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PREFACE

This year's edition of *The Investment Treaty Arbitration Review* boasts a number of new chapters. The result is greater coverage and a resource that is even more useful to practitioners.

As before, this new edition provides an up-to-date panorama of the field. This is no small feat given the constant flow of new awards, decisions and other developments in investment treaty arbitration.

Although many useful treatises on investment treaty arbitration have been written, the relentless rate of change in the field rapidly leaves them out of date.

In this environment of constant change, *The Investment Treaty Arbitration Review* fulfils an essential function. Updated every year, it provides a current perspective on a quickly evolving topic. Organised by topic rather than by jurisdiction, it allows readers to access rapidly not only the most recent developments on a given subject, but also the debate that led to those developments and the context behind them.

This eighth edition represents an important achievement in the field of investment treaty arbitration. I thank the contributors for their fine work in developing the content for this volume.

Barton Legum
Honlet Legum Arbitration
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Chapter 2

COVERED INVESTORS

Laura P MacDonald and Ronan O'Reilly[1]

I INTRODUCTION

A critical threshold issue that an investment arbitration tribunal must address is whether the claimant qualifies as a covered investor under the applicable international investment agreement (IIA). Although it may sound straightforward, the analysis can be quite complicated and often lies at the heart of jurisdictional disputes.

At a high level, whether a particular investor is covered by an IIA depends on the treaty at issue and the rules governing the arbitration – and, of course, the underlying facts. In general, covered investors are (1) natural or juridical persons, (2) who are nationals of one contracting state and (3) own, control or make an investment in the territory of another contracting state. This chapter focuses on these three elements and explores current issues concerning the nationality of covered investors and the degree of control that an investor must have with respect to an investment to be protected by an IIA. The chapter does not take a position on the proper way to approach or resolve any of these questions for any particular dispute.

II KEY SOURCES TO DETERMINE WHO IS A COVERED INVESTOR

To determine whether an investor can bring an investment arbitration claim, the analysis generally starts with and largely depends on two sources: the applicable IIA and the rules governing the arbitration proceeding.

Most IIAs contain a section in which the terms 'investor' or 'national' are defined. Generally, the definitions are broad and include both natural and legal persons. With respect to defining the latter category of covered investors, instead of using the commonly used terms 'juridical persons' or 'legal entities', some IIAs use the term 'enterprise', which may be more inclusive to the extent that it is interpreted to comprise investors such as trusts or unincorporated consortiums that may not fall within the category of legal entities. For example, the bilateral investment treaty (BIT) of 2008 between the United States and Rwanda defines investor as 'a national or an enterprise of a Party'.[2]

Most arbitration rules do not contain restrictions regarding who can bring claims; however, the International Centre for Settlement of Investment Disputes (ICSID) Convention provides that the jurisdiction of ICSID shall extend to disputes between a contracting state

1 Laura P MacDonald is a partner and Ronan O'Reilly is a special counsel at Jenner & Block LLP.

2 United States–Rwanda bilateral investment treaty (BIT) (2008), Article 1.

and a national of another contracting state.[3] Under the ICSID Convention, the term 'national of another Contracting State' includes only natural or juridical persons.[4] According to some scholars, this restriction means that a mere association of individuals or juridical persons cannot bring a claim under the ICSID Convention.[5] Following this approach, some tribunals have declined to exercise jurisdiction, for example, over claims brought by a consortium of companies determined not to have a juridical personality.[6]

III ANALYSIS OF PROTECTED INVESTORS

To qualify for protection and bring a claim under most IIAs, an investor must be a national of a contracting state other than the host state of the investment;[7] therefore, nationality is a critical question. The analysis of whether an investor has the necessary link with the contracting states to justify protection differs for natural and legal persons.

i Natural persons

Criteria for determining the nationality of natural persons

The nationality of a natural person is typically established in the IIAs by reference to the domestic legislation of the state for which nationality is claimed.[8] For example, the Czech Republic–Switzerland BIT defines investors as 'natural persons who are nationals of that Contracting Party in accordance with its laws'.[9]

Under domestic laws, there are generally two accepted criteria to determine the nationality of an individual: (1) the nationality of one or both parents of the natural person (*ius sanguinis*); or (2) the place of birth of the individual (*ius soli*).[10] The domestic laws of most countries adhere to one or both of these criteria in regulating the concept of nationality.

