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**Recent Developments in Investment Treaty
Jurisprudence: Investment Arbitration
Tribunal Approaches to Treaty Shopping**

Submitted by: Arnold & Porter LLP



**Capacity Building on Existing International
Investment Agreements in the APEC Region,
Relevance, Emerging Trends, Challenges and
Policy Options to Address Coherence in Treaty
Making
Lima, Peru
22-24 February 2016**

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Recent Developments in Investment Treaty Jurisprudence: Investment Arbitration Tribunal Approaches to Treaty Shopping

Capacity Building on Existing International Investment Agreements in the
APEC Region Relevance, Emerging Trends, Challenges and Policy Options
to Address Coherence in Treaty Making

APEC Peru

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Treaty Shopping



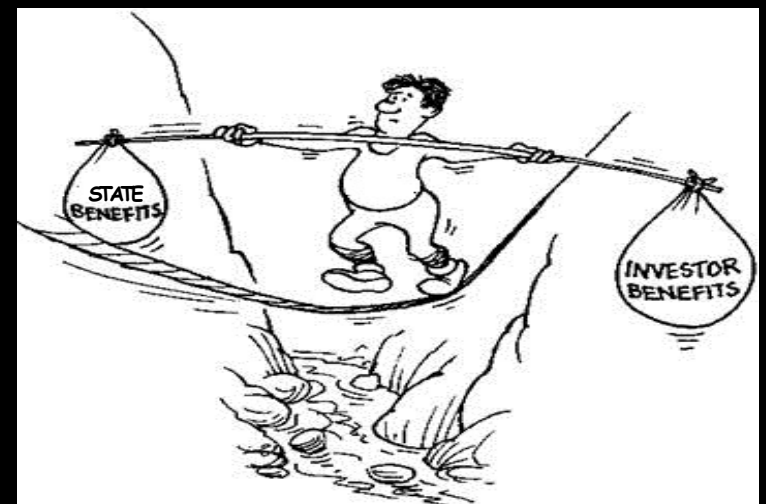
What Claimant-Investors think Treaty Shopping is



