That was the factual context of the present case. The *Fakes* Tribunal's rejection of any effective nationality test was in accord with the drafting history of the Convention and the jurisdictional determinations in, eg *Micula v Romania*[143] and *Pey Casado v Chile*,[144] with the latter case also having provided a similar ruling on the issue of dual nationals who did not hold the nationality of the host State.

5.86 The *Fakes* award is particularly useful in detailing the reasons for the inapplicability of the *Notttebohm* case in investment treaty arbitration, in the face of the respondent State's contention that previous ICSID tribunals had not excluded the application of this test. In summary, the Tribunal explained that in the context of diplomatic protection, the requirement of a 'genuine link' with the State of nationality made sense when the State was asserting a claim on behalf of an individual, but in treaty arbitration the State does not assert a claim.[145] Indeed, under the ICSID Convention, the Contracting Parties have waived their right to grant diplomatic protection to or bring an international claim on behalf of their nationals

[136] See also *Oostergetel v Slovakia* (Decision on Jurisdiction) (UNCITRAL, 2010, Kaufmann-Kohler P, Trapl & Wladmiroff) para 119.
[137] See *Arif v Moldova* and *Micula v Romania*.
[138] *Fakes v Turkey* (Award) ICSID Case No ARB/07/20, IIC 439 (2010, Gaillard P, Lévy & van Houtte).
[139] ibid para 54, citing *Nottebohm*.
[140] ibid para 55.
[141] ibid para 63.
[142] ibid para 62.
[143] ibid para 64, citing *Micula v Romania* para 101.
[144] ibid paras 61 and 63, citing *Pey Casado v Chile* (Award) ICSID Case No ARB/98/2 (2008, Lalive P, Chemloul & Gaillard) para 241.
[145] ibid para 68.

who pursue arbitration at ICSID.[146] The rules of customary international law do not apply as such to investor–State arbitration. The Tribunal quoted Sinclair's work on ICSID's nationality requirements with approval, in which Sinclair commented that there was an increasingly clear distinction in ICSID jurisprudence between standing for the purposes of ICSID jurisdiction and the rules governing nationality in diplomatic protection cases: in ICSID arbitration, 'the significance of the bond of nationality seems to have diminished to a mere formality'.[147] Furthermore, 'this bond is relevant only to determine whether the facilities of [ICSID] could be used by the parties [who have] agreed to do so.'[148] The *Fakes* Tribunal further commented that decisions of the Iran–US Claims Tribunal were inapposite in this regard because the Algiers Declarations must be understood as consistent with the effective nationality test in *Nottebohm*.[149]

5.87 The *Fakes* Tribunal rejected the respondent State's assertion that ICSID cases embraced the effective nationality test. It noted that the *Siag v Egypt* majority concurred with *Champion Trading*'s conclusion that art 25 of the ICSID Convention excluded a test of dominant or effective nationality.[150] The Tribunal considered that the respondent State's effort to distinguish these cases 'finds no support in the text of the Convention'.[151] The Tribunal acknowledged that this 'is not to say that the effective nationality test never has any bearing in the context of ICSID arbitration'.[152] Similarly, Broches recognised that a nationality of convenience or a nationality '*acquired involuntarily by an investor*' might be disregarded in the particular circumstances of a given case.[153] But those would be exceptional circumstances, and did not exist in the case before the Tribunal.

Dual nationality

5.88 In the non-ICSID context, where the individual's dual nationality is that of the home Contracting State and of a third State that is not a Contracting State, there is no basis under international investment law (again, unless the relevant treaty specifies otherwise) to apply the *Nottebohm* test and to seek to determine the 'effective nationality' of the claimant individual. Indeed, under customary international law, such a dual national is not precluded from pursuing a claim for diplomatic protection. Article 6(1) of the Draft Articles on Diplomatic Protection, titled 'Multiple nationality and claim against a third State', provides that any 'State of which a dual or multiple national is a national may exercise diplomatic protection in respect of that national against a State of which that person is not a national'.[154] The commentary to art 6 explains that although some support exists for the requirement of a genuine or effective link between the State of nationality

[146] ibid para 69.

[147] ibid para 69, citing A Sinclair, 'ICSID's Nationality Requirement' in T Weiler (ed) *Investment Treaty Arbitration and International Law* (2008) 86–7.

[148] ibid, citing Sinclair, 'ICSID's Nationality Requirement' 86–7, citing A Broches, 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (1972) 136 *Recueil des Cours* 331, 349.

[149] ibid para 71.

[150] ibid para 73 citing *Siag v Egypt* para 198, citing *Champion Trading Co v Egypt* (Decision on Jurisdiction) ICSID Case No ARB/02/9 (2003, Briner P, Aynès & Fortier).

[151] ibid para 76.

[152] ibid para 77.

[153] ibid, citing A Broches, *Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law* (1995) 204–5 (emphasis in original).

[154] ILC 'Diplomatic Protection: Draft Articles with Commentaries'.

States could not be taken to arbitration by investors who were their nationals, upholding Siag's standing and denying his Egyptian nationality was at odds with the meaning of the Convention. That is, in Orrego Vicuña's view, the negative test for an individual's nationality—ie the individual cannot be a national of the host State—applies not only when the investor consents to arbitration 'but also at that [date] in which the State consents, or at the date the investment was made'.[160] However, Orrego Vicuña recognised that his reading of the Convention on this point did not find support in a strict reading of art 25 or in the ICSID Arbitration Rules.[161] While the dissent provides a compelling argument that does seem in harmony with the meaning of the Convention in the light of its drafting history, it is not likely to have much influence in future cases.

5.93 Thus, while *Siag* affirmed the art 25(2)(a) bar against home and host State nationality, the Decision on Jurisdiction also demonstrated that ICSID arbitrators have a legal basis for testing the host (or home) State's determination of an individual's nationality, such that if the individual did not hold such nationality at the arbitration commencement dates, jurisdiction *ratione personae* might well be accepted.

5.94 To be sure, the circumstances of the claimant individuals in *Siag* were exceptional in that they were able to persuade the Tribunal that they had lost host State nationality. It is often the situation that dual home and host State nationals do not have a plausible argument that they have lost their host State nationality. In those situations, such individuals are often advised not to choose ICSID arbitration if another arbitral method exists, because of the negative test posed by art 25(2)(a). For example, no such negative test exists under the UNCITRAL arbitration. However, it has generally been the holding in UNCITRAL or other non-ICSID arbitrations that such dual national claimants must nonetheless demonstrate that their effective or genuine nationality is their home State nationality, so that they can invoke the relevant treaty's protections on the grounds that the treaty itself, interpreted under international law, requires that a home State national be the qualifying investor. In this respect, the law of diplomatic protection has had a lasting effect on international investment arbitration. As mentioned above, art 7 of the Draft Articles on Diplomatic Protection[162] states that the predominant nationality of an individual holding dual home and host State nationalities must be the home State nationality in order for the home State to exercise diplomatic protection. The application of the dominant and effective nationality test is discussed above at para 5.23, where it is noted that the test takes into account factors such as habitual residence, centre of interests, family ties, participation in public life, and other evidence of attachment to a particular nationality.

5.95 However, the recent jurisdictional decision by the UNCITRAL Tribunal in *Armas v Venezuela*,[163] under the Spain–Venezuela BIT, has now put in doubt whether the effective nationality test will survive in the case of dual home and host State nationality in non-ICSID cases. In *Armas*, the claimant individuals were nationals of both Spain and Venezuela. Venezuela objected to jurisdiction on the grounds that the claimants' effective nationality was Venezuelan, not Spanish, and argued that it was appropriate to apply the diplomatic

[160] *Siag v Egypt* (Dissenting Opinion, Orrego Vicuña) para 18.
[161] ibid.
[162] ILC 'Diplomatic Protection: Draft Articles with Commentaries'.
[163] *Armas v Venezuela* (Decision on Jurisdiction) PCA Case No 2013-3 (2014, Grebler P, Oreamuno Blanco & Santiago Tawil).

protection doctrine because both the BIT and the Vienna Convention on the Law of Treaties directed that the Tribunal should apply international law when interpreting the BIT. The Tribunal rejected the objection. It held that the BIT constituted a *lex specialis*, and as such the terms of the BIT shall prevail when clear. Here, the terms were clear, according to the Tribunal, and for the purposes of the BIT, Spanish nationality was sufficient and there was no constraint on dual home and host State nationals invoking treaty protections. In other BITs that Venezuela and Spain had entered into, such a constraint expressly existed, which had an impact on the decision reached by the Tribunal.

5.96 *Armas* is a path-breaking decision in its unwillingness to apply a diplomatic protection test that previous tribunals have conventionally applied in non-ICSID cases of claimant individuals who were dual home and host State nationals. While path-breaking, *Armas* is also an outlier that disrupts an otherwise coherent *jurisprudence constante* in favour of the dominant and effective nationality test. The better view (advocated by Dugan, Wallace, Rubins and Sabahi) is that where a BIT or investment agreement contains a broad definition of investor (without specifically addressing the eligibility of dual nationals to bring arbitral proceedings), a tribunal may 'apply international law to fill any perceived lacuna, also permitting the application of the *effective nationality* test'.[164] Douglas also supports this position, stating that, where an individual claimant with the nationality of one Contracting State also has the nationality of the host State, the tribunal's jurisdiction *ratione personae* 'extends to such individuals only if the former nationality is the dominant of the two' (subject, of course, to a contrary provision of an investment treaty or application of art 25(2) of the ICSID Convention).[165] In breaking away from this *jurisprudence constante*, the *Armas* decision demonstrates how international investment arbitration is continuing to develop its own set of rules and principles that distinguish the process from the rules applied in general international law.

Mass claimants

5.97 The requirement that an investor establish that he satisfies the applicable nationality and domicile stipulations applies equally in arbitrations involving one investor or multiple investors. Investment treaty tribunals have commonly accepted jurisdiction over claims involving multiple parties.[166] The number of claimants has not, by itself, necessarily operated as a bar against a finding of jurisdiction (even if jurisdiction may have been denied on other grounds).[167]

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[164] C Dugan, D Wallace, N Rubins and B Sabahi, *Investor-State Arbitration* (2008) 304 (emphasis in original).

[165] Douglas 321.

[166] *Goetz v Burundi* (Award) ICSID Case No ARB/95/3, 6 ICSID Rep 3, IIC 16 (1999, Weil P, Bedjaoui & Bredin)—involving six individual Belgian shareholders in a Burundian company; *Suez Sociedad General de Aguas de Barcelona SA v Argentina* (Decision on Jurisdiction) ICSID Case No ARB/03/17, IIC 236 (2006, Salacuse P, Kaufmann-Kohler & Nikken)—involving one French and two Spanish shareholders in an Argentine water company; *Urbaser SA v Argentina* (Decision on Jurisdiction) ICSID Case No ARB/07/26, IIC 447 (2012, Bucher P, Martinez-Fraga & McLachlan)—involving two Spanish shareholders in an Argentine water company; *OKO Pankki Oyj v Estonia* (Award) ICSID Case No ARB/04/6 (2007, de Witt Wijnen P, Fortier & Veeder)—involving one German and two Finnish banks; and *Funnekotter v Zimbabwe* (Award) ICSID Case No ARB/05/6, IIC 370 (2009, Guillaume P, Cass & Wasi Zafar)—involving 14 unaffiliated Dutch investors in different farms in Zimbabwe.

[167] See discussion in Chapter 4, especially paras 4.206–4.214. *Anderson v Costa Rica* (Award) ICSID Case No ARB(AF)/07/3, IIC 437 (2010, Morelli Rico P, Salacuse & Vinuesa)—involving 137 investors, but jurisdiction was denied because of lack of investments 'owned in accordance with the laws' of Costa Rica; *Bayview Irrigation District v Mexico* (Award) ICSID Case No ARB(AF)/05/1, IIC 290 (2007, Lowe P, Gómez-Palacio

5.98 What has arisen as an issue in investment arbitrations involving multiple parties is the logistics involved in verifying that each claimant satisfies the applicable nationality requirements. The best-known example of this logistical challenge is *Abaclat*.[168] A central issue is how to manage the case proceedings, and the large volume of documentary evidence involved, in a way that best balances the parties' competing rights and interests.[169]

5.99 In *Abaclat*, the Tribunal permitted an arbitration to proceed where it involved some 60,000 claimants. As the Tribunal recognised, notwithstanding the large number of claimants involved, it would be necessary for the Tribunal to be persuaded of the elements of jurisdiction in respect to each claimant, namely the nationality of the claimant, its status as an investor and the existence of its investment.[170] Given the significant number of claimants, it would be necessary for the Tribunal to develop a mechanism for processing this large amount of information:

> [I]t is undeniable that the Tribunal will not be in a position to examine all elements and related documents in the same way as if there were only a handful of Claimants. In this respect, the Tribunal would need to implement mechanisms allowing a simplified verification of evidentiary material, while this simplification can concern either the depth of examination of a document (e.g. accepting a scanned copy of an ID document instead of an original), or the number of evidentiary documents to be examined, and if so their selection process (i.e. a random selection of samples instead of a serial examination of each document) … However, such a simplification of the examination process is to be distinguished from the failure to proceed with such examination.[171]

5.100 In *Abaclat*, each individual claimant had to supply information confirming its nationality/nationalities at the relevant points in time, and such information was then compiled into a database (the Claimants' Database). The Tribunal also appointed an expert to examine and verify the documents in the Claimants' Database, specifically that natural persons satisfied both the requisite nationality and domicile requirements, and that juridical persons met the applicable incorporation requirements, pursuant to the relevant BIT and to the ICSID Convention.[172]

5.101 While the Tribunal had considered simply using a sampling procedure (for example, the expert proposed the sampling of 1,060 claims of natural persons), it ultimately decided to

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& Meese)—involving 46 claimants, but jurisdiction was denied because of lack of 'investment' in Mexico; *Canadian Cattlemen for Fair Trade v United States of America* (Award on Jurisdiction) IIC 316 (UNCITRAL, 2008, Böckstiege P, Bacchus & Low)—involving 109 claimants, but jurisdiction was declined for lack of 'investment' in the United States; and *Alemanni v Argentina* (Jurisdiction and Admissibility) ICSID Case No ARB/07/8, IIC 666 (2014, Bermann P, Böckstiegel & Thomas)—involving, initially, 183 Italian individuals and legal entities.

