International Institute for Sustainable Development
Institut international du développement durable

BEST PRACTICES SERIES

Best Practices
Definition of Investor

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March 2012

www.iisd.org

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1.0 Introduction

Bilateral investment treaties (BITs) are treaties signed between two States in which each contracting party undertakes to behave in a particular way and to refrain from certain practices prejudicial to investors who are nationals of the other contracting party. Although interstate in nature, these international treaties are intended to benefit investors who are private individuals and not signatories. Furthermore, these investors are direct beneficiaries, as BITs allow them direct access to international arbitration. This means that they have the right to bring a claim against the host State of their investment on the grounds that the State has failed to fulfil its obligations under the BIT. The international arbitration mechanism can only be activated by investors. This is a peculiarity of BITs. They confer on investors the extraordinary prerogative of claiming their rights before an international arbitration tribunal.

The investors who are the beneficiaries of BITs are not specifically named. They are merely identifiable. This means that the treaties stipulate a criterion which will allow, when appropriate and on a case-by-case basis, identification of those investors who may benefit from the protection of a treaty. The criterion in question is the nationality[1] link between an investor and a signatory State. Indeed, the purpose of a BIT is to protect the nationals of one contracting party who make investments in the territory of the other contracting party. In a positive sense, this means that only those investors holding the nationality of a contracting State have the right to make a claim against the other contracting State which hosts their investments. In a negative sense, it also means that investors who are nationals of a state that is not a party to the BIT, and investors who are nationals of the contracting State in which their investment is made, cannot have recourse to international arbitration against that State pursuant to the treaty.

Therefore, defining whether an investor is protected by a BIT is basically a question of defining that investor's nationality.[2] This nationality link is a fundamental criterion for determining the scope of the protection afforded by an investment treaty.[3]

The definition of the protected foreign investor is a fundamental issue for those States which are signatories to BITs. It is true that each country clearly defines its policy on attracting investment. Firstly, a country has a sovereign right to opt to make protection available to as many investors as possible. Conversely, it can choose to limit that protection to specific investors. Secondly, by signing a bilateral and reciprocal agreement, it does not, in principle, intend investors of non-party States, or its own nationals, to be able to benefit from a BIT specially negotiated with another State in a particular context and for specific interests. In any case, making protection widely available to investors has significant practical implications. Indeed, it is all very well to offer rights and guarantees to the greatest number of investors in the hope of attracting foreign capital, regardless of its provenance. However, allowing any investor recourse to an international arbitration process against the host State is another matter. It should be noted that, to date, some 400 investor-State arbitrations that have been brought under investment treaties are known around the world. The majority of these have been initiated during the last 10 years within the framework of the International Centre for Settlement of Investment Disputes (ICSID).[4] Indeed, the rights and guarantees afforded by current BITs generally involve access to international arbitration.

[1] Nationality is defined in international law as the binding link between a private individual and a State. This link is determined independently by each sovereign State according to specific criteria in its national law.
[2] Subject to the definition of legal entities deemed investors.
[3] In BITs, it is not sufficient for the investor to hold the nationality of one of the contracting parties. It is also necessary for the investor to have made an investment as defined by the treaty. The nationality of the investor and the definition of the investment are two significant factors which determine the scope of persons and goods included in the protection of the treaty.
[4] This number does not include those cases not made public. Source : UNCTAD (2011, March). IIA issue Note, No. 1, *Latest Developments in Investor–State Dispute Settlement*, p. 2. Retrieved from www.unctad.org.

It is therefore important to include provision for the definition of persons that can use the international arbitration mechanism provided by the BITs.

The objective of this study is to define nationality of investors protected by BITs For this purpose, it is essential to analyze the meaning and scope of the provisions on investor nationality stipulated in the BITs (3) and the interpretation of those provisions by international arbitration tribunals (4). Based on the study of States' conventional practices in BITs, and the case law of tribunals, it will be possible to make recommendations in order to inspire and encourage best practices in this field (5). Firstly, it is useful to examine current issues regarding the definition of which investors are protected by BITs.

2.0 Issues Relating to Defining Protected Investors

Investors are defined in BITs as being either natural persons (individuals) or legal persons (companies/businesses).[5] The issues are different depending on whether individuals or companies are involved.

2.1 Dual Nationality of Natural Persons

Investors who benefit from the protection of investment treaties must hold the nationality of a State party, excluding the nationality of the host State or of a third-party State. However, what happens when an investor holds the nationality of the host State of the investment, or of a third State, in addition to the nationality of the home State party to the treaty?

In the context of investor-State arbitration, cases of dual nationality are more complicated for natural persons than for legal persons. This is primarily explained by the fact that it is relatively rare for companies to be able claim both nationalities equally on the basis of the same criterion. Nevertheless, it does occur with joint venture companies where they are controlled by two partners equally. In this case, they can be considered to hold the nationality of each partner. A secondary explanation lies in the fact that companies themselves, together with their individual shareholders, are generally deemed investors by BITs.[6] On this basis, where the nationality of the company presents a problem, every shareholder can claim the benefit of a treaty in his or her own name.

For natural persons, two dual nationality scenarios can be noted.

Situation 1: A BIT has been signed between States A and B. An investor holding the nationalities of A and B makes an investment in State B. Should the dispute between this investor and State B be considered as an internal dispute between a country and its national, outside the protection of the BIT, or should it be considered an international dispute between a country and a foreign investor within the scope of the BIT?

[5] Today, foreign private investors are largely constituted by transnational company groups, also called multinational enterprises or international companies. Despite this terminology, the group does not have its own specific nationality. Rather, each company within the group holds its own nationality.

[6] Shares in a company are defined as investments by most BITs. Consequently, each shareholder is an investor with its own right protected under the treaty.

Situation 2: A BIT has been signed between States A and B. An investor holding the nationalities of A and State C makes an investment in country B. Should a dispute between the investor and State B be considered a dispute involving an investor from a State party to the BIT (A) or an investor from a State not party to the BIT (C)?

These two scenarios raise an important question. In signing a BIT, did the State also envisage subjecting itself to international arbitration with its own nationals or with the nationals of countries not party to the treaty? In principle, the response is negative. However, it may depend on both the definition of investor protected by the BIT and the rules governing the jurisdiction of the established arbitral tribunal. ICSID, for example, is open to investors holding the nationality of a signatory State on the condition that they do not hold the nationality of the host State against which the claim is being brought (Article 25.2a of the ICSID Convention). The only exception permitted by the Centre concerns the situation in which, for the purpose of making its investment, a foreign investor was required to create a company under local law but that company is controlled by the foreign investor. In this case, Article 25.2.b of the ICSID Convention stipulates that the State may expressly agree to consider this local company as a foreign company.

2.2 "Treaty shopping" by Transnational Company Groups

"Treaty shopping" is largely, although not exclusively,[7] practised by transnational company groups.

2.2.1 Definition of Treaty Shopping

The term "treaty shopping" refers to the practice of investors who specifically seek to benefit from the most advantageous protection of a BIT that has been signed between the host State in which they have invested and another State of which they do not hold the nationality.

