A Re-consideration of Nationality Planning in Investment Treaty Arbitration: Challenging Fundamental Assumptions and Beyond

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Abstract

Pre-empting an examination of nationality to meet any challenges of jurisdiction ratione personae, multi-national corporations structure their operations in a manner that secures them access to a bi-lateral treaty. The possibilities afforded by the use of a corporate vehicle are distinct from those available to an individual investor and this is reflected in the divergent awards and jurisprudence that follow these claiming entities. The emphasis on the distinction between individuals and corporate bodies has precluded a broader recognition of the accepted principles and assumptions that are common to and should inform any examination of nationality. This observation forms the starting point of this paper.

In relation to corporate structures specifically, through multiple awards, dissenting notes and scores of scholarly opinions, much ink has been spilled over nationality planning and yet no settled outcome emerges. The concerns of nationality planning are sometimes reflected in the very BIT under question, arguably ineffectively so, or often arise later before a tribunal that is faced with a specific factual oddity. Tribunals have then navigated through complex structures, and to uphold the purpose and objectives of international treaty arbitration as they define them, have creatively employed the use of doctrines such as the principle of abuse of rights and piercing the corporate veil. On that note, this paper takes a sharp deviation from the mainstream international practice to look at the outliers for a solution, drawing lessons from individual investor decisions and the ramifications of a corporate personality to offer a new approach to address the issue of nationality planning.

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I. Introduction and Contextual Background

Investment treaty arbitration offers an effective remedy to investors against the host State in which their investment is made, to resolve disputes on an international and neutral platform. This remedy, usually enabled through a bi-lateral investment treaty, represents the consent of the State for any dispute arising out an investment. The relevant treaty also provides the definition of investor and investments that must be satisfied in addition to Article 25 of the ICSID Convention, if the arbitration is an ICSID arbitration. This paper looks at an issue that has arisen in this context, and seeks to provide a solution.

This position that is argued for in this paper is premised of an assumption that is acknowledged and sought to be justified in the beginning itself. This assumption relates to the acceptability of nationality planning in investment treaty arbitration. By nationality planning, the author refers to the structuring and use of corporate structures[1] to benefit from advantages that would otherwise not have been available to the corporation, in this specific context, the advantage being the availability of protections and remedies provided under a bi-lateral investment treaty (BIT).

The current preferred position in law, as understood from the approach taken by a majority of Tribunals, is a reflection of a statement of the Tribunal in the case of *Aguas del Tunari v. Bolivia*, wherein it was observed that nationality planning is a common practice and not illegal, where the objective is to obtain a beneficial requirement such as the availability of a BIT.[2] The situation in which Tribunals have held such a practice to be unacceptable and constitute a violation of rights is when the re-structuring occurs after the dispute has arisen, or there is a foreseeable dispute. Such an application can be seen in the decisions of *Phoenix v. Czech Republic, and Philip Morris v. Australia* among others. This point was reiterated in the observation of the Tribunal in *Mobil v. Venezuela*, which drew a clear distinction in restructuring as it concerned future disputes not yet arisen, and a pre-existing dispute, the former being legitimate and the latter being an abuse of the system.[3] This position is justified by the Tribunals that adopt them in many ways. For example, the absence of a denial of benefits clause has been construed as an acceptance of different corporate

[1] Those without substantial economic activities or independent functioning.
[2] *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objection on Jurisdiction (Oct. 21, 2005), ¶330.
[3] *Mobil Corp. Venezuela Holdings, B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction (Jun. 10, 2010), ¶205.

structures by the Contracting States,[4] or the definitions provided in the relevant BIT if broad may highlight the intent of the multi-lateralize of the regime which is in keeping with purpose of protection of foreign investment.[5] However, it has also been recognized that identifying when a dispute is foreseeable or has arisen is a difficult and uncertain process.[6]

