



Locus Standi of Locally Incorporated Companies and Shareholders
under ICSID Convention and BITs

A thesis submitted to the New Vision University Master of Comparative Private and
International Law Program for the award of the Master of Laws (“LL.M.”) Degree

Nino Khizanishvili

2021

Supervisor: Davit Atabegashvili

Contents

LIST OF ABBREVIATIONS.....	3
INTRODUCTION.....	4
CHAPTER 1. The Basic Requirements for the ICSID Convention Jurisdiction	7
1.1 Consent to submit the Dispute to the ICSID Arbitration	7
1.2 Elements of the ICSID Jurisdiction’s Subject-matter.....	11
1.2.1 The Dispute.....	11
1.2.2 The Legal nature of the Dispute	12
1.2.3 Directness of the Dispute	13
1.2.4 Investment	15
1. Subjective Meaning of Investment under International Investment Agreements (IIA)	16
2. Objective Meaning of Investment	17
1.3. Ratione Personae Requirements	20
1.3.1 Parties of the Dispute.....	20
1. Host state	20
2. Foreign Investor	22
2.1 Nationality of Individuals.....	23
2.2 Dual Nationality	24
2.3 “Foreignness” of Corporate Investors	24
2.3.1 The Place of Incorporation.....	25
2.3.2 Foreign Control of the Locally Incorporated Company – Article 25(2)(b).....	26
1.4 Interim Conclusion	27
CHAPTER 2. Claims of Shareholders and Locally Incorporated Companies	29
2.1 Locus Standi of Locally Incorporated Companies	29
2.2 Parent Companies	33
2.3 Shareholding as Investment.....	35
2.3.1 Majority Shareholders.....	36
2.3.2 Minority Shareholders	38
2.3.3 Indirect Shareholders.....	41
2.3.4 Intermediate Corporations.....	44
2.4 Interim Conclusion	48

CHAPTER 3. The Legal Complexities of the Generous Extension of Rights to Shareholders 49

 3.1 Multiple, Parallel Claims..... 49

 3.2 Orascom TMT v Algeria..... 50

 3.2.1 Abuse of Rights 52

 3.2.2 Double Recovery..... 53

 3.3 Interim Conclusion 54

CONCLUSION.....55

BIBLIOGRAPHY... .. 56

LIST OF ABBREVIATIONS

BIT	Bilateral investment treaty
Ed.	Edition
Ibid.	Ibidem, exact same location in the previous citation
ICSID	The International Centre for Settlement of Investment Disputes
Id.	Idem, another page in the previous citation
IIA	International investment agreement
MIT	Multilateral investment treaty
No.	Number
p./pp.	Page/Pages
para./paras.	Paragraph/Paragraphs
Sec.	Section
v.	Versus
Vol.	Volume
FIL	Foreign Investment Law

INTRODUCTION

For developing economies, foreign direct investment (FDI) is critical. In majority international investment cases, FDIs are usually conducted by legal entities. Companies are owned by shareholders who may themselves be juridical persons. Shareholders may own the corporation entirely, its majority or minority shares. Besides that, a company may or may not be controlled by the shareholder, that is different from majority ownership.

ICSID arbitration between foreign investor and host state is increasing and it is becoming widely attractive. Between 1997-1999 8 cases were publicly registered by year, 2008-2009 20-23 cases, in 2015 52 cases, in 2020 54 cases.¹

The vast majority of State-investor arbitration cases are brought under the framework of International Centre for Settlement of Investment Disputes Convention (ICSID Convention). The consent about arbitration can be found in BITs, MITs, national legislation or contract. The most extended form of arbitration agreement is BITs. Hence, the tribunals establish their jurisdiction under ICSID Convention and BITs. Therefore, claimants should meet the requirements under ICSID Convention and BITs.

The host state that adopts measures against the company (where shareholders have shares) will have an impact on the economic interests of shares. This impact to a shareholder might be direct, such as expropriation of his shares, or indirect, such as a decrease of profitability or value of the shares.

Initially shareholders did not have an independent legal standing. A good illustration of this is Barcelona Traction case that was decided by ICJ (1970) under customary international law. The court concluded that Belgium (State of majority shareholders of Barcelona Traction that was incorporated in Canada) was unable² to bring a claim before the court against Spain for

¹ The ICSID Caseload Statistics, Issue 2021 -1, p.8.
<https://icsid.worldbank.org/sites/default/files/publications/The%20ICSID%20Caseload%20Statistics%20%282021-1%20Edition%29%20ENG.pdf>

² It was unable to bring a claim under customary international law.

the damage that was done to Barcelona Traction. It stated regarding shareholders' capacity under international customary law:

“Notwithstanding the separate corporate personality, a wrong done to the company frequently causes prejudice to its shareholders. But the mere fact that damage is sustained by both company and shareholder does not imply that both are entitled to claim compensation. In such cases, no doubt, the interests of the aggrieved are affected, but not their rights. Thus whenever a shareholder's interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action; for although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed”.³

The basis of this interpretation was international customary law and not any treaty that protects investment. After this, many cases were submitted to ICSID arbitration by shareholders under BITs. Because of the increased number of arbitration cases, I'll examine recently concluded arbitration decisions in conjunction with the old practice of ICSID tribunals regarding shareholders' legal standing.

The purpose of this paper is to discuss:

- Have different categories of shareholders separate rights to bring the claim before tribunals or they are dependent on the claims of the company? If yes, to what extent?
- What are the legal complexities that general extension to shareholders' rights will lead?

The research is mostly based on the decisions of tribunals and I'll use a comparative analysis to determine whether the practice has changed regarding shareholders' legal standing.

First chapter examines ICSID jurisdiction elements that should be cumulatively met. All these features are important for ICSID tribunals' jurisdiction, therefore shareholders should be

³ Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain), ICJ Judgment 5 February 1970 (“Barcelona Traction”), para 44.

prudent and take them into consideration. This section will answer the questions where to find the consent for the arbitration, what are the requirements for the subject matter of ICSID Convention and nationality requirements for the claimants will be addressed.

Second chapter discusses the admissibility of shareholders claims by major, minor, indirect direct (parent companies) shareholders and locally incorporated companies.

Third chapter analyzes some practical problems regarding the generous extension of the shareholders' legal standing. There will be discussed parallel proceedings by different categories of shareholders. Also, the issue of different categories remedies will be examined when the locally incorporated company and its shareholders pursue distinctive remedies.

Shareholders definition in the master's thesis has a broad meaning and it includes persons (legal and physical) who own shares in the corporation or participate otherwise.

CHAPTER 1. The Basic Requirements for the ICSID Convention Jurisdiction

1.1 Consent to Submit the Dispute to the ICSID Arbitration

ICSID arbitration, as the creature of international arbitration, is based on the willingness of the parties to resolve their dispute before arbitration. Expressed consent of both parties – the host state and an investor - is essential prerequisite for the jurisdiction of tribunals. Article 25(1) of the ICSID Convention defines the form of the consent – “consent in writing”, but it does not stipulate how parties must do it. ⁴

Article 25

1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting 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.

Since article 25(1) does not determine where to find the consent, the question arises regarding it. The fact that State ratified ICSID Convention does not mean host state’s consent on ICSIDS tribunal’s jurisdiction.⁵ In practice, the Centre has accepted jurisdiction of tribunals that arise from consent to ICSID arbitration in 3 ways⁶:

- 1) A consent provision may be contained in a direct agreement between parties;⁷
- 2) Host state’s national legislation ⁸ - most often in the investment code;⁹
- 3) Bilateral investment treaty (BIT) between the investor’s home State and the host State;

⁴ L. Reed, J. Paulsson and N. Blackaby. *Guide to ICSID Arbitration* (2nd edn, Kluwer 2011), p.53.

⁵ M. J. Valasek, P. Dumberry, *Developments in The Legal Standing of shareholders and Holding Corporations in Investor-State Disputes* (26(1) ICSID Review-Foreign Investment Law Journal, 2011), p. 38.

⁶ L. Reed, J. Paulsson and N. Blackaby. *Guide to ICSID Arbitration* (2nd edn, Kluwer 2011), p.53.

⁷ R. Dolzer and Ch. Schreuer, *Principles of International Investment Law* (Oxford, 2008), p.238.

⁸ L. Reed, J. Paulsson and N. Blackaby. *Guide to ICSID Arbitration* (2nd edn, Kluwer 2011), p.53; See R. Dolzer and Ch. Schreuer, *Principles of International Investment Law* (Oxford, 2008), p.238.

⁹ R. Dolzer and Ch. Schreuer, *Principles of International Investment Law* (Oxford, 2008), p.238.

4) Multilateral investment treaty (MIT) among countries that include the host State and investor's home State.

The parties consent is simultaneously given in an arbitration clause (included in the direct agreement) or in a separate submission agreement.¹⁰ There are 2 steps in non-contractual arbitration: 1) The consent of the host State is incorporated in the national legislation/BIT/MIT; 2) The investor consents at any time while national legislation/ BIT/ MIT is in force either by writing to the host State (for example, in a simple letter or a notice of dispute) or by filing a request to arbitrate.¹¹

The parties are not allowed to withdraw the consent unilaterally due to its binding effect. This principle is also derived from the preamble of the convention.¹² It means that consent withdrawal will succeed by party agreement.¹³

i) Contract between parties

Consent between parties could be given regarding the existing or future disputes¹⁴. A consent clause in the contract functions as an agreement for the submission of future disputes.¹⁵

ii) National Legislation

National Investment Legislation is a second source of the host state's consent¹⁶ by which the host State unilaterally consents to the arbitration.¹⁷ Investment protection laws may contain the provisions stipulating that claims by investors against host state may be submitted before ICSID institution.¹⁸ Provision in national legislation is likely an offer by the state that should

¹⁰ L. Reed, J. Paulsson and N. Blackaby. Guide to ICSID Arbitration (2nd edn, Kluwer 2011), p.53.

¹¹ See *ibid*.

¹² Preamble to ICSID Convention, recital 6: "Recognizing that mutual consent by the parties... constitutes a binding agreement..."

¹³ J. Fouret, R.Gerbay and G.M. Alvarez with D. Parchajev, *The ICSID Convention, Regulations and Rules* (EE, 2019), p. 147.

¹⁴ R. Dolzer and Ch. Schreuer, *Principles of International Investment Law* (Oxford, 2008), p.239.

¹⁵ K. N. Schefer, *International Investment Law* (3rd edn, EE 2020), p. 498.

¹⁶ See *ibid*, p. 499.

¹⁷ L. Reed, J. Paulsson and N. Blackaby. Guide to ICSID Arbitration (2nd edn, Kluwer 2011), p.54.

¹⁸ K. N. Schefer, *International Investment Law* (3rd edn, EE 2020), p. 499.

be accepted by the investor. The investor consents at any time as mentioned above while the host state's domestic investment legislation is in force. The host state may revoke its consent to arbitrate at any time unilaterally by amending the relevant investment law or repealing it¹⁹ prior to the investor's acceptance of the offer. Hence, investor should accept the offer as early as possible.²⁰

Consent by the investor could be given to the extent of host state's offer. Besides, it is possible to give the consent about particular matters and to make the acceptance narrower than host state's offer.²¹ Consent by the investor could be given in different ways: 1) Formal agreement/written communication with the host state/any other method provided in domestic legislation (for example, to file a license) 2) If there is no writing consent made by the investor before requesting to ICSID arbitration, filing the claim itself will be considered as the consent.²²

iii) BIT

Most investment arbitration cases are based on the BITs.²³ ICSID arbitration is always between the foreign investor and the host state, therefore the treaty itself is not considered as a consent. States parties through BIT make an offer (offer consent), that should be accepted by the foreign investor.²⁴

¹⁹ L. Reed, J. Paulsson and N. Blackaby. Guide to ICSID Arbitration (2nd edn, Kluwer 2011), p.54.

²⁰ R. Dolzer and Ch. Schreuer, Principles of International Investment Law (Oxford, 2008), p.241.

²¹ See *ibid.*

²² L. Reed, J. Paulsson and N. Blackaby. Guide to ICSID Arbitration (2nd edn, Kluwer 2011), p.57.

²³ R. Dolzer and Ch. Schreuer, Principles of International Investment Law (Oxford, 2008), p.242.

²⁴ C. Schreuer, UNCTAD, Dispute settlement, International Centre for Settlement of Investment Disputes. 2.3, Consent to arbitration (2003), p.17

https://unctad.org/system/files/official-document/edmmisc232add2_en.pdf

Not all BITs constitute binding offers.²⁵ Some of them contain undertakings (promises) that the host state will give the consent in the future.²⁶ Such kind of clauses include the wording “shall consent”.²⁷

A foreign investor may consent an offer by “instituting ICSID proceedings”.²⁸ The tribunal in *El. Paso v Argentina* stated:

“The Center can only have jurisdiction if there is mutual consent. It is now established beyond doubt that a general reference to ICSID arbitration in a BIT can be considered as being the written consent of the State, required by Article 25 to give jurisdiction to the Centre, and that the filing of a request by the investor is considered to be the latter's consent.”²⁹

A foreign investor may accept the BIT even if the treaty is terminated because many treaties determine that the treaty will be effective for some additional period regarding past investments.³⁰

iv) MIT

The mechanism of the offer consent through MIT is similar to the BIT - states parties make an offer consent, that should be accepted by the foreign investor.³¹

²⁵ R. Dolzer and Ch. Schreuer, *Principles of International Investment Law* (Oxford, 2008), p. 242.

²⁶ C. Schreuer, UNCTAD, *Dispute settlement, International Centre for Settlement of Investment Disputes*. 2.3, *Consent to arbitration* (2003), p.18
https://unctad.org/system/files/official-document/edmmisc232add2_en.pdf

²⁷ Philippines - United Kingdom BIT (1980), Art 10.1:

The Contracting Party in the territory of which a national or company of the other Contracting Party makes or intends to make an investment shall assent to any request on the part of such national or company to submit, for conciliation or arbitration, to the Centre established by the Convention on the settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington on 18 March 1965(‘) any dispute that may arise in connection with the investment.