Although some IIAs include a single definition of 'investor' or 'national', which applies to both parties, others have separate definitions for each contracting state. For example, the

3 ICSID Convention, Article 25.

4 id.

5 Christoph Schreuer, *The ICSID Convention: A Commentary*, 2nd edn., Cambridge University Press, 2009, p. 278.

6 See, e.g., *Consorzio Groupement LESI – DIPENTA v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/03/08, Award, 10 January 2005, Paragraphs 37–41; *Impregilo, SpA v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, Paragraphs 131–39.

7 Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles,* Oxford University Press, 2008, p. 112.

8 See, e.g., *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Award, 7 July 2004, Paragraph 55. ('It is accepted in international law that nationality is within the domestic jurisdiction of the State, which settles, by its own legislation, the rules relating to the acquisition (and loss) of its nationality.')

9 Czech Republic–Switzerland BIT (1990), Article 1(1)(a).

10 United Nations Conference on Trade and Development (UNCTAD), 'Course on Dispute Settlement in International Trade, Investment and Intellectual Property', 2003, p. 14, https://unctad.org/system/files/official-document/edmmisc232add3_en.pdf (accessed 9 May 2023).

Netherlands–Panama BIT contains a single definition of 'investor',[11] while the United States–Uruguay BIT contains a different definition of 'national' depending on whether the investor claims to be a national of the United States or of Uruguay.[12]

In some investor definitions, the contracting parties extend protection not only to their nationals but also to those who qualify as permanent residents under their domestic laws. For example, the Canada–Trinidad Tobago BIT defines 'investors from Canada' as 'any natural person possessing the citizenship of or permanently residing in Canada in accordance with its laws'.[13]

A few IIAs have included additional requirements that an investor must satisfy to meet the nationality definition, such as requirements of residence or domicile. For example, the Germany–Israel BIT provides that the term 'nationals' means, with respect to Israel, 'Israeli nationals being permanent residents of the State of Israel'.[14]

Natural persons who have the nationalities of both contracting states

One complicating factor that arises is investors having the nationality of both state parties to the treaty under their respective laws; for example, a dual national of Italy and Panama makes an investment in Panama and brings a claim under the Italy–Panama BIT.[15] In those instances, there are two possibilities: (1) the applicable IIA addresses and resolves whether a dual national can bring claims against the host state; or (2) the IIA is silent on this issue. Where the IIA is silent, tribunals have applied different approaches, including looking to additional IIAs entered into by the relevant state, the applicable arbitration rules and customary international law to determine whether a dual national is allowed to bring a claim against a state of one of its nationalities.

International investment agreements

IIAs that address the issue of dual nationals take different approaches. Some IIAs expressly allow dual nationals to bring claims against the host state, others expressly forbid it and some are silent on the issue.

Following the international law principle of an effective link, one approach considers a person with dual nationality as a national of the country of his or her dominant and effective nationality.[16] Under this approach, a dual national sharing the nationality of the host state may nevertheless bring a claim against the host state so long as it is not his or her 'dominant

11 Netherlands–Panama BIT (2000), Article 1(b).

12 United States–Uruguay BIT (2005), Article 1.

13 Canada–Trinidad Tobago BIT (1995), Article 1(g).

14 Germany–Israel BIT (1976), Article 1(3)(b). This BIT is not in force yet.

15 Some states do not permit dual nationality and require foreigners seeking to become naturalised citizens to renounce their nationality of origin. If a natural person has agreed to become a naturalised citizen of a host state in this way, he or she will not be able subsequently to rely on his or her nationality of origin to bring a claim against the host state, even if he or she has not renounced his or her nationality under the laws of his or her state of origin. See, e.g., *Carlos Esteban Sastre and others v The United Mexican States*, ICSID Case No. UNCT/20/2, Award on Jurisdiction, 21 November 2021.