What Respondent-States think Treaty Shopping is

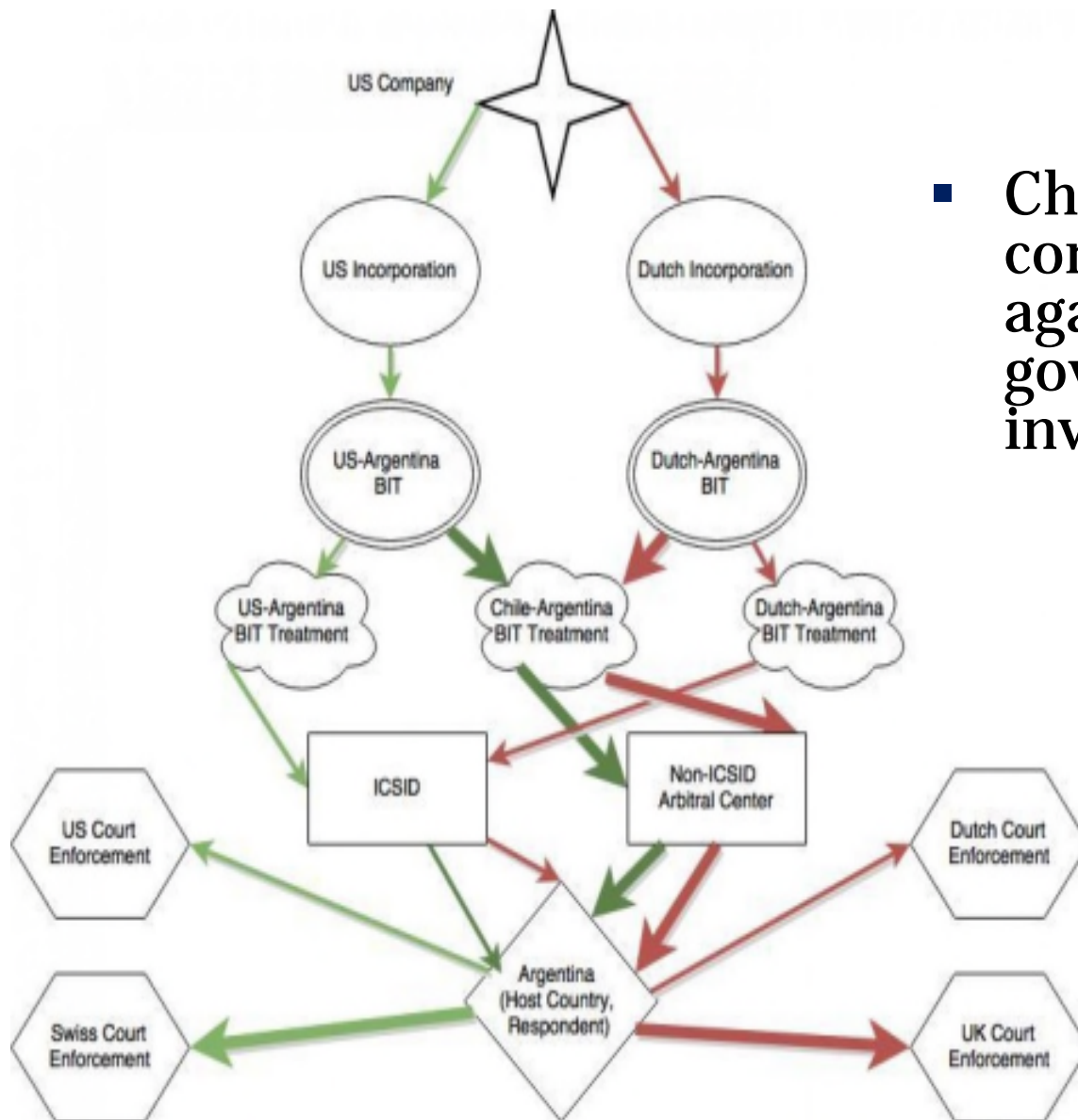


What Treaty Negotiators think Treaty Shopping is



What Tribunals think Treaty Shopping is

