

The Nationality of Juridical Persons in the ICSID Convention in Light of Its Jurisprudence

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I. Introduction

Foreign investment has always been considered a crucial issue in order to boost economic growth for all countries around the world. This statement is more accurate when talking about developing nations. In this field, foreign investment is deemed one of the keys to achieving a higher stage of development allowing peoples to escape poverty.

After World War II, in a new climate of cooperation and goodwill, the victorious countries created several international institutions aimed at strengthening international economic ties. This new international order, concerned with economic issues, was known as the *Bretton Woods System*. Its name came from the place in New Hampshire, United States, where the representatives of 44 nations met in 1944. This conference gave birth to the International Monetary Fund (IMF) and the World Bank (International Bank for Reconstruction and Development, IBRD). The main task of the latter was to provide assistance for reconstruction in the post war period. Later, this organization changed its emphasis focusing on development. Latin American countries mainly encouraged this updated vision. In this context, the World Bank was fully aware of the importance of capital flows from developed to developing countries one of whose main goals was private foreign investment. Quantitatively, foreign investment is responsible for a significant part of the total capital flows between these two groups. On the other hand, political risk is one of the main factors that discourage the flow of private foreign capital to developing nations.

At the beginning of the sixties, the World Bank decided to make a contribution in this area which aimed at resolving any conflicts which had arisen between host state and foreign investors in order to create a better environment for foreign investments in developing countries. Instead of making a recommendation for an international agreement about this matter to its members, the World Bank chose to assume the task itself creating an entity within its organization's ambit.¹ The mission of this entity would be to serve as a forum before which the host state and the foreign investor could settle, through conciliation and arbitration, their disputes related to investment matters while maintaining the investor's right to go before the host state judiciary if he wanted to. After several meetings of experts which were held on a regional basis, the likelihood of an international convention on this issue appeared fea-

¹ A. Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 1972, Vol. II, 345 et seq.

sible. This convention, according to the Board of Governors of the World Bank, should be drafted “taking into account the views of member governments and shall keep in mind the desirability of arriving at a text which could be accepted by the largest possible number of governments.”²

Finally, on 18 March 1965, the Executive Directors submitted the convention to the members of the Bank for their consideration, signature and ratification together with a report. On 14 October 1966, the Convention on the Settlement of Investment Disputes between States and the Nationals of Other States entered into force after its ratification by 20 countries, and the International Centre for Settlement of Investment Disputes (ICSID) came into being.

One of the most important features of the ICSID Convention (hereinafter the Convention) was the position of equality between the states and the investors whenever a dispute arose. In such case the investor could begin the procedure before the ICSID with no further requirements or intervention of its state of nationality. This fact had two important consequences: firstly, it gave a strong support to the growing trend that considered the individual as a subject of international law. Secondly, by putting the host state in a position of equality with the investor the latter was able to bypass the problems stemming from diplomatic protection. Though this concept diminished in importance throughout the 20th century, it still played an important role regarding individuals’ claims against states, when the Convention was signed, as will be analyzed below.

In the beginning, Latin America was the only region as a whole which rejected the Convention. This rejection was mainly based on political reasons due to the endorsement given by Latin American countries to the *Calvo Doctrine*. This doctrine, originally developed in the 19th century by an Argentine diplomat and scholar, acquired high importance during the first decades of the following century, when important natural resources of the respective countries were exploited by multinational corporations of developed nations. Likewise, it was a reaction to the “prompt, adequate and effective” compensation for the expropriation of foreign investments embodied by the *Hull Formula*, that was strongly supported by the United States and other developed

² Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, available at <<http://www.worldbank.org/icsid>>. The Convention is available under <<http://www.worldbank.org/icsid/basicdoc/basicdoc.htm>>.

nations. The *Calvo Doctrine* affirmed that the rules governing the jurisdiction of a country over aliens and the collection of indemnities should apply equally to all nations, regardless of size. It further stated that foreigners who held property in Latin American states and who had claims against the governments of such states should apply to the courts within such nations for redress instead of seeking diplomatic intervention.³ Therefore, Latin American rulers were reluctant to become part of agreements that meant a waiver of the *Calvo Doctrine* allowing jurisdiction of international courts over disputes on property located inside their boundaries but owned by foreigners. Moreover, the division of the world into two ideological blocs during the Cold War period and the struggles staged for this reason also contributed to a climate of confrontation on the economic front.

The end of the Cold War brought several consequences not only political but also economic. One of the most important was the emergence of a certain international consensus on deeming the free market economy as the best economic system. Latin American states and other countries changed their vision about international arbitration in the foreign investment field and the *Calvo Doctrine* lost its importance.

In this new scenario, since the beginning of the nineties, the ICSID judicial mechanism has acquired an increasing importance because it has been viewed as the more appropriate framework to resolve the disputes on investment matters. The importance of the ICSID is reflected both in the large number of countries which became parties to the Convention in recent years and in the growing number of disputes taken before the ICSID judiciary in the same period. Currently, more than 150 nations have ratified the Convention, a number similar in importance to the WTO membership. The main vehicles to access before the ICSID are Bilateral Investment Treaties (BITs), which contain provisions regarding arbitration. According to an UNCTAD survey, the number of BITs has increased from 385 in 1989 to 2,265 in 2003, encompassing 176 countries.⁴ On the other hand, the number of pending cases before ICSID Tribunals grew from 14 at the end of 1997 to 85 at the end of 2004.⁵

³ Calvo Doctrine, Encyclopedia Britannica Premium Service, available at <<http://www.britannica.com/eb/article-9018741>>.

⁴ Quantitative data on bilateral investment treaties and double taxation treaties, available at <<http://www.unctad.org>>.

⁵ S. Alexandrov, "The 'baby boom' of the treaty-based arbitrations and the jurisdiction of ICSID tribunals: shareholders as 'investors' and jurisdiction

With this background, it is possible to assert that the effectiveness of the ICSID in the investment field is as important as the success of the WTO judicial body to resolve trade disputes in order to strengthen the global economic system.

Due to its importance, the members of the Convention must be efficient to identify and remove any flaw which could undermine the judicial mechanism devised in its clauses.

In the area of the jurisdiction requirements, one matter where certain doubts have arisen is that of the nationality of juridical persons. Chapter II of the Convention, article 25, refers to this topic. Para. 1 of this article states that, "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*" (emphasis added). According to its para. 2 lit. b) "National of another Contracting State" means, "*any juridical person which had the nationality of a Contracting State other than the State party to the dispute*" (emphasis added).⁶ The basic requirement is thus that the dispute must involve a contracting state and a juridical person who is a national of another contracting state. However, the Convention does not define the concept of nationality in connection with juridical persons. Therefore, regarding the ICSID jurisdiction, this matter depends on the provisions freely agreed by the parties in the BITs. In turn, these instruments embody the visions that have been developed by the doctrine.

International law has mainly dealt with the nationality of juridical persons in the diplomatic protection field. Here, several theories have been devised like the place of incorporation or the *siège social*. These theories leave ample room for different interpretations.

Bearing this in mind, one of the latent risks of such interpretations is that they would be used in a manner that would go against the provisions and purposes of the Convention. A situation which embodies this assertion is to evade the jurisdiction of national courts in a domestic conflict by seeking for redress through an ICSID Tribunal. This is, precisely, the case denounced by Prof. Prosper Weil, President of the ICSID Arbitral Tribunal, in his dissenting opinion on the decision on ju-

ratione temporis, in: id., *The Law and Practice of International Courts and Tribunals* 4, 2005, 19–59, 20 et seq.

⁶ ICSID Convention, see note 2.

isdiction issued in the *Tokios Tokelés* case.⁷ Though this case will be analyzed further below, the essential facts are the following:

- The claimant was a publishing enterprise established under the laws of Lithuania at the beginning of the nineties, 99 per cent of whose shares were owned and controlled by Ukrainian nationals.
- It submitted its dispute with Ukraine to the ICSID in 2002 under a BIT signed in 1994 between both governments.
- It alleged that certain governmental authorities in Ukraine had taken a series of measures violating the BIT in respect of its wholly owned subsidiary in Ukraine, Taki spravy.
- The majority vote deemed that the claimant was an “investor” of Lithuania under article 1(2)(b) of the Ukraine-Lithuania BIT based on its state-of-incorporation. This article defines the term “investor,” with respect to Lithuania, as “any entity established in the territory of the Republic of Lithuania in conformity with its laws and regulations.”⁸

Furthermore, it stated that the definition of corporate nationality in the Ukraine-Lithuania BIT was consistent with the Convention rejecting thus the argument of the respondent that the real claimants were in fact Ukrainian nationals pursuing an international arbitration against their own government.

- The Tribunal decided by a majority vote that the dispute was within the jurisdiction of the ICSID and the competence of the Tribunal.
- The decision on jurisdiction was issued in April 2004. The case on the merits is still pending before the ICSID.

Prof. Prosper Weil underscored the danger that in his view entails the interpretation made by the majority vote as follows, “There can be no question of leaving unconditionally to the parties the task of determining the scope of application of the Convention along with the rights and duties it places upon both parties. This would frustrate the system by putting its extent in the hands of the parties and at their discretion, thus making the provisions of its Chapter II, and more particularly of its central and crucial article 25, a purely optional clause.” The final paragraph of his vote points out, “To sum up, The ICSID mechanism

⁷ *Tokios Tokelés v. Ukraine* ICSID Case No. ARB/02/18, available at <www.worldbank.org/icsid/cases>.

⁸ *Tokios Tokelés v. Ukraine*, see note 7, para. 28.

and remedy are not meant for, and are not to be construed as, allowing—and even less encouraging—nationals of a State party to the ICSID Convention to use a foreign corporation, whether preexistent or created for that purpose, as a means of evading the jurisdiction of their domestic courts and the application of their national law. It is meant to protect—and thus encourage—international investment. It is regrettable, so it seems to me, to put the extraordinary success met by ICSID at risk by extending its scope and application beyond the limits so carefully assigned to it by the Convention. This might dissuade Governments either from adhering to the Convention or, if they have already adhered, from providing for ICSID arbitration in their future BITs or investment contracts.”⁹

The foregoing paragraphs have a twofold goal: firstly, to make clear the crucial role for the international economic system that the ICSID plays nowadays; secondly, to disclose a possible fault in the provisions of the Convention.

Both elements were the reasons to choose this topic.

This work is based on the statements of Prof. Prosper Weil’s dissenting opinion and the dangers that he foresaw for the effectiveness of the ICSID judiciary.

This thesis aims at verifying those statements, especially the one related to the discretionary character of the ICSID provisions for the members of the Convention in the field of corporate nationality. The analysis could help to identify possible improvements of the Convention in this area.

The above mentioned factors were used to formulate the following hypothesis: the lack of a clear definition about the nationality of juridical persons in the Convention allows a discretionary interpretation of this issue.

The hypothesis will be verified outlining theoretical concepts and studying practical application.

The thesis will deal with the historical background of the nationality of juridical persons, its features, theories on the subject and legal provisions. Then focusing on the wording of article 25 para. 2 lit. b) of the Convention. Followed by an analysis of four recent cases brought before ICSID Tribunals where the nationality provisions of the Convention have been applied.

⁹ Tokios Tokelés v. Ukraine, see note 7, Dissenting Opinion, para. 28 and 30.

II. The Nationality of Juridical Persons in International Law

1. Historical Background

In the international context, corporate nationality is a concept tied to that of natural persons and stemming from it. The main field where it has been developed is in diplomatic protection affairs. On the other hand, unlike the situation of natural persons, municipal law systems do not deal with this subject. Hence, there are no provisions related to the nationality of corporations in most national legislations.¹⁰

Accordingly, the concept and features of diplomatic protection will be analyzed first. Next, I will focus on the findings concerning the nationality of juridical persons in this area.