16 UNCTAD, 'Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking', 2007, p. 14, https://unctad.org/system/files/official-document/iteiia20065_en.pdf (accessed 9 May 2023).

and effective' nationality. This approach is followed, for instance, by the United States–Uruguay BIT, which establishes that 'a natural person who is a dual citizen shall be deemed to be exclusively a citizen of the State of his or her dominant and effective citizenship'.[17]

Other IIAs consider a person who has both nationalities as a national only of the host state of the investment. This approach has the effect of excluding those individuals from the protections of the IIA.[18] For instance, the Canada–Lebanon BIT states that 'in the case of persons who have both Canadian and Lebanese citizenship, they shall be considered Canadian citizens in Canada and Lebanese citizens in Lebanon'.[19]

Similar to the previous approach, other IIAs simply state that a protected investor cannot have the nationalities of both contracting states. For example, the Canada Model BIT (2004) states that a foreign investor who makes an investment in Canada is not protected if he or she is a national of Canada.[20]

Arbitration rules

With the exception of the ICSID Convention, arbitration rules generally do not address dual nationals. Accordingly, in a non-ICSID context, dual nationality is not precluded per se unless the relevant IIA so provides.[21] When an IIA is silent on dual nationality in a non-ICSID context, the tribunal must address which nationality should prevail. In some instances, tribunals have followed an 'effective nationality' approach and allowed the investor to bring a claim if the effective nationality was different from the nationality of the host state.[22] Other tribunals have concluded that investment treaty arbitration does not allow dual nationals of the contracting states to bring claims and disregarded the dominant and effective nationality test.[23] Finally, some tribunals have applied the IIA as *lex specialis* and held that if the applicable treaty does not preclude a dual national from bringing a claim, the tribunal should not imply an exclusion for dual nationals into the IIA on the basis of customary international law.[24]

However, the ICSID Convention does regulate this issue. It defines 'national of another Contracting State' as 'any natural person who had the nationality of a Contracting State

17 United States–Uruguay BIT (2005), Article 1. See also Canada Model BIT (2014), Article 1 ('a natural person who is a dual citizen of Canada and _____ shall be deemed to be exclusively a national of the Party of his or her dominant and effective nationality').

18 UNCTAD, 'Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking', p. 14.

19 Canada-Lebanon BIT (1997), Article 1(e).

20 Canada Model BIT (2004), Article 1.

21 Campbell McLachlan et al., p. 160.

22 ibid.

23 See, e.g., *Manuel García Armas et al. v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Award on Jurisdiction, 13 December 2019, Paragraphs 738, 739 (referencing 'the terms of the Treaty, its structure, and its offer and hierarchy of forums (which include as a main option an arbitration under the ICSID Convention or the Additional Facility), the Tribunal considers that the Treaty does not protect dual-national Spanish-Venezuelans against Spain or Venezuela, regardless of their dominant nationality'.)

24 See, e.g., *Serafín García Armas and Karina García Gruber v. Bolivarian Republic of Venezuela*, PCA Case No. 2013-3, Decision on Jurisdiction, 15 December 2014, Paragraphs 158, 196, 199. See also *Sergei Viktorovich Pugachev v. The Russian Federation*, UNCITRAL, Award on Jurisdiction, 18 June 2020, Paragraphs 385–86. The tribunal concluded that because both France and Russia had included an exclusion for dual nationals in their treaties with third countries, this demonstrated that 'if either of the Contracting States had intended to exclude dual nationals from the scope of the France-USSR BIT, they would have done so expressly'.

other than the State Party to the dispute'.[25] Accordingly, under the ICSID Convention, the investor must pass a two-part test to bring a claim, which involves a positive requirement (to be a national of a contracting state) and a negative requirement (of not being a national of the host state);[26] therefore, under the ICSID Convention, a dual national who has the nationality of the host state would not be allowed to bring a claim. Further, ICSID tribunals have concluded that a dual national is excluded even when his or her nationality with the host state is no longer effective.[27]

Critical dates for assessing nationality

The critical dates for assessing an investor's nationality and, therefore, eligibility to bring a claim under an IIA depend on the specific wording of the relevant IIA. In the absence of any provision in the IIA to the contrary, it is an accepted principle of international adjudication that the relevant date is the date the proceedings were instituted.[28] The date of the alleged violations of the IIA has been identified by several tribunals as a second critical date under IIAs.[29]

In addition to any requirements under an IIA, to bring a claim under the ICSID Convention, a natural person must comply with the positive and negative requirements of nationality on two critical and separate dates.[30] According to Article 25 of the ICSID Convention, an investor must be a national of a contracting state both at the time the parties consented to submit the dispute to ICSID's jurisdiction and on the date the request for arbitration is registered by ICSID.[31] In addition, the investor must not be a national of the host state on either of these two dates.[32]

Typically, an IIA's dispute settlement provision contains an open offer to arbitrate investment disputes by the contracting states. Consent is achieved when the investor accepts the offer, which generally occurs when the investor files the request for arbitration; however, acceptance could happen at an earlier time, such as in a notice of dispute or other communication between the investor and the host state.

