To Lift or not to Lift the Corporate Veil in International Investments: The issue of Veil piercing to determine the nationality of a Company

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Abstract

In 2004, and for the first time, the question of piercing the corporate veil of a company, upon request of a State, in order to deny the protection of a Bilateral Investment Treaty appeared in front of a ICSID Tribunal. The present work offers a broad overview of the main arguments used by the different Tribunals seized of the matter as well as a comprehensive reflexion on the positions of scholars and arbitrators on the question. This work is concluded by an outline of the different solutions available.

Reference

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TO LIFT OR NOT TO LIFT
THE CORPORATE VEIL
IN INTERNATIONAL INVESTMENTS

THE ISSUE OF VEIL PIERCING TO DETERMINE THE NATIONALITY OF A COMPANY

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A. Introduction

“Piercing the corporate veil”! Very few terms in international arbitration have been used to such extent both by investors and States, with radically different objectives and final results. The corporate veil is the legal fiction creating the juridical personality of a company and making therefore a distinction between the shareholders and the company itself. For short, piercing the corporate veil is ignoring the difference between the legal personality of a company and the shares someone personally owns.

If investors demand the tribunals to pierce the corporate veil, it is mostly in order to obtain an advantage. Practically, they demand the tribunals to do that in order to protect, by a bilateral investment treaty (hereinafter “BIT”), their investment in a local company. Or, it happens that they wish that the tribunal looks further, in order to identify who really suffered from the breach of a BIT¹.

On the other hand, the States use this argument in order to search directly for the investor behind the veil, usually, to negate an advantage offered by a BIT or to seek for the responsibilities of the Investors.

This work interests itself in the second query, when the States demand the tribunals to lift the corporate veil of a company.

In the first part, we will see the arguments which plead for the maintain of the legal personality and the importance of it for the Convention on the Settlement of Investment disputes between States and Nationals of other States² (hereafter “ICSID”) system. A fair number of arguments have been confirmed by ICSID tribunals and reinforced by a large part of the scholars. It is generally accepted that the principles of the ICSID Convention tend to favour and to encourage investment. Such position militates for a broad scope of its jurisdiction and therefore limits the possibility to pierce the veil in order to escape it. Accordingly, the general liberty of the States in the negotiation of the BIT tends to offer the States the possibility to tailor their definition of nationality. Since the system lets them a great liberty, this liberty must be recognised, and it is only on specific occasions that a tribunal should put aside this definition and pierce the corporate veil. This becomes a problem when corporate veil lifting has not been planned by the

² Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention or Washington Convention).
States. This is also a question of legal security for investors, since they have to be able to anticipate if they do or do not fall under the jurisdiction of the ICSID.

Juridical arguments are not the only ones that favour a restrictive practice of veil piercing. There are also practical and political arguments that may direct the tribunals to keep a certain distance with a veil piercing doctrine. The agreement reached by the parties is the result of a negotiation. Such bargain should be enforced since not respecting it may change the subtle and fragile balance the parties have reached in their negotiations.

Finally, it may be interesting to conclude this section by a small and short overview on the factually contractual nature of the relation between a State and an investor.

On the second part, we will interest ourselves in the recent arguments that emerged to contest the absolute protection of the legal personality. Recently, some very interesting cases have discussed the question of veil piercing requested by a state. Those cases have been greatly discussed and most of the time, the awards were closely followed by a dissenting opinion of great importance. The scholars as well are profoundly divided on the question.

However, some strong arguments can be identified in those cases. For example, some tribunals wished to give broader importance to some tests, such as the Objective or Control Test. Relatively new theories have been developed to find a solution to an unconvincing situation. This is the case with the origin of capital test presented by Pr. Prosper Weil in its dissenting opinion in Tokios Tokelès\(^3\).

On top of this, the question to lift or not the corporate veil in international investment can be brought back to the Barcelona Traction case\(^4\). It was probably the first time this question was arisen. In its decision, the International Court of Justice (hereafter “ICJ”) gave precious guidance under which conditions the veil can be pierced. It is crucial to understand its importance and implication on modern investment law. Furthermore, its conclusions remain one of the principal ground for veil lifting.

Finally, a short and practical summary of the different position will conclude the present work.

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\(^3\) Tokios Tokelès v. Ukraine, dissenting opinion by Prosper Weil, Decision on Jurisdiction, ICSID Case No. ARB/02/18, 29\(^{th}\) April 2004.

\(^4\) International Court of Justice, Barcelona Traction, Light and Power Company Limited, Decision, 5 February 1970.
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B. Argument in favour of maintaining the Corporate Veil

Respecting the corporate veil of an investor is, for now, the most common practice. It is symptomatic of a view over international investment that comes from private law, with typical contractual law reflexes.

A vast number of cases and a solid part of the scholars’ writings, mostly coming from private law background, tend to object to any veil lifting unless it has been written down in the BIT. In order to sustain this position, a significant number of arguments have been elaborated. This position has been defended by the tribunal in Tokios Tokèles\(^5\), Rompetrol\(^6\), and in the dissenting opinion of the Arbitrator Grant Aldonas in TSA Spectrum de Argentina\(^7\). From the principles of the ICSID Convention that tend to encourage investment by offering arbitration to the investors, to the vast liberty given to the States in drafting their nationality clauses, which also means they are fully responsible for the consequences of an improperly drafted clause, or more general concepts of law.

To understand better this position it is important to go through the arguments in favour of keeping the corporate veil that are the most used in practice. It is also of some interest to mention some other, more recent, arguments that have been developed to assess the importance of the corporate veil, and prohibit from lifting it too easily. Finally, some concepts mentioned here may be put in balance by recent opinions that tend to jeopardise and limit the “absolute” protection offered by the legal personality.

1. Principles of the ICSID Convention

Above all, the main objective for the ICSID Convention is to fill a gap in procedure. Without it, disputes between an investor of a foreign state and a State would only be subject to the

\(^{5}\) Tokios Tokelès v. Ukraine, Decision on Jurisdiction, ICSID Case No. ARB/02/18, 29 April 2004.
\(^{6}\) The Rompetrol Group N.V. v. Romania, Decision on Respondent’s Preliminary Objections on Jurisdiction and admissibility, ICSID Case No. ARB/06/3, 18th April 2008.
\(^{7}\) TSA Spectrum de Argentina S.A : v. Argentine republic, Award, ICSID Case No. ARB/05/5, 19 December 2008.

TSA Spectrum de Argentina SA v. Argentine Republic, Dissenting opinion of the Arbitrator Grant D. Aldonas, ICSID Case No. ARB/05/5, 19 December 2008.
jurisdiction of the involved State. In those cases, two main concerns may appear individually or jointly.

On the one hand, the state of the investor might wish to help its national in case of a dispute. If the diplomatic protection is a well-established practice, it is not so common in international investment law, and it also brings two flaws.

Firstly, for the investor, it is not a guarantee. His own State can freely choose to either intervene or not. The State has here a discretionary power to choose either to act or to refuse to intervene. As a result, the risk is entirely supported by the investor if a case of discriminating practice by a State of an investment occurs and his own state does not act.

Secondly, for the State, there is a risk the reaction of the nationality State of the investor might not be proportionate. There have been examples in history where a state took aggressive actions, even military ones, in order to protect or supposedly protect nationals’ interests.

On the other hand, in some State, the recourse to the national courts could be unsatisfying for an investor. The independence of the local courts may only be an empty promise. In the case an investor has to go in front of national courts of the disputed State to have its rights recognized, there is a huge risk for him that national courts will not offer him all the guarantees of an independent and just trial, based on facts and law. It might be the case in some countries where the courts will only dismiss the case, jeopardising the rights of the investor. Or, in some other cases, the courts have to apply the national law that may contain restrictions in its jurisdiction or norm of State immunity.

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9 CMS Gas Transmission Company v. Republic of Argentine, Decision on Jurisdiction, ICSID Case No. ARB/01/8, 29th July 2003, para. 45.
11 Muller, D., op. cit., p.13.
12 For example, in 1956, after the nationalisation of the Suez Canal by the President Nasser of the Republic of Egypt, Shareholders, Britannic and French, complained to their respective government. Three month later, the two countries and Israel launched a military operation called “Operation Musketeer”, in order to protect the investors’ claims.
15 Rompetrol v. Romania, op. cit., para. 67.
In many cases, neither domestic courts, that may be viewed as partial, nor international diplomacy, that may be more “political” than “legal”, are fully satisfactory for investors.\textsuperscript{17}

One of the avowed purpose of the ICSID Convention is to encourage investment\textsuperscript{18} through the establishment of an independent and impartial tribunal and to fix definite norms that would apply to international investments\textsuperscript{19}, providing legal and financial security\textsuperscript{20} for the investor and the investment\textsuperscript{21}. Definite norms permit a just and equitable treatment, and allow parties to play with the same rules in the case of a dispute. In order to guarantee the protection of the investment, it is important for the investor not to be under the complete mercy of an all-powerful state with no-boundaries\textsuperscript{22}. In other words, the protection of foreign investment is an essential element of the system, to attract and keep investments from abroad. For this reason, foreign investors acquire special rights\textsuperscript{23}. For example, the State can provide this security by offering to the investor the certitude that not only its cause will be heard by an independent tribunal, but also, if he respects all the relevant prescriptions and regulations in its activity, he will win against the State\textsuperscript{24}. By doing so, the State delivers a message that investments will be secure\textsuperscript{25}. In former socialist countries, there has been a tendency to sign many treaties in order to give this insurance to investors\textsuperscript{26}.

This argument is reinforced by the report of the Executive Directors on the Convention. It states at his paragraph 9 and 12\textsuperscript{27}:

9. In submitting the attached Convention to governments, the Executive Directors are prompted by the desire to strengthen the partnership between countries in the cause of


\textsuperscript{18} Schreuer, C., Malintoppi, L., Reinisch, A. & Sinclair, A., \textit{op. cit.}, p. 4, para. 11.


\textsuperscript{20} Kaufmann-Kohler, G., \textit{op. cit.}, p. 4.


\textsuperscript{22} Sornarajah, M., \textit{op. cit.}, p. 185.

\textsuperscript{23} Müller, D., \textit{op. cit.}, p. 336.


\textsuperscript{26} Sornarajah, M., \textit{op. cit.}, p. 187.

economic development. The creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it.

12. […] adherence to the Convention by a country would provide additional inducement and stimulate a larger flow of private international investment into its territories, which is the primary purpose of the Convention.

In conclusion, the primary aim of the ICSID Convention is to offer a “safe heaven” for both investors and host country. It is then necessary for the parties to be able to rely on the ICSID Convention, and for the sake of the ICSID Convention itself to be confirmed in this goal by the tribunals. The ICSID arbitral tribunal should aim to protect the very purpose of the convention and orientate their awards to take into consideration this specific purpose.

Investors should be able to trust the BIT on which they rely to invest their money abroad. If an investor complies with the letter of a BIT, it is then very important for him to be sure he will not suffer an unpredictable lack of jurisdiction of the ICSID Arbitration Tribunals. Piercing the corporate veil, when it is not a solution that has been included in a BIT, or has been limited to some extent, and if it is not a case of fraud, jeopardises the legitimate trust of investors in both the BIT and the system of the ICSID Convention. The ICSID Convention has been designed to protect investors in their relations with a State, by giving him certitudes on what he can expect in case of a dispute, not putting him in a doubtful situation where he cannot be sure if he is covered or not by an arbitration clause.

Moreover, accepting an easy corporate lifting founded on the ICSID Convention itself would go against its purpose. In fact, a good faith investor that invested based on the certitude he complied to the description of nationality in a BIT and therefore would be protected by ICSID Arbitration in the case of a dispute with the host State, could be deceived in his expectative by introducing a systematic corporate piercing. On top of this, it may even prevent him from implementing in the contract with the host state a possibility to go to a “normal” arbitration. The principle of the convention must confirm him in his expectancy and protect him in order to achieve more investments, with more security for all the parties.