The doctrine of diplomatic protection was born as a consequence of the emergence of state responsibility for injury to aliens. This notion appeared mainly because of the piracy actions, and it was first developed in the 18th century. Already *Emer de Vattel* stated in his book *Le Droit des gens ou les principes de la loi naturelle*, that “anyone who mistreats a citizen directly offends the State. The sovereign of that State must avenge its injury, and if he can, force the aggressor to make full reparation or punish him, since otherwise the citizen would simply not obtain the main goal of civil association, namely, security.”¹¹

At the beginning of the 20th century it was generally accepted that state responsibility arose due to wrongful acts or omissions which caused injury to aliens involving the responsibility of the state to which such acts and omissions were attributable. In this way, although a state was not obliged to admit aliens, once it had done so, it was under an obligation towards the aliens’ state of nationality to provide a degree of protection to their persons or properties in accordance with an international minimum standard of treatment due to aliens.

At the same time, the only subjects of international law were the states and no role was assigned to the individuals on this ground. Therefore, once accepted by the state to act on behalf of one of its nationals in an international claim, this became its own claim leaving aside

¹⁰ I. Brownlie, *Principles of Public International Law*, 2003, 407-408.

¹¹ Quoted by Mohamed Bennouna in his Preliminary Report on Diplomatic Protection to the International Law Commission, 1998, available at <www.un.org/law/ilc/reports>.

the individual's rights which were in its origin. Several consequences derived from this approach to the issue. The discretionary power of the state both to espouse the claim and to dispose the compensation and the crucial role of the political authority were among them.¹²

Regarding jurisprudence, the leading case that embodies this classical stance about diplomatic protection is the *Mavrommatis Concessions* case (1924). Here, the PCIJ stated that "by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law."¹³

In an attempt to codify certain matters of international law, Chapter V of the Report of the ILC of 2000 proposed the following elements to describe diplomatic protection, "means action taken by a State against another State in respect of an injury to the person or property of a national caused by an internationally wrongful act or omission attributable to the latter State." It also stated that in exceptional circumstances diplomatic protection may be extended to a non-national.¹⁴

According to international law, one of the key requirements for exercising diplomatic protection is an effective bond of nationality between the aggrieved party and the state which makes the claim. The main statement in this respect was laid down by the ICJ in the *Nottebohm* case in the following terms, "According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties."¹⁵ Thus, not only the aggrieved party must be a national of the claimant state but also he or she must have a "genuine connection" with that state in order to entitle the latter to bring an international claim. This requirement is also applicable to juridical persons.¹⁶

¹² F. Orrego Vicuña, "Changing Approaches to the Nationality of Claims in the Context of Diplomatic Protection and International Dispute Settlement", in: S. Scemmer-Schulte (ed.), *Liber Amicorum Ibrahim F.I. Shihata*, 2001, 503 et seq.

¹³ *Mavrommatis Palestine Concessions* case, Greece v. Great Britain, PCIJ Series A No. 2, available at <www.icj-cij.org/icjwww/idecisions/icpij/A02>.

¹⁴ Available at <www.un.org/law/ilc/reports>.

¹⁵ ICJ Reports 1955, 4 et seq. (23).

¹⁶ Brownlie, see note 10, 465.

In the field of corporate nationality, the most important and emblematic case and a landmark in this matter was the *Barcelona Traction, Light and Power Company, Limited* case ruled by the ICJ.

This case arose between Belgium and Spain due to a bankruptcy ruling in Spain of Barcelona Traction, a company incorporated in Canada. The object of the Belgium suit was to seek reparation for the damage alleged by this country because Belgian nationals were the owners of the overwhelming majority of the company's shares. Belgium contended that the bankruptcy was the outcome of actions of Spanish authorities allegedly contrary to international law. The Court deemed that Belgium was not entitled to exercise diplomatic protection of shareholders in a Canadian company with respect to measures taken against that company in Spain.

This stance has been severely criticized by the scholars because it left shareholders without any protection under international law. However, this analysis will be concentrated on the statements about nationality contained in the adjudication.

One of the most important paragraphs of the sentence related to this issue is the following,

“In allocating corporate entities to States for purposes of diplomatic protection, international law is based, but only to a limited extent, on an analogy with the rules governing the nationality of individuals. The traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office. These two criteria have been confirmed by long practice and by numerous international instruments. This notwithstanding, further or different links are at times said to be required in order that a right of diplomatic protection should exist. Indeed, it has been the practice of some States to give a company incorporated under their law diplomatic protection solely when it has its seat (*siège social*) or management or centre of control in their territory, or when a majority or a substantial proportion of the shares has been owned by nationals of the State concerned. Only then, it has been held, does there exist between the corporation and the State in question a genuine connection of the kind familiar from other branches of international law. However, in the particular field of the diplomatic protection of corporate entities, no absolute test of the ‘genuine connection’ has found general acceptance. Such tests as have been applied are of a rela-

tive nature, and sometimes links with one State have had to be weighed against those with another.”¹⁷

This statement outlined the main criteria for determining the nationality of juridical persons at the international level.

The first method to attribute nationality is that of the place of incorporation, that is to say, the state under whose law the company is established.

The *siège social* is the second method. It is understood as the state where the corporation has its seat or centre of administration.

The third method in this field is related to the control or substantial interest. This allocates the nationality of the company on the state of the shareholders who own a majority or a substantial proportion of its shares. This criterion requires the use of the “piercing the veil” formula, namely to see behind the façade of the corporation in order to identify who are the owners of it. Thus, shareholders’ nationality prevails over the one of the state of incorporation in case they do not concur.

The existence of a “corporate veil” has to do with the distinct legal personality of the corporation. The company is a legal entity separate from its shareholders with its own rights and obligations under the law.

At least two consequences derive from this feature: shareholders are entitled to avoid liability for the obligations undertaken by the company, and they keep safe their personal assets because the investment risk is reduced solely to the interest that they hold in the company.

On the other hand, as long as this formula preserves the personal interests of the shareholders and their liability for the obligations of the company, it should not enable them as individuals to enforce the company’s rights. Otherwise, the corporate veil would remain to shield shareholders from liability, and it would be lifted only if they need to enforce the company’s rights.

Regarding diplomatic protection, the ICJ identified in the *Barcelona Traction* ruling at least two situations where it is possible to lift the corporate veil allowing diplomatic protection for shareholders. The first one is the case of a corporation that has ceased to exist. The second one refers to a state incapable of taking action on behalf of the company.¹⁸ A third case, related to the exercise of this right by the state of the share-

¹⁷ ICJ Reports 1970, 3 et seq. (42, para. 70).

¹⁸ See note 17, 40, para. 64.

holders when the state of incorporation is the respondent, was not clearly upheld by the adjudication.¹⁹

Nineteen years later, another case before the ICJ changed its vision about the nationality of juridical persons in the diplomatic protection field.

This was the *Elettronica Sicula S.p.A. (ELSI)* case which was brought by the United States against Italy under their Treaty of Friendship, Commerce and Navigation (FCN) of 1948.

ELSI was a company incorporated under the laws of Italy whose owners were two American companies, Raytheon and Machlett. The company experienced serious financial trouble at the end of the sixties, and its managers decided to close the main factory of the company located in Sicily. This would mean the layoff of several dozens of workers. Prior to the closing, the Italian authorities seized the factory with all its assets. Finally, the company was declared bankrupt. The bankruptcy procedure took several years and the subsequent liquidation left no monetary surplus for the former American owners. The U.S. exercised diplomatic protection on behalf of the *ELSI* shareholders due to the violations of the FCN treaty allegedly committed by the Italian authorities. In this way, the shareholders of a foreign company were protected by their state (the U.S.) against the state of incorporation (Italy). Based on the provisions of the treaty related to foreign investment, the ICJ ruled that such provisions conferred rights on the shareholders even in respect of acts committed against the corporation.²⁰

In spite of the fact that the claimant lost the case due to the lack of evidence about certain factual matters, the Court deemed that there was a genuine connection between the company and the state of nationality of the shareholders. Thus, the ICJ granted the United States the right to exercise diplomatic protection on behalf of the shareholders, as long as the company whose rights were at stake was incorporated in the defendant state, a frequent situation when talking about foreign investment.

Although *ELSI* was a wholly owned subsidiary of the American companies and thus they faced the entire damage produced by the measures of the Italian authorities, the drift in this field has been to diminish the rate of the shares required to enable diplomatic protection for shareholders. This rate is generally associated with the control of the company, namely 50 per cent. Professor Orrego Vicuña stated that

¹⁹ See note 17, 48, para. 92.

²⁰ ICJ Reports 1989, 15 et seq.

“Control of a foreign company by shareholders of a different nationality, generally expressed in a fifty percent ownership of its capital stock or such other proportion needed to control the company, may entitle the State of nationality of such shareholders to exercise diplomatic protection on their behalf or otherwise to consider the company as having its nationality.”²¹

At the same time, diplomatic protection can be exerted by the home state of the shareholders not only when the state of incorporation is the defendant but also when the state of incorporation is unable or unwilling to exercise such protection.

In brief, it is possible to assert that the consolidated trend in this matter implies the emergence of the real interest remaining behind the investment putting aside the legal form adopted to carry it out. In this way, to entitle the shareholders' state with the right of diplomatic protection is the recognition of the underlying economic interests in an investment made through a corporation.

Therefore, the fact that the nationality of the shareholders of a given company is a valid method to establish a genuine connection with a state in order to exercise diplomatic protection regarding their corporate rights, is well established nowadays.

However, as stated before, the widespread adhesion to the free economic system once the Cold War ended, which states saw as an unavoidable step to benefit from the global economy, spurred the increasing process of cross-border economic activities and, in particular, of foreign investment. The essential goal in this respect is to create an adequate framework in order to protect economic interests regardless of their nationality. In this context, in recent years it has been possible to witness a steady development in international law aimed at lowering the requirements for exerting claims by foreign shareholders as such, departing from the criteria applied in the diplomatic protection field. This development is embodied not only in state practice, mainly through BITs, but also in judicial findings, especially from the ICSID judiciary.

By widening the scope of the term “investment” of article 25 para. 1, the ICSID Arbitral Tribunals have developed a significant jurisprudence which facilitates the access to the judicial mechanism of the Convention even to foreign shareholders, who have a minority share in the locally incorporated company. This recognition was made for the first

²¹ Orrego Vicuña, see note 12, 525.

time in the *Lanco* case of 1998.²² This stance has recently been backed by rulings issued in claims against Argentina in the *Enron* and *CMS* cases, where American companies owned near to 30 per cent of the shares in local corporations created as vehicles for their investments. The former states that, “there is nothing contrary to international law or the ICSID Convention in upholding the concept that shareholders may claim independently from the corporation concerned, even if those shareholders are not in the majority or in the control of the company.”²³ Finally, in another recent decision, an ICSID Tribunal supported the entitlement of a shareholder for bringing a claim with only a 5 per cent holding of shares.²⁴

2. Concept

Generally speaking, the definition of nationality is regulated by national law. This statement was recognized by the Hague Convention on Nationality (1930) in its article 1, which stated, “It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.”²⁵

In other words, each state was entirely free to determine who was going to be considered one of its nationals, and there were no generally binding rules concerning acquisition and loss of nationality. Accordingly, the determination made by each state granting its own nationality did not necessarily have to be accepted by the others without question. Likewise, diplomatic protection could not be invoked against a state of which the injured party was also a national, since the person in question was also considered by that state as its citizen. As long as several prob-

²² Alexandrov, see note 5, 30.

²³ See *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, paras 39-40 and *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Jurisdiction, para. 55, available at <www.asil.org/ilib/Enron.pdf>.