This practice is facilitated by the existence of a large number of BITs which virtually link all the countries of the world.[8] In this "marketplace" of over 2,700 BITs, investors can "go shopping" and select, according to their needs, the treaty that gives them the greatest legal protection. It is almost always the case that an investor will find at least one BIT in force between the host State and another State. As such, the benefits of a BIT between States A and B may be "stretched" to investors from State C who acquire the nationality of A or B for the purpose of benefitting from the protection of the BIT. Acquisition of a "useful" nationality by companies is possible through various means and for a variety of reasons.

2.2.2 Classification and Methods of Treaty Shopping

2.2.2.1 Why Go Treaty Shopping?

Companies generally resort to treaty shopping in three cases.

Case 1: State A, the state of the investor's nationality, does not have a BIT with State B, the host State of its investment. In this case, the investor of country A will seek to benefit from the BIT which exists between State B and State C by acquiring the nationality of State C through structuring its investment.

[7] A natural person may, in effect, go treaty shopping by creating and controlling a company.

[8] Today, there are few countries (Monaco, Andorra, Liechtenstein, and North Korea) which have not signed any BIT and one country—Brazil—with no BITs in force.

Case 2: State A, the state of the investor's nationality, has a BIT with State B, the host State of its investment. However, some clauses of this BIT do not suit the investor. The investor therefore wishes to benefit from a more advantageous clause which appears in another BIT signed between host State B and State C.[9] In this case, there are two solutions available to the investor. It can either decide to structure its investment in order to acquire the nationality of State C and bring a claim on the basis of the BIT between States B and C, instead of the BIT between States A and B. Alternatively, it can bring its claim on the basis of the BIT between States A and B but request application of the most favoured nation (MFN) clause in order to import an advantageous clause from the BIT between B and C.[10]

Case 3: The investor holds the nationality of State A in which it has invested. It is therefore not a foreign investor. However, as the investor wishes to benefit from the more advantageous rights in BITs, particularly access to international arbitration which is reserved for foreigners,[11] the national investor may structure its investment in order to acquire the nationality of State B which has signed a BIT with State A.

2.2.2.2 How to Go Treaty Shopping

There are two main methods that can be used to structure an investment for the purpose of acquiring a useful nationality.

Method 1: Let us consider a BIT between States A and B. Company X has invested in State B but does not hold the nationality of State A, which would enable it to benefit from that BIT. The company creates a Subsidiary Y in State A which will hold the useful nationality. This subsidiary might be an empty shell without any independent business activity or staff. These are known as "mailbox" companies.[12] It is then this Subsidiary Y, controlled by Company X, which will formally hold the investment in in State B. In case of a dispute, Company Y will claim the benefit of the treaty signed between States A and B even though the real investor holds the nationality of a third-party State or of the host State. The creation of Subsidiary Y will be even simpler, quicker and cheaper where State B offers very generous conditions for acquiring its nationality.

Method 2: Let us consider again the BIT between States A and B. The same Company X this time decides to sell on its investment in State A to a Company Y already constituted in State B. The latter, protected by the BIT between A and B, then brings a claim before an international arbitration tribunal against host State A. This second option is generally used where a dispute already exists with the host State and the initial investor feels that it has not benefited from the best legal protection in terms of its nationality. In reality, the company sells its "claim" to another investor with a greater chance of winning against the host State thanks to the protection of a BIT which confers the "right" nationality on it. This practice has developed to the point at which one can speak of "trafficking in BIT claims."[13]

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[9] The advantage in the second BIT could be, for example, the absence of a clause requiring the investor to attempt to resolve its dispute with the host State in the national courts before initiating an international arbitration process.
[10] The MFN clause, which has effects comparable to those of treaty shopping, will not be analyzed here.
[11] International arbitration has advantages for the investor when compared with national arbitration against the host State. These refer to implementing the arbitral award. For example, the ICSID arbitral award is directly enforceable and does not require recognition or exequatur.
[12] So named because their only physical presence within the State of their nationality is a postal address.
[13] See M. Skinner, C.A. Miles, S. Luttrell, "Access and advantage in investor-state arbitration: The law and practice of treaty shopping," *Journal of World Energy Law and Business*, 2010, vol. 3, p. 269.

2.2.2.3 When to Go Treaty Shopping?

Treaty shopping can occur before or after a dispute arises with the investment host State. Firstly, there is *pre-dispute* treaty shopping. The investor anticipates the possibility of a dispute arising between itself and the host State. Even before establishing itself in the host country, or during the course of its activities, it structures its investment in order to benefit from a more advantageous BIT which it has selected in the BIT "market." Secondly, there is *post-dispute* treaty shopping. After making its investment, and once the dispute has arisen, the investor then requests the nationality necessary to benefit from a BIT which will give it access to international arbitration and/or a greater chance of winning its case against the host State.

2.2.2.4 Different Interpretations of Treaty Shopping

Treaty shopping is not always, of itself, seen as a negative or fraudulent practice on the part of investors. Depending on one's point of view, "treaty shopping" or "incorporation of convenience[14] could be seen as nothing more than a reasonable nationality acquisition planning or legal strategy. Commentators and practitioners who share the second view believe that this practice constitutes a legitimate strategy for investors along the same lines as planning in order to benefit from a better tax regime. However, just as the difference between tax optimization and tax evasion is somewhat hazy, so the line between nationality planning and abusive practice is a fine one.

2.3 Multiple Intermediary Investors

An issue that is linked to the definition of protected investor, but also to the definition of protected investment,[15] is that of the significance and rights of multiple intermediary companies within the context of one investment. A company may invest directly in the host country or else create a company subject to local law. It can also place one or more companies, constituted in different States, between itself and its investment. When viewed in the specific context of defining an investor, there are, in reality, two key aspects to the issue of multiple intermediary investors.

The first relates to the identity of the ultimate investor in a chain of intermediary investors resulting in an investment being made in a host country. To put it another way, the fundamental question that arises is whether, within a chain of investors, there is a point after which an investor is too far removed to receive protection. For example, where an investment was not made directly by an investor from State A in the territory of State D, but instead passes through a company in State B, then in State C, then in State D, which investor is the one with the relevant nationality? The response to this question has real implications where an arbitration tribunal uses the criterion of control to determine an investor's nationality. Is it necessary to follow the chain of investors to find a useful nationality and how far is it possible to go? Or should the question be limited to the first immediate investor, even if this is a "mailbox" company created for treaty shopping purposes?

Second, in a company which has the characteristics of an investor, are the minority and majority shareholders of that company also individual investors able to claim protection for their shares in their own names? A BIT may consider

[14] In reference to "flags of convenience" used by ships.

[15] The question can also be expressed from the perspective of defining the investment in these terms: do majority or minority shareholdings in a company of themselves constitute protected investments giving shareholders the status of investor where they hold a useful nationality pursuant to the BIT in question?

majority, and even minority, share holdings to be investments per se and in parallel to the investment constituted by a company. In such cases, in order to initiate an arbitration process against the host State, it will be sufficient for the shareholders to hold the useful nationality in terms of the BIT being cited.