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28 Amco v. Indonesia, Decision on Jurisdiction, ICSID Case No. ARB/81/1, 25 September 1983, para. 23.
The dissenting opinion of Pr. Prosper Veil in Tokios Tokelès\textsuperscript{30} emphasises that the main goal of the ICSID Convention is to protect \textit{international} investment. For him, the approach of the tribunal, in this case, is odd “with the object and purpose of the ICSID Convention and might jeopardize the future of the institution”\textsuperscript{31}. He feels that “extending [the Convention’s] scope and application beyond the limits so carefully assigned to it by the Convention” might dissuade governments from providing to ICSID arbitration in their BIT\textsuperscript{32}.

However, according the preceding development, it may be doubtful that such extensions would dissuade governments to provide for ICSID Arbitration in their BIT. Many countries sign BIT and submit to ICSID Arbitration in order to prove their good intentions towards foreign investors and give them an insurance that their rights will be respected. Indeed, this is at the very heart of the ICSID Convention. Therefore, giving the ICSID Convention a broad scope should logically reinforce it. The confidence placed in it by investors would be tightened and as a corollary, the effect looked for by the states will be confirmed and enhanced. The signal emitted by a State giving jurisdiction to ICSID Convention, with a broad scope, can only be stronger. The present affirmation is corroborated by the true impulsion given to ICSID arbitrations since the nineties, and the first cases were the tribunals clearly found jurisdiction in national laws or BIT, sometimes, at the surprise of the States\textsuperscript{33}.

On top of this, it belongs to the states to carefully draw the line of competence and jurisdiction for the ICSID, using a coherent definition of nationality (cf. \textit{Infra} p. 12).

In conclusion, the opinion of Pr. Prosper Veil, concerning the danger of opening the jurisdiction of the ICSID, cannot be followed. By opening it, the ICSID Convention becomes an even more powerful tool when it comes for states to convince foreign companies to invest in the country. It also obliges the state to be more careful and diligent when writing BIT’s clauses, and that can only be an improvement.

\textsuperscript{30} Tokios Tokelès v. Ukraine, dissenting opinion by Prosper Weil, \textit{op. cit.}, para. 30.
\textsuperscript{31} Tokios Tokelès v. Ukraine, dissenting opinion by Prosper Weil, \textit{op. cit.}, para. 1.
\textsuperscript{32} \textit{Ibid.}, para. 30.
2. Nationality of Juridical Entities under the ICSID Convention

a. Legal basis

Chapter II of the ICSID Convention founds the jurisdiction of the Centre. Art. 25 (1) of the Convention\(^{34}\) states:

“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally”.

Even if the convention does not describe what it implies by “investment”\(^{35}\), concerning nationality, it defines “National of another Contracting state” by (art.25 (2) ICSID Convention):

(a) “any natural person who had the nationality of a Contracting State other than the State party to the dispute …”

(b) “any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention”.

b. Nationality of Natural and Juridical Persons

One of the first step to determine whether or not the ICSID has jurisdiction is to determine if the plaintiff can be considered as an investor. The decisive criterion to determine if an entity is an investor\(^{36}\) is through the nationality. The national state of the investor must be part of an agreement, with the hosting state, giving jurisdiction for an ICSID Arbitration.

\(^{34}\) Convention on the Settlement of Investment Disputes between States and Nationals of other States.

\(^{35}\) International Bank for Reconstruction and Development, \emph{op. cit.}, para. 27.

For a natural person, the question is simple. The nationality is determined by reference to the law of the State whose nationality is claimed. If the person has the nationality of one of the contracting state and has a dispute regarding an investment with the other contracting state, he is an investor according to the ICSID Convention. There is one slight exception, if someone has multiple nationalities, including the one of a contracting State, even if this nationality is not effective, and he does not have the nationality of the other contracting State, he can rely on the BIT, reserved are the exceptional circumstances. But, if a person has the nationalities of both parties to the BIT, he cannot invoke it. He would be considered a national of the Host state and would not be able to go to an ICSCID Tribunal.

However, concerning a juridical person, there is not such a thing as a company nationality as it is usually intended for a natural person. The nationality of a company depends of the law of the state or rules of an institution that makes the determination in the frame of a specific purpose. There is not a passport for companies and frequently, they will have to prove their nationality. This can be seen in many areas of law, for instance tax law or, of course, international investment law.

Accordingly, most of the time a company will have multiple nationalities. Those nationalities might be acquired on purpose or the result of an activity of the company. It may also have links with several states through joint ventures, subsidiaries or other forms of presence in multiple countries.

The main anchorage points for a company are the state of incorporation, the headquarters or main office, where the executive board takes its decisions, places of business with local offices, place of origin of the majority of the members or management staff.

For example, a company may be incorporated in Holland, with headquarters in London, and production or distribution facilities in Spain, while its core business its trading with south

38 Mr. Saba Fakes v Republic of Turkey, Award, ICSID Case No. ARB/07/20, 14 July 2010.
Eudoro Armando Olguin v Republic of Paraguay, Award, ICSID Case No. ARB/98/5, 26 July 2001.
43 Ibid., p. 88.
44 Ibid., p. 90
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America, its managers are from the USA and its shareholders are Germans. The company may have all those nationalities.

c. Liberty to choose the definition of Nationality

The ICSID Convention gives the responsibility to the States to define what they imply by “investors”. Every BIT must have such definition and tell how a company’s nationality should be determined. This definition is then utmost important. The ICSID Convention lets the States choose how they wish to determine the nationality of an entity. It relies on them to define what is the pertinent nationality and how to define it. In other words, the burden is on the drafters of the BIT to clearly express any limitations. The States do use this possibility through a large variety of criteria. The drafters of the ICSID Convention were in favour of giving the parties to any investment agreement “the widest possible latitude to agree on the meaning of ‘nationality’”. The goal is to offer the parties the maximum flexibility.

In general, three criteria are applied to determine a company’s nationality: the place of incorporation, the effective seat, and the control over a company. For instance, the most widely recognised and used criteria is the place of incorporation or, to a lesser degree, the effective seat. The Swiss BIT prototype of 1986 is one of the sole example where the control criterion has been applied alone. In a number of cases, two criteria or more are combined, incorporation and seat for instance. The place of incorporation is also the main and unique

45 Müller, D., op. cit., p. 345, para. 706.
46 Nathan, K., op. cit., p. 90
52 Agreement between the government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Polish people’s republic for the promotion and reciprocal protection of investments, 8 December 1987 (entered in force on 14 April 1988).
53 United Nations Centre on Transnational Corporations, op. cit., p. 32.
54 Agreement between the Republic of France and Republic of Argentina for the promotion and reciprocal protection of investments, 3 July 1991 (entered in force on 28 may 1993).
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criteria for diplomatic protection\textsuperscript{55} according to the Barcelona Traction Case\textsuperscript{56} (cf. infra p. 40). However, those are not the only available criteria\textsuperscript{57}. It may also happen that treaties require a far more developed link between the corporate investor and the state whose nationality is claimed\textsuperscript{58}. For example, the BIT between the Netherlands and Venezuela\textsuperscript{59}, at its article 2 (b), offers another connecting “nationalising” factor. It opens the agreement to companies under foreign law, but under control by a person in the contracting countries. The criteria of control being quite vague, some treaties added annexes or supplementary agreement defining the term “control” in the treaty\textsuperscript{60}.

Perhaps, the most complex definition of a national is found in the Swiss and Iranian BIT. It does not only require incorporation, but also its seat and a real economic activity in that country (art. 1 (1)(b))\textsuperscript{61}. It belongs to the investor to show that it meets the conditions of nationality of one of the parties to a BIT\textsuperscript{62}, and not the conditions of the host state\textsuperscript{63}.

A problem may occur when a company from a country is controlled by nationals of another country. For example, a company incorporated in the host state but controlled by nationals of the other contracting state shouldn’t be able to invoke the protection of a BIT, according to the article 25 (2)(b)\textsuperscript{1}\textsuperscript{st} part. In fact, the ICSID convention only applies in an international dispute and is not meant in any way to arbitrate disputes between a national and his own state. Thus, it would clearly go against the object of the convention and therefore, it would not be possible to invoke it in a dispute. However, this form of investment is very common and a strict application of this principle would lead to removing this type of disputes from the ICSID Jurisdiction\textsuperscript{64}. To prevent it, they are exceptions to the principle. Concerning the juridical person, according to art.25(2)(b) of the ICSID Convention, a company incorporated in a contracting State, can be eligible to be a party to proceedings, if the State agreed to treat it as a national of another country.

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\textsuperscript{55} Sornarajah, M., \textit{op. cit.}, p. 197.
\textsuperscript{56} International Court of Justice, decision Barcelona Traction, Light and Power Company Limited, 5 February 1970.
\textsuperscript{58} Schreuer, C. & Dolzer, R., \textit{op. cit.}, p. 49.
\textsuperscript{59} Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Republic of Venezuela, 22 October 1991 (entered in force on 1 November 1993).
\textsuperscript{61} Agreement between the Swiss confederation and the Islamic republic of Iran on the promotion and reciprocal protection of investments, 8 march 1998 (entered in force on 1 November 2001).
\textsuperscript{62} Schreuer, C. & Dolzer, R., \textit{op. cit.}, p. 252.
\textsuperscript{64} Schlemmer E., \textit{op. cit.}, p. 75.
\end{flushleft}
contracting state because of foreign control\textsuperscript{65}. This possibility can even be open despite multiple subsidiaries as stated by the tribunal in the case Mobil v Venezuela\textsuperscript{66}. This possibility may also be opened for a company incorporated in a tierce country, but controlled by nationals of a contracting state\textsuperscript{67}.

In the art.25(2)(b) of the ICSID Convention, the role of the control test is useful only if the parties chose to use it\textsuperscript{68}. According to Aron Broches, the father of the ICSID Convention, the control-test is not meant to restrict the jurisdiction of the tribunals but rather to expand it\textsuperscript{69}. Furthermore, during the preparatory work, this question was raised, to either have an objective requirement in the Convention or not. Broches was of the opinion that the ICSID’s jurisdiction was optional, and that it was up to the host State whom it wished to regard as a foreign investor\textsuperscript{70}. In addition, the main case law of the ICSID courts have confirmed this interpretation. In Wena v. Egypt, the tribunal said: “the literature rather convincingly demonstrates that Article 25(2)(b) of the ICSID Convention […] are meant to expand ICSID jurisdiction”\textsuperscript{71}. In CMS v. Argentina, the tribunal points out that the purpose of this article is to “facilitate agreement between the parties, so as not to have the corporate personality interfering with the protection of the real interests associated with the investment”\textsuperscript{72}. It also states that the control-test shouldn’t be used, unless planned by the BIT. In all those cases, the tribunals have seen the art.25(2)(b) as a way to expand the jurisdiction of the ICSID tribunals according to the wishes of the parties. It is present only if the parties agreed to and in order to open the jurisdiction of the ICSID.

On top of this, the access to ICSID jurisdiction because of foreign control is clearly let to the parties to put it or not in their agreement\textsuperscript{73}. During the drafting of the ICSID Convention, it has been precisely let to the parties to define with the broadest possible choice the meaning of

\textsuperscript{65} International Bank for Reconstruction and Development, \textit{op. cit.}, para. 30.
\textsuperscript{67} Kingdom of the Netherlands and the Republic of Venezuela BIT, \textit{op. cit.}, art.2(b)
\textsuperscript{69} Broches, A., \textit{op. cit.}, para. 358-359.
\textsuperscript{71} Wena Hotels Ltd. v. Arab republic of Egypt, Summary Minutes of the Session of the Tribunal held in Paris on May 25, 1999, Case No. ARB/98/4 I.L.M. paras. 888.
\textsuperscript{72} CMS v. Republic of Argentina, Jurisdiction, \textit{op. cit.}, para. 51.
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“nationality”\textsuperscript{74}. An objective test is therefore empty of any sense, and would lead to reduce, if not eliminate drastically, the liberty given and that was intended to be given to the parties.