²⁸ *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9 award (Sep 16, 2003), para 12.2.

<https://www.italaw.com/sites/default/files/case-documents/ita0358.pdf>

²⁹ *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15 decision on jurisdiction (Apr 27, 2006) para 35.

https://www.italaw.com/sites/default/files/case-documents/ita0268_0.pdf

³⁰ J. Foubert, R.Gerbay and G.M. Alvarez with D. Parchajev, *The ICSID Convention, Regulations and Rules* (EE, 2019), p. 148.

³¹ C. Schreuer, UNCTAD, *Dispute settlement, International Centre for Settlement of Investment Disputes*, 2.3, *Consent to arbitration* (2003), p. 23.

1.2 Elements of the ICSID Jurisdiction's Subject-matter

The subject matter of the ICSID jurisdiction refers to the existence of legal, direct dispute in relation to the investment. It has 3 elements under article 25(1) of the ICSID Convention: 1) The legal nature of the dispute 2) The directness of the dispute of the underlying transaction 3) Qualification of the underlying transaction as an investment.³² The Convention itself does not provide the definitions any of these elements. The lack of one of these elements, may raise jurisdictional questions.

1.2.1 The Dispute

The International Court of Justice has established case law about the interpretation of the “dispute”. It has defined a dispute as “a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.”³³ For the existence of a dispute, “it must be shown that the claim of one party is positively opposed by the other”.³⁴ International dispute is a situation in which the two sides “hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations”.³⁵ The Court clarified that the existence of a dispute should be based on the objective determination – factual background. The court takes into consideration exchanged statements or documents for the objective determination.³⁶ In the judgment of the case *Marshall Islands v. India*, ICJ relied on the

https://unctad.org/system/files/official-document/edmmisc232add2_en.pdf

³² A. A. Escobar, UNCTAD, *Dispute settlement, International Centre for Settlement of Investment Disputes*, 2.5, Requirements Ratione Materiae, p.7.

https://unctad.org/system/files/official-document/edmmisc232add4_en.pdf

³³ *Mavrommatis Palestine Concessions*, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 11

³⁴ *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 328

³⁵ *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, I.C.J. Reports 2016 (I), p. 26, para. 50, citing *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion*, I.C.J. Reports 1950, p. 74 (<https://www.univie.ac.at/intlaw/wordpress/pdf/95.pdf>)

³⁶ *Belgium v. Senegal*, Judgment, I.C.J. Reports 2012 (II), pp. 443-445, paras. 50-55

reasoning in past decisions of the Court regarding the interpretation of the dispute. It emphasized that the two sides should have “clearly opposite views” about the merit and the dispute should be approved by facts.

ICSID tribunals define the dispute in the same way.³⁷ In *Emilio Agustín Maffezini v. The Kingdom of Spain*, the tribunal stated that in the dispute party is opposing directly or indirectly with the claimant’s position.³⁸

The Tribunal in *Valores Mundiales v. Venezuela* defined:

“A dispute is a “disagreement on a legal or factual matter, a conflict of legal points of view or of interests between the parties.”³⁹

1.2.2 The legal nature of the dispute

ICSID tribunals consider the dispute legal when it is related to “the existence or scope of a legal right/obligation or the nature or extent of the reparation to be made the for breach of a legal obligation.”⁴⁰

The drafting history of the convention shows that the requirement of a legal dispute excludes purely political and commercial disputes.⁴¹ Tribunals reject to extend their jurisdiction on

³⁷ *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction (Jan 25, 2000), paras. 93, 94; *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction (Apr 29, 2004), paras. 106, 107; *Lucchetti v. Peru*, Award (Feb 7 2005), para. 48; *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction (Apr 22, 2005), paras. 302, 303; *AES Corporation v. The Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction (Apr 26, 2005), para. 43; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction (Apr 27, 2006), para. 61; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction (May 16, 2006), para. 29; *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award (Jul 31, 2007), para. 63.

³⁸ *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (Jan 25, 2000), para 96. <https://www.italaw.com/sites/default/files/case-documents/ita0479.pdf>

³⁹ *Valores Mundiales, S.L. and Consorcio Andino S.L. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/13/11, award (Jul 25, 2017), para 232.

<https://www.italaw.com/sites/default/files/case-documents/italaw10247.pdf>

⁴⁰ Report of the Executive Director on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965), para 26.

⁴¹ The History of the ICSID Convention, Vol II-1 (ICSID Publication), pp 54, 322.

purely political/commercial disagreements, but they liberally interpret the legal nature of the dispute⁴². ICSID tribunal in *CSOB v. Slovakia* noted that when the dispute involves the State as a party, the dispute has frequently political overtones or governmental actions. As long as such kind of disputes concern to legal rights/obligations or the consequence of their breaches, disputes have legal nature.⁴³

1.2.3 Directness of the Dispute

Article 25 of ICSID Convention imposes one more precondition for the ICSID's jurisdiction - submitted dispute should arise "directly out of an investment". An early draft of the Convention limited ICSID's jurisdiction to the legal disputes "arising out of or in connection with investments".⁴⁴ This wording was rejected in favor of the more restrictive formulation.^{45,46}

In *Fedax v. Venezuela*, the respondent – Venezuela made objections to the jurisdiction of Tribunal on the argument that claimant Fedax's transaction was not a direct investment. The tribunal interpreted:

The term "directly" refers to "the dispute" and not to the "investment". "The jurisdiction can exist even in respect of investments that are not direct, so long as the dispute arises directly from such transaction. This interpretation is also consistent with the broad reach that the term "investment" must be given in light of the negotiating history of the Convention."⁴⁷

The Convention doesn't stipulate the definition of the term "directly". Article 25 requires that the dispute between parties must not only related to the investment but also it should have

⁴² K. N. Schefer, *International Investment Law* (3rd edn, EE 2020), p. 535.

⁴³ *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction (May 24, 1999), para 61. <https://www.italaw.com/sites/default/files/case-documents/ita0144.pdf>

⁴⁴ *The History of the ICSID Convention*, Vol I (ICSID Publication), p.116.

⁴⁵ It is implied that the current language of the Convention "arising directly out of an investment" is more restrictive.

⁴⁶ *Ibid.* Vol II-2, pp 707, 708, 826, 830.

⁴⁷ *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3 (July 11, 1997), para 24. https://www.italaw.com/sites/default/files/case-documents/ita0315_0.pdf

“reasonably close connection.”⁴⁸ The tribunal in *Inmaris Perestroika v. Ukraine* confirmed this criteria and noted that it didn’t find a “reasonably close” connection in the case.⁴⁹

ICSID Tribunals avoid to give narrow interpretation for the term “investment”. In *Holiday Inns v. Morocco*, respondent argued that the dispute matter - loan contracts were based on the agreements which were not related to the investment and was different transaction. The tribunal highlighted that investment was consisted by juridical acts and it would be against parties’ intention or economic reality to consider each of these acts in isolation from the others.⁵⁰ The tribunal decided that the claimant was entitled to submit the claim arising out of loan agreements that were separate from the main investment agreement but sufficiently connected to.

In *CSOB v Slovakia*, the tribunal noted:

An investment is frequently a rather complex operation, composed of various interrelated transactions, each element of which, standing alone, might not in all cases qualify as an investment. Hence, a dispute that is brought before the Centre must be deemed to arise directly out of an investment even when it is based on a transaction which, standing alone, would not qualify as an investment under the Convention, provided that the particular transaction forms an integral part of an overall operation that qualifies as an investment.⁵¹

⁴⁸ Christoph H. Schreuer, *THE ICSID CONVENTION: A COMMENTARY* (1st ed. 2001), at 114; see also Christoph H. Schreuer, *THE ICSID CONVENTION: A COMMENTARY* (2nd ed. 2009), at 106.

⁴⁹ *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, para 86 (March 8, 2010)

<https://www.italaw.com/sites/default/files/case-documents/ita0427.pdf>

⁵⁰ *Holiday Inns S.A. and others v. Morocco*, ICSID Case No. ARB/72/1, Decision on Jurisdiction (12 May, 1974), see PIERRE LALIVE “THE FIRST ‘WORLD BANK’ ARBITRATION (HOLIDAY INNS v. MOROCCO)-SOME LEGAL PROBLEMS” (1980), p. 159

⁵¹ *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, (May 24 1999), para 72.

Hence, claims that are indirectly related to an investment are not allowed under ICSID Convention.⁵²

1.2.4 Investment

The existence of an investment is of fundamental importance for the ICSID Convention's *ratione materiae* (subject-matter) jurisdiction. If there is no protected investment, the tribunal will not establish its competence. The ICSID Convention, in Art. 25, does not provide the definition of the term "investment". As the drafting history of the Convention makes clear, several attempts, to include the definition of the "investment", were considered and rejected.⁵³ Drafters preferred to leave a room to the parties to agree what is an "investment".⁵⁴ Parties' freedom to determine what constitutes an investment is not conclusive.⁵⁵ The tribunal may examine whether the requirements of jurisdiction are met.⁵⁶ Tribunal in *CSOB v. Slovakia* explained:

Parties' agreement that describe their transactions as an investment is not conclusive in resolving the issue whether the dispute is related to an investment under Article 25(1) of the ICSID Convention. The concept of an investment under the Convention is objective in nature. The parties may limit the definition but they may not avoid it.⁵⁷

BITs, as the legal framework for the treatment of the investments⁵⁸, do not refer to article 25 of the ICSID convention to determine "investment"⁵⁹, but instead they explicitly provide the

⁵² A. A. Escobar, UNCTAD, *Dispute settlement, International Centre for Settlement of Investment Disputes*, 2.5, Requirements *Ratione Materiae*, p.11.

https://unctad.org/system/files/official-document/edmmisc232add4_en.pdf

⁵³ C. Schreuer, *The ICSID Convention: A Commentary* (2001), para 86.

⁵⁴ L. Reed, J. Paulsson and N. Blackaby. *Guide to ICSID Arbitration* (2nd edn, Kluwer 2011), p.25.

⁵⁵ C. Schreuer, *The ICSID Convention: A Commentary* (2001), para 90.

⁵⁶ ICSID Convention, Article 41.

⁵⁷ *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4; *Decision of the Tribunal on Objections to Jurisdiction* (May 24 1999), para 68.

⁵⁸ N. Horn, *Arbitrating Foreign Investment Disputes*, volume 19 (2004), p.337.

⁵⁹ R. Dolzer and Ch. Schreuer, *Principles of International Investment Law* (Oxford, 2008), p. 61.

definition of the term “investment”. An arbitration clause in BITs is an implied agreement that the covered investment in the agreement falls under Art. 25 of the ICSID Convention.⁶⁰ The Tribunal adopted “double keyhole approach” providing that tribunal should determine whether the dispute relates to an investment within the meaning of Convention and BIT.⁶¹

1. Subjective Meaning of Investment under International Investment Agreements (IIA)

The subjective meaning of the term “investment” is explicitly defined by the applicable international investment agreements.⁶² IIAs provide general definition and the non-exhaustive list of activities that the parties consider as an investment.⁶³ Most treaties have adopted the “asset-based” approach of the term “investment”, protecting foreign investor’s “every kind of asset”.⁶⁴ Germany–Nigeria BIT (2000) provides:

1. the term "investments" comprises every kind of asset and, in particular, though not exclusively:
 - (a) movable and immovable property as well as any other rights in rem, such as mortgages, liens and pledges;
 - (b) shares, stocks and debentures of companies and other kinds of interest in companies;
 - (c) claims to money which has been used to create an economic value or claims to any performance having an economic and financial value;
 - (d) rights arising out of a leasing agreement;

⁶⁰ N. Horn, *Arbitrating Foreign Investment Disputes*, volume 19 (2004), p.18.

⁶¹ *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999, para 68.

⁶² C.L.Lim, J. Ho and M. Pappas, *International Investment Law and Arbitration* (Cambridge, 2018), p. 218.

⁶³ K. N. Schefer, *International Investment Law* (3rd edn, EE 2020), p. 75

⁶⁴ J. Fourret, R. Gerbay and G.M. Alvarez with D. Parchajev, *The ICSID Convention, Regulations and Rules* (EE, 2019) p. 115.

(e) intellectual property rights, in particular copyrights, patents, utility-model patents, industrial designs, trade-marks, trade-names, trade and business secrets, technical processes, know-how, and good will;

(f) business concessions which have been or may be granted under public law, including concessions to search for, cultivate, extract and exploit natural resources.⁶⁵

The list of examples is open and illustrative under international investment agreements.⁶⁶

Therefore, the large amount of activities fall under the definition of investment.⁶⁷

2. Objective Meaning of Investment

The approach of the Convention gives parties freedom to describe what kind of transactions constitute an investment, however, the requirement of an investment is objective.⁶⁸ The tribunal in *Salini v Morocco* applied 'Salini Test' and identified the features of investment:

- A contribution of an asset by the investor;
- Risk;
- A certain duration
- A contribution to the economic development of the host state⁶⁹.

First three elements of the investment have been widely relied by tribunals⁷⁰, while the fourth criterion - a contribution to the development – has not received an universal acceptance⁷¹ and

⁶⁵Germany-Nigeria BIT (2000), art. 1.1, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1382/download>

⁶⁶ K. N. Schefer, *International Investment Law* (3rd edn, EE 2020), p. 76.

⁶⁷ See *ibid.*

⁶⁸ C. Schreuer, *The ICSID Convention: A Commentary* (2001) para 90.

⁶⁹ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, Decision on Jurisdiction (Jul 31, 2001), para 52.

⁷⁰ K. N. Schefer, *International Investment Law* (3rd edn, EE 2020), p. 93.

