CORPORATE NATIONALITY IN INTERNATIONAL INVESTMENT LAW

Aleksandrs Fillers, LL.M., PhD Candidate
University of Latvia, Latvia

Abstract

International investments are common feature of globalized economy. Such investments need protection against arbitrary and discriminatory measures by the host state. International investment law, through a web of international bilateral and multilateral treaties, provides such protection. These treaties offer extremely generous guarantees to foreign investors. Each international investment treaty has its own scope of application. Many of them protect investments made by companies, incorporated under the laws of another Contracting State. The formal criterion of incorporation allows nationals of the host state or nationals of third states, not parties to the relevant treaty, benefiting from investment treaty protection, by incorporating companies in a Contracting State.

In this article, author presents a short overview of arbitration practice, interpreting the corporate nationality requirement. The author argues that international investment treaties, determining corporate nationality by means of incorporation, must be applied literally, without requiring any additional links between the corporate entity in question and the place of incorporation.

Keywords: Investment law, interpretation of international treaties, corporate nationality

Introduction

Protection of foreign investors is an important task of international law. Historically, certain level of protection was achieved through the means of diplomatic protection. The idea behind diplomatic protection is that "an injury to a state's national is an injury to the state itself, for which it may claim reparation from any responsible state."[29] From this premise follows its main weakness – a foreign investor "has no right to diplomatic protection."[30] The state of his nationality has discretionary power to decide whether to take up the case.[31] Once it takes up the case, it has the right to claim reparation for damage caused to its national by another state.

In last two decades, situation has changed. States have ratified numerous bilateral and multilateral investment protection treaties. These treaties contain generous guarantees protecting foreign investors. A violation of the treaty by the host state, for instance, impairment of the investment by means of expropriation, or arbitrary and discriminatory measures, gives rise to the investor's claim. However, most importantly, they allow foreign

[29] Newcombe, A., Paradell, L. Law and Practice of Investment Treaties: Standards of Treatment. New York: Kluwer Law International, 2009, p. 5.

[30] Muchlinski P., Ortino F. and Schreuer C. eds. The Oxford Handbook of International Investment Law. New York: Oxford University Press, 2008, p. 991. See also, Shaw M. International Law. 5th Edition. Cambridge: University Press, 2003, p. 723.

[31] Muchlinski P., Ortino F. and Schreuer C., eds. The Oxford Handbook of International Investment Law. New York: Oxford University Press, 2008, p. 991.

investors to bring direct claims against Contracting States. These claims are brought before investment arbitration tribunals.

A Contracting State violating an investment treaty may face serious consequences. It is enough to mention three recent arbitration awards, obliging Russian Federation to pay shareholders of Yukos Oil Company compensation worth US $50 billion.[32] This sum Russian Federation must pay for violations of the Energy Charter Treaty,[33] a multilateral treaty protecting foreign investments in the energy sector of a Contracting State.

In order to bring such a claim against a Contract State, a claimant must be a national of a Contracting State, other than the host state. Since a corporate entity may act as an investor, the question comes up how to determine corporate nationality. In Yukos cases, the tribunals faced with deciding, whether claimants qualify as foreign investors. Article 1(7)(a)(ii) of the Energy Charter Treaty provides that "investor" means: "a company or other organization organized in accordance with the law applicable in that Contracting Party". Claimants were companies incorporated in the Isle of Man and Cyprus, while their beneficial owners were Russian nationals. This posed the question, whether such companies may enjoys protection under an international investment treaty, if their owners are nationals of the respondent state.

This problem has another variation. A national from a third state could attempt benefiting from the Energy Charter Treaty. For example, Brazil is not party to the treaty. Thus, normally, a Brazilian investor would lack protection provided therein. Nevertheless, he could incorporate a company in a Contracting State. Both Latvia and Georgia are parties to the Energy Charter Treaty; hence, a Brazilian national could incorporate a company in Latvia and use it to make an investment in Georgia, in order to benefit from guarantees under the Energy Charter Treaty.

Similar patterns may arise under numerous other bilateral and multilateral investment treaties, determining corporate nationality by reference to incorporation. For example, Article 1 of the investment treaty between Georgia and Latvia provides that any corporate entity registered in one of these states will benefit from the treaty in respect of its investments made in another state.[34] Similar definitions are included in numerous international investment treaties, thus drastically enlarging their personal scope of application.