In addition, it would practically render void and useless the Jurisdiction of the centre. In fact, a significant part of the investments usually occurs through local subsidiaries. The objective test, as defended in the case TSA, goes deep down till the last layer of control, which practically means till the physical person behind a company. As it is evoked by the tribunal\textsuperscript{75}, such test would only allow national physical people to invest under the BIT, excluding all the others, including bi-national with the host state\textsuperscript{76}. It would also prevent a company from changing hands. Only a national could buy it, excluding all the other people, since they would never fulfil an objective test. This approach is neither pragmatic nor realistic in today’s society where companies change hands easily\textsuperscript{77}. Finally, it may inhibit any investment since, depending how the shares of a company are distributed, even less than 50% of a company in foreign hands’ control could lead to the inapplicability of the BIT. An objective test is not only clearly incompatible with the ICSID Convention, but it is also very dangerous, as it could lead to lock the system if it was regularly used by the tribunals.

Thus, this principles object to any veil piercing, unless it is stated otherwise in the BIT, or a case of fraud is discovered. Because the ICSID Convention offers a huge liberty to the parties, it is only in very restricted cases where the clear definition of nationality, as stated and negotiated by the parties, is not respected or used in bad faith, that it is acceptable to pierce the corporate veil. The absolute rule in the matter is to respect the wishes of the parties till the furthest possible extent.

d. Practice of the Tribunals

A vast number of decisions by ICSID tribunal concerning their jurisdiction agree that the art.25(2)(b) of the ICSID Convention, as to quote Broches, “indicates the outer limits within disputes may be submitted to conciliation or arbitration under the auspices of the Centre with the consent of the parties thereto. As a result, the parties should be given the widest possible latitude to agree on the meaning of “nationality” and any stipulation of nationality made in

\textsuperscript{74} Broches A., \textit{op. cit.}, para. 361.

\textsuperscript{75} TSA v. Argentina, Award, \textit{op. cit.}, para. 147 and 161.


connection with a conciliation or arbitration clause which is based on a reasonable criterion should be accepted.\(^7\) It gives the parties a wide liberty to choose their definition of nationality, as long as it is “based on a reasonable criterion.”\(^9\) For example, an agreement between a host state and an investor concerning the nationality is a strong evidence that the nationality requirement has been fulfilled. However, even such agreement cannot create a nationality that doesn’t exist,\(^8\) and here lies the absolute limit in the parties’ liberty.

On top of this, it appears from the decisions of the tribunals that they have a great respect for “the definition of corporate nationality contained in the agreement between the contracting Parties.”\(^1\) The tribunals will try to enforce the parties’ intent rather than replacing it by their own judgement of a case.\(^2\) For this reason, they give a great importance to the words of the agreement reached by the parties.\(^3\) This assertion is reinforced by the negotiating history behind its creation.\(^4\) Furthermore, the interpretation of the letter of the convention according to its “ordinary meaning of a term is determined not in the abstract but in its context and in the light of the object and purpose of the treaty,” as affirmed by the International Court of Justice. This gives a precious indication of the exact meaning of the treaty. Meaning that the courts have to enforce.

However, in the case TSA Spectrum de Argentina, the tribunal has chosen another path.\(^5\) It limited drastically the liberty of the States in negotiating the terms of a BIT, submitting the possibility offered by the Convention, at the will of the State, to agree that a national of the host state, under foreign control, can be covered by the BIT, to an “Objective test”. Doing so, they disregarded an international agreement between two States. This choice has been heavily criticised by Arbitrator Grant Aldonas in his dissenting opinion.\(^6\) Such a limitation placed on

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\(^7\) Broches A., *op. cit.*, para. 360.

\(^8\) Ibid., para. 361.


\(^2\) Rompetrol v. Romania, *op. cit.*, para. 81.


\(^5\) TSA Spectrum de Argentina SA v. Argentine Republic, Dissenting opinion of the Arbitrator Grant D. Aldonas, ICSID Case No. ARB/05/5, para. 11.

\(^6\) International Bank for Reconstruction and Development, *op. cit.*, para. 23.


\(^8\) TSA v. Argentina, award, *op. cit.*

\(^9\) TSA v. Argentina, dissenting opinion of Grant D. Aldonas, *op. cit.*, para. 3.
the sovereignty finds no justification. The tribunal must enforce what has been rightfully negotiated by the parties\textsuperscript{89}. It is unacceptable that an ICISD tribunal substitutes its judgement, its understanding to the clear language of the agreement reached by the parties\textsuperscript{90}. The leading cases tend to demonstrate that the formal nationality defined by incorporation has not been qualified by the application of an “effective control” test, unless the treaty has done so expressly\textsuperscript{91}.

For this reason, the award in TSA is not sustainable. By including an objective test and disregarding the clear and common intention of the States part to the BIT, the tribunal ignored the agreement and substituted its own judgement to the agreement achieved by the States. Clearly, this award goes against the clear precedents of the ICSID tribunals so far.

e. Fairness

Finally, during the negotiation of a BIT, the countries have a huge margin to negotiate in order to suit their mutual interest\textsuperscript{92}. Unlike a multilateral treaty, they can adapt it according to their wishes and needs\textsuperscript{93}. Giving jurisdiction to the ICSID arbitral tribunal is a choice of the parties\textsuperscript{94}, just like many others they could have made. In fact, without the express consent of the parties, the ICSID Convention doesn’t have any ground for competence\textsuperscript{95}. Another instrument must provide for its jurisdiction, such as the law, or a treaty\textsuperscript{96}. Once the State is party of the ICSID Convention, it is no subject to a waiver by the parties. The State has to compel to it\textsuperscript{97}. In their precedents, the tribunals have constantly made sure that the convention would apply to the largest extends. For example, the tribunal stated that “the critical date for determining the status of a contracting state is the date of submission of the dispute to ICSID, rather than the date of

\textsuperscript{89} Ibid., para. 34.
\textsuperscript{90} Ibid., para. 35.
\textsuperscript{91} Bishop, R. D., Crawford, J. & Reisman, W. M., \textit{op. cit.}, p. 324
\textsuperscript{92} Sornarajah, M., \textit{op. cit.}, p. 183.
\textsuperscript{93} Rompetrol v. Romania, \textit{op. cit.}, para. 81.
\textsuperscript{94} Reed, L., Paulsson, J. & Blackaby, N., \textit{op. cit.}, p. 13.
\textsuperscript{96} Fouret, J. & Khayat, D., \textit{op. cit.}, p. 201-202.
the agreement containing the ICSID arbitral clause\textsuperscript{98}. There is a wish to make efficient any ICSID arbitral clause\textsuperscript{99}.

It has also been previously stated (cf. supra p. 12) that, even when a country submits his consent to ICSID arbitration, it still conserves an important liberty in defining who is touched by the agreement. In other words, the States can define with great accuracy what they intend by investor and which criteria they have to meet to be able to arbitrate at the ICSID, but once they do they should not be able to waive back the jurisdiction of the Centre. Some countries use this possibility with great care, using many conditions\textsuperscript{100} to define what they intend by investors. Other countries, such as Ukraine and Lithuania only refer to the classic condition of incorporation in their BIT\textsuperscript{101}.

It is therefore clear that the parties to the dispute (State and a national of the other state) have no influence on the jurisdiction of ICSDI tribunal, unlike the parties to the BIT, who can choose and define the conditions for a question or a dispute to be or not submitted to arbitration\textsuperscript{102}. The definition of the nationality is in their hands.

Therefore, it seems unfair to deprive a good faith investor, that complies with the definition of the BIT, from the possibility to arbitrate under ICSID tribunals on the ground that the very definition, not imposed but negotiated and chosen by the parties, is not valid. It is the responsibility of the State to write a sufficient and convincing definition of nationality. Trying to avoid the ICSID jurisdiction afterwards on the ground that the clear definition, wrote by the parties themselves is not valid or should contain limitations that have never been mentioned before, seems unfair\textsuperscript{103}.

This argument is reinforced by one of the great aspiration of both arbitration and investment treaties. They tend to put the parties on equal grounds. It has been said that investment

\textsuperscript{98} Cable Television of Nevis, Ltd. and Cable Television of Nevis Holdings, Ltd. v. Federation of St. Kitts and Nevis, Award, ICSID Case No. ARB/95/2, 13 January 1997., para. 4.09.
\textsuperscript{100} Amco v. Indonesia, \textit{op. cit.}, para. 34.
\textsuperscript{101} Liberian Eastern Timber Corporation v. Republic of Liberia, Decision on Jurisdiction, ICSID Case No. ARB/83/2, 31 march 1986.
\textsuperscript{102} Agreement between the Swiss confederation and the Islamic republic of Iran on the promotion and reciprocal protection of investments, 8 march 1998 (entered in force on 1 November 2001).
\textsuperscript{103} Ukraine and Lithuania BIT, \textit{op. cit.}, art.1(2).
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arbitration is an effort “to create equal rules for all, to tame the natural asymmetry”\(^{104}\). In case of a dispute between an investor and a State, arbitration is a very convenient way to ensure a pragmatic, independent and effective decision\(^{105}\). In arbitration, no party should have more rights or a more decisive influence on the result than the other party. Any other practice would empty arbitration of its purpose. In addition, in many countries, the equality of the parties and independence of the court in arbitration\(^{106}\) are both guaranteed and made mandatory by constitutions\(^{107}\) or human right conventions\(^{108}\).

Concerning investment treaties, it is in their principles to allow greater equity between the State and the investor. The State sacrifices part of its sovereignty in order to offer the investors the frame and the security they need to inject their capitals in the country\(^{109}\). The effect of this is a more equal relationship. We can also mention the contractual relation that may exist between the State and the investor. All those instruments tend to equalise the parties and not submit the investor to an almighty and discretionary State.

In the definition of nationality, this equality, that is offered by the State and begged by the investor, implies a mutual responsibility of fairness. It has previously been stated that the State should not try to change afterwards the definition of nationality in order to “save” what it could have done in the first place if it was diligent enough, because that would not be fair with the investor. But, this responsibility of fairness is incumbent upon the investor as well.

The principle of fairness for the investor is easier and by many aspects may be confounded with good faith. For short, an investor has to be fair with the hosting state. As it will be further developed in the analysis of the Barcelona Traction case (cf. infra p. 40), it may be negatively defined as using an institution, respecting its rules, but in a way that is not compatible with its purpose or with the intention to use it to obtain an undue advantage. In those cases, where the investor is unfair, it should be permitted for the court to look upon the appearances. It is then and only in those circumstances acceptable to pierce the corporate veil when it is not required by the BIT itself. The fraudulent and unfair intention of the investor should be very clear in


\(^{105}\) Daillier, P., Forteau, M. & Pellet, A., op. cit., para. 646.


\(^{107}\) Ex. art. 30(1) Swiss Constitution

\(^{108}\) Ex. art. 6(1) European Convention on Human Rights.

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those cases and by no means should it offer an easy escape for a State against an investor’s claim.

