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Standing of Locally Incorporated Entities in International Investment Law and the Notion of "Foreign Control"

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Under customary international law, a state's ability to espouse the claims of its nationals and subsequently file a suit against another state is limited by the rule of incorporation.[1] This has been clear at least since the seminal decision of the International Court of Justice in Barcelona Traction, where it was decided that Belgium could not seek recourse against Spain by espousing the claims of Belgian stockholders in Barcelona Traction, a Canadian company.[2] Equally, claims by locally incorporated entities against the host state are not possible under customary international law.[3] The strict incorporation test has nevertheless become obsolete, if not thrust aside, by the emergence of investment treaties. In fact, the unprecedented and drastic change brought about by investment treaties is all the more evident when considering the whole new array of nationality rules they have solidified. Investment treaties allow for shareholder claims explicitly or by reference to shareholding as one of the covered forms of investment.[4] Some investment treaties go a step further by allowing locally incorporated entities to directly file a claim against the host state,

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1. *See generally* CHRISTOPHER DUGAN ET AL., INVESTOR-STATE ARBITRATION 296-311 (2008); Markus Burgstaller, *Nationality of Corporate Investors and International Claims against the Investor's Own State*, 7 J. WORLD INV. & TRADE 857 (2006); Francis A. Mann, *The Protection of Shareholders' Interests in the Light of the Barcelona Traction*, 67 AM. J. INT'L L. 259 (1973); Anthony C. Sinclair, *The Substance of Nationality Requirements in Investment Treaty Arbitration*, 20 ICSID REV. 357 (2005).

2. Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain), Judgment, 1970 I.C.J Rep. 3 (Feb. 5).

3. *See* DUGAN ET AL., *supra* note 1, at 310-11.

4. *See, e.g.*, *2012 U.S. Model Bilateral Investment Treaty*, U.S. TRADE REPRESENTATIVE, art. 1 (2012), https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf ("'investment' means every asset that an investor owns or controls, directly or indirectly . . . ."); Energy Charter Treaty art. 1(6), Dec. 12, 1994, 34 I.L.M. 381; Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Republic of Bolivia art. 1(a)(ii), Bol.-Neth., Mar. 10, 1992, 2239 U.N.T.S. 505 [hereinafter Bolivia-Netherlands BIT].

provided that such entities are controlled by nationals or legal entities of the other Contracting Party.[5] *Claims by locally incorporated entities are also provided for under the International Centre for Settlement of Investment Disputes Convention ("ICSID Convention").*[6] *However, the ICSID Convention, unlike investment treaties, allows for such claims by reference to a "foreign control" test. Setting out from this premise, this Article does not intend to touch upon all of the nationality rules encountered in modern international investment law. Rather, it focuses on the standing of locally incorporated entities. In particular, it asks whether locally incorporated entities controlled by nationals of the host state qualify as covered investors, and if so, whether there is a difference between ICSID and non-ICSID claims. In a nutshell, this Article establishes that when a locally incorporated entity files a claim against the host state (the state of its incorporation), the operation of the foreign control test under the ICSID Convention enables an investment tribunal to unlimitedly pierce the corporate veil and assess whether the locally incorporated entity is ultimately controlled by nationals of the host state. In this case, an ICSID tribunal will have to deny the vesting of its jurisdiction because the locally incorporated entity cannot satisfy the foreign control test.*[7] *This principle was first introduced in 2008 by the tribunal in* TSA Spectrum v. Argentina *and has recently solidified in the rulings of* Burimi v. Albania *and* National Gas v. Egypt.[8] *On the contrary, when nationals of the host state ultimately control a locally incorporated entity but decide to file a claim against the host state through an intermediate company, incorporated in the other Contracting State, the locally incorporated entity is treated as an investment of the intermediate entity.*[9] *In this case, an ICSID tribunal cannot pierce the corporate veil and assess whether the intermediate company is ultimately controlled by nationals of the host state.*

5. *See, e.g.*, Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Dominican Republic art. 1(b)(iii), Dom. Rep.-Neth., Mar. 30, 2006, 2561 U.N.T.S. 149 [hereinafter Dominican Republic-Netherlands BIT]; Bolivia-Netherlands BIT, *supra* note 4, art. 1(b)(iii). While the term national in principle encompasses both individuals and legal entities, this Article uses the term nationals to refer to individuals alone.