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25 ICSID Convention, Article 25.

26 UNCTAD, 'Course on Dispute Settlement in International Trade, Investment and Intellectual Property' p. 14.

27 *Champion Trading Company v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Decision on Jurisdiction, 21 October 2003, Paragraph 3.4.1.

28 See, e.g., *Ceskoslovenska Obchodini Banka AS v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999, Paragraph 31; Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, 2nd edn., Oxford University Press, 2012, pp. 38–39.

29 See, e.g., *Serafín García Armas and Karina García Gruber v. Bolivarian Republic of Venezuela*, PCA Case No. 2013-3, Decision on Jurisdiction, 15 December 2014, Paragraph 214; *Victor Pey Casado v. Republic of Chile*, ICSID Case No. ARB/98/2, Final Award, 8 May 2008, Paragraph 414; *Vladislav Kim v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Award on Jurisdiction, 9 March 2017, Paragraphs 190–91. See also *Sergei Viktor Pugachev v. The Russian Federation*, UNCITRAL, Award on Jurisdiction, 18 June 2020, Paragraphs 398–441, in which the tribunal identified (based on specific wording in the BIT) the date that the investment was made in the host state as an additional critical date for assessing the investor's nationality.

30 These requirements are screened by the secretary general of ICSID in the process of registering a request for arbitration. If the request is registered, the tribunal finally determines whether these requirements are satisfied.

31 ICSID Convention, Article 25.

32 The requirement to have nationality on these two critical dates is not present in non-ICSID arbitration rules.

Authority to decide questions of nationality

Even though each state has the sovereign right and power to determine who its nationals are, an international investment tribunal has authority to decide whether the investor is a national of the state in question for purposes of the arbitration. It follows that a tribunal's determination of whether an investor qualifies as a national may contradict a state's own findings.[33] The threshold to override the state's decision to confer its nationality on a natural person is a high one, requiring clear and convincing evidence that the nationality was fraudulently acquired or that the acquisition resulted from a material error.[34]

In some instances, tribunals have ignored a state's rules on nationality on the grounds that the nationality was conferred in the absence of any effective link between the state conferring the nationality and the individual. Such 'nationalit[ies] of convenience', which may be obtained from certain countries through mere compliance with specified procedural steps,[35] are subject to challenge by host states.

ii Juridical persons

Criteria for determining the nationality of juridical persons

Determining the nationality of a corporation can be similarly complicated.[36] Different criteria have been used in IIAs to define the nationality of a legal entity, including (1) the place of incorporation, (2) the location of the company's seat (*siège social* or principal place of business) and (3) the nationality of ownership or control. IIAs use these criteria alone, in combination or as alternatives. Accordingly, there is no single test to define the link required between a juridical person seeking protection under an IIA and the contracting state.

Several IIAs use the place of incorporation to determine the nationality of a juridical person. For example, the incorporation approach is followed by the 2008 UK Model BIT, whereby UK companies are 'corporations, firms and associations incorporated or constituted under the law in force in any part of the United Kingdom'.[37]

Other IIAs look at the corporate seat or *siège social* to determine the nationality of a legal entity. Under these IIAs, to be a protected investor, the corporate seat or the effective management should be in the territory of one of the contracting states. For instance, the

33 See, e.g., *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Award, 7 July 2004, Paragraphs 55, 58 and 84. In this case, the claimant asserted he was an Italian citizen protected by the BIT between Italy and the UAE. He provided the court with five certificates of nationality, copies of his Italian passports and a letter from the Italian Ministry of Foreign Affairs that explicitly declared Soufraki was entitled to invoke the ICSID/BIT forum on the basis of his Italian citizenship; however, the tribunal concluded that it would 'in the end decide for itself whether, on the facts and law before it, the person whose nationality is at issue was or was not a national of the State in question'. The tribunal found that, under Italian law, Soufraki – unbeknown to him – had forfeited his citizenship when he acquired Canadian nationality and residence, and the tribunal declined jurisdiction over the dispute.