Finally, the principle of fairness should also apply between the investors submitted to a BIT. If it is perfectly possible to have objective differences of treatments and conditions between the contracts binding a State and an investor, the treatment under a BIT should be equal and fair. One of the most shocking example of an unfair treatment is offered by the award of the Tribunal in the TSA case. According to the tribunal, it is admissible to pierce all the layers of corporate veil in the case of an investment made through a local subsidiary\textsuperscript{110}, but if there is no subsidiary and the investment is made directly from the other State, then it is not possible to pierce the corporate veil\textsuperscript{111}. This vision is unacceptable and shocking. It would lead to two very different results, but with very common backgrounds. For example, in the TSA case, if the investment was made directly by TSI in Argentina, instead of founding a local company, according to the words of the tribunal they wouldn’t have pierced the corporate veil and the tribunal would have had jurisdiction. It is clearly not fair to have two very different results in that case. In addition, since an important part of international investments are made through local subsidiaries, the difference in treatment is even more unsustainable. Accordingly, in order to have a fair treatment the tribunal should have paid the same respect to the definition chosen by the parties in the two cases of 25(2)(b) ICSID Convention, and decide only to see if it was a Dutch national, in this case a company that had control over the subsidiary.

3. Legal Security

For private investor, legal security is utmost important. Legal security may be defined as the certainty someone can have in a given juridical environment. For example, in pure international law, this minimum standard would be \textit{pacta sunt servanda}.

Concerning international investments, the matter is slightly more complicated, since it doesn’t only concern States but also legal and physical persons.

First and above all, the rule of \textit{pacta sunt servanda} must be enforced. A BIT or the ICSID Convention are still international treaties and therefore the rules of the Vienna Convention\textsuperscript{112}.

\textsuperscript{110} \textit{TSA v. Argentina}, award, \textit{op. cit.}, para. 147.
\textsuperscript{111} \textit{Ibid.}, para. 144.
\textsuperscript{112} Vienna Convention on the law of the treaties, 22 may 1929.
or international customary law should be respected. The States must respect what they negotiated and more importantly they are bound by it. By signing a BIT a State gives back a significant part of its almighty sovereignty, and only conserves a residual one\textsuperscript{113}. The reason for this self-imposed limitation is offering security and stability to the investors. Therefore, the State is bound by the good faith\textsuperscript{114} interpretation of the treaty\textsuperscript{115}. The State has to be loyal and faithful to its engagements, and not to fraud the law or do anything that would deprive the treaty of an effective effect\textsuperscript{116}. A treaty with a clear meaning has to be respected by the State and the investor has to be certain the state will respect it. Lifting the corporate veil, in order to prevent the jurisdiction of the court, when nothing provides for it in the treaty, jeopardises the rights of the investor that are granted by the treaty and, in some cases, may constitute a disrespect of the treaty by the State.

In addition, the possibility to open the corporate lifting puts in jeopardy a great number of companies and would lead to limit this form of international investment, since investors won’t be able anymore to plan and organise themselves for the investment.

Foremost, a company must be able to anticipate and be reasonably sure of what to expect in the case of an investment. In order to do so, they have to know if they fulfil the conditions of nationality in a BIT and that these conditions are sufficient to grant them the nationality. It is the only way for them to guarantee their assets. Adding conditions that are not on the BIT makes it impossible for them to be sure of their status. For example, if a BIT provides for place of incorporation or seat, that is the condition a company should meet and if it does so, then it is under the protection of the BIT.

Lifting the corporate veil tend to impeach such simple and easy operation. Firstly, it is unknown how many layers a Tribunal will pierce and when it will stop. Secondly, it is in the nature of today’s companies to have complex structure with multiple layers and international links and shareholders\textsuperscript{117}. The lack of a crystal clear and rock solid accessible criteria for them to asses if they are able to claim the protection of a BIT is a major issue.

\textsuperscript{113} Daillier, P., Forteau, M. & Pellet, A., op. cit., para. 642
\textsuperscript{114} Amco v. Indonesia, \textit{op. cit.}
\textsuperscript{115} Daillier, P., Forteau, M. & Pellet, A., \textit{op. cit.}, para. 139.
\textsuperscript{116} \textit{Ibid.}, para. 139.
\textsuperscript{117} Onguene Onana, D. E., \textit{op. cit.}, para. 902.
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The previously exposed reasons have been decisive when it came to decide if it was suitable or not to define the nationality of a company by the nationality of its shareholders or the majority of them\textsuperscript{118} and, by extend, militates for a limited approach of veil piercing. Neither of those solutions have been followed for a number of reasons.

Firstly, it is in the nature of today society to have a changing ownership. Titles and shares are often transferred from one hand to another in time and space. The result is that, if the criteria of the nationality of the shareholders should be applied, the nationality of the company would be constantly changing\textsuperscript{119}. This is not suitable and would result that, from one day to another, a company would not be any more in position to arbitrate. In TSA, the matter has been mentioned. In fact, the company was at first in possession of a French group and through numerous operations, it ended in the hand of a German-Argentinian citizen\textsuperscript{120}. It is not reasonable to let the situation move and change to such an extend on the basis of a volatile criteria\textsuperscript{121}.

Moreover, if the layers are pierced up to the shareholders, there is a risk a huge number of companies would never be able to arbitrate in front of an ICSID tribunal. In fact, depending of the structure of the shareholding, the possession of less than 50\% is sufficient to control a company. The problem is the same in case of even participations. At this point, it would be doubtful to know if the company has the nationality of every participation or none of them\textsuperscript{122}. If the person controlling a company through a minority of the shares is not a national of the country part to the BIT, the possibility to arbitrate would be gone, even if the rest of the shareholders have this nationality\textsuperscript{123}. Accordingly, there is a great risk that such a significant part, if not all the shareholders, have a different nationality than the incorporation nationality\textsuperscript{124}. Would this situation lead to a lack of jurisdiction or would it be still possible because the veil piercing would stop one layer before? In all cases, the situation is not satisfactory, and may lead to great injustices in the treatment of investors. In fact, it would only be in the hand of tribunals to decide how far they should pierce and decide on what they find\textsuperscript{125}. This is not acceptable for legal security.

\textsuperscript{118} Ibid., para. 902.
\textsuperscript{119} Ibid., para. 902
\textsuperscript{120} TSA v. Argentina, award, op. cit., para. 128.
\textsuperscript{121} Onguene Onana, D. E., op. cit., para. 902.
\textsuperscript{122} Onguene Onana, D. E., op. cit., para. 902.
\textsuperscript{124} Ibid. para. 5.63.
\textsuperscript{125} Ibid., para. 5.63.
For those reasons, the legal security strongly militates in favour of protecting the corporate veil.126

Finally, another argument reinforces this perspective is that, if the nationality can change so easily, resulting in frustrating the company from the protection of a BIT, that may jeopardise the company expectancy to be able to arbitrate. A company may invest on the promise of the BIT to be able to arbitrate under ICSID. However, if a tribunal decides it lacks jurisdiction after piercing its corporate veil, without any ground in the BIT, this possibility is unfair for the company. The company will have to go to national courts, and that may be unsatisfactory for them, as it was previously exposed (cf. supra p. 7). In addition, because the company expected it could arbitrate under ICSID, it did not have the opportunity to add an arbitration clause in their contract with the State. The company suffers a double deception that it could not possibly anticipate.

4. Balance of interest between States

The BIT’s are negotiated by at least two States. Adding undue conditions through piercing the corporate veil would seriously alter the fragile balance in the agreement of two States.

This concrete danger has been brought up to light in the dissenting opinion of Arbitrator Grant Aldonas, in the TSA case. He says: “Our responsibility is to intuit the intent of the parties as reflected in the actual language of the agreement between them and vindicate the bargain they reached”127. The two parties to a BIT have interest, sometimes convergent, sometimes divergent, and they both have made sacrifices and compromises. This “bargain” should be enforced by the tribunals. By not doing so, they prevent a State to claim its advantages in the treaty, when at the same time, the other State received the full benefit of the bargain without paying the price for it.

Since countries are relatively free of negotiating a BIT and they are only in a bilateral relation, they have a greater margin to adapt it to their needs128. It is only normal then that the tribunal should first of all look and enforce the wishes of both parties to a BIT. It is only in limit cases, where the parties could not possibly want a given result, and that result is obtained by fraud or

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127 TSA v. Argentina, dissenting opinion of Grant D. Aldonas, op. cit., para. 35.
128 Rompetrol v. Romania, op. cit., para. 83.
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bad faith, that a tribunal should derogate to the clear word of a treaty. On the other situations, there is a high risk that it will only frustrate a State from the benefits he looked for. For example, like few other countries, Argentina has a huge passive of expropriation. The clear letter of the BIT with the Netherlands provides for a large protection of its investors, like it is usually the case with the investment treaties of this country. Argentina agreed to offer the Dutch the protection they sought. By not enforcing it, the Tribunal didn’t respect the clear intention of the parties and distrusted the agreement, leading to a result that could not have been wished by the parties and especially the Netherlands. It is not advisable that an award doesn’t follow the intention of the parties, even more if the parties agreed to achieve a different result.

According to the great liberty given to the parties in contracting and negotiating a BIT, to the subtle agreement achieved by the parties, to the mutual expectation of the parties to the BIT, to the clear and unambiguous intention of the parties, lifting the corporate veil, when it is not provided by the BIT, should be a last resort for the tribunals.

5. A doctrine of precedent in investment treaty arbitration

The scholars and the tribunals have very divergent point of view on the question whether or not to admit a doctrine of precedent in investment arbitration. If the tribunals seem to have a general, recurrent and convergent practice, and they inspire themselves from previous awards, they are absolutely not bind by any precedent. In other words, the composition of a tribunal has a far greater impact on the result than any precedent or previous award.
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This conclusion is not pleasant and unsatisfactory\textsuperscript{135}. It is anyway the way arbitration works. Accordingly, an argument for keeping the corporate veil cannot be interfered from precedents and the main practice of the ICSID Tribunals.

6. Contractual nature of the relation between State and Investor

Since the “consent of the parties is the cornerstone of the jurisdiction”\textsuperscript{136}, just like in a normal arbitration\textsuperscript{137}, it may be suitable to expand the perspective and have a look on what is done in private law between the parties, namely, in contract law. This generalisation should not be given a too broad scope, but some interesting parallels may be drawn between nationals’ contract law, international investment agreements, and Investor-State agreements.

It is certain that a foreign investor and a State enter in a contract in order to invest in the country. Most of the time, they are bound by a contract specifying the mutual obligations. This contract has a wide scope and has a great importance in practice\textsuperscript{138}. For example, it is often advised to write down on the contract that the host State acknowledge the investor is from the other State, or controlled by nationals of another State\textsuperscript{139}.

In such cases, if there is a BIT agreement between the host State and the investor’s State, it acts like a general provision giving the main guidelines and regulation to the parties. We can draw a parallel between the function of a BIT from the stand point of the state-investor contract and the general conditions that can be found in many private contracts. In private law, the person that drafted the general conditions and the contract are usually the same. The co-contractor, if he can negotiate the contract as much as he wants, has, on the other hand, a limited control over the general conditions. Whereas, in a law governing contract, the parties to the contract have very little to no control over it and its content. In an investor-state relationship, the parties are nearly equals when it comes to negotiate the terms of the contract, but the investor has no control over the rules in a BIT. Thus, it is clear that there is a resemblance between a BIT and general conditions. Acknowledging it, it is possible to emit some ideas by analogy to provisions concerning general conditions to a BIT.

\textsuperscript{135} \textit{Ibid.}, p. 24.
\textsuperscript{136} International Bank for Reconstruction and Development, \textit{op. cit.}, para. 23.
\textsuperscript{138} Reed, L., Paulsson, J. & Blackaby, N., \textit{op. cit.}, p. 32.
\textsuperscript{139} \textit{Ibid.}, p. 31.
First and foremost, it is undisputed that the parties are bind by both the BIT and the contract. In case of divergence, unlike in private law, it will be the BIT that overrules the contract. However, if there is no contradiction between the BIT and the contract, the BIT acts pretty much like general conditions.

It is a general rule in law that a contract must be followed by the parties. In case of divergence, the courts may need to interpret the dispositions of the contract. Here, there is a slight difference between the continental approach and the common law.