[168] *Abaclat v Argentina* (Decision on Jurisdiction and Admissibility) ICSID Case No ARB/07/5, IIC 504 (2011, Tercier P & van den Berg, Abi-Saab (dissenting)).

[169] ibid para 519: 'The need for certain adaptations to the standard ICSID arbitration procedure merely derives from the impossibility to anticipate all kinds of possible investments and disputes, and is certainly not a sufficient motive to simply close the door of ICSID arbitration to investors who are not "standard investors" having made "standard investments." However, it is understood that adaptations made to the standard procedure must be done in consideration of the general principle of due process and must seek a balance between procedural rights and interests of each party.'

[170] ibid para 529.

[171] ibid para 531.

[172] *Abaclat v Argentina* (Procedural Order No 15) (2012) para 19.

proceed with a full review, in order to respect the respondent State's right to defend itself against each claimant individually.[173]

5.102 In addition to the logistical issues, another mass claimant case, *Ambiente v Argentina*, addressed two issues: first, who should bear the burden of proof for establishing nationality requirements; and second, at what stage of the proceedings should nationality be established.

5.103 As to the first issue, the majority held that the claimants bore the burden of establishing the positive nationality requirements (in *Ambiente*, natural-person claimants had to show they held Italian nationality at the relevant times, and juridical person claimants had to show that they were incorporated under Italian law). However, the respondent State bore the burden of proving (with evidence) the negative elements of nationality, namely that the claimants were not Argentine (for example, as dual nationality holders) and had not been domiciled in Argentina for more than two years.[174]

5.104 The dissenting arbitrator considered that the claimants should bear the burden of proving all the elements of nationality. The dissenting arbitrator reasoned that since the claimants were the party seeking to establish that they were protected investors, they carried the burden of proving all positive and negative elements of the nationality and domicile requirements under the applicable treaty or law.[175] The dissent criticised the majority for 'mak[ing] easier the burden of proof for the Claimants at the expense of burdening the Respondent with the heavier lot',[176] and in doing so, 'depart[ing] from the well-settled principle in international law … that the litigant seeking to establish the existence of a fact … bears the burden of proving it.'[177]

5.105 As to the second issue, the majority held that it was sufficient to show, at the jurisdiction stage, that 'at least some of the Claimants' qualified as covered investors under the applicable treaty, in order for the case to proceed to the merits.[178] However, the State could submit documents later on in the proceedings to raise any doubts about whether individual claimants satisfied the nationality requirements. The Tribunal also reserved the right to enter into a more detailed analysis of these individual cases 'at a later stage as necessary and appropriate'.[179]

5.106 In contrast, the dissenting arbitrator said that it would be appropriate for the Tribunal to complete examining and verifying the claimants' nationality at the jurisdiction stage, before proceeding to the merits stage. Otherwise, if it turned out that none of the claimants satisfied the nationality requirements, the merits decision would be rendered an 'empty shell'.[180] The dissenting arbitrator noted that this was not a case involving a huge number of claimants—there were 90 claimants compared with 60,000 in *Abaclat*. As such the verification of the

[173] *Abaclat* (Decision on Jurisdiction and Admissibility) paras 665–6; and Procedural Order No 17 (2013) paras 4, 8 and 25.

[174] *Ambiente Ufficio SpA v Argentina* (Decision on Jurisdiction and Admissibility) ICSID Case No ARB/08/9, IIC 576 (2013, Simma P, Böckstiegel & Torres Bernárdez (dissenting)) para 312.

[175] ibid (Dissenting Opinion, Torres Bernárdez) para 141.

[176] ibid para 136.

[177] ibid para 140, citing *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (Jurisdiction) [1984] ICJ Rep 392, 437, para 101.

[178] *Ambiente v Argentina* para 324.

[179] ibid para 325.

[180] *Ambiente* (Dissenting Opinion, Torres Bernárdez) para 121.

ratione personae requirements of each individual claimant was 'doubtlessly manageable' for the Tribunal.[181]

5.107 The approach to dealing with multiple investors undertaken in *Abaclat* and *Ambiente* was affirmed in a third multi-investor case, *Alemanni*.[182] There the respondent argued that the multiplicity of claimants (ranging between 183 and 74 investors) and the variations between them required 'procedural innovations that lie beyond the powers of an ICSID tribunal and will not be able to protect the due process rights of the Respondent'.[183] The Tribunal rejected this argument for two reasons. First, the ICSID Convention itself, given its ordinary meaning (as required by art 31(1) of the Vienna Convention on the Law of Treaties), did not prohibit arbitrations involving multiple investors. Specifically, art 25 of the ICSID Convention did not limit arbitration to proceedings involving only one investor.[184] Second, the Tribunal considered that it could readily devise appropriate procedural solutions to deal with the multiplicity of claimants, including verifying that each individual claimant met the requisite nationality requirements. In the Tribunal's view, mere inefficiency (arising from having to verify a large amount of information) would not justify depriving the 'claimants of a right to be heard that they would otherwise have'.[185] In fairness to the respondent, the Tribunal conceded each claimant would have to prove it met the nationality requirements for 'each Claimant claims in his own name, advancing his own personal loss in respect of his own identified investment'.[186] However, given the relatively limited number of claimants in this case, the Tribunal was reluctant to describe the proceedings as a 'mass arbitration' at all, as a range of between 183 and 74 investors did not 'in ordinary usage fit the descriptor "mass" '.[187] Thus, verifying the nationality of each claimant in these circumstances would be manageable.

5.108 Further, the *Alemanni* Tribunal took heed of the way the Tribunals in *Abaclat* and *Ambiente* had successfully dealt with the same types of logistical issues presented in *Alemanni*. By the time the *Alemanni* Tribunal issued its decision on jurisdiction, both the *Abaclat* and *Ambiente* cases had proceeded to the merits stage of each case respectively and the *Abaclat* Tribunal had made numerous procedural orders to deal with the large amount of information that needed to be verified.[188] Following the approaches in *Abaclat* and *Ambiente*, the *Alemanni* Tribunal affirmed that, citing *Ambiente*, the 'mere number of Claimants ... would [not] make the proceedings "unmanageable" ... or violate fundamental principles of due process' either in the jurisdictional or merits phases.[189]

5.109 The decisions in the three principal mass claimant cases to date indicate that tribunals will continue to entertain such claims and will seek to accommodate them by developing pragmatic, cost-effective methods to verify, at least provisionally, the *ratione personae* status of each of the claimants. However, the case management methods in this regard are

[181] ibid para 120.
[182] *Alemanni v Argentina* (Decision on Jurisdiction and Admissibility) ICSID Case No ARB/07/8, IIC 666 (2014, Berman P, Böckstiegel & Thomas).
[183] ibid para 318.
[184] ibid paras 270–1.
[185] ibid para 324.
[186] ibid para 267.
[187] ibid.
[188] ibid para 324.
[189] ibid, citing *Ambiente v Argentina* para 166.

also likely to remain controversial. As the dissenting opinion in *Ambiente* suggests, there may be future resistance from some arbitrators to methods that appear to be too cursory at the jurisdictional stage, and thereby place respondent states at a disadvantage by lowering the *ratione personae* bar. There will also undoubtedly be continuing controversy over the number of claimants that should justify special case management treatment of a 'mass claimant' type for purposes of assessing the nationality of each purported member of the claimant group.

F. Awards on the Nationality of Corporations

ICSID Convention Article 25(2)(b)—first limb

5.110 In ICSID arbitrations where the claimant is a corporation or juridical person, the tribunal's *ratione personae* jurisdiction must be established pursuant to both art 25(1) of the ICSID Convention *and* either the first limb or the second limb of art 25(2)(b), as well as the BIT (or investment agreement/investment law) on which the claimant relies to invoke arbitration under ICSID. Thus, the claimant corporation must show either:

(i) under the first limb, that it had the nationality of the home State (ie it had the nationality 'of a Contracting State other than the State Party to the dispute') on the date of submission of the dispute, pursuant to the definition of nationality in the relevant investment instrument, or

(ii) under the second limb, the claimant had the nationality of the respondent State on the date of submission, 'and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State'.

Under the second limb there is an express issue regarding 'foreign control' of a claimant corporation with the respondent State's nationality. In contrast, the point of contention under the first limb has been whether foreign control has any role when the claimant corporation satisfies the nationality criterion of the home State and the BIT is silent on imposing any control requirement.[190]

Tokios: *the context, issues, decision, and dissent*

5.111 The *Tokios*[191] arbitration featured a contest between the competing tests of (a) substantive control versus (b) corporate form of the investment vehicle, to determine the nationality requirement under the first limb of ICSID Convention art 25(2)(b). This contest results in option (b), formal corporate form, prevailing in *Tokios* and in subsequent ICSID jurisprudence: in the absence of an express 'control' provision in the relevant BIT,[192] and interpreting art 25(2)(b)'s first limb, corporate form, not substantive control, is the relevant criterion. It is nonetheless instructive to recall that *Tokios* was a majority decision in which the dissenting

[190] *Ratione personae* determinations pursuant to either limb of art 25(2)(b) are subject to the *ratione temporis* requirement and any potential 'abuse of process' proscription accompanying a claimant's change in nationality: see paras 5.159 *et seq* below.

[191] *Tokios Tokelés v Ukraine* (Decision on Jurisdiction) ICSID Case No ARB/02/18, 11 ICSID Rep 313, IIC 258 (2004, Weil P (dissenting), Price & Bernardini).

[192] The Ukraine–Lithuania BIT contained a control provision, but it only related to nationals of any third State, not to the two contracting States: Agreement for the Promotion and Reciprocal Protection of Investments (Ukraine–Lithuania) (signed 8 February 1994, entered into force 27 February 1995).

arbitrator (Weil) was the President of the Tribunal. Weil's dissent is still relied on by respondent States in ICSID cases,[193] but it has not enjoyed a successful afterlife, and there can no longer be any reasonable expectation that it will do so or should do so.[194]

5.112 *Tokios* was based on the following background facts. The claimant, Tokios Tokelés (Tokios), was a Lithuanian corporation. It created a wholly-owned subsidiary under Ukrainian law. The claimant alleged that Ukraine took actions regarding the subsidiary that constituted a breach of the Ukraine–Lithuania BIT. Tokios filed a request for arbitration with ICSID in 2002, together with its Ukrainian subsidiary.[195]

5.113 The Ukraine–Lithuania BIT defined 'investors' in respect of Ukraine as natural persons who are nationals of Ukraine under Ukrainian law, and entities established in Ukraine. In respect of Lithuania, the same definitions were included. There was also an additional category of nationals in respect of either Ukraine or Lithuania—any entity established in any third State controlled, directly or indirectly, by nationals of either Ukraine or Lithuania, or by entities with their seat in the contracting party. 'Control' was defined as requiring 'a substantial part in the ownership'.[196] Tokios removed the subsidiary as a claimant on the grounds that the subsidiary could not be considered a national of Lithuania under the BIT and art 25(2)(b) (second limb) of the ICSID Convention.[197] This 'control' test had no impact on the question of nationality as between corporations and owners that were themselves nationals of the two contracting States.

5.114 Tokios, although a Lithuanian corporation, was 99 per cent owned by nationals of Ukraine. Ukrainian nationals also made up two-thirds of the management of Tokios.[198] Relying on the principle that the purpose of the ICSID Convention is to 'facilitate the settlement of investment disputes between States and nationals of other States', and 'is not meant for disputes between States and their own nationals',[199] Ukraine argued that the Tribunal should 'pierce the corporate veil' and find that despite the claimant having Lithuania as its State of incorporation, the claimant's nationality should be determined on the basis of the nationality of its predominant ownership and management, and the site of its headquarters. This, Ukraine contended, would lead to a determination of Ukrainian nationality and would therefore disqualify Tokios from maintaining an ICSID arbitration against Ukraine.[200]

5.115 The Tribunal first considered whether the ICSID Convention prescribes any method for assessing nationality of juridical entities. As noted above, the Convention does not—which led the Tribunal to consider the definitions supplied in the BIT.[201] The BIT did not prescribe any test other than establishment under Lithuanian law. Tokios met that test. Moreover, if

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[193] See, for example, *KT Asia Investment Group BV v Kazakhstan* (Award) ICSID Case No ARB/09/8, IIC 615 (2013, Kaufmann-Kohler P, Glick & Thomas) para 121.

[194] *KT Asia* fn 38. But see *Venkolim Holding BV v Venezuela* (Award) ICSID Case No ARB/12/22 (2015, Derains P, Gomez Pinzón & Oreamuno Blanco) discussed below at para 5.133.

[195] *Tokios Tokelés v Ukraine* para 7: the request for arbitration was withdrawn and resubmitted to satisfy the BIT's six-month negotiation requirement.

[196] ibid para 18, citing art 1(2)(c) of the Ukraine–Lithuania BIT.

[197] ibid para 8: see ICSID Convention art 25(2)(b), second limb, discussed at paras 5.134 *et seq* below.