Treaty Shopping Example

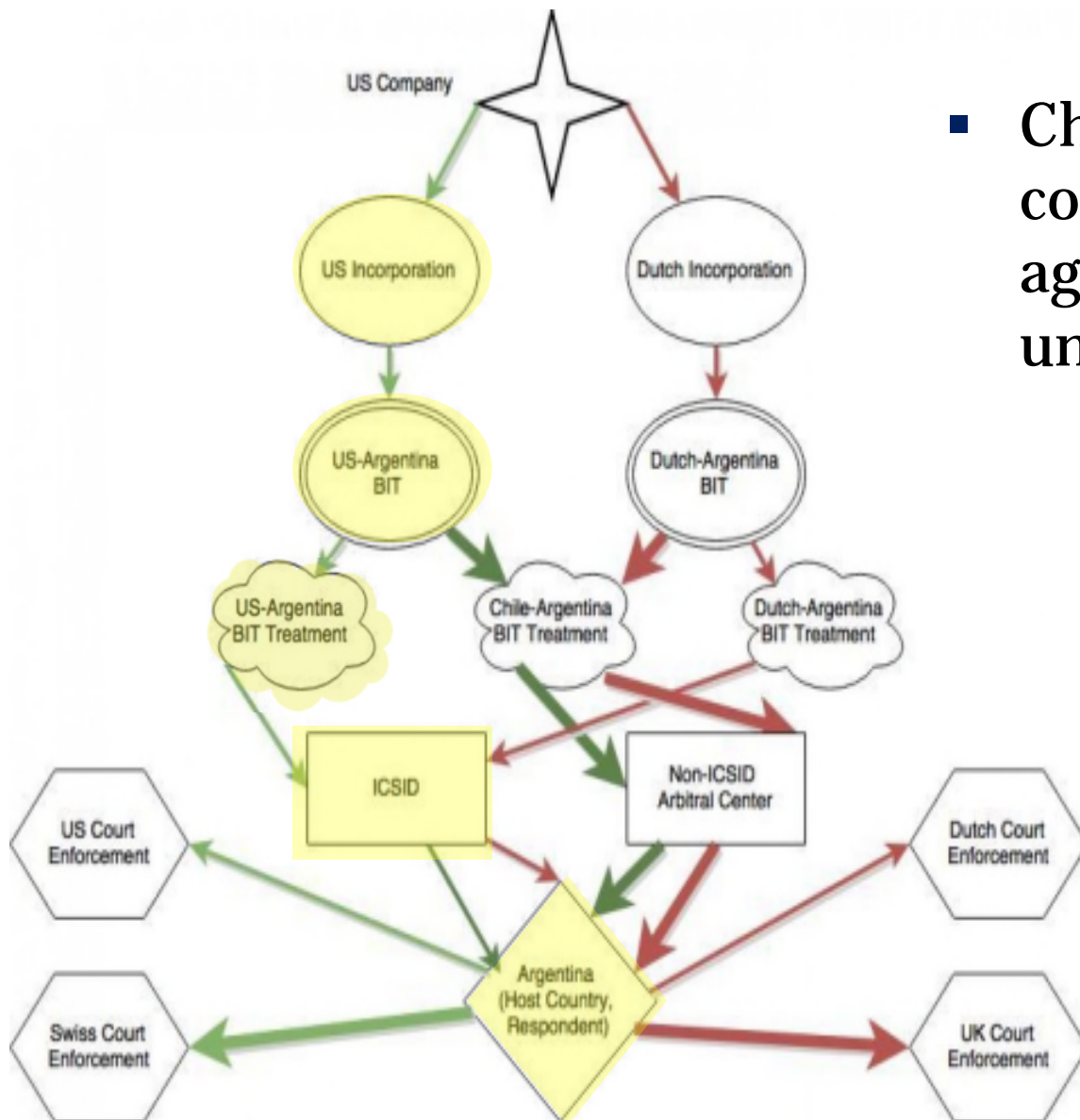


- Choices of an investor considering bringing a claim against the Argentine government under an investment treaty

* Note:
Thin lines = easy for claimant-investor
Thick lines = complicated for claimant-investor

Treaty Shopping Example

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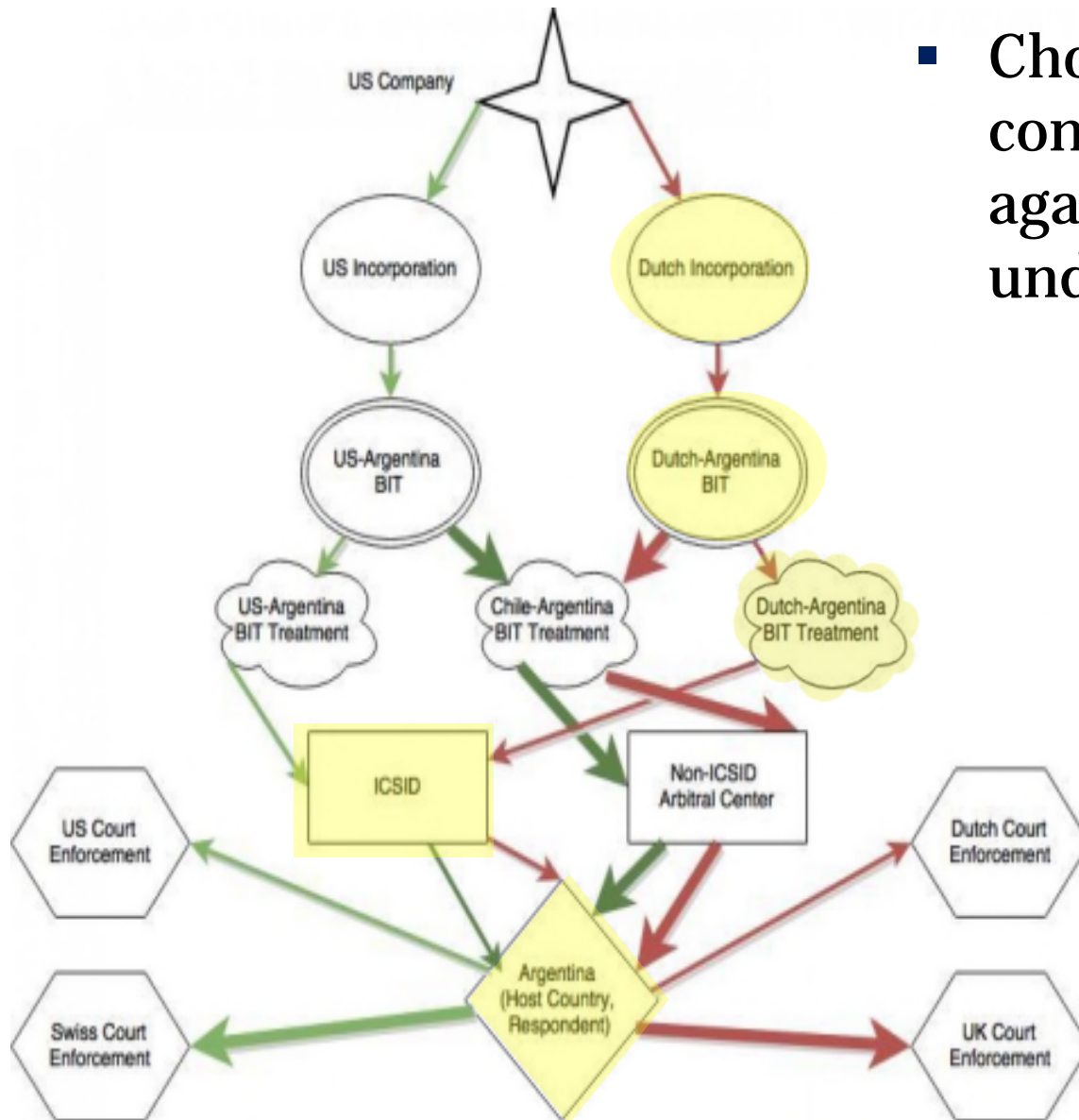