⁷¹ J. Foubert, R. Gerbay and G.M. Alvarez with D. Parchajev, *The ICSID Convention, Regulations and Rules* (EE, 2019), p. 118.

is subject to the disagreement.⁷² These criteria should not be necessarily discussed as mandatory jurisdictional requirements but it must be considered as characteristics of an investment.⁷³

i) Contribution of an asset

The contribution of an asset is interpreted broadly by the tribunals and it includes monetary and non-monetary contributions such as “materials, works or services”.⁷⁴ The size of contribution is not decisive to determine whether the contribution exists,⁷⁵ but some amount of financial, technical or personnel involvement is necessary for the investor-state relationship.⁷⁶ Investors, who paid a nominal price, are not entitled for the protection.⁷⁷

ii) Risk

In *Fedax v Venezuela*, the tribunal defined that the mere fact that parties had a dispute, was itself taking a risk.⁷⁸ Some other tribunals distinguished normal business risk from the “investment risk” and deemed that the contribution of an asset must face more risk than the normal commercial risk.⁷⁹

⁷² L.E.S.I. S.p.A. and ASTALDI S.p.A. v. République Algérienne Démocratique et Populaire, ICSID Case No. ARB/05/3, Decision on Jurisdiction (Jul 12, 2006), para 72.

⁷³ C. Schreuer (n. 17) 139-141.

⁷⁴ *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award (March 10, 2015), paras 241, 245 <https://www.italaw.com/sites/default/files/case-documents/italaw7100.pdf> ; *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Award (Oct 22, 2018), paras 297-99 <https://www.italaw.com/sites/default/files/case-documents/italaw10051.pdf>

⁷⁵ *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award (Jul 25, 2018) para 210. <https://www.italaw.com/sites/default/files/case-documents/italaw9887.pdf>

⁷⁶ K. N. Schefer, *International Investment Law* (3rd edn, EE 2020), p. 96.

⁷⁷ *Anglo-Adriatic Group Limited v. Republic of Albania*, ICSID Case No. ARB/17/6, Award (Feb 7, 2019), para 246.

⁷⁸ *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3 (July 11, 1997), para 40. https://www.italaw.com/sites/default/files/case-documents/ita0315_0.pdf

⁷⁹ *Posťtová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award (Apr 9, 2015), para 369 (“investment risk” is an “operational risk and not a commercial risk or a sovereign risk”), para 370 (The distinction here would be between a risk inherent in the investment operation in its surrounding – meaning that the profits are not ascertained but depend on the success or failure of the economic venture concerned – and all the other commercial and sovereign risks).

iii) Duration

During the drafting of the history, a proposal to include of placing fixed period - not less than 5 years – was rejected.⁸⁰ In *Bayindir v Pakistan*, the tribunal stated that there should not be imposed a very high bar for the duration of project.⁸¹ ICSID Tribunals have accepted that the duration could be last for months to many years.⁸²

iv) Development

The Tribunal in *Salini v. Morocco*, derived the legal ground for the fourth element from the preamble to the Convention.⁸³ The criteria of host state's economic development is the most controversial⁸⁴ and it is limited supported by some ICSID tribunals.⁸⁵ Other tribunals clarified that *Salini* test with 3 criteria implicit host state's economic development and therefore, should not be established separately.⁸⁶

⁸⁰ The History of the ICSID Convention, Vol II-1 (ICSID Publication), p .702.

⁸¹ K. N. Schefer, *International Investment Law* (3rd edn, EE 2020), p. 98.

⁸² *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award (Oct 31, 2012), paras 303,304.

⁸³ ICSID Convention, preamble: "The contracting states considering the need for international cooperation for economic development..."

⁸⁴ K. N. Schefer, *International Investment Law* (3rd edn, EE 2020), p. 98.

⁸⁵ *Mr. Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award (Nov 1, 2006), paras 28-31; *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction (Jul 6, 2007), para 117.

⁸⁶ *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award (Apr 15, 2009), para 85: "the contribution of an international investment to the development of the host State is impossible to ascertain – the more so as there are highly diverging views on what constitutes "development". A less ambitious approach should therefore be adopted, centered on the contribution of an international investment to the economy of the host State, which is indeed normally inherent in the mere concept of investment as shaped by the elements of contribution/duration/risk, and should therefore in principle be presumed"; *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction (Nov 30, 2012), para 5.43: "the economic development of the host State is one of the objectives of the ICSID Convention and a desirable consequence of the investment, but it is not necessarily an element of an investment".

1.3 Ratione Personae Requirements

1.3.1 Parties of the Dispute

ICSID arbitration involves contracting host state and a foreign investor.⁸⁷ It is the mixed proceeding between investors and states – contracting states or their nationals can commence arbitration against another contracting state or their nationals.⁸⁸

1. Host State

A state should have the status of Contracting State for the date of the registration of the request for ICSID arbitration.⁸⁹

A state is considered Contracting State of ICSID Convention after ratification, acceptance or approval of the Convention.⁹⁰ The state obtains the status of contracting state after 30 days of depositing the instrument of ratification, acceptance or approval.⁹¹ There is a [List of Contracting States and Other Signatories of the Convention \(ICSID/3\)](#)⁹² on the Centre's website to determine if a state has the status of Contracting state. The date of signature of the ICSID Convention, the date of deposit of ratification and the date of entry into force of the Convention are provided in the list.

If a state gives the consent for the arbitration before becoming Contracting State, the consent will be effective after the State attains the status of Contracting state. ⁹³ Therefore, ICSID tribunal's jurisdiction will not extend on a state that is not a Contracting State but has given the consent for the arbitration.

⁸⁷ Art 25(1), 1st sentence, ICSID Convention: "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..."

⁸⁸ Al-Sh. Mona, UNCTAD, Dispute settlement, International Centre for Settlement of Investment Disputes, 2.4, Requirements Ratione Personae (2003), p.9 https://unctad.org/system/files/official-document/edmmisc232add3_en.pdf

⁸⁹ Ibid, p.11.

⁹⁰ Art 68(1) of ICSID Convention

⁹¹ Ibid.

⁹² <https://icsid.worldbank.org/resources/lists/icsid-3>

⁹³ Al-Sh. Mona, UNCTAD, Dispute settlement, International Centre for Settlement of Investment Disputes, 2.4, Requirements Ratione Personae (2003), p.11.

In *Holiday Inns v. Morocco*, the claimant – Holiday Inns group (HI) requested for the arbitration against Morocco. The claimant stopped construction of hotels in Morocco and argued that Morocco alleged acts. Neither Morocco or investor’s state – Switzerland were contracting states when parties gave the consent for arbitration, but both countries attained the status of Contracting State before the claimant’s request for arbitration. Hence, the dispute was not outside the ICSID’s jurisdiction since the consent to arbitration became effective.⁹⁴

Foreign investors may conclude investment agreements with a state that is represented either by a central organ, such as a ministry, or through a separate entity that could be territorial (province or municipality) or governmental agency (investment board or privatization agency). Article 25 (1) provides that in addition to the Contracting State, the jurisdiction of the Centre extends to “any constituent subdivision or agency of a Contracting State.” The Convention does not define these terms. “Constituent subdivision” refers to a state, province, canton, or a municipality. These territorial entities are below the level of state.⁹⁵ “Agency” is a corporation of the host state. The main point of “agency” is that it performs public functions on behalf of a contracting state.⁹⁶ Constituent Subdivision or agency should be designated to the Centre. This requirement is to ensure the investor that Constituent Subdivision or Agency is authorized by the State.⁹⁷ If the state fails to make a designation, the Centre will not register the request for arbitration. Designation could be made through domestic legislation, BIT or by informing the Centre. Designation should exist on the day of a request for arbitration.

In *Cable Television v. St. Kitts and Nevis*⁹⁸ the tribunal stated that it had no jurisdiction because the respondent constituent subdivision - Nevis Island Administration (NIA), which gave the

⁹⁴ *Holiday Inns S.A. and others v. Morocco*, ICSID Case No. ARB/72/1, Decision on Jurisdiction (May 12 1974). The Decision is unpublished. A detailed description of the Decision is provided by Lalive, P., *The First ‘World Bank’ Arbitration (Holiday Inns v. Morocco) – Some Legal Problems*, 51 *British Year Book of International Law* 123 at 142/3 (1980).

⁹⁵ C. Schreuer, *The ICSID Convention: A Commentary*, Article 25, paras. 145-149, pp. 150-152 (2001).

⁹⁶ *Ibid.*

⁹⁷ Al-Sh. Mona, UNCTAD, *Dispute settlement, International Centre for Settlement of Investment Disputes*, 2.4, *Requirements Ratione Personae* (2003), p.9

⁹⁸ *Cable Television of Nevis, Ltd. and Cable Television of Nevis Holdings, Ltd. v. Federation of St. Kitts and Nevis*, ICSID Case No. ARB/95/2, Award (Jan 13, 1997), *ICSID Review, Foreign Investment Law Journal*, Vol 13 (1998).

consent for arbitration, was not designated by Federation of St. Kitts & Nevis. Therefore, it was an infringement of article 25(1) in accordance with article 25(3) providing that the consent of subdivision should be approved by the state.

In addition, article 25(3) defines that the consent given by the Constituent Subdivision or Agency about the ICSID's Jurisdiction should be approved by the State.

2. Foreign Investor

ICSID Convention restricts personal jurisdiction of tribunals to investors who are nationals of another contracting state other than the respondent State party to the dispute. The convention does not use the term foreign investor, instead it uses "national of a contracting State". Under article 25(2) of ICSID Convention, investors can be either natural or legal persons. The article establishes requirements that foreign investors should fulfill for the protection under ICSID Convention. These preconditions are cumulative: a) He/it is considered as a foreign investor (he/it has the nationality of home state); b) He/it does not have the nationality, dual nationality, of the host state. Therefore, the Convention determines positive and negative nationality requirements. There are 2 critical dates regarding the nationality possession for individual investors: On the date when parties consented to arbitration and on the date when the request for arbitration was registered.⁹⁹ ICSID Convention does not stipulate that individual investors possess his nationality continuously between these two days, hence, foreign investor's other nationalities is irrelevant in the interim period of these 2 dates.¹⁰⁰ For legal person, there is only 1 critical date: A legal person should possess the nationality of home state on the date parties consented to arbitration.

⁹⁹ C.L.Lim, J. Ho and M. Papparinkis, *International Investment Law and Arbitration* (Cambridge, 2018), p. 235.

¹⁰⁰ Al-Sh. Mona, UNCTAD, *Dispute settlement, International Centre for Settlement of Investment Disputes, 2.4, Requirements Ratione Personae* (2003), p.13.

2.1 Nationality of Individuals

Domestic law regulates whether an investor is a citizen of particular country.¹⁰¹ A certificate of nationality is an evidence for the citizenship, but it is not conclusive proof.¹⁰² In *Hussein Nuaman Soufraki v United Arab Emirates*¹⁰³, the claimant Canadian citizen Mr. Soufraki claimed Italian citizenship when he submitted the claim to ICSID tribunal against Dubai. The claimant Mr. Soufraki was born in Lybya (Italian-ruled). He attained Canadian nationality after moving to Canada. Mr. Soufraki submitted Italian certificates of nationality issued by the Italian authorities before tribunal. Tribunal found that the claimant lost his Italian nationality as a consequence of obtaining Canadian nationality under the domestic law of Italy. Hence, ICSID tribunal had no jurisdiction.

By contrast, in *Siag v Egypt*,¹⁰⁴ a tribunal established its jurisdiction. The claimant, Mr. Siag was born in Egypt. He obtained Lebanon citizenship, then Italian. The tribunal stated that Siag lost his Egyptian nationality under Egyptian law under which if an applicant receives a foreign nationality, he should make a declaration within one year for the retaining Egyptian citizenship. ICSID Tribunal found out that the claimant, Mr. Siag did not made such declaration, therefore, he was an Italian national and lost his Egyptian citizenship.

Nationality is a different concept from residency – foreign investors living in the host state could be considered as “investors” if they have attained the status of permanent resident.¹⁰⁵ In *Marvin Feldman v. Mexico*,¹⁰⁶ the tribunal stated that claimant, who had the citizenship of US and a permanent residence in Mexico, was eligible to sue the respondent before arbitration.

¹⁰¹ C.L.Lim, J. Ho and M. Paparinskis, *International Investment Law and Arbitration* (Cambridge, 2018), p. 239.

¹⁰² R. Dolzer and Ch. Schreuer, *Principles of International Investment Law* (Oxford, 2008), p.47

¹⁰³ *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Award (Jul 7, 2004).

¹⁰⁴ *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Decision on Jurisdiction (Apr 11, 2007).

¹⁰⁵ K. N. Schefer, *International Investment Law* (3rd edn, EE 2020), p. 148.

¹⁰⁶ *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1 (also known as *Marvin Feldman v. Mexico*), Award (Dec 16, 2002), para 48. <https://www.italaw.com/sites/default/files/case-documents/ita0319.pdf>

2.2 Dual Nationality

ICSID Convention shares the approach of international law of dispute settlement – a national may only bring a claim against state in national courts.

ICSID Convention excludes from its jurisdiction claims, that are submitted by dual nationals – having the nationality of home state and host state at the same time.¹⁰⁷

In *Champion Trading v Egypt*,¹⁰⁸ three claimants - brothers had dual citizenship of US and Egypt. The brothers were arguing that their Egyptian father lost his Egyptian nationality when he obtained U.S. citizenship. Tribunal found out that father, Mr. Wahba had Egyptian Personal Identity Card and an Egyptian passport. It occurred after the birth of brothers, but tribunal stated that there was no evidence that it was a change in father's existing status. Besides, Mr. Wahba was using Egyptian passport for travel after the birth of his children and he did not refuse his citizenship before the Egyptian Minister of the Interior. Hence, brothers had U.S nationality by the birth place and Egyptian nationality. ICSID Tribunal stated that the Convention had a clear rule stipulating that any person who also has the nationality of host state is excluded from submitting a claim.