[198] ibid para 21: It was disputed whether Tokios had any substantial business activities in Lithuania and whether it maintained its administrative headquarters in Ukraine.

[199] ibid fn 6.

[200] ibid para 22.

[201] ibid para 24.

the contracting States had wanted to impose a 'control' requirement, they could have done so and in fact did so in the case of juridical persons of third States.[202] Thus, the absence of a control requirement vis-à-vis nationals of the two contracting States gave additional reason not to impose such a test. Other provisions of the BIT supported the notion of a broad scope of investment protection.[203]

5.116 Other BITs and multilateral investment treaties (MITs) to which Ukraine is a party expressly denied protection benefits to corporations owned or controlled by nationals of a third State if such entities had no substantial business activities in the contracting State in which they were organised. Article 17(1) of the Energy Charter Treaty[204] was considered in this regard by the Tribunal. Again, the control provisions in these treaties were further evidence that if a limitation on nationality based on ownership or control were to be applied, the Contracting States were free to include it. However, they did not do so. The Tribunal majority emphasised that it was simply interpreting the BIT according to the ordinary meaning of its words, consistent with its context, and consistent with the concept of corporate nationality in the ICSID Convention, which, according to *Amco*,[205] was the 'classical' concept by which nationality is determined on the basis of the law and place of incorporation.[206]

5.117 It may be thought that a substantive control test would accord more closely with the object and purpose of investment treaties, and of the ICSID Convention, in the protection of *foreign* investment and investors. This may be seen as stemming in large part from the economic rationale underlying the dispute resolution provisions in such treaties, which is to enable capital importing countries to attract foreign investment. The question, then, is whether such a 'control' or 'piercing' test may properly be read into the treaty requirement of a foreign national.

5.118 The *Tokios* majority answered that in no respect did international law permit it to impose a control test. The *Tokios* majority, despite the vigorous dissent of Weil, appears to be firmly within the majority of international tribunals and scholars that have addressed the corporate nationality issue. To be sure, the bulk of the *Tokios* decision concerns a discussion of what can or cannot be construed from art 25 of the ICSID Convention. Still, the *Tokios* majority also explained that the international law direction was to favour the expansion of arbitral jurisdiction when the issue was whether the claimant was incorporated in the home Contracting State but owned by nationals of the host contracting State.[207] The decision on jurisdiction in *Wena Hotels Ltd v Egypt* was important in this regard, as the Tribunal in that case also found that expanding jurisdiction was the modern tendency.[208] Beyond the confines of art 25 of the ICSID Convention, the *Tokios* majority also found support from the classic *Barcelona*

[202] ibid para 34.

[203] ibid paras 31, 32, 73, 77, 79 and 85.

[204] ECT (Appendix 2 below) art 17(1). On the interpretation of ECT art 17 see *Plama Consortium Ltd v Bulgaria* (Decision on Jurisdiction) ICSID Case No ARB/03/24, IIC 189 (2005, Salans P, van den Berg & Veeder).

[205] *Amco Asia Corp v Indonesia* (Decision on Jurisdiction) ICSID Case No ARB/81/1, 1 ICSID Rep 376 (1983, Goldman P, Foighel & Rubin) 396.

[206] *Tokios Tokelés v Ukraine* para 40.

[207] ibid paras 46–9. If Tokios had not opted for ICSID arbitration and instead had pursued UNCITRAL arbitration, the object of the ICSID Convention would clearly not have been such a substantial issue, and Weil's analysis—assuming he still would have dissented—would have necessarily been different.

[208] ibid para 49, citing *Wena Hotels Ltd v Egypt* (Decision on Jurisdiction) ICSID Case No ARB/98/4, 6 ICSID Rep 74, IIC 272 (1999, Leigh P, Fadlallah & Haddad) para 888.

Traction decision of the International Court.[209] The International Court commented on the use of piercing under municipal law, but did not define the conduct that would support piercing by an international tribunal—although Tokios' conduct, according to the Tribunal majority, did not approach the municipal law standards that were discussed in *Barcelona Traction*.[210]

5.119 The *Tokios* majority also referred to the 'predominant approach in international law', whereby, the Tribunal observed, it is usual to attribute corporate nationality to the State where the corporation has been incorporated, together with the need for the head or registered office or *siège social* to be in the same State.[211] For this 'predominant approach' the Tribunal relied on *Barcelona Traction* and *Oppenheim's International Law*.[212] This does not appear wholly satisfactory as an exegesis of the customary international law position, as it relies on two sources that refer to what is 'usual' or to the 'traditional rule', without exploring whether what is 'traditional' should carry weight in the investment protection context. Nonetheless, the *Tokios* majority's conclusion that the 'Ukraine–Lithuania BIT uses the same well established method for determining corporate nationality as does customary international law', cannot be considered unreliable.[213]

5.120 Given the importance of certain international investment tribunal decisions and awards in themselves developing or at least clarifying commonly used treaty provisions, the *Tokios* decision is of crucial significance in clearly extending the applicability of this traditional rule to the investment protection field in general, and to the ICSID Convention in particular. The dissenting opinion of Weil (considered below), whereby under the ICSID Convention one must take into account the origins of capital in assessing whether ICSID's jurisdictional requirements have been met, has become emblematic of the expression of a permanent minority position, albeit one that is forcibly and in certain respects persuasively presented. The *Tokios* majority only briefly addressed Ukraine's argument that the origin of the capital used was Ukrainian.[214] The *Tokios* decision simply reports that the ICSID Convention contains no jurisdictional requirement that the origin of capital be non-domestic.

5.121 Weil's dissent identifies no express ICSID requirement in relation to the origin of capital. However, Weil's position was that the object and purpose of the ICSID Convention—as set out in the Preamble to the Convention and the Report of the Executive Directors[215]—made the origin of capital a highly relevant issue:

> The ICSID mechanism and remedy are not meant for investments made in a State by its own citizens with domestic capital through the channel of a foreign entity, whether pre-existent or created for that purpose. To maintain, as the Decision does, that 'the origin of capital is not relevant' and that 'the only relevant consideration is whether the Claimant is established under the laws of Lithuania' runs counter to the object and purpose of the whole ICSID system.[216]

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[209] *Tokios Tokelés v Ukraine* paras 54–56, citing *Barcelona Traction* paras 44 and 46.
[210] ibid para 55.
[211] ibid para 70.
[212] Oppenheim 859–60.
[213] *Tokios Tokelés v Ukraine*.
[214] ibid para 80.
[215] World Bank, 'Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965' 1 ICSID Rep 23 (footnotes omitted).
[216] *Tokios Tokelés v Ukraine* (Dissenting Opinion, Weil P) para 19.

5.122 The dissent further observed that the *Tokios* majority had been unsystematic in its analysis of jurisdiction as between the ICSID Convention and the BIT.[217] In particular, the majority should first have considered whether the Tribunal had jurisdiction under art 25 of the Convention, and only after that assessed jurisdiction under the BIT, in keeping with the ICSID principle that parties to a BIT can narrow but not expand the jurisdiction provided by the Convention. The majority, however, had worked from the opposite direction, emphasising its deference to the parties' treatment of corporate nationality in the BIT.[218]

5.123 Weil also opined that 'piercing' is irrelevant to the jurisdictional assessment that needs to be made. The issue in his view was not whether Tokios, the claimant, had somehow acted improperly or unfairly taken advantage of the corporate form. Rather, the issue was whether, as a matter of substance, the original capital was domestic. If it were, then, in Weil's view, as a matter of public international law and the ICSID Convention properly understood, the claimant was not entitled to investment protection under the BIT.[219]

5.124 The concluding section of the Dissenting Opinion raised a policy point: are tribunals meant to scrutinise the claimant's legal structure and determine whether there is a hidden 'reality' carrying jurisdictional consequences? Weil was not comfortable with an affirmative answer and endorsed a 'flexible approach' while observing that the task of determining the origin of capital may be clear cut, as in the present case, and even if not, is no more complex than other jurisdictional issues such as the identification of the relevant corporation within a group of corporations for ICSID jurisdiction.[220]

5.125 However, the Weil's support for a 'flexible approach' might have threatened the efficient working of the ICSID arbitration system. Bright-line tests such as that applied by the *Tokios* majority provide predictability and therefore stability. Investors are more likely to contribute capital to a venture if they are confident of a reasonable level of protection. Weil's origin of capital test is more likely to place protection at risk than would the bright-line place-of-incorporation test. Indeed, the flexible approach could well have led to the need for tribunals to make difficult assessments regarding the nationality status of the claimant corporation. For example, the shareholders could, by nationality, be widely dispersed, or the shares could be held by legal entities incorporated in turn in one or more third States with the majority of shares being held by nationals of the respondent State. Alternatively, the shareholders of the respondent State could exert certain aspects of control over the claimant corporation even though they are not majority owners. In short, there are multiple reasons why the Dissenting Opinion's perspective has very much remained a minority position.

KT Asia and the reaffirmation of the Tokios majority decision

5.126 A recent arbitral award that manifests the ongoing application of the *Tokios* majority's approach to nationality of corporations under ICSID Convention Article 25(2)(b), first limb, is *KT Asia*.[221] The relevant BIT in that case (Netherlands–Kazakhstan) defined 'nationals' as '(i) natural persons having the nationality of that Contracting Party; (ii) legal persons

[217] ibid paras 13–14.
[218] ibid para 14.
[219] ibid paras 11 and 19–20.
[220] Ibid para 27.
[221] *KT Asia Investment Group BV v Kazakhstan* (Award) ICSID Case No ARB/09/8, IIC 615 (2013, Kaufmann-Kohler P, Glick & Thomas).

constituted under the law of that Contracting Party; (iii) legal persons not constituted under the law of that Contracting Party but controlled, directly or indirectly, by natural persons as defined in (i) or by legal persons as defined in (ii)'. The claimant was incorporated in the Netherlands.

5.127 Kazakhstan objected on, inter alia, *ratione personae* grounds: it argued that the claimant's nominal nationality was Dutch, but its 'real and effective' nationality was Kazakh. Additionally, the State contended that the claimant's corporate veil should be lifted to reveal the real party in interest, an individual who was not entitled to bring a claim under the BIT.

5.128 The basis of the State's *ratione personae* objection was its position that the principle of 'real and effective nationality' applies in investment arbitration in the same way as it does in the field of diplomatic protection, and no contrary *jurisprudence constante* existed. Since the claimant had no connection with the Netherlands besides its place of incorporation, and decision-making power rested with a Kazakh national, the claimant should not be treated as a Dutch national. Moreover, since the BIT and the ICSID Convention are concerned with the fundamental presumption of diversity of nationality, and the Dutch shell company offered no international flow of capital, the shell should not be recognised as a proper claimant in an ICSID case. The State thus advanced what was, in effect, the approach of Weil's dissenting opinion in *Tokios*.

5.129 KT Asia responded that there was in fact a *jurisprudence constante* opposing the State's position: 'this is the twentieth known instance in which a respondent State has sought to undermine the test of nationality [of corporations] in an investment treaty by reference to the rules of diplomatic protection, a strategy which has failed in all but one instance'.[222] Additionally, the claimant contended, the case law does not support the assertion that a special real and effective nationality rule comes into play when the claimant's beneficial owner has ties to the host State.

5.130 The *KT Asia* Tribunal's analysis included the following eleven points, all of which reaffirm the *Tokios* majority's decision:

(1) The ICSID Convention does not impose any particular test for the nationality of juridical persons not having the nationality of the host State.
(2) Contracting States have broad discretion to define nationality, in particular corporate nationality, in their BITs.
(3) Under the Netherlands–Kazakhstan BIT, a legal entity incorporated in a Contracting State is deemed a national of that State.
(4) Under the Vienna Convention on the Law of Treaties, the ordinary meaning of the BIT's words is clear: KT Asia Investment Group BV is a Dutch national since it is incorporated in the Netherlands.
(5) No other provision of the BIT impinges on this definition of 'nationals'.
(6) Kazakhstan could have insisted on a more demanding definition of corporate nationality, but did not do so.
(7) The principle of 'real and effective' nationality is applied in the context of diplomatic protection of claimants who hold dual nationality. There is no issue of dual nationality

[222] ibid para 104.

in this case of corporate nationality, and there is a specific treaty regime whereby corporate nationality is a legal construct.

(8) There is a 'wide consensus' in the case law by which diplomatic protection rules do not apply where varied by the *lex specialis* of an investment treaty.

(9) The respondent State incorrectly relied on the *TSA Spectrum* award,[223] an art 25(2)(b) 'second limb' case, in which the claimant was a national of the host State and the question was, objectively, whether the claimant was controlled by a national of another State.

(10) The *Tokios* majority correctly declined to pierce the corporate veil on the basis of the principle of real and effective nationality, and subsequent cases have supported the majority.

(11) There is no basis in the treaty context to investigate beneficial ownership for admissibility of claims. Otherwise, every tribunal assessing corporate nationality would have to engage in such a painstaking and wholly unauthorised investigation.[224]

5.131 Other recent 'limb one' jurisdictional decisions have emphatically followed the *Tokios* majority's approach and have rejected Weil's dissenting approach. Recently, for example, the Tribunal in *Gold Reserve v Venezuela*[225] faced the State's argument that Gold Reserve, despite being a duly incorporated Canadian company, was not entitled to claim under the Canada–Venezuela BIT because it was a shell company, with management headquartered in the USA. The BIT's nationality requirement for juridical persons claiming against Venezuela was incorporation in Canada (and non–Venezuelan nationality). The Tribunal rejected the State's position: 'As many previous ICSID tribunals have found, where the test for nationality is "incorporation" as opposed to control of a "genuine connection", there is no need for the tribunal to enquire further unless some form of abuse has occurred … The Parties could have chosen to include a "genuine link" test or a "management" test, but did not.'[226] The Tribunal refused to read these criteria into the BIT.