34 See, e.g., *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, Paragraph 357; *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, Paragraph 87; *Sergei Viktor Pugachev v. The Russian Federation*, UNCITRAL, Award on Jurisdiction, 18 June 2020, Paragraphs 306–09.

35 A Broches, Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law, Martinus Nijhoff Publishers 204-205 (1995). See, e.g., *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, Paragraphs 77–78.

36 Dolzer and Schreuer, p. 47.

37 United Kingdom Model BIT (2008), Article 1(d).

Germany–China BIT defines 'company' to include, with respect to Germany, 'any juridical person as well as any commercial or other company or association with or without legal personality having its seat in the territory of the Federal Republic of Germany'.[38] The particular meaning of *siège social* within a given agreement, however, may be the subject of debate. Some tribunals have held that the phrase is not a legal term of art with a singular meaning. It can be 'susceptible of either a formal or substantive meaning'[39] because it can refer to the seat appearing in a company's by-laws or statutes, or to the effective seat where the company is actually managed.[40] In one case, the tribunal defined the corporate seat as the 'effective center of administration' and found that an evidential showing would be required, such as the place where the company's board of directors regularly meets, the place where the company has a considerable number of employees, or the company's address and physical location.[41]

Other IIAs adopt a control test and define 'investor' to cover companies not incorporated under the laws of any of the contracting states, but controlled, directly or indirectly, by natural persons or by legal persons incorporated in the state of one contracting party.[42]

A few IIAs require a bond of economic substance between a corporate investor and the state of its purported nationality. This bond might comprise 'real economic activity' within the state of the purported nationality.[43]

Some BITs combine two or more approaches. For example, the Iran–Sri Lanka BIT requires that juridical persons be 'formed and incorporated under the laws of one Contracting Party and have their seat together with their substantial economic activities in the territory of that same Contracting Party'.[44]

When an IIA is silent on the method of determining the nationality of a legal entity, ICSID tribunals typically rely on the place of incorporation or the principal place of business. ICSID case law demonstrates a reluctance to adopt the control test in defining nationality of a juridical person.[45]

38 China–Germany BIT (2005), Article 1 (2).

39 *Tenaris SA & Talta-Trading v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award, 29 January 2016, Paragraph 144.

40 id.; *Orascom TMT Investments Sàrl v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Final Award, 31 May 2017, Paragraph 273.

41 *Alps Finance and Trade AG v. The Slovak Republic*, UNCITRAL, Award, 5 March 2011, Paragraph 217.

42 Netherlands–Venezuela BIT, Article 1(b) (The term 'nationals' shall comprise with regard to either Contracting Party: (1) natural persons having the nationality of that Contracting Party; (2) legal persons constituted under the law of that Contracting Party; (3) legal persons not constituted under the law of that Contracting Party but controlled, directly or indirectly, by natural persons as defined in point (1) or by legal persons as defined in point (2) above).

43 Paraguay–Switzerland BIT (1991), Article 1(ii)(c).

44 Iran–Sri Lanka BIT (2000), Article 1(2)(b).

45 UNCTAD), 'Course on Dispute Settlement in International Trade, Investment and Intellectual Property', p. 15.

Exception to the rule: juridical persons with the nationality of the host state

Although, typically, only foreign juridical persons can initiate an arbitration against a host state, certain IIAs include provisions allowing companies incorporated in the host state to file an arbitration against that state. This exception exists because states often require that foreign investments be channelled through locally incorporated companies,[46] and barring such foreign investors from bringing claims against the host state might be viewed as unjust.

The ICSID Convention allows a locally incorporated company with the nationality of the respondent state to bring an arbitration if, because of foreign control, the parties have agreed that it should be treated as a national of another contracting state for the purposes of the ICSID Convention.[47] In other words, some IIAs will treat a local company as a foreign investor (i.e., as eligible to bring an investment arbitration claim) if it is foreign-controlled and the respondent state consents to it. States may consent in either a direct contract with the investor or by a blanket offer of consent via the IIA.