The author of this article will provide a short overview of different approaches to corporate nationality in practice of investment arbitration tribunals. First four parts of the article describe four different approaches to determination of corporate nationality. The first one deals with the literal approach, the second – multi-prong test approach, the third – with piercing the corporate veil approach, the fourth – with origin of capital approach. The fifth part of the article is devoted to their critical analysis.

Literal Approach

Problems with corporate nationality arise under investment treaties, defining investor as a corporate entity incorporated in a particular jurisdiction. In many states, incorporation is

[32] See, Hulley Enterprises Ltd v Russian Federation, Final Award, PCA Case No AA 226, 18 July 2014, available at http://www.pca-cpa.org/showfile.asp?fil_id=2722 [30.08.2014]; Yukos Universal Ltd v Russian Federation, Final Award, PCA Case No AA 227, 18 July 2014, available at http://www.pca-cpa.org/showfile.asp?fil_id=2723 [30.08.2014]; Veteran Petroleum Ltd v Russian Federation, Final Award, PCA Case No AA 228, 18 July 2014, available at http://www.pca-cpa.org/showfile.asp?fil_id=2724 [30.08.2014].

[33] Energy Charter Treaty. Entered into force on 16 April 1998, available at http://www.encharter.org/fileadmin/user_upload/document/EN.pdf [30.08.2014].

[34] Agreement between the Government of Georgia and the Government of the Republic of Latvia for the Promotion and Reciprocal Protection of Investments, entered into force on 5 March 2006, available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/1322 [30.08.2014].

a fast and simple procedure. As a result, incorporation neither establishes, nor proves a genuine economic link between the incorporated entity and the place of incorporation. A company incorporated in a particular jurisdiction may turn out to have foreign beneficial owners and lack any real economic interests therein. Fiscal considerations, considerations of corporate law or even considerations of international investment law regime may determine the place of incorporation.

An investment treaty determines the circle of persons whose rights it protects. If this circle in respect of corporate entities is determined by the sole criterion of incorporation, a tribunal, hearing the case of an investor against a Contracting State, must decide, whether to apply treaty language literally or seek limiting the circle of corporate entities protected by the treaty.

The tribunals in Yukos cases supported the literal approach.[35] As it was said before, the Energy Charter Treaty establishes corporate nationality through incorporation. The claimants in a case against Russian Federation were companies incorporated in Contracting States, holding shares in Yukos Oil Company. Beneficial owners of these companies were Russian nationals. Russian Federation argued that „[c]laimant[s] [do] not qualify for protection under the ECT since [they are] shell compan[ies] beneficially owned and controlled by Russian nationals and, as such, by nationals of the host State."[36] The tribunals declined this line of reasoning, finding "no general principles of international law that would require investigating how a company or another organization operates when the applicable treaty simply requires it to be organized in accordance with the laws of a Contracting Party."[37]

Literal approach is also shared by other tribunals.[38] The approach has the advantage of respecting the treaty language, while establishing transparent method for determining corporate nationality. Usually such approach favors investors,[39] since every company

[35] Hulley Enterprises Ltd v Russian Federation, Interim Award on Jurisdiction and Admissibility, PCA Case No AA 226, 30 November 2009, available at http://www.italaw.com/sites/default/files/case-documents/ita0411.pdf [30.08.2014]; Yukos Universal Ltd v Russian Federation, Interim Award on Jurisdiction and Admissibility, PCA Case No AA 227, 30 November 2009, available at http://www.italaw.com/sites/default/files/case-documents/ita0910.pdf [30.08.2014]; Veteran Petroleum Ltd v Russian Federation, Interim Award on Jurisdiction and Admissibility, PCA Case No AA 228, 30 November 2009, available at http://www.italaw.com/sites/default/files/case-documents/ita0891.pdf [30.08.2014].

[36] Hulley Enterprises Ltd v Russian Federation, Interim Award on Jurisdiction and Admissibility, PCA Case No AA 226, 30 November 2009, available at http://www.italaw.com/sites/default/files/case-documents/ita0411.pdf [30.08.2014], p. 149, para. 407; Yukos Universal Ltd v Russian Federation, Interim Award on Jurisdiction and Admissibility, PCA Case No AA 227, 30 November 2009, available at http://www.italaw.com/sites/default/files/case-documents/ita0910.pdf [30.08.2014], p. 149, para. 407; Veteran Petroleum Ltd v Russian Federation, Interim Award on Jurisdiction and Admissibility, PCA Case No AA 228, 30 November 2009, available at http://www.italaw.com/sites/default/files/case-documents/ita0891.pdf [30.08.2014], p. 149, para. 407.

