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Caution Restructuring: The New Restrictive Jurisdictional Approach of ICSID Tribunals

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International Centre for Settlement of Investment Disputes (ICSID) tribunals have been accused of systemic impartiality and of favouring investors. In response to criticism, a new approach to jurisdiction has emerged. While, initially, tribunals liberally heard investment claims as long as a foreign entity could be identified in the corporate chain of the claimant, now arbitrators use the notions of corporate control and timing of restructuring to determine whether investors may legitimately access international arbitration. In the light of recent decisions, corporate restructuring can no longer be used as a safe method of accessing ICSID jurisdiction. This improves the balance between State and investor interests.

Keywords: bona fide, corporate restructuring, corporate veil, ICSID jurisdiction, *Tokios*

The purpose of this article is to outline the emergence of a restrictive jurisdictional approach to the nationality of corporate claimants under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States[1] (Convention). This new approach prevents corporate restructuring from becoming a tool of accessing international arbitration.

The Convention is one of the most utilized arbitration rules.[2] Besides being specifically designed for investor-State arbitration, the International Centre for

Settlement of Investment Disputes (ICSID) has its own enforcement mechanism, and ICSID awards cannot be challenged in domestic courts.[3] With 150 States having ratified it, the confirmation and enforcement of awards is relatively swift and inexpensive.[4] However, ICSID's legitimacy is challenged. South American States such as Bolivia, Ecuador and Venezuela have denounced the Convention as a symbol of colonialism, accusing the tribunals of being too favourable to investors.[5]

The tribunals' reaction to the accusation of systemic impartiality will be analyzed by focusing on the evolution of the jurisdictional interpretation of corporate nationality, particularly through Article 25(2)(b) of the Convention. The premise of this article is that a corporate investor would restructure and gain the nationality of an ICSID member State in order to bring a claim under the Convention. Such restructuring poses jurisdictional difficulties.

The development of the interpretation of Article 25(2)(b) from liberal and investor-friendly to more restrictive will be examined in two parts. First, the concept of corporate nationality will be reviewed in the context of the Convention. Second, the evolution of the notions of corporate control and timing of restructuring will be presented.

1. Nationality, The Outer Limit of ICSID Jurisdiction

ICSID administers arbitrations governed by the Convention. The provisions regarding the jurisdiction of ICSID are enshrined in Article 25. Jurisdiction refers to the limits within which the Convention will apply and the facilities of ICSID will be available for arbitration and conciliation.[6] It has three essential elements: consent, parties and the nature of the dispute. The focus of this paper is the nationality of corporate claimants, Article 25(2)(b).[7]

The nationality requirement has a negative part and a positive part. The former is that the investor-claimant may not have the nationality of the State with which it is in dispute; this prevents the use of international arbitration as a substitute for national courts for exclusively domestic disputes. The latter is that the investor-claimant must have the nationality of a Contracting Party. This requirement is based on the mutuality principle, balancing the interests of host-States and of investors. Pursuant to this principle, once the host-State has agreed to arbitration, it is protected against diplomatic protection claims[8] and it will be able to enforce awards in its favour,[9] because the investor is a national of another Contracting Party.[10]

There are two types of corporations that meet the ICSID nationality requirements: either, under the first branch of Article 25(2)(b), corporations have the nationality of a Contracting Party other than the respondent-State, on the relevant date, or, under

Article 25(2)(b) *in fine*, corporations have the personality of the respondent-State and, because of foreign control, the Contracting Parties have agreed they should be treated as nationals of another State. This last provision was included because hosts often require foreign investors to use domestic entities for their business.[11] Thus, the nationality inquiry is not limited to the claimant, but may extend up its corporate chain.

2. Arbitral Interpretation of Corporate Nationality: From Liberal to Restrictive

While Article 25(2)(b) allows Contracting Parties to establish nationality requirements in bilateral international trade agreements (BITs), the Convention's jurisdiction does not completely defer to them. The nationality requirements are among the Convention's objective criteria.[12] The Convention determines the "outer limits" of ICSID's jurisdiction and of the arbitral tribunals.[13] These limits guard against investors bringing domestic disputes before international tribunals. The Vienna Convention on the Law of Treaties[14] (VCLT), Article 31(1), provides that a treaty shall be interpreted in the light of its object and purpose. Corporate control and timing of restructuring are interpretative aids establishing the Convention's borders.

A. True Control of the Company: From a Formalist Approach to Genuine Connection

Assessing whether a foreign investor who has the nationality of a Contracting Party controls the claimant is difficult. Tribunals struggle between two options: (1) determining who really controls the corporate structure by looking beyond the place of incorporation and *siege social* (i.e., place of effective management) of this first controlling company or (2) considering only the first level of corporate ownership. These are the fundamental issues.