In the latter case, the IIA usually will state more broadly that local companies controlled by nationals of the other state will be treated as nationals of that state.[48] Several IIAs explicitly provide for this type of consent. For instance, the Ethiopia–Malaysia BIT states that '[a] company which is incorporated or constituted under the laws in force in the territory of one Contracting Party and in which before such a dispute arises the majority of shares are owned by investors of the other Contracting Party shall in accordance with Article 25(2)(b) of the Convention be treated for the purpose of this Convention as a company of the other Contracting Party'.[49]

Tribunals have noted that Article 25(2)(b) of the ICSID Convention 'separately establishes a subjective test and an objective test'.[50] Even where the parties agree 'to treat the company as a national of another Contracting State for the purposes of this Convention', ICSID jurisdiction is not satisfied unless the company is actually subject to foreign control – the 'objective test is not satisfied by mere agreement by the Parties'.[51]

The ICSID Convention requires control; therefore, the status of minority shareholders remains an open question that requires careful review under the specific facts of a case. For example, one tribunal confronted whether, through a shareholders' agreement, a foreign investor might aggregate its ownership share of a local company with other investors to achieve the requisite degree of 'foreign control' under Article 25(2)(b) of the ICSID Convention. It found the aggregation permissible in some circumstances but not in others.[52]

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46 Dolzer and Schreuer p. 50.

47 ICSID Convention, Article 25.

48 Dolzer and Schreuer p. 51.

49 Ethiopia–Malaysia BIT (1998), Article 7(3).

50 *National Gas SAE v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7, 3 April 2014, Paragraph 131.

51 ibid., Paragraph 133. See, also, *Vacuum Salt Products Ltd. v. Republic of Ghana*, ICSID Case No. ARB/92/1, 16 February 1994, Paragraph 36 (finding that 'the parties' agreement to treat Claimant as a foreign national "because of foreign control" does not *ipso facto* confer jurisdiction'); *Eskosol SpA in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Respondent's Application Under Rule 41(5), 20 March 2017, Paragraph 90 ('the test for Article 25(2)(b) of the ICSID Convention also has an objective component that is not necessarily satisfied merely because of the parties' subjective agreement').

52 See, e.g., *Camuzzi International SA v. The Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Objection to Jurisdiction, 11 May 2005, Paragraphs 38–41. For a critique of this tribunal's reasoning, see Zachary Douglas, 'The International Law of Investment Claims', 2009, 320–321 (criticising the case for 'mistak[ing] the jurisdictional nature of Article 25(2)(b)' and for contradicting 'the express terms of that provision').

Critical dates for assessing nationality

The critical dates for assessing the nationality of juridical persons will typically be, subject to the specific wording of the IIA, the date of the alleged breach and the date of the initiation of the arbitration.[53] In addition to the requirements under the relevant IIA, for the purposes of registration of their claims at ICSID, the critical date for claimants is the date on which the parties consented to submit the dispute to arbitration.[54] In most cases, consent is deemed to occur when the claimant files its request for arbitration; however, the claimant may accept the offer to arbitrate contained in a BIT prior to the filing of such a request.[55]

Nationality planning and abuse of process

Given that the nationality of the investor is critical for the enjoyment of rights under treaties, and the jurisdiction of a tribunal is determined by the claimant's nationality, among other considerations, a prudent investor may structure or restructure an investment to obtain the benefits of a specific IIA.[56] This can be achieved through the incorporation of a company in a state that has an IIA in force with the host state of the investment provided that the relevant treaty accepts incorporation as the basis for corporate nationality.[57]

The desire or need for an investor to alter its nationality can arise when the investment protection provided in a particular state is removed because of the state's termination of a BIT or its withdrawal from a multilateral investment treaty. For example, in light of the agreement by EU Member States to terminate all intra-EU BITs (130 in total), many EU-based investors have had to consider taking steps to restructure their investments, including by interposing one or more subsidiaries based outside the European Union in their investment structures to maximise their investment protection.[58]

Nationality planning, or treaty shopping, is not prohibited, in principle, under international investment law, which aims to encourage investment;[59] however, the distinction between a protected investor and an abuse of process through corporate planning can be a fine one. The specific facts of the case and the timing of the corporate (re)structuring are paramount to the validity determination.

Under ICSID case law, the validity of nationality planning is primarily dependent on the time of the restructuring in relation to the dispute. In that sense, if the restructuring was undertaken before the dispute was foreseeable, the newly acquired nationality is likely to be

53 See, e.g., *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdiction Objections, 1 June 2012, Paragraph 3.34 (holding that 'what CAFTA requires is not that the investor should bear the nationality of one of the Parties before its investment was made, but that such nationality should exist prior to the alleged breach of CAFTA by the other Party'); *Serafín García Armas and Karina García Gruber v. Bolivarian Republic of Venezuela*, PCA Case No. 2013-3, Decision on Jurisdiction, 15 December 2014, Paragraph 214.