²⁴ See *Champion Trading Company and Ameritrade International, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Decision on Jurisdiction, available at <www.worldbank.org/icsid/cases>.

²⁵ Convention on Certain Questions relating to the Conflict of Nationality Laws, available at <www.law.dal.ca/kindredinflaw/conflictfnationality>.

lems regarding double nationality of national persons arose, especially in diplomatic protection claims, international law had to confront this issue. Different international tribunals issued several rulings regarding nationality during the 20th century.²⁶ To bypass the problems stemming from double nationality, the principle of “effective nationality” emerged.

The clearest definition of nationality was given by the ICJ in the *Nottebohm* case, “nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.”²⁷

The genuine connection between the state and its nationals, underscored in this definition, is the above mentioned principle of “effective nationality.”

Though the *Nottebohm* case involved a natural person, this definition is also applicable to juridical persons. According to *Brownlie* “The borrowing of a concept developed in relation to individuals is awkward in some respects but is now well established.”²⁸

a. Features

Three main features can be highlighted in this concept.

- 1.) Nationality is a legal bond. The entire regulation of this matter is submitted to domestic law.
- 2.) It requires a genuine connection between both parties. This concept has been already explained in depth.
- 3.) It implies the existence of reciprocal rights and duties.

b. Legal Provisions

In the field of international relations, many treaties refer to the nationality of companies for different purposes.

At the beginning, this issue was addressed by commercial treaties aimed at creating standards of treatment regarding individuals or companies of the contracting parties. In this context for instance, the Treaty

²⁶ E.g., the *Canevaro* case (1912), the *Salem* case (1932) and the *Mergé* claim (1955) analyzed in: D.J. Harris, *Cases and Materials on International Law*, 1998.

²⁷ ICJ Reports, see note 15.

²⁸ *Brownlie*, see note 10, 407.

of Commerce, Establishment and Navigation between the United Kingdom and Iran (1959) dealt with this issue in the following terms,

“The term ‘companies’:

means all legal persons except physical persons;

‘in relation to a High Contracting Party’ means all companies which derive their status as such from the law in force in any territory of that High Contracting Party to which the present Treaty applies;

‘in relation to a country’ means all companies which derive their status as such from the law in force in that country.”²⁹

Nevertheless, this issue has acquired greater importance during the last decade due to the economic integration process. Both multilateral agreements and bilateral arrangements usually have provisions regarding the nationality of juridical persons. Because of its steady proliferation, BITs have probably become the most fruitful source of definitions in connection with this matter.

These instruments generally follow some of the three criteria outlined above or a combination of them.

By way of example, several treaty provisions will be quoted.

According to Chapter Two of the Chile-United States Free Trade Agreement signed in 2003,³⁰ “enterprise” means “any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture, or other association”, and “enterprise of a Party” means “an enterprise constituted or organized under the law of a Party.” Thus, the method used to attribute nationality in this case is the place of incorporation.

Article B-01 of the Chile-Canada Free Trade Agreement contains a provision in the same terms.³¹

Other treaties set higher requirements for entitling companies with their benefits.

The Energy Charter Treaty,³² a multilateral instrument, states in its article 1,

“(7) ‘Investor’ means:

²⁹ Quoted at Brownlie, see note 10, 408.

³⁰ Available at <www.direcon.cl>.

³¹ See note 30.

³² Available at <www.encharter.org/upload/1/TreatyBook-enpdf>.

(a) with respect to a Contracting Party:

(i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law;

(ii) a company or other organization organized in accordance with the law applicable in that Contracting Party;

(b) with respect to a “third state”, a natural person, company or other organization which fulfils, *mutatis mutandis*, the conditions specified in subparagraph (a) for a Contracting Party.”

However, article 17 of the Treaty adds another requirement in order to take advantage of its stipulations by saying,

“(1) Each Contracting Party reserves the right to deny the advantages of this Part to:

a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized.”

This instrument establishes a twofold condition for companies of the member states. Firstly, it applies the place of incorporation criterion. Secondly, it adds a substantial business activity formality when the company is owned or controlled by nationals of a third state.

Likewise, the U.S. BIT Draft Model³³ issued in 2004, in its article 1, defines an “enterprise of a Party” in the following terms, “means an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party *and carrying out business activities there*” (emphasis added).

Some countries add the *siège social* or seat test to the place of incorporation as a double nationality requirement.

For instance, article 1 of the BIT signed in 1995 between Hong Kong and France³⁴ provides,

“(3) ‘investors’ means:

(b) in respect of the Republic of France:

(i) physical persons possessing French nationality;

(ii) any legal person constituted on French territory in accordance with French legislation and having its head office on French territory, or any legal person controlled directly or indirectly by French

³³ Available at <www.bilaterals.org/article.php3?id_article=137>.

³⁴ Available at <www.unctadxi.org/templates/DocSearch.aspx?id=779>.

nationals or by legal persons having their head office on French territory and constituted in accordance with French legislation (hereinafter referred to as ‘companies’).”

Regarding the control or substantial interest method, Switzerland is one of the countries whose BITs have consistently resorted to it.

Thus, the Switzerland-Albania BIT,³⁵ signed in 1992, refers to this matter pointing out,

“Art. 1 Definitions

For the purposes of the present Agreement:

(1) The term ‘investor’ designates, with regard to each Contracting Party:

(a) the natural persons that, according to the legislation of that Contracting Party, are considered as its nationals;

(b) the legal entities, including the companies, the incorporated companies, the individual corporations or other organizations, that are constituted or organized in accordance with the legislation of that Contracting Party, and which have their seat, at the same time as their real economic activities, in the territory of the same Contracting Party;

(c) *the legal entities established in accordance with the legislation of any country that are controlled, directly or indirectly, by nationals of that Contracting Party or by legal entities having their seat, together with their real economic activities, in the territory of that Contracting Party*” (emphasis added).

Similar provisions are contained in Swiss BITs with Latvia, Lithuania and Vietnam.

Nevertheless, the place of incorporation still is the most popular formula regarding the nationality of juridical persons in the BITs.³⁶

To conclude this section:

First, most legislations around the world do not have provisions regarding corporate nationality.

Second, international law has mainly dealt with this issue in the diplomatic protection field.

³⁵ Available at <www.unctadxi.org/templates/DocSearch.aspx?id=779> Unofficial translation.

³⁶ Alexandrov, see note 5, 36.

Third, there are at least three ways in international law to attribute nationality to juridical persons. These are based on the place of incorporation, the *siège social* or seat and the control or substantial interest of the company.

Fourth, the last way requires the lifting of the corporate veil, to see behind the façade of the corporation in order to identify who are the owners of it.

Fifth, as occurs with natural persons, the nationality of juridical persons requires a genuine connection between the state and the company.

Sixth, there has been a consistent trend to lower the requirements about nationality in order to facilitate a prompt and expedite access to the mechanism of diplomatic protection for shareholders. This feature means a recognition of the underlying economic interests in a foreign investment. Thus, the home state is allowed to exercise this right on behalf of shareholders who have the control of a company, generally represented by 50 per cent of the shares.

Seventh, it is well established at the international level that shareholders can resort to their home state for diplomatic protection in three cases:

- a.) When the state of incorporation is the defendant state.
- b.) When the state of incorporation is unable to exercise diplomatic protection.
- c.) When the state of incorporation is unwilling to exercise such protection.

Eighth, the worldwide belief in the advantages of the free economic system has encouraged a fast development of formulas to protect foreign investment, leaving aside the criteria of diplomatic protection. ICSID findings have accomplished an important role in this area entitling minority shareholders of locally incorporated companies to look for protection before its judicial mechanism.

Ninth, the clearest definition of nationality at the international level was given in the *Nottebohm* case. This stated that nationality is a legal bond which has at its core a social fact of attachment, i.e. a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. Hence, a legal bond, a genuine connection between the parties and the existence of reciprocal rights and duties, are the features of nationality.

Tenth, due to their number, BITs have become the most fertile source of definitions regarding the nationality of juridical persons.

These instruments are framed by the criteria of incorporation, *siège social* and control, or some combinations of them.

Having developed a panoramic vision of the nationality of juridical persons in the realm of international law, the next Chapter will be devoted to the provisions concerning this issue in the ICSID Convention.

III. The Wording of Article 25 para. 2 lit. b) of the ICSID Convention

1. Text of the Article

Chapter II of the Convention, entitled “Jurisdiction of the Centre”, includes arts 25, 26 and 27. While the first one is the key provision in this matter, the last two refer to the exclusion of other remedies when the parties resort to the ICSID arbitral procedure and to the exercise of the diplomatic protection mechanism in this context.

Article 25 provides,

“(1) 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.

(2) “National of another Contracting State” means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of article 28 or paragraph (3) of article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

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

a national of another Contracting State for the purposes of this Convention.

(3) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.

(4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).³⁷

In this text the most particular feature of ICSID clearly appears, namely the mixed nature of the dispute that involves a state and a national of another state. No forum of this kind existed prior to the creation of this entity.

From the text of article 25 it follows that four requirements must be fulfilled to bring a case before the judiciary of the Convention:

- 1.) A legal dispute;
- 2.) Arising directly out of an investment;
- 3.) Between a contracting state and a national of another contracting state, that is to say, the investor;
- 4.) Which the parties have consented in writing to submit to the ICSID.

This article sets out the core jurisdictional framework establishing two kinds of requirements. On the one hand, certain conditions pertaining to the nature of the dispute (*ratione materiae*) are outlined. On the other hand, attributes for the parties' eligibility (*ratione personae*) are also developed. The former are embodied by a legal dispute and the fact that it arises directly from an investment. The latter encompass the status of a contracting state and the quality of being national of another contracting state. Therefore, the nationality of the parties to the dispute is a requirement *ratione personae*.

The Convention kept silent about the meaning of the first two requirements mentioned: a legal dispute arising directly out of an invest-

³⁷ ICSID Convention, see note 2.

ment. However, the Executive Directors' report confirmed that a legal dispute did not refer merely to a conflict of interests.³⁸

Notwithstanding the fact, that in both cases it was very difficult to agree to a common definition bearing in mind the great variety of legal systems represented by the delegates to the World Bank meetings, the main reasons behind this omission seem to be other issues. The voluntary character of the Convention on the one hand and the belief that the precise delimitation of ICSID jurisdiction should be left to the parties' discretion on the other, outweighed the arguments of those who supported the idea of stipulating specific concepts for both terms.

In connection with the scope of the word "investment", a proposition was made at an early stage of the meetings in order to fix a minimum amount avoiding insignificant claims. However, this attempt was quickly abandoned.³⁹

Concerning the nationality requirement, the Convention did not define the meaning of this term for natural persons, neither did it for juridical ones. In this sense, individuals' nationality is regulated by national law as previously stated. Accordingly, BITs usually refer to municipal law regarding this issue.⁴⁰

With regard to the nationality of natural persons, it must be stated that the requirements stipulated for them are higher than those stated for juridical persons. In the first case the nationality attribute must be present both on the date when the parties consented to submit the dispute to conciliation or arbitration and on the date when the request was registered. In the second case this formality has to be fulfilled exclusively on the former date.

Paragraph 3 of arts 28 and 36 is identical, and refers to the duties of the Secretary-General in case of a request for conciliation or arbitration. In both cases he shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre.

Individuals are also subject to a double negative condition as long as they cannot have the nationality of the state party to the dispute not

³⁸ Report of the Executive Directors, see note 2, para. 26.

³⁹ C. Schreuer, *The ICSID Convention: A Commentary*, 2001, 123.