On the one hand, in the continental system the courts analyse both the objective and subjective common intention of the parties. If it is not possible for them to find it, or there is none common intention, they ask themselves what a third person would interfere from the contract.

On the other hand, the contracts are interpreted objectively in the common law. There is no place for the subjective intention of the parties. The courts only focus on what says the contract.

Even if the two systems are slightly different, they arrive at the same interpretation’s result, most of the time, in front of a crystal clear disposition. From there, the obligation of the disposition should be fulfilled by the parties. In case of a litigious article in a contract, the party that acted accordingly with the interpretation given by the courts is protected.

In addition, it can be found in many countries, that the party that stipulated the contract suffers any loophole in it. For example, if a disposition is poorly drafted, but the co-contractor invokes it, the party that drafted the agreement supports the risk. The main idea is that it had the opportunity to draft better clauses and prevent it to happen if they had this possibility in mind. If they didn’t provide, it is their fault and they have to assume the consequences. This principle is often called in dubio contra stipulatorem.

On top of this, the principle of good faith protects a party that acted accordingly to a contract, without knowing there was a flaw in it. A small remark must be made here. If this principle does exist in continental law, it is more doubtful in Anglo-Saxon law. In fact, the common law does not know the principle of good faith. Instead, as it has been previously stated, it refers to the purely objective interpretation of the contract. It must also be mentioned that a doctrine of equitable estoppel was indeed used by equity’s courts for over 50 years. It is only very recently that a judgement of the UK Supreme Court over ruled this doctrine. Since then, there have been lots of discussion in the doctrine about it.
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In a BIT, it means that an investor that acted accordingly to a provision in it, should be protected. If we apply the concepts we previously developed, the result is obvious. The principles of good faith and interpretation protect the party that acted accordingly with the meaning of an agreement.

For example, in the Ukraine-Lithuanian BIT, the art. 1(2) is limpid and not subject to interpretation. If we apply the concepts developed before, the investor should be given the protection of the ICSID Convention, assuming that the ICSID Convention provides competence in that case, because Tokios Tokelès followed perfectly the rules established by the BIT. In addition, since they didn’t have any influence on the negotiation of the BIT, every flaw or argument can be opposed to the State. Therefore, from a purely private point of view, Ukraine cannot invoke that Tokios Tokelès is not an investor, as it perfectly complied to the terms of the BIT.

This reasoning by analogy with private law has a limit, since we are still talking about a State. It still maintains a dominant position over the investor, but the whole point of the investments agreements and contracts is to limit the autonomy of the State and try to make States and investors as equal as possible.
C. Arguments in favour of lifting the Corporate Veil in BITs

A debated question in investment law recent history, is to know if it is possible as a general rule or in some precise and more or less exceptional cases, such as the foreign control over a company through a BIT agreement, to pierce the corporate veil. More importantly, should the veil be pierced if the company respects for the letter of the BIT? This point has been disputed and there is no unanimity in the doctrine or the jurisprudence. In fact, if a majority of the ICSID jurisprudence tend to admit that according to the ICJ’s ruling in Barcelona Traction\(^{140}\), the clear word of the treaty should only be ignored and the corporate veil pierced in case of fraud or abuse\(^{141}\), a strong minority tends to argue otherwise.

In order to gain a better understanding of the main objections raised by those tribunals and scholars\(^{142}\), it is important to present the main arguments brought up in two different cases. The first case is Tokios Tokeles v. Ukraine\(^{143}\), including the dissenting opinion of Pr. Prosper Weil\(^{144}\) and the second one is TSA v. Argentina\(^{145}\), where the Tribunal used an objective test to lift the corporate veil of the Dutch incorporated company.

1. Tokios Tokeles, the first of its type

Tokios Tokeles v. Ukraine is a remarkable case. First, it is not common for the appointed chairman of an ICSID arbitral tribunal to withdraw from it and present a dissenting opinion from the decision drafted by his colleagues. Secondly, and more importantly, it may be the very first time an ICSID tribunal is confronted against an undertaking, incorporated in a State, in a dispute opposing it to another State, from which comes the majority of the capital, the shareholders and the management\(^{146}\).

\(^{140}\) International Court of Justice, Barcelona Traction, Light and Power Company Limited, Decision, 5 February 1970.
\(^{142}\) Rompetrol v. Romania, *op. cit.*, para. 85.
\(^{143}\) Tokios Tokélès v. Ukraine, *op. cit.*, para. 79.
\(^{144}\) Pey Casado and President Allende Foundation v. Chile, Award, ICSID Case No. ARB/98/2 April 22, 2008.
\(^{145}\) TSTM Spectrum de Argentina S.A. v. Argentine Republic, Award, ICSID Case No. ARB/05/5, 19 December 2008.
\(^{146}\) Tokios Tokélès v. Ukraine, dissenting opinion by Prosper Weil, *op. cit.*, para. 10.
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The main point of disagreement between the arbitrators is to know whether or not they have to consider the nationality of the shareholders or are they bind by the incorporation of the company. In other words, should they see through the corporate veil

In addition, this case, and especially the dissenting opinion of Pr. Prosper Weil is often cited by the States in order to lift the corporate veil. This case has been greatly discussed by some of the most prominent authors on the subject, both in support and disfavour of the opinion offered by Pr. Prosper Weil. It is also possible to find mention of this case in nearly any book related to international investment since 2004. Above all, it must be said that the arguments presented in the dissenting opinion must now be answered by nearly every ICSID tribunal where the question of lifting the corporate veil is raised. It is therefore a leading case on the question and a good understanding of it is essential.

Before presenting the main arguments, brought up by Pr. Prosper Weil, in favour of piercing the corporate veil and taking into account the origin of the shareholders, it is important to draw a brief summary of the case’s facts.

a. The Dispute

The claimant is Tokios Tokelès, a company established under the laws of Lithuania, since 1989. It is primarily active in the advertising, publishing and printing business. Ninety-nine percent of the outstanding shares of Tokios Tokelès belongs to Ukraine’s nationals. Furthermore, two-thirds of its management comes from Ukraine, despite the fact that the company has its legal siege in Vilnus, Lithuania.

The company Taki Spravy was founded by Tokios Tokelès in Ukraine in 1994. It is active in the same field as the mother company. Tokios Tokelès has made an initial investment of $170’000 in order to create its subsidiary. Since then, it has reinvested the profits of Taki Spravy for up to $6.5 million.

Beginning in February 2002, Tokios Tokelès claims that its subsidiary has been targeted by a series of “unreasonable and unjustified actions” by the authorities of Ukraine, affecting its


Tokios Tokelès v. Ukraine, Jurisdiction, op. cit., para. 22.
TSA v. Argentina, award, op. cit., para. 118.
Rompetrol v. Romania, op. cit., para. 52.
Tokios Tokelès v. Ukraine, Jurisdiction, op. cit., para. 3.
investments, and breaching the Bilateral investment treaty (thereafter BIT) between Ukraine and Lithuania\textsuperscript{150}.

The efforts of the claimant to settle the dispute were found unsuccessful, therefore he initiated the proceedings for arbitration in August 2002 with the International Centre for Settlement of Investment Disputes (Thereafter “ICSID”).

The article 8 of the Ukraine-Lithuania BIT submits to arbitration “Any dispute between an investor of one Contracting Party and the other Contracting Party in connection with an investment on the territory of that other Contracting Party” (art.8 (1)). The case must be submitted to the International Centre for settlement of investment disputes (art.8 (2a) of the BIT).

Ukraine objected to the jurisdiction of the arbitral Tribunal\textsuperscript{151}.

Firstly, Ukraine does not think the ICSID Arbitral Tribunal is competent because the Lithuanian Company is under control of Ukrainian nationals. In other words, it would allow Ukrainian nationals to pursue arbitration against their own country, bypassing the national courts. In order to avoid this result, they wish that the Arbitral Tribunal pierces the corporate veil, which stands for not taking into account the incorporation state, and determines the nationality of the Claimant based on the nationality of the shareholders and managers\textsuperscript{152}.

The second argument of Ukraine against the jurisdiction of the ICSID arbitral tribunal is simple. They don’t dispute the fact that Tokios Tokelès is legally established in Lithuania, but for them it’s not a “genuine investor of Lithuania”, not only because of the Ukrainian National’s Control over it, but also because of the lack of a substantial business activity in Lithuania. In fact, they argue that the administrative headquarters is found in Ukraine, rather than in Lithuania. Therefore, Tokios Tokelès should be considered an Ukrainian investor in Lithuania rather that the opposite\textsuperscript{153}. This point won’t be examined any further because of the weakness of this argument\textsuperscript{154}.

\textsuperscript{150} Ukraine and Lithuania BIT.
\textsuperscript{151} Tokios Tokelès v. Ukraine, Jurisdiction, \textit{op. cit.}, para. 11.
\textsuperscript{152} Ibid., para. 22.
\textsuperscript{153} Ibid., para. 21.
\textsuperscript{154} Fouret, J. & Khayat, D., \textit{op. cit.}, p. 203.
b. Core divergence in the tribunal

“When it comes to mechanism and procedures involving states and implying therefore issues of public international law, economic and political reality is to prevail over legal structure, so much so that the application of the basic principles and rules of public international law should not be frustrated by legal concepts and rules prevailing in the relations between private economic and juridical players”\textsuperscript{155}.

By those words, Pr. Prosper Weil resumes the main elements that lead him to dissent from the Tribunal and present his dismissal\textsuperscript{156}. Before all legal considerations, there is a strong philosophical disagreement between the President and the rest of the Tribunal.

On the one hand, Pr. Weil comes from a publicist background and tends to put treaties, custom and States above other considerations. It is a classic position\textsuperscript{157}, such as it is taught in the Universities. For him the principles of the Convention must be strictly followed and any liberal interpretation of it may “jeopardize” its future\textsuperscript{158}.

On the other hand, the rest of the tribunal has a different approach to the Investment arbitration. Their approach is more modern, more progressive, as it takes into account the recent developments in that field\textsuperscript{159}, such as the multiplication of multilateral and bilateral investment treaties and the general movement toward offering new grounds for investors to bring their claims in front of an ICSID Tribunal\textsuperscript{160}. This is also the path followed by the Tribunals in Wena Hotels Ltd v. Arab Republic of Egypt\textsuperscript{161}. In other words, they tend to give more importance and a broader scope to the contract and the Pacta Sunt Servanta between the parties.

2. Place of the analyse of the Jurisdiction under the ICSID Convention

The first argument against the decision of the tribunal, in Tokios Tokelès, is the order they took to analyse the problem and find or not jurisdiction. In fact, the Tribunal started by analysing if

\begin{itemize}
  \item \textsuperscript{155} Tokios Tokelès v. Ukraine, dissenting opinion by Prosper Weil, \textit{op. cit.}, para. 24.
  \item \textsuperscript{156} Fouret, J. & Khayat, D., \textit{op. cit.}, p. 196.
  \item \textsuperscript{157} \textit{Ibid.}, p. 196.
  \item \textsuperscript{158} Tokios Tokelès v. Ukraine, dissenting opinion by Prosper Weil, \textit{op. cit.}, para. 30.
  \item \textsuperscript{159} McLachlan, C., Shore, L. & Weiniger, M., \textit{op. cit.}, para. 5.54.
  \item \textsuperscript{160} Fouret, J. & Khayat, D., \textit{op. cit.}, p. 196.
  \item \textsuperscript{161} Wena v. Egypt, \textit{op. cit.}, para. 81-82.
\end{itemize}

McLachlan, C., Shore, L. & Weiniger, M., \textit{op. cit.}, para. 5.54.
Tokios Tokelès was an investor under the BIT and only subsequently the tribunal examined if the definition of investor was acceptable under the ICSID Convention\textsuperscript{162}.