2.4 Difficulties for the Investment Host State

The problematic situations described above could have serious negative consequences for the host State.

The first difficulty arises mainly as a result of treaty shopping. This is the extension of the protection of a BIT to investors who were not envisaged as beneficiaries of the treaty because of their nationality. While a treaty has been signed between two or more specific States, the number of nationalities which can benefit indirectly from that treaty can practically cover all the nationalities in the world. This is notwithstanding the fact that nationality was, when negotiating and drafting the agreement, a fundamental criterion for defining the scope of persons protected by the BIT. This extension of coverage calls into question the fundamental principle of reciprocity. When State A agrees to give access to international arbitration to investors from State B, it is in return for the same advantage being conferred on its own nationals. However, when an investor of State C artificially benefits from that BIT, State A finds itself in the position of protecting the investors of State C without its own investors being able to demand the same treatment in State C with which it does not have a BIT.

The second difficulty arises from the proliferation of intermediary investors protected by a single investment. This is the risk of multiple claims. The host State risks being brought to multiple arbitration procedures over a single investment and a single dispute. Numerous foreign investors may claim the protection of numerous BITs. These include a company subject to local law and created for the purpose of investment under foreign control, the intermediary subsidiaries, the parent company, the majority shareholders in each of these companies, and even the minority shareholders in each of these companies. The more BITs the host State has signed with States of which these companies or shareholders are nationals, the greater the risk of multiple claims for a single investment and a single dispute. Where a contract exists between the intermediary investor and the host State, it will also be necessary to consider any forums for settling disputes stipulated in the contract. All of these disputes can be brought before various national and international forums for settling disputes. In this way, the State could have to respond to numerous legal proceedings at the same time, with all the costs that that implies. Similarly, there is a real risk of conflicting arbitral awards and legal decisions. Case law already includes examples of this nature.[16]

Despite these risks of broad and unforeseen exposure to investor claims, and their negative impacts on the host State, it must be acknowledged that abusive practices are not prohibited by the majority of BITs.

[16] See, for example, the two conflicting awards issued in the CME v. Czech Republic and R. S. Lauder v. Czech Republic cases by two different arbitration tribunals ruling on the same facts. The first case was brought by the company CME on the basis of the Netherlands–Czech Republic BIT before a UNCITRAL tribunal. The second was brought by the majority shareholder of CME (Ronald Lauder) on the basis of the United States–Czech Republic BIT before an ICSID tribunal. Verdicts available at http://www.investmentclaims.com

3.0 *Generous Clauses in BITs: An open door to abusive practices*

BITs offer protection to both natural persons and legal persons. Identifying a natural person does not present problems. Only that person's legal capacity to take legal action which could constitute a barrier to accessing investor–State arbitration. Legal persons are more complicated. A very large number of BITs protect "all legal persons" or "legal entities" without distinction.[17] A considerable number of BITs explicitly include public companies, non-registered companies, branches of a company and not-for-profit organisations. Several early German BITs even cover entities with no legal status.

As an example, Article 1 of the United States–Rwanda BIT (2008) defines a company as: "any entity (...) 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 organisation; and a branch of an enterprise."[18] This means that, in the case of both natural persons and companies, the designation of protected investor will depend on the nationality criterion used.

3.1 Nationality of Natural Persons: Referral to States' domestic law

It is a common feature of BITs to refer to the national law of each contracting State to determine the nationality of investors who are natural persons.

For example, Article 1.2a of the Burkina Faso–Chad BIT (2001) defines investors as "natural persons who, according to the law of the two contracting parties, are considered to be their citizens."

Some States, such as Canada and the United States, extend the protection of their BITs to their permanent residents in order to conform with internal immigration legislation. This is the case in Article 1.g.i of the Canada–Ecuador BIT (1996) which stipulates that, for Canada, an investor is "a natural person who, according to Canadian law, is a citizen or permanent resident in Canada."

In principle, a certificate of nationality constitutes proof of this nationality. However, tribunals retain the right to verify that the acquisition of that nationality complies with the conditions required by national law.

Most BITs, especially those signed before the beginning of the 21st century, do not mention the case of dual nationalities, giving rise to the problems outlined above.

3.2 Nationality of Legal Persons: Different nationality criteria

Before considering the criteria used, it is necessary to specify the procedures for defining the nationality of legal persons. Most BITs stipulate a single criterion for contracting States. However, some BITs use a different nationality criterion for each contracting State.[19] This procedure could place companies from State A in an advantageous situation when compared to companies from State B. In other words, it could be easier to go treaty shopping in one of these

[17] Examples: Central African Republic–Egypt (2000), Article 1.2.b; Gabon–Belgium (1998), Article 1.2.b.

[18] See also the following BITs: Cameroon–Mali (2001), Article 1.3.b; Mexico–Singapore (2009), Article 1.2; Togo–Switzerland (1966), Article 7 ; Germany–Burkina Faso (1998), Article 1.4.

[19] See, for example, the Germany–Burkina Faso BIT (1998), Article 1.4: "head office criterion for Germany and incorporation criterion for Burkina Faso." See also the Germany–Cameroon BIT (1962), Article 8.4.

States than in the other. In contrast to those treaties that contain provisions on determining the nationality of investors covered by the agreements, a very few BITs do not include such provisions. However, in those cases, the investor–State arbitration process is not usually included in the agreement,[20] which makes this omission less of a problem.

3.2.1 Criteria Used for Determining Nationality in BITs

Two main criteria and one alternative criterion are used in BITs: place of incorporation, head office and control.

3.2.1.1 The Place of Incorporation Criterion

This criterion for determining nationality takes as the deciding factor the State in which the company is formally incorporated.

For example,[21] Article 1.b.i of the Netherlands–Benin BIT (2001) defines the investors protected as: "Legal persons incorporated according to the law of this contracting Party."

The place of incorporation criterion has the advantage of being easily identifiable and fixed inasmuch as it is unaffected by changes to the head office or the place of a company's principal activities. However, there is a negative aspect in that it creates a link that can be based on a very tenuous, not to say artificial, attachment. In effect, the link between the company and the State may be limited to registration of articles of incorporation and the existence of a postal address. As we have seen, this encourages treaty shopping by companies.

States adopt this criterion when they wish to encourage the establishment of companies in their territory without concerning themselves with the fact that those companies conduct their activities beyond that country's borders. This is the case, for example, of the Netherlands, which is frequently used as the country of incorporation by investors wishing to do some treaty shopping. In effect, the Netherlands has signed over 105 BITs around the world, mainly with developing countries. As such, it increases opportunities for an investor company in State A to find a BIT between that State and the Netherlands. Furthermore, the Netherlands uses incorporation as the sole criterion in its BITs.[22] It is therefore very easy to create a subsidiary under Netherlands law that will be protected by the Netherlands' BITs. In fact, around 20,000 "mailbox" companies were counted in the Netherlands in 2006.[23] These factors have led the Netherlands to be the country of origin of the largest number of complainant companies involved in investor-State arbitration procedures under BITs.[24]

3.2.1.2 The Head Office Criterion

The head office refers to the place from which the company is actually managed. It is either the place of residence of the board of directors or the place where the managerial meetings are held and decisions made. The head office criterion therefore requires that, in order to acquire the nationality of a State, management or central administration of a company should effectively occur in the territory of that State.