⁴⁰ E.g., U.S. BIT Draft Model, Chapter One, article 1, see note 33, which defines "national" as follows: "(a) for the United States, a natural person who is a national of the United States as defined in Title III of the Immigration and Nationality Act."

only on the date of their consent for conciliation or arbitration but also on the date of registration of the request. This provision bars the chance of taking a case before the ICSID for those natural persons who are parties to a dispute even if they have double nationality. This feature was emphasized by para. 29 of the Executive Directors' report in the following terms, "It should be noted that under clause (a) of article 25 (2) a natural person who was a national of the State party to the dispute would not be eligible to be a party in proceedings under the auspices of the Centre, even if at the same time he had the nationality of another State. This ineligibility is absolute and cannot be cured even if the State party to the dispute had given its consent."⁴¹

Likewise, the parties are allowed to treat juridical persons of the host state as foreigners for the purposes of the Convention, whereas this is not allowed in the case of natural persons. Though this situation will be analyzed further below, the main reason for adopting this provision was the usual condition of host states in order to require that foreign investments must be channeled through locally incorporated companies. A strict application of the criterion issued for natural persons would have left beyond the scope of the Convention an important number of instruments used as foreign investments vehicles.⁴²

While the draft of the rules related to the nationality of individuals took up a significant part of the agenda of the delegates, its importance in practice has been rather secondary due to the low number of cases where natural persons have been the investors involved. The great majority of cases witnessed in ICSID Tribunals have included juridical persons.⁴³

The Convention also lacks a definition of juridical persons, even though certain attempts were made in this respect as is explained later in this article. The convenience of a wide range for the autonomy of the parties in this area, bearing in mind the voluntary character of the Convention, explains this situation.

Over and above these requirements is the consent of the parties, which they must express in writing. The importance of consent was underscored in the report of the Executive Directors by saying "Consent of the parties is the cornerstone of the jurisdiction of the Centre."⁴⁴

⁴¹ Report of the Executive Directors, see note 2.

⁴² Broches, see note 1, 358-359.

⁴³ Schreuer, see note 39, 266.

⁴⁴ Report of the Executive Directors, see note 2, para. 23.

A crucial attribute of consent is its irrevocable nature once given. According to *Aron Broches*, founding father of the Convention and former Secretary-General of the ICSID, this could be the most important provision of the Convention, and was intended to avoid a gap that would have thwarted the goals pursued with the creation of this entity.

Multiple examples can be found where agreements between governments and foreign investors, which included arbitration clauses, collapsed as a consequence of unilateral withdrawals of those governments entailing, thus, the end of the arbitration mechanism.⁴⁵

Because consent of both parties does not necessarily have to be given simultaneously, as explained below, this irrevocability operates only from the moment when the consent is completed. This assertion has been supported by the ICSID jurisprudence.⁴⁶

Consent of states is twofold. Firstly, they have to become members of the Convention. Secondly, they have to agree on submitting a specific dispute or certain categories of disputes to the ICSID. Nowadays, this injunction is mainly fulfilled through BITs, though other vehicles are also available. National legislation provisions and stipulations in multilateral agreements are among them.⁴⁷ BITs usually contain a compromissary clause submitting in advance disputes arising from the investment to the ICSID judiciary.

However, it must be underlined that all the ways previously mentioned amount to an offer made by the host state to the investor in order to access the ICSID mechanism. Only when the investor accepts the offer has the consent between the parties been perfected. Thus, the consent of the latter is normally given by means of a request to the ICSID proceedings. In this way, consent to the ICSID does not need to be simultaneous, nor is it, in practice, most of the time. Additionally, it can also be given once the dispute has emerged either by one or by both parties.

⁴⁵ Broches, see note 1, 352.

⁴⁶ Schreuer, see note 39, 254-256, quoting *Holiday Inns v. Morocco and Alcoa Minerals of Jamaica v. Jamaica* among others.

⁴⁷ Schreuer, see note 39, 193-225.

2. Nationality Rules Applicable to Juridical Persons

Article 25 para. 2 lit. b) refers to this matter defining “National of another Contracting State” as “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.”

This proviso rules two different cases. The first one is the general rule in this topic, whereas the second one is an exception on which the parties can freely agree.

The first case encompasses 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.

The second case includes any juridical person which had the nationality of the contracting state party to the dispute on the date when the parties consented to submit such dispute to conciliation or arbitration and which, because of foreign control, the parties have agreed, should be treated as a national of another contracting state for the purposes of the Convention.

Therefore, these two kinds of juridical persons are entitled to submit requests for conciliation or arbitration in the ICSID environment.

However, as mentioned above, article 25 kept silent about the concept of nationality for the purposes of the Convention regarding both juridical persons and individuals.

An attempt was made during the meetings sponsored by the World Bank to define this term. The Preliminary Draft offered a double criterion for this purpose. This document, which was sent to the Regional Consultative Meetings, described a national of a contracting state as a natural or juridical person possessing the nationality of any contracting state, including a company “which under the domestic law of the State is its national” and any company “in which the nationals of that State have a controlling interest.”⁴⁸ In turn, a “company” was defined as “any association of natural or juridical persons, whether or not such associa-

⁴⁸ Broches, see note 1, 359.

tion is recognized by the domestic law of the Contracting State concerned as having juridical personality.”⁴⁹

This text reveals that, in a primary stage of the draft, both incorporation and control were deemed valid formulas for attributing nationality.

Notwithstanding this fact, the provision was subject to strong criticism by those who rejected the idea that a company created in accordance with the legislation of the host state could access the ICSID even in exceptional circumstances. On the other hand, it was also criticized by those who believed that “controlling interest” was too imprecise a term, capable of creating certain trouble in the case of companies incorporated in the host state but controlled by many different shareholders of several countries.⁵⁰

For these reasons, the proposition was finally left aside, and neither the Revised Draft nor the Convention contained stipulations on this subject.⁵¹

As in other situations previously stated, the drafters of the Convention considered that its voluntary character made it possible to leave this point at the discretion of the parties. In other words, it is up to the parties to determine the requirements that a company must accomplish for being treated as a foreigner within the framework of article 25. *Broches* underscored this point by saying, “the parties should be given the widest possible latitude to agree on the meaning of ‘nationality’ and any stipulation of nationality made in connection with a conciliation or arbitration clause which is based on a reasonable criterion should be accepted.”⁵²

Accordingly, article 25 was intended to fix the outer limits of that instrument leaving ample room to the parties to establish what kind of disputes may be submitted to conciliation or arbitration under the ICSID mechanism.

The parties’ will, in this respect, is generally expressed in the treaty where they agreed to submit their differences to that mechanism. The treaty contains statements about those matters on which the Convention remained silent. Thus, in these instruments we can usually find

⁴⁹ Quoted by Schreuer, see note 39, 276.

⁵⁰ Broches, see note 1, 359-360.

⁵¹ Schreuer, see note 39, 278.

⁵² Broches, see note 1, 361.

definitions regarding “investment”, “nationality”, “company” or other concepts that are part of the jurisdictional requirements of article 25.

With these elements at hand, it is possible to perceive ICSID jurisdiction as a double circle where the inner one is embodied by the stipulations of the treaty submitting the controversies between the parties to this entity, while the outer one is constituted by the provisions of the Convention related to this subject. The parties are only enabled to set regulations narrower than those of the Convention. Provisions which exceed its framework are not allowed.

In this way, the jurisdiction of a given ICSID Tribunal will depend on the fulfillment of both categories of requirements, namely those contained in the treaty and the general ones of article 25. The tribunal must equally examine if there exists consent in connection with the specific dispute, and if the nature of the dispute and the parties comply with the norms of the above mentioned provision.⁵³

This feature acquires greater importance for two reasons. The ICSID judicial bodies are the judges of their own competence as stated in arts 32 and 41 of the Convention. Likewise, the faculties of the Secretary-General devised in arts 28 and 36 to reject registration are restricted to a single case, that is to say, when the dispute is manifestly outside the jurisdiction of the Centre.

Departing from the rule stated in the *Barcelona Traction* case, whose scope he restricted exclusively to the diplomatic protection field, *Broches* pointed out that the Commission or Tribunal should favor giving effect to the agreement between the parties by adopting a more functional approach, taking into account not only formal criteria such as incorporation but adopting a broader approach which would give effect to economic realities such as ownership and control.⁵⁴

3. Interpretation of the Provision

As an introduction, it is useful to remember that the first instrument where the parties refer to this matter is the agreement which submits the differences between them to the ICSID. There, we can find a variety of provisions which deal with the nationality of juridical persons. The

⁵³ Alexandrov, see note 5, 25.

⁵⁴ Broches, see note 1, 361.

traditional criteria of incorporation, *siège social* and control are generally used as well as mixed formulas of them.⁵⁵

When the consent is based on foreign investment frameworks created by national legislations, these norms include definitions in this respect.

Regarding the wording of article 25, most scholars agree that it accepts, in a rather implicit way, either incorporation or incorporation and *siège social* as the valid formulas for attributing nationality. This stance is supported by several facts.

Since the first part of article 25 para. 2 lit. b) establishes the general rule in this matter (“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”), the second part becomes an exception (“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”).

Since the word “nationality” appears twice in this paragraph, it is likely that it has the same meaning in both cases. At the same time, if a juridical person, national of the host state, can be treated as a foreigner because of foreign control, this implies necessarily that the mechanism for attributing the host state nationality is other than control. For instance, the company can have this nationality due to incorporation or *siège social* and be treated as an alien because of control.

Thus, control constitutes the exception in this field and some of the other possible methods constitute the general rule.⁵⁶

This conclusion can also be supported applying the general rules of interpretation of treaties contained in article 31 of the Vienna Convention on the Law of Treaties, regarding good faith and the ordinary meaning given to the terms in the light of its object and purpose.⁵⁷

Moreover, scholars rely on the interpretations of article 25 made by ICSID Tribunals which uniformly pointed at incorporation or *siège social* as the accepted criteria in this matter.

⁵⁵ See under II. 2. b.

⁵⁶ Schreuer, see note 39, 278.

⁵⁷ UNTS Vol. 1155 No. 18232.

One finding that highlighted this point was issued in *SOABI v. Senegal* in the following terms,

“As a general rule, States apply either the head office or the place of incorporation criteria in order to determine nationality. By contrast, neither the nationality of the company’s shareholders nor foreign control, other than over capital, normally govern the nationality of a company, although a legislature may invoke these criteria in exceptional circumstances. Thus, ‘a juridical person which had the nationality of the Contracting State party to the dispute’, the phrase used in article 25 (2) (b) of the Convention, is a juridical person which, in accordance with the laws of the State in question, had its head office or has been incorporated in that State.”⁵⁸ Other rulings in the same direction were stated in *Kaiser Bauxite v. Jamaica* and *SPP v. Egypt*.⁵⁹

With this background, Prof. *Schreuer* asserted that “The overwhelming weight of the authority, outlined above, points towards the traditional criteria of incorporation or seat for the determination of corporate nationality under Art. 25 (2) (b).”⁶⁰

However, it is important to keep in mind, despite the clearness of the paragraph quoted above, that the finding of *SOABI v. Senegal* was issued in 1984, more than 20 years ago, in one of the first cases decided by an ICSID Tribunal, and not only international law but also the ICSID jurisprudence have witnessed important changes and new developments in the last two decades.

Whether the two criteria mentioned above, namely incorporation and *siège social*, should be the acceptable ones is a point that has not been decided yet by the scholars, and it is possible to find different opinions in this area.⁶¹

At this point it is advisable to hear the authoritative voice of *Broches*. He shared the point of view of other scholars in order to acknowledge that article 25 implicitly assumes incorporation as a criterion of nationality, but he rejected that this was the exclusive formula in this field.⁶² Accordingly, he fostered a more flexible approach aimed at making it possible to encompass economic realities such as ownership and control. The ICSID judiciary should generally endorse its jurisdiction

⁵⁸ Schreuer, see note 39, 280; also quoted by Alexandrov, see note 5, 35.