According to Pr. Weil, this practice is wrong. In fact, according to him, it is of the utmost important to know, prior to any discussion if the BIT grants jurisdiction to ICSID arbitration to an entity, if the dispute enters in the application field and jurisdiction of the ICSID Convention. The tribunal should examine, before all considerations arising from the BIT, if the situation is covered by in the ICSID Convention\textsuperscript{163}. The idea behind it, is that the parties can narrow the jurisdiction of the ICSID Convention but in no case expand it\textsuperscript{164}. By first analysing the jurisdiction under the ICSID Convention itself, it is then certain that the matter clearly falls under the ICSID jurisdiction\textsuperscript{165}.

This affirmation seems reasonable and perfectly logical. In fact, since law school, it is traditionally taught to first examine if an instrument is formally applicable to a case, before discussing if the instrument gives a material answer to the question\textsuperscript{166}. Thus, it also offers, in some cases, some procedural economies, such as when the terms of the convention are narrower than the agreement\textsuperscript{167}. This is the case when a nationality is fictional and purely agreed\textsuperscript{168}.

However, the process used by the majority of the tribunal is not deprived from all logic\textsuperscript{169}. Since the convention doesn’t have a ground for competence in itself, it requires that an agreement refers to it to have jurisdiction. Therefore, it is logical for the tribunal to first examine if the claimant can first invoke and answer the conditions of the BIT and only then, because the BIT provides for the jurisdiction of the ICSID, if the definition chosen by the BIT is coherent with the Convention\textsuperscript{170}.

This question can remain open here since the impact of both approaches will often not be decisive in many cases.

\textsuperscript{162}Tokios Tokelès v. Ukraine, dissenting opinion by Prosper Weil, \textit{op. cit.}, para. 14.
\textsuperscript{163}\textit{Ibid.}, para. 29.
\textsuperscript{164}Tokios Tokelès v. Ukraine, dissenting opinion by Prosper Weil, \textit{op. cit.}, para. 22.
\textsuperscript{165}McLachlan, C., Shore, L. & Weiniger, M., \textit{op. cit.}, para. 5.60.
\textsuperscript{166}Mouawad, C. & Karam, L., \textit{op. cit.}, p. 280.
\textsuperscript{167}\textit{Ibid.} p. 269.
\textsuperscript{168}Schreuer, C., Malintoppi, L., Reinisch, A. & Sinclair, A., \textit{op. cit.}, para. 710.
\textsuperscript{169}Rompetrol v. Romania, \textit{op. cit.}, para. 82.
3. Origin of Capital Test

The main argument Pr. Weil brought up, in Tokios Tokelès, is that if the tribunal should find jurisdiction in such a case, it would be “at odds with the object and purpose of the ICSID Convention and might jeopardize the future of the institution”\textsuperscript{171}. According to the Vienna’s Convention on the Law of treaties\textsuperscript{172}, a treaty must be interpreted in conformity with “its object and its goal”\textsuperscript{173}.

Concerning the interpretation rules of the Vienna’s Convention, a small note must be made. A significant part of the scholars argues that the “the principles contained in the Vienna’s Convention are not wholly useful in resolving difficult questions of BIT interpretation. The guidance they provide is insufficiently concrete”\textsuperscript{174}. In fact, the interpretation rules are so large, that the tribunals are able to mould the provisions of a BIT\textsuperscript{175} in whatever shape they wish\textsuperscript{176}. Still, the convention, even if it’s practical utility in BITs has been criticised, remains the major instrument for lack of other acceptable alternatives\textsuperscript{177}. Accordingly, arguments from both parts, based on the Vienna’s Convention, must be taken with care.

A second point to make is the criticism against the too literal interpretation of words followed by tribunals. In fact, they tend to stick to the definition of the words offered only by a dictionary\textsuperscript{178}. The tribunals should go deeper, beyond the words, to find the core meaning of a provision and make it coherent with the whole protection system\textsuperscript{179}.

The object and purpose of the ICSID Convention, as expressed in the Preamble of the Convention, the Report of the Executive Directors\textsuperscript{180}, and according to Pr. Weil is “to have the reality of foreign investment prevail for the purposes of the Convention over its legally domestic character when this investment was made through the channel of a domestic corporation, whether pre-existent or created for that purpose”\textsuperscript{181}. In other words, for Pr. Weil, the core

\textsuperscript{171} Tokios Tokelès v. Ukraine, dissenting opinion by Prosper Weil, \textit{op. cit.}, para. 1.
\textsuperscript{172} Vienna Convention on the law of the treaties, 22 may 1929.
\textsuperscript{173} Art. 31 Vienna Convention on the law of the treaties.
\textsuperscript{174} McLachlan, C., Shore, L. & Weiniger, M., \textit{op. cit.}, para. 3.72.
\textsuperscript{175} Van Harten, G., \textit{op. cit.}, p. 629.
\textsuperscript{177} Ibid., para. 2.19.
\textsuperscript{178} McLachlan, C., Shore, L. & Weiniger, M., \textit{op. cit.}, para. 7.66.
\textsuperscript{179} Weeramantry, J. R., \textit{op. cit.}, para. 3.42.
\textsuperscript{180} McLachlan, C., Shore, L. & Weiniger, M., \textit{op. cit.}, para. 5.59.
\textsuperscript{181} Tokios Tokelès v. Ukraine, dissenting opinion by Prosper Weil, \textit{op. cit.}, para. 23.
question is to know if the capital is domestic. If it is, the economic reality should prevail the legal structure, and the protection of the ICSID Convention should not apply since the foreign character of the investment should be denied.

The arguments of Pr. Weil are followed by part of the doctrine. They complimented the somewhat logical result of this approach, when incorporation or seat test may lead to illogical and far from reality results.

This approach has been stated in a number of cases, mostly by States, in order to disqualify an investor from the ICSID Jurisdiction. In the case Rompetrol, one of the leading argument of Romania was the supposed Romanian origin of the funds.

4. The Control Test

The ICSID Convention was not meant for investments made in a State by its own citizen with domestic capital channelled through a foreign entity, whether pre-existent or created for the purpose. Pr. Weil, in his dissenting opinion, insists on the Ukrainian origin of the capital, but also with the nationality of the shareholders and managers. This argument was brought up in order to pierce the Corporate veil in other cases.

The ICSID Convention has been designed to settle international investment disputes between foreign investor and a host State only. Therefore, it is not meant to deal with a dispute between a State and its own nationals. By not piercing the corporate veil, according to Pr. Weil, the tribunal failed to fall within the scope and objective of the convention. Furthermore, in its decision in Tokios Tokelès, the tribunal fails to “give effect to the letter and spirit, as well as the object and purpose” of the ICSID Convention.
The purpose of the ICSID Convention is to offer arbitration in international investments. It clearly insists on the word *international*. International must be the key question answered by ICSID tribunals where the question of lifting the corporate veil is raised\(^\text{193}\).

The ICSID Convention clearly states that the jurisdiction of ICSID extends to legal disputes “between a Contracting State […] and a national of another Contracting State”\(^\text{194}\). It is clearly not meant to arbitrate disputes between a State and its own citizen\(^\text{195}\). The danger that may follow an opening of the jurisdiction of the Centre is the possibility for nationals to bypass their own courts. The real scope of ICSID arbitration and other forms of investment’s protections is to provide protection for the investors of a contracting State\(^\text{196}\). In accordance, the nationality should be determined not by incorporation or seat test but by the “reality”\(^\text{197}\) of the situation. This affirmation is reinforced by the sheer limitation of the range of possibilities offered for physical investors.

Intuitively, we may conclude that it is therefore not possible for a *de facto* national company to pursue arbitration on the basis of the ICSID Convention against its own State. This is, not without some simplification, the position defended in the dissenting opinion\(^\text{198}\). One cannot repress to think that a foreign entity, belonging at 99% or controlled by a national of another country, has something of an objective double nationality. This is the second reproach addressed by Pr. Weil to the Tribunal. For him, the dispute was between Ukraine and Ukrainian investors\(^\text{199}\).

The control test, as intended by Pr. Weil has a limit. In his mind, it is only intended for cases where the lack of foreign investment is evident and in no case should it be a general practice of the court to look behind the Veil to find some hidden realities\(^\text{200}\). This limitation is essential\(^\text{201}\). Otherwise, it would lead to a complete freeze of the system, since only companies from the other State, owned or controlled by nationals of the other State exclusively would be granted.

\(^{193}\) Ibid., para. 20.  
\(^{194}\) Art. 25 I ICSID Convention  
\(^{195}\) Tokios Tokelès v. Ukraine, dissenting opinion by Prosper Weil, *op. cit.*, para. 19.  
\(^{196}\) Schlemmer, E. C., *op. cit.*, p. 79.  
\(^{197}\) Ibid., p. 79.  
\(^{198}\) Tokios Tokelès v. Ukraine, dissenting opinion by Prosper Weil, *op. cit.*, para. 21.  
\(^{200}\) Ibid., p.268.  
\(^{201}\) McLachlan, C., Shore, L. & Weiniger, M., *op. cit.*, para. 5.63.
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arbitration. The spectrum of jurisdiction would therefore be excessively narrow, which is not coherent with the purpose of the ICSID Convention.

5. The Objective test

TSA Spectrum de Argentina threw a brick in a pond, or was it an ocean? Despite not having received as much publicity as Tokios Tokelès, and going under the spectrum of many, the Tribunal in this case offers a very interesting argumentation why the art.25(2)(b) second possibility of the ICSID Convention requires an objective test. There are not many other cases were a Tribunal went so far in piercing the corporate veil. Furthermore, what is interesting in this case, is that they founded the obligation of an objective test, in the heart of the ICSID Convention itself, to which the States part to a BIT cannot waive. On top of this, the opinion of the majority is balanced by a brilliantly drafted eleven pages dissenting opinion by arbitrator Grant Aldonas, putting the argumentation of the Tribunal in perspective.

a. Background

Thales Spectrum de Argentina S.A. (hereinafter TSA) is a company active in Argentina where it has a concession to provide radio spectrum administration, monitoring, and control services. It was the only purpose of the company, to exploit this concession. This Argentinian company is fully owned by TSI Spectrum international N.V. (hereinafter TSI), a company registered in the Netherlands.

During its existence, TSA and TSI had several owners-

- At the time of the signature of the Concession Contract, it was owned by a French company, Thomson CSF S.A.
- At the date before the dispute arose, it belonged to the French group Thales, the French citizen Jean Nicolas d’Ancezune and the German-Argentinian Jorge Justo Neuss.
- At the time of the termination of the concession, it was owned by the Thales group and Jorge Justo Neuss, with certain rights to Jean Nicolas D’Ancezune.

202 TSA Spectrum de Argentina S.A : v. Argentine republic, Dissenting opinion of Arbitrator Grant Aldonas, ICSID Case No. ARB/05/5, 19th December 2008.
203 TSA v. Argentina, award, op. cit., para. 1 and 8.
204 Ibid., para. 128.
- At the time of the notice of the dispute, it belonged to Jorge Justo Neuss, with certain rights to Jean Nicolas d’Anzecune.

Argentina declared the concession contract terminated on the ground TSA had breached the contract in regard of provision of an integrated information system and had unduly enriched itself\textsuperscript{205}. TSA requested arbitration on the provision of the Argentina-Netherlands BIT providing for ICSID Arbitration\textsuperscript{206}.

b. Arguments of the parties

In the Argentina-Netherlands BIT, the nationality of the investor is defined in this way\textsuperscript{207}:

(b) the term ‘investor’ shall comprise with regard to either Contracting Party:

i. natural persons having the nationality of that Contracting Party in accordance with its law;

ii. without prejudice to the provisions of paragraph (iii) hereafter, legal persons constituted under the law of that Contracting Party and actually doing business under the laws in force in any part of the territory of that Contracting Party in which a place of effective management is situated; and

iii. legal persons, wherever located, controlled, directly or indirectly, by nationals of that Contracting Party.