2.3 “Foreignness” of Corporate Investors

ICSID Convention does not provide the test to determine the nationality of corporate investors. Tribunals follow the intention of convention's drafters to leave determinacy of juridical person's nationality to states.¹⁰⁹ Establishing corporate nationality is difficult, because legal systems and treaties use numerous criteria to determine whether a company does or does not

¹⁰⁷ Report of the Executive Directors, *supra* note 2, para. 29; Schreuer, *supra* note 7, Article 25, paras. 440, 444; I.F.I. Shihata & A.R. Parra, *The Experience of the International Centre for the Settlement of Investment Disputes*, 14 ICSID Rev.—FILJ 299, 308 (1999).

¹⁰⁸ *Champion Trading Company, Ameritrade International, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9 (formerly *Champion Trading Company, Ameritrade International, Inc., James T. Wahba, John B. Wahba, Timothy T. Wahba v. Arab Republic of Egypt*), Decision on Jurisdiction (Oct 21, 2003).

¹⁰⁹ A. C. Sinclair, *ICSID Review - Foreign Investment Law Journal*, Volume 23, Issue 1, *ICSID's Nationality Requirements* (2008), p. 87.

have the nationality of particular state.¹¹⁰ The criteria are: Place of incorporation or legal establishment; place of the seat of business; place of real economic activity; place of the company's preponderant interest.¹¹¹

Austria-Georgia BIT (2001), article 1(1)(b) defines investor as an enterprise that is “constituted or organized under the applicable law of a Contracting Party.”¹¹²

Belarus-Georgia BIT (2017) is more restrictive. It requires a triple test of legal establishment, registered office and substantial economic activities.¹¹³

Under article 25(2)(b) of ICSID Convention, the nationality of corporation should be determined by the juridical person's place of incorporation/seat or by foreign control.

2.3.1 The Place of Incorporation

The most common tests for juridical person's nationality are incorporation (the law under which the company is formed) or the main seat of business (where management/headquarters are located). In *Société Ouest-Africaine des Bétons Industriels v. Republic of Senegal*, the tribunal stated that a corporation was considered as a juridical person under article 25(2) of the ICSID due to its principle place of business in home state or establishment under the national legislation.¹¹⁴ In *Autopista v Venezuela*, the tribunal provided the same, that the most commonly used criteria are place of incorporation or registered office.¹¹⁵

¹¹⁰ R. Dolzer and Ch. Schreuer, *Principles of International Investment Law* (Oxford, 2008), p.49.

¹¹¹ K. N. Schefer, *International Investment Law* (3rd edn, EE 2020), p. 165.

¹¹² Austria-Georgia BIT (2001), art 1(1)(b),
<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/188/download>

¹¹³ Belarus-Georgia BIT(2017), article 1(3)(b)
<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5946/download>

¹¹⁴ *Société Ouest-Africaine des Bétons Industriels (“SOABI”) v. Republic of Senegal*, Award, (Feb. 25, 1988) (Broches, President; Mbaye and Schultz, Arbitrators);

¹¹⁵ *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction (Sep 27, 2001), para 107.

The convention does not impose an express requirement that a legal person should have a connection with the contracting state where it is incorporated except the fact of incorporation.¹¹⁶

2.3.2 Foreign Control of the Locally Incorporated Company – Article 25(2)(b)

The second sentence of article 25(2)(b) of ICSID exceptionally allows legal persons to submit claims in its own name to ICSID if companies are incorporated in the host state but controlled by home state nationals.

Article 25(2)(b), 2nd sentence provides that national of another contracting state means:

“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”.

That part of the provision is a good solution and guarantees the access to ICSID Convention¹¹⁷ when host states require that investment should be made through a locally incorporated company¹¹⁸ or investor chooses to make an investment through a locally incorporated entity.¹¹⁹ Normally such kind of legal persons will not be considered as foreign investors, but because of the foreign control, locally incorporated companies are permitted to submit a claim before the tribunal on its own name.¹²⁰

The preconditions, to access the protection under this part, are: 1) Existence of an agreement between the host state and investor company; 2) Foreign control. Such agreement may be

¹¹⁶ A. C. Sinclair, ICSID Review - Foreign Investment Law Journal, Volume 23, Issue 1, ICSID's Nationality Requirements (2008), p. 88.

¹¹⁷ Al-Sh. Mona, UNCTAD, Dispute settlement, International Centre for Settlement of Investment Disputes, 2.4, Requirements Ratione Personae (2003), p.19.

¹¹⁸ R. Dolzer and Ch. Schreuer, Principles of International Investment Law (Oxford, 2008), p.52.

¹¹⁹ A. C. Sinclair, ICSID Review - Foreign Investment Law Journal, Volume 23, Issue 1, ICSID's Nationality Requirements (2008), p. 95.

¹²⁰ Ibid, p. 96.

explicitly found in the instrument setting out the consent of the parties about ICSID arbitration,¹²¹ or implicitly by virtue of reference to ICSID dispute settlement clause in BIT.¹²² Tribunals are flexible about the form of the agreement.¹²³

The agreement must be supported by the element of actual foreign control over the locally incorporated company.¹²⁴ If there is no foreign control, ICSID Tribunal will have no jurisdiction.¹²⁵ The convention does not define the term “foreign control”. Control should be exercised by the national of other Contracting state of ICSID.¹²⁶ Therefore, nationals of the host state or nationals of non-ICSID State are not allowed to bring the claim.¹²⁷

Foreign control can be exercised by a majority/minority shareholder,¹²⁸ directly/indirectly, absolutely/partially. This part will be discussed in the Chapter 2.

1.4 Interim Conclusion

This chapter has discussed the requirements for ICSID Jurisdiction. Shareholders should take into consideration the elements of the ICSID Convention to be entitled for the protection. Form of the consent - “writing requirement”- should be adhered. Also, the dispute between parties should be considered as a legal and direct in relation to an investment. The chapter has also addressed the existence of an investment. Definition of an investment is important element to determine whether an investment qualifies for ICSID protection. Parties stipulate in their agreement the definition of an investment and its features are established by an objective test

¹²¹ Al-Sh. Mona, UNCTAD, Dispute settlement, International Centre for Settlement of Investment Disputes, 2.4, Requirements Ratione Personae (2003), p.19.

¹²² K. N. Schefer, International Investment Law (3rd edn, EE 2020), p. 185.

¹²³ R. Dolzer and Ch. Schreuer, Principles of International Investment Law (Oxford, 2008), p.53.

¹²⁴ See *ibid* p. 237.

¹²⁵ Al-Sh. Mona, UNCTAD, Dispute settlement, International Centre for Settlement of Investment Disputes, 2.4, Requirements Ratione Personae (2003), p. 22.

¹²⁶ *Société Ouest Africaine des Bétons Industriels v. Senegal*, ICSID Case No. ARB/82/1, Decision on Jurisdiction (Aug 1, 1984) Paras 32-33.

¹²⁷ Al-Sh. Mona, UNCTAD, Dispute settlement, International Centre for Settlement of Investment Disputes, 2.4, Requirements Ratione Personae (2003), p. 22.

¹²⁸ C.L.Lim, J. Ho and M. Paparinskis, International Investment Law and Arbitration (Cambridge, 2018), p. 249.

of ICSID Convention. The dispute should be related to an investment within the meaning BIT and ICSID Convention. ICSID Convention limits its jurisdiction to investors who are nationals of another contracting states, therefore the nationality of an individual investor and of a corporate investor should be adhered. The nationality of an individual investor is determined by the certificate of citizenship. Individual investors must be national of another contracting state for 2 critical dates: On the date when parties consented to arbitration and on the date when the request for arbitration was registered. The nationality of legal person is defined either by its place of incorporation or by the foreign control. Corporate investors should possess the nationality of home state on the date parties consented to arbitration.

CHAPTER 2. Claims of Shareholders and Locally Incorporated Companies

2.1 Locus Standi of Locally Incorporated Companies

Generally, locally incorporated companies are not considered as foreign investors under the ICSID Convention and, therefore, are deprived from the right to submit the claims before ICSID tribunals. Locally incorporated companies do not possess the element of “foreignness”, that is required by the ICSID Convention as far as they are established in the host state. There exists an exception from this rule, if the investor and the host state agree that locally incorporated company should be treated as a foreign investor because of the foreign control and “foreign control” is objectively presented,¹²⁹ the locally incorporated company is entitled to resort to ICSID arbitration.

In *Amco v Indonesia*,¹³⁰ PT Amco was locally incorporated subsidiary controlled by the foreign parent company – Amco Asia (A United States corporation). The respondent - Indonesia made an objections regarding the ICSID Jurisdiction, arguing that the there was no explicit agreement that PT Amco was considered as a foreign company. Tribunal referred to the ICSID consent agreement by which Indonesia recognized that PT Amco was locally incorporated company but should be treated as a “foreign business” because of foreign control.¹³¹ Therefore, ICSID tribunal accepted PT Amco as a claimant under the article 25(2)(b) of ICSID Convention.

In *TSA Spectrum de Argentina SA v. Argentina*,¹³² TSA was established in Argentina, but it was fully owned by a Dutch parent company (“TSI”). TSA submitted a claim before ICSID tribunal based on the Netherlands-Argentina BIT. Argentina argued that TSI was not entitled to commence ICSID arbitration proceedings because the concession agreement between parties stipulated that competent forum for the dispute was national court or ICC. The tribunal defined that Article 25 of the ICSID Convention could not be derogated by the parties’ agreement as

¹²⁹ For detailed discussion see p. 18

¹³⁰ *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, (Sep 25, 1983), 1 ICSID Reports 389 (1993).

¹³¹ *Ibid*, paras 10-15.

¹³² *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award (Dec 19, 2008).

far as the provision determined objective limits of the ICSID jurisdiction.¹³³ The tribunal decided to found out the existence of “foreign control” under article 25(2)(b) and, therefore, to pierce the corporate veil. Tribunal argued that art. 25(2)(b) itself allowed to pierce the veil and to pursue “its objective identification of foreign control up to its real source”.¹³⁴

The tribunal determined that ultimate owner and controller of TSA was Argentinian - Mr. Jorgo Justo Neuss. Hence, TSA could not be considered as a national of the Netherlands because of “foreign control” absence under art. 25(2)(b).

The claimant National Gas (incorporated in Egypt) in *National Gas v Egypt*¹³⁵ filed a claim against Egypt under Egypt-UAE BIT. CTIP (shell company – UAE nationality) owned 90% of shares in the National Gas. CTIP was wholly owned by REGI (UAE nationality, which was also a shell company). REGI was owned by Mr. Ginena. The respondent made an objection that National Gas was an Egyptian company under control of Mr. Ginena (Egyptian national), therefore there was not presented foreign control. The tribunal stated that the evidence showed that the investor was owned and controlled by national of Host State and not by the national of another Contracting State.

The tribunal examined objective and subjective¹³⁶ test under art. 25(2)(b) of ICSID Convention and it decided that the Claimant National Gas did not satisfy the objective test¹³⁷ of Art 25(2)(b) of ICSID, therefore it had no jurisdiction. The tribunal stated:

“In the Tribunal’s view, there is a significant difference under Article 25(2)(b) between (i) control exercised by a national of the Contracting State against which the Claimant asserts its

¹³³ Ibid, para 134.

¹³⁴ Ibid, para 147.

¹³⁵ *National Gas S.A.E. v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7, Award (Apr 3, 2014).

¹³⁶ The subjective test is raised by the words “the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention”. In the Tribunal’s view, this subjective test is met by Article 10(4) of the Treaty by treating the Claimant as a national of the UAE, the latter being a Contracting State to the ICSID Convention. Article 10(4) refers expressly to Article 25(2)(b) of the Convention; the Claimant is a juridical person registered or established in accordance with the laws of Egypt; and CTIP owns a majority of the Claimant’s shares.

¹³⁷ The objective test is raised by the words “because of foreign control”.

claim and (ii) control by a national of another Contracting State. The latter situation violates no principle of international law and is consistent with the text of the ICSID Convention. On the other hand, the former situation violates the general limitation in Article 25(1) and the first part of Article 25(2)(b) of the ICSID Convention in regard to both Contracting States and nationals (including dual nationals). In other words, the latter is consistent with the object and purpose of the ICSID Convention; but the former is inconsistent: it would permit the use of the ICSID Convention for a purpose for which it was clearly not intended and it would breach its outer limits. [...] Hence, it is not surprising to see tribunals (and scholarly commentators) apply the control test favoring jurisdiction in the latter case. Conversely, it is not surprising to see its application rejecting jurisdiction in the former case.”¹³⁸

In *Caratube v Kazakhstan*,¹³⁹ Claimants “Caratube” (or “CIOC” incorporated in Kazakhstan) and Mr. Devincci Salah Hourani, (U.S. national, majority shareholder 92% of “CIOC”) filed a claim against Kazakhstan based on the ICSID Convention and Kazakhstan-United States BIT.

Respondent alleged that CIOC did not meet the requirements of article 25(2)(b) of ICSID because there was no explicit agreement, Mr. Hourani did not had actual control over CIOC and the real controller was JOR (Lebanese offshore company. According to respondents JOR was owned and controlled by Mr. Hourani). The tribunal examined whether there was an agreement to treat CIOC as a foreign investor and if there was a foreign control under art 25(2)(b) of ICSID Convention. It found out that there was a contract¹⁴⁰ between parties that should be interpreted to treat CIOC as a foreign national. Regarding “Foreign Control”, tribunal examined whether “Article 25(2)(b) requires the existence of objective, actual and effective

¹³⁸ Id, paras. 136, 137.

¹³⁹ *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award (Sep 27, 2017).