The position of the author is in contrast to the one detailed above. The author suggests that nationality planning, or specifically the use of complex corporate structure through holding and subsidiary companies, should be scrutinised on every occasion by Tribunals and not just when a dispute may be foreseeable or arisen. To substantiate this position, the author relies on certain arguments offered by Chieh Lee in *Resolving Nationality Planning Issue through the Application of the Doctrine of Piercing the Corporate Veil in International Investment Arbitration*.[7] Preliminarily, it may be observed that Respondent States object to such behaviour during arbitrations consistently, claiming that it is a manipulation of the protections offered by the regime. Lee argues that a simple textual adherence of BITs that ignores the context, object and purpose of the treaty is inconsistent with the Article 31, of the Vienna Convention on the Law of Treaties. This is because it frustrates the principle of reciprocity that is embodied in BITs. Reciprocity in this context refers to the idea that the obligations to protect investors of the contracting state (and not to all investors at large) are in exchange for similar protection to its own nationals, and such is circumvented when a third State investor claims benefit of the BIT. It is not all kinds of foreign capital that is sought to be attracted, rather investment from the reciprocating State with which the treaty is entered into, and States should have the right to decide the party with whom to contract and not have this choice subverted.

The allowance of claims of third parties through corporate structure allows transforms the limited bi-lateral protections to assume an unlimited and unpredictable character. Furthermore, multi-lateralization as a consequence of broad interpretation in an unforeseen consequence objected to by states,[8] confirmed further by the fact that a multilateral regime has failed to emerge despite

[4] As observed in *Tokios Tokelis v Ukraine* ICSID Case No. ARB/02/18 Decision on Jurisdiction (Apr 29, 2004).
[5] This was observed by the Tribunal in *Aguas del Tunari v. Bolivia* (*supra* note 2).
[6] *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, (June 1, 2012), ¶66.
[7] Chieh Lee, *Resolving Nationality Planning Issue through the Application of the Doctrine of Piercing the Corporate Veil in International Investment Arbitration*, 9 Contemp. Asia Arb. J. 87 (2016).
[8] Such as Venezuela terminating its treaty with Netherlands, available at http://www.state.gov/documents/organization/229303.pdf.

efforts. Finally, Lee argues that where a controlling shareholder has absolute control over a company with no independent functioning, the application of the separate legal entity concept is unjustified. As a final note, it is observed that denial of benefits clauses have been largely ineffective in protecting States in these matters as Tribunals have implied a need to give notice of such denial before the dispute arises.[9] This paper is therefore grounded in this context and offers a different solution.

II. Lessons from Nationality Requirements of Individual Investors

In looking at tackling the issue of nationality planning, the author of this paper believes that jurisprudence relating to nationality of investors that are natural persons has important consequences that should be considered when cases concerning the nationality of corporations are in question. With respect to natural investors, the nationality inquiry is less accommodating. Article 25(2)(a) of the ICSID Convention, which is understood to set the outer limits for ICSID arbitrations, provides that the investor bringing the claim must have the nationality of the Contracting Party and should not have the nationality of the Host State at the relevant times. The Report of the Executive Directors states that the dual national ineligibility is absolute and cannot be cured by consent of the State in the dispute.[10] However, Article 25(2)(b) relating to corporate nationality, does not explicitly contain such a condition.

Such comparative rigidity in the case of individual investors is also evidenced by certain observations made by Tribunals. For example, in *Soufraki v. UAE*, the Tribunal while denying jurisdiction because Mr. Soufraki failed to satisfy the nationality requirements observed that there would have been no problem of jurisdiction had a corporation incorporated in Italy been used to make the claim.[11] Again, in *Champion Trading v. Egypt*, the jurisdiction of the investor was denied due to dual nationality, and the Tribunal observed that a corporate vehicle would have resolved this issue.[12] Such observations seem manifestly unfair as it goes against the commonly accepted

[9] *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (Feb. 8, 2005); *Limited Liability Company AMTO v. Ukraine*, SCC Case No. 080/2005, Final Award, (Mar. 26, 2008).
[10] Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1964), ¶29.
[11] *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Award, (Jul. 7, 2004), ¶83.
[12] *Champion Trading Company and Ameritrade International, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Decision on Jurisdiction, (Oct. 21, 2003).

principle that a person should not be allowed to do that through a corporate vehicle, which is he prohibited from doing himself.