5.132 The decision on *ratione personae* jurisdiction in *Burimi v Albania*[227] (Italy–Albania BIT) is of similar effect as *KT Asia* and *Gold Reserve*. *Burimi* furthermore clarifies the proper understanding of art 25(2)(b), because the Tribunal had to address the State's apparent confusion of the two limbs of this ICSID Convention provision. The State contended that Burimi SRL, a company incorporated in Italy, lacked standing to be a claimant because it was owned by Mr Burimi, who was a dual national (Italy and Albania). Furthermore, argued the State, since the BIT included a provision whereby an entity's nationality is determined by who controls it, and not by the company's incorporation, it was appropriate to pierce the corporate veil of the company to identify the nationality of the entity or person holding the majority of the capital for purposes of the first limb of art 25(2)(b). The Tribunal pointed out the State's confusion, and clarified the correct approach: 'Respondent mistakenly argues that piercing the corporate veil—as is required by Article 8(2)(c) of the Italy–Albania BIT—is necessary to determine the nationality of a company that *already* has the nationality of a State other

[223] *TSA Spectrum de Argentina SA v Argentina* (Award) ICSID Case No ARB/05/5, IIC 358 (2008, Danelius P, Abi-Saab & Aldonas (dissenting)).

[224] However, note that in *KT Asia*, the Tribunal decided that it lacked jurisdiction to hear the case because the claimant did not hold a qualifying investment under the applicable BIT and art 25(1) of the ICSID Convention: *KT Asia* para 222.

[225] *Gold Reserve Inc v Venezuela* (Award) ICSID Case No ARB(AF)/09/1 (2014, Bernardini P, Dupuy & Williams).

[226] ibid paras 252 and 255.

[227] *Burimi SRL v Albania* (Award) ICSID Case No ARB/11/18, IIC 593 (2013, Price P, Cremades & Fadlallah).

than a State party to the dispute. The purpose of Article 8(2)(c), however, is to determine whether companies *with* the nationality of the State party to the dispute (Albania), can be considered as being under foreign control and therefore should be treated as a "national of another Contracting State" for the purposes of the ICSID Convention.'[228] Accordingly, the Tribunal concluded that it did have jurisdiction *ratione personae* regarding Burimi SRL, simply on the basis of its Italian incorporation.

5.133 Despite the overwhelming consensus supporting the *Tokios* majority's art 25(2)(b) first limb approach, a recent *ratione personae* jurisdictional decision appears, quite surprisingly, to have followed Weil's dissenting approach. In *Venkolim v Venezuela*,[229] an ICSID case brought pursuant to the Netherlands–Venezuela BIT and the Venezuela Investment Law, the Tribunal majority decided that even though the claimant was incorporated in the Netherlands, under the object and purpose of the ICSID Convention, the claimant's nationality was nominal and should be disregarded because it was a mere shell controlled by Venezuelan nationals.[230] Perhaps the majority's decision can be explained by the extreme facts in Venkolim, where the claimant was 100 per cent controlled by a Venezuelan company, which was itself controlled and wholly-owned by two Venezuelan nationals. As such, these factual circumstances arguably constitute one of those exceptional circumstances justifying piercing the corporate veil.[231] There was a dissenting opinion in this case (Gomez Pinzón), which pointed out that the majority's *ratione personae* decision ran contrary to, for example, the *Tokios* majority's decision, the *Saluka v Czech Republic* decision, and Schreuer's *Commentary*, pursuant to which it was not open to the *Venkolim* majority to add nationality requirements on which the BIT was silent. It is highly doubtful that the *Venkolim* majority's *ratione personae* jurisdictional decision will have any influence on subsequent tribunals.

ICSID Convention Article 25(2)(b)—second limb

5.134 In ICSID cases, as indicated above, the possibility may exist for a corporation holding host State nationality to be a claimant in the arbitration against the State where it is incorporated. This is provided for in the second limb of ICSID Convention art 25(2)(b): claimant-corporations holding the nationality of the host State must show jurisdiction *ratione personae* on the basis of 'foreign control' as provided for by agreement between the parties. Although not completely clear of doubt, such 'agreement' may be set out in a BIT (an agreement between the Contracting States until its offer to arbitrate is accepted by the investor) or in an investment contract (unquestionably an agreement of the parties). It is increasingly likely, particularly in view of the recent decisions,[232] that a claimant-corporation holding host State nationality and therefore seeking jurisdiction *ratione personae* in an ICSID arbitration under

[228] ibid para 132 (emphasis in original).

[229] *Venkolim Holding BV v Venezuela* (Award) ICSID Case No ARB/12/22 (2015, Derains P, Oreamuno Blanco & Gomez Pinzón (dissenting)).

[230] The majority noted that the Investment Law provided for something more than incorporation—though whether that provision had any relevance is questionable—but also offered its conclusion based separately on the ICSID Convention.

[231] Contrast, for example, the test for piercing the corporate veil in private international law, which is justified only where a corporation is 'a mere façade concealing the true facts': see *Adams v Cape Industries plc* [1990] Ch 433, 539 (EWCA).

[232] See *TSA Spectrum v Argentina; Caratube International Oil Co LLP v Kazakhstan* (Award) ICSID Case No ARB/08/12, IIC 562 (2012, Böckstiegel P, Griffith & Hossain); *National Gas SAE v Egypt* (Award) ICSID Case No ARB/11/7 (2014, Veeder P, Fortier & Stern).

the second limb of art 25(2)(b) must satisfy both a 'subjective test', pursuant to the nationality definition in the relevant BIT, and an 'objective test', pursuant to the 'foreign control' provision in art 25(2)(b).

5.135 However, it would be too ambitious to posit that the above-mentioned ICSID decisions form a *jurisprudence constante* regarding the two-fold test to be applied when a company incorporated in, or is otherwise a national of, the respondent State seeks claimant status. At least three awards, *Swisslion v Macedonia*,[233] *Quiborax v Bolivia*[234] and *AdT v Bolivia*,[235] and a powerful dissenting opinion in *TSA Spectrum v Argentina*,[236] discussed below, none of which apply the objective test, constitute a highly significant gap in the *jurisprudence constante* string.

Subjective test—the BIT and 'foreign control'

5.136 The first test is characterised as subjective: it turns on whether the BIT (or other investment instrument) provides the host State company with the opportunity, for the purposes of the ICSID Convention, to be considered a home State national because of the Contracting Parties' agreement to include a 'foreign control' test, and the host State Company has, by the terms of that agreement, fulfilled its requirements.

5.137 The Tribunal in *National Gas v Egypt* explained the subjective test as follows, in the context of the United Arab Emirates–Egypt BIT, where an Egyptian-incorporated company is the putative claimant:

(1) The test is raised by the phrase in art 25(b)(2), 'the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention'.
(2) A provision of the BIT provides that if an investor from the home State owns the majority of the shares of a juridical person of the host State before the dispute arises, the juridical person, for the purposes of the ICSID Convention, may be treated as an investor of the home State.
(3) The BIT requirement of majority ownership of shares is satisfied.[237]

5.138 In these circumstances the subjective test is satisfied. Following the decisions in *Vacuum Salt*[238] and *Autopista*,[239] this satisfaction would constitute a rebuttable presumption that the *ratione personae* requirements of both the BIT and the ICSID Convention have been fulfilled. However, this is only a rebuttable presumption, which is where the objective test is triggered.

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[233] *Swisslion DOO Skopje v Macedonia* (Award) ICSID Case No ARB/09/16, IIC 558 (2012, Guillaume P, Price & Thomas).

[234] *Quiborax SA v Bolivia* (Decision on Jurisdiction) ICSID Case No ARB/06/2, IIC 563 (2012, Kaufmann-Kohler P, Lalonde & Stern).

[235] *Aguas del Tunari SA v Bolivia* (Decision on Jurisdiction) ICSID Case No ARB/02/3, IIC 8 (2005, Caron P, Álvarez & Alberro-Semerena (dissenting)) (*AdT v Bolivia*).

[236] *TSA Spectrum* (Dissenting Opinion, Aldonas).

[237] *National Gas* para 132.

[238] *Vacuum Salt Products Ltd v Ghana* (Award) ICSID Case No ARB/92/1 (1994, Jennings P, Brower & Hossain).

[239] *Autopista Concesionada de Venezuela CA v Venezuela* (Decision on Jurisdiction) ICSID Case No ARB/00/5, IIC 19 (2001, Kaufmann-Kohler P, Böckstiegel & Cremades).

Objective test—ICSID Convention and 'foreign control'

5.139 The *National Gas* award usefully summarises the second test:

> (1) The objective test is raised by the phrase 'because of foreign control' in art 25(2)(b).
> (2) Once it is determined that the juridical person of the host State has met the terms of the parties' agreement, it must next be determined if, objectively, the host State juridical person is controlled by a national of the home State.
> (3) That is, the mere agreement of the Contracting Parties is insufficient to satisfy the objective test. It must be investigated whether the host State company is actually controlled directly or indirectly by nationals of a third, non-Contracting State or nationals of the host State.[240]

5.140 Piercing the corporate veil, then, is a permitted exercise—indeed, a mandatory exercise—under the second limb's objective test as understood by the *National Gas* Tribunal.

Recent ICSID cases applying the two tests

5.141 In *TSA Spectrum v Argentina*, a case brought pursuant to the Netherlands–Argentina BIT, the Tribunal majority worked from the principle that art 25 of the ICSID Convention defines the extent, and hence the objective limits, of ICSID jurisdiction, 'which cannot be extended or derogated from even by agreement of the Parties.'[241] The majority cited Broches' much-quoted explanation that the purpose of art 25 is to indicate the 'outer limits' within which disputes may be submitted to ICSID arbitration.[242] In emphasising the objective character of the 'outer limits' jurisdictional responsibility of ICSID tribunals, *TSA Spectrum* relied in part (as did *National Gas*) on the award in *Vacuum Salt*. The central legal point that *TSA Spectrum* developed was that the second limb of art 25(2)(b) 'introduces a significant exception to one of the major premises of the Convention (which also reflects a general principle of international law), *i.e.* that it deals exclusively with disputes between parties of diverse nationalities, to the exclusion of those between a State and its own national investors.'[243] The basis of this exception was the wording 'because of foreign control': 'Foreign control is thus the objective factor on which turns the applicability of this provision. It justifies the extension of the ambit of ICSID, but sets the objective limits of the exception at the same time.'[244] ICSID jurisdiction cannot exist outside this objective 'because of foreign control' limit.

5.142 The *TSA Spectrum* Tribunal further explained that a significant difference existed between the two limbs of art 25(2)(b): the first uses a 'formal legal criterion, that of nationality, whilst the second uses a material or objective criterion, that of "foreign control," in order to pierce the corporate veil and reach for the reality behind the cover of nationality'.[245] Thus, limb one looks to the formal legal concept of nationality, which is determined by place or incorporation or siege social (seat) of the corporation. There is no reference to control or looking beyond this nationality or to exercising a lifting of the corporate veil. Strangely, however, the Tribunal majority considered that the *Tokios* majority's 'strict constructionist' interpretation of limb one 'has not been generally accepted and that it was also criticised by the dissenting

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[240] *National Gas* para 133.
[241] *TSA Spectrum* para 134.
[242] ibid para 135.
[243] ibid para 139.
[244] ibid.
[245] ibid para 140.

President of the *Tokios* Tribunal'.[246] As to the second limb, though, *TSA Spectrum* states that no controversy should exist, since the text itself allowed parties to lift the corporate veil: 'the existence and materiality of this foreign control have to be objectively proven in order for them to establish ICSID jurisdiction by their agreement. It would not be consistent with the text, if the tribunal, when establishing whether there is foreign control, would be directed to pierce the veil of the corporate entity national of the host State and to stop short at the second corporate layer it meets, rather than pursuing its objective identification of foreign control up to its real source, using the same criterion with which it started.'[247]

5.143 The *TSA Spectrum* majority acknowledged that previous tribunals had not been consistent in whether to pierce the second corporate layer in identifying foreign control, with some refusing (eg *AMCO*[248] and *Autopista*[249]) and others willing (eg *SOABI*[250] and *African Holding Co*[251]) to pierce to the second layer. In all of these cases, the question was the nationality of the foreign control. The majority of commentators appeared to favour piercing to expose the real controllers. Moreover, piercing up to the real source was even more compelling when ultimate control was alleged to be in hands of nationals of the host State, whose formal nationality was also that of the claimant corporation. In the case before it, TSA Spectrum was an Argentinean juridical person, whose shares were held by a Dutch juridical person. But the Dutch national was controlled by an Argentinean natural person. Thus, under the objective test of the second limb, TSA Spectrum was not to be treated as a national of the Netherlands, and jurisdiction *ratione personae* did not exist. In a concurring opinion, Abi-Saab posed the question that 'if the text allows piercing the corporate veil to establish "indirect" foreign control at a third or fourth remove, could it prohibit doing the same' by establishing that real control is in the hands of nationals of the host State?[252] His answer was that a tribunal needed to focus on the more probative evidence that would result from piercing the second corporate layer.[253]

5.144 As indicated above, the *TSA Spectrum* award also featured a strongly argued dissent from Aldonas.[254] His view was that an objective test did not exist under the second limb of art 25(2)(b). Such a test, Aldonas wrote, effectively disregards the BIT that was intended to determine the precise issue at hand.[255] A good faith interpretation of art 25 was that it makes the determination of which juridical persons may gain access to ICSID jurisdiction by virtue of their foreign control expressly dependent on an agreement of the parties, not some putative objective test.[256] His reconstruction of the negotiating history of the ICSID Convention reinforced this conclusion. Parties had the widest possible latitude to determine

[246] ibid para 146.
[247] ibid para 147.
[248] *Amco Asia Corp v Indonesia*.
[249] *Autopista* (Decision on Jurisdiction).
[250] *Société Ouest Africaine des Bétons Industriels v Senegal* (Decision on Jurisdiction) ICSID Case No ARB/82/1, 2 ICSID Rep 264 (1984, Broches P, Mbaye & van Houtte) (*SOABI*).
[251] *African Holding Co of America Inc v Democratic Republic of Congo* (Award) ICSID Case No ARB/05/21 (2008, Orrego Vicuña P, Grisay & de Witt Winjen).
[252] *TSA Spectrum* (Concurring Opinion, Abi-Saab) para 15.
[253] ibid para 17.
[254] *TSA Spectrum* (Dissenting Opinion, Aldonas).
[255] ibid para 3(2).
[256] ibid para 8.

the limits of nationality.[257] Piercing was not even applied in the diplomatic protection case, *Barcelona Traction*, that the majority relied on; the ICJ respected the legal personality of the Canadian company, and the language on piercing was *obiter*. In the case before the Tribunal, the Contracting Parties wanted a 'foreign control' provision to apply, and there had been no misuse of the corporate form by TSA Spectrum or its shareholders. Properly understood, Broches' 'outer limits' comment did not indicate a restriction on the parties' agreement as long as that agreement was 'reasonable'. Aldonas distinguished *Vacuum Salt* on the grounds that there had been no agreement between the parties in that case, and therefore second limb consideration should never have been triggered in the first place.