[20] See for example the Technical and Economic Cooperation Agreement between the Netherland and Ivory Coast, 1965, Article 3.
[21] See also Article 1 (7) (a) (ii) of the Energy Charter.
[22] See, for example, the BITS of Netherlands–Singapore (1972), Article 1 and Netherlands–Burundi (2007), Article 1.b.
[23] See Roos van Os & Roeline Knottnerus, *Dutch Bilateral Investment Treaties A gateway to "treaty shopping" for investment protection by multinational companies*, SOMO, Amsterdam, October 2011, p. 4.
[24] Some 10 per cent of investor–State international arbitration procedures known around the world, supra, p. 37.

There is an example[25] of this criterion in the Germany–Bangladesh BIT (Article 8.4.a) which stipulates that a national of the German Republic is considered to be "any juridical person (...) having its seat in the German area (...)."

The head office criterion has the advantage of establishing a stronger link between a company and a State and of reducing the risk of "mailbox" companies. However, there is a negative side when compared to incorporation, as companies are able to transfer their head offices to another State more easily.

It should be noted that head office is rarely used as a sole criterion in BITs.

3.2.1.3 The Control Criterion

✳ Definition

The control criterion is systematically included in almost all the BITs in the world. A typical example is present in Article 1.2 of the Burkina Faso–Chad BIT (2001) which defines national companies of a contracting party as: "Established legal entities, **in accordance with the legislation of** **any country** [emphasis added] which are controlled, directly or indirectly, by nationals of a contracting Party (...)."

In applying this criterion, the company will hold the nationality of the persons which control it, i.e., the principal shareholders. This criterion leads to a "piercing of the corporate veil" of a company, to borrow an expression from the International Court of Justice (ICJ), for the purpose of considering the members which constitute it. It has the advantage of revealing the "true" nationality of the company capital.

There are several negative aspects to the control criterion. Firstly, it is not easy to apply. Effectively, it is sometimes difficult to identify the real shareholders of a company where there is a long chain of intermediary investors. Next, mutability of control means mutability of nationality, especially for companies listed on stock markets, which can pass through the control of numerous shareholders in a relatively short time.

There are three important observations to be made regarding the control criterion: (i) it is an alternative one (ii) it is applicable only in a manner that favours the useful nationality of investors, and (iii) it enables the chain of intermediary investors to be pursued indefinitely.

✳ An Alternative Criterion

The control criterion is used as an alternative in BITs. This means that, outside of the principal criteria for determining nationality (incorporation or head office), it is always possible for a company from a third-party State to claim the nationality of a signatory State on the basis of the control exercised over the company by nationals of that signatory State. Specifically, let us imagine a BIT between States A and B which uses only the criterion of incorporation. Company X, incorporated in State C, invests in State A. The company therefore does not have the useful nationality pursuant to the BIT in question. However, the company will be able to claim protection of the treaty if it is controlled by companies holding the nationality of State B.

[25] See also Germany–Burkina Faso BIT (1962), Article 1.4.b

✳ A Criterion Applicable Only in a Manner That Favours the Useful Nationality of Investors

As indicated above, the control criterion allows the "piercing of the corporate veil" in order to see who really controls the company. Therefore, logically, one could expect this verification to enable the protection of the business interests of a signatory State hidden behind by a legal person from a third-party State. Similarly, one could also expect it to disregard the business interests of a third-party State hidden behind a legal person from a State party.

However, this is not the case for the majority of BITs. The control criterion only allows attribution of the nationality of a State party to a company which did not previously hold it on the basis of the principal nationality criterion. In reality, the criterion control only allows the following:

- either conferring the benefit of the treaty on companies from third-party States controlled by investors from a State party to the treaty
- or conferring the benefit of the treaty on companies constituted under local law and controlled by investors from a State party to the treaty.

✳ A Criterion Allowing Indirect Control by Intermediary Companies

The control criterion used by BITs includes investments controlled "directly or indirectly" by nationals of a State party. Furthermore, in defining the investment covered, several BITs explicitly include "any kind of asset owned or controlled either directly, **or indirectly through an investor of a third State**[emphasis added],"[26] or else "the shares, stocks and all other forms of participation, **even minority or indirect** [emphasis added], in the capital of companies incorporated in the territory of one of the contracting parties."[27]

As a result of these provisions, any company with shares in an investment vehicle has the status of protected investor where that company can be considered to have indirect control of the company making the investment. This means that it is possible to follow the chain of investors until a company or natural person is found holding the useful nationality of a State party to the relevant BIT being cited before the arbitrators. By not specifying the limits of the level of indirect control at which an investor may be protected,[28] these BITs encourage treaty shopping. Again, this following of the chain of intermediary investors cannot be used in terms of denying the benefit of the BIT to a company having the right nationality but controlled by an investor of a non-party State .

In conclusion, generous clauses in BITs encourage abusive practices by investors and put States in the position of giving unintended investors access to international arbitration. To paraphrase a commentator, in this type of BIT, "all roads lead to the nationality."[29] However, a growing number of BITs are attempting to put a stop to abusive practices.

[26] Canada–Ecuador BIT (1996), Article 1.g.
[27] Belgium–Benin BIT (2001), Article 1.2.b.
[28] This discussion is related to the definition of the concept of investment which is not discussed here.
[29] Valérie Pironon, "L'arbitrage des différends entre une joint-venture et l'État d'accueil de l'investissement : à la recherche de la nationalité de l'investisseur," [Arbitration in dispute between a joint venture and the investment host State: In search of the investor nationality] *Revue de l'arbitrage*, 2010, Issue 2, p. 247.

4.0 *Limiting Clauses in BITs: Towards stricter parameters for defining protected investors*

The restrictions and specifications included in certain treaties signed relatively recently tend to curtail the extension of BIT coverage to unintended investors.

4.1 Natural Persons: Clarification of the dual nationality position

In order to resolve potential conflicts in the case of dual nationality, some BITs already include a specific clause on this matter. This happens in the case of Article 1 of the United States–Uruguay BIT (2005): "investor of a Party means (...), a national (...) of a Party, (...); provided, however, that a natural person who is a dual national shall be deemed exclusively a citizen of the State of his or her dominant and effective citizenship" [emphasis added].[30]

The solution proposed means that, in the case of dual nationality, the investor shall, in practice, only be able to use his or her effective nationality in the context of an international arbitration process pursuant to a BIT. The effective nationality can be defined as the nationality of the country in which either an individual has his or her principal and habitual residence, or the country with which, according to the circumstances, he or she has closer ties such as customs, language, etc.[31] The effective nationality criterion is used in general international law in the area of diplomatic protection where an individual who enjoys diplomatic protection from his or her State also holds the nationality of the State against which the claim has been brought.[32]

4.2 Legal Persons: Putting a stop to "treaty shopping"

In order to reduce the practice of treaty shopping, recent clauses have used two methods, generally in cumulative form. The first consists of restricting the definition of protected investors by using a stricter set of nationality criteria. The second consists of explicitly excluding certain investors from the benefits of nationality of the State parties, independently of the application of the initial nationality criterion stipulated in the BIT.