Control can be used both as a sword and as a shield. The claimant-investor may invoke the control theory to argue that the tribunal has personal jurisdiction, regardless of whether the investment is owned through a third-State company, as long as nationals of a Contracting Party control it.[15] By the same token, the respondent-State may invoke the control theory to argue that the tribunal does not have jurisdiction because investors ineligible for ICSID protection control the investment.[16] In response, the claimant-investor may argue for a literal interpretation of the Convention, avoiding the control theory while having its claim heard by the tribunal.[17]

The arbitral approach to the control theory has evolved from investor-friendly to more restrictive. Until 2008, tribunals used the control theory to establish jurisdiction

and refused to use it when it would deny jurisdiction (1). After 2008, however, tribunals have adopted a more restrictive approach, using the control theory to identify a genuine connection to the Contracting Party (2). The chronological presentation of decisions will reveal this development.

i) Initial liberal approach: low threshold for hearing claims

Initially, tribunals used the control theory only when it allowed them to hear the claim. The old approach was liberal because it ensured broad access to ICSID jurisdiction. This was possible through a formalist interpretation of the Convention that resulted in ascertaining jurisdiction once a foreign entity was identified in the claimant's corporate chain of control

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a) LOOKING UP THE CORPORATE CHAIN UNTIL SATISFACTION OF THE NATIONALITY REQUIREMENT

In *Amco v Indonesia*[18] the tribunal allowed an Indonesian company controlled by a U.S. company, in turn controlled by Dutch nationals, to sue Indonesia under ICSID. Indonesia claimed that it would not have consented to arbitration had it known that the investor was controlled by Dutch nationals. The tribunal rejected this argument, finding that the Convention does not require the arbitrators to delve beyond the first level of foreign ownership. The tribunal held that the concept of nationality under ICSID "is a classical one, based on the law under which the juridical person has been incorporated, the place of incorporation and the place of the social seat."[19]

The *Amco* tribunal explicitly stated that it was not required under the Convention to consider the nationality of the juridical or natural persons controlling the foreign juridical person.[20] It refused to apply the control theory, barring exceptional circumstances, although the respondent-State proved that it would not have consented to arbitration had it known the nationality of the controller.[21]

Amco is considered by some to be incompatible with *SOABI*, an ICSID decision rendered only four years later, in which the tribunal looked through two levels of corporate ownership to identify the ultimate foreign controller.[22] In *SOABI*,[23] a Senegal corporation controlled by a Panama corporation owned by Belgian nationals was allowed to sue Senegal under ICSID. Panama was not party to the Convention at the time of the decision. One arbitrator, in dissent, would have dismissed the claim by adopting the incorporation theory. The dissent considered that the claim should have been rejected under Article 25(2)(b) *in fine* because the immediate foreign controller was not a national of a Contracting Party.[24] The majority, however, held that ultimate control was sufficient to establish the tribunal's jurisdiction. It was held, in the award,

that the ratio of the decision reconciled the desire of host States for investments to be made through national vehicles while allowing foreign investors access to ICSID jurisdiction.[25]

Some authors have tried to reconcile *Amco* and *SOABI*. Wisner and Gallus argued that the decisions both suggest that tribunals will look through mere holding companies, as was the case in *SOABI*, but will refuse to look through companies pursuing activities in the jurisdiction where they are incorporated.[26] However, later decisions, i.e., *Tokios*[27] and *Rompetrol*,[28] where the tribunals allowed claims of shell companies controlled by host State nationals, stand in disagreement. The more coherent interpretation of decisions up until 2008 is that of Nathan, who wrote that the awards demonstrate that the tribunals would look up the corporate chain until they find nationality satisfying Article 25(2)(b) requirements.[29]

b) CONFIRMATION OF THE TRIBUNAL'S PROPENSITY TO HEAR CLAIMS WHILE EMERGENCE OF STRICTER APPROACH IN DISSENT

The *Tokios* decision explored the role of the control test in the context of ICSID. In *Tokios*, the tribunal allowed a Lithuanian company, 99 percent owned by Ukrainian nationals, to bring a claim against Ukraine under the Lithuania-Ukraine BIT. The tribunal interpreted the BIT notion of "investor" literally and refused to lift the corporate veil. The tribunal held that the formalist approach fulfils the parties' expectations, increases the predictability of dispute resolution and allows investors to structure their business to benefit from BIT protection.[30]

The majority in *Tokios* considered that, because the Convention does not define a method for determining corporate nationality, great deference is owed to the definition of corporate nationality under the BIT.[31] In dissent, Professor Weil held that the discretion of the Contracting Parties to define corporate nationality should not extend ICSID jurisdiction single-handedly so as to allow ICSID tribunals to hear disputes between the host-State and domestic investors.[32]

While the majority first considered the BIT nationality requirements and then analyzed whether Article 25, interpreted in the light of its object and purpose,[33] limited the tribunal's jurisdiction, the dissent held that the arbitrators must first consider the inherent limitations of Article 25 and, once they are met, delve into the assessment of the BIT requirements.[34] Although the debate seemed methodological, the crux was how the majority and the dissent defined the "outer limits" of the Convention. The majority chose to assess the formal requirements of Article 25.[35] The dissent, however, considered the purpose of the Convention and held that only foreign investors could bring ICSID claims.