[37] Hulley Enterprises Ltd v Russian Federation, Interim Award on Jurisdiction and Admissibility, PCA Case No AA 226, 30 November 2009, available at http://www.italaw.com/sites/default/files/case-documents/ita0411.pdf [30.08.2014], p. 152, para. 415; Yukos Universal Ltd v Russian Federation, Interim Award on Jurisdiction and Admissibility, PCA Case No AA 227, 30 November 2009, available at http://www.italaw.com/sites/default/files/case-documents/ita0910.pdf [30.08.2014], p. 152, para. 415; Veteran Petroleum Ltd v Russian Federation, Interim Award on Jurisdiction and Admissibility, PCA Case No AA 228, 30 November 2009, available at http://www.italaw.com/sites/default/files/case-documents/ita0891.pdf [30.08.2014], p. 152, para. 415.

[38] See, for instance, Rompetrol Group NV v Romania, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, ICSID Case No ARB/06/3, 18 April 2008, available at http://www.italaw.com/sites/default/files/case-documents/ita0717.pdf [30.08.2014], pp. 23-37.

[39] In atypical cases, the non-literal approach may favor investors. The Sedelmayer case is a good illustration. Mr. Sedelmayer, being a German national, attempted to benefit from the investment treaty between Germany and the Soviet Union. The investment was made through a company incorporated in the US. The tribunal,

satisfying the formal requirement of incorporation in a Contract State, other than the host state, may benefit from the treaty in question.

Multi-prong Test Approach

Some tribunals have considered that incorporation is subject to abuse by investors, creating companies with the purpose of benefiting from treaty protection. In order to restore justice, these tribunals have listed different criteria, qualifying otherwise vulnerable investor definitions. Failure to satisfy these criteria prevents an investor from bringing a claim under the relevant investment treaty.

In a case that arose under the Dominican Republic - Central America Free Trade Agreement,[40] one tribunal established a multi-prong test, with ambition to limit abusive use of incorporation.[41] Here, a company owning the investment changed its nationality by means of corporate restructuring. The tribunal commenced its reasoning by setting out the first prong of the test, relevant for triggering further analysis of the abusive behavior. For the tribunal, the first prong was satisfied, if gaining access to the investment treaty protection was the dominant motive behind the corporate restructuring.[42] Once the first prong was satisfied, the tribunal went on to analyze the second prong - the time of corporate restructuring in relation to the alleged violation.[43] The tribunal agreed, stating that "if a corporate restructuring affecting a claimant's nationality was made in good faith before the occurrence of any event or measure giving rise to a later dispute, that restructuring should not be considered as an abuse of process."[44]

Variations of this legal test exist. Thus, in the Tidewater case, the tribunal presented a somewhat different combination of similar criteria. In accordance with the tribunal, a change of corporate nationality was considered abusive, if the dispute arising from the treaty was foreseeable at the time of corporate restructuring and the latter was done with the motive to benefit from the investment treaty protection.[45] As to the second criterion, the tribunal found that it was enough that the motive of benefiting from the investment treaty protection was just one among others.[46]

This last prong of the legal test seems particularly redundant. Nowadays, most of large businesses would consider advantages from investment treaty protection, before making any changes in their business structure. Particularly, once their investment is endangered by the host state. Thus, in most, if not in all cases, securing investment treaty protection will be among the motives behind the corporate restructuring.

---

however, ignored this fact, considering that Mr. Sedelmayer must "be regarded as an investor under the Treaty, even with respect to investments formally made by [his company]."[39] See, Sedelmayer v Russian Federation, Award, Ad hoc arbitration rules, 07 July 1998, available at http://www.italaw.com/sites/default/files/case-documents/ita0757.pdf [30.08.2014], p. 59.

[40] Dominican Republic - Central America Free Trade Agreement, entered into on force 2006, available at http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text [30.08.2014].

[41] Pac Rim Cayman LLC v El Salvador, Decision on the Respondent's Jurisdictional Objections, ICSID Case No ARB/09/12, 1 June 2012, available at http://www.italaw.com/sites/default/files/case-documents/ita0935.pdf [30.08.2014], paras. 2.41-2.111.

[42] Ibid., para. 2.41.

[43] Ibid. para. 2.45.

[44] Ibid. para. 2.47.