6. Convention of the Settlement of Investment Disputes Between States and Nationals of Other States art. 25(2)(b), Mar. 18, 2965, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

7. *See id.* art. 25(2)(b).

8. Burimi SRL v. Republic of Albania, ICSID Case No. ARB/11/18, Award (May 9, 2009); Nat'l Gas S.A.E. v. Arab Republic of Egypt, ICSID Case No. ARB/11/7, Award (Apr. 3, 2014); TSA Spectrum de Arg. S.A. v. Argentine Republic, ICSID Case No. ARB/05/5, Award (Dec. 19, 2008).

9. *See infra* Part II.B.

I. INTRODUCTION

Under customary international law, a state's ability to espouse the claims of its nationals, and subsequently file a suit against another state, is limited by the rule of incorporation.[10] This has been clear at least since the seminal decision of the International Court of Justice (ICJ) in *Barcelona Traction*, where it was decided that Belgium could not seek recourse against Spain, by espousing the claims of Belgian stockholders (shareholders) in Barcelona Traction, a Canadian company.[11] Equally, claims by locally incorporated entities against the host state are not possible under customary international law.[12] Certainly, the ICJ in *Elettronica Sicula S.p.A.* allowed a shareholder claim to proceed but that was done not on the basis of customary international law, but rather pursuant to the United States-Italy Friendship Commerce and Navigation Treaty.[13] The strict incorporation test has nevertheless become obsolete, if not thrust aside, by the emergence of investment treaties. In fact, the unprecedented and drastic change brought about by investment treaties is all the more evident when considering the whole new array of nationality rules they have solidified. Initially, investment treaties allow for shareholder claims, either explicitly[14] or by reference to shareholding in the non-exhaustive list of covered investments.[15] Some investment treaties also go a step further by allowing locally incorporated entities to directly file a claim against the host state, provided that such entities are controlled by nationals or corporations of the other Contracting Party.[16] Claims by locally incorporated entities are also provided for under the

10. DUGAN ET AL., *supra* note 1, at 296-311; Burgstaller, *supra* note 1; Mann, *supra* note 1; Sinclair, *supra* note 1.

11. Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain), Judgment, 1970 I.C.J. Rep. 3 (Feb. 5).

12. *See* Dugan et al., *supra* note 1, at 310-11.

13. Elettronica Sicula S.p.A. (U.S. v. It.), Judgment, 1989 I.C.J. Rep. 15 (July 20).

14. *2012 U.S. Model Bilateral Investment Treaty*, *supra* note 4, art. 1.

15. Energy Charter Treaty, *supra* note 4; Bolivia-Netherlands BIT, *supra* note 4.

16. Dominican Republic-Netherlands BIT, *supra* note 5; Bolivia-Netherlands BIT, *supra* note 4.

ICSID Convention.[17] However, this Article does not intend to touch upon all of the nationality rules encountered in modern international investment law. Rather, it focuses on the standing of locally incorporated entities. In particular, it asks whether locally incorporated entities controlled by nationals of the host state qualify as covered investors, and if so whether there is a difference between ICSID and non-ICSID claims. This issue is analyzed in Parts II to IV below, which discuss the notion of control under investment treaties, the notion of foreign control under the ICSID Convention, and the relationship between articles 25(1) and 25(2)(b) *limb a* and *limb b*. This Article establishes that when a locally incorporated entity files a claim against the host state (state of its incorporation), the operation of the foreign control test under the ICSID Convention enables an investment tribunal to unlimitedly pierce the corporate veil and assess whether the locally incorporated entity is ultimately controlled by nationals of the host state. In this case, an ICSID tribunal would have to deny the vesting of its jurisdiction because the locally incorporated entity cannot satisfy the foreign control test. This principle was first introduced in 2008 by the tribunal in *TSA Spectrum* and has recently solidified in the rulings of *Burimi* and *National Gas*.[18] On the contrary, when nationals of the host state ultimately control a legally incorporated entity but decide to file a claim against the host state through an intermediate company incorporated in the other Contracting State, the locally incorporated entity is treated as an investment of the intermediate entity.[19] In this case, an ICSID tribunal cannot pierce the corporate veil and assess whether nationals of the host state ultimately control the intermediate company.