Contrastingly, another approach has been taken in *Burimi v. Albania*, wherein a Tribunal required the investor to withdraw his claim, as he was a national of both the Contracting States.[13] In this case, Burimi SRL was owned by Mr. Ilir Burimi who was an Italian-Albanian national, and the company had been incorporated in Italy. There were important observations made in this award that are relevant to this discussion. The Tribunal held that it would be anomalous if the dual nationality requirement did not transfer to Article 25(2)(b).[14] However, this was noted in reference to examining the control of the Albanian company, wherein the Tribunal found that a corporate vehicle cannot be used to circumvent the dual nationality bar in Article 25(2)(a). With respect to a company incorporated in Italy however, it observed that piercing the corporate veil would not be entered into in the case where the company was incorporated in the Contracting Party not party to the dispute.[15] Therefore, from this case, it emerges that while the bar on dual nationals would be considered only in an inquiry under the second part of Article 25(2)(b).

Again in *National Gas v. Egypt*, a similar claim by a national of the Contracting State to the dispute was rejected due to the dual nationality bar.[16] In this case, a dual national wholly owned a company incorporated in the United Arab Emirates, which in turn wholly owned another company in the United Arab Emirates, which held 90% shares of a company incorporated in Egypt (Claimant company). The Tribunal observed the difference between foreign control and foreign nationality of the claimant.[17] It disregarded the corporate structure of the companies stating that while they had been incorporated in good faith for legitimate fiscal reasons, they were shell companies and therefore had no independent existence from their owner who was a dual national.[18] For this reason, the objective test under Article 25(2)(b) requiring foreign control was not satisfied.[19]

From the preceding discussion, it emerges that a locally incorporated company whose ultimate controllers are dual nationals, should be prevented from bringing a claim. It is argued that foreign

[13] *Burimi SRL and Eagle Games SH. A v. Republic of Albania*, ICSID Case No. ARB/11/18, Award (May 29, 2013), ¶46.
[14] *id*, ¶121.
[15] *id*, ¶130-133.
[16] *National Gas S.A.E. v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7, Award (April 3, 2014), ¶117.
[17] *id*, ¶141.
[18] *id*, ¶144-147.
[19] *id*, ¶149.

control in Article 25(2)(b) is both a subjective and objective inquiry, the latter which stands to be prevent nationals of the Contracting Party from preceding against it on an international forum.[20] The bar on dual nationals is made clear and uncurable in Article 25(2)(a). As observed in cases before, it would be anomalous if this bar was allowed to be circumvented through use of a corporate vehicle. Therefore, the author of this paper agrees that the correct interpretation of the second part of Article 25(2)(b) incorporates the same bar against nationals and dual nationals, and carves out an exception for foreign controlled companies. As with Article 25(2)(a), this requirement of foreign control against dual nationals cannot be lifted by consent of the Contracting State. This is further supported by the statements made in the Report of the Executive Directors that "while consent of the parties is an essential prerequisite for the jurisdiction of the Centre, consent alone will not suffice to bring a dispute within its jurisdiction. In keeping with the purpose of the Convention, the jurisdiction of the Centre is further limited by reference to the nature of the dispute and the parties to it".[21]

This position however is sought to be extended by author to the following extent. The underlying rationale behind the preceding discussion is that a corporate form should not allow an individual to accumulate an advantage that is otherwise inaccessible to him and that a national should not be allowed to bring a proceeding against its own State on an international forum. Therefore, the bar on dual nationals as found in individual and juridical person nationality should not be allowed to be circumvented through incorporation of a corporate vehicle in another Contracting Party (which would fall under the first part of Article 25(2)(b))[22] and that the logic of no independent existence regarding shell companies should be extended to all corporate structures where the ultimate controller is not a national of the other Contracting State. This is elaborated on in the next section.