54 ICSID Convention, Article 25(2)(b).

55 There is no such critical date requirement in non-ICSID arbitration rules.

56 Christoph Schreuer, 'Nationality Planning' in Arthur W Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers*, Brill Nijhoff, 2012, p. 18.

57 id.

58 Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union (5 May 2020).

59 Schreuer.

honoured; however, a change of nationality after the dispute became foreseeable is likely to be rejected and viewed as an abusive manipulation of the system of international investment protection. In those cases, the tribunal will decline jurisdiction.[60]

Several new treaties address the issue of abuse of process and state that an investor may not submit a claim if the investment has been made through 'conduct amounting to an abuse of process'.[61]

State-owned enterprises

Some IIAs explicitly protect entities owned or controlled by a state;[62] however, even when IIAs are silent, state-owned enterprises may receive investor protection in certain circumstances. Applying the Broches test,[63] ICSID tribunals have stated that state-owned entities can bring claims if certain requirements are met. In that sense, a state-owned entity could qualify as a 'national of another Contracting State' and bring a claim under an IIA if the legal entity does not act as an agent for the government and is not discharging an essential governmental function.[64]

IV DENIAL OF BENEFITS

Some IIAs contain 'denial of benefits' clauses to preclude nationals of a third state – typically, those with no meaningful connection with a contracting state – from taking advantage of an IIA's protections.[65] Under the clause, states reserve the right to deny a legal entity of the other party the benefits of the IIA in certain circumstances, such as if a legal entity has

60 See, e.g., *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Respondent's Jurisdictional Objections (1 June 2012), Paragraph 2.99 ('In the Tribunal's view, the dividing-line occurs when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy.').

61 See, e.g., Comprehensive Economic and Trade Agreement (2016), Article 8.18.3; EU–Vietnam BIT (2019), Article 3.27.2; Belgium–Luxembourg Model BIT (2019), Article 19; Netherlands Model BIT (2019), Article 16.2, India–Belarus BIT (2018), Article 13.3; India Model BIT, Article 13.4.

62 See, e.g., Australia–China FTA (2015), Article 9.1, which expressly defines the term 'enterprise' to include 'governmentally owned or controlled' entities.

63 Aron Broches, former ICSID Secretary-General, in his 1972 General Course at The Hague Academy of International Law: 'It would seem, therefore, that for purposes of the Convention a mixed economy company or government-owned corporation should not be disqualified as "a national of another Contracting State" unless it is acting as an agent for the government or is discharging an essentially governmental function.'

64 *Beijing Urban Construction Group Co Ltd v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction (31 May 2017), Paragraph 33. See also *Ceskoslovenska Obchodini Banka AS v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999; *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, 25 January 2000; *Rumeli Telekom AS v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008.

65 See, e.g., The Energy Charter Treaty (1998) (ECT), Article 17(1).

no substantial business activities within the state party of its incorporation. For instance, Article 9.15 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership states that a party:

> *may deny the benefits . . . to an investor of another Party that is an enterprise of that other Party and to investments of that investor if the enterprise: (a) is owned or controlled by a person of a non-Party or of the denying Party; and (b) has no substantial business activities in the territory of any Party other than the denying Party.*[66]

The Comprehensive Economic and Trade Agreement between the European Union and Canada has a denial of benefits clause allowing contracting states to deny benefits to a corporate investor if the investor's owners are nationals of a third-party state that is subject to sanctions. Article 8.16 states that a party:

> *may deny the benefits . . . to an investor of the other Party that is an enterprise of that Party and to investments of that investor if: (a) an investor of a third country owns or controls the enterprise; and (b) the denying Party adopts or maintains a measure with respect to the third country that: (i) relates to the maintenance of international peace and security; and (ii) prohibits transactions with the enterprise or would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.*

Tribunals have differed with regard to whether a denial of benefits clause must be invoked before arbitration has been sought, and there appears to be no definite answer.[67] The language of the IIA in question and the length of time between the commencement of arbitration by an investor and the denial of benefits by the state are important factors to consider in assessing this question.[68] Although a denial of benefits clause may be substantively similar to a restricted definition of 'investor' based on bonds of economic substance, the burden of proof can be different. Although a claimant generally has the burden of proving that it falls within the definition of 'investor' for jurisdictional purposes, tribunals diverge on which party bears the burden of proof once a state invokes a denial of benefit clause.[69]

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66 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (2018), Article 9.15.