While the majority in *Tokios* was correct in observing that its formalist interpretation would allow for more predictability, it disregarded, as Professor Weil noted, the objectives of the Convention.[36] According to the dissent, ICSID was meant to protect international investment, not national investment channelled through foreign conduits.[37] If, however, the purpose of the Convention is to "provid[e] a broad protection to the investors and their investments in the territory of either party,"[38] then the majority's decision is preferable, as it does not include additional hurdles to accessing ICSID's dispute resolution mechanism.[39]

The majority and the dissent in *Tokios* differed on the role of the control test under the Convention. On the one hand, the majority found that the control test is to be used only for the purposes of expanding jurisdiction under Article 25(2)(b) *in fine*, in the case of a national claimant controlled by a foreigner.[40] On the other hand, the dissent considered that the control test is meant to ensure that the reality of the foreign investment prevailed and is not limited to the circumstances of Article 25(2)(b) *in fine*. Nevertheless, the dissent did acknowledge the difficulties of identifying the real controller and held that "the control test should not be used in each and every case in the situations involving multiple investors."[41] Therefore, both the dissent and majority agreed that the incorporation or *siege social* should be the test in the case of complicated corporate structures. The dissent, however, opposed allowing domestic investors to benefit from ICSID guarantees when their control is clearly identifiable. While the dissent was concerned with preventing the circumvention of the Convention, the majority followed a formalist interpretation consistent with *Amco* and *SOABI*, reflecting the liberal approach previously identified.

c) RESISTANCE OF FORMALISM

The last claimant-friendly decisions reviewed are the 2008 awards of *Rompetrol v Romania*[42] and *Rumeli v Kazakhstan.*[43] Both cases dealt with the issue of control of the claimant's foreign controller. Jurisdiction was challenged because ICSID does not provide for, respectively, domestic-State and State-State arbitration. In *Rompetrol*, the respondent alleged that the host's domestic investor controlled the foreign controller. In *Rumeli*, the respondent argued that the State controlled the foreign controller. In both cases the respondents were unsuccessful. The tribunals favoured the formalist rationale of *Tokios*.

In *Rompetrol*, the tribunal found that it had jurisdiction to hear a claim of a Romanian subsidiary controlled by a Dutch holding company. A host-State national in turn controlled the Dutch company. The corporate structure was similar to the one in *Tokios.* In *Rompetrol* the question was whether it was relevant that a national of the host-State controlled the foreign controller of the domestic claimant, while in *Tokios*

the question concerned the national control of the foreign claimant. The tribunal held that Professor Weil's dissent went beyond the ordinary meaning of the terms of the treaty and thus contradicted VCLT Article 31(1). Therefore, the *Rompetrol* tribunal adopted a literal interpretation of the Netherlands-Romania BIT,[44] confirming *Tokios.*

In the same vein, the tribunal in *Rumeli* found that it had jurisdiction to hear a claim by Turkish State-controlled companies. Although States cannot bring claims under the Convention, the tribunal found that the Turkish corporations fit the ICSID definition of investors and that, according to *ADC,*[45] the corporate veil should be pierced only in cases of misuse of the corporate structure.

Both *Rompetrol* and *Rumeli* confirm the majority's approach in *Tokios.* In these cases, once they found they had jurisdiction, the tribunals refused to look beyond the first level of ownership, despite clear indications that they might be effectively extending the ICSID mechanism to hosts' nationals and States.