[20] This opinion is supported by Professor Christoph Schreur in his commentary The ICSID Convention: A Commentary, and judgments like *Autopista Concesionada de Venezuela, C.A. v. Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction, (Sep. 27, 2001).
[21] *supra* note 10, ¶60.
[22] It may be noted that in the judgments *Burimi v. Albania* and *National Gas v. Egypt*, the Tribunals remain limited to the second clause of Article 25(2)(b), and in the former case, the Tribunal states that analysis of control would not be applicable in the first part of Article 25(2)(b). This position is departed from.

III. Addressing Corporate Structures and Nationality Planning

A starting point for this section is the recognition that investment treaty law has come to recognize both direct and indirect claims brought by shareholders. Direct claim refers to an action brought by shareholders for the effect on the value of their shares (being the investment) by an action of the State. An indirect action refers to shareholders bringing the claim as owners for damage to the company as a result of the actions of State (essentially the company's BIT rights). Gabriel Bottini, in his article, writes that recognition of indirect claims by shareholders is outside the jurisdiction of the ICSID Convention but nonetheless have been so recognized by Tribunals.[23] He argues that in the negotiation of the Convention, the drafters rejected the suggestion that direct access to foreign owners could be granted for injury to a company. However, despite this limitation, he notes that jurisprudence has used the definition of investment (shares) and investor in the BIT to circumvent this condition such as in *Enron v. Argentina* where the Tribunal stated that the definition of investment-controlled Enron's *jus standi*.[24] Zachary Douglas elaborates on this point stating that recognition of shareholding in investment treaty settles the capacity of the investor, however it has been extended to include a derivative (indirect) action for the claim of the company.[25] The point that is relevant to this discussion is that definition of investment has played an important role in the understanding of the definition of an investor, both contained in a BIT which ultimately has the effect of extending the scope of the ICSID Convention.

The argument proposed in this paper is that *ratione materiae* (definition of an investment) should be used to qualify the boundaries of jurisdiction *ratione personae* in a way that furthers the purpose of investment treaty law. This draws from a link between both of these aspects of jurisdiction has already been established as discussed above. This has also been done before in the case of dual nationals specifically, where the French Supreme Court ruled that nationality at the time of investment was relevant for jurisdiction *ratione materiae* as the term used in the relevant BIT is assets 'invested' by the investor, which was distinguished from assets held by the investor, however in this case to decline jurisdiction, rather than to expand and accept it.[26]

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[23] Gabriel Bottini, *Indirect Claims Under the ICSID Convention*, 29 U. Pa. J. Int'l L. 563 (2008).
[24] *Enron Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (Ancillary Claim), 11 ICSID Rep. 295, (Aug 2, 2004), ¶30.
[25] Zachary Douglas, Admissibility: Shareholder Claims (Chapter 11) in *The International Law of Investment Claims (pp. 397-457*), Cambridge University Press (2009).
[26] Cass Civ. 1re, February 13, 2019, Appeal No. A 17-25.851.

IV. A New Approach

This section will proceed as follows. First, two arbitration awards and their related proceedings will be discussed. These judgments, are, in a sense, outlier judgments and the reasoning used will be extrapolated to formulate an approach to interpretation of treaties when considering nationality planning. After doing so, justifications with be provided for adopting this approach by looking and drawing lessons for investment arbitration jurisprudence.