The company could invoke protections under the Argentina-U.S. BIT.

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Treaty Shopping Example

- Choices of an investor considering bringing a claim against the Argentine government under an investment treaty

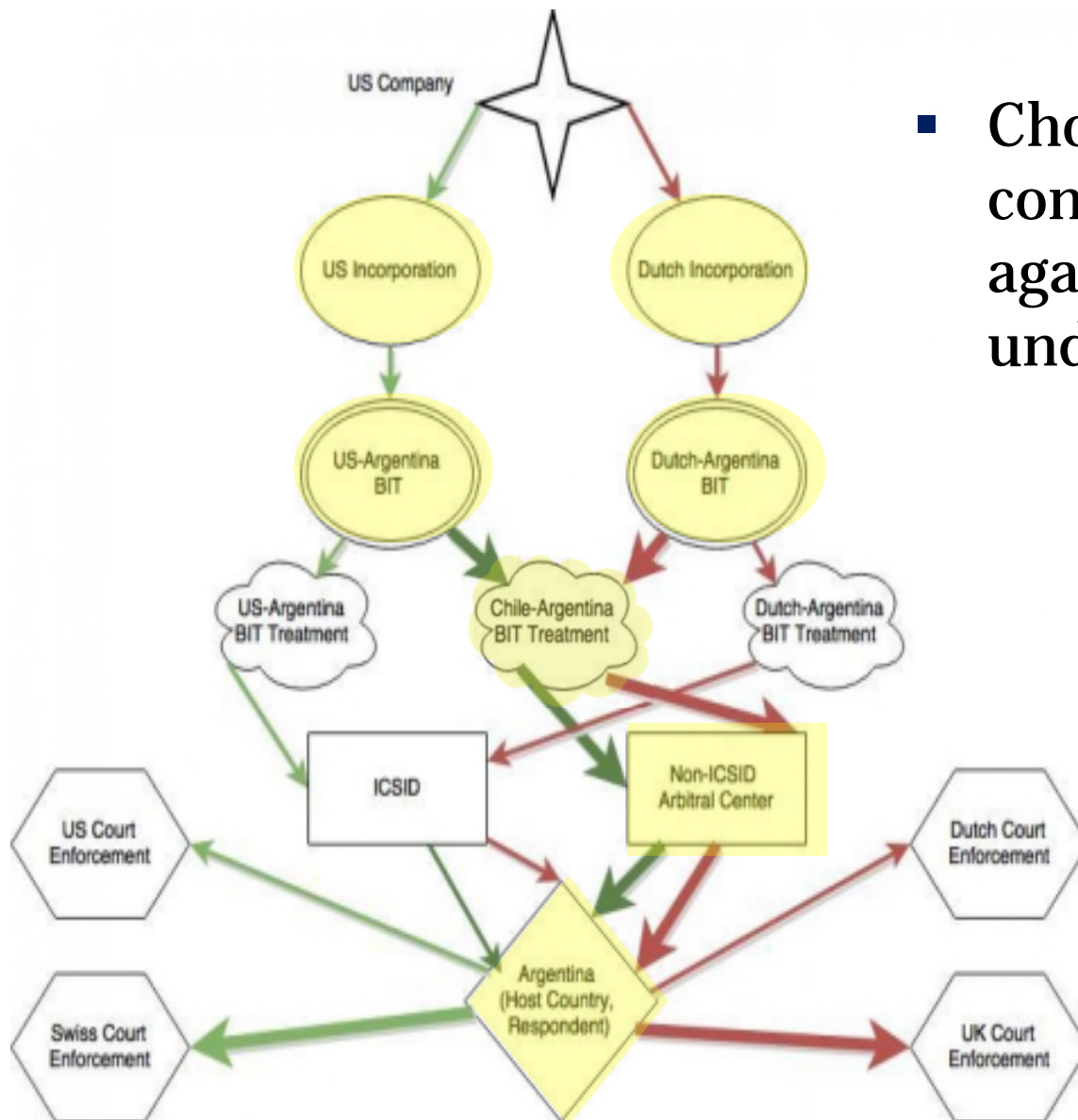


OR the company could manipulate its multinational holding company structure so that its Dutch subsidiary is the legal owner of its Argentine operations. Then the company could invoke protection under the Argentina-Netherlands BIT.

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Thin lines = easy for claimant-investor
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Treaty Shopping Example

- Choices of an investor considering bringing a claim against the Argentine government under an investment treaty



OR the company could seek protection under third country treaties (e.g., Argentina-Chile BIT via an MFN Clause).

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Thin lines = easy for claimant-investor
Thick lines = complicated for claimant-investor

Respondent States in Potential Treaty Shopping Cases since 2015

Country	Frequency
Venezuela	11
India	8
Hungary	5
Argentina	4
Czech Republic	4
Bolivia	3
Russia	2
Egypt	2
Georgia	2
Kazakhstan	2
Mexico	2
Mongolia	2
Australia	1
Azerbaijan	1
Chile	1
Ecuador	1
El Salvador	1
Guatemala	1
Indonesia	1
Macedonia	1
Paraguay	1
Peru	1
Poland	1
Republic of Korea	1
Romania	1
Senegal	1
Slovak Republic	1
Slovenia	1
Turkmenistan	1
Uruguay	1
Yemen	1
Total	66

***Source:** Eunjung Lee, *Treaty Shopping in International Investment Arbitration: How often has it occurred and how has it been perceived by Tribunals?* London School of Economics and Political Science Department of International Development Working Paper Series, No. 15-167 (Feb. 2015).

Claimants' Home Countries in Potential Treaty Shopping Cases

Country	Frequency
Netherlands	27
United Kingdom	8
United States	7
Cyprus, Luxembourg	4
Belgium, Mauritius	3
Singapore, Spain	2
Argentina, Austria, Barbados, Chile, France, Hong Kong, Italy, Switzerland, UAE (9 countries)	1
Total	69

**Source: Eunjung Lee, Treaty Shopping in International Investment Arbitration: How often has it occurred and how has it been perceived by Tribunals? London School of Economics and Political Science Department of International Development Working Paper Series, No. 15-167 (Feb. 2015).*

Home Country of Claimants' Parent Companies in **Potential** Treaty Shopping Cases

Country	Frequency
United States	21
United Kingdom	7
Italy	5
Canada	3
France	3
Russia	2
Luxembourg	2
Mexico	2
Switzerland	2
Australia, Belgium, Germany, Japan, Korea, New Zealand, Norway, Spain, Israel, Bahamas, Cyprus, Kuwait, UAE (13 countries)	1
Argentina, Azerbaijan, Kazakhstan, Malaysia, South Africa, Turkey (6 countries)	1
Total	66

**Source: Eunjung Lee, Treaty Shopping in International Investment Arbitration: How often has it occurred and how has it been perceived by Tribunals? London School of Economics and Political Science Department of International Development Working Paper Series, No. 15-167 (Feb. 2015).*

Consent: Language of the Treaty Governs

“The Tribunal cannot read more into the BIT than one can discern from its plain text.”