¹⁴⁰ Clause 27.8 of the contract: “Furthermore, it is hereby agreed that the Contractor is a resident of Lebanon, or in the event of assignment as a national of the resident country of the assignee, and therefore the Contractor shall be treated as a resident of Lebanon, or other country if appropriate, for purposes of the ICSID Convention”. Tribunal found that by means of Clause 27.8 of the Contract, the Parties agreed to “internationalize” their disputes arising under that Contract.

foreign control, formal or legal control not being enough”.¹⁴¹ Parties had a disagreement whether the requirement under the article was for effective, actual control. The tribunal did not agree with the position of respondent that “a person’s legal capacity to control an entity is not enough, but actual exercise of that control is required for the purposes of “foreign control” under Article 25(2)(b) of the ICSID Convention.”¹⁴² The tribunal’s discussion was relied on the *Vacuum Salt v Ghana* where nationals of Ghana had 80% of shares and 20% of shares were held by foreign nationals, the tribunal stated:

“100 percent foreign ownership almost certainly would result in foreign control, by whatever standard” the tribunal then found that “it must be true that the smaller [...] the percentage of voting shares held by the asserted source of foreign control, the more one must look to other elements.”

The tribunal found out that CIOC has always been wholly owned by foreign nationals – Mr. Devincci Hourani and Mr. Omar, a Palestinian national and a resident of Lebanon, who owned the remaining 8% of CIOC’s shares. Kazakhstan did not provide an evidence that CIOC was controlled by JOR and therefore it was necessary to pierce the corporate veil. Hence, CIOC met the requirements under art 25(2)(b) of ICSID Convention.

In a recently decided case *CMC Muratori v Mozambique*¹⁴³, the claimants (“CMC”, collectively 3 companies: “CMC Ravenna”, “CMC Maputo” , “CMC Africa Austral”) filed a claim for relief against Mozambique (respondent) under the ICSID Convention and the Italy-Mozambique Bilateral Investment Treaty (“BIT”). The dispute concerned the reconstruction of Mozambique's highway. The Claimants entered into an agreement with Mozambique to complete the work, but after only a portion of it was completed, the Claimants attempted to obtain an additional compensation for the work that was completed. Unable to reach an

¹⁴¹ Id, para. 611.

¹⁴² Id, para. 619.

¹⁴³ *CMC Muratori Cementisti CMC Di Ravenna SOC. Coop., CMC Muratori Cementisti CMC Di Ravenna SOC. Coop. A.R.L. Maputo Branch and CMC Africa, and CMC Africa Austral, LDA v. Republic of Mozambique*, ICSID Case No. ARB/17/23, Award (Oct 24, 2019).

agreement, the Claimants initiated arbitration proceedings claiming that Mozambique's failure to properly compensate them violated certain BIT obligations. The respondent Mozambique argued that the claimants failed to prove that they made an “investment” and therefore they were not investors under BIT.¹⁴⁴

Article 1(2) of the BIT defined an “investor” as: Any natural or legal person of a Contracting Party investing in the territory of the other Contracting Party as well as the foreign subsidiaries, affiliates and branches controlled by the above natural and legal persons.”

The claimant, CMC Africa Austral was a wholly owned subsidiary of CMC Ravenna incorporated in Mozambique with its head office in Mozambique. CMC Africa Austral was a legal person under foreign control of CMC Ravenna (within the meaning of ICSID)¹⁴⁵ and it was also an investor under Article 1(2) of the BIT.¹⁴⁶ Three claimants had legal standing to bring a claim before arbitration.

To sum up, the practice regarding legal standing of locally incorporated companies has not changed. Locally incorporated company can bring a claim before arbitration if it has a foreign control element and there exists an agreement between parties that locally incorporated company should be treated as a foreigner. In some cases, tribunals pierced the corporate veil to determine a foreign control element.

2.2 Parent Companies

It is well recognized practice of arbitral tribunal to accept claims by parent companies investing in a foreign country through another entity, its wholly-owned subsidiary.

¹⁴⁴ The claimants responded that both CMC Africa Austral and CMC Maputo invested in this project and were therefore investors. CMC Ravenna also made an investment, and was thus also an investor, because CMC Maputo was a branch of CMC Ravenna, and because CMC Ravenna owned 99.99% of the shares in CMC Africa Austral.

¹⁴⁵ Parties agreed under article 2 of BIT to treat the entities under foreign control as nationals of Italy.

¹⁴⁶ *Id.*, para 170.

In *Amco v Indonesia*, Amco Asia Corporation (incorporated in the U.S) was a parent company of the locally incorporated subsidiary P.T.Amco. Tribunal stated that parent company (and subsidiary too) could bring a claim before ICSID arbitration under U.S.-Indonesia BIT and ICSID Convention. It provided: “Now, the goal of the arbitration clause was to protect the investor. How could such protection be ensured, if Amco Asia [the parent U.S. corporation] would be refused the benefit of the clause? Moreover, the Tribunal did find that PT Amco [the corporation incorporated in Indonesia] had this benefit, because of the foreign control under which it is placed: would it not be fully illogical to grant this protection to the controlled entity, but not to the controlling one? No doubt Amco Asia has understood the clause in this way. But Indonesia could not reasonably have understood it otherwise, nor reasonably have imagined that the clause would not grant protection to the investor himself, that is to say to Amco Asia”.¹⁴⁷

The tribunal in recently decided case, *CMC Muratori v Mozambique*,¹⁴⁸ established a jurisdiction over parent company’s - “CMC Ravenna” claim. Article 1(4) of the BIT stated that the “term ‘legal person’, in reference to either Contracting Party, shall mean any entity having its head office in the territory of such Contracting Party and recognized by it, such as public institutions, corporations, partnerships, foundations and associations, regardless of whether their liability is limited or otherwise.” “CMC Ravenna” wholly owned its subsidiary CMC Africa Austral - incorporated in Mozambique with its head office in Mozambique. The tribunal found out that it was not disputed that “CMC Ravenna” was a corporation incorporated in Italy with its head office in Italy, therefore it was an Italian legal person within the meaning of Article 1(4) of the BIT, and qualified as an investor if it made an investment in Mozambique.¹⁴⁹

¹⁴⁷ *Amco Asia Corp. and others v. Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, para. 24 (Sept. 25, 1983), 1 ICSID Rep. 389 (1993), 23 I.L.M. 351 (1984).

¹⁴⁸ *CMC Muratori Cementisti CMC Di Ravenna SOC. Coop., CMC MuratoriCementisti CMC Di Ravenna SOC. Coop. A.R.L. Maputo Branch and CMC Africa, and CMC Africa Austral, LDA v. Republic of Mozambique*, ICSID Case No. ARB/17/23, Award (Oct 24, 2019). For more details, see p.3 of this paper.

¹⁴⁹ *Id.*, para 168.

In *Lotus Holding v. Turkmenistan*¹⁵⁰ the claimant Lotus brought a claim against Turkmenistan based on the ICSID Convention, Turkey-Turkmenistan BIT and ECT. Lotus was a parent company of fully-owned subsidiary Lotus Enerji. The dispute related to energy projects in Turkmenistan in which claimant was involved.

The tribunal followed the language of the tribunal in *Enkev Beheer BV v. Poland* and concluded that Lotus Holding (claimant) “cannot stand in the shoes of its subsidiary Lotus Enerji” and bring claims on its subsidiary's behalf for direct harm suffered by its subsidiary. Claimant must prove that its rights under the BIT and/or the ECT have been violated.¹⁵¹ Therefore, Lotus Holding had no standing and tribunal dismissed the case.

To sum up, parent companies have independent legal standing if their own rights defined in the agreement were violated. In addition, they should prove that they are foreign investors.

2.3 Shareholding as Investment

BITs include definition of investment¹⁵² stipulating that shares or interests in the company are forms of investments. Participation in the locally incorporated company is itself an investment.¹⁵³ Czech Republic-United States BIT (1991)¹⁵⁴ provide the definition of investment:

“A company or shares of stock or other interests in a company or interests in the assets...”

¹⁵⁰ *Lotus Holding Anonim Şirketi v. Turkmenistan* (ICSID Case No. ARB/17/30), Award (Apr 6, 2020).

¹⁵¹ *Id.*, para 180.

¹⁵² For further, see p.9 of this paper.

¹⁵³ C. Schreuer, *Shareholder Protection in International Investment Law*, in Pierre-Marie Dupuy et al. (ed.), *Common Values in International Law*, (Engel 2006), p.606

¹⁵⁴ Czech Republic-United States BIT (1991), Art 1(1)(a)(ii).

BITs that contain such kind of definition of “investment” don’t make the difference between shareholders.¹⁵⁵ Hence, an investment may include shareholders that are controlling/non-controlling, majority/minority and direct/indirect through another company.¹⁵⁶

Shareholders are entitled to resort to ICSID arbitration separate from the local company if wrongdoing to the company by the host state affects its profitability.

2.3.1 Majority Shareholders

The tribunals have recognized the right of majority shareholders to bring claims before ICSID arbitration depending on the wording of BITs.

In the first illustration *Alex Genin v Estonia*¹⁵⁷ the tribunal accepted claim of majority shareholders (U.S. nationals) of locally incorporated financial institution EIB. Estonia-U.S. BIT determined the definition of investment that included: “a company or shares of stock or other interests in a company or interests in the assets thereof.”¹⁵⁸ The respondent Estonia made an objection that claim did not link with the definition of investment under BIT. The tribunal rejected this opinion and stated: “The term “investment” as defined in Article I(a)(ii) of the BIT clearly embraces the investment of Claimants in EIB. The transaction at issue in the present case, namely the Claimants’ ownership interest in EIB, is an investment in “shares of stock or other interests in a company” that was “owned or controlled, directly or indirectly” by Claimants. The investment of Claimants in EIB is also embraced by the

¹⁵⁵ S. A. Alexandrov, *The Baby Boom of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as Investors and Jurisdiction Ratione Temporis*, (2005), p.30.

¹⁵⁶ *International Investment Law: Understanding Concepts and Tracking Innovations* (OECD 2008), p. 40.

¹⁵⁷ *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award (Jun 25, 2001), 6 ICSID Reports 241.

¹⁵⁸ Article I 1(a)(ii) of Estonia - United States of America BIT (1994).

meaning of the term “investment” under the Convention”.¹⁵⁹ Therefore, shareholders had standing to file a claim.

In *Caratube v Kazakhstan*,¹⁶⁰ claimants “Caratube” (or “CIOC” incorporated in Kazakhstan)¹⁶¹ and Mr. Devincci Salah Hourani, (U.S. national, majority shareholder 92% of “CIOC”) the tribunal noted that it had no jurisdiction about the Mr. Devincci Hourani’s claims under the Foreign Investment Law (FIL). The tribunal stated:

“Only potentially available consent granting instrument, i.e. the FIL, was already repealed in January 2003, namely over a year before Mr. Devincci Hourani acquired his shares in CIOC.”

The tribunal stated that in this case there was no BIT between parties that would give to the shareholder (Mr. Hourani) independent standing from the CIOC to submit a claim.¹⁶² Besides that, there was no FIL (in force, because it repealed 1 year prior Mr. Hourani bought shares in CIOC) that would consider the shareholder as a foreign investor who made an investment and FIL would have binding offer of ICSID arbitration.¹⁶³ Therefore, Mr. Hourani as a majority shareholder could not file a claim (independently) because an investment was made one year after the repeal of FIL and could not find a jurisdiction under the FIL.

In *Cortec Mining v Kenya*¹⁶⁴ the claimants CMK (incorporated in Kenya), “Cortec UK”, Stirling (both companies incorporated in England and Wales), filed a claim against Kenya. CMK was majority (70%) owned by Cortec UK and Stirling. Article 1(d) of the BIT defined “companies” as (in the case of the UK) “corporations, firms and associations incorporated or constituted under the law in force of any part of the United Kingdom.” The tribunal concluded that it had

¹⁵⁹ Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia, ICSID Case No. ARB/99/2, Award (Jun 25, 2001), 6 ICSID Reports 241, par 324.

¹⁶⁰ *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award (Sep 27, 2017).

¹⁶¹ For further, see p.2 of this paper.

¹⁶² *Id*, para. 694.

¹⁶³ *Id*, para. 695.

¹⁶⁴ *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya* (ICSID Case No. ARB/15/29), Award (Oct 22, 2018).

ratione personae jurisdiction. It mentioned that: “The UK companies hold the shares. Through their corporate network money was invested in Kenya”.¹⁶⁵

2.3.2 Minority Shareholders

Minority shareholders have been accepted as claimants before ICSID arbitration. Practice shows that tribunals have found out that minority shareholders may submit the claims on the basis of “shares” including as a form of investment in the investment treaty. They claim for the loss shareholder value and not for the damage done to the company.¹⁶⁶

Shareholder claims potentially broaden access to ICSID further than the solution offered in Article 25(2)(b), since even non-controlling shareholders may claim. As the Tribunal in *CMS Gas Transmission Company v. Argentine Republic* noted, upholding the standing to claim of a minority shareholder in an Argentine company: “[t]he same result can be achieved by means of the provisions of the BIT, where the consent may include non-controlling or minority shareholders.”¹⁶⁷

In *LG&E Energy Corp and others v. Argentine*,¹⁶⁸ the claimant “LG&E” (three U.S. companies) filed a claim against Argentine under BIT. The claimant held a shareholding interest in three gas distribution companies established in Argentine. The tribunal stated that:

“In the present case there is no need of determining what type of control the parent company exercises. Article 25(2)(b) of the ICSID Convention refers to “foreign control” in the context of who may qualify as an investor with a right to ICSID arbitration (it includes local companies in the host State subject to foreign control). A companion provision can be found in Article VII(8) of the Bilateral Treaty (without the express requirement of control). The present case,

¹⁶⁵ *Id.*, para. 271.

¹⁶⁶ *Ibid.*, para 42.

¹⁶⁷ *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Jurisdiction, July 17, 2003 (Orrego Vicuña, President; Lalonde and Rezek, Arbitrators), para. 51

¹⁶⁸ *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc.v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision of the Arbitral Tribunal on Objections to Jurisdiction (Apr 30, 2004), para 50.

however, is concerned with shares held by the Claimants in local companies which the Claimants allege to have been affected by breaches of the Respondent of its obligations under the Bilateral Treaty. Those shares are the investment within the meaning of Article I(1)(a)(ii) of the Bilateral Treaty. The Respondent has not disputed that those shares are “owned or controlled directly or indirectly” by the Claimants. In that connection, it is irrelevant whether the shares are majority or minority shares.”