67 Compare, e.g., *Guaracachi America, Inc v. The Plurinational State of Bolivia*, UNCITRAL, Award, 31 January 2014, Paragraph 376 (*Guaracachi America, Inc*) (finding that 'it is proper that the denial is "activated" when the benefits are being claimed', and so the denial of benefits may be invoked at the time the claimant seeks arbitration) with *Masdar Solar & Wind Cooperatief UA v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, Paragraph 239 (finding that 'it would contradict the text and the purposes of the ECT to say that a Contracting State may deny benefits retrospectively, after an investment has been made and a dispute has arisen').

68 See, e.g., *Littop Enterprises, Bridgemont Ventures and Bordo Management v. Ukraine*, SCC Case No. 092/2015, Award, 4 February 2021, Paragraph 581 (finding that the state should invoke Article 17(1) of the ECT (denial of benefits clause) 'within a reasonable period of time after the dispute arises and is known to both parties' and what is a reasonable time 'will depend on the circumstances and facts of each case, such as the timing of the notice of dispute, the nature of the attempts for amicable settlement, and the assurances given that Article 17 would not be invoked.').

69 *Compare Ulysseas, Inc v. The Republic of Ecuador*, Interim Award, 28 September 2010, Paragraph 166 (finding the burden with the state), with *Guaracachi America, Inc.*, Paragraph 370 (finding the burden with the investor).

V THE LINK BETWEEN THE INVESTMENT AND THE INVESTOR

Foreign investment is often carried out through complex structures with several layers of entities and shareholders, which may be nationals of several countries. Some IIAs protect investors that make, own or control an investment either directly or indirectly, meaning that an investor of a contracting state would be protected even if multiple corporate layers exist between him or her and the investment. Some BITs are silent with regard to whether a direct link between the investor and the investment must exist or whether an indirect link is sufficient for protection. Some scholars argue that, when a treaty is silent, only a direct link is protected. In other words, the investor must directly make, own or control the investment;[70] however, various tribunals have determined that when an IIA is silent, indirect investments are protected.[71]

In addition, the terms used by the applicable IIA are critical for determining the required link between the investor and the investment. For instance, some IIAs state that an investor must 'own or control' the investment, while others require that the investor 'made' the investment. Some tribunals have held that, when the IIA uses the word 'made' in reference to the link between the investor and the investment, it requires an active contribution by the investor or that only active investors are protected. In that case, the claimant must show that the investment was made at the claimant's direction, that the claimant funded the investment or that the claimant controlled the investment in an active and direct manner.[72]

VI CONCLUSION

It is axiomatic that if an investor is not covered by an IIA, that IIA generally does not provide the investor with substantive protections. Determining this status is central to any investor-state dispute and requires careful analysis; it will turn on the particular language of the applicable IIA, the applicable rules and on the facts at hand, which can often involve complex corporate structures or searching enquiries into how a person has lived. Should a dispute arise between an investor and a state, both parties must develop a view on these issues early in the proceedings.

70 See, e.g., Zachary Douglas, *The International Law of Investment Claims*, Cambridge University Press, 2009, Paragraphs 578 and 580 ('Investment treaties generally either permit the claimant to exercise control over its investment directly or indirectly, or are silent on the question . . . A great number of investment treaties do not contain a provision of the type under consideration and hence there must be a concomitant limitation upon the tribunal's jurisdiction ratione personae: the claimant must exercise effective control directly over the investment.').

71 See, e.g., *CEMEX Caracas Investments BV et al v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 December 2010, Paragraphs 157–58; *Guaracachi America, Inc, and Rurelec PLC v. The Plurinational State of Bolivia*, PCA Case No. 2011-17, Award, 31 January 2014, Paragraphs 352–55; *Siemens AG v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, Paragraph 137; *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, Paragraphs 122–24; *Señor Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction, 19 June 2009, Paragraph 111.

72 See, e.g., *Standard Chartered Bank v. The United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, 2 November 2012, Paragraph 230; *Alapli Elektrik BV v. Republic of Turkey*, ICSID Case No. ARB/08/13, Award (excerpts), 16 July 2012, Paragraph 350.