ADC Affiliate Ltd., et al. v. Hungary

“[A] treaty must be interpreted first on the basis of its plain language.”

Yukos Universal Limited (Isle of Man) v. The Russian Federation

Consent: Language of the Treaty Governs . . . *with limits . . .*

* There is jurisdiction only if the parties to the dispute have each **consented** and throughout the process each is treated on an equal footing. . . . That equality of position in the present context is, in this Tribunal's view, a further factor supporting the **growing body of decisions placing some limits on the investor's choice of corporate form, even if it complies with the relevant technical definition in the treaty text.**

Conocophillips Petrozuata B.V., Conocophillips Hamaca B.V. and Conocophillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits, ¶ 274, 3 September 2013

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How Tribunals Have Addressed Treaty Shopping

- Definition of “investor” (jurisdiction *ratione personae*)
- Definition of “investment” (jurisdiction *ratione materiae*)
- Denial of benefits clause

Definition of “Investor”: Examples

Netherlands

- i. natural persons having the nationality of one of the Contracting Parties in accordance with its law;
- ii. legal persons constituted under the law of one of the Contracting Parties.

Draft TPP

[A] Party, or a **national** or an **enterprise of a Party**, that **attempts to make**, is making, or has made an **investment** in the territory of another Party.

An **enterprise of a Party** means an enterprise constituted or organised under the law of a Party, or a branch located in the territory of a Party and carrying out business activities there.

[A]n investor “**attempts to make**” an investment when that investor has taken concrete action or actions to make an investment, such as channelling resources or capital in order to set up a business, or applying for a permit or licence.

[I]**vestment** means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

- a) an enterprise;
- b) shares, stock and other forms of equity participation in an enterprise;
- c) bonds, debentures, other debt instruments and loans;
- d) futures, options and other derivatives;
- e) turnkey, construction, management, production, concession, revenue-sharing and other similar contracts;
- f) intellectual property rights;
- g) licences, authorisations, permits and similar rights conferred pursuant to the Party’s law; and
- h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens and pledges, but investment does not mean an order or judgment entered in a judicial or administrative action.

Definition of “Investor”

- “Lifting” (or “Piercing”) the Corporate Veil



Definition of “Investor”

- **Typical Treaty Shopping Scenario Number 1:**
Claimant is foreign-incorporated but majority-controlled by a natural or legal person of the host State.



Definition of “Investor”

- Typical Treaty Shopping
Scenario No. 1: Claimant is foreign-incorporated but majority-controlled by a natural or legal person of the host State.
 - A general **reluctance to “pierce the corporate veil”**
 - Unclear **how far “downstream an arbitral tribunal should look to determine the nationality of the ultimate control of the claimant**



Definition of “Investor”

- Typical Treaty Shopping Scenario Number 2: Claimant is locally incorporated but majority-controlled by a natural person holding **dual nationality**, one of which is the host State’s nationality.



Definition of “Investor”

Recently articulated limits to the use of dual nationalities for the purpose of obtaining jurisdiction for a claim subject to a BIT:

- 2013 - Dual nationality cannot be used to circumvent ICSID Art. 25(2)(b).
Burimi SRL and Eagle Games S.H.A v. Albania

- 2014 - “[C]ontrol exercised by a national of the Contracting State against which the Claimant asserts its claim” violates the limitations set forth in Article 25(1) and Article 25(2)(b)(i) in regard to both Contracting States and nationals (including dual nationals).
 - Granting jurisdiction in such a case “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.”
National Gas Company S.A.E. v. Egypt

Definition of “Investor”

Recently articulated limits to the use of dual nationalities for the purpose of obtaining jurisdiction for a claim subject to a BIT:



Definition of “Investment”

- **Double-Barreled Test**



Definition of “Investment”

- In the context of ICSID, according to the *Salini Construction v. Morocco* Tribunal:
 - Contribution of assets
 - Certain duration of performance of the contract
 - Participation in the risks of the transaction
 - Contribution to the development of the host state

Definition of “Investment”

- Abuse of Process & Good Faith
 - *See Phoenix Action, Ltd. v. Czech Republic*



Definition of “Investment”

- **Abuse of Process & Good Faith** (*détournement de procedure*)
 - Timing of the restructuring in relation to timing of the claim
 - Substance of the transaction
 - True nature of the operation

Definition of “Investment”

- Abuse of Process & Good Faith
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 - Substance of the transaction
 - **True nature of the operation**

Denial of Benefits Clauses: A New Defense Against Treaty Shopping?