In *Hochtief AG v. Argentina*,¹⁶⁹ a claimant “Hochtief” (company - incorporated in Germany) filed a claim against Argentina under the Germany-Argentina BIT.¹⁷⁰ Claimant owned 26% of shares in PDL (locally incorporated company). Hochtief alleged that because of the Emergency law that Argentina passed after economic crisis, the rights provided in the Concession Contract were violated. PDL could not fulfill its obligations to third parties and bankruptcy proceedings started. Because of this, the value of Hochtief’s shares reduced. Tribunal stated that Hochtief made an investment in Argentina and was an investor under the BIT.

“Article 1(1)(b) of the BIT is unequivocal in stipulating that an investment includes “shares, stocks in companies, and other forms of participation in companies.” The States Parties to the BIT could, had they wished, have limited the scope of the term ‘investment’ to cases where the foreign investor holds a controlling shareholding or even a 100% shareholding in a locally-incorporated subsidiary in the host State. They did not do so.¹⁷¹

Hochtief owns 26% of the shares in PDL, to which it has contributed capital and made loans totalling over USD 34 million. Given the scale of what would be regarded in any commercial context as an investment, and given the likelihood of consortium funding for large-scale projects, it is not surprising that the States Parties to the BIT agreed upon a definition of ‘investment’ that includes configurations such as those in the present case. Moreover, the terms

¹⁶⁹ *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction (Oct 24, 2011).

¹⁷⁰ A consortium (of five companies, including Hochtief) participated in a bidding process to construe a road and bridges in Argentina. The consortium was granted the concession. The consortium incorporated a company “PDL” in Argentina. After economic crisis in Argentina, the government took “Emergency Law”.

¹⁷¹ *Id.*, para 115.

of the tender document under which Hochtief bid for the right to engage in this project stipulated that the successful bidder would have to operate through a company incorporated in Argentina.¹⁷²

The fact that Hochtief agreed, under Article 5 of the Concession contract, to assign all of its rights and obligations to PdL does not alter the position. Indeed, it confirms that Hochtief's investment consisted precisely in its shares in PdL and other forms of investment recognized in BIT Article 1(1).¹⁷³

In *Renée Rose Levy de Levi v Peru*,¹⁷⁴ the claimant Ms. Renee Rose (French national) filed a claim against Peru under the France-Peru BIT. The claimant alleged that Peru subjected BNM (incorporated in Peru), the shareholder of which was the claimant, to liquidation. The claimant planned to make a project and build a "tourism and real estate 'urban megaproject' on the land of Pacific coast in Peru (the owner of the land was claimant). The land was adjacent to a historically significant area "Morro Solar". Peru delimited the boundaries of "Morro Solar" which surrounded claimant's land, therefore claimant's investment had destroyed. Peru made an objection that the claimant was not a protected investor because she acquired indirect interest in BNM late, after BNM was already intervened. The tribunal defined:

"The Respondent alleged that what the Claimant received was an indirect and minority interest (paragraph 118(a) above). Several Arbitral Tribunals have repeatedly stated that investors with an indirect interest, including a minority interest, may on the basis of the ICSID Convention request protection of the rights accorded to them by an investment treaty. In addition, the Tribunal points out that Article 1 of the APPRI is very clear in defining the concept of investment and stating that it includes shares "...whether minority or indirect, in the corporations constituted in the territory of one of the contracting parties."¹⁷⁵

¹⁷² Id, para 116.

¹⁷³ Id, para 117.

¹⁷⁴ *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award (Feb 26, 2014).

¹⁷⁵ Id, para. 144.

Therefore, the claimant was entitled to file the claim before ICSID tribunal.

2.3.3 Indirect Shareholders

It is a common case when a foreign investor (parent company) does not invest in the host State directly with the locally-incorporated entity, but instead indirectly through another corporation that is called “intermediate”, “shell” corporation.¹⁷⁶

In *Impregilo v Argentine*¹⁷⁷, Impregilo (a corporation incorporated in Italy) brought a claim against Argentine under ICSID and Argentina-Italy BIT. The dispute related to a concession of water and sewage services under a Concession Contract concluded by “AGBA” (an Argentine company) in which Impregilo had a dominating interest, and the Province of Buenos Aires.

Impregilo formed a consortium with other international companies and it was awarded one of the concession areas. According the bidding rules, Impregilo and its partners incorporated and funded AGBA (locally incorporated company). The tribunal stated that Impregilo’s shares in AGBA were protected under article 1(1)(b)¹⁷⁸ of the Argentina-Italy BIT. It confirmed that Impregilo was one of the parties in the consortium that was granted the concession for water and sewage service.

“If AGBA was subjected to expropriation or unfair treatment with respect to its concession – an issue to be determined on the merits of the case – such action must also be considered to have affected Impregilo’s rights as an investor, rights that were protected under the BIT.”¹⁷⁹

Therefore, Impregilo had a standing to bring a claim before ICSID tribunal.

¹⁷⁶ P. Dumberry, The legal standing of shareholders before arbitral tribunals: Has any rule of customary international law crystallised? *Michigan State Journal of International Law*, Vol 18:3, p. 358.

¹⁷⁷ *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award (Jun 21, 2011).

¹⁷⁸ Article 1(1)(b) of the BIT defines investments as “any kind of asset invested or reinvested by an individual or a legal entity of one Contracting Party in the territory of the other Party”, such as “shares of stock, interests or any other form of participation, including minority or indirect interest, in a company incorporated in the territory of either Contracting Party”.

¹⁷⁹ *Id*, para 138.

In *Fouad v Jordan*,¹⁸⁰ the claimants (FASGTC – registered in Kuwait and Mr. Alghanim) had an interest in the company UTT (registered in Jordan). UTT hold 66% of interest in the company (UMC – registered in Jordan) and it was used as a vehicle to proceed with bidding process. UTT sold its majority shares in UMC to BATELCO (Bahraini Company). After 2 years, UTT was voluntarily liquidated. In the same year, the government of Jordan assessed UTT liable for income tax due to the sale of shares in UMC. The claimants alleged that the taxation measure made by the government was arbitrary and against Jordan-Kuwait BIT. The respondent made an objection that mistreatment was related to the UTT and not to the claimants, therefore they were not entitled to sue to for harm done to the separate company (UTT). The tribunal agreed on the claimants’ submission that they submitted the claim “to vindicate their own rights as shareholders in UTT”.¹⁸¹ The tribunal noted:

“It is those shares, and the returns on them, that constitute their ‘investment’ for the purpose of Article 1 of the BIT. It is precisely the purpose of investment treaties to enable the foreign shareholder to bring a claim for losses to his investment in a locally incorporated investment company. The availability of such a claim has been regarded as ‘perfectly clear’ from the earliest decisions under investment treaties.”

“In the present case, the link between the effect of the state’s measure upon the investment company and the claim of the investor is a fortiori as a result of the Respondent’s pursuit of a direct claim to recover the sums that it claims UTT is liable to pay in tax from the Claimants.”¹⁸²

Therefore, the tribunal concluded that it had a jurisdiction.

In *Eyre, Montrose v Sri Lanka*,¹⁸³ the claimants - Mr. Eyre (a British national owned 99% of shares of Montrose Singapore - which in turn was the legal, direct owner of the sole Montrose

¹⁸⁰ *Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan* (ICSID Case No. ARB/13/38), Award (Dec 14, 2017)

¹⁸¹ *Id.*, para 120.

¹⁸² *Id.*, para 121.

¹⁸³ *Raymond Charles Eyre and Montrose Developments (Private) Limited v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/16/25), Award (Mar 5, 2020).

Share) and Montrose (company incorporated in Sri Lanka), were alleging that they intended to build a hotel complex on the Montrose Land (in Sri Lanka). Mr. Eyre indirectly exercised the control over Montrose. Claimants claimed that Sri-Lanka sabotaged the hotel project and expropriated the Montrose Land without proper compensation, therefore they filed a claim against Sri-Lanka under UK-Sri Lanka BIT (and ICSID Convention).

The tribunal stated that it was undisputable that Mr. Eyre, as a national of another Contracting state (UK) had a standing under BIT¹⁸⁴ and 25(2)(a) of the ICSID Convention.

Regarding another claimant – Montrose, the tribunal examined subjective¹⁸⁵ (under BIT) and objective test (under ICSID – whether “foreign control” existed). It found out that BIT was a declaration of agreement between Sri-Lanka and UK for the purpose of the second clause of Art 25(2) stipulating to treat a local company as a foreigner because “the majority of shares are owned by nationals or companies of the other Contracting Party”.¹⁸⁶ In regard with “foreign control”, the locally incorporated company – Montrose may be deemed foreigner if “the majority of shares are owned by nationals or companies of the other Contracting Party” – in this case Mr. Eyre. The Respondent made an objection that Montrose did not have a legal standing because Mr. Eyre was an indirect ownership of Montrose. Tribunal found out that there was no indication in the BIT (art8(2) that majority shares could not be owned indirectly by the national of another contracting state and the purpose of art 8(2) was that locally incorporated companies had the possibility to submit a claim without regard to the indirect/direct shareholding.¹⁸⁷

¹⁸⁴ UK-Sri Lanka BIT, art 1(c)

¹⁸⁵ Subjective test is raised under art. 25(2)(b) by the phrase: “the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention”.

¹⁸⁶ Art 8(2) of the BIT: A company which is incorporated or constituted under the law in force in the territory of one Contracting Party and in which before such dispute arises the majority of shares are owned by nationals or companies of the other Contracting Party shall in accordance with Article 25(2)(b) of the ICSID Convention be treated for such purposes of the Convention as a company of the other Contracting Party.

¹⁸⁷ See, note 28, para 265.

The tribunal decided that, claimants met indirect foreign control test and it had Ratione Personae jurisdiction.

To sum up, indirect shareholders have an independent standing from the locally incorporated companies and they can commence arbitration proceedings if their shares are protected by the agreements, besides that they should show that host state's measure effected their own rights and there is a link between that measure and indirect shareholder's claim.

2.3.4 Intermediate Corporations

Shell corporations usually do not have significant assets and are established to own shares in another entity.¹⁸⁸ There is no restriction of jurisdiction under ICSID where the claimant is "shell" or "mailbox" company.¹⁸⁹

Tokios Tokelés v Ukraine, is a good example where the tribunal accepted shell company as a claimant. The issue was about the Tribunal's jurisdiction under the Convention and the Lithuania-Ukraine BIT. Tokios Tokelés (TT) was registered in Lithuania. It established the company Taki, a wholly owned subsidiary, in Ukraine. The respondent Ukraine raised arguments against the Lithuanian nationality of the company that 99% of shares were owned by Ukrainians, the seat of the company was in Ukraine and the capital for the investment originated in Ukraine. Therefore, Ukraine argued that although TT was established in Lithuania, it was not a "genuine entity" of Lithuania. Article 1(2)(b) of the Lithuania-Ukraine BIT stipulated that with respect to Lithuania, "investor" means "any entity established in the territory of the Republic of Lithuania in conformity with its laws and regulations."¹⁹⁰ The tribunal stated that it was not arguable that Tokios Tokelés was established under the laws of

¹⁸⁸ M. J. Valasek, P. Dumberry, Developments in The Legal Standing of shareholders and Holding Corporations in Investor-State Disputes (26(1) ICSID Review-Foreign Investment Law Journal, 2011), p.55.

¹⁸⁹ A. C. Sinclair, ICSID Review - Foreign Investment Law Journal, Volume 23, Issue 1, ICSID's Nationality Requirements (2008), p. 88.

¹⁹⁰ Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction (Apr 29, 2004), para 28.

Lithuania. The tribunal established its jurisdiction on the basis of the legal place of incorporation of the company. It clarified that the object and purpose of the BIT confirmed that the control-test should not be used to limit the scope of “investor” in BIT. The preamble of BIT provided that it maintained the “favourable conditions for investment”. The Tribunal defined that Parties were free to limit the scope of persons to whom they extended treaty protection and to extend for such protection, entities incorporated pursuant to the laws of a Contracting Party also be controlled by nationals of that State, or to reserve the right to deny protection to entities that lack a substantial connection to the State in which they were incorporated and that are also controlled by nationals of a third State.¹⁹¹ The Tribunal regarded the absence of such qualifications as “a deliberate choice of the Contracting Parties.” The tribunal noted that TT was formed before the Ukraine-Lithuania BIT entered into force. It added that there was “no evidence in the record that the Claimant used its formal legal personality for any improper use such as fraud or malfeasance. It concluded that there had been no abuse of legal personality.”¹⁹² However, the President of the Tribunal disagreed in the motivated opinion that the investment had been made “in Ukraine by Ukrainian citizens with Ukrainian capital” and therefore could not benefit from the protection of the ICSID Convention. Hence, the tribunal ruled that the claimant was an investor under BIT and a national of another contracting state under article 25(2) of ICSID.

In *Aguas del Tunari v. Bolivia*,¹⁹³ the Claimant “AdT”, a Bolivian company, which entered into a water concession contract with the Bolivian authorities brought a claim against Bolivia alleging Dutch-Bolivia BIT. Bechtel (incorporated in US) owned 55 % of AdT. Bechtel then joined its water management projects with Edison and its shares in AdT were transferred to a Dutch company. Bolivia claimed that the Dutch corporation was a shell company created solely

¹⁹¹ Ibid, para 39

¹⁹² *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, (29 April 2004), § 53 to 56. 20 ICSID Review Foreign Investment Law Journal. 205 (2005).

¹⁹³ *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction, (21 October 2005).

to gain access to ICSID and AdT was not controlled by Dutch corporation, hence, the tribunal lacked jurisdiction under the BIT.