[45] Tidewater Inc, Tidewater Investment SRL, Tidewater Caribe, CA, Twenty Grand Offshore, LLC, Point Marine, LLC, Twenty Grand Marine Service, LLC, Jackson Marine, LLC, Zapata Gulf Marine Operators, LLC v The Bolivarian Republic of Venezuela, Decision on Jurisdiction, ICSID Case No ARB/10/5, 8 February 2013, available at http://www.italaw.com/sites/default/files/case-documents/italaw1277.pdf [30.08.2014], pp. 59-63, paras. 183-198.

[46] Ibid., p. 59, paras. 183-184.

Piercing the Corporate Veil Approach

As a rule, under domestic legal systems corporate entities have their own legal personality. Thanks to this principle, shareholders are not personally liable for corporate debts. However, in some legal systems, courts may pierce the corporate veil and subject shareholders to personal liability. In short, under some exceptional circumstances, a corporate personality may be overpassed.

In international law, piercing the corporate veil is most closely associated with the Barcelona Traction judgment by the International Court of Justice, dealing with international customary law on diplomatic protection. The Court indicated that the corporate personality might be disregarder "to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations."[47] The Court did not pierce the corporate veil, only hinting at hypothetical powers to do so.

Following the same path, in investment cases, piercing the corporate veil is more often mentioned than actually applied. A good illustration is the Tokios Tokelės case. [48] Here, a dispute arose between a company incorporated in Lithuania and the Republic of Ukraine. The tribunal was faced to decide, whether a Lithuanian company, owned by Ukrainian nationals, qualified as an investor in a case against Ukraine. The bilateral investment treaty between Lithuania and Ukraine required incorporation as the only criterion for establishing nationality of an investor.[49] The tribunal applied treaty language literally, finding no reason to deny the claimant its rights under the said treaty.[50]

In addition to literal interpretation of the treaty, the tribunal considered, whether piercing the corporate veil, arguably, permissible in the context of diplomatic protection, was relevant for international investment law. The tribunal recognized the hypothetical relevance of piercing the corporate veil principle, but came to a conclusion that this approach was justified only towards investors abusing rights flowing from a legal personality.[51] Facts of the case gave no reason to believe that the investor used the corporate personality in order to hide its identity[52] or that the corporate entity was created manifestly for the purpose of gaining access to investment protection.[53] The corporate entity had been incorporated in Lithuania six years before the relevant bilateral investment treaty entered into force.[54] In the light of these findings, the tribunal concluded that "there [was] no evidence in the record that the Claimant [had] used its formal legal nationality for any improper purpose."[55]

Origin of Capital Approach

According to the fourth approach, origin of capital is crucial to determine corporate nationality. With the greatest force, this opinion was expressed in relation to the ICSID Convention. [56]

[47] Barcelona Traction, Light and Power Company, Limited, available at http://www.icj-cij.org/docket/files/50/5387.pdf [30.08.2014], p. 39, para. 56

[48] Tokios Tokelės v Ukraine, Decision on Jurisdiction, ICSID Case No ARB/02/18, 29 April 2004, available at http://italaw.com/documents/Tokios-Jurisdiction_000.pdf [30.08.2014].

[49] Ibid., p.7, para. 18 and p. 13, para. 30.

[50] Ibid., p. 13, para. 30.

[51] Ibid., p. 23, para. 55.

[52] Ibid., p. 24, para. 56.

[53] Ibid., p. 24, para. 56.

[54] Ibid.

[55] Ibid.

[56] Schreuer C. H., Malintoppi L. et al. The ICSID Convention: A Commentary. New York: Cambridge University Press, 2010, pp. 136-137.

The ICSID Convention is multilateral convention with a truly global reach.[57] Unlike investment treaties, this instrument does not provide substantive guarantees to investors, instead it provides a supranational dispute settlement mechanism for international investment disputes. An investor may benefit from this dispute settlement mechanism, only if falling within the personal scope of the Convention. In regards to corporate entities, Article 25(2)(b) of the ICSID defines "National of another Contracting State" as:

> "any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration […]."