⁵⁹ Schreuer, *ibid.*, 279-280.

⁶⁰ Schreuer, *ibid.*, 281.

⁶¹ Schreuer, *ibid.*, 278-279.

⁶² Broches, see note 1, 361.

when interpreting investment agreements unless this position allows the parties to use the Convention for purposes for which it was clearly not intended.⁶³

It is important to realize that these opinions were given 34 years ago, when the world was divided into two blocs in political terms, foreign investment was a rather controversial subject, and many countries declined, for ideological reasons, to sign the Convention. Moreover, the ICSID jurisprudence at that time was a purely theoretical thing since the first case was brought before this entity in 1972, and the first adjudication was issued several years later.

The second part of article 25 para. 2 lit. b) contains an exception in the nationality field. This exception refers to an agreement of the parties in order to treat as a national of another contracting state, for the purposes of the Convention, a juridical person of the host state controlled by aliens.

The clear intention to restrict the framework of the Convention to the dispute between a state and nationals of other states, as is pointed out in its preamble, is one of the reasons for this provision. In other words, the conflicts between a state and its citizens are outside the scope of the ICSID and must be solved by other means, usually national courts. On the other hand, the requirements of the host state in order to transfer foreign investments by means of locally incorporated companies is the other reason for such a statement. The risk of leaving, without standing before the ICSID mechanism, an important number of foreign investors was carefully considered during the meetings. Thus, the Preliminary Draft granted this right even to the investors who had double nationality, one of them that of the host state. Similarly, this document attributed nationality to companies not only by way of the incorporation method but also by means of the control test. Both ideas were later abandoned due to resistance of the delegates. Regarding juridical persons, *Broches* proposed a draft which combined two formulas previously discussed, namely the parties' agreement and the controlling interest. This solution was finally adopted.⁶⁴

The formalities of this agreement were not specified in the text. Whereas consent to ICSID jurisdiction must be expressed in writing, according to article 25 para. 1, no similar requirement was stated regarding the agreement on nationality. This fact allows parties to have

⁶³ Broches, see note 1, 361.

⁶⁴ Schreuer, see note 39, 291-292.

some leeway about the way in which they express their consent. In this way, an explicit and an implicit agreement are equally acceptable. This conclusion has been supported by the ICSID jurisprudence upholding implicit agreements on several occasions. Even the sole existence of an arbitration clause giving jurisdiction to the ICSID has been deemed enough evidence of the existence of such agreement.⁶⁵

In connection with the meaning of “control”, in a first phase it pointed at an effective control or dominant position of foreign shareholders in order to meet this requirement.⁶⁶ However, as the ICSID jurisprudence has evolved towards a more flexible approach which gives direct standing to foreign shareholders even if they have a minority share in the local company, this matter has lost its importance. This change was possible by interpreting the term “investment” stated in article 25. Although the Convention did not define the word, the ownership of shares was one of the cases intended to fall under its scope. The same conclusion can be drawn from BITs with ICSID arbitral clauses since most of them include, as a kind of investment, shares and other interests in local companies.⁶⁷ The trend followed by the ICSID jurisprudence in this respect was described by Prof. *Schreuer* commenting on the adjudication in *Klöckner v. Cameroon* with these words,

“By substituting the foreign controller for the local company, the Tribunal bypassed the entire question of nationality and hence of foreign control. The tendency of tribunals to look beyond the identity of the company named in the consent agreement and to accept jurisdiction in respect of unnamed parent companies [...] could make the question of control over a local company at a particular time largely irrelevant.”⁶⁸

Whether the contracting state, whose nationality the parties have agreed to attribute to the juridical person of the host state because of foreign control, must be identified or not is not entirely clear. While a positive identification is advisable for practical reasons, some ICSID sentences have ruled in the opposite direction.⁶⁹

⁶⁵ Schreuer, *ibid.*, 297-299, quoting *Amco v. Indonesia*, *Klöckner v. Cameroon* and *Letco v. Liberia*.

⁶⁶ Schreuer, see note 39, 313.

⁶⁷ Alexandrov, see note 5, 28.

⁶⁸ Schreuer, see note 39, 329.

⁶⁹ Schreuer, *ibid.*, 301-305.

This situation has diminished its importance in recent years as there are few countries which have not entered into the Convention. However, among them are some important receivers of foreign investment like Brazil, Mexico and Russia. The latter signed the Convention in 1992, but its ratification is still pending.⁷⁰

In sum, this Chapter has dealt with the meaning of nationality regarding juridical persons within the framework of the ICSID Convention set out in article 25 para. 2 lit. b). The main findings in this respect are the following,

first, the general requirements of that article regarding jurisdiction are four,

- 1.) A legal dispute;
- 2.) arising directly out of an investment;
- 3.) between a contracting state and a national of another contracting state, that is to say, the investor;
- 4.) which the parties have consented in writing to submit to the ICSID.

Second, the Convention does not define several terms contained in this provision, like legal dispute, investment, juridical person and nationality. In the latter case, this silence includes natural and juridical persons alike.

Third, the main reason behind this fact was the belief that the precise delimitation of ICSID jurisdiction should be left to the parties' discretion. Thus, the article fixed only the outer limits of the Convention.

Fourth, consent of the parties is a key requirement of the provision, and it is irrevocable once given. Consent of states includes both the ratification of the Convention and the agreement to submit specific disputes to the ICSID. The latter is mainly fulfilled through BITs. The investor usually gives his consent by resorting to the ICSID proceedings.

Fifth, article 25 para. 2 lit. b) regulates the nationality of juridical persons establishing a general rule and an exception. The first one encompasses 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. The second one includes any juridical person which had the nationality of the contracting state party to the dispute on the date when the parties consented to submit such dispute to conciliation or arbitra-

⁷⁰ See List of Contracting States at the ICSID web site.

tion and which, because of foreign control, the parties have agreed should be treated as a national of another contracting state for the purposes of the Convention.

Sixth, interpreting article 25, most scholars accept that incorporation or incorporation and *siège social* embody the general rule for attributing nationality. Control constitutes the exception in this field. *Broches* pointed out a flexible criterion in this point looking for encompassing economic realities such as ownership and control, but underlining that an interpretation favoring ICSID jurisdiction should avoid being used against the objectives of the Convention.

Seventh, the ICSID jurisprudence has uniformly interpreted article 25 supporting incorporation and *siège social* as the prevailing criteria on the nationality ground.

Eighth, the exceptional situation outlined in the second part of article 25 pursued two goals. The first was to restrict the framework of the Convention exclusively to the disputes between a state and the nationals of other states. The second was to comply with the requirement of the host state in order to transfer foreign investments by means of locally incorporated companies.

Ninth, the exceptional situation explained in the previous paragraph has lost its importance as long as the ICSID judiciary, interpreting the term “investment”, has given direct standing to foreign shareholders even if they have a minority share in the locally incorporated company.

Against this background, the next Chapter will analyze the practical application of the norms referred to juridical persons by the ICSID Tribunals in several cases heard during the last few years.

IV. Case Study⁷¹

1. Banro American Resources (2000)

a.) The facts: an American company, *Banro American Resources*, hereinafter BAR, registered in the state of Delaware, resorted to the ICSID in 1998 against the Democratic Republic of the Congo (the Congo). BAR was a wholly-owned subsidiary of *Banro Resource Corporation*, a company registered in Ontario, Canada. The dispute concerned the alleged

⁷¹ All the quotations made in this Chapter have omitted the footnotes of the related findings.

expropriation by the Congo of the assets of SAKIMA, a subsidiary of BAR established and existing under the laws of that country in violation of a mining convention between the Congo, on the one hand, and *Banro Resource Corporation* and SOMINKI, on the other (the Mining Convention). SOMINKI had originally entered into a mining convention with the Congo for the exploration and development of mining rights in two Congo provinces. When the mining convention was due to expire, SOMINKI, *Banro Resource Corporation* and the Congo entered into a new convention, the Mining Convention, transferring to SAKIMA the mining concessions. The Mining Convention contained an ICSID arbitration clause for disputes between the parties arising out of the Mining Convention. In July 1998, the Congolese Government revoked the decrees which had approved the Mining Convention and the creation of SAKIMA due to alleged irregularities in the dissolution of SOMINKI and the creation of SAKIMA. In August 1998, *Banro Resource Corporation* transferred its SAKIMA shares to BAR, which thereby became the majority shareholder. BAR brought before the ICSID a request for arbitration against the Congo. SAKIMA joined as a requesting party in the proceeding. The request was registered by the Secretary-General of ICSID two months later.

Since before the constitution of the Tribunal the defendant raised objections referring to jurisdiction, the Tribunal decided to suspend the proceeding on the merits and focused on these objections.

Finally, the award was rendered on 1 September 2000, declining jurisdiction by a majority of the members of the Arbitral Tribunal.

b.) The ruling: although the problem posed in this case stemmed from the fact that Canada, the country of incorporation of *Banro Resource Corporation*, was not a member of the Convention and most of the adjudication dealt with the diplomatic protection topic, certain important considerations related to both the criteria of ICSID Tribunals in jurisdictional matters and the nationality of juridical persons in this context can be underscored.

Paragraph [7] of the ruling stated,

“A second approach would be to go beyond procedural appearances and to view the actual Claimants in these arbitration proceedings as the parent company of Banro American, namely Banro Resource, with SAKIMA acting in such a case as the Congolese subsidiary of Banro Resource. In other words, ‘the veil’ of the group’s structure would be ‘pierced’ to reveal the parent company as the actual Claimant in this proceeding. This approach, which would have the advantage of allow-

ing the financial reality to prevail over legal structures, would also be consistent with the press releases published on Banro Resource's website, which describe the measures adopted by the Congolese Government as targeting Banro Resource ..."

Paragraph [9], in turn, provided,

"The Tribunal has nevertheless considered that the issue of its jurisdiction in the present dispute cannot be limited to an analysis of the provisions of the Mining Convention. It has asked itself whether the jurisprudence of the ICSID tribunals does not require a certain flexibility regarding the identification of the Claimant for the purpose of determining the jurisdiction of the Tribunal."

Paragraph [10] added,

"Indeed, ICSID tribunals faced with such an issue have rarely proven to be formalistic. This was the case, in particular, in two situations: when the request was made by a member company of a group of companies while the pertinent instrument expressed the consent of another company of this group; and when, following the transfer of shares, the request came from the transferee company while the consent had been given by the company making the transfer."

Paragraph [11] pointed out,

"These few examples demonstrate that in general, ICSID tribunals do not accept the view that their competence is limited by formalities, and rather they rule on their competence based on a review of the circumstances surrounding the case, and, in particular, the actual relationships among the companies involved. This jurisprudence reveals the willingness of ICSID tribunals to refrain from making decisions on their competence based on formal appearances, and to base their decisions on a realistic assessment of the situation before them."

Paragraph [12] declared,

"It is for this reason that ICSID tribunals are more willing to work their way from the subsidiary to the parent company rather than the other way around. Consent expressed by a subsidiary is considered to have been given by the parent company, the actual investor, whose subsidiary is merely an 'instrumentality.' The extension of consent to subsidiaries that are not designated or not yet created, even following a transfer of shares, is less readily accepted."

The final part of para. [14] asserted,

"Beyond a literal analysis of the relevant provisions of the ICSID Convention and the Mining Convention, beyond the choice between a

realistic and a formalistic approach regarding the jurisdiction of ICSID tribunals, they are considerations that fall within the scope of public international law that take the present case outside the jurisdiction of the Centre and the Tribunal. This latter element requires particular attention on the part of the Tribunal.”