The Tribunal held that the Dutch entity was “not simply a corporation shell established to obtain ICSID jurisdiction over the case”.¹⁹⁴ It added that “it is not uncommon in practice and - absent a particular limitation – not illegal to locate one’s operation in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for example, of taxation or the substantive law of the jurisdiction, including the availability of a BIT.”¹⁹⁵ It concluded that it “did not find a sufficient basis in the present record to support the allegation of abuse of corporate form or fraud.”¹⁹⁶

The Tribunal made a different conclusion in *Phoenix v. Czech Republic*. The Claimant, Phoenix (incorporated in Israel), was controlled by a former Czech national Mr. Beno. Phoenix purchased an interest in two Czech companies owned by members of Beno’s family. Before the acquisition, the Czech companies were involved in legal disputes in the Czech Republic. Approximately two months after the purchase, Phoenix filed a claim against Czech Republic.

The Tribunal took into consideration the timing of the investment, the initial request to ICSID, the timing of the claim, the substance of the transaction, and the true nature of the operation. It provided that “all the damages claimed by Phoenix had already occurred and were inflicted on the two Czech companies, when the alleged investment was made”. It stated that the initial request “was based on a claim by the two Czech companies, which were supposedly assigned to Phoenix”. The tribunal added that the timing of the claim showed that “what was really at stake were indeed the pre-investment violations and damages”. The “whole operation was not an economic investment, based on the actual or future value of the companies, but indeed, simply a rearrangement of assets within a family, to gain access to ICSID jurisdiction. In

¹⁹⁴ *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction, (21 October 2005), § 321, 20 ICSID Review - Foreign Investment Law Journal – 450 (2005).

¹⁹⁵ *Id.*, para 330 (d).

¹⁹⁶ *Id.*, para 331.

addition, “no activity was either launched or tried after the alleged investment was made”. “All the elements analyzed lead to the same conclusion of an abuse of right”. As a consequence the Tribunal concluded that it had no jurisdiction on the Claimant’s request.¹⁹⁷

In *Mobil v Venezuela*¹⁹⁸ three U.S and one Dutch companies filed a claim under ICSID Convention and Netherlands-Venezuela BIT. Venezuela alleged that Dutch company was a shell company. The tribunal pointed out that BIT defined “investment property” broadly as “various types of property” and BIT did not refer to a direct or indirect investment. It also stated that a Dutch shareholder's shares or joint venture conducting investment in Venezuela, as well as other profits, would be protected. Furthermore, the tribunal provided that there were no requirements that intermediary corporation could not exist between the final owner of a company or a joint venture and an investment asset.¹⁹⁹ The tribunal concluded that indirect investment was not excluded from the BIT protection.

In a recently decided case *United Utilities v. Estonia*,²⁰⁰ the claimants UUTBV (incorporated in Netherlands) and ASTV (incorporated in Estonia) filed a claim against Estonia under ICSID Convention and Netherlands-Estonia BIT. United Utilities (UK companies) became parent company of UUTBV. The respondent claimed that UUTBV was a mere shell company, that was not controlled by UUTBV rather it was controlled by United Utilities that was not covered by the Netherlands-Estonia BIT. Therefore, ASTV did not meet the nationality requirements under ICSID Convention and BIT.

The tribunal shared *AdT v Bolivia* tribunal’s reasoning and stated that BIT did not exclude identifying multiple sources of foreign control of a local corporation, “as well as the very real possibility that a person having direct or indirect – though not necessarily the “ultimate” –

¹⁹⁷ *Phoenix Action Ltd v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, (15 April 2009), paras 136 to 145.

¹⁹⁸ *B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction (Jun 10, 2010).

¹⁹⁹ *Id*, para. 165.

²⁰⁰ *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Award (Jun 21, 2019).

control could bring a claim under the Treaty so long as that person is a national of the non-host State party.”²⁰¹ Therefore, tribunal concluded that United Utilities’ control of UUTBV did not exclude a finding of jurisdiction by the Dutch shell corporation over ASTV’s claims, under the Dutch-Estonia BIT.

2.4 Interim Conclusion

Shareholders’ legal standing depends on the wording of applicable treaties. In most cases, shareholding in another company is considered as a form of investment that is protected. All categories of shareholders -majority, minority, controlling, indirect - are protected under BITs if treaties do not make a distinction between them. Shareholders have independent standing from the affected company but they have burden of proof that they claim for the violation of their own rights of BIT (loss of shareholder value, profitability diminution, expropriation of shares) and not for the damage done to the company. With regard to locally incorporated company, it has the legal standing before arbitration if the corporation has a foreign control element and there is an agreement between parties that locally incorporated company should be treated as a foreigner. Parent companies’ legal standing is based on the wording of legal entity in the BIT.

²⁰¹ Id, para 444.

CHAPTER 3. The Legal Complexities of the Generous Extension of Rights to Shareholders

3.1 Multiple, Parallel Claims

An investor in the vast majority of investment treaty arbitration cases is a legal entity in the form of a corporation, which is owned by shareholders.²⁰² They are all separate investors and may, in theory, file independent investment claims as different shareholders or group of shareholders in consequence of the same measures taken by the host State with respect to the investor²⁰³ (Parallel proceedings):

“[t]he extension of treaty protection to indirect shareholders creates an option for a group of companies to bring multiple claims through different companies in the group regarding the same investment and against the same measures of the host State.”²⁰⁴

In addition, the contracts between foreign investor and state may include provision providing arbitration as a dispute settlement. An investor can institute proceedings based on both arbitration clause – in the Contract and in the IIA.²⁰⁵ As a result, if an investor holds shares in a locally incorporated company through a chain of shell companies incorporated in different jurisdictions, and all of these states have entered into Treaties with the host State that do not exclude indirect shareholdings, each of these entities would be entitled to initiate separate arbitration against the host state claiming the same wrongdoing.

Therefore, the generous extension of rights to the shareholders enables different entities within the same corporate structure to file parallel or multiple claims relating to the same investment and the same alleged wrongdoing by the host State. When Shareholders and corporations at

²⁰² The ICSID Caseload, Statistics Special Focus, European Union (April 2016) of the 93 ICSID cases involving an EU member State, 80% were instituted by juridical persons.

²⁰³ Christoph Schreuer, Shareholder Protection in International Investment Law, *Transnational Dispute Management*, Vol. 2, No. 3 (2005), *supra* (n 2) 1.

²⁰⁴ K. Yanacca-Small, “Parallel Proceedings” in Muchlinski et al. (eds.), *The Oxford Handbook of International Investment Law* (2008), 1010-1011).

²⁰⁵ I. Uchkunova, *Indirect Investments Through Chain Of Intermediary Companies: A Philosopher’s Stone Or Not Any More?* (IMCCA), Jul 3, 2013.

different levels may follow competing or conflicting litigation strategies, that may be difficult to reconcile and coordinate.²⁰⁶

A positive side of the multiplication of claims is that it increases chances for the investors to attain a positive outcome of the judgment.

Furthermore, parallel or multiple proceedings raise the possibility of tribunals issuing contradictory or inconsistent awards.²⁰⁷ This has an impact on and undermines the credibility of investment treaty arbitration as an adjudication system.²⁰⁸

3.2 Orascom TMT v. Algeria

For the first time, ICSID tribunal decided in *Orascom TMT Investments Sari v Peoples Democratic Republic of Algeria*²⁰⁹ that multiple proceedings by an investor who controls several entities in a vertical chain of companies to recover the same economic harm could constitute an abuse of right (namely, the right to treaty protection).

The claimant OTMTI (Luxembourg) claimed that Algeria was making an unlawful campaign of harassment against OTA, who operated the telecommunications system in Algeria and in whom OTMTI had an indirect controlling shareholding.

OTH (an Egyptian company) won Algeria's public bid in 2001 to develop a mobile telecommunications network. OTH began operations in Algeria through its subsidiary OTA (incorporated in Algeria).

The claimant and its subsidiaries were part of a group of companies that were vertically integrated. OTMTI held an indirect controlling shareholding in OTA through a number of

²⁰⁶ Dolzer, R., and Schreuer, C., *Principles of International Investment Law* (2nd ed., Oxford University Press, Oxford 2012), *supra* (n 3), 60.

²⁰⁷ Hobér, K., *Selected Writings on Investment Treaty Arbitration* (1st ed., Studentlitteratur, Lund, 2013), *supra* (n 3) 345-347.

²⁰⁸ *Id.*, *supra* (n 3) 538.

²⁰⁹ *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Final Decision (May 31, 2017).

companies including Weather Investments and OTH. The claimant was in turned owned by the Sawiris entities.

OTMTI brought a claim before ICSID tribunal under the BLEU-Algeria BIT. In Parallel to this arbitration, OTH (OTA's direct shareholder) also filed a Notice of Arbitration against Algeria under the Egypt-Algeria BIT and UNCITRAL Rules. The result of that arbitration was the settlement under which Algerian Fonds National d'Investissement received 51% interest in OTA. A third notice of dispute filed by Weather Investments under the Italy-Algeria BIT was also signed by Mr Sawiris'. The Tribunal looked at the three notices of dispute and found that the dispute was the same in each case although the legal bases for the claims (BITs) and the parties of the disputes were different. It was related to the same events and the same measures. The Tribunal explained that in the vertically integrated group that constituted the Weather Group, although several entities could in theory commence arbitration proceedings against Algeria, this did not mean that the corporations could make use of the existing arbitration clauses to recover the same loss. The Tribunal stated that "if the harm caused by one company in the chain was fully repaired in one arbitration, the claims brought by other members of the vertical group in other arbitration proceedings may become inadmissible. The legal protection that was available at the various levels of the corporate chain was activated at the level of OTA's direct investor (OTH) on 2 November 2010 by notifying Algeria of a dispute under the Egypt-Algeria BIT. To the extent OTH would have restored its company value through arbitration proceedings, all of the companies higher up in the corporate chain, including the claimant, would have been made whole as well. That is, if the value of OTH is restored then the shareholders of OTH suffer no loss (unless they incur a loss of their own, independent of the value of OTH)."²¹⁰ Therefore, the claim was rejected. In addition, the Tribunal found that the claimant's claim was an abuse of rights

²¹⁰ L. Carroll, Parallel proceedings in investment arbitration: moving forward after Orascom TMT investments v Algeria, *Australian International Law Journal* 23 (2017), p. 149.

3.2.1 Abuse of Rights

The doctrine of abuse of rights forbids exercising a right for purposes other than those for which it was established. So far, the doctrine has been applied in cases where an investment was restructured to attract treaty protection at a time when a dispute with the host State had arisen or was anticipated.²¹¹

The Tribunal's award, for the first time, extended the doctrine's application to the scenario in which an investor who controls several companies in a vertical chain of corporations seeks to impugn the same host state measures and claims for the same harm at various levels of the chain in reliance on several investment treaties concluded by the host state. The tribunal stated: “where multiple treaties offer entities in a vertical chain similar procedural rights of access to an arbitral forum and comparable substantive guarantees, the initiation of multiple proceedings to recover for essentially the same economic harm would entail the exercise of rights for purposes that are alien to those for which these rights were established”.²¹²

The claimant had taken advantage of the existence of various treaties at various levels of the vertical corporate chain, using its rights to treaty arbitration in a manner that contradicted the purpose of such rights and of investment treaties, resulting in an abuse of the investment protection system.

The Tribunal also stated that its decision on admissibility was unique to the facts of the case, namely: “(i) the group of companies of which the Claimant was part was organized as a vertical chain; (ii) the entities in the chain were under the control of the same shareholder; (iii) the measures complained of by the various entities in the chain were the same and thus the dispute

²¹¹ *Aguas del Tunari SA v Bolivia (Decision on jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/02/3, 21 October 2005), [330]; *Philip MorrisAsia Limited (Hong Kong) v 7he Commonwealth of Australia*, PCA Case No 2012- 12, Award on Jurisdiction and Admissibility (17 December 2015).

²¹² *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Final Decision (May 31, 2017), para 543.

notified to Algeria by those entities was in essence identical; and (iv) the damage claimed by the various entities was, in its economic essence, the same”.²¹³

3.2.2 Double Recovery

In deciding that when one entity in a vertical group is fully repaired in arbitration, claims brought by other members of the group in other arbitration proceedings may be inadmissible, the Tribunal indirectly commented on the tools available to tribunals in international law to guard against double recovery. The tribunal also stated that the host State, Algeria, did not accept to be “sued multiple times by various entities under the same control and part of the same group in relation to the same investment, same measures, and same harm”.²¹⁴ Investment treaties should be interpreted to mean that the host state did not accept or intend multiple claims in relation to the same dispute. Although the investment treaty protects 'indirect' investments (typically in the definition of 'investment,' which includes shares in a company), this does not mean that the host state has agreed to be sued multiple times by entities in the same vertical group for the same investment, the same measures, and the same harm.

Article 31(1) of the Vienna Convention on the Law of Treaties provides that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. A good faith interpretation of a bilateral investment treaty takes into account the reasonable and legitimate expectations of the parties.²¹⁵ Unless an investment treaty contains ambiguous language, it is highly unlikely that a host state would have agreed to a (potentially harmful) multiplicity of claims and multiple recovery of damages. Indeed, attributing to the host state an intention to allow

²¹³ *Id.*, para 546.

²¹⁴ *Id.*, para 542.

²¹⁵ *Amco v Indonesia* (Decision on jurisdiction) 1 ICSID Rep 389, [14], [18], [29] cited with approval in *Cable TV v St Kitts and Nevis* (Award) 5 ICSID Rep 108, [6.27]; *CSOB v Slovakia* (Decision on Jurisdiction) 5 ICSID Rep 335, [34]; *Ethyl Corp v Canada* (Decision on Jurisdiction) 7 ICSID Rep 12, [55]; *SOABI v Senegal* (Award) 2 JCSJD Rep 190, [4.10].

multiple shareholder claims that could potentially cripple it would be antithetical to the object and purpose of a bilateral investment treaty.