Interpretation of this provision was given in the above mentioned Tokios Tokelės case, where the tribunal, relying on literal interpretation, concluded that the Lithuanian company, owned by Ukrainian nationals, was a foreign investor in context of Article 25(2)(b) of the ICSID Convention. However, Prof. Weil in his dissenting opinion took an opposite stance.[58] The preamble of the ICSID Convention refers to "the role of private international investment".[59] This, according to Prof. Weil, meant that "[t]he ICSID mechanism and remedy are not meant for investments made in a State by its own citizens with domestic capital through the channel of a foreign entity, whether preexistent or created for that purpose."[60] A company created in Lithuanian, owned by Ukrainian nationals and using their capital, did not qualify as a foreign national vis-à-vis Ukraine.

The argument as formulated by Prof. Weil in his dissenting opinion, has limited relevance. It does not apply to cases where the capital flows from a third country not party to a given treaty.[61] There is still an international economic exchange among states. Likewise, it makes no sense in respect of treaties that explicitly mention incorporation in a given jurisdiction as the sole criterion of corporate nationality. An unambiguous treaty language may hardly be ignored based on contextual hints. Hence, for cases like those of Yukos, the reasoning is inapplicable, because the Energy Charter Treaty expressly refers to incorporation as the sole criterion, determining investor's nationality.

Analysis of Different Approaches

Vienna Convention on Law of Treaties provides rules on treaty interpretation.[62] Article 31 of the convention contains the principle rule. Its first paragraph reads, "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." Interpreting this provision, the International Court of Justice has noted that it is necessary to give effect to treaty provisions "in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context that is an

[57] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, entered into force on 14 October 1966, available at https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf [30.08.2014]. Entered into force in Latvia on 7 September 1997. Entered into force in Georgia on 6 September 1992. In total 150 States have ratified this convention.

[58] Tokios Tokelės v Ukraine, Dissenting Opinion of Prof. Weil, ICSID Case No ARB/02/18, 29 April 2004, available at http://www.italaw.com/sites/default/files/case-documents/ita0864.pdf [30.08.2014].

[59] Ibid., p. 11, para. 19.

[60] Ibid.

[61] ADC Affiliate Ltd and ADC & ADMC Management Ltd v Hungary, Final award on jurisdiction, merits and damages, ICSID Case No ARB/03/16, 27 September 2006, available at http://italaw.com/documents/ADCvHungaryAward.pdf [30.08.2014], pp. 68-69, para. 360.

[62] Vienna Convention on the Law of Treaties, entered into force on 27 January 1980, available at https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf [30.08.2014]. Entered into force in Georgia on 8 June 1995. Entered into force in Latvia on 4 May 1993.

end of the matter."[63] However, if "the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words."[64] Thus, it follows that reasonable and unambiguous provisions must be given effect in accordance with their ordinary meaning.

A tribunal faced with establishing corporate nationality, must look at the ordinary meaning of words used in a treaty. An investment treaty may determine corporate nationality based on different facts. For example, Article 1(2)(b) of treaty between Georgia and Iran, defines corporate investors as "legal entities which are established under the laws of that Contracting Party and have their seat together with their real economic activities in the territory of that Contracting Party."[65] Here, a mere incorporation of corporate entity in a Contracting State will be insufficient to qualify as a foreign investor. A company must engage in economic activity in the particular jurisdiction.

Likewise, states may enlarge scope of their treaties beyond incorporation. For example, Article 1(c)(ii) of the treaty between Finland and the Slovak Republic defines corporate investor as "any legal person having its seat in the territory of either Contracting Party, or in a third country with a predominant interest of an investor of either Contracting Party."[66] Such formulation protects even those investors that have incorporated their companies in third countries. This shows that states know how important it is to define the notion of investor and have preferred nuanced definitions when necessary.

This confirms that words used in treaties are crucial for determination of corporate nationality. When the treaty requires no more than incorporation of a corporate entity, no other criteria may be introduced.

The deviating practice, introducing piercing the corporate veil principle is erroneous. Firstly, there seems to be insufficient amount of state practice in order to consider such approach part of customary international law.[67] Tribunals themselves seem to have difficulties in determining precise circumstances that would justify piercing the corporate veil, implying that the principle has no real basis in international law.[68]

---

[63] Competence of Assembly regarding admission to the United Nations, Advisory Opinion, available at http://www.icj-cij.org/docket/files/9/1883.pdf [30.08.2014], p. 8; Arbitral Award of 31 July 1989, Judgment, available at http://www.icj-cij.org/docket/files/82/6863.pdf [30.08.2014], p. 20, para. 48.