Finally, para. [25] affirmed,

“The Tribunal is fully aware of the need for a judicial regulation of the relationships arising out of foreign private investments. It is thus, with reluctance, that the Tribunal declared that it had no competence. It felt, however, that it was essential to maintain the fundamental consensual characteristic of the ICSID mechanism conferred by the Washington Convention, with regard to the host State, the foreign investor or the State of which the investor is a national. The ICSID mechanisms will be all the more efficient and effective if the conditions to their applications provided by the relevant texts are better respected.”⁷²

2. Autopista Concesionada de Venezuela (2001)

a.) The facts: in December 1996, *Autopista Concesionada de Venezuela, C.A. (AUCOVEN)*, a company incorporated under the laws of Venezuela, concluded a concession agreement with the Ministry of Infrastructure of that country for the construction and maintenance of two major highways, linking Caracas to La Guaira. At the time of the agreement, *AUCOVEN* was controlled by ICA, a Mexican subsidiary of ICA Holding. In June, 1998, following a request by *AUCOVEN*, the Ministry of Infrastructure authorized the transfer of 75 per cent of *AUCOVEN*'s shares to *ICATECH Corporation (ICATECH)*, a United States company. This authorization was given after ICA Holding accepted to financially guarantee the fulfillment of the concession agreement.

In June, 2000, *AUCOVEN* submitted a request for arbitration against Venezuela invoking the ICSID arbitration clause contained in the 1996 concession agreement. The Secretary-General of the ICSID registered the request in the same month.

Once the Tribunal was constituted, Venezuela raised some objections regarding jurisdiction. The Tribunal decided to suspend the proceeding while a determination on the issue of jurisdiction was pending.

⁷² Available at <www.worldbank.org/icsid/cases>.

Venezuela's objections to jurisdiction mainly focused on two provisions of the Convention, article 25 para. 2 lit. b) and article 27.

Reasoning about the exception stated in article 25 para. 2 lit. b) in order to give the status of a foreigner to a juridical person which has the nationality of the host state, Venezuela argued that the conditions of the provision were not met in this case. The defendant outlined two main arguments to support its position. Firstly, it contended the standing of *AUCOVEN* to initiate an ICSID proceeding since this company was in fact controlled by ICA Holding. In turn, ICA Holding was incorporated under the laws of Mexico, a non-member state of the convention. Furthermore, Mexican officials had sent written communications and held meetings with Venezuelan officials, this amounted to Mexico's diplomatic intervention confirming ICA Holding's direct interest in *AUCOVEN*. Secondly, Venezuela asserted that it had not consented to treat *AUCOVEN* as a national of the United States because its consent to ICSID jurisdiction, stated in the arbitration clause, depended on a transfer of actual control to a national of another contracting state.

The Tribunal, in a decision issued in September 2001, deemed that it had jurisdiction. This decision was mainly based on the finding that the criteria chosen by the parties to define foreign control were reasonable.

b.) The ruling: on the ground of the requirements of article 25 of the Convention and based on *Broches'* statements, it provided in para. 97, "The drafters of the Convention deliberately chose not to define the terms 'legal dispute' 'investment', 'nationality' and 'foreign control'. In reliance on the consensual nature of the Convention, they preferred giving the parties the greatest latitude to define these terms themselves, provided that the criteria agreed upon by the parties are reasonable and not totally inconsistent with the purposes of the Convention."

Analyzing the exception of article 25 para. 2 lit. b) para. 105 stated, "The Convention does not require any specific form for the agreement to treat a juridical person incorporated in the host state as a national of another Contracting State because of foreign control."

Expounding the possible criteria on nationality and following *Broches'* and *Schreuers'* texts, para. 107 asserted, "According to international law and practice, there are different possible criteria to determine a juridical person's nationality. The most widely used is the place of incorporation or registered office. Alternatively, the place of the central administration or effective seat may also be taken into consideration."

Paragraph 109 added, "However, as stated by Aron Broches, the purpose of article 25 (2) (b) being to indicate 'the outer limits within

which disputes may be submitted to conciliation or arbitration under the auspices of the Centre', the parties should be given 'the widest possible latitude' to agree on the meaning of nationality. Any definition of nationality based on a 'reasonable criterion' should be accepted."

In the field of foreign control, para. 110 affirmed, "Like the other objective requirements of article 25 of the ICSID Convention, foreign control is not defined. Article 25 (2) (b) does not specify the nature, direct, indirect, ultimate or effective, of the foreign control."

Paragraph 114 pointed out, "Given the autonomy granted to the parties by the ICSID Convention, an Arbitral Tribunal may not adopt a more restrictive definition of foreign control, unless the parties have exercised their discretion in a way inconsistent with the purposes of the Convention."

Paragraph 116 expressed, "On the basis of the foregoing developments, it is the task of the Tribunal to determine whether the parties have exercised their autonomy within the limits of the ICSID Convention, i.e. whether they have defined foreign control on the basis of reasonable criteria. For this purpose, the Tribunal has to review the concrete circumstances of the case without being limited by formalities. However, as long as the definition of foreign control chosen by the parties is reasonable and the purposes of the Convention have not been abused (for example in cases of fraud or misrepresentation), the Arbitral Tribunal must enforce the parties' choice."

Studying the parties' agreement contained in Clause 64, para. 119 declared, "As a general matter, the arbitral Tribunal accepts that economic criteria often better reflect reality than legal ones. However, in the present case, such arguments of an economic nature are irrelevant. Indeed, exercising the discretion granted by the Convention, the parties have specifically identified majority shareholding as the criterion to be applied. They have not chosen to subordinate their consent to ICSID arbitration to other criteria."

Paragraph 120 added, "As a result, the Tribunal must respect the parties' autonomy and may not discard the criterion of direct shareholding, unless it proves unreasonable."

The final paragraph is also interesting, "Finally, the Tribunal is aware that the ICSID award in *Banro* (*Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema, S.A.R.L. v. the Democratic Republic of the Congo* (Case No. ARB/98/7)) reached a different conclusion. However, the circumstances in *Banro* were different too. In *Banro* the transfer of shares was not subject to the approval of the Gov-

ernment and, more importantly, the parties had not contractually defined the test for foreign control. As a result of these differences, the Arbitral Tribunal is of the opinion that an analogy between *Banro* and the present case is inapposite.”⁷³

3. Champion Trading Company (2003)

a.) The facts: in 1992, a treaty between the United States of America and the Arab Republic of Egypt concerning the Reciprocal Encouragement and Protection of Investments entered into force.

In 2002, the shareholders of the *National Cotton Company (NCC)*, a cotton trading and processing company incorporated in Egypt, contended that this country had violated the treaty by taking a series of measures in the cotton industry affecting their investment. The shareholders of *NCC* were two American companies and three brothers who were born in the United States. In turn, both American companies were owned by the same three individuals and their parents. The father was born in Egypt and later became a citizen of the United States. The mother was American. Neither the father nor the mother were part of the proceedings.

Accordingly, the five claimants brought the case before the ICSID. The request for arbitration was registered in August of the same year. In March, 2003, the respondent raised objections to the jurisdiction of the Tribunal, which the latter decided to deal with as a preliminary matter.

These objections were twofold. On the one hand, they contended that the individuals acting as claimants, three brothers who were described as United States nationals in the request for arbitration, in fact also held Egyptian nationality. However, dual nationality was not accepted by article 25 para. 2 lit. a) of the Convention as described above. Thus, they had no right to access the ICSID arbitration mechanism.

On the other hand, the respondent also objected that the corporate claimants, two companies incorporated in the state of Delaware, did not fit in with the requirements of the treaty to qualify as United States companies. The treaty required that natural persons who are United States nationals had a substantial interest in a company in order to see it as a United States corporation. In this way, since the majority of the

⁷³ Available at <www.worldbank.org/icsid/cases>.

shareholders in the corporate claimants were dual American and Egyptian nationals, the criterion of “substantial interest” had not been demonstrated.

b.) The ruling: in connection with the objection related to the individuals’ nationality, the Tribunal stated in para. 3.4.1 the following, “All three individual Claimants were born in the United States of America as sons of Dr. Mahmoud Ahmed Mohamed Wahba, born at Kafr-El-Sheikh, Egypt, on February 12, 1941 and Mrs Susanne Patterson Wahba, born in Minnesota, USA, on June 24, 1944.” “The Parties are in agreement that a child born of an Egyptian father, either within or outside Egypt, automatically acquires at birth Egyptian nationality if at that time the father holds Egyptian nationality.”

“It is uncontested that Dr. Mahmoud Wahba, on March 27, 1997, applied for an Egyptian personal identity card (Exhibit D90) and that he received the identity card. It is also not contested that he carried the Egyptian passport No 287, issued by the Consulate of the Arab Republic of Egypt in the United States of America in 1992, and that he used this passport extensively for travels to Egypt, at least between the period of 1995 and 1997.”

“The Arbitral Tribunal therefore comes to the conclusion that at the time the three individual Claimants were born their father still possessed his Egyptian nationality and that therefore under Egyptian law the three individual Claimants upon birth automatically acquired the Egyptian nationality.” “The Tribunal therefore holds that it does not have jurisdiction over the claims of the three individual Claimants.”

Related to the two corporate claimants, the Tribunal issued a short statement in para. 3.4.2, “According to article I (b) of the Treaty ‘Company of a Party’ means a company duly incorporated, constituted, or otherwise duly organised under the applicable laws and regulations of a Party or its subdivision in which

- (i) natural persons who are nationals of such Party
- (ii) ...
- (iii) have a substantial interest.”

Article 25 para. 2 lit. b) of the Convention states, the term “National of another Contracting State” is defined as “any juridical person which had the nationality of a Contracting State other than the State party to the dispute”

It is not disputed that *Champion Trading Company* was incorporated in the state of Delaware on 24 July 1995 and *Ameritrade Interna-*

tional Inc. was likewise incorporated in the state of Delaware on 20 May 1992.

According to the uncontested statement of the claimants, the shareholders of both companies are the natural persons Mahmoud Wahba, Susanne Patterson Wahba, James T. Wahba, John B. Wahba and Timothy T. Wahba and each of these five individuals holds 20 per cent of the capital of each company.

Neither the treaty nor the convention contain any exclusion of dual nationals as shareholders of companies of the other contracting state, contrary to the specific exclusion of article 25 para. 2 lit. a) of the Convention regarding natural persons.

The respondents did not adduce any precedents or learned writings according to which dual nationals could not be shareholders in companies bringing an ICSID action under the treaty.

The Tribunal therefore holds that it does have jurisdiction over the claims of the two corporate claimants.⁷⁴

4. Tokios Tokelés (2004)

a.) The facts: the claimant, *Tokios Tokelés*, was a business enterprise established under the laws of Lithuania. It was founded as a cooperative in 1989, and, by 1991, had been registered as a “closed joint-stock company.” The claimant was engaged primarily in the business of advertising, publishing and printing in Lithuania and outside its borders. In 1994, *Tokios Tokelés* created Taki spravy, a wholly owned subsidiary established under the laws of Ukraine. Taki spravy was in the business of advertising, publishing, and printing, and related activities in Ukraine and outside its borders.

Tokios Tokelés, submitted its dispute with Ukraine to the ICSID under the 1994 Agreement between the Government of Ukraine and the Government of the Republic of Lithuania for the Promotion and Reciprocal Protection of Investments, which entered into force in 1995 (the Treaty). It alleged that certain governmental authorities in Ukraine had taken a series of measures violating the Treaty in respect of its subsidiary in Ukraine, Taki spravy, in which *Tokios Tokelés* had made investments. The claimant contended that these measures, mainly pertaining to tax investigations, were in fact retaliation for a publication issued

⁷⁴ See note 72.

by Taki spravy concerning a Ukrainian opposition politician in January 2002.