3.3 Interim Conclusion

The generous extension of rights to shareholders lead to some problems such as parallel proceedings, where different claimants may pursue distinct remedies. Besides that, different claimants' strategies may be in conflict and, hence, hard to coordinate. As a result of parallel, the host state may be sued for the same harm, that is an abuse of right and there will be a risk of double recovery that is against a good faith and parties' expectations.

Conclusion

The purpose of this thesis was to demonstrate that the legal standing of shareholders since Barcelona Traction has changed and in accordance with tribunal's current practice they enjoy independent standing from the locally incorporated company. The legal basis for this capacity is provided in the BITs, therefore the wording of BITs is of essence for the tribunal's jurisdiction. Shareholders possess shares in a locally incorporated companies. Shareholding is a form of investment under BITs which provide broad definition of "investment" and include "shares or any kind of assets". All categories of shareholders have burden of proof that their own rights were violated by affecting of local company. They can commence proceedings before arbitration when the measure by the host state affects the value of shares (loss of shares). As noted by Stanimir Alexandrov, "it is beyond doubt that shareholders have standing in ICSID to submit claims separate and independent from the claims of the corporation" and "this principle applies to all shareholders, no matter whether or not they own the majority of the shares or control the corporation."²¹⁶

Besides that, shareholders and locally incorporated companies should take into consideration all the requirements of the ICSID Convention to be entitled for the protection. The dispute between parties should be considered as a legal and direct in relation to an investment, besides that the writing form of the consent for the ICSID arbitration should be adhered. The dispute should be related to an investment within the meaning BIT and ICSID Convention. ICSID Convention limits its jurisdiction to investors who are nationals of another contracting states, therefore the nationality requirement for the shareholders must be adhered.

On the one hand, generous extension of rights to shareholders to submit claims before arbitration is good for shareholders because they have the possibility to defense their interests in the arbitration, but, on the other hand, it may cause some legal complexities such as multiple,

²¹⁶ Alexandrov, *supra* note 22, at 30. But see Gabriel Bottini, *Indirect Claims under the ICSID Convention*, 29(3) U. Pa. J. Int'l L. 563 (2008).

parallel claims. In Parallel proceedings it is an abuse of right where an investor that controls several companies in a vertical chain of corporations seeks to impugn the same host state measures and claims for the same harm at various levels of the chain in reliance on several investment treaties concluded by the host state. The claimant who takes an advantage of the existence of various treaties at various levels of the vertical corporate chain, using its rights to treaty arbitration in a manner that contradicted the purpose of such rights and of investment treaties, resulting in an abuse of the investment protection system.

The solution for the legal problems regarding generous extension is to exclude some categories of shareholders (for example, minority shareholders that hold only 1% in the company) to bring the claim before arbitration and therefore make the protection of BIT narrower.

BIBLIOGRAPHY

Case law

AES Corporation v. The Argentine Republic, ICSID Case No. ARB/02/17, Decision on Jurisdiction (Apr 26, 2005)

Anglo-Adriatic Group Limited v. Republic of Albania, ICSID Case No. ARB/17/6, Award (Feb 7, 2019)

Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/00/5, Decision on Jurisdiction (Sep 27, 2001)

Amco Asia Corporation and others v. Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on Jurisdiction, (Sep 25, 1983)

Aguas del Tunari S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, (21 October 2005)

Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia, ICSID Case No. ARB/99/2, Award (Jun 25, 2001)

B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Decision on Jurisdiction (Jun 10, 2010)

Cable Television of Nevis, Ltd. and Cable Television of Nevis Holdings, Ltd. v. Federation of St. Kitts and Nevis, ICSID Case No. ARB/95/2, Award (Jan 13, 1997)

Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic, ICSID Case No. ARB/97/4, Decision on Jurisdiction, (May 24 1999)

Champion Trading Company, Ameritrade International, Inc. v. Arab Republic of Egypt, ICSID Case No. ARB/02/9 (formerly Champion Trading Company, Ameritrade International, Inc., James T. Wahba, John B. Wahba, Timothy T. Wahba v. Arab Republic of Egypt), Decision on Jurisdiction (Oct 21, 2003)

Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan, ICSID Case No. ARB/13/13, Award (Sep 27, 2017)

CMC Muratori Cementisti CMC Di Ravenna SOC. Coop., CMC MuratoriCementisti CMC Di Ravenna SOC. Coop. A.R.L. Maputo Branch and CMC Africa, and CMC Africa Austral, LDA v. Republic of Mozambique, ICSID Case No. ARB/17/23, Award (Oct 24, 2019)

Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya (ICSID Case No. ARB/15/29), Award (Oct 22, 2018)

CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, Decision on Jurisdiction, July 17, 2003 (Orrego Vicuña, President; Lalonde and Rezek, Arbitrators)

Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/2, Award (Oct 31, 2012)

El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15 decision on jurisdiction (Apr 27, 2006)

Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction (Jan 25, 2000)

Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. The Republic of Peru, ICSID Case No. ARB/03/4 (also known as: Industria Nacional de Alimentos, A.S. and Indalsa Perú S.A. v. The Republic of Peru), Award (Feb 7 2005)

Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction (Nov 30, 2012)

Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan (ICSID Case No. ARB/13/38), Award (Dec 14, 2017)

Fedax N.V. v. The Republic of Venezuela, ICSID Case No. ARB/96/3 (July 11, 1997)

Generation Ukraine, Inc. v. Ukraine, ICSID Case No. ARB/00/9 award (Sep 16, 2003)

Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia, ICSID Case No. ARB/12/39, Award (Jul 25, 2018)

Hochtief AG v. The Argentine Republic, ICSID Case No. ARB/07/31, Decision on Jurisdiction (Oct 24, 2011)

Holiday Inns S.A. and others v. Morocco, ICSID Case No. ARB/72/1, Decision on Jurisdiction (12 May, 1974)

Hussein Nuaman Soufraki v. The United Arab Emirates, ICSID Case No. ARB/02/7, Award (Jul 7, 2004)

Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine, ICSID Case No. ARB/08/8, Decision on Jurisdiction, para 86 (March 8, 2010)

Impregilo S.p.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/3, Decision on Jurisdiction (Apr 22, 2005)

Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17, Award (Jun 21, 2011)

Ioannis Kardassopoulos v. The Republic of Georgia, ICSID Case No. ARB/05/18, Decision on Jurisdiction (Jul 6, 2007)

L.E.S.I. S.p.A. and ASTALDI S.p.A. v. République Algérienne Démocratique et Populaire, ICSID Case No. ARB/05/3, Decision on Jurisdiction (Jul 12, 2006)

Lotus Holding Anonim Şirketi v. Turkmenistan (ICSID Case No. ARB/17/30), Award (Apr 6, 2020).

LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision of the Arbitral Tribunal on Objections to Jurisdiction (Apr 30, 2004)

M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador, ICSID Case No. ARB/03/6, Award (Jul 31, 2007)

Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1 (also known as Marvin Feldman v. Mexico), Award (Dec 16, 2002)

Mr. Patrick Mitchell v. Democratic Republic of the Congo, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award (Nov 1, 2006)

National Gas S.A.E. v. Arab Republic of Egypt, ICSID Case No. ARB/11/7, Award (Apr 3, 2014)

OI European Group B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/25, Award (March 10, 2015)

Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria, ICSID Case No. ARB/12/35, Final Decision (May 31, 2017)

Posťtová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic, ICSID Case No. ARB/13/8, Award (Apr 9, 2015)

Philip Morris Asia Limited v. The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (Dec 17, 2015)

Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award (Apr 15, 2009)

Renée Rose Levy de Levi v. Republic of Peru, ICSID Case No. ARB/10/17, Award (Feb 26, 2014)

Raymond Charles Eyre and Montrose Developments (Private) Limited v. Democratic Socialist Republic of Sri Lanka (ICSID Case No. ARB/16/25), Award (Mar 5, 2020)

Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic, ICSID Case No. ARB/03/17, Decision on Jurisdiction (May 16, 2006)

Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, Decision on Jurisdiction (Jul 31, 2001)

Société Ouest-Africaine des Bétons Industriels (“SOABI”) v. Republic of Senegal, Award, (Feb. 25, 1988) (Broches, President; Mbaye and Schultsz, Arbitrators)

Société Ouest Africaine des Bétons Industriels v. Senegal, ICSID Case No. ARB/82/1, Decision on Jurisdiction (Aug 1, 1984)

South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports (1962)

Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction (Apr 29, 2004)

TSA Spectrum de Argentina S.A. v. Argentine Republic, ICSID Case No. ARB/05/5, Award (Dec 19, 2008)

United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia, ICSID Case No. ARB/14/24, Award (Jun 21, 2019)

Valores Mundiales, S.L. and Consorcio Andino S.L. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/13/11, award (Jul 25, 2017)

Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt, ICSID Case No. ARB/05/15, Decision on Jurisdiction (Apr 11, 2007)

Books

Dolzer, R. and Schreuer C., Principles of International Investment Law (Oxford University Press, 2008)

Dolzer, R., and Schreuer, C., Principles of International Investment Law (2nd ed., Oxford University Press, 2012)

Fouret J., Gerbay R. and Alvarez M., G. with D. Parchajev, The ICSID Convention, Regulations and Rules (EE, 2019)

Hobér K., Selected Writings on Investment Treaty Arbitration (1st ed., Studentlitteratur, Lund, 2013)

Lim C.L., Ho J. and Papparinskis M., International Investment Law and Arbitration (Cambridge University Press, 2018)

Reed L., Paulsson J. and Blackaby N., Guide to ICSID Arbitration (2nd ed., Kluwer, 2011)

Schefer K. N., International Investment Law (3rd ed., EE, 2020)

Schreuer H., C., The ICSID Convention: A Commentary (1st ed., Cambridge University press., 2001)

Schreuer H., C., The ICSID Convention: A Commentary (2nd ed., Cambridge University press., 2009)

Articles, Reports & Periodicals

Alexandrov A., S., The Baby Boom of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as Investors and Jurisdiction Ratione Temporis

Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)

Carroll L., Parallel proceedings in investment arbitration: moving forward after Orascom TMT investments v Algeria, Australian International Law Journal 23 (2017)

Dumberry P., The legal standing of shareholders before arbitral tribunals: Has any rule of customary international law crystallised? (Michigan State Journal of International Law, Vol 18:3)

Escobar A. A., UNCTAD, Dispute settlement, International Centre for Settlement of Investment Disputes, 2.5, Requirements Ratione Materiae

Horn N., Arbitrating Foreign Investment Disputes, volume 19 (Kluwer Law International, 2004)

ICSID Reports, Volume 1 (1993)

ICSID Reports, Volume 6 (2004)

ICSID Review - Foreign Investment Law Journal, Volume 20 (2005)

ICSID Review, Foreign Investment Law Journal, Vol 13 (1998)

International Investment Law: Understanding Concepts and Tracking Innovations (OECD 2008)

Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950

Investment Disputes, 14 ICSID Rev. (1999)

Lalive, P., The First 'World Bank' Arbitration (Holiday Inns v. Morocco) – Some Legal Problems, 51 *British Year Book of International Law* (1980)

Mona Al-Sh., UNCTAD, Dispute settlement, *International Centre for Settlement of Investment Disputes*, 2.4, Requirements Ratione Personae (2003)

Report of the Executive Director on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965)

Schreuer C., Shareholder Protection in International Investment Law, in Pierre-Marie Dupuy et al. (ed.), *Common Values in International Law*, (Engel 2006)

Schreuer C., UNCTAD, Dispute settlement, *International Centre for Settlement of Investment Disputes*, 2.3, Consent to arbitration (2003)

Schreuer Ch., Shareholder Protection in International Investment Law, *Transnational Dispute Management*, Vol. 2, No. 3 (2005)

Shihata I.F.I and Parra R., A., The Experience of the International Centre for the Settlement of Investment Disputes, 14 *ICSID Rev.* (1999)

Sinclair C., A., *ICSID Review - Foreign Investment Law Journal*, Volume 23, Issue 1, ICSID's Nationality Requirements (2008)

The History of the ICSID Convention, Vol II-1 (ICSID Publication)

Uchkunova I., Indirect Investments Through Chain Of Intermediary Companies: A Philosopher's Stone Or Not Any More? (IMCCA), (Jul 3, 2013)

Valasek J., M., Dumberry P., Developments in The Legal Standing of shareholders and Holding Corporations in Investor-State Disputes (26(1) ICSID Review-Foreign Investment Law Journal, 2011)

Yanacca-Small K., "Parallel Proceedings" in Muchlinski et al. (eds.), The Oxford Handbook of International Investment Law (2008)

Electronic Sources

The ICSID Caseload, Statistics Special Focus, European Union (April 2016)

<https://icsid.worldbank.org/sites/default/files/publications/ICSID%20Web%20Stats%20EU%20%28English%29%20Updated%20June%202013%202016%20Final.pdf>

Last visited on Sep 9, 2021

The ICSID Caseload Statistics, Issue 2021-1

<https://icsid.worldbank.org/sites/default/files/publications/The%20ICSID%20Caseload%20Statistics%20%282021-1%20Edition%29%20ENG.pdf>

Last visited on Sep 9, 2021

<https://icsid.worldbank.org/resources/lists/icsid-3>

Last visited on Sep 9, 2021

International Treaties

Austria-Georgia BIT, entered into force in 2004

Belarus-Georgia BIT, entered into force in 2017

Convention on the Settlement of Investment Disputes between States and Nationals of Other States, entered into force in 1966

Czech Republic-United States BIT, entered into force in 2004

Estonia - United States of America BIT, entered into force in 2004

Germany-Nigeria BIT, entered into force in 2007

Philippines - United Kingdom BIT, entered into force in 1981

UK-Sri Lanka BIT, entered into force in 1981

I, Nino Khizanishvili, confirm that this master's thesis is done by me and it is original.