Six months after the *Rumeli* decision, in December 2008, *TSA Spectrum*[46] was released. This case inaugurated a new approach on investors' access to ICSID tribunals. After 2008 the abuse-of-rights doctrine gained traction, limiting the previous liberal jurisdictional approach. Tribunals started denying claims when the investors were not acting *bona fide,*[47] meaning that the investors acted artificially or deceitfully during the negotiation or execution of instruments that gave rise to the investment.[48] The subjective element of motivation is always difficult to prove directly, so tribunals will use timing and control as proxies in assessing the *bona fide* conduct of the investor. Two aspects that limit the investor's access to investment tribunals, the restrictive approach of corporate control and the timing of acquiring a certain nationality, will be further presented.

ii) Recent restrictive approach: pursuit of control to its source

In *TSA Spectrum,* the tribunal denied the claim against the Argentine Republic of an Argentine company controlled by a Dutch holding company that was in turn controlled by Argentinian nationals. The relevant facts for the jurisdictional question were similar to the ones in *Rompetrol.* The Netherlands-Argentine BIT provided that corporations controlled by nationals of the Contracting Parties would be considered investors under the BIT.[49] Therefore, the tribunal had to determine whether the control exerted by the Dutch holding company was foreign despite it being owned by nationals of the respondent. The tribunal held that the objective identification of foreign control must be pursued to its source.[50] The tribunal followed the dissent in *Tokios* and rejected the formalist approach of the decisions previously discussed.[51]

The *TSA* tribunal went beyond the first level of foreign ownership when identifying control. While identifying the true controller and denying jurisdiction, the arbitrators applied the *SOABI* approach of looking up the corporate chain. Moreover, they directly criticized both *Tokios* and *Rompetrol*.[52] By distinguishing *TSA* from *Tokios*, the tribunal implicitly denied that the control theory was limited to extending ICSID jurisdiction under Article 25(2)(b) *in fine*. Furthermore, it should be noted that *TSA* was decided on the basis of ICSID and not under the control provision of the BIT. Therefore, the TSA holding cannot be limited to the situation of a national claimant controlled by a foreign investor and is equally relevant when analyzing the nationality of a foreign claimant under the first thesis of Article 25(2)(b).[53]

After having observed the evolution of the control requirement from investor-friendly to restrictive, the similar evolution of the timing element will be presented. The timing of corporate restructuring has become an essential element of the jurisdictional analysis.

B. Timing of National Change: From Irrelevant to Essential

To benefit from a favourable BIT, an investor might consider changing its nationality or introducing in its corporate structure entities with the required nationality. Structuring investments in such a way is neither unusual nor reprehensible.[54] The timing, however, of the change might give rise to jurisdictional challenges. Initially, tribunals had an investor-friendly approach, which has been recently tempered by the abuse-of-rights doctrine.

i) Initially no scrutiny of timing

In *Aguas del Tunari v Republic of Bolivia*,[55] the tribunal accepted jurisdiction under the Netherlands-Bolivia BIT[56] over the investor's claim. The claimant was a Bolivian company controlled by Dutch holdings. A U.S. corporation and a Spanish juridical person primarily owned the Dutch holdings. The most remarkable aspect of this decision is that the Dutch holdings were introduced in the corporate structure after the problems regarding the investment arose and when it was foreseeable that a claim would be filed. [57]

The majority allowed the claim because it did not find sufficient evidentiary support that the change of corporate structure was an abuse of corporate form or fraud. In making this determination, the majority looked at the following elements: (1) the scope of the joint venture between the primary investor and the Dutch companies and (2) the reason for setting the joint venture in the Netherlands. Regarding the second

criterion, although the tribunal did not find strong evidence justifying the choice of seat of the holdings, the majority held that simply trying to profit from beneficial legal provisions is not illegal and thus allowed the claim.[58]

The dissent argued that the majority was wrong not to carefully examine the timing of the restructuring. Prior to the restructuring, the investor did not have access to ICSID jurisdiction and, at the time of the restructuring, the investor was obviously alarmed by certain events unfolding in Bolivia.[59] Thus, the dissenting arbitrator considered that Bolivia had not consented to arbitration and suggested that otherwise, "the balance between the benefits and the obligations of the host State [would be] broken since the latter [would] become unpredictable."[60]

ii) Increasing importance of timing in the recent application of the abuse-of-rights doctrine

The subsequent decisions that involved corporate restructurings shortly prior to or during arbitration adopted a more restrictive approach than *Aguas* and scrutinized the timing of corporate restructuring in order to identify abusive conduct. First, *Phoenix* considered both timing and motivation, then *Mobil* focused solely on timing and, finally, *Pac Rim* attempted to clarify the timing requirement.

a) ALLEGATION OF DOMESTIC CONTROL: CLOSE SCRUTINY OF TIMING

In 2009, the *Phoenix Action v Czech Republic*[61] decision inaugurated a new approach to jurisdiction. In this case, as a result of a freeze of assets pursuant to a criminal investigation, two Czech companies went bankrupt. A Czech national owned the corporations. The owner, after changing his own nationality, created an Israeli corporation that bought the Czech corporations. Then, the Israeli corporation sued the Czech Republic under ICSID for the damage incurred.