The first award is that of *Serafín García Armas v. Bolivarian Republic of Venezuela*.[27] This case concerned a dispute arising out of unlawful indirect expropriation by the Respondent State against the Claimant and his daughters' investment in two Venezuelan food companies. These proceedings were according to the UNCITRAL Rules under the Spanish-Venezuelan BIT. The Respondents objected to jurisdiction of the Tribunal on the grounds that the Claimants were dual nationals and had the nationality of Venezuela. The Claimant was born in Spain and moved to Venezuela where he acquired Venezuelan nationality in 1972, although he regained Spanish nationality in 2004. He was only a Venezuelan national at the time of making the investment. Similarly, at the time of making investment, the Claimant's daughter also did not have Spanish nationality. Therefore, the Respondent State alleged that the Tribunal lacked jurisdiction *ratione personae* as the treaty did not allow a national to sue its own State in an international forum, and that dual nationality should bar the claim. The Respondent also argued that the Tribunal lacked jurisdiction *ratione materiae* as at the time of making the investment, the Claimant and his daughter were not foreign investors. The Tribunal ruled that there was no explicit restriction on dual nationals in the relevant BIT, as contrasted to specific incorporation of such a restriction in other treaties concluded by Venezuela. Further, this being a Non-ICSID arbitration, the bar on dual nationals would not be applicable in this context. With respect to jurisdiction *ratione materiae*, the Tribunal held that the nationality at the time of making the investment was not relevant as the relevant dates were the date of violation and the date on which the arbitration procedure was initiated. The Tribunal concluded that it had jurisdiction.

[27] *Serafín García Armas v. Bolivarian Republic of Venezuela*, PCA Case No. 2013-3, Decision on Jurisdiction (Spanish), (Dec 15, 2014). The award was rendered in Spanish and an internet translation feature has been used to study the award.

This award was then challenged in the Court of Appeal in Paris, which partially set aside the award. On appeal, the award reached the French Supreme Court, referred to as the Court of Cassation.[28] This Court referred to Article 1.2 of the BIT, which defines the term investment as any type of asset, invested by investors of the Contracting Party in the territory of the other Contracting Party and held that the ordinary meaning of these terms is that simply owning an asset would not suffice, rather the asset must be 'invested' by a foreign investor which refers to a condition of nationality on the date of making the investment. The Court stated that the relevant provision of the treaty must be interpreted in function of the principle of international law, which prohibits a person from proceedings against his own State in an international forum. On this basis, the Court wholly set aside the award.

The next award that will be looked at is of *Clorex Spain v. Bolivarian Republic of Venezuela*.[29] This arbitration was brought under the Spain-Venezuelan BIT in accordance with the UNCITRAL Rules. In the case, the Respondent State alleged that the Claimant was not the proprietary investor of the investment and there was an abuse of process as the Claimant had indulged in treaty shopping. The Respondent argued that Clorex Spain was a shell company that held shares for Clorex International, which was a company incorporated in the United States of America. The goods invested by the Claimant were monies that were originally contributed by Clorex International. The Respondent argued that the definition of investment in the BIT uses the term 'by the investor' which requires an action of investing if interpreted according to Article 31 of the Vienna Convention on the Law of Treaties. In this case, there was no investment, rather simply an exchange of shares for capital in a new company and therefore Clorex Spain would not be an investor. The Respondent argued that corporate planning must have underlying commercial reasons and not simply to gain the benefits of an unenforceable treaty. The Respondent also stated that it was an abuse of process because the dispute had already become foreseeable.

The Tribunal held that even though prima facie, Clorex Spain would seem to satisfy the requirements of holding an investment, it said that the requirement of action of investment as indicated by the term 'by the investor of the other Contracting Party' was important. They held

[28] *supra* note 26. This decision was available in French and has been translated to English through an internet translation service.
[29] *Clorex Spain v. Bolivarian Republic of Venezuela*, PCA Case No. No. 2015-30, Award (Spanish), (May 20, 2019). This award was only available in Spanish and has been translated to English through an internet translation service.

that through the substantive provisions of the BIT, such as Article 3 which provides for full protection and security, and Article 4 which provides for fair and equitable treatment are all similarly qualified by the term 'made by investors of the other Contracting Party'. Reading this in light of Article 31 of the Vienna Convention on the Law of Treaties, the Tribunal concluded that there is a requirement imposed of active investment action. The Tribunal concluded that no transfer of value had taken place, and the Court concluded that the Claimant was not an investor (owner of the investment specifically) in this case. The Tribunal ruled in favour of the Respondent State and did not go into the other objections of the Respondent. This award was however set aside by the highest court of Switzerland, stating that emphasis on the definition of investment was misplaced, and the question of abuse of rights due to corporate restructuring was a pending issue.[30]