Before delving deeper into the steps needed in reaching the above conclusions some delimitations are indispensable. First, claims by locally incorporated entities should not be confused with claims by investors of one Contracting Party on behalf of an enterprise of the host state. The latter category is among others encountered in the North American Free Trade Agreement (NAFTA) and U.S. treaty practice but is different from the cases discussed in this Article inasmuch the locally

17. ICSID Convention, *supra* note 6, art. 25(2)(b).

18. Burimi SRL v. Republic of Albania, ICSID Case No. ARB/11/18, Award (May 9, 2009); Nat'l Gas S.A.E. v. Arab Republic of Egypt, ICSID Case No. ARB/11/7, Award (Apr. 3, 2014); TSA Spectrum de Arg. S.A. v. Argentine Republic, ICSID Case No. ARB/05/5, Award (Dec. 19, 2008).

19. *See* e.g., Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction (Apr. 29, 2004).

incorporated entity does not directly file the arbitration claim.[20] Second, this Article does not intend to touch upon shareholder claims at length.[21] The issue of shareholding is nevertheless addressed to the extent that it is relevant in satisfying the foreign control of a locally incorporated entity. Third, this Article does not deal with dual nationals or natural persons who hold multiple nationalities and file a claim against a state whose nationality they cumulatively possess.[22] Lastly, this Article does not address issues connected to the continuous nationality test of natural persons or legal entities.[23]

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20. *See* North American Free Trade Agreement art. 1117, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 (1993)[hereinafter NAFTA]; *see also 2012 U.S. Model Bilateral Investment Treaty*, *supra* note 4, art. 24(1)(b); Meg Kinnear et al., Investment Disputes Under NAFTA: An Annotated Guide to NAFTA Chapter 11, § 1116, 1-41, § 1117, 1-6 (2006); Andrea K. Bjorklund, *NAFTA Chapter 11*, *in* Commentaries on Selected Model Investment Treaties 465, 500-04 (Chester Brown ed., 2013).

21. *See generally* Zachary Douglas, The International Law of Investment Claims 284-327 (2009).

22. Contrast the "real and effective" nationality test to ICSID Convention, art. 25(2)(a). *See* Nottebohm (Liech. v. Guat.), Judgment, 1955 I.C.J. Rep. 4 (Apr. 6); Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20, Award, ¶¶ 54-81 (July 14, 2010); Micula v. Romania, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility (Sept. 24, 2008); Siag v. Arab Republic of Egypt, ICSID Case No. ARB/05/15, Decision on Jurisdiction (Apr. 11, 2007); Soufraki v. United Arab Emirates, ICSID Case No. ARB/02/7, Award, ¶¶ 25-84 (July 7, 2004); Champion Trading Co. v. Arab Republic of Egypt, ICSID Case No. ARB/02/9, Decision on Jurisdiction (Oct. 21, 2003); Casado v. Republic of Chile, ICSID Case No. ARB/98/2, Decision (May 8, 2002); Feldman v. Mexico, ICSID Case No. ARB(AF)/99/1, Award (Dec. 6, 2000); Olguin v. Republic of Paraguay, ICSID Case No. ARB/98/5, Decision on Jurisdiction (Aug. 8, 2000); RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 45-47 (2012); RUDOLPH DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES 31-33 (1995); Roberto Aguirre Luzi & Ben Love, *Individual Nationality in Investment Treaty Arbitration: The Tension Between Customary International Law and Lex Specialis*, *in* INVESTMENT TREATY LAW: CURRENT ISSUES III 183, 183-208 (Andrea K. Bjorklund et al. eds., 2009); Maurice Mendelson, *Issues Relating to the Identity of the Investor*, *in* CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2010 at 22, 22-32 (Arthur W. Rovine ed., 2011) [hereinafter Mendelson, *Identity of Investor*]; KATIA YANNACA-SMALL, *Who Is Entitled to Claim? Nationality Challenges*, *in* ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 211, 211-19 (2010); *Claims of Duel Nationals in the Modern Era: The Iran-United States Claims Tribunal*, 83 MICH. L. REV. 597, 597-624 (1984); *see also* Decision in Case No. A/18 Concerning the Question of Jurisdiction over Claims of Persons with Dual Nationality, *reprinted in* 23 I.L.M. 489, 496 (Iran-U.S. Cl. Trib. 1984). The latest case that dealt with dual nationality issues appears to be Serafin Garcia Armas y Karina Garcia Gruber v. La Republiclica Bolivariana de Venezuela. Armas v. Bolivarian Republic of Republic of Venezuela, Case No. 2013-3, Decision on Jurisdiction (Perm. Ct. Arb. Dec. 15, 2014). There are two pending cases. *See* Ballantine v. Dominican Republic, Notice of Intent to Submit a Dispute to Arbitration (June 12, 2014), http://www.italaw.com/sites/default/files/case-documents/italaw3310.pdf; Pugachev v. Russian Federation, Notice of Arbitration (Sept. 21, 2015), http://www.italaw.com/sites/default/files/case-documents/italaw4374.pdf.

23. Panevezys-Saldutiskis Railway (Est. v. Lith.), Judgment, 1939 P.C.I.J. (ser. A/B) No. 76, at 6 (Feb. 28) (stating that it is a "rule of international law that a claim must be national not

II. OF CONTROL AND LOCALLY INCORPORATED ENTITIES

A. Why Protect Claims by Locally Incorporated Entities?

In discussing the ability of locally incorporated entities to file a claim against the host state, that is, the state of their incorporation, it is important to first understand the underlying principles behind this option. In brief, the reason of allowing such claims is twofold. As Aaron Broches, the first Secretary General of the ICSID, has long stated when referring to article 25(2)(b) of the ICSID Convention, "[i]t is quite usual for host States to require that foreign investors carry on their business within their territories through a company organized under the laws of the host country" and "[i]f no exception were made for foreign-owned but locally incorporated companies, a large and important sector of foreign investment would be outside the scope of the Convention."[24] Second, allowing a locally incorporated entity to directly file a claim against the host state ensures that damages are paid to the locally incorporated entity itself, rather than to the investor.[25] Indeed, the possibility of a locally incorporated entity to directly file a claim is important inasmuch as it first "ensures that all investors in the enterprise receive some share in, or benefit from, any damages paid," second, "it ensures that creditors of the enterprise are not circumvented in claiming whatever share might be owed them," and third "the tax treatment of the award might change depending on which entity received the award."[26]

There may be cases where it will be of little, if any, importance if a claim is filed by an investor that controls a locally incorporated entity or by the locally incorporated entity itself. However, complex corporate structures as well as a host of other reasons ranging from tax treatment to

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only at the time of its presentation but also at the time of injury"); Loewen Group, Inc. v. United States, ICSID Case No. ARB(AF)/98/3, Award, (June 6, 2003) (finding that the continuous nationality rule requires continuity in the investor's nationality from the date of the events giving rise to a claim to the date of the award); Maurice Mendelson, *Runaway Train: The 'Continuous Nationality' Rule from the Panavezys-Saldutiskis Railway Case to Loewen*, *in* INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 97, 97-149 (Todd Weiler ed., 2005) [hereinafter Mendelson, *Runaway Train*]; Jan Paulsson, *Continuous Nationality in Loewen*, 20 ARB. INT'L 213 (2004); Noah Rubins, *The Burial of an Investor-State Arbitration Claim*, 21 ARB. INT'L 1 (2005).

24. Aaron Broches, Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law 201-02 (1995).

25. Bjorklund, supra note 20, at 503.

26. *Id.* (referring to Article 1117 NAFTA, that enables claims by investors of one Contracting Party, on behalf of an enterprise of the host state); *see also* Lee M. Caplan & Jeremy K. Sharpe, *United States*, *in* COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 755, 766-70 (Chester Brown ed., 2013).

allocation of damages may well render significant the additional option of claims filed directly by locally incorporated entities. Taking these remarks into consideration, the next Part turns to the notion of "control" as a qualifier for the standing of locally incorporated entities.

B. "Control" in General

Investment treaties use various criteria in defining the nationality of legal entities. This is often an issue of crucial importance, inasmuch it determines which legal entities will eventually fall under an investment treaty's protective veil.[27] While not uniform, investment treaties usually employ the tests of incorporation, main seat of business (*siège social*), and effective control, or a combination thereof.[28]

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27. *See generally* U.N. Conference on Trade and Development, *Scope and Definition*, 85-92, UNCTAD/DIAE/IA/2010/2 (Feb. 28, 2011); CHITTHARANJAN F. AMERASINGHE, JURISDICTION OF SPECIFIC INTERNATIONAL TRIBUNALS 474-85 (2009); Piero Bernandini, *Nationality Requirements Under BITS and Related Case Law*, *in* 2 INVESTMENT TREATY LAW: CURRENT ISSUES 17, 22-23 (Federico Ortino et al. eds., 2007); NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 471-74 (2009); R. DOAK BISHOP ET AL., FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY 281-380 (2014); DOLZER & SCHREUER, *supra* note 22, at 45-7; DUGAN ET AL., *supra* note 1, at 340; George Stephanov Georgiev, *The Award in Saluka Investments v. Czech Republic*, *in* THE REASONS REQUIREMENT IN INTERNATIONAL INVESTMENT ARBITRATION: CRITICAL CASE STUDIES 149, 149-190 (Guillermo Aguilar Alvarez & W. Micheal Reisman eds., 2008); Nartnirun Junngam, *The Decision on Jurisdiction in Tokios Tokeles v. Ukraine*, *in* THE REASONS REQUIREMENT IN INTERNATIONAL INVESTMENT ARBITRATION: CRITICAL CASE STUDIES *supra* note 27, at 191-210; Georgios Petrochilos et al., *ICSID Convention, Chapter II, Article 25*, *in* CONCISE INTERNATIONAL ARBITRATION 66, 66-77 (Loukas A. Mistelis ed., 2010); JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES 186-90 (2009) [hereinafter SALACUSE, LAW OF INVESTMENT TREATIES]; JESWALD W. SALACUSE, THE THREE LAWS OF INTERNATIONAL INVESTMENT: NATIONAL, CONTRACTUAL, AND INTERNATIONAL FRAMEWORKS FOR FOREIGN CAPITAL 376-78 (2013) [hereinafter SALACUSE, THREE LAWS]; LUIZ EDUARDO SALLES, FORUM SHOPPING IN INTERNATIONAL ADJUDICATION: THE ROLE OF PRELIMINARY OBJECTIONS 16-46 (2014); KRISTA NADAKAVUKAREN SCHEFER, INTERNATIONAL INVESTMENT LAW: TEXT, CASES AND MATERIALS 113-64 (2013); CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY 296-337 (2009); ANDRES RIGO SUREDA, INVESTMENT TREATY ARBITRATION JUDGING UNDER UNCERTAINTY 43-55 (2012); KENNETH J. VANDEVELDE, BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION 168-72 (2010); YANNACA-SMALL, *supra* note 22, at 214-15; Pia Acconci, *Determining the Internationally Relevant Link Between a State and a Corporate Investor: Recent Trends Concerning the Application of the "Genuine Link" Test*, 5 J. WORLD INV. & TRADE 139, 148-60 (2004).

28. Acconci, *supra* note 27, at 148-60; DUGAN ET AL., *supra* note 1, at 306; Bernandini, *supra* note 27, at 20; CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 143 (2007); NOAH RUBINS & N. STEPHAN KINSELLA, INTERNATIONAL INVESTMENT, POLITICAL RISK AND DISPUTE RESOLUTION: A PRACTITIONER'S GUIDE 137-38 (2005); SALACUSE, LAW OF INVESTMENT TREATIES, *supra* note 27, at 187-88; SALACUSE, THREE LAWS, *supra* note 27, at 376-77; Engela C. Schlemmer, *Investment, Investor, Nationality, and Shareholders*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 49, 76-78 (Peter Muchlinski et al. eds., 2008); VANDEVELDE, *supra* note 27, at 168-72; *see* Autopista Concesionada

For example, the Switzerland-United Arab Emirates bilateral investment treaty (BIT) provides that the term "investor":

> shall mean . . . in respect of the Swiss Confederation . . . companies including corporations, partnerships, associations and other organizations, which are constituted or otherwise duly organised under Swiss law, as well as companies not established under Swiss law but effectively controlled by Swiss nationals or by companies established under Swiss law . . . .[29]

Similarly, the Netherlands-Dominican Republic BIT provides that:

> (b) the term 'nationals' shall comprise with regard to either Contracting Party . . . (ii) legal persons constituted under the law of that Contracting Party; (iii) legal persons not constituted under the law of that Contracting Party but controlled, directly or indirectly, by natural persons . . . or by legal persons as defined in (ii).[30]

The above provisions make clear that locally incorporated companies, in the above examples Emirati and Dominican companies, effectively controlled (directly or indirectly) by Swiss or Dutch nationals or by companies established under Swiss or Dutch law, qualify as covered investors. However, the above provisions do not define the concept of control other than in the first instance, qualifying it as "effective" and in the second as "direct or indirect."[31] Likewise, other investment treaties refer to "immediate" or "intermediate" control.[32] Some investment treaties are more explicit and require a certain threshold of shareholding, usually set to the majority or at least 50%.[33] As Newcombe and Paradell

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de Venez., C.A. v. Bolivarian Republic of Republic of Venezuela, ICSID Case No. ARB/00/5, Decision on Jurisdiction, ¶ 107 (Sept. 27, 2001), 16 ICSID Rev. 469 (2001) ("According to international law and practice, there are different possible criteria to determine a juridical person's nationality. The most widely used is the place of incorporation or registered office. Alternatively, the place of the central administration or effective seat may also be taken into consideration.").

29. Agreement Between the Government of the United Arab Emirates and the Swiss Federal Council On the Promotion and Reciprocal Protection Of Investments art. 1(1)(a)(ii), Switz.-UAE, Nov. 3, 1998 [hereinafter Switzerland-U.A.E. BIT].

30. Dominican Republic-Netherlands BIT, *supra* note 5, art. 1(b) (emphasis added).

31. Switzerland-U.A.E. BIT, *supra* note 29, art. 1(1)(a); Dominican Republic-Netherlands BIT, *supra* note 5, art. 1(b).

32. ALBERT BADIA, *Piercing the Veil of Investors in Nationality Claims*, *in* PIERCING THE VEIL OF STATE ENTERPRISES IN INTERNATIONAL ARBITRATION 133, 143 (2014).

33. ASEAN Comprehensive Investment Agreement, art. 19(3)(b) (Feb. 26, 2009), http://www.asean.org/storage/images/archive/documents/FINAL-SIGNED-ACIA.pdf ("A juridical person is: (a) 'controlled' by an investor if the investor has the power to name a majority of its directors or otherwise to legally direct its actions."). The Iran-U.S. Claims Settlement Declaration specifies:

> For the purpose of this Agreement: 1. A "national" of Iran or of the United States, as the case may be, means . . . (b) a corporation or other legal entity which is organized under the laws of Iran or the United States or any of its states or territories, the District

note, control "is a flexible and broad concept, referring not only to majority shareholding, but also to other "reasonable" criteria such as managerial responsibility, voting rights, nationality of board members, etc."[34] In other words, in the absence of explicit provisions, the definition of control may be to a certain degree indeterminate and subject to gradation. What nevertheless needs to be determined is whether, on the basis of reasonable criteria, a locally incorporated entity is actually or effectively controlled by foreign nationals.

An enumeration of such reasonable criteria is embodied in Understanding No. 3 of the Final Act of the European Energy Charter Conference.[35] This Understanding clarifies the meaning of article 1(6) of the Energy Charter Treaty (ECT) that contains the definition of covered investments, but can be applied *mutatis mutandis* to determine the ability of locally incorporated entities to directly bring a claim against the host state.[36] In particular, article 1(6) of the ECT qualifies as covered investments "every kind of asset, owned or controlled directly or indirectly . . . and includes . . . shares, stock, or other forms of equity participation."[37] The Understanding itself provides that:

> For greater clarity as to whether an Investment made in the Area of one Contracting Party is controlled, directly or indirectly, by an Investor of any other Contracting Party, control of an Investment means control in fact, determined after an examination of the actual circumstances in each situation. In any such examination, all relevant factors should be considered, including the Investor's

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> of Columbia or the Commonwealth of Puerto Rico, if, collectively, natural persons who are citizens of such country hold, directly or indirectly, an interest in such corporation or entity equivalent to *fifty per cent* or more of its capital stock.

Declaration of the Government of the Democratic and Popular Republic of Algeria Relating to the Commitments made by Iran and the United States, 20 I.L.M. 223, art. VII(1) (Iran-U.S. Cl. Trib. 1981). The Convention Establishing the Multilateral Investment Guarantee Agency specifies:

> Upon the joint application of the investor and the host country, the Board, by special majority, may extend eligibility to a natural person who is a national of the host country or a juridical person which is incorporated in the host country or the majority of whose capital is owned by its nationals, provided that the assets invested are transferred from outside the host country.

Convention Establishing the Multilateral Investment Guarantee Agency art. 13(c), Oct. 11, 1985, 1508 U.N.T.S. 99.

34. Andrew Newcombe & Luís Paradell, Law And Practice Of Investment Treaties 69 (2009).

35. Energy Charter Treaty, *supra* note 4.

36. *See* Thomas Roe & Matthew Happold, Settlement of Investment Disputes Under the Energy Charter Treaty 53 (2011).

37. Energy Charter Treaty, *supra* note 4.

> (a) financial interest, including equity interest, in the Investment;
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> (b) ability to exercise substantial influence over the management and operation of the Investment; and
>
> (c) ability to exercise substantial influence over the selection of members of the board of directors or any other managing body.
>
> Where there is doubt as to whether an Investor controls, directly or indirectly, an Investment, an Investor claiming such control has the burden of proof that such control exists.[38]

The above understanding provides for a comprehensive definition of control, here defined as "control in fact," that can be applied on a case-by-case analysis.[39] As already noted, this definition can be applied *mutatis mutandis* when determining control with respect to locally incorporated entities and their standing as covered investors.[40] Certainly, when explicit qualifiers are inserted in investment treaties, such as the majority shareholding threshold referred to above, such conditions will have to be met. However, when no such qualifiers are inserted, a reasonable criteria test should be employed to determine whether a foreign national actually or effectively controls a locally incorporated entity. In sum, locally incorporated entities sometimes qualify as covered investors, as long as they are controlled by nationals or legal entities of the other Contracting Party. For the sake of clarity, the standing of such locally incorporated entities will be an issue jurisdiction *ratione personae* inasmuch the latter entities can enjoy the status of a covered investor.[41] In the absence of express provisions enabling the locally incorporated entity to directly sue the host state, such entities can be treated as an investment controlled, directly or indirectly, by a national or a legal entity of the other Contracting Party. In such a case, the issue will be one of jurisdiction *ratione materiae*, but this Article does not purport to address these matters.

However, investment treaties are not the only instruments that enable locally incorporated entities to directly file a claim against the host state. In fact, the ICSID Convention also provides for this possibility.[42] However, as the next Part shows, the test