5.145 The Aldonas dissent has received little attention in subsequent cases. As noted above, in *National Gas*,[258] the Tribunal applied both a subjective and objective test in assessing a second limb claim of *ratione personae* jurisdiction by an Egyptian juridical person under the UAE–Egypt BIT. The BIT contained a 'foreign control' provision, therefore establishing UAE investor status where the Egyptian company was majority-owned by a UAE national. However, the Tribunal also found, in applying the objective test, that an Egyptian national (an individual who held dual nationality, Egyptian and Canadian) owned 90 per cent of the claimant via several UAE intermediaries. Thus, the BIT's presumption of 'foreign control' was rebutted, according to the Tribunal, by the objective investigation of real control. The approaches taken and the results reached by the Tribunal in the earlier *Caratube*[259] arbitration were similar: no jurisdiction under the objective test of the second limb. A similar approach was also taken in *Guardian v Macedonia*.[260]

5.146 In *Swisslion v Macedonia*,[261] however, the Tribunal declined to apply an objective test under the second limb. Article 2 of the relevant BIT defined investor and control as being either more than 50 per cent of a company's equity beneficially owned or as the power to name a majority of a company's directors or otherwise legally direct its actions. The Tribunal found that Swisslion was a Macedonian company and that more than 50 per cent of its equity interest was beneficially owned by a Swiss company, DRD Swisslion, which also had the power to legally direct Swisslion's action. On that basis, the Tribunal determined that the claimant met the conditions fixed by the BIT for foreign control, 'and it is a Swiss investor in Macedonia, whatever the nationality of the ultimate owner of DRD Swisslion may be. The Tribunal has jurisdiction *ratione personae*.'[262] Similarly, in *Quiborax*, the Tribunal only applied the subjective test under the second limb of art 25(2)(b) in finding that a claimant (Non-Metallic Minerals SA) had established jurisdiction *ratione personae*.

5.147 Finally, the *AdT v Bolivia*[263] jurisdictional decision (Netherlands–Bolivia BIT) warrants further consideration. The Tribunal majority adopted an approach highly favourable to the

[257] ibid para 9, citing A Broches, 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (1972) 136 *Recueil des Cours* 331, 360–1.

[258] *National Gas SAE v Egypt* (Award) ICSID Case No ARB/11/7 (2014, Veeder P, Fortier & Stern).

[259] *Caratube International Oil Co LLP v Kazakhstan* (Award) ICSID Case No ARB/08/12, IIC 562 (2012, Böckstiegel P, Griffith & Hossain).

[260] *Guardian Fiduciary Trust Ltd v Former Yugoslav Republic of Macedonia* (Award) ICSID Case No ARB/12/31 (2015, Heiskanen P, Bucher & Stern).

[261] *Swisslion DOO Skopje v Macedonia* (Award) ICSID Case No ARB/09/16, IIC 558 (2012, Guillaume P, Price & Thomas).

[262] ibid para 132.

[263] *AdT v Bolivia*.

claimant that was later broached in the Aldonas dissent in *TSA Spectrum* (no objective test), and which also posited a relatively broad approach to the concept of legal control (a flexible subjective test). In that case, a Dutch entity was found to have control over the Bolivian claimant company for the purpose of the BIT.

5.148 The Tribunal specifically noted that the applicable BIT was not to be construed narrowly. Rather, the Tribunal's task was to find the intent of the parties in the specific instrument, taking into account the fact that the parties had used the BIT to address 'issues of mutual concern in innovative ways'. It should not to seek to tie the specific aims of the BIT to 'general assumptions about the intent of States, assumptions which necessarily are based on assessments of past practice'.[264] The Tribunal thus proceeded to engage in an extensive and intensive examination of 'controlled directly or indirectly'. First, the Tribunal considered the meaning of the words of the text, as directed by art 31 of the VCLT.[265] Secondly, the Tribunal confirmed the resulting interpretation in accordance with art 32 of the VCLT by looking to background circumstances when the meaning of the words themselves are ambiguous or would lead to an absurd or unreasonable result. Finally, the Tribunal applied that interpretation to the specific case at hand.

5.149 The *TSA Spectrum* Tribunal majority concluded that the phrase 'controlled directly or indirectly' referred to legal capacity rather than fact.[266] However, the *ADT* Tribunal determined that the record disclosed no special meaning for control as used by the contracting parties: 'Nor should such intent be assumed since the Tribunal finds the contexts of foreign investment protection and the regulation of corporate activity to be sufficiently distinct.'[267]

5.150 The majority's textual analysis led it to agree with the claimant that the phrase 'creates the possibility of there simultaneously being a direct controller and one or more indirect controllers. The BIT does not limit the scope of eligible claimants to only the "ultimate controller"'.[268] However, that still left the question of whether any controller, indirect or direct, had to exercise actual control. To assess this point, the Tribunal focused on the object and purpose of the BIT, as stated in the preamble to be to 'stimulate the flow of capital and technology', based on 'agreement upon the treatment' to be accorded to investments by nationals of one contracting party in the territory of the other contracting party. The Tribunal majority further observed that the nationality definition in the BIT was intended in part to define 'the scope of eligible claimants' and not just the persons and entities to be accorded substantive rights under the BIT.[269] Given this background, 'controlled' indicated a quality of ownership interest. The Tribunal noted that control in the absence of an ownership interest might not qualify jurisdictionally. The question then became how 'controlled' was meant to qualify 'ownership'. Again, the majority accepted the claimant's view, in this instance that control 'is a quality that accompanies ownership'.[270] The majority was not troubled by the elevation of corporate formality in this respect.

[264] ibid para 91.
[265] ibid para 225 *et seq.*
[266] *AdT v Bolivia* para 264.
[267] ibid para 235.
[268] ibid para 237.
[269] ibid para 242.
[270] ibid para 245.

5.151 Above all, the majority found that the jurisprudence regarding art 25(2) of the ICSID Convention did not alter its conclusions. The majority recognised that it 'must therefore evaluate whether the dispute presented to it under the BIT passes through the jurisdictional keyhole defined by Article 25 of the ICSID Convention. The State parties to the BIT can seek to encompass all manner of disputes. But in attempting to place disputes under their BIT before ICSID, an institution regulated by a separate instrument, the scope of the disputes which may be submitted is necessarily limited to those disputes that pass through the jurisdictional keyhole defined by Article 25'.[271] It further recognised that pursuant to *Vacuum Salt*, '[t]he reference in Article 25(2)(b) to "foreign control" necessarily sets an objective Convention limit beyond which ICSID jurisdiction cannot exist and parties therefore lack power to invoke same no matter how devoutly they may have desired to do so.'[272] However, significantly, the Tribunal concluded that 'although there is an objective limit, a Tribunal must also remain flexible so as to accommodate the agreement of the parties as to the definition of "foreign control" ... The question is whether this definition of control in the BIT is such that disputes under the BIT pass through the jurisdictional keyhole of Article 25. In this light, it is not at all surprising that the drafting history, commentary and arbitral awards concerning that phrase "foreign control" in Article 25 all point to "foreign control" being "flexible" so that reasonable definitions in referring instruments may pass through the jurisdictional keyhole.'[273]

5.152 The *AdT* majority concluded, therefore, that 'any *reasonable determination* of the nationality of juridical persons contained in national legislation or in a treaty should be accepted by an ICSID commission or tribunal'.[274] The majority thought this was consistent with the drafting history of art 25. This indicates that the drafters intended a flexible definition of control in art 25, not because they regarded 'control' as requiring a wide ranging inquiry, but rather—recognising the keyhole function that would be played by art 25—to accommodate a wide range of agreements between parties as to the meaning of 'foreign control'.[275] The majority quoted Broches, who stated that during the drafting process, the attempt to provide an exacting definition of foreign control was 'abandoned' and that instead it was decided that 'an attempt should be made ... to give the greatest possible latitude to the parties to decide under what circumstances a company could be treated as a "national of another Contracting State" '.[276]

5.153 Applying its understanding of the second limb of art 25(2)(b) to the case before it, the *AdT* Tribunal held that there was 'no issue in the Tribunal's view that Article 1 of the BIT under either the Claimant's or Respondent's interpretation would be an agreement as to "foreign control" that satisfies the flexible and deferential requirement of Article 25(2)'.[277] In short, if the BIT's provisions were reasonable—with reasonable being very flexibly understood—the subjective test was the only second limb test.

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[271] ibid para 278.

[272] ibid fn 237, citing *Vacuum Salt* para 36.

[273] *AdT v Bolivia* para 280.

[274] ibid para 281, citing C Schreuer, *The ICSID Convention: A Commentary* (2001) 286 para 481 (emphasis in original).

[275] ibid para 283.

[276] ibid para 284, citing A Broches, 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (1972) 360.

[277] *AdT v Bolivia* para 285.

Non-ICSID Cases—'Juridical Persons'

5.154 In cases where the ICSID Convention has not been at issue, arbitral tribunals, in interpreting the *lex specialis* of the relevant investment treaty pursuant to the Vienna Convention on the Law of Treaties, largely follow the same approach as the *Tokios* majority[278] in assessing the jurisdiction *ratione personae* of a claimant corporation that meets the nationality requirements of the home State as set out in the treaty (the counterpart to an ICSID Convention Article 25(2)(b) first limb case). If, as is the case with the Energy Charter Treaty, the treaty simply provides that a company is required to be organised under the laws of the home State, no other test has been applied.[279] In *Hulley*, the Tribunal quoted Crawford's expert opinion as follows: 'The Treaty [ECT] imposes no further requirements with respect to shareholding, management, *siège social* or location of its business activities … Companies incorporated in Contracting parties are embraced by the definition, regardless of the nationality of shareholders, the origin of investment capital or the nationality of directors or management.'[280]

5.155 The *Hulley* Tribunal observed that questions about ownership and control of the claimant would be relevant to an examination of the ECT's 'denial of benefits' provision (art 17), whereby ownership or control of a claiming party by nationals of a third State may, under certain conditions, entitle the respondent State to deny certain benefits of the Treaty to the claimant. However, ownership or control would not be relevant where the nationality requirements had been met: the Tribunal was not entitled 'by the terms of the [Energy Charter Treaty] to find otherwise'.[281] In this regard, the *Hulley* Tribunal quoted *Saluka*: '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 law 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.'[282]

5.156 The principle invoked in *Hulley* was that 'no general principles of international law' require a tribunal to investigate the operation or ownership or control of a company when the investment treaty requires nothing more than incorporation.[283] Rather, when the sole requirement is incorporation in the host State, any other methods of assessing a company's nationality are excluded. The *Hulley* Tribunal cited two ICSID cases—*Plama Consortium Ltd v Bulgaria* and *Tokios Tokelés v Ukraine*—as support for this proposition, thereby drawing the link with ICSID 'first limb' cases discussed above.[284]

5.157 A requirement of organisation under the law of the host State is not necessarily simple to assess. In this respect, 'juridical person' jurisdictional challenges can be similar to challenges

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[278] *Tokios Tokelés v Ukraine* (Decision on Jurisdiction) ICSID Case No ARB/02/18, IIC 258 (2004, Weil P (dissenting), Bernardini & Price).

[279] See *Hulley Enterprises Ltd v Russia* (Interim Award on Jurisdiction and Admissibility) PCA Case No AA 226, IIC 415 (UNCITRAL, 2009, Fortier P, Poncet & Schwebel); *Petrobart Ltd v Kyrgyz Republic* (Award) SCC Case No 126/2003, IIC 184 (SCC, 2005, Danelius C, Bring & Smets); and *Saluka Investments BV v Czech Republic* (Partial Award) PCA Case No 2001–04, 15 ICSID Rep 274, IIC 210 (UNCITRAL, 2006, Watts P, Behrens & Fortier).

[280] *Hulley v Russia* para 411.

[281] ibid para 413.

[282] ibid para 414, citing *Saluka* para 241.

[283] ibid para 415.