The *Phoenix* tribunal applied the abuse-of-rights doctrine[62] and refused to hear the claim submitted after an "artificial transaction".[63] The tribunal built on the findings of *Inceysa*[64] and *Plama*,[65] cases in which jurisdiction was denied because the investors had been, respectively, corrupt and deceitful and thus violated domestic and international public policy.[66] To refuse jurisdiction, the tribunal in *Phoenix* held that artificial restructuring violated the international principle of good faith and that "[t]he tribunal has to prevent an abuse of the system of international investment protection under the ICSID Convention."[67]

While assessing the investor's conduct, the *Phoenix* tribunal analyzed two elements: (1) the timing of the transaction[68] and (2) its motivation.[69] While the

tribunal did not specify the acceptable timing, it was used as a proxy for identifying the motivation of the transaction. The tribunal held that the chronological proximity between the change in corporate structure and filing the claim suggested that the modification was not made in good faith. The tribunal rejected the claim because it appeared to be motivated solely by the desire to access the Israel-Czech Republic BIT.[70] Moreover, the tribunal held that such a motivation is not acceptable.[71]

It should be noted that the tribunal might have been strict with the claimant in this case because the ultimate controller was a national of the host, unlike in *Aguas*. It should also be remarked that, in both *Tokios* and *Rompetrol*, the respondent claimed that the investors had abused their rights and incorporated the foreign entities specifically to gain access to ICSID tribunals. In those cases, however, the tribunals looked at the fact that the entities had been incorporated six years prior to lodging the claim, and thus concluded that the motivation for their incorporation was not limited to accessing the arbitral jurisdiction.

b) TIMING: ESSENTIAL FOR ACCESSING ICSID JURISDICTION

The following year, 2010, *Mobil v Venezuela*[72] quoted *Phoenix* in approval. In *Mobil* the restructuring occurred after problems arose and shortly before the risk of expropriation was actualized. This case dealt with a claim of a Venezuelan entity controlled by Bahamas subsidiaries. U.S. subsidiaries owned the Bahamas corporations and a Dutch holding controlled the U.S. entities. The BIT invoked was the Netherlands-Venezuela Agreement.[73] The tribunal allowed the claim using a similar control analysis to the one in *SOABI*.

In 2005 a dispute arose between Mobil and Venezuela regarding higher royalty payment and income tax requirements for Mobil's investments. In 2007 the President of Venezuela announced the nationalization of certain oil products. From 2005 to 2006 Mobil restructured its investments through a holding company in the Netherlands. The arbitration claim was filed in 2007. The tribunal refused to assume jurisdiction for the claims regarding the royalty payment and the income tax because they had occurred prior to the restructuring and, in that respect, the sole purpose of the restructuring was to obtain BIT protection.[74] The tribunal, however, accepted the claim regarding the nationalization. The tribunal held that such a claim was not abusive because the issues regarding nationalization occurred after the restructuring became effective and because the investors were allowed to protect their investment through nationality planning.[75]

The tribunal's analysis first established that good faith is a generally accepted principle and that it has been recognized by the ICJ as "one of the basic principles governing the creation and performance of legal obligations".[76] Moreover, the tribunal

held that the abuse of right is to be determined in each case, taking into account all circumstances.[77] After reviewing ICSID decisions in which the abuse-of-rights doctrine was discussed, the tribunal observed that the reviewed decisions[78] used different criteria in assessing the abusive behaviour, but that the underlying question was how "to give effect to the object and purpose of the ICSID Convention and how to preserve its integrity".[79]

The tribunal clarified that the main motivation of the restructuring was protecting the investment from adverse Venezuelan measures.[80] In its decision, the tribunal considered two factors: (1) whether the investment developed normally up to the lodging of the complaints[81] and (2) the timing of the restructuring.[82] The first question was answered in the affirmative. Thus, the criterion of "course of investment" seems to be proposed as an alternative to the motivation criterion in *Phoenix*. Regarding the second question, the tribunal only stated that it had jurisdiction over claims that arose after the restructuring, but not over pre-existing ones. In supporting its finding, the tribunal contended that restructuring to protect the investment from future abuses is legitimate, while restructuring to protect the investment from past abuses is illegitimate, as was held in *Phoenix*.[83]