[64] Competence of Assembly regarding admission to the United Nations, Advisory Opinion, available at http://www.icj-cij.org/docket/files/9/1883.pdf [30.08.2014], p. 8; Arbitral Award of 31 July 1989, Judgment, available at http://www.icj-cij.org/docket/files/82/6863.pdf [30.08.2014], p. 20, para. 48.

[65] Agreement on Reciprocal Promotion and Protection of Investments between the Government of the Republic of Georgia and the Government of the Islamic Republic of Iran, entered into force on 22 June 2005, available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/1319 [30.08.2014].

[66] Agreement between the government of the Republic of Finland and the government of the Czech and Slovak Federal Republic for the promotion and protection of investment, entered into force on 23 October 1991, available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/1213 [30.08.2014].

[67] Brownlie I. The Principles of Public International Law, 7th ed. Oxford: Oxford University Press, 2008, pp. 482-483; Barcelona Traction, Light and Power Company, Limited, Separate Opinion of Judge Ammoun, available at http://www.icj-cij.org/docket/files/50/5409.pdf [30.08.2014], p. 295, para. 6.

[68] For the Tokios Tokelės tribunal, the use of the corporate entity to hide the identity of the investor or creation of corporate entity manifestly to gain excess to investment protection mechanisms could trigger piercing of corporate veil. Tokios Tokelės v Ukraine, Decision on Jurisdiction, ICSID Case No ARB/02/18, 29 April 2004, available at http://italaw.com/documents/Tokios-Jurisdiction_000.pdf [30.08.2014], p. 23, para. 55.

In another case, the tribunal considered that piercing the corporate veil "only applies to situations where the real beneficiary of the business misused corporate formalities in order to disguise its true identity and therefore to avoid liability." ADC Affiliate Ltd and ADC & ADMC Management Ltd v Hungary, Final award on jurisdiction, merits and damages, ICSID Case No ARB/03/16, 27 September 2006, available at http://italaw.com/documents/ADCvHungaryAward.pdf [30.08.2014], p. 68, para. 358. Thus, here an avoidance of liability becomes a precondition for piercing the corporate veil. See,

Secondly, even assuming that the piercing the corporate veil is a well attested principle of international public law, two principles must be used, in order to solve contradictions between the customary rule and the treaty rule – *lex posterior derogat legi* priori and *lex specialis derogat legi generali*. According to the first principle, in case of a conflict between "two rules of the same subject-matter differ in their contents, […] the rule originating later in time shall prevail."[69] The International Court of Justice rendered the Barcelona Traction judgment in 1970. This implies that the piercing the corporate veil principle must have been part of international law some time before this moment, as the Court cannot create legal rules, but only apply those in existence. The majority of international investment treaties are much younger than this legal principle and would prevail over piercing the corporate veil principle. According to the second principle, "the more special rule prevails over the general rule."[70] Again, it is reasonable to assume that a specific investment treaty provision prevails as a special rule over a much more abstract principle, allowing under undefined circumstances to disregard corporate nationality determined by incorporation. States have reasonable motives for implicit exclusion of piercing the corporate veil principle from their treaties, since this principle is ambiguous, while its application would create additional uncertainty costs.

For similar reasons it is hard to welcome attempts of introducing different multi-prong tests for the purpose of determining corporate nationality. Such legal tests are not supported by treaty language and create additional uncertainty risks. Incorporation is a suitable method for establishing corporate nationality. It is extremely easy to ascertain. A simple inquiry in a foreign corporate register, allows gathering all the necessary information about corporate nationality. Both the investor and the Contracting State may foresee, whether the corporate entity enjoys rights arising from an investment treaty. Notably, the host state, knowing the nationality of the company, may evaluate the risk of taking any adverse action. This is particularly important, when the investment treaty creates substantial guarantees to the foreign investors, not found in domestic or customary international law. Blending this simple criterion, with a non-defined number of other criteria, calling for profound inquiry into corporate ownership structure, deprives investment treaties of their simplicity.

Finally, the origin of capital principle is likewise subject to criticism, even in relation to the ICSID Convention. Article 25(2)(b) of the ICSID Convention uses the term "national", without defining it. Thus, one could say that this provision is ambiguous. Consequently, according to the rules of Article 31 of the Vienna Convention, such provision must be read in the light of its context and purpose. An important element of context is the preamble of the treaty. The preamble of the ICSID Convention recognizes "the need for international cooperation for economic development […]". The most reasonable reading of the ICSID Convention is one that stimulates economic relations among Contracting States. Determination of corporate nationality by incorporation establishes the widest personal scope of the ICSID Convention, thus stimulating economic relations between Contracting States.