4.2.1 The Requirement for Genuine Close Links Between the Investor and the State of their Nationality

In addition to one or other of the two standard criteria, i.e., incorporation or head office, certain treaties require the investor also to have further links with the State in order to be considered a national of that State. There are basically two examples which can be cited.

4.2.1.1 Incorporation Plus Head Office

For example, Article 1.2.b of the Gabon–Belgium BIT (1998) defines a national of a State party as "any legal person incorporated in accordance with the legislation of one of the contracting States which has its head office in the territory of that State (...)."[33]

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[30] See also Canada–Lebanon BIT (1997), Article 1, which is less clear.

[31] See the Hague Convention of April 12, 1930 pertaining to legal conflicts on nationality, Article 5.

[32] Nottebohm case (Liechtenstein v. Guatemala), ICJ, Judgment of November 18, 1953; Reports ICJ, 1955, pp. 4–65; see also, Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), ICJ, Judgment, July 24, 1964, Reports ICJ, 1970, pp. 3–357.

[33] See also, Cameroon–China BIT (1997), Article 1.3 ; Belgium–Benin BIT (2001), Article 1.b ; France–Nigeria BIT (1990), Article 1.3.

The combination of these two nationality criteria requires that the company establish its head office in the place in which it was incorporated. The possibility of creating a mere "mailbox" subsidiary company is thereby rendered more difficult. Incorporation associated with head office is the most commonly used combination in those BITs that do not use broad nationality criteria.

4.2.1.2 Incorporation Plus Head Office Plus Significant Business Activity

For example,[34] Article 1.2.b of the Colombia–Switzerland BIT (2006) defines investors as "legal entities (…), which are constituted or (…) organised under the law of that Party and have their seat, **together with** [emphasis added] real economic activities, in the territory of the same Party."

Here we have the strictest definition with regard to company nationality. Companies must, in effect, satisfy three cumulative criteria in order to claim the nationality of a signatory State. Nevertheless, some BITs cite presence of business activities without requiring these to be substantial. This could weaken the effect of the clause.

4.2.2 Excluding Front Companies: The "denial of benefits" clause

Denial of benefits clauses have long existed in BITs. However, they traditionally aimed to exclude "enemy companies" from treaty protection in times of war.[35] Today, this clause is also used to limit treaty shopping.

For example,[36] the United States–Rwanda BIT (2007), Article 17.2 reads as follows:

A Party **may deny** the benefits of this Treaty to an investor of the other Party that is an enterprise (…), to the investments of that investor **if the enterprise has no substantial business activities** in the territory of the other Party and **persons of a non-Party, or of the denying Party, own or control the enterprise** [emphasis added].

Clauses also exist which refer only to companies controlled by business interests of a third-party State. This is true in the case of Article 17.1 of the Energy Charter:

> Each Contracting Party reserves the right to deny the advantages of this Part to: (1) a legal entity if **citizens or nationals of a third State own or control such entity and if that entity has no substantial business activities** [emphasis added] in the Area of the Contracting Party in which it is organized.

Treaty shopping by nationals of the host State is not excluded here.

In practice, this clause authorizes each State party to the investment treaty to deny the benefits of the treaty to an investor which holds the nationality of the other State but which does not have genuine business ties to that State. Lack of business ties includes the following:

[34] See also Switzerland–Iran BIT (1998), Article 1.1.b; Czech Republic–China BIT (2005) Art. 1.2.b ; Germany–Algeria BIT (1996), Article 1.4; Burkina–Chad BIT (2001) , Article 1.2.b.

[35] On the history of the denial of benefits clause in BITs, see for example, L.A. Mistelis & C.M. Baltag, "Denial of benefits and article 17 of the Energy Charter Treaty," *Penn St Law Review*, 2009, p. 113 ff.

[36] See also the Canadian model BIT (2004), Article 18 : "Subject to prior notification and consultation (…) a Party may deny the benefits of this Agreement to an investor of the other Party that is an enterprise of such Party and to investments of such investors if investors of a non-Party own or control the enterprise and the enterprise has no substantial business activities in the territory of the Party under whose law it is constituted or organized."

- either absence of substantial business activities in the State of their nationality; for example, "mailbox" companies with no substantial business activities are excluded
- or where nationals of a non-party State, or of the host State, exercise control over the company claiming the nationality of the home State party. From here, it follows that companies of a State party controlled by the investors of a non-party State and/or investors of the host State are excluded.

These two conditions may be exclusive, as in the U.S.–Rwanda BIT (absence of a single link is sufficient), or cumulative, as in the Energy Charter (the two links must be lacking).

In reality, the denial of benefits clause complements the control criterion. It effectively allows the "corporate veil" to be pierced in order to narrow the treaty's scope of application. As such, previously the control criterion only made it possible to verify whether or not there were, in reality, any businesses interests for a home State signatory to a treaty behind a company of a non-party country or the host State. Now, with the denial of benefits clause, it is also possible to verify whether or not, behind a company of a home State party to the treaty, there are in reality business interests of a non-party State or the home State. A certain balance is thus restored.

It should be noted that this clause, as it is currently drafted in BITs, does not establish a systematic denial of benefits of the treaty to specified investors. The State "may refuse" or "reserves the right to refuse" to confer the benefits. The denial is thus left to the discretion of the host State which chooses, according to its needs, the companies to which it denies or accords the benefits of the treaty. This is why the clause is termed "not automatic" or subjective. This flexibility may seem to be an advantage for States. However, it has important legal implications before the arbitration tribunals which have had to interpret it owing to its unpredictability.

5.0 Interpretation by Arbitration Tribunals

We now consider the interpretation of nationality criteria applicable to natural persons and to legal persons.

5.1 Natural Persons

Where a BIT makes no reference to dual nationality, several tribunals have concluded that the this did not present an obstacle to their jurisdiction under the treaty. It is sufficient for the investor to hold the required nationality. The fact that the investor also holds another nationality which, on its own, would be an obstacle is not relevant.

In other words, the tribunals refuse to exercise a choice in favour of the effective nationality, i.e., the nationality that represents the closest link between the individual and his or her State. As such, in the Micula v. Romania case, the tribunal held that

it is (...) doubtful whether the genuine link test would apply pursuant to the BIT. The Contracting Parties to the BIT are free to agree whether any additional standards must be applied to the determination of nationality. Sweden and Romania (...) included no additional requirements for the determination of Swedish nationality.[37]

[37] Micula v. Romania (ARB/05/20), verdict on jurisdiction and admissibility, September 24, 2008, para. 101. See also, Champion Trading Company et al. v. Arab Republic of Egypt (ARB/02/9), verdict on jurisdiction of October 21, 2003; Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt, (ARB/05/15, verdict on jurisdiction of April 11, 2007; Hussein Nuaman Soufraki v. United Arab Emirates (ARB/02/7, verdict of July 7, 2004.