When the dispute arose, three Ukrainian nationals owned 99 per cent of the shares in *Tokios Tokelés*, and a national of Lithuania owned the remaining one percent.

The claimant's request for arbitration was registered by the ICSID in December 2002. Subsequently, the respondent raised objections to the jurisdiction of the Tribunal, which the Tribunal decided to deal with as a preliminary matter.

These objections mainly pertained to the claimant's nationality and its investment. The respondent first observed that the claimant was owned and controlled 99 per cent by Ukrainian nationals and further argued that it did not have any substantial business activities or its *siège social* in Lithuania. The respondent thus stated that the real claimants were in fact Ukrainian nationals pursuing an international arbitration against their own government, which would be inconsistent with the object and purpose of the Convention. It therefore requested that the Tribunal "pierce the corporate veil" to determine the nationality of the claimant based on that of its predominant shareholders and managers.

Likewise, the defendant contended that, even if the claimant were a Lithuanian investor, it did not make an "investment" in Ukraine because it did not show that the source of capital originated outside Ukraine and that, in any event, an investment was not made in accordance with the laws and regulations of Ukraine as required by the Treaty.

The Tribunal dismissed the arguments of the defendant and, by a majority vote issued in April 2004, decided that the dispute was within the jurisdiction of the Centre and the competence of the Tribunal.

b.) The ruling: regarding the nationality of the claimant, paras 21 and 22 established,

"The Respondent does not dispute that the Claimant is a legally established entity under the laws of Lithuania. The Respondent argues, however, that the Claimant is not a 'genuine entity' of Lithuania first because it is owned and controlled predominantly by Ukrainian nationals. There is no dispute that nationals of Ukraine own ninety-nine percent of the outstanding shares of *Tokios Tokelés* and comprise two-thirds of its management. The Respondent also argues, but the Claimant strongly contests, that *Tokios Tokelés* has no substantial business activities in Lithuania and maintains its *siège social*, or administrative headquarters, in Ukraine. The Respondent

contends, therefore, that the Claimant is, in terms of economic substance, a Ukrainian investor in Lithuania, not a Lithuanian investor in Ukraine.

The Respondent argues that to find jurisdiction in this case would be tantamount to allowing Ukrainian nationals to pursue international arbitration against their own government, which the Respondent argues would be inconsistent with the object and purpose of the ICSID Convention. To avoid this result, the Respondent asks the Tribunal to ‘pierce the corporate veil,’ that is, to disregard the Claimant’s state of incorporation and determine its nationality according to the nationality of its predominant shareholders and managers, to what the Respondent contends is the Claimant’s lack of substantial business activity in Lithuania, and to the alleged situs of its *siège social* in Ukraine.”

On the ground of nationality of juridical entities under article 25 of the Convention, para. 25 stated, “Thus, we begin our analysis of this jurisdictional requirement by underscoring the deference this Tribunal owes to the definition of corporate nationality contained in the agreement between the Contracting Parties, in this case, the Ukraine-Lithuania BIT.”

About the definition of “Investor” in the BIT, para. 28 pointed out, “article 1 (2) (b) of the Ukraine-Lithuania BIT defines the term ‘investor’, with respect to Lithuania, as ‘any entity established in the territory of the Republic of Lithuania in conformity with its laws and regulations’.”

The ordinary meaning of “entity” is “[a] thing that has a real existence.” The meaning of “establish” is to “[s]et up on a permanent or secure basis; bring into being, found (a ... business).” Thus, according to the ordinary meaning of the terms of the treaty, the claimant is an “investor” of Lithuania if it is a thing of real legal existence that was founded on a secure basis in the territory of Lithuania in conformity with its laws and regulations. The treaty contains no additional requirements for an entity to qualify as an “investor of Lithuania.”

In the same field, para. 31 explained,

“The object and purpose of the Treaty likewise confirm that the control-test should not be used to restrict the scope of ‘investors’ in article 1(2)(b). The preamble expresses the Contracting Parties’ intent to ‘intensify economic cooperation to the mutual benefit of both States’ and ‘create and maintain favourable conditions for investment of investors of one State in the territory of the other State.’ The Tribunal in *SGS*

v. Philippines interpreted nearly identical preambular language in the Philippines-Switzerland BIT as indicative of the treaty's broad scope of investment protection. We concur in that interpretation and find that the object and purpose of the Ukraine-Lithuania BIT is to provide broad protection of investors and their investments."

Reasoning on the consistency of article 1 para. 2 of the BIT with the Convention, the first part of para. 42 provided,

"In our view, the definition of corporate nationality in the Ukraine-Lithuania BIT, on its face and as applied to the present case, is consistent with the Convention and supports our analysis under it. Although article 25 (2) (b) of the Convention does not set forth a required method for determining corporate nationality, the generally accepted (albeit implicit) rule is that the nationality of a corporation is determined on the basis of its *siège social* or place of incorporation."

Accordingly, para. 46, in its first part, asserted, "The use of a control-test to define the nationality of a corporation to *restrict* the jurisdiction of the Centre would be inconsistent with the object and purpose of article 25(2) (b)."

Next, the adjudication analyzed the doctrine of "veil piercing". In this respect, paras 53 and 54 expounded, "Finally, we consider whether the equitable doctrine of 'veil piercing', to the extent recognized in customary international law, should override the terms of the agreement between the Contracting Parties and cause the Tribunal to deny jurisdiction in this case."

The seminal case, in this regard, is *Barcelona Traction*. In that case, the ICJ stated, "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." In particular, the Court noted,

"[t]he wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, 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."

Accordingly, the first part of para. 55 affirmed, "The Respondent has not made a *prima facie* case, much less demonstrated, that the Claimant has engaged in any of the types of conduct described in *Barcelona Traction* that might support a piercing of the Claimant's corporate veil."

In turn, the last part of para. 56 added, “The Claimant manifestly did not create Tokios Tokelės for the purpose of gaining access to ICSID arbitration under the BIT against Ukraine, as the enterprise was founded six years before the BIT between Ukraine and Lithuania entered into force. Indeed, there is no evidence in the record that the Claimant used its formal legal nationality for any improper purpose.”

Bearing in mind all these elements, para. 71 declared, “The Tribunal concludes that the Claimant is an ‘investor’ of Lithuania under article 1 (2) (b) of the BIT and a ‘national of another Contracting State’, under article 25 of the Convention.”

The last paragraphs of the sentence are dedicated to study and dismiss the objections of the defendant related to the term “investment”. The latter contended that the claimant had not made an investment covered by the BIT between Lithuania and Ukraine.

In this sense, the first part of para. 78 expressed, “We conclude that, under the terms of the BIT, both the enterprise Taki spravy and the rights in the property described in the above-referred ‘Informational Notices’, are assets invested by the Claimant in the territory of Ukraine. The investment would not have occurred but for the decision by the Claimant to establish an enterprise in Ukraine and to dedicate to this enterprise financial resources under the Claimant’s control. In doing so, the Claimant caused the expenditure of money and effort from which it expected a return or profit in Ukraine.”

Moreover, para. 79, in its first part, stated, “The Tribunal’s finding under the BIT is also consistent with the ICSID Convention. The broad definition of ‘investment’ in the Lithuania-Ukraine BIT is typical of the definition used in most contemporary BITs.”

c.) The dissenting vote of Prof. Prosper Weil, referring to the purpose of the Convention, paras 4 and 5 explained,

“The Convention, for its part, refers in its Preamble to ‘the possibility that from time to time disputes may arise in connection with ... investment between Contracting States and nationals of other Contracting States.’

[W]hile such disputes, so the Preamble states, would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases; that is why it has been regarded as appropriate to establish ‘facilities for international arbitration ... to which Contracting States and nationals of other Contracting States may submit such disputes if they so desire’.

Accordingly, article 25 para. 1 of the Convention establishes the jurisdiction of the Centre over disputes ‘between a Contracting State ... and a national of another Contracting State’ Over other disputes the Centre has no jurisdiction.”

“From this it appears that the ICSID arbitration mechanism is meant for *international* investment disputes, that is to say, for disputes between States and *foreign* investors. It is because of their *international* character, and with a view to stimulating private *international* investment, that these disputes may be settled, if the parties so desire, by an *international* judicial body. The ICSID mechanism is not meant for investment disputes between States and their own nationals. This is in effect not disputed by the Claimant since in its Opening Statement it declared that:

... this Convention has as its express purpose the encouragement of international private investment. We can agree with the Respondent that the ICSID Convention prohibits a host State from being sued by its own nationals with the single exception of the circumstances foreseen by the second clause of article 25 (2) (b).”

Regarding the case at stake, he asserted in para. 10,

“It is, I think, the first time that an ICSID tribunal has to address the specific problem of a dispute opposing to State A (Ukraine) a corporation which has the nationality of State B (Lithuania) but which is controlled by citizens of State A (Ukraine) – so much so that the dispute, while formally meeting the condition of being between a Contracting State and a national of another Contracting State, is in actual fact between a Contracting State and a corporation controlled by nationals of that State. In some instances, there may be doubts about whether the corporation is, or is not, to be regarded as being controlled by nationals of the respondent State, and a choice will then have to be made between various possible criteria. In the present case, however, where Tokios Tokelés is indisputably and totally in the hands of, and controlled by, Ukrainian citizens and interests, there is no evading the issue of principle.”

The first part of para. 11 added,

“The Decision rests on the idea that the Ukrainian origin of the capital invested by Tokios Tokelés in Taki spravy and the Ukrainian nationality of Tokios Tokelés’ shareholders and managers are irrelevant to the application of both the Convention and the BIT. What is relevant and decisive, according to the Decision, is the fact that the investment

has been made by a corporation of Lithuanian nationality, whatever the origin of its capital and the nationality of its managers.”

Paragraph 13 stated,

“The Decision thus accepts, as a matter of principle, that the provisions of the BIT governing the jurisdiction of the ICSID tribunals can be given effect only within the limits of the jurisdiction defined in the Convention. It refers to that effect to Broches’ well-known phrase that the Convention determines the ‘outer limits’ of the jurisdiction of the ICSID and its tribunals. In other words, it is within the limits determined by the basic ICSID Convention that the BITs may determine the jurisdiction and powers of the ICSID tribunal, and it is not for the Contracting Parties in their BIT to extend the jurisdiction of the ICSID tribunal beyond the limits determined by the basic ICSID Convention. From this it follows that, while the Contracting Parties to the BIT are free to confer to the ICSID tribunal a jurisdiction narrower than that provided for by the Convention, it is not for them to extend the jurisdiction of the ICSID tribunal beyond its determination in the Convention.”

Accordingly, the first sentences of para. 14 affirmed,

“To decide the jurisdictional issue the Decision should, therefore, have checked *first* whether the Tribunal has jurisdiction under article 25 of the Convention—interpreted, as the Decision recalls, in light of its object and purpose—and *then*, in a second stage, whether it has jurisdiction *also* under the bilateral investment treaty. It is only if the tribunal had reached the conclusion that it has jurisdiction under the Convention that it would have had to examine whether it has jurisdiction *also* under the BIT. This, however, is not how the Decision proceeds.”

Paragraph 17 posed the key issue, “The central question before the Tribunal was thus as follows: Does Tokios Tokelés meet the requirement of having, for the purposes of the Convention, the nationality of Lithuania—in which case the Tribunal has to affirm its jurisdiction—, or is it to be regarded for the purposes of the Convention as being an Ukrainian corporation because it is indisputably under Ukrainian control—in which case the Tribunal has no jurisdiction?”

In turn, para. 19 declared,

“This raises the single most important issue which lies at the heart of my dissent. As observed earlier, the silence of the Convention on the criterion of corporate nationality does not leave the matter to the discretion of the Parties.