Another tribunal stated that "the corporate form may be abused and that form may be set aside for fraud or on other grounds." Aguas del Tunari SA v Bolivia, Decision on Respondent's Objections to Jurisdiction, ICSID Case No ARB/02/3, 21 October 2005, available at http://www.iisd.org/pdf/2005/AdT_Decision-en.pdf [30.08.2014], p. 57, para. 245.

Finally, in the Saluka case it was decided that piercing the corporate veil is "a remedy which, being equitable, is discretionary." See, Saluka Investments BV v Czech Republic, Partial Award, PCA—UNCITRAL Arbitration Rules, 17 March 2006, available at http://www.pca-cpa.org/showfile.asp?fil_id=105 [30.08.2014], p. 47, para. 230. According to this view, there is a lack of precise preconditions for piercing the corporate veil.

[69] Villiger M.E. Customary International Law and Treaties: A Study of Their Interactions and Interrelations, with Special Consideration of the 1969 Vienna Convention on the Law of Treaties. Dordrecht: Martinus Nijhoff Publishers, 1985, p. 36.

[70] Ibid.

Therefore, even in regards to the ICSID Convention incorporation is the most solid foundation for determining the circle of persons to whom it applies.

Conclusion

Both Georgia and Latvia are parties to the Energy Charter Treaty, the ICSID Convention and a number of bilateral investment treaties, explicitly or implicitly defining corporate nationality by means of incorporation. Such treaty language drastically enlarges the circle of persons that can benefit from these international instruments.

The issue of corporate nationality remains controversial. Due to divergent case law, it is difficult to ascertain in advance, whether all corporate investors, formally satisfying the incorporation requirement, will be able to enjoy treaty protection. Literal interpretation of incorporation requirement seems to be the most appropriate response to such uncertainty. True, it has a disadvantage - it allows a large number of persons – nationals of the host state and third states – to benefit from investment treaty regime by incorporating a company in a Contracting State. However, the same disadvantage may turn out to be a virtue, as it motivates foreigners to invest in the host state and nationals of the host state to preserve their investments therein, relying on international investment treaty protection. Moreover, the literal approach to incorporation requirement respects treaty language, while providing a simple and transparent criterion for establishing corporate nationality.

It follows that corporate nationality under investment treaties must be determined by literal interpretation of the relevant treaty provisions. When these provisions are unambiguous and refer to incorporation as the criterion establishing corporate nationality, there is no justification for ignoring explicit treaty language.

References:

Agreement between the Government of Georgia and the Government of the Republic of Latvia for the Promotion and Reciprocal Protection of Investments, entered into force on 5 March 2006, available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/1322 [30.08.2014].

Agreement between the government of the Republic of Finland and the government of the Czech and Slovak Federal Republic for the promotion and protection of investment, entered into force on 23 October 1991, available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/1213 [30.08.2014].

Agreement on Reciprocal Promotion and Protection of Investments between the Government of the Republic of Georgia and the Government of the Islamic Republic of Iran, entered into force on 22 June 2005, available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/1319 [30.08.2014].

Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, entered into force on 14 October 1966, available at https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf [30.08.2014].

Dominican Republic - Central America Free Trade Agreement, entered into 2006, available at http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text [30.08.2014].

Energy Charter Treaty. Entered into force on 16 April 1998, available at http://www.encharter.org/fileadmin/user_upload/document/EN.pdf [30.08.2014].

Vienna Convention on the Law of Treaties, entered into force on 27 January 1980, available at https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf [30.08.2014].

Brownlie I. The Principles of Public International Law, 7th ed. Oxford: Oxford University Press, 2008.