[284] ibid para 416, citing *Plama Consortium Ltd v Bulgaria* para 128 and *Tokios Tokelés v Ukraine* para 101.

to a natural person's nationality. The corporation might have difficulty establishing that it is a national under the law of the host State, despite incorporation there, if under the host State's law nationality based on incorporation is a rebuttable presumption in the event that evidence is adduced that the company's real seat of business is located elsewhere. In a recent ICSID 'first limb' jurisdictional decision in which the result undoubtedly would have been the same if the same tribunal were not applying the ICSID Convention, *Société Civile Immobilière de Gaëta v Guinea*,[285] that is precisely what the Tribunal found. Despite French incorporation, the claimant corporation was operated from Guinea. Consequently, the Tribunal held that French nationality could not be sustained for purposes of the claim according to French law. Although this case concerned the application of a foreign investment law rather than an investment treaty, the exercise that the Tribunal sought to conduct—assessing the company's nationality status pursuant to French law—was in keeping with the principles of international investment law.

5.158 In non-ICSID cases, a claimant company that is a national of the host State may seek to take advantage of an investment treaty provision that establishes investor status by showing that the company is 'controlled' or 'owned' by a national of the home State (the non-ICSID counterpart to ICSID Convention art 25(2)(b) 'second limb' cases). In these cases, the 'objective test' of control would not necessarily apply. This is so even if the arbitrators were persuaded by *National Gas v Egypt* rather than the *AdT v Bolivia* majority because, by definition, the ICSID Convention art 25(2)(b) would not apply to the arbitration. The Tribunal would have to make its determination of whether second-level piercing was appropriate based on the terms of the relevant investment treaty, interpreted, of course, pursuant to the Vienna Convention on the Law of Treaties, without reference to the ICSID *travaux* guidance of Broches—whether or not in favour of an 'objective test' of 'foreign control'.

G. Restructuring and 'Nationality of Convenience'

5.159 Investment law recognises, in principle, the validity of altering nationality through corporate restructuring in order to take advantage of another country's treaty protections. However, restructuring is not acceptable in all circumstances, despite the absence of any prohibition in an investment treaty, and where satisfying the *ratione personae* requirement would, on the face of the treaty, be accomplished by incorporation in the home State by the date on which an arbitration is commenced. Investor–State tribunals have, in the recent cases identified below, promulgated a framework for assessing the instances where an investor's fulfilment of the formal requirements of nationality through restructuring nonetheless fails to meet the *ratione personae* standard. The framework is based on the timing of the restructuring, and the duty of tribunals to ensure that the international law principle of good faith is adhered to in the dispute resolution process.

5.160 Stated in general terms, tribunals apply the following test: restructuring is acceptable if the alteration of nationality comes before the treaty dispute has arisen; however, if the restructuring occurs after the dispute has arisen, so that the investor may take advantage of access to an arbitration provision in a treaty, a tribunal may deem this restructuring to be a misuse of the

[285] *Société Civile Immobilière de Gaëta v Guinea* (Award) ICSID Case No ARB/12/36, IIC 755 (2015, Tercier P, Grigera Naón & Lévy).

treaty system and an abuse of process or of right, leading to a denial of jurisdiction. The 2009 arbitral award in *Phoenix Action v Czech Republic*[286] and the 2010 decision on jurisdiction in *Mobil v Venezuela*[287] are the pre-eminent cases in explicating the test.

5.161 In *Phoenix Action v Czech Republic*, the issue was not that a company had changed its nationality but instead, as the Czech Republic alleged, that the claimant Phoenix was an *ex post facto* creation of an Israeli entity by a Czech fugitive, seeking to create non-Czech nationality and acquire interests in Czech companies already involved in disputes with the Czech authorities, thereby seeking to bring a pre-existing, domestic dispute before an ICSID tribunal. The Tribunal commented that the BIT's and the ICSID Convention's jurisdictional requirements could not be read 'in isolation from public international law, and its general principles', including the principle of good faith. A corporation could not, according to ICSID case law, modify the structure of its investment for the sole purpose of gaining access to ICSID jurisdiction, *after damage had occurred*.[288] The Tribunal concluded that 'change [in] the structure of a company complaining of measures adopted by a State for the sole purpose of acquiring an ICSID claim that did not exist before such change cannot give birth to a protected investment'.[289]

5.162 In *Mobil v Venezuela*, the State argued that Exxon Mobil's corporate restructuring through the creation of the Dutch holding in 2005–2006 constituted an abuse of right, and that the Tribunal therefore had no jurisdiction under the BIT. The Tribunal accepted that the main, if not the sole, purposed of the restructuring was to gain access to ICSID arbitration through the Dutch–Venezuela BIT, but observed that such restructuring could be 'legitimate corporate planning' rather than an 'abuse of right', depending upon the circumstances in which it happened. Those circumstances, the Tribunal concluded, were quite different from the situation before the Tribunal in *Phoenix Action v Czech Republic*. The *Mobil v Venezuela* Tribunal found that restructuring through a Dutch holding 'was a perfectly legitimate goal as far as it concerned future disputes'.[290] With respect to pre-existing disputes, the Tribunal considered that restructuring would constitute, to take the words of the *Phoenix Action* Tribunal, 'an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs'.[291] The result was that jurisdiction was upheld 'with respect to any dispute born after 21 February 2006 for the Cerro Negro project and after 23 November 2006 for the La Ceiba project', and jurisdiction was rejected for any dispute arising before those dates.[292]

5.163 As Douglas has felicitously phrased the general test for restructuring, there cannot be 'a restructuring of the investment in order to resort to the dispute resolution provisions of an investment treaty once a dispute has arisen. Treaty shopping is acceptable; forum shopping is not.'[293]

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[286] *Phoenix Action Ltd v Czech Republic* (Award) ICSID Case No ARB/06/5, IIC 367 (2009, Stern P, Bucher & Fernández-Armesto).

[287] *Mobil Corp Venezuela Holdings BV v Venezuela* (Decision on Jurisdiction) ICSID Case No ARB/07/27, IIC 435 (2010, Guillaume P, Kaufmann-Kohler & El-Kosheri).

[288] *Phoenix Action v Czech Republic* para 78.

[289] ibid para 92.

[290] *Mobil v Venezuela* para 204.

[291] ibid para 205, citing *Phoenix Action v Czech Republic* para 144.

[292] ibid para 206.

[293] Douglas, 290.

5.164 Recent restructuring rulings consistently cite *Phoenix Action v Czech Republic* and *Mobil v Venezuela* for the proposition that all tribunals have the obligation to prevent abuse of the system of international investment protection, which includes the obligation to prevent manipulation of nationality to bring a claim that might otherwise be precluded. In *ConocoPhillips v Venezuela*,[294] the Tribunal explained that nothing precludes a corporation from altering its nationality to benefit from protection of another country's laws. However, tribunals must still consider, where formal nationality requirements are met as a consequence of the restructuring, a possible broader objection: whether the restructuring to take advantage of treaty protections was a misuse of a power conferred by law. Quoting *Mobil v Venezuela*, the *ConocoPhillips* Tribunal reaffirmed that 'in all systems of law whether domestic or international, there are concepts framed in order to avoid misuse of the law,' such as good faith and abuse of right.[295] A corporation, the Tribunal observed, was seeking to make use of a procedure of an international character to settle a dispute with a State, and the circumstances of the restructuring had to be closely examined to ensure that good faith was preserved. A finding of breach of good faith is rare and the standard to demonstrate a breach is high.[296]

5.165 The Tribunals in *Lao Holdings v Lao* and *Pac Rim v El Salvador*,[297] by way of further example, have reiterated the *Phoenix Action v Czech Republic* and *Mobil v Venezuela* guidance that when nationality has been altered or created to obtain treaty protection, it must be determined whether there was an abusive manipulation of the system in accomplishing the alteration. That determination turns chiefly on timing—when was the dispute reasonably foreseeable, and when did the restructuring take place? *Lao Holdings* states that 'it is clearly an abuse for an investor to manipulate the nationality of a company subsidiary to gain jurisdiction under an international treaty at a time when the investor is aware that events have occurred that negatively affect its investment and may lead to arbitration. In particular, abuse of process must preclude unacceptable manipulations by a claimant acting in bad faith who is fully aware prior to the change in nationality of the "legal dispute" '.[298] *Pac Rim* quoted *Phoenix Action* on timing: 'International investors can of course structure *upstream* their investments, which meet the requirement of participating in the economy of the host State, in a manner that best fits their need for international protection, in choosing freely the vehicle through which they perform their investment ... But on the other side, an institutional investor cannot modify *downstream* the protection granted to its investment by the host State, once the acts which the investor considers are causing damages to its investment have already been committed.'[299]

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[294] *ConocoPhillips Petrozuata BV v Venezuela* (Decision on Jurisdiction) ICSID Case No ARB/07/30, IIC 605 (2013, Keith P, Abi-Saab & Fortier).

[295] ibid para 273, citing *Mobil v Venezuela* para 169.

[296] ibid para 275.

[297] *Lao Holdings NV v Lao* (Decision on Jurisdiction) ICSID Case No ARB(AF)/12/6, IIC 633 (2014, Binnie P, Hanotiau & Stern) and *Pac Rim Cayman LLC v El Salvador* (Decision on Jurisdiction) ICSID Case No ARB/09/12, IIC 543 (2012, Veeder P, Santiago Tawil & Stern).

[298] *Lao Holdings* para 70.

[299] *Pac Rim* para 2.46, citing *Phoenix Action v Czech Republic* paras 94–5 (emphasis as cited in the *Pac Rim* decision).

5.166 In *Pac Rim*, an arbitration under the Central America Free Trade Agreement (CAFTA), the Tribunal found that a principal purpose of the claimant's change in nationality was to gain access to CAFTA's protection of investment rights and international arbitration. There were other purposes, but they were less important in prompting the claimant's change from Cayman Islands to USA nationality. Adhering to the general approach set out in *Mobil v Venezuela* and in *Phoenix Action v Czech Republic*, the *Pac Rim* Tribunal focused on timing as well as the circumstances in which the restructuring of nationality had taken place in order to determine whether the restructuring would be considered legitimate corporate planning or an abuse of right—agreeing with the decision in *Mobil v Venezuela* that all systems of law include concepts, such as good faith, to prevent the misuse of law. However, as the *Pac Rim* Tribunal explained, although the test is clear, its application may well be complicated by factual uncertainties: 'the dividing-line [between a valid nationality change and abuse] occurs when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy. In the Tribunal's view, before that dividing-line is reached, there will ordinarily be no abuse of process; but after that dividing-line is passed, there ordinarily will be … [T]he Tribunal is here more concerned with substance than semantics; and it recognizes that, as a matter of practical reality, this dividing-line will rarely be a thin red line, but will include a significant grey area.'[300]

5.167 In the circumstances and timing of the case before it, the *Pac Rim* Tribunal found that (i) under CAFTA, there was no requirement that a claimant had to have a CAFTA party's nationality before making its investment, and (ii) at the time the relevant dispute arose, the claimant was already, in fact, a national of the USA and therefore a CAFTA party. Consequently, the restructuring was not an abuse of process. However, it should be noted that the claimant's CAFTA claims nonetheless failed on the grounds of CAFTA's 'denial of benefits' clause: the claimant, as a Nevada corporation, was a passive actor and did not have 'substantial' activities in the USA.[301] In a 2015 case, *Levy v Peru*, the Tribunal noted the high bar for a respondent to demonstrate abuse of process, and expressly adopted the guidance from *Pac Rim* that a specific future abuse must be foreseeable 'as a very high probability and not merely as a possible controversy'.[302] Given this high bar, the *Levy v Peru* Tribunal nonetheless found that there had been an abuse on the grounds that Levy, a French national, only became an investor in a Peruvian company (Gremcitel SA) in order to provide that company with jurisdiction under the second limb of ICSID Convention art 25(2)(b) when the relevant dispute with Peru was readily apparent. Accordingly, the Tribunal determined that the abuse of process precluded it from exercising jurisdiction over the dispute.

5.168 Thus, although tribunals look behind the formal requirements of nationality in cases of apparent restructuring or 'treaty shopping' and rely on the principle of good faith to do so, the investigation is itself directed to an overriding chronological issue: whether the change in nationality, initiated by the investor to obtain treaty protection, came before or after a dispute was foreseeable by the investor or the events allegedly causing damage to the investor. In that sense at least, as the *Pac Rim* Tribunal pointed out, international investment law contains a formalistic timing test in relation to restructuring of corporate nationality.

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300 *Pac Rim* para 2.99.

301 ibid para 4.68.

302 *Levy and Gremcital SA v Peru* (Award) ICSID Case No ARB/11/17, IIC 671 (2015, Kaufmann-Kohler P, Vinuesa & Zuleta) para 178.

5.169 The foreseeability element in this test raises one distinction that some tribunals have recently drawn regarding restructuring: the difference between an 'abuse of process' objection and a *ratione temporis* objection. As explained in *Mobil v Venezuela, Lao Holdings*, and *Pac Rim*, at issue in the doctrine of *ratione temporis* is the principle of non-retroactivity in the interpretation and application of treaties. That is, jurisdiction *ratione temporis* is not concerned with the purpose of the restructuring or the obtaining of nationality; rather, the question is simply whether the dispute has actually arisen before the date that the relevant nationality has been obtained. The *Lao Holdings* Tribunal provided the following explanation, from which it is apparent that a respondent State is probably well-advised to lodge both types of objection: 'in the present case, the question could have been discussed whether a dispute was foreseeable before the change of nationality, if an objection had been raised on the basis of an abuse of process. However, as the only objection to jurisdiction was based on *ratione temporis* issues, the only task of the Tribunal is to determine the moment when the dispute arose. If that moment—"the critical date"—is before the change of nationality, then the Tribunal enjoys no jurisdiction; if, to the contrary, the critical date is after the change of nationality, then the Tribunal can assert jurisdiction.'[303]

5.170 The problem of changing nationality for the purpose of treaty protection has less relevance in the case of an individual investor. Nevertheless in certain instances a tribunal might have to consider whether an individual's nationality still holds. This is particularly so in cases of dual nationality.In the context of ICSID, such an assessment would require the tribunal to determine whether an individual's *apparent* home State nationality is still applicable. In a non-ICSID context, the tribunal would have to determine whether the individual's 'dominant' nationality has changed. In the latter context, a tribunal would have to undertake an 'effective nationality' analysis that would at least resemble, if not equate to, a diplomatic protection 'effective nationality' exercise. Even in the ICSID context, a tribunal has acknowledged the possible need to apply an effective nationality test in the case of an individual, in extraordinary circumstances. In *Fakes v Turkey*,[304] the Tribunal stated that one might envisage several instances where this test could be justified: 'Broches observed that "there was a general recognition that in the course of ruling on their competence Commissions and Tribunals might have to decide whether a nationality of convenience or a nationality acquired involuntarily by an investor could or should be disregarded." '[305] The Tribunal added that it might be the case, for example, that a nationality of convenience acquired by an individual 'in exceptional circumstances of speed and accommodation' for the purpose of bringing an ICSID arbitration would not satisfy the nationality requirements of a BIT read together with ICSID Convention art 25(2)(a).[306] But this possible need, as a matter of the principle of good faith, to look behind an individual's acquisition of nationality has not engendered (and is unlikely to do so in the future) the frequently recurring issue that tribunals have faced in relation to corporate restructuring.

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[303] *Lao Holdings* para 83.

[304] *Fakes v Turkey* (Award) ICSID Case No ARB/07/20, IIC 439 (2010, Gaillard P, Lévy & van Houtte).

[305] ibid para 77, citing A Broches, *Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law* (1995) 204–5.

[306] ibid para 78.

Continuous Nationality

5.171 The 'restructuring' cases have not put entirely to rest an issue that was central in the *Loewen v United States*[307] arbitration under NAFTA: is it a principle of international investment law—either as a matter of customary international law or pursuant to interpretation of a particular treaty—that a claimant's nationality must remain unchanged 'from the date of the events giving rise to the claim, which date is known as the *dies a quo*, through the date of the resolution of the claim, which date is known as the *dies ad quem*'?[308] The *Loewen* Tribunal answered this question in the affirmative, holding that the requisite continuity extends from the date of injury to the date of the award, and therefore accepted the jurisdictional objection of the State. Leaving aside the factual issue of whether the *Loewen* Tribunal was correct in determining that the claimant's nationality was not continuous, the question remains whether the Tribunal's version of the 'continuous nationality' principle was and is correct, and in what ways, if any, it has any continuing applicability in investment arbitration.

5.172 The *Loewen* Tribunal stated that continuous nationality was a requirement both as a matter of 'historical and current international precedent'.[309] It noted that NAFTA provided for nationality requirements at the beginning date of the claim, but was silent on 'the question of whether nationality must continue to the time of resolution of the claim'.[310] That silence, the Tribunal stated, required the application of customary international law to resolve the matter, and as a historical matter, there was only limited dispute as to the requirement of continuous nationality. When governments dealt directly with each other on investment claims, nationality had to be continuous; if there were a break in the chain, then the home government no longer had a citizen to protect. However, as private claimants began to pursue their own claims under investment treaties, 'provision has been made for amelioration of the strict requirement of continuous nationality'.[311] The Tribunal emphasised that because such provisions were 'specifically spelled out' in various treaties (including, for example, the Iran–US claims settlement agreement pursuant to the Algiers Accords and many BITs), NAFTA's silence on the point spoke volumes. Thus, the contracting States were content to rely on the customary international law rule.[312]

5.173 The *Loewen* Tribunal further sought to explain that 'NAFTA claims have a quite different character [from domestic claims], stemming from a corner of public international law in which, by treaty, the power of States under that law to take international measures for the correction of wrongs done to its nationals has been replaced by an ad hoc definition of certain kinds of wrong, coupled with specialist means of compensation.'[313]

5.174 In considering NAFTA's purpose and language as a whole, the *Loewen* Tribunal commented that both the ICSID Convention's nationality provisions on timing issues and the International Law Commission's report[314] proposing to eliminate the continuous nationality

[307] *Loewen Group Inc v United States of America* (Award) ICSID Case No ARB(AF)/98/3, 7 ICSID Rep 421, IIC 254 (NAFTA, 2003, Mason P, Mikva & Mustill).
[308] ibid para 225 (emphasis in original).
[309] ibid para 225.
[310] ibid para 226.
[311] ibid para 229.
[312] ibid.
[313] ibid para 233.
[314] ibid paras 235–6: the report was 'met with criticism in many quarters and from many points of view.'

rule were not relevant. However, the purpose of NAFTA, to protect a foreign investor, was relevant. On the facts, the claim, following the bankruptcy of the Canadian claimant, would only inure to the benefit of a US corporation. Accordingly, the continuous nationality rule applied and the claim therefore failed.[315]

5.175 Many aspects of the *Loewen* award were quickly subject to intense scrutiny and criticism by the community of international law scholars and investment arbitration practitioners, and it is probably safe to say that the award has not withstood the test of time.[316] For example, there was the *Loewen* Tribunal's troubling application of a customary international law rule that the Tribunal appeared to acknowledge had little relevance to circumstances where private claimants, under investment protection treaties, directly pursue private claims. The *Loewen* Tribunal refused to import language into a treaty yet sought to rely on a customary international law rule that had not been adopted in many other treaties, and considered that NAFTA's silence permitted the arbitrators—or required them—to find that the customary law rule should be applied. The Tribunal did not consider whether the customary international law rule that it applied had been rendered ineffective because many investment protection treaties expressly pointed to a different approach to the nationality question.

5.176 Under the ICSID Convention and the US and Canada model BITs, continuous nationality through to the date of resolution of the claim is not a requirement.[317] In *Micula v Romania*,[318] the State contended that art 25(2) of the ICSID Convention, which requires that the investor hold the relevant nationality at the date of the request for arbitration as well as on the date on which the request is registered at ICSID, does not exclude application of customary international law on continuous nationality. The Tribunal rejected that contention, and no other recent ICSID case has ruled otherwise. Indeed, 'continuous nationality' under the ICSID Convention is not strictly required; rather the time to assess nationality simply refers to the distinct dates noted in *Micula*—the date of the request and the date of registration (usually within a very short period of time).[319] One finds in the relevant BIT to be interpreted with the ICSID Convention that nationality is also relevant at the date of the injury or foreseeable injury, as explained in the restructuring cases discussed above.

5.177 Moreover, NAFTA itself should not be regarded as silent on the matter of the dates relevant to nationality, since nationality at the date of submission of the claim is expressly provided

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[315] ibid para 237.

[316] See, notably, M Mendelson, 'The Runaway Train: the "Continuous Nationality Rule" from the *Panevezys-saldutiskis Railway case* to *Loewen*' in T Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (2005). See also Paulsson 183–4, and his 'Continuous Nationality in *Loewen*' (2004) 20 Arb Int'l 213, and E Gaillard, 'Centre International pour le Reglement des Differends relatifs aux Investissements: Chronique des Sentences Arbitrales' (2004) Journal du Droit International 213, 230–3.

[317] A point made in Mendelson 'The Runaway Train' 292.

[318] *Micula v Romania* (Decision on Jurisdiction and Admissibility) ICSID Case No ARB/05/20, IIC 339 (2008, Lévy P, Alexandrov & Ehlermann).

[319] See Schreuer (1st edn, 2001) 274 as quoted in *Siag v Egypt* para 205:

> In the traditional law of diplomatic protection, a requirement of continuous nationality is often asserted from the time the claim arises up to the date it is taken up by the State of the injured person's nationality or even up to the date of a decision. The Convention does not require continuity of nationality. Its wording is directed at distinct points in time and not at a continuous period of time, which could have been expressed quite easily by 'from to' or 'continuously until' rather than by 'as well as' and 'on either date.'

for.[320] Mendelson further criticises the Tribunal's treatment of customary international law as follows:

> The Tribunal's attempt to use these and other treaties as the basis for an a contrario argument to the effect that, because the NAFTA does not contain specific provisions modifying the continuous nationality rule, the (supposed) customary rule must apply, might have been more convincing if it had satisfactorily established that the extended version of the rule was an established principle of customary law—which, for the reasons provided above, it could not and in any event did not convincingly do. Nor did it explain why a rule developed in one context (diplomatic protection) necessarily carried over into another area (investor claims). It did not even cite a single authority in support of any of its propositions."[321]

5.178 The tribunal in *EnCana v Ecuador*[322] observed that there is in NAFTA at least an 'apparent co-mingling of diplomatic protection concepts with investor–State claims (see, for example, Article 1136(5))'.[323] In the event that a disputing Party fails to abide by, or comply with, a final award, art 1136(5) of NAFTA allows a successful claimant to request that the NAFTA Free Trade Commission: (1) determine that the disputing Party's failure to comply is inconsistent with its NAFTA obligations; and (2) recommend that the Party comply with the award. An analogy can thus be drawn between the art 1136(5) procedure and diplomatic espousal or protection, because both are a peaceful means of putting pressure on recalcitrant States to comply with awards. However, that co-mingling does not salvage the approach of the *Loewen* Tribunal, as can be discerned from the International Law Commission's Draft Articles on Diplomatic Protection, particularly arts 5 (continuous nationality of a natural person) and 10 (continuous nationality of a corporation). The International Law Commission (ILC) stated that it was not prepared to follow the *Loewen* Tribunal 'in adopting a blanket rule that nationality must be maintained to the date of resolution of the claim'[324] (regarding art 5). Instead, the ILC preferred 'the date of the official presentation of the claim as the *dies ad quem*'.[325] The same principle is applied to corporations by the ILC.[326] This would seem to provide a compelling answer to—and rejection of—the *Loewen* Tribunal's position on continuous nationality.

5.179 In international investment arbitration, then, 'continuous nationality', if not specifically defined by the relevant treaty, should not be considered a requirement. As a practical matter, the requirement of continuous nationality runs from the date on which the matter giving rise to the dispute arose until the institution of the claim, but not thereafter. If there is a break in nationality of ownership of the claim during that period, the resumption of nationality

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[320] NAFTA (Appendix 1 below) arts 1116 and 1117.

[321] Mendelson 141.

[322] *EnCana Corp v Ecuador* (Award) LCIA Case UN3481, IIC 91 (UNCITRAL, 2006, Crawford P, Grigera Naón & Thomas).

[323] ibid para 128. NAFTA art 1136(5): 'If a disputing Party fails to abide by or comply with a final award, the Commission, on delivery of a request by a Party whose investor was a party to the arbitration, shall establish a panel under Article 2008 (Request for an Arbitral Panel). The requesting Party may seek in such proceedings:

(a) a determination that the failure to abide by or comply with the final award is inconsistent with the obligations of this Agreement; and

(b) a recommendation that the Party abide by or comply with the final award.'

Further, in fn 84, the *EnCana* Tribunal refers to the ILC Draft Articles on Diplomatic Protection, art 5.

[324] ILC 'Diplomatic Protection: Draft Articles with Commentaries' art 5 commentary para 5.

[325] ibid.

[326] ibid art 10 commentary para 2.

would trigger investigation pursuant to the principles constraining restructuring, discussed above, and would unlikely survive such investigation. However, even under this practical requirement of continuous nationality, the end date would be submission of the claim—and not, as the *Loewen* Tribunal determined, the date of resolution of the claim.

H. Denial of Benefits

5.180 Some investment treaties contain 'denial of benefits' clauses to address concerns about nationals, legal entities in particular, of the home State that seek to lodge treaty claims but have no connection to the home State other than the simple fact of their incorporation.[327] These clauses typically require a link between the company and its State of incorporation represented by 'substantial business activities' or, as in the US model BIT, may also exclude treaty protections from companies that are owned or controlled by investors from a country with which a contracting State has no diplomatic relations or otherwise prohibits transactions. 'Denial of benefits' clauses originally arose in the diplomatic protection context, in order to exclude 'enemy companies' from the possibility of obtaining espousal.

5.181 In addition to art 17 of the 2012 US model BIT, art 17(1) of the Energy Charter Treaty (ECT) provides an important example of a 'denial of benefits' clause. ECT art 17 states that each party to the Treaty reserves the right to deny the advantages of Part III on investment promotion and protection to companies that have no 'substantial business activities' in the State in which the company is organised or if the investment belongs to an investor from a third State with which the State does not maintain diplomatic relations. A differently worded clause appears in art VI of the ASEAN Framework Agreement on Services (December 1995), which provides that '[t]he benefits of this Framework Agreement shall be denied to a service supplier who is a natural person of a non-Member State or a juridical person owned or controlled by persons of a non-Member State constituted under the laws of a Member State, but not engaged in substantive business operations in the territory of Member States(s)'.[328]

5.182 CAFTA (art 10.12) also includes a variant of a denial of benefits clause, though unlike the above ASEAN clause, it is permissive:

> A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such other Party and to investments of that investor if persons 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 or a person of 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.
>
> Subject to Articles 18.3 (Notification and Provision of Information) and 20.4 (Consultations), a Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise

[327] See eg L Gastrell and PJ Le Cannu, 'Procedural Requirements of "Denial-of-Benefits" Clauses in Investment Treaties: A Review of Arbitral Decisions' (2015) 30 ICSID Review-FILJ 78–97; LA Mistelis and C Baltag, 'Denial of Benefits and Article 17 of the Energy Charter Treaty' (2009) 113 Penn State LR 1301–21; R Hoffmann, 'Denial of Benefits' in M Bungenberg et al (eds) *International Investment Law* (2015) 598–613; and Douglas 468–72.

[328] signed 15 December 1995 (1996) 35 ILM 1072.

of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of any Party, other than the denying Party, and persons of a non-Party, or of the denying Party, own or control the enterprise.

The *Pac Rim* Tribunal interpreted this CAFTA clause to require that the respondent State seeking to exercise it must establish that the claimant had no substantial business activities in the territory of the home State, and that the claimant was owned or controlled by persons of a non-CAFTA Party.

5.183 Denial of benefits clauses have been considered in a number of investment cases.[329] The only clear principle emerging from these awards to date is the overriding importance of parsing the particular wording of the clause at issue. Tribunals have taken, accordingly, different views on whether a denial of benefits clause has retrospective or only prospective effect. In *Plama v Bulgaria*, the Tribunal analysed the ECT clause and found that it only applied with prospective effect, after notice of exercise of the clause by the respondent State. The *Liman v Kazakhstan* Tribunal agreed with this approach, explaining that ECT art 17(1) had to be interpreted as conferring to a Contracting State the right of denial, but that this right that had to be exercised in an explicit manner, and thus the notification had a prospective and not retroactive effect.[330]

5.184 However, in *Ulysseas v Ecuador*, in which the denial of benefits clause in the US–Ecuador BIT was at issue, the Tribunal held that the clause did not apply only prospectively. Rather, retrospective effect was acceptable, in that it would not cause uncertainties as to the legal relations under the BIT, since the possibility for the host State to exercise the right in question is known by the investor from the time when it made its the investment.[331]

5.185 The *Amto v Ukraine* Tribunal reviewed the ECT clause. Since the ECT clause does not contain a definition of 'substantial', the Tribunal analysed the meaning of 'substantial' in the phrase 'substantial business activities'. The Tribunal reached a nuanced conclusion: since the purpose of art 17(1) is to exclude from ECT protection investors that have adopted a

[329] See eg *Generation Ukraine Inc v Ukraine* (Award) ICSID Case No ARB/00/9, IIC 116 (2003, Paulsson P, Salpius & Voss); *Petrobart Ltd v Kyrgyz Republic* (Award) SCC Case No 126/2003, IIC 184 (SCC, 2005, Danelius C, Bring & Smets); *Pan American Energy Int Co v Argentina* (Decision on Preliminary Objections) ICSID Case No ARB/03/13, IIC 183 (2006, Caflisch P, Stern & van den Berg); *Plama Consortium Ltd v Bulgaria* (Decision on Jurisdiction) ICSID Case No ARB/03/24, IIC 189 (2005, Salans P, van den Berg & Veeder) and (Award) IIC 338; *Amto LLC v Ukraine* (Final Award) SCC Case No 080/2005, IIC 346 (SCC, 2008, Cremades C, Runeland & Söderlund); *Empresa Eléctrica del Ecuador v Ecuador* (Award) ICSID Case No ARB/05/9, IIC 376 (2009, Sepúlveda Amor P, Reisman & Rooney); *Hulley Enterprises Ltd v Russia* (Interim Award on Jurisdiction and Admissibility) PCA Case No AA 226, IIC 415 (UNCITRAL, 2009, Fortier P, Poncet & Schwebel); *Veteran Petroleum Ltd v Russia* (Interim Award on Jurisdiction and Admissibility) PCA Case No AA 228, IIC 417 (UNCITRAL, 2009, Fortier P, Poncet & Schwebel); *Yukos Universal Ltd v Russia* (Interim Award on Jurisdiction and Admissibility) PCA Case No AA 227, IIC 416 (UNCITRAL, 2009, Fortier C, Poncet & Schwebel); *Liman Caspian Oil BV v Kazakhstan* (Award) ICSID Case No ARB/07/14, IIC 590 (2010, Böckstiegel P, Crawford & Hobér); *Ulysseas Inc v Ecuador* (Interim Award) PCA Case No 2009-19 (UNCITRAL, 2010, Bernardini P, Pryles & Stern); *Pac Rim Cayman LLC v El Salvador* (Decision on Jurisdiction) ICSID Case No ARB/09/12, IIC 543 (2012, Veeder P, Santiago Tawil & Stern); *Stati v Kazakhstan* (Award) SCC Arb V 116/2010 (SCC, 2013, Böckstiegel C, Lebedev & Haigh); *Guaracachi America Inc v Bolivia* (Award) PCA Case No 2011-17, IIC 628 (2014, Miguel Júdice P, Conthe & Vinuesa).

[330] *Liman Caspian Oil BV v Kazakhstan* (Award) ICSID Case No ARB/07/14, IIC 590 (2010, Böckstiegel P, Crawford & Hobér) paras 224–5.

[331] *Ulysseas Inc v Ecuador* para 172.

nationality of convenience, 'substantial' in this context means 'of substance, and not merely of form'. But it does not mean 'large'—the materiality and not the magnitude of the business activity is the decisive question.[332]

5.186 In *Generation Ukraine v Ukraine*, the wording of the 1994 US–Ukraine BIT had to be assessed to determine precisely what the State had to prove about the status of the investor in order to exercise the clause. Although the State ultimately prevailed in the arbitration, the Tribunal rejected its position on denial of benefits: the Tribunal found that third party control, as well as the absence of substantial business activities in the home State, was a condition precedent for the host State to exercise the right of denial. Although the clause was not completely clear on its face, the Tribunal determined that a US Department of State 'Letter of Submittal' to the US President, when the US entered into the BIT, clarified that the State carried the burden of showing third party control in addition to the absence of substantial business activities.[333]

5.187 Tribunals analysing denial of benefits clauses continue to disagree on where such clauses fall on the 'jurisdiction or admissibility' divide. This may be less a matter of the precise wording of the clause than the views held by individual arbitrators on the distinction between jurisdiction and admissibility. In *Generation Ukraine v Ukraine*, the Tribunal considered the right of denial (under the US–Ukraine BIT) to be a question of admissibility, but did not fully explain how it reached this conclusion.[334] The *Plama v Bulgaria* Tribunal stated that ECT art 17(1) did not operate as a denial of all benefits to a covered investor under the treaty, but was expressly limited to a denial of the advantages of Part III of the ECT. It therefore concluded that art 17(1) had no relevance in determining the Tribunal's jurisdiction.[335] However, in *Ulysseas v Ecuador*, the Tribunal reached the opposite conclusion, holding that a valid exercise of the right of denial would have the effect of depriving the Tribunal of jurisdiction. Since Ulysseas was an UNCITRAL case, the jurisdictional objection had to be raised no later than in the statement of defence.[336] Similarly, the Tribunal in *Pac Rim v El Salvador* characterised denial of benefits as a jurisdictional issue.[337]

5.188 In contrast, in *Ampal-American Israel Corp v Egypt*, the Tribunal imposed mandatory requirements of consultation between States as to whether the benefits were to be denied. It further held that, since the jurisdiction of the Tribunal is to be determined at the time it is seised of the dispute, to be effective a denial of benefits must take place prior to the institution of proceedings.[338]

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[332] *Amto v Ukraine* para 69.

[333] *Generation Ukraine v Ukraine* para 15.1–15.9.

[334] *Generation Ukraine v Ukraine* paras 17.1–17.8.

[335] *Plama v Bulgaria* (Decision on Jurisdiction) paras 149 and 179.

[336] *Ulysseas Inc v Ecuador* para 172. For ICJ jurisprudence on this point, see *Right of Passage Over Indian Territory (Portugal v India)* (Preliminary Objections) [1957] ICJ Rep 125, 142: 'It is a rule of law generally accepted, that, once the Court has been validly seised of a dispute, unilateral action by the respondent State in terminating its Declaration, in whole or part, cannot divest the Court of that jurisdiction'.

[337] *Pac Rim* para 4.92; see also *Guaracachi v Bolivia* paras 381–2 where the Tribunal agreed that denial of benefits raised a jurisdictional rather than admissibility bar.

[338] *Ampal-American Israel Corp v Egypt* (Decision on Jurisdiction) ICSID Case No ARB/12/11 (2016, Fortier P, McLachlan & Orrego Vicuña), citing *Portugal v India* 142.

I. Conclusion

5.189 To assess the viability of the *ratione personae* jurisdictional foundation of an investment claim, the following series of short propositions should be considered as a framework for analysis, in view of recent cases interpreting investment treaties.

5.190 The starting point for analysis is the express provision (if any) on nationality in the BIT (or MIT) on which the foreign investor's claim is based.[339]

5.191 *ICSID Convention.* In instances where the ICSID Convention is also applicable to the claim:

(a) Article 25(2)(a) adds that individuals ('natural persons') cannot be a national of both the home and host States either when the claim is submitted to ICSID or when the request is registered by ICSID.
(b) Article 25(2)(b), first limb, extends the jurisdiction of ICSID to juridical persons on the basis of their nationality of another Contracting State. It does not require a determination of the origin of capital invested.
(c) Article 25(2)(b), second limb, in relation to juridical persons, adds, pursuant to *National Gas* (though this is not fully settled), that there are subjective and objective tests to determine whether a corporation that is a national of the host State can nonetheless avail itself of home State investor status pursuant to a 'foreign control' provision to which the Contracting Parties have agreed.

5.192 In determining a claimant's nationality, the claimant's putative home State provides the legal determination that is to be accepted (pursuant to Convention on Certain Questions Relating to the Conflict of Nationality Law), in so far as the home State's legal determination is 'consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality'.[340] Thus, in the context of an investment treaty claim, the home State's law may be said to provide a very powerful, though possibly rebuttable, presumption regarding the claimant's nationality.

5.193 The nationality of a natural person-claimant is generally conclusively determined by the home State's citizenship laws:

(a) The natural person-claimant must possess home State citizenship at the date of injury and, usually, continuously from that date until the date of submission of the arbitration request (in ICSID cases, home State citizenship must also be possessed at the date of registration of the claim).
(b) Dual nationality, where the natural person-claimant is a national of both the home and host States, will preclude the maintenance of an ICSID claim (art 25(2)(a) of the ICSID Convention). In non-ICSID cases, depending on the relevant investment treaty, dual nationality may be permitted, and in the event that it is not precluded, it is generally the case that a 'predominant' or 'effective' nationality test will be applied (though an important recent case (*Armas*[341]) may lead future tribunals not to apply such a test).

[339] Paragraphs 5.58 *et seq* above provide examples of such express provisions.
[340] Convention on Certain Questions Relating to the Conflict of Nationality Law, art 1.
[341] *Armas v Venezuela* (Decision on Jurisdiction) PCA Case No 2013-3 (2014, Grebler P, Oreamuno Blanco & Santiago Tawil).

5.194 In the case of juridical persons, a 'formal' State of incorporation test (the *Tokios*[342] line of cases) usually applies, including in cases of purely 'shell' corporations, unless the relevant BIT or MIT provides otherwise:

(a) It is usually the case that the corporation must possess home State nationality continuously from the date of injury until the date of submission of the arbitration request.
(b) The nationality of the corporation's shareholders will not be regarded as the nationality of the corporation unless the corporation has ceased to exist pursuant to the law of the State of incorporation or the corporation had the nationality of the host State at the date of injury and (i) the host State is alleged to be responsible for the injury, and (ii) incorporation in the host State was required by it as a precondition for doing business there.
(c) The nationality of the shareholders will further be relevant in the event that they claim direct injury to their rights as opposed to injury to the corporation itself.

5.195 Where an investment treaty extends its protections to legal persons controlled directly or indirectly by nationals of one Contracting Party but constituted in accordance with the law of the other Contracting Party, it is necessary to determine whether 'control' is sufficiently established by formal ownership or whether ultimate substantive control is required. The current majority view is arguably expressed in *National Gas v Egypt*[343] which provides that formal ownership or control is necessary but *not* sufficient: substantive, objective control must be investigated, in effect lifting the corporate veil to determine who holds ultimate substantive control (or at least to determine whether a host State person or entity is in the substantive control chain). This view cannot be regarded as settled in light of, for example, the decision in *AdT v Bolivia* (majority)[344] and the dissenting opinion in *TSA Spectrum*,[345] which eschew an 'objective test' and consider formal ownership or control by a home State entity or natural person (pursuant to the relevant investment treaty's provisions) to be necessary and sufficient.

5.196 The burden of establishing jurisdiction *ratione personae* is on the claimant individual or claimant corporation.

5.197 'Mass claimant' claims are permitted, provided that the individual claimants (whether natural or juridical persons) meet their respective burdens to demonstrate *ratione personae*.

5.198 Corporate 'restructuring' is permitted to take advantage of treaty protections, provided that a dispute with the host State that would entitle the putative claimant to such protections was not foreseeable before the date of the restructuring and that the pursuit of the claim on this basis is not otherwise an abuse of right or in bad faith.

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[342] *Tokios Tokelés v Ukraine*.
[343] *National Gas SAE v Egypt* (Award) ICSID Case No ARB/11/7 (2014, Veeder P, Fortier & Stern).
[344] *Aguas del Tunari SA v Bolivia* (Decision on Jurisdiction) ICSID Case No ARB/02/3, IIC 8 (2005, Caroli P, Álvarez & Alberro-Semerena (dissenting)) (*AdT v Bolivia*).
[345] *TSA Spectrum de Argentina SA v Argentina* (Award) ICSID Case No ARB/05/5, IIC 358 (2008, Danelius P, Abi-Saab & Aldonas (dissenting)).