Consequently, where an investor bringing a claim holds two nationalities, one of which is useful and the other is not (non-party State or investment host State), arbitration tribunals refrain from enquiring which nationality should take precedence unless a treaty specifically requires it.

5.2 Legal Persons

Interpretations of tribunals differ notably according to whether they involve treaty shopping pre-dispute or post-dispute.

5.2.1 Pre-dispute Treaty Shopping: A legal practice

Tribunals are generally tolerant in cases of deliberate acquisition of a nationality through the creation of a company, whether "mailbox" company or not, within a State in order to benefit from a BIT when this occurs well in advance of a dispute arising. Similarly, they do not make a distinction according to whether the pre-dispute treaty shopping is the action of a host state investor that has acquired the nationality of the host State or of an investor from a non-party State that has acquired the nationality of the host State party to the BIT.

In the award on jurisdiction in the *Tokios Tokeles v. Ukraine case*,[38] there had been treaty shopping on the part of a national of the respondent host State in order to escape national jurisdictions. In the circumstances, the complainant, Tokios Tokeles, was a company incorporated in Lithuania which complained about the actions of the Ukrainian State with regard to the company's investment in Ukraine (a subsidiary under Ukrainian law named Taki Spravy). Nevertheless, 99 per cent of the capital of Tokios Tokeles and two thirds of its directors were of Ukrainian origin. For Ukraine, the complainant company was, in reality, Ukrainian on account of the persons who controlled it. Therefore, it could not benefit from the Ukraine–Lithuania BIT, as it was a case of an internal dispute between a State and its national. However, under the terms of the Ukraine–Lithuania BIT cited, the incorporation criterion was sufficient for acquiring the nationality of a State party. Therefore, the majority of the ICSID tribunal concluded that:

> under the terms of the Ukraine–Lithuania BIT (...) and in light of the object and purpose of the Treaty, the only relevant consideration is whether the Claimant is established under the laws of Lithuania. We find that it is. (...) We decline to look beyond (or through) the Claimant to its shareholders (...). that may have an interest in the claim (...).

The tribunal therefore refused to take the origin of the company's capital into consideration, and to pierce the "corporate veil," as the BIT did not formally prohibit treaty shopping. Several other tribunals have adopted similar positions to that in the Tokios Tokeles case.[39] Furthermore, some tribunals that have refused jurisdiction on the grounds that the investor did not hold the nationality of a State party to the treaty cited did not hesitate to give advice to those investors on how to avoid that inconvenient outcome. Arbitrators have informed investors that they should have done the following: made their investments through companies incorporated in the State party to the BIT in question instead of doing so under their own names. This was the case in the award in *Soufraki v. United Arab Emirates*,[40] on the basis of the Italy–United Arab Emirates BIT, as Mr. Soufraki did not hold Italian nationality at the time at which the dispute arose.

[38] Tokios Tokeles v. Ukraine (ARB/02/18), award on jurisdiction of April 29, 2004.

[39] For examples see the award in ADC v. Hungary (ARB/03/16), verdict of October 2, 2006, para. 360; Rompetrol v. Romania (ARB/06/3), award on jurisdiction of April 18, 2008, para. 85.

[40] Hussein Nuaman Soufraki v. United Arab Emirates, ARB/02/7, verdict of July 7, 2004, para. 83 : "[H]ad Mr. Soufraki contracted with the United Arab Emirates through a corporate vehicle incorporated in Italy, rather than contracting in his personal capacity, no problem of jurisdiction would now arise."

The *Tokios Tokeles* award was the subject of a strong dissenting opinion on the part of the chair of the tribunal, who condemned the distortion of the ICSID arbitration mechanism. For Professor Weil, the tribunal should have pierced the corporate veil and taken into account the nationality of the shareholders in order to ensure that they were dealing with a genuinely Lithuanian investor. As Professor Weil explained, this practice would result in national investors being able to have access to international arbitration against their own States simply by creating a company in another State. He further noted that the ICSID arbitration process is, in fact, limited to disputes relating to private international investments between a State signatory of the convention and an investor from another State signatory.[41] Nevertheless, this position was rejected by the other tribunal judges[42] and criticized by the majority of academia.[43]

It should be noted that some tribunal awards have denounced the practice of pre-dispute treaty shopping where the intermediary company is a mere "mailbox" company without business links to the home State.[44] Thus, in the *Saluka Investments v. Czech Republic* case, the treaty cited was the Netherlands–Czech Republic BIT. The complainant company (Saluka) which had invested in the Czech Republic was indeed of Dutch nationality. However, it was wholly controlled by a Japanese company (Nomura). The tribunal[45] expressed its sympathy with the argument of the State that a "mailbox" company, without any business link with its nationality State, should not be able to benefit from the protection of BITs signed by that State.[46] Despite this sympathy for the arguments of the State against pre-dispute treaty shopping, and the condemnation of the practice as unfair, the tribunal accepted jurisdiction pursuant to the BIT's broad definition of investor which did not prohibit such tactics. This demonstrates that it is the responsibility of the signatory States of a BIT to review the provisions of their BIT if they want a different interpretation. Other tribunals have reached the same conclusion. Thus, in the award in *Yukos Universal v. Russian Federation* on the basis of the Energy Charter, citing the Saluka case, the arbitrators considered that it was not their role to "impose upon the parties a definition of "investor" other than that which they had themselves agreed."[47] In this case, the complainant company was a simple holding company incorporated in the Isle of Man, Great Britain, without any business activity and entirely controlled by investors from the defendant State (Russia).

In sum, where incorporation is a sufficient criterion for acquiring the nationality of a State party, the tribunals have not found it necessary to look beyond formalities at who really controls the company or whether there is a genuine business link with the State of which the nationality is claimed. The reaction of tribunals is different where treaty shopping occurs after a dispute has arisen.

[41] Cf. ICSID Convention, Article 25.1

[42] The final tribunal was composed of Michael Mustill (Chairperson replacing Prosper Weil), Daniel M. Price, and Piero Bernardini.

[43] See, for example, E. Gaillard, who described the dissenting opinion as "very odd." E. Gaillard, "Notes sous CIRDI, décision sur la compétence du 18 avril 2008, The Rempetrol Group NV c. République de Roumanie, [Notes re : ICSID, decision on jurisdiction of April 18, 2008, The Rempetrol Group NV v. Republic of Romania] *Journal de droit international*, 2009, No. 1, p. 367.

[44] See Yukos Universal v. Russian Federation, Interim verdict on jurisdiction and admissibility of November 30,2009, *Cour Permanente d'Arbitrage*, No. AA 227. Available at www.investmentclaims.com, para. 241; Aguas del Tunari v. Bolivia (ARB/02/3), verdict on jurisdiction of 21 October 2005, para. 321, *ICSID Review-Foreign Investment Law Journal* vol. 20, 2005, p. 450 ff. Even the *Tokios Tokeles* verdict did not avoid expressing regret at the negative aspects of treaty shopping (paras. 24–52).