Muchlinski P., Ortino F. and Schreuer C. eds. The Oxford Handbook of International Investment Law. New York: Oxford University Press, 2008.
Newcombe, A., Paradell, L. Law and Practice of Investment Treaties: Standards of Treatment. New York: Kluwer Law International, 2009.
Schreuer C. H., Malintoppi L. et al. The ICSID Convention: A Commentary. New York: Cambridge University Press, 2010.
Shaw M. International Law. 5th Edition. Cambridge: University Press, 2003.
Villiger M.E. Customary International Law and Treaties: A Study of Their Interactions and Interrelations, with Special Consideration of the 1969 Vienna Convention on the Law of Treaties. Dordrecht: Martinus Nijhoff Publishers, 1985.
ADC Affiliate Ltd and ADC & ADMC Management Ltd v Hungary, Final award on jurisdiction, merits and damages, ICSID Case No ARB/03/16, 27 September 2006, available at http://italaw.com/documents/ADCvHungaryAward.pdf [30.08.2014].
Aguas del Tunari SA v Bolivia, Decision on Respondent's Objections to Jurisdiction, ICSID Case No ARB/02/3, 21 October 2005, available at http://www.iisd.org/pdf/2005/AdT_Decision-en.pdf [30.08.2014].
Arbitral Award of 31 July 1989, Judgment, available at http://www.icj-cij.org/docket/files/82/6863.pdf [30.08.2014].
Barcelona Traction, Light and Power Company, Limited, available at http://www.icj-cij.org/docket/files/50/5387.pdf [30.08.2014].
Barcelona Traction, Light and Power Company, Limited, Separate Opinion of Judge Ammoun, available at http://www.icj-cij.org/docket/files/50/5409.pdf [30.08.2014].
Competence of Assembly regarding admission to the United Nations, Advisory Opinion, available at http://www.icj-cij.org/docket/files/9/1883.pdf [30.08.2014].
Hulley Enterprises Ltd v Russian Federation, Final Award, PCA Case No AA 226, 18 July 2014, available at http://www.pca-cpa.org/showfile.asp?fil_id=2722 [30.08.2014].
Hulley Enterprises Ltd v Russian Federation, Interim Award on Jurisdiction and Admissibility, PCA Case No AA 226, 30 November 2009, available at http://www.italaw.com/sites/default/files/case-documents/ita0411.pdf [30.08.2014].
Pac Rim Cayman LLC v El Salvador, Decision on the Respondent's Jurisdictional Objections, ICSID Case No ARB/09/12, 1 June 2012, available at http://www.italaw.com/sites/default/files/case-documents/ita0599.pdf [30.08.2014].
Rompetrol Group NV v Romania, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, ICSID Case No ARB/06/3, 18 April 2008, available at http://www.italaw.com/sites/default/files/case-documents/ita0717.pdf [30.08.2014].
Saluka Investments BV v Czech Republic, Partial Award, PCA—UNCITRAL Arbitration Rules, 17 March 2006, available at http://www.pca-cpa.org/showfile.asp?fil_id=105 [30.08.2014].
Sedelmayer v Russian Federation, Award, Ad hoc arbitration rules, 07 July 1998, available at http://www.italaw.com/sites/default/files/case-documents/ita0757.pdf [30.08.2014].
Tidewater Inc, Tidewater Investment SRL, Tidewater Caribe, CA, Twenty Grand Offshore, LLC, Point Marine, LLC, Twenty Grand Marine Service, LLC, Jackson Marine, LLC, Zapata Gulf Marine Operators, LLC v The Bolivarian Republic of Venezuela, Decision on Jurisdiction, ICSID Case No ARB/10/5, 8 February 2013, available at http://www.italaw.com/sites/default/files/case-documents/italaw1277.pdf [30.08.2014].
Tokios Tokelės v Ukraine, Decision on Jurisdiction, ICSID Case No ARB/02/18, 29 April 2004, available at http://italaw.com/documents/Tokios-Jurisdiction_000.pdf [30.08.2014].
Tokios Tokelės v Ukraine, Dissenting Opinion of Prof. Weil, ICSID Case No ARB/02/18, 29 April 2004, available at http://www.italaw.com/cases/documents/1102 [30.08.2014].

Veteran Petroleum Ltd v Russian Federation, Final Award, PCA Case No AA 228, 18 July 2014, available at http://www.pca-cpa.org/showfile.asp?fil_id=2724 [30.08.2014].
Veteran Petroleum Ltd v Russian Federation, Interim Award on Jurisdiction and Admissibility, PCA Case No AA 228, 30 November 2009, available at http://www.italaw.com/sites/default/files/case-documents/ita0891.pdf [30.08.2014].
Yukos Universal Ltd v Russian Federation, Final Award, PCA Case No AA 227, 18 July 2014, available at http://www.pca-cpa.org/showfile.asp?fil_id=2723 [30.08.2014].
Yukos Universal Ltd v Russian Federation, Interim Award on Jurisdiction and Admissibility, PCA Case No AA 227, 30 November 2009, available at http://www.italaw.com/sites/default/files/case-documents/ita0910.pdf [30.08.2014].