It is completed by a Protocol specifying some points of the BIT:

B. With reference to Article 1, paragraph b) (iii) the Contracting Party in the territory of which the investments are undertaken may require proof of the control invoked by the investors of the other Contracting Party. The following facts, \emph{inter alia}, shall be accepted as evidence of the control:

i. being an affiliate of a legal person of the other Contracting Party;

\textsuperscript{205} Ibid., para. 9.
\textsuperscript{206} Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Argentine Republic, art.10 BIT
\textsuperscript{207} Netherlands and Argentina BIT, art. 1(b).
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ii. having a direct or indirect participation in the capital of a company higher than 49% or the direct or indirect possession of the necessary votes to obtain a predominant position in assemblies or company organs.”

Argentina raised four objections to the jurisdiction of the ICSID Tribunal. In the third one, Argentina denied jurisdiction on the basis that TSA is not a foreign investor. According to Argentinian arguments, the art.25(2)(b) of the ICSID Convention allows the extension of the jurisdiction to local companies which, because of foreign control, should be treated as a national of another contracting State. They mainly argue that “the control required is an objective requirement that shall not be replaced by an agreement”208. Since at the time of the dispute “the Dutch company that claims to have control over the local companies is not controlling but is a mere vehicle to control the Argentine company through other companies”209, they ask the Tribunal to pierce the corporate veil. According to Argentina, the final owner of the Dutch company is a bi-nationals from Germany and Argentina. Therefore, it is not possible for a national, even if he has more than one nationality and it is not his predominant nationality, to arbitrate in front of an ICSID Tribunal210.

In order to prove their point, Argentina referred itself to the Barcelona Traction case (cf. Infra ‘p. 40), and to Tokios Tokelès case211.

By contrast, TSI affirms that it controled TSA, according to the terms of the art. 25(2)(b) of the ICSID Convention, art. 1 b) and 10(6) of the BIT, and the criterion of control in the protocol of the BIT212. To sustain their position, they argued that the relevant moment for arbitration is the date on which the parties consent to submit the dispute to arbitration for the ICSID convention and the date before the dispute arose for the BIT. At those moments, TSA was entirely owned by TSI, making it under “foreign control”213. In addition, they quoted a significant number of cases, including Tokios Tokeles and Rompetrol Group N.V. v. Romania, where the tribunals accepted their jurisdiction despite nationals of the hosting country owning the company in the other Country part of the BIT.

208 TSA v. Argentina, award, op. cit., para. 114.
211 TSA v. Argentina, award, op. cit., para. 117-118.
212 Ibid., para. 126.
213 Ibid., para. 129.
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c. The Triumph of the Objective test.

According to the tribunal, the art.25(2)(b) requires a foreign control. This foreign control is an objective factor.\textsuperscript{214} In order to assess this view, the tribunal starts quoting Broches, when he says the Convention fixes the outer limits of the Centre. For the tribunal, this limits have an objective character, to which a State cannot extend or derogate in an agreement.

In addition, according to the tribunal, there is a major difference between the two clauses of the art. 25(2)(b).

The first criterion is the one of the nationality. It is both a legal and formal criterion. Because of its nature, there is no reference to piercing since it is legally established by incorporation or seat.\textsuperscript{215} In this respect, the tribunal found that the other tribunals have chosen to interpret it in a “strict constructionist manner”, giving no place for veil piercing despite the control of the company by nationals of the host State.\textsuperscript{216}

The second one however, is an exception to the principle of the ICSID Convention, allowing a national entity to arbitrate with its own country because of “foreign control”. Thus, it uses “a material or objective criterion, that of “foreign control”, in order to pierce the corporate veil and reach for the reality behind the cover of nationality”.\textsuperscript{217} The parties are bound by this criterion, prohibiting them to agree on an extension of the jurisdiction of the ICSID tribunals. The possibility offered by this criterion is justified by this “foreign control”, but at the same time it binds the State with this condition.\textsuperscript{218} The foreign control must be objectively proven in order to access ICSID Arbitration. In order to do so, and in the accordance with the interpretation of the ICSID Convention by the tribunal in this particular case, the tribunal must not stop after the first layer of corporation is pierced, in casu, the Dutch company, TSI, but have to identify the “real source” of control.\textsuperscript{219}

Concerning the possible agreement between the States part to the BIT, including in this case the Protocol, the Tribunal quotes the Vacuum Salt Products Ltd v. Republic of Ghana, stating that any agreement or precise indication of the nationality of a precise investor only constitutes

\textsuperscript{214} Ibid., para. 139.
\textsuperscript{215} TSA v. Argentina, award, op. cit., para. 144.
\textsuperscript{216} Ibid., para. 145-146.
\textsuperscript{217} Ibid., para. 140.
\textsuperscript{218} Ibid., para. 147.
\textsuperscript{219} Ibid., para. 147.
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a “rebuttable presumption that the foreign control criterion” is satisfied\(^\text{220}\). By stating so, the tribunal intends here to waive back any provisions that may grant a nationality that a purely objective test would not confirm, even if this provision has been intentionally elaborated by the States to the BIT.

In the present case, the tribunal does so in order to prevent the company to bring up the argument that since it complies with the conditions Protocol of the BIT, it has to be considered as a Dutch national. It is implied in its argumentation, that since the company do not fulfil the so-called objective test, the company is out, and no agreement between States can give them access to ICSID Arbitration.

In addition, in its concurring opinion\(^\text{221}\), Arbitrator Georges Abi-Saab, interprets the words of the BIT’s Protocol in order to avoid the conclusion that fulfilling the conditions of the Protocol would grant a nationality. He finds in the term “indirect” participation in capital, a right to pierce the corporate veil, not only to find foreign control, but also to infirm it\(^\text{222}\).

Even if he says he agrees with the decision of the tribunal, it is not sure which weight to give to his concurring opinion. It can be interfered two things:

Firstly, there was another way to waive jurisdiction in this case, without “creating” or “discovering” an obligation for an objective test in the convention. The majority of the tribunal deliberately decided to use this test, instead of other means.

Secondly, even if he begins by discarding this possibility, it seems like the solution chosen by the tribunal doesn’t entirely convince him, or rather that he would have preferred to arrive to the same conclusion but with different means, less intrusive ones\(^\text{223}\).

\(^{220}\) Ibid., para. 151. Vacuum Salt Products Ltd v. Republic of Ghana, Award, ICSID Case No. ARB/92/1, 16 February 1994, para. 38.

\(^{221}\) TSA Spectrum de Argentina S.A : v. Argentine republic, Concurring Opinion of Arbitrator Georges Abi-Saab, ICSID Case No. ARB/05/5, 19th December 2008, para. 11-17.

\(^{222}\) Ibid., para.15 b.

\(^{223}\) TSA v. Argentina, Concurring Opinion of Arbitrator Georges Abi-Saab, op. cit., para. 1.
D. Equitable doctrine of “Veil Piercing” and the Barcelona Traction Case

Today, the question of the protection of the investor, shareholder or corporate veil lifting shifts mainly in bilateral or multilateral agreements. It appears that the role of the institution of the diplomatic protection is less and less important in practice, since most investment cases are covered by a BIT and can be arbitrated in front of a ICSID tribunal. Accordingly, the scope of the international court of justice’s judgement should be narrower.

However, in countless cases, the arbitral tribunals refer themselves to the ICJ jurisprudence. One of the most infamous cases concerning international investments is the Barcelona Traction Case.

1. The background

In this seminal case of 1970, the Barcelona Traction company, a Canadian holding, belonging to Belgian nationals, both natural and juridical persons, but active in Catalonia, in Spain, in the electric production and distribution field, got bankrupt in 1952. This was due to the Spanish refusal to transfer currencies as the company couldn’t pay back obligations. No other solution was found and Barcelona Traction Ltd. went bankrupt.

The Belgian shareholders of the Canadian company asked for the diplomatic protection of Belgium. Belgium carried the issue to the International Court of Justice in 1962, against Spain, on the ground that the bankruptcy proceedings were improperly conducted, for which Spain was thus internationally responsible.

In its decision, the Court refused to admit the right of Belgium to act on the behalf of the shareholders of Barcelona Traction. Synthetically, the ICJ found that Belgium could not just ignore the reality of a company incorporation and bypass it to only take into account the Belgian shareholders behind the juridical construction of the company. In other words, the ICJ refused to pierce the corporate veil in this case. In its own words, “international law is called upon to

225 Barcelona Traction, op. cit., para. 90.
226 Tokios Tokelès v. Ukraine, Jurisdiction, op. cit., para. 54.
recognize institutions of municipal law that have an important and extensive role in the international field. [...] All it means is that international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. This in turn requires that, whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law.”

Despite this convincing affirmation, the Court also stated that “there may in principle be special circumstances which justify the lifting of the veil in the interest of shareholder”

2. Impact of Barcelona Traction in international investment law

A question that quickly arises is the place and the weight to give to the Barcelona Traction case in the context of international investment arbitration. Because it concerns diplomatic protection, many arbitral tribunals are keen to quickly withdraw any impact of the decision of the ICJ. Even Broches himself, father of the ICSID Convention, warned against relying too heavily on Barcelona Traction, pointing out that the ICJ decision was actually made “for the exercise of diplomatic protection” and should “be carefully constricted to the context in which it was given.”

This is the path chosen by a vast majority of arbitral tribunals. In fact, their position can be resumed by the declaration of the Tribunal in the Camuzzi v. Argentina case:

“Whatever may have been the merits of Barcelona Traction, that case was concerned solely with the diplomatic protection of nationals by their State, while the case here disputed

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228 Barcelona Traction, op cit., para. 38.
229 Ibid., para. 58.
231 Barcelona Traction, op cit., para. 35.
233 Azurix Corp. v. Argentine Republic, Decision on the Application for Annullment of the Argentine Republic, ICSID Case No. ARB/01/12, 1st September 2009, para. 87.
Daimler v. Argentina, op. cit., para. 90.
LG&E v. Argentina, decision on jurisdiction, ICSID Case No. ARB/02/1, 30th April 2004, para. 52.
Noble Energy, Inc. and Machalapower Cia. Ltda. v. The Republic of Ecuador and Consejo Nacional de Electricidad, Decision on Jurisdiction ICSID Case No. ARB/05/12, 5th March 2008, para. 78.
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concerns the contemporary concept of direct access for investors to dispute resolution by means of arbitration between investor and State.²³⁴

And Sempra Energy v. Argentina:

“For the same reason that diplomatic protection is inappropriate under the bilateral treaty system, neither can this system rely on approaches arising from that traditional mechanism, in particular those of the Barcelona Traction case.”²³⁵

In the case Daimler v. Argentina, the tribunal goes to the extent to speak about a jurisprudence constante²³⁶. We can therefore clearly see a natural inclination of the arbitration tribunals to feel not bound by the ICJ ruling. To a further extend, it may be taken into consideration that now, according to the huge amount of practice and the generalisation of ICSID arbitration, it may be the ICJ that should take in serious consideration the rulings of the tribunals²³⁷, even do a differentiate practice may be objectively justified²³⁸.