[45] The tribunal was composed of Arthur Watts, KCMG, QC (Chair), L. Yves Fortier and Peter Behrens.

[46] Para. 240.

[47] Para. 414.

5.2.2 Post-dispute Treaty Shopping: An illegal practice

Where an investment restructuring has taken place after a dispute has arisen, the tribunals have refused to accept jurisdiction. They considered that the investor had demonstrated an abuse of rights or procedure in order to have access to the benefits of a treaty and its international arbitration clause.

The 2009 *Phoenix v. Czech Republic* case[48] (based on the Israel–Czech Republic BIT) perfectly illustrates this position. The arbitration process had been initiated by Phoenix, a company under Israeli law which, two months previously, had bought out two companies subject to Czech law (Benet Praha and Benet Group). The two companies were controlled by a Czech national, Mr. Vladimir Beno, while Phoenix was controlled by other members of Mr. Beno's family. When the two companies were bought out by Phoenix, they had already initiated proceedings against the Czech Republic in the national courts. The facts appeared to show clearly that there had been a trafficking in BIT claims.[49]

The tribunal[50] refused jurisdiction on the basis that the investor had not intended to engage in bona fide business activity when buying out the two Czech companies. Rather the action merely constituted "a rearrangement of assets within a family, to gain access to ICSID jurisdiction to which the initial investor was not entitled." Consequently, the investment was "not a bona fide transaction and cannot be a protected investment under the ICSID system (...) All the elements analyzed lead to the same conclusion of an abuse of rights. The abuse here could be called a "**détournement de procedure**' [abuse of the procedure]" The notion of abuse of procedure was defined by the tribunal as the violation of a fundamental principle of good faith.

It is true that, in this case, the tribunal was more concerned with the definition of protected investment than protected investor. In a sense, the investor, although holding the nationality of a State party, was unable to obtain the protections of the BIT because there was no covered investment. The tribunal proposed a set of criteria for assessing whether an investment had been conducted in good faith.[51] However, the tribunal arguments are also interesting for the definition of protected investor. In effect, one of the determining elements was the date on which the two companies were bought out, i.e., the restructuring of the investment. In the case in question, Phoenix had bought out the companies two months before bringing the claim against the Czech Republic for past intra-Czech disputes. Furthermore, Phoenix had not even finished the formalities of registration under Israeli law. Nor did it have a business plan at the time of the claim.

In the *Mobil Oil v. Venezuela* case[52] (on the basis of the Netherlands–Venezuela BIT), the date of the investment restructuring and the date of the dispute were also determining factors in the tribunal's decision on jurisdiction. In this case, a Dutch investor had introduced an ICSID request for arbitration against Venezuela following an increase in royalties and profits taxes in the oil sector and the adoption of a nationalization law. The BIT included a broad definition of an investor and did not have a denial of benefits clause. As the tribunal noted, and as the investor also recognised, "the main, if not the sole purpose of the restructuring was to protect Mobil investments from adverse Venezuelan

[48] Phoenix Action Ltd v. Czech Republic (ARB/06/5), verdict of April 15, 2009.

[49] See also Banro v. RDC, ARB/98/07. A Canadian investor had sold its investment to its American subsidiary some days before bringing the dispute to ICSID in order to benefit from the ICSID clause inserted in a contract. In effect, unlike the United States, Canada has not signed the ICSID Convention. The tribunal refused jurisdiction.

[50] The tribunal was composed of Brigitte Stern (Chair), Andreas Bucher, Juan Fernández-Armesto.

[51] These criteria are: when the investment occurred (was the investment already in difficulty when it was bought out by a new investor?); when the complaint was lodged (was the complaint lodged immediately after acquisition of the investment and does it cover disputes arising before that acquisition?); and the nature of the acquisition operation (was the investment acquired with the intention of conducting genuine business activities and making it profitable again?).

[52] Mobil Corporation, Venezuela Holding BV, et al. v. Venezuela (ARB/07/27), decision on jurisdiction of June 10, 2010.

measures in getting access to ICSID arbitration through the Dutch–Venezuela BIT." However, according to the tribunal, this practice demonstrates that treaty shopping is not to be automatically condemned in itself.[53] The tribunal believed that it was necessary to verify whether there was a case of "abuse of right" or rather "legitimate corporate planning."[54] The judges concluded that the fact of acquiring a more useful nationality for protection against the actions of a State was legitimate where disputes arose after restructuring. As a consequence, it accepted jurisdiction for reviewing the law on nationalization arising after restructuring. However, it refused jurisdiction regarding the increase in royalties and profits taxes which had occurred before the restructuring. Citing the Phoenix case, the arbitrators condemned post-dispute treaty shopping as "an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs."[55]

The rejection of post-dispute treaty shopping is not based on any explicit BIT clauses but rather on a principle of abuse of process which appears to be emerging from recent arbitral awards. It is still too early to assess the scope of the precedent. For some commentators, rejection of treaty shopping is principally justified by the fact that the treaty cannot be applied retrospectively. This means that the investor must hold the nationality of a State party to the treaty at the time at which the events that are the source of the dispute occur.[56] The BIT would only protect against events that occurred after the company goes on to acquire the nationality of a signatory State.

In conclusion, to date, the tribunals have held that investment restructuring for the purpose of acquiring a particular nationality in advance of a dispute constitutes strategic legal planning (nationality planning). Conversely, restructuring undertaken once a dispute has arisen with a State, for the purpose of rectifying a lack of strategic planning on the part of an investor, constitutes unacceptable treaty shopping. However, as approaches may differ according to the composition of the tribunals, there is no guarantee that this distinction will always be observed in future cases.

5.2.3 The Denial of Benefits Clause: The non-automatic effect

The existence of a denial of benefits clause could put an end to the practice of treaty shopping. For example, in the aforementioned *Tokios Tokeles* case, the tribunal held that, if the States had wished to prevent the investor's actions, they would have done so by including appropriate provisions in the treaty.[57] At first glance, this means that the existence of a denial of benefits clause, or a stricter definition, would have led to a different result.

Nevertheless, the effect of a non-automatic denial of benefits clause will depend on the date on which the refusal is exercised with reference to the date of the dispute. As such, in the *Plama Consortium v. Bulgaria* case, the tribunal ruled that the denial of benefits clause (Article 17 ECT) only allowed States to deny the benefits of the treaty to foreign investors in cases of treaty shopping before a claim had been brought and at the point at which the investor settled in the territory:

[53] See also Aguas del Tunari SA v. Bolivia (ARB/02/3), decision on jurisdiction of October 21, 2005 : "[I]t is not uncommon in practice, and (...) not illegal to locate one's operations in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for examples [sic], of taxation or the substantive law of the jurisdiction, including the availability of a BIT," para. 330.
[54] *Mobil Corporation, Venezuela Holding BV*, para. 191.
[55] Mobil Corporation, Venezuela Holding BV, para. 205.
[56] See Christoph Schreuer, "Nationality of Investors: Legitimate Restrictions vs. Business Interests." *ICSID Review – Foreign Investment Journal of Law*, 2009, vol. 24, No. 2, p. 527.
[57] Tokios Tokeles v. Ukraine (ARB/02/18), verdict on jurisdiction of April 29, 2004, paras. 28–30.