In *Mobil*, the tribunal appears to replace the subjective-objective criteria of motivation and timing from *Phoenix* with the objective factors of timing and of normal development of the investment. This decision clearly contradicts *Aguas*, because it refuses to hear the claim regarding the royalties and tax requirements that preceded the restructuring. It also appears to be more restrictive than *Phoenix*, as its critical analysis of motivation was quasi-inexistent. The tribunal accepted that gaining ICSID protection might have motivated the restructuring.[84] To reconcile *Phoenix* and *Mobil*, it is probable that the tribunal will mainly consider the timing of the restructuring and refuse hearing pre-restructuring claims. As an exception, the tribunal will be stricter in scrutinizing the attempt of host-nationals to have access to BITs, as was the case in *Phoenix.*

c) CLARIFICATION OF TIMING: NO JURISDICTION WHEN RESTRUCTURING WHILE VERY HIGH PROBABILITY OF DISPUTE

In the recent case of *Pac Rim v El Salvador*[85] the tribunal tried to clarify the issue of timing. Pac Rim Cayman was a U.S. entity wholly owned by Pac Rim Canada. Pac Rim Cayman had initially been a Cayman Islands entity and had changed its nationality on December 17, 2007. Pac Rim Cayman sued El Salvador for mining bans that deemed its investment useless after the Salvadorian President announced a ban on mining, on March 11, 2008. The change of nationality occurred prior to the claimant realizing that there was a problem. The respondent argued that the investor

had abused its rights because, prior to the restructuring, it was foreseeable that problems would arise. El Salvador claimed that Pac Rim could have foreseen the expropriation because the authorities had delayed granting it the mining permits, beyond the timing provided by domestic legislation. The tribunal decided to place a very high threshold on the use of abuse of right in such circumstances. The tribunal held that only when the claimant "can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy" would restructuring be abusive.

In *Pac Rim*, just as in *Mobil*, the tribunal found gaining ICSID protection motivated the change of nationality.[86] After reviewing arbitral practice,[87] the tribunal concluded that, when determining whether the restructuring was abusive, the fundamental issue was its timing relative to the timing of the claim.[88] After a lengthy analysis, the tribunal concluded that the Salvadorian authorities' conduct was a continuous illegal act that continued after the claimant's change of nationality and ended when the Salvadorian President announced the mining ban.[89] The turning point of the case was the threshold of likeliness of the dispute that would deem the restructuring abusive. The tribunal held that the test should be heightened foreseeability of a specific dispute and not a mere possibility of dispute.[90] Thus, the Salvadorian President's declaration of a *de facto* ban was the moment when the claim was actualized, because at that point the investor had no domestic remedy left.[91]

The current approach seems to contradict the *Aguas* decision. The common theme of *Phoenix*, *Mobil* and *Pac Rim* is that, when identifying abusive conduct, a tribunal should primarily look at timing. It appears, however, that a tribunal will consider other factors, such as motivation, when a national is trying to gain BIT protection (*Phoenix*), but it will be less strict when a foreign investor tries the same thing (*Mobil, Pac Rim*). Such an approach is coherent with ICSID's goal of protecting foreign investors, the main purpose suggested by the dissent in *Tokios*, and less in tune with the majority's approach in *Tokios*, which focused on protecting economic activity regardless of its origin.

The new restrictive approach appears to balance access to international arbitration with the predictability of international disputes. This might benefit ICSID as a whole, although individual claimants may suffer. This new trend leans towards a purposive approach to jurisdiction.

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The Lowen Group, Inc. and Raymond L. Lowen v. United States of America (2003), 42 I.L.M. 811 (International Centre for Settlement of Investment Disputes Additional Facility).
The Rompetrol Group N.V. v. Romania, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility (2008), online: <htpp://www.italaw.co> (International Centre for Settlement of Investment Disputes).
Tokios v. Tokelès v. Ukraine (2004), online: <htpp://italaw.com> (International Centre for Settlement of Investment Disputes).
TSA Spectrum de Argentina S.A. v. the Argentine Republic (2008), online: <htpp://www.italaw.com> (International Centre for Settlement of Investment Disputes).
Vacuum Salt Products Ltd v. Republic of Ghana (1994), online: <http://www.icsid.worldbank.org> (International Centre for Settlement of Investment Disputes).

Endnotes

[1] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 March 1965 [*ICSID*].

[2] Susan D Franck, "The ICSID Effect? Considering Potential Variations in Arbitration Awards" (2010-2011) 51 Va J Int'l L 825 at 854.

[3] Art 54(1) ICSID.

[4] David J. Branson, W. Michael Tupman, "Selecting an Arbitral Forum: A Guide to Cost-Effective International Arbitration" (1983-1984) 24 Va J Int'l L 917 at 938.

[5] Leon E Trackman, "The ICSID Under Siege" (2013) 25 Cornell Int'l LJ 603 at 604.

[6] Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States at 22.

[7] Article 25 (1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) "National of another Contracting State" means:

[…]

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

[8] Art 27(1) ICSID.

[9] Art 54(1) ICSID.

[10] Aron Broches, *Selected Essays World Bank, ICSID, and other Subjects of Public and Private International Law*, "The Convention on the Settlement of Investment Disputes between States and Nationals of Other States" (Dordecht: Martinus Nijhoff Publishers, 1995) 188 at 202 [*Broches on ICSID*].