“[M]any recent investment agreements include provisions authorizing host States to deny treaty benefits to shell companies. Such ‘denial of benefits’ provisions have been developed in response to concerns over ‘treaty shopping,’ *i.e.*, the practice of establishing a corporate presence in a jurisdiction solely to gain access to certain treaty protections.”

<http://kluwarbitrationblog.com/2015/07/20/the-emerging-harmonization-of-the-international-investment-law-regime/>



Comparing Denial of Benefits Provisions

Denial of Benefits Clause	ASEAN CIA, Art. 19	NAFTA, Art. 1113	ECT, Art. 17	US Model BIT, Art. 17	Draft TPP, Art. 9.14
Investment in Party is owned or controlled by investor(s) of non-Party [<i>or</i> Denying Party (ASEAN, US Model BIT, TPP)] <i>and</i> has no substantive business operations in Party [other than the Denying Party (TPP)]	§ 1(a, b)	§ 2 requires prior notification	§ (1)	§ 2	§ 1(a, b)
Investment in Party is owned or controlled [directly or indirectly (ECT)] by investor(s) of non-Party <i>and</i> Denying Party and non-Party do not maintain diplomatic relations	§ 1(c)	§ 1.a	§ (2)(a)	§ 1(a)	
Investment in Party breaches domestic law of Denying Party by misrepresenting ownership	§ 2 requires prior notification				
Investment in Party is owned or controlled [directly or indirectly (ECT)] by investor(s) of non-Party <i>and</i> Denying Party adopts or maintains measures that prohibit transactions with certain non-Party investors or would be violated or circumvented if IIA benefits were granted to non-Party investor(s)		§ 1.b	§ (2)(b)	§ 1(b)	§ 2

Divergence of Tribunals' DOB Interpretations: A Question of Timing

Benefits GRANTED to Claimant:

- Unless otherwise provided in the relevant treaty, a State-Respondent must deny the benefits afforded in the respective treaty **before** such benefits are claimed by the Investor-Claimant.
 - ***Plama Consortium Limited v. Bulgaria, 2005***
 - ECT
 - ***LLC AMTO v. Ukraine, 2008***
 - ECT
 - ***Yukos Universal Limited (Isle of Man) v. The Russian Federation, 2009***
 - ECT
 - ***Liman Caspian Oil B.V. and NCL Dutch Investment B.V. v. Kazakhstan, 2010***
 - ECT



Benefits DENIED to Claimant:

- Unless otherwise provided in the relevant treaty, a State-Respondent is entitled to deny the benefits afforded in the respective treaty after such benefits are claimed by the Investor-Claimant.
 - ***Guaracachi America, Inc. and Rurelec plc v. Bolivia, 2014***
 - US-Bolivia BIT
 - ***Pacific Rim Cayman LLC v. El Salvador, 2012***
 - CAFTA

Don't Forget the
Most Favored Nation Clause:
The Gift that Keeps on Giving . . .



Take-Aways on Treaty Shopping

- Know and understands the terms and *plain language* of the IIA.
- Review the definition of “investor” in the IIA.
 - The jurisprudence of assessing investors for jurisdiction *ratione personae*, the jurisprudence is less developed. Fraud or misrepresentation can be a window to piercing the corporate veil.
- Review the definition of “investment” in the IIA.
 - When assessing investments for jurisdiction *ratione materiae*, remember the double-barreled test in the ICSID context (*Salini*) and good faith/abuse of process factors (*Phoenix*).
- Does the IIA have a Denial of Benefits provision?
 - Recall that tribunals’ interpretations of Denial of Benefits provisions vary.
 - Some Tribunals have interpreted Denial of Benefits provisions to require prior notification of claimants if the State intends to invoke such protections prior to commencing proceedings.
 - Refer back to the IIA definitions of investor/investment, as these can serve as ways around Denial of Benefits clauses.
- Evaluate the IIA’s MFN clause.

Thank You



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