According to article 31 of the Vienna Convention on the Law of Treaties, which the International Court of Justice has repeatedly described as the expression of customary international law, '[a] treaty shall be interpreted ... in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.' It is indisputable, and indeed undisputed, that the object and purpose of the ICSID Convention and, by the same token, of the procedures therein provided for are not the settlement of investment disputes between a State and its own nationals. It is only the international investment that the Convention governs, that is to say, an investment implying a transborder flux of capital. This appears from the Convention itself, in particular from its Preamble which refers to 'the role of private international investment' and, of course, from its article 25. This appears also from the passages in the *Report of the Executive Directors* quoted above. As Professor Schreuer writes:

The basic idea of the Convention, as expressed in its title, is to provide for dispute settlement between States and foreign investors ...

Disputes between a State and its own nationals are settled by that State's domestic courts ...

The Convention is designed to facilitate the settlement of investment disputes between States and nationals of other States. It is not meant for disputes between States and their own nationals.

The latter type of dispute is to be settled by domestic procedures, notably before domestic courts.

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

Paragraph 28 confronted the view chosen by the majority vote as follows,

"Paragraph 82 [of] the Decision states that Ukraine, Lithuania and other Contracting Parties chose their methods of defining corporate nationality and the scope of covered investment in BITs with confidence that ICSID arbitrators would give effect to those definitions. That confidence is premised on the ICSID Convention itself, which leaves to the reasonable discretion of the parties the task of defining key terms. We would be loathe to undermine it.

While it may be for private parties within the framework of a private, purely commercial, contractual relationship ‘to chose their methods of defining corporate nationality,’ this does not hold true to the same extent when the application of the ICSID Convention is involved. The restrictions imposed on, and the rights accorded to, the parties by the Convention are based on the nationality of the party other than the ‘Contracting State,’ and it cannot be assumed that the parties are free to dispose at will of these restrictions and rights by playing with the definition of corporate nationality. In particular, article 26 provides that, unless otherwise stated, consent of the parties to arbitration under the Convention is exclusive of any other remedy, and article 27 prohibits a Contracting State from giving diplomatic protection, or bringing an international claim, in respect of a dispute which one of its nationals and another Contracting State have consented to submit, or have submitted, to arbitration under the Convention, unless the State party to the dispute fails to honor the award rendered in that dispute. Chapter II of the Convention (‘Jurisdiction of the Centre’), which, in the words of the *Report of the Executive Directors*, defines ‘the limits within which the provisions of the Convention will apply and the facilities of the Centre will be available’, is the cornerstone of the system. Even assuming that the definition of these ‘limits’-in particular, the definition of the key term ‘national of another Contracting Party’-is left to the discretion of the Parties, this, as the Decision recognizes, holds true only insofar as this discretion is ‘reasonable’... There can be no question of leaving unconditionally to the parties the task of determining the scope of application of the Convention along with the rights and duties it places upon both parties. This would frustrate the system by putting its extent in the hands of the parties and at their discretion, thus making the provisions of its Chapter II, and more particularly of its central and crucial article 25, a purely optional clause. This, in my view, is unacceptable. This, however, is what the Decision does.”

Paragraph 30 concluded,

“To sum up: The ICSID mechanism and remedy are not meant for, and are not to be construed as, allowing-and even less encouraging-nationals of a State party to the ICSID Convention to use a foreign corporation, whether preexistent or created for that purpose, as a means of evading the jurisdiction of their domestic courts and the application of their national law. It is meant to protect and thus *encourage-international* investment. It is regrettable, so it seems to me, to put the extraordinary success met by ICSID at risk by extending its scope and application beyond the limits so carefully assigned to it by the Conven-

tion. This might dissuade Governments either from adhering to the Convention or, if they have already adhered, from providing for ICSID arbitration in their future BITs or investment contracts.”⁷⁵

The main findings of this Chapter are the following:

First, ICSID arbitral tribunals have dealt with the nationality of juridical persons in several cases during the last years.

Second, the rulings have shown that the ICSID judiciary relies entirely on the parties’ autonomy on the ground of the definitions of corporate nationality. However, two limits can be identified in this respect: when those definitions are not reasonable and when they go against the purposes of the Convention.

Third, when interpreting the provisions of BITs or other instruments where the parties have given their consent, the tribunals are prone to accept jurisdiction rather than to deny it.

Fourth, in general, the ICSID judiciary does not restrict its conclusions in the jurisdiction field guided by formal appearances. Instead, its decisions are made based on a realistic assessment of the situation.

Fifth, the previous statement also embodies the view that economic criteria often better reflect reality than legal ones.

Sixth, ICSID rulings have uniformly interpreted the general rule of article 25 by applying either incorporation or *siège social* as the acceptable criteria set by this provision.

Seventh, ICSID jurisprudence has seen stipulations of article 25 as the outer limits of its jurisdiction regarding juridical persons’ nationality.

Eighth, at least twice in recent years ICSID tribunals have dealt with proceedings where the defendants were contracting states and the claimants foreign companies with investments in those states but owned by nationals of the defendants.

Ninth, the first of these cases was *Champion Trading Company and others v. Arab Republic of Egypt*, where the corporate claimants were owned by individuals who had double nationality, that is to say, American and Egyptian nationality. The second one was *Tokios Tokelés v. Ukraine*, where the overwhelming majority of the shares of the claimant belonged to Ukrainian nationals.

⁷⁵ See note 72.

Tenth, in both cases the adjudication supported the jurisdiction of the arbitral tribunals based on the provisions of the BITs regarding nationality which stipulated the incorporation criterion in this respect. Moreover, in at least one of these cases a request for piercing the corporate veil overruling the stipulations of the treaty was denied.

Eleventh, the last of these cases was decided against the opinion of the President of the Tribunal who issued a strong dissenting opinion contesting the jurisdiction of the tribunal due to the nationality of the claimant's shareholders.

V. Conclusions

This work has reviewed the main elements on the ground of the nationality of juridical persons both in the realm of international law and, specifically, in the framework of the ICSID Convention.

In the first area, it is possible to assert that the issue of corporate nationality has been developed in the diplomatic protection field where three formulas to attribute corporate nationality were devised. These formulas are based on the place of incorporation, the *siège social* and the control of the company. The last one requires identifying who are the owners of it piercing the corporate veil.

Likewise, there has been a consistent trend to lower the requirements about nationality in the diplomatic protection field allowing a prompt and expedite access to this mechanism for shareholders. This fact implies a recognition of the underlying economic interests in a foreign investment.

However, the globalization of the free economic system has left behind the criteria of diplomatic protection, demanding the creation of new formulas to protect foreign investment. The ICSID mechanism has a crucial role in this new scenario since it is seen as the more appropriate forum to solve the disputes on investment matters maintaining a fair balance between the states and the investors.

Entering in the ICSID framework, the Convention remained silent on the issue of corporate nationality. The main reason for this approach was the belief that the precise delimitation of the ICSID jurisdiction should remain in the hands of the parties, bearing in mind the voluntary character of the convention. Thus, this instrument fixed only the outer limits in this matter.

The precise scope of the parties' consent is usually contained in the BITs or other instruments which submit the investment disputes to the ICSID. Lately, these treaties have become the most fertile source of definitions about the nationality of juridical persons in the international context applying some of the three above mentioned criteria or combinations of them.

Although article 25 para. 2 lit. b) of the Convention does not define the nationality of juridical persons, it regulates this matter establishing a general rule and an exception. Interpreting this provision, scholars point at incorporation or *siège social* as the general rule as long as control was expressly established as the exception. This position has been confirmed by the ICSID jurisprudence.

At the same time, this jurisprudence has relied entirely on the parties' autonomy on the ground of the definitions of corporate nationality with two limits: when those definitions are not reasonable and when they go against the purposes of the convention. Moreover, the arbitral tribunals have interpreted the instruments which contain the parties' consent favoring jurisdiction.

An other feature of the ICSID judiciary is that its conclusions in the jurisdiction field are based on realistic assessments of the situation rather than on formal appearances. This fact enables that real economic interests can emerge.

A dispute where the defendant was a contracting state and the claimant a foreign company with investments in this state but owned by nationals of the defendant is a new phenomenon, since only in two cases to date have the ICSID Tribunals dealt with this situation. In both cases the adjudications favored jurisdiction based on the parties' autonomy expressed in the provisions of the BITs regarding nationality.

As stated in the Introduction, the purpose of this article was to verify whether the lack of a definition about the nationality of juridical persons in the Convention allows a discretionary interpretation of this issue.

Despite the silence of article 25 in this matter, I do believe that the nationality of juridical persons is not a discretionary matter.

This conclusion stems from the analysis made throughout this work. This analysis reflects two clear things: on the one hand, the interpretation of article 25 necessarily leads to a general rule embodied by incorporation or *siège social* and an exception typified by control. On the other hand, the ICSID Tribunals have uniformly supported this scope in their findings.

This assertion is upheld by abundant evidence in the scholars' context and in the judicial field. However, other reflections are also possible.

In my opinion, it is clear that the indisputable trend in the economic field of modern international law is to maintain that substance prevails over form. Thus, the real interests behind the investment can emerge.

Probably, this tendency began departing from the vision stated in the *Barcelona Traction* case which embodied the opposite stance. The dangers of a formalistic approach were underlined in that case by the fact that the real victims of the measures of Spain, that is to say the Belgian shareholders, were left without shelter by the ICJ.

This trend has been expressed both in the field of diplomatic protection lowering the requirements for resorting to this mechanism and in the area of the ICSID Convention allowing direct standing to foreign shareholders of locally incorporated companies among other developments.

Having left behind the ideological conflicts about its existence and purposes and with a large number of new member states, the convention has to face new challenges looking at the future.

These challenges are more likely to appear due to the increasing number of cases steadily taken before the ICSID judiciary.

Thus, disputes which involve companies incorporated abroad but owned by nationals of the host state pursuing international arbitrations against the latter, is one of these challenges.

This situation can occur, for instance, when nationals of a country do not trust their judicial authorities which encourage them to invest by means of companies incorporated in a state member of ICSID. In this way, the chance to protect their investments by resorting to the ICSID mechanism will always be open.

As seen before, until now this situation has occurred in the ICSID environment on only two occasions. Nevertheless, as long as those who want to take advantage of the Convention in order to invest in their own countries realize that its norms can be easily bypassed, new disputes regarding this subject are foreseeable.

The ICSID judiciary must be fully aware of this risk, which clearly falls outside of the scope of the Convention. In this sense, new formulas that let substance prevail over form must appear.

For instance, the adjudication in the *Tokios Tokelés* case based its reasoning for denying the veil piercing on the same criteria stated in the

Barcelona Traction case 34 years before.⁷⁶ Because the damage caused to the Belgian shareholders stemmed precisely from the rejection of the Court to devise new situations where the veil piercing could be applied, further developments in this field were encouraged.

Accordingly, if the protection of shareholders experienced great advances after the *Barcelona Traction* case not only in the diplomatic protection field but also in international law as a whole, we should expect similar improvements to preserve the essential role of ICSID, namely its character as a forum to arbitrate international disputes.

In spite of the fact that most of the scholars have upheld the majority vote in the *Tokios Tokelés* case, this is an interesting warning about the dangers that can darken the future of the Convention.⁷⁷

In sum, further advances are likely to occur in the area of the nationality of juridical persons in the ICSID context during the next years to preserve both substance over form and the international status of the Convention.

⁷⁶ See paras 53 and 54 of the sentence reproduced in Chapter IV.

⁷⁷ E.g., G. Wisner/ N. Gallus, "Nationality Requirements in Investor State-Arbitration", *The Journal of World Investment and Trade* 5 (2004), 927 et seq. (942-944), and note 5, 37-40.