[11] *Broches on ICSID*, supra note 10 at 205; *Societe Ouest Africaine des Betons Industriels v Senegal* (1988), online: <http://www.italaw.co> (International Centre for Settlement of Investment Disputes) at 35 [*SOABI*].

[12] Christoph H Schreurer with Lorretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention A Commentary*, 2d ed, (Cambridge, UK: Cambridge University Press, 2009) at 82 [*Schreurer*].

[13] *Tokios v Tokelès v Ukraine* (2004), Dissent of Prosper Weil, online:<http://italaw.com> (International Centre for Settlement of Investment Disputes) at 13 [*Tokios* dissent].

[14] *Vienna Convention on the Law of Treaties*, 23 May 1969.

[15] This was the case in *SOABI*, *supra* note 11.

[16] This was the Senegal's claim in *SOABI*, *ibid*.

[17] This was the case in *Tokios*, *supra* note 13.

[18] *Amco Asia Corporation and Others v. Republic of Indonesia* (1984), online: <http://www.italaw.co> (International Centre for Settlement of Investment Disputes) [*Amco*].

[19] *Ibid* at 362.

[20] *Ibid*.

[21] *Ibid*.

[22] Delaume states that the *SOABI* Decision " is consistent with the manner in which many investments are made and especially those involving transnational companies or groups of companies, which, for various reasons, may elect to channel their investments through affiliated companies under their control"; Georges R Delaume, "How to Draft an ICSID Arbitration Clause" (1992) 7 ICSID Rev-FILJ 168 at 178. Hirsch states: "We are of the opinion that the approach by the tribunal in the case *of SOABI v. Senegal* is preferable, since it is in keeping with the aim underlying the special arrangement set out in Article 25(2)(b) "; Moshe Hirsch, *The Arbitration Mechanism of the ICSID* (The Hague, Netherlands: M. Nijhoff, 1993) at 104. Amerasinghe also agrees with this view; see CF Amerasinghe, "Interpretation of Article 25(2)(b) of the ICSID Convention", in R B Lillich and C.N. Brower, *International Arbitration in the 21st Century: Towards Judicialization and Uniformity?* (New York, US: Transnational Publishers, 1994) at 223 and 236; *SOABI*, *supra* note 11 at 38.

[23] *SOABI*, *supra* note 11.

[24] *Ibid SOABI* dissent at 62.

[25] *Ibid* at 35.

[26] Robert Wisner and Nick Gallus, "Nationality requirements in Investor-State Arbitration" (2004) 5 J World Investment and Trade 927 at 936.

[27] *Tokios v Tokelès v Ukraine* (2004), online:<http://italaw.com> (International Centre for Settlement of Investment Disputes) [*Tokios*].

[28] *The Rompetrol Group N.V. v Romania*, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility (2008), online: <http://www.italaw.co> (International Centre for Settlement of Investment Disputes) [*Rompetrol*].

[29] K. Nathan, *The ICSID Contention: The Law of the International Centre for Settlement of Investment Disputes* (New York, US: Juris Publishing, 2000) at 97.

[30] *Tokios, supra* note 27 at 40.

[31] *Ibid* at 24-25.

[32] *Tokios* dissent, *supra* note 13

[33] *Tokios, supra* note 27 at 27.

[34] *Tokios* dissent, *supra* note 13 at 14.

[35] "(1) the Claimant is an investor of one Contracting Party; (2) the Claimant has an investment in the territory of the other Contracting Party; (3) the dispute arises directly from the investment; and (4) the parties to the dispute have consented to ICSID jurisdiction over it." *Tokios, supra* note 27 at 20

[36] Also criticized by Engela C. Schlemmer in the Oxford handbook, Peter Muchlinski, Federico Ortino and Christoph Schreurer, *The Oxford Handbook of International Investment Law* (Oxford, UK: Oxford, 2008) at 72.

[37] *Tokios, supra* note 27 at footnote 4; *Tokios* dissent, *supra* note 13 at 8.

[38] *Tokios, supra* note 27 at 77.

[39] William Lawton Kirtley, "The Transfer of Treaty Claims and Treaty-Shopping in Investor-State Disputes" (2009) 10 J World Investment & Trade 427 at 441.

[40] *Tokios, supra* note 27 at 46.

[41] *Tokios* dissent, supra note 13 at 27.

[42] *Rompetrol, supra* note 28.

[43] *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v Republic of Kazakhstan* (2008), online: <http://www.italaw.com> (International Centre for Settlement of Investment Disputes) [*Rumeli*].

[44] *Agreement on encouragement and reciprocal protection of investments between the Government of the Kingdom of the Netherlands and the Government of Romania*, 27 October 1983.