However, the fact that the all those tribunals and argumentations of the parties tend to include the ICJ and more specifically the Barcelona Traction case is an interesting clue, that perhaps the influence of the Court is not so negligible, as they tend to present it. If the main point of the Barcelona Traction case was the possibility or not for shareholders to have a direct action against the hosting State in international law, it is admitted today that the BITs clearly regulate the question, and there is very little space now for interpretation of the general international law. Even more, “nothing in general international law prohibits the conclusion of treaties allowing ‘claims by shareholders independently from those of the corporation concerned […] even if those shareholders are minority or non-controlling shareholders.’ Such treaties and in particular the ICSID Convention must be applied as lex specialis”²³⁹. Nowadays, most of the

²³⁶ Daimler v. Argentina, op. cit., para. 91.
²³⁸ Diallo, op. cit., para. 23.
²³⁹ CMS Gas Transmission Company v. The Republic of Argentina, Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No. ARB/01/8, 17th July 2003, para. 48.
questions regarding nationality of claims are adjudicated during arbitration between an investor and a State. \(^{240}\)

A huge number of BIT offer the possibility to the shareholders to bring a claim for harms to their investments in locally incorporated companies. \(^{241}\) In those cases, the Barcelona Traction is inapplicable. \(^{242}\) It is without success, but with a reluctant perseverance that Argentina tried to invoke this argument in a few cases. \(^{243}\)

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\(^{241}\) Daimler v. Argentina, *op. cit.*, para. 91.


\(^{243}\) Lanco International Inc. v. The Argentine Republic, Decision on Jurisdiction, ICSID Case No. ARB/97/6, 8 December 1998, para. 9-10.
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If in those cases, the importance of the Barcelona Traction case is more than relative, it remains profoundly important when the goal is to lift the corporate veil of a company not to give a direct right to investors, but rather to dismiss such right or negate the ICSID jurisdiction. In fact, in an orbiter dictum, the Court gave the main conditions allowing to pierce the corporate veil of an entity.

3. Equitable doctrine of “Veil Piercing”

According to the ICJ ruling in the Barcelona Traction case:

“58. In accordance with the principle expounded above, the process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law. It follows that on the international plane also there may in principle be special circumstances which justify the lifting of the veil in the interest of shareholders.”

In order to assess its declaration, the Court refers itself to the national or municipal laws, where, facing a risk of abuse of the legal personality, they had to recognise that “the independent existence of the legal entity cannot be treated as an absolute”. The court therefore stated:

“It is in this context that the process of "lifting the corporate veil" or "disregarding the legal entity" has been found justified and equitable in certain circumstances or for certain purposes.

The court then gives some examples where it might be found justified to disregard the legal personality and pierce the corporate veil, such as, for instance, “to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations.”

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244 TSA v. Argentina, award, op. cit., para. 117.
Tokios Tokelès v. Ukraine, Jurisdiction, op. cit., para. 53.
245 TSA v. Argentina, Dissenting opinion of Grant D. Aldonas, op. cit., para. 18.
246 Barcelona Traction, op. cit., para. 58.
247 Ibid., para. 56.
248 Ibid., para. 56.
249 Ibid., para. 56.
250 Ibid., para. 56.
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The ICJ ruling clearly offers and recognises the right to see beyond the veil in exceptional, particular and critical circumstances, as stated above. In order to use this possibility, the entity asking for lifting the Corporate Veil has to demonstrate, or at least suggest that the targeted entity misused its juridical personality in a way that constitute a fraud, or a malfeasance. Alternatively, it must show that piercing the corporate veil is necessary to protect a third person or that the entity uses its corporate nationality to evade applicable legal requirements or obligations.

However, we may still deplore that the ICJ did not precise the conducts that might conduct a tribunal to lift the corporate veil. It was not necessary for the court to examine this question at the time, since they decided to respect the legal personality. But, it makes it quite difficult to find the exact limit whether or not a given behaviour may be a misuse of the juridical personality.

For example, it is common to find companies that have been founded for the sole purpose of detaining shares in a foreign company. Those structures are built to obtain tax advantages or the benefit of a BIT between two countries. No clear answer has been given to this date, but again the ICSID tribunals will look for the conditions of the BIT, if a local activity is requested.

From the main ICSID cases, where the tribunals had to answer this argument, it appears they pay a very close attention to the proof brought up by the parties. In Tokios Tokelès, the tribunal dismissed the argument saying that the proofs given weren’t convincing that there was a case of abuse of the legal personality. Therefore, there was no need for it to examine if the possible situations where it is acceptable to lift the corporate veil were given.

Interestingly, in TSA, the award mentions Barcelona Traction as a possible ground for lifting the corporate veil. However, the court fails to show in its award that there has been a misuse of the legal personality. Moreover, applying Barcelona Traction, it should have arrived at the...
opposed result, since the ICJ decided to respect the legal personality and pleaded for its respect unless a misuse was found\textsuperscript{260}.

One of the central question here is the proof of a misconduct. The few cases, where the ICSID tribunals had to discuss either the proofs of the conditions of the equitable “veil piercing” doctrine where sufficient or not, don’t enlighten us on the precision and type of proof required to accept them. However, the precedents concerning a case of fraud in investment give us a precious guidance.

In the particular case of fraud, most cases do not analyse the question to lift or not the corporate veil. However, a brief analysis of the decisions taken by tribunals in cases of fraud still remain pertinent. It is generally accepted that “investments made on the basis of fraudulent conduct cannot benefit from a BIT protection, and this principle is independent of the effect of any express requirement in a BIT […]”\textsuperscript{261}. This position must be enforced, for at least two reasons. Firstly, because it is doubtful that a State could have given a fraudulent investment the benefit of BIT protection and secondly, because no claimant should benefit from his own fraud\textsuperscript{262}.

Concerning the proof of a fraudulent behaviour, the tribunals do not accept it too easily, providing by the way an easy and convenient escape for States trying to dismiss their responsibilities. The cases where the fraud answers the double condition to be both manifest and closely connected to the facts are exceptional, but in those cases, the tribunals never hesitated to decide against the entity at the origin of the fraudulent behaviour\textsuperscript{263}. In all the other cases, it is up to the tribunals to decide if it is a case of fraud or not. It is only if a clear and unambiguous proof of the fraud has been given, that it is acceptable for a tribunal to dismiss the case\textsuperscript{264}.

It also shows that even if it is not always easy to prove a fraudulent behaviour, it is in no way impossible or excessively complicated. Furthermore, it is always possible and it is even recommended for the accused entity to help demonstrating that it did not have a fraudulent conduct. This is the case in Tokios Tokelèès, where the company actively showed that it already had activities in the country years before the adoption of the BIT\textsuperscript{265}. It was a clear proof that

\textsuperscript{260} Ibid., para. 16-18.
\textsuperscript{261} D. Minnote & R. Lewis v. Poland, award, ICSID Case No. ARB(AF)/10/01, 16 may 2014, para. 131.
\textsuperscript{262} Inceysa Vallisoletana, S.L. v. Republic of El Salvador, Award, ICSID Case No. ARB/03/26, 2nd August 2006, para. 230-244.
\textsuperscript{263} Minnote & Lewis v. Poland, \textit{op. cit.}, para. 132.
\textsuperscript{264} \textit{Ibid.}, para.133-134.
\textsuperscript{265} Tokios Tokelès v. Ukraine, Jurisdiction, \textit{op. cit.}, para. 56.
the company didn’t use its legal personality in a fraudulent way or in order to have an undue access to ICSID arbitration.

In conclusion, the possibility offered by the ICJ in the Barcelona Traction case should not be undermined. It should be considered as a major if not sole reason to lift the corporate veil, when such possibility is not offered by the BIT. The conditions brought up by the orbiter dictum are sufficiently understandable, even by non-experts, and investors can intuitively and reasonably expect them. It is a good and equitable bargain between security for the investment and protection of a States’ interest. Finally, by offering this possibility, it also confirms the strong position and importance of the juridical personality. By deciding to give pre-eminence to the legal personality and refusing to lift the corporate veil in this specific case, it confirms that the rule in general international law, where there is no treaty, is the respect of the legal personality.

E. Conclusion

The arguments recently used in order to pierce the corporate veil are very interesting. The matter is recent and yet suffers insecurity regarding the issue. It still depends a lot on the composition of the tribunal and the view it adopts on those arguments. In the same way, States continue to use them in order to ask a tribunal to lift the corporate veil of a company.

They are three leading theories nowadays that give the opportunity to the tribunal to pierce the corporate veil. The first two, namely the origin of capital and the control test seem to have their origin in Prosper Veil dissenting opinion in Tokios Tokelès. They have the great advantage to perceive the economic reality behind a situation. The third one, the objective test, is newer and perhaps less used in subsequent cases.

Despite how convincing those theories might look at first, their approach is apparently not followed by academics and professional literature, nor subsequent tribunals.

The principal argument against all those brilliant theories is perhaps the responsibility, the burden the States have to be cautious and careful in drafting their clauses and their BITs. It is

266 Barcelona Traction, op. cit., para. 90.
Rompetrol v. Romania, op. cit., para. 91.
267 Ibid., para. 90.
268 Ibid., para. 85 and 101.
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not admissible to jeopardise the rights of an investor of good faith because of the short sighted perspective of a State. Doing so, would be not only mean to discharge of its responsibility any State, but it would also lead to an end of the system.

Investors have to be able to trust it. And this is one of the key, if not the key objective of the ICSID Convention. In order to encourage investments, investors have to trust the system, that their cause will be heard in case of a dispute. This is the whole point of the ICSID Convention. It tries to find a balance between the over powerful State and an investor. The Tribunals should therefore not offer an easy escape to the States, when such possibility is not offered to the investor and even worst, his investment is blocked and left to violation by a State.

In addition, it is not like there was no other solutions for States. In the vast majority of the cases, if not all of them, the problem would have been easily resolved for the State by adopting a more specific and narrow definition of nationality. For example, they could have request the obligation to have an activity at the seat of incorporation.

From a more political point of view, respecting the agreement reached by the parties is vital. It is not acceptable for a State to jeopardise it, by suddenly limiting one of the State’s obligations without any relieve for the other State. One very fine example can be found in the Dutch-Romania BIT. The chosen criteria here was incorporation’s place\(^{269}\). Romania already had BITs with other countries with different criteria’s. Therefore, we clearly see it was wished by the parties and was perhaps an essential part of the agreement. This view is confirmed by the Dutch practice in the field. Why then would a tribunal change the conditions of this BIT or any other, operating unilateral changes, without taking into consideration the interests of the other party at the BIT.

From an equitable stand point, even considering the contras in lifting the corporate veil, a State should be able to request the piercing of it in precise conditions. Finding equitable, acceptable and expectable ones are not an easy task. However, in a *dictum* in Barcelona Traction, the ICJ offered a solution. According to it, it is possible to lift the corporate veil in proven case of misuse of the legal personality.

\(^{269}\) Agreement on encouragement and reciprocal protection of Investments between the Government of the Kingdom of the Netherlands and the Government of Romania, 19th April 1994 (entered in force on 1st February 1995).
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The conditions requested by the ICJ are the representation of general international law, or at least, a very common occurrence in many municipal laws. It makes them easily understandable for both investors or States, from any country. The conditions cannot be only understood, but also expected, by all parties. Even if we can discuss the exact importance of Barcelona Traction in international investment, in a matter that today is mainly ruled by BITs, the conditions requested by the ICJ are, at the end of the day, accepted and respected by most.

On top of this, by leaving the door open, under conditions, for veil piercing, the ICJ also confirms that the legal personality should prevail and reinforce its position. The legal personality is not absolute, but it’s fiction should be protected and enforced with the broadest possible scope. The limit of the legal personality is the BIT itself, and the definition of the nationality chosen by the parties and the misuse of it, in case of fraud for example.

In conclusion, the question to lift or not the corporate veil is a recent one that will surely receive new updates in the upcoming years. Since the dissenting opinion of Pr. Prosper Weil, States are eager to bring this argument in front of tribunals. However, for the sake of the system, in respect with its goals and purpose, the tribunals should first and foremost try to enforce the definition of nationality in the pertinent BIT. Also, the conditions of the Barcelona Traction dictum should be the ones used to lift the corporate veil, since for the moment, no other convincing alternative theory has been offered.
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