> the object and purpose of the ECT suggest that the right's exercise should not have retrospective effect. A putative investor, properly informed and advised of the potential effect of Article 17(1), could adjust its plans accordingly prior to making its investment.[58]

The tribunal in the *Yukos Universal v. Russia* case reached the same conclusion.[59]

Specifically, this means that if a State "may," or if it "reserves the right," to deny the benefit of the treaty to an investor from the other State party to the BIT, it must effectively exercise that right from the outset of the investment in its territory by notifying the investor. Otherwise, the investor shall have a legitimate expectation not to be denied the benefit of the treaty.

This interpretation of the clause places on the host State a potential obligation that would be very difficult to apply in practice. In effect, it presupposes that each State has cognizance of the persons who effectively control all the foreign companies established in its territory together with the existence, or not, of substantial activities by those companies in their country of incorporation. This is the condition by which the State may, pre-emptively, deny the benefits of the BIT to the company in question.

In contrast to the aforementioned rulings, it could be considered that a denial of benefits clause would take effect as soon as the treaty between the two States enters into force. All the investors of a State party that do not meet the required conditions of the clause would be automatically excluded from the protection of the treaty. However, it is necessary to wait until a tribunal has occasion to rule on this type of clause in order to assess the impact. Such a clause could be drafted as follows:

> *Party* **deny** *the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of the other Party and persons of a non-Party, or of the denying Party, own or control the enterprise.*

In order to introduce a certain flexibility, which could be considered useful on occasion, the clause could also stipulate that each State nevertheless reserves the right to confer the advantages of the BIT on those types of investors and investments on a case-by-case basis, via a written approval and at the specific request of the investor.

Similarly, the approach consisting of demanding closer ties between the investor and its nationality State (two cumulative criteria in place of a single one) has the advantage of predictability given that this solution is also automatic.

5.2.4 Indirect Control by Intermediary Companies: Non-limitation

In numerous cases, the arbitration tribunals have accepted that a company which had only a very indirect link with a protected investment, on account of the number of intermediary companies, could bring a claim for arbitration for damage caused to its investment. In *Waste Management v. Mexico*, the tribunal ruled that the parties to NAFTA:

> could have restricted claims of loss or damage by reference to the nationality of the corporation which itself suffered direct injury. No such restrictions appear in the text (...) (...) Acaverde was an enterprise owned or controlled indirectly by the Claimant, an investor of the United States. The nationality of any intermediate holding companies is irrelevant to the present claim.[60]

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[58] Plama Consortium Limited v. Bulgaria, ARB/03/24, decision on jurisdiction of February 8, 2005, ILM, vol. 44, 2005, p. 721 ff., paras. 161–162.
[59] Yukos Universal v. Russian Federation, Interim verdict on jurisdiction and admissibility of November 30, 2009, paras. 456–459.
[60] *Waste Management v. Mexico*, ARB(AF)/00/3, award of April, 30, 2004, § 85.

In the *Aguas del Tunari v. Bolivia* case, the tribunal also stated that there is nothing in the BITs that constitutes an obstacle to the protection of intermediary investors.[61] Similarly, in the *Tza Yap Shum v. Peru* case, the tribunal ruled that the ICSID Convention did not distinguish between investments effected directly or indirectly through a company from a third-party State.[62]

As such, where a company introduces a claim against a State, the tribunals shall, firstly, limit themselves to ensuring that that company owns or controls, even indirectly, the company that is making the investment in the host country and has suffered injury. Secondly, the tribunals shall consider whether the complainant company holds the relevant nationality in accordance with the nationality criteria cited in the BIT. Consequently, the tribunals shall be able to accept jurisdiction, even if there is another company which controls the complainant company (ultimate investor) or an intermediary company between the complainant company and the ultimate investor (intermediary investor) where one or the other of those companies holds the nationality of a third-party State or the host State.

For example, in the *SOABI v. Senegal* case,[63] the complainant company (FLEXA) was incorporated in Panama but controlled by Belgian shareholders. However, Panama was not a signatory to the ICSID Convention and its nationals could not therefore have access to that arbitration centre. Nevertheless, the tribunal accepted jurisdiction based on the fact that the company was indirectly controlled by shareholders who were nationals of a signatory State of the ICSID Convention. Furthermore, in the *Aguas del Tunari v. Bolivia* case, the tribunal held that the company subject to local law held the nationality of the Dutch company that controlled it. However, it did not go further in order to take into account the nationality of the persons controlling the Dutch company who themselves held the nationality of a country that was not a party to the BIT.

[61] Aguas del Tunari v. Bolivia, decision on jurisdiction of October 21, 2005, para. 332.
[62] *Tza Yap Shum v. The Republic of Peru*, (ARB/07/6), Award of July, 7, 2011, para. 96.
[63] SOABI v. Senegal (ARB/82/1), decision on jurisdiction of August 1, 1984, 2 *ICSID Reports* Vol. 2, pp. 182–183.

6.0 Conclusions and Recommendations

It is clear from the arbitration awards issued on the subject of treaty shopping that the tribunals give full effect to broad definitions of investors in BITs. Thus, except in clear cases of abuse of rights (post-dispute treaty shopping), or where a full and automatic denial of benefits clause exists, they have refused to pierce the corporate veil to see whether or not the ultimate investor in fact holds the nationality of the home State.

Consequently, it is desirable that States pay closer attention from the outset to the definition of protected investors in their BITs in order not to indirectly enable access to international arbitration for unintended investors. To this effect, several options are available to them in terms of best practice and the interpretations of tribunals.

With regard to natural persons, it is important to address the question of dual nationality. BITs may demand the application of relevant/dominant nationality criteria where an investor has two nationalities with equal effect.

With regard to legal persons, some changes in the drafting of clauses may produce significant effects on the defined and foreseeable scope of the protected investor:

- Not referring the definition of company nationality to the laws of each contracting party but choosing a single criterion that will apply to both contracting parties in the treaty;
- Always having at least two combined nationality criteria for companies which shall be applied cumulatively: incorporation plus substantial business activities or head office plus substantial business activities;
- Defining the concept of substantial business activities (number of permanent employees; turnover; tax status etc.);
- Including a denial of benefits clause which would be "automatic" in its effects and also "comprehensive" in its application, i.e., prohibiting treaty shopping by both national investors and those of non-party countries; and
- Defining the content of control criteria. For example, establishing the level of participation required in order to have control, or significant influence, in a company or, in the case where the nationality of the ultimate investor in a complex investment chain is relevant, defining who that investor is.

Finally, in order to strengthen the legal effects of these treaty amendments, it is necessary to combine them with a more precise definition of the concept of investment and a restrictive Most Favoured Nation (MFN) clause.

International Institute for Sustainable Development
Institut international du développement durable

Published by the International Institute for Sustainable Development.

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