[45] *ADC Affiliate Limited & ADMC Management Limited v. Republic of Hungary (2006)*, online: <http://www.italaw.com> (International Centre for Settlement of Investment Disputes) at 328 [*ADC*].

[46] *TSA Spectrum de Argentina S.A. v. the Argentine Republic* (2008), online: <http://www.italaw.com> (International Centre for Settlement of Investment Disputes) [*TSA*].

[47] *Phoenix Action Ltd v Czech Republic* (2009), online: <http://www.italaw.com> (International Centre for Settlement of Investment Disputes) at 140 [*Phoenix*].

[48] *Inceysa Vallisoletana S.L. v Republic of El Salvador* (2006), online: <http://www.italaw.com> (International Centre for Settlement of Investment Disputes) at 231 [*Inceysa*] ; Defining abuse of process: Zimmermann et al, The Statute of the International Court of Justice: a Commentary (Oxford, UK: Oxford University Press, 2006) at p. 831; for an in depth analysis of abuse of process in investment law see John P Gaffney, "'Abuse of Process' in Investment Treaty Arbitration" (2010) 11 J World Investment & Trade 515 [Gaffney].

[49] *The Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Argentine Republic*, 20 October 1992, Article 1(a)(iii).

[50] *TSA*, *supra* note 46 at 147.

[51] See Part II A) 1 **Initial liberal approach: low threshold for hearing claims** of this article.

[52] *TSA*, *supra* note 46 at 146.

[53] Charles Owen Verrill, "Introductory Note to the ICSID-TSA Spectrum S.A. v Argentine Republic" (2009) 48 ILM 493 at 495.

[54] *HICEE BV v The Slovak Republic* (2011), online:<http://www.italaw.com> (UNCITRAL Rules) at 103.

[55] *Aguas del Tunari, S.A. v. Republic of Bolivia* (2005), 20 ICSID Rev: Foreign Investment L J 450 (International Centre for Settlement of Investment Disputes) [*Aguas*].

[56] *Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Bolivia*, 10 March 1992.

[57] Alexandre de Gramont, "After the Water War: The Battle For Jurisdiction in Aguas Del Tunari, S.A. v Republic of Bolivia" (2006) vol 3 issue 5 Transnational Dispute Management at 13.

[58] *Aguas*, *supra* note 55 at 330-331.

[59] *Aguas*, *supra* note 55, Declaration of Jose Luis Alberro-Semerena at 11.

[60] *Ibid* at 8.

[61] *Phoenix*, *supra* note 47.

[62] For an extensive discussion see Gaffney, *supra* note 48.

[63] *Phoenix*, *supra* note 47 at 143.

[64] *Inceysa*, *supra* note 48.

[65] *Plama Consortium Limited v. Bulgaria* (2008), online: <http://www.italaw.com> (International Centre for Settlement of Investment Disputes).

[66] Phoenix, *supra* note 47 at 112.

[67] *Ibid.*

[68] *Ibid* at 137-138.

[69] *Ibid* at 139-142.

[70] *Agreement between the Government of the Czech Republic and the Government of the State of Israel for the Reciprocal Promotion and Protection of Investments*, 23 September 1997.

[71] *Phoenix*, *supra* note 47 at 142.

[72] *Mobil Corporation, Venezuela Holdings, 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* (2010), online: <http://www.italaw.com.> (International Centre for Settlement of Investment Disputes) [*Mobil*].

[73] *Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Republic of Venezuela*, 22 October 1991.

[74] *Mobil*, *supra* note 72 at 206.

[75] *Ibid* at 203-204.

[76] *Ibid* at para 170.

[77] *Ibid* at para 177.

[78] The decisions reviewed were: *Autopista, Tokios, Aguas, Phoenix*; *Ibid.* at 178-184.

[79] *Ibid* at 184.

[80] *Ibid* at 190.

[81] *Ibid* at 193-198.

[82] *Ibid* at 199-206.

[83] *Ibid* at 204-205.

[84] Mark Feldman, "Setting Limits on Corporate Nationality Planning in Investment Treaty Arbitration" (2012) 27 No 2 ICSID Review 281 at 290.

[85] *Pac Rim Cayman LLC v Republic of El Salvador* (2012), online: <http://www.italaw.com> (International Centre for Settlement of Investment Disputes) [*Pac Rim*].

[86] *Ibid* at 2.41.

[87] The decisions reviewed were: *Phoenix, Mobil, Tokios, Aguas; Ibid* at 2.45- 2.51.

[88] *Ibid* at 2.52.

[89] *Ibid* at 2.94.

[90] *Ibid* at 2.99.

[91] *Ibid* at 2.85.