The most important argument in these cases is that the term invested in the definition of investor can be attributed significant meaning, although they are used to different ends. The argument proposed by the investor is that the term invested used in the definition of investment in BITs forms the basis of enquiry into the corporate structures employed to determine who the actual investment is made by, and who benefits from the measures given in the treaty. It forms the explicit basis to look at the holding structures of the companies in question. This approach has the potential to eliminate multiplicity of claims and resolve the issue of indirect claims, without prohibiting indirect claims altogether. Rather, what will be sought to be looked at is the actual act of investing, which would be satisfied where there is a legitimate corporate structure that doesn't comprise of shell companies. The position that would emerge is that while indirect claims are allowed, the indirect claimants must necessarily show the action of investment and therefore holding companies which simply hold shares as part of a corporate structure will be prevented from bringing a claim. Such a link between *ratione personae* and *ratione materiae* is not novel, as discussed above, these have been connected to expand the jurisdiction of Tribunals to include indirect claims.

The author recognizes that a shortcoming of this approach is that it hinges excessively on the use of the term 'invested' in bilateral treaties. However, it may be noted that many bilateral treaties such as the Indian Model BIT and the US Model BIT, the definition of investment provides that characteristics of investment should be present such as commitment of capital, certain duration, expectation of profit, and assumption of risk. When analysing these factors, the understanding of

[30] BGE vom 25. mars 2020 (4A.306/2019).

action of investment can be incorporated. Specifically, when the Tribunal approaches the question of investment, capital contribution and assumption of risk when informed by the understanding of action of investment, cease to be satisfied in the case of shell companies that *do not channel their own capital, nor do they assume risk*. Furthermore, the characteristics of investment implying the need for action of investment, can also inform the term 'investment' in the ICSID Convention as understood and examined by Tribunals.

The question that emerges is why such an interpretation must be adopted. Here, the discussion in the preceding sections becomes relevant. Firstly, such an analysis opens up the opportunity for the Tribunal to scrutinise the corporate structure and determine whether through a shell company with no independent existence, dual nationals have routed their investments in order to circumvent the bar in Article 25 of the ICSID Convention.

As a result, the bar under Article 25(2)(a), and extended to the second part Article 25(2)(b) would also be enforced in cases falling under the first part of Article 25(2)(b) directly (by reading it in the term investment in the ICSID Convention) and indirectly i.e. using the definition in the BIT, and without actually using the 'control test'[31] to cases that fall in the first part of Article 25(2)(b). This in turn, would uphold the notion that an individual cannot gain a benefit which he is not entitled to through a corporate vehicle and that a national should not be able to proceed against its own State in an international dispute. It also has the advantage of harmonizing the underlying rules and principles of investment treaty, regardless of the context of individual or corporation.

It would also further the purpose of investment treaty law as understood in the first section, which is to encourage investments from bona fide investors of the other Contracting Party based on the principle of reciprocity and not make a bilateral treaty, an instrument to affect a multilateral regime which has not been consented to. Finally, it lays down one step in addressing the issue of multiplicity of claims.

[31] Although the outcome/end result is arguably the same or similar in application of the control test or an understanding of action of investing, the conceptual premise and foundation are different and there is no application of the control test to the first part of Article 25(2)(b).

V. Concluding Remarks

This paper looks at the idea of scrutinising corporate structures of the claimant using the BIT as the relevant entry point, in accordance with Article 31 of the Vienna Convention on Law of Treaties and in furtherance of the object and purpose of the relevant treaty. This approach is strongly supported by the conclusion that it is necessary to ensure that dual nationals, which are not entitled from bringing a claim, are not able to do through the guise of a corporation. It seeks to ensure that the bar against dual nationals which is directly enforced under Article 25(2)(a) and the second part of Article 25(2)(b) is also given effect to in cases that fall under the first part of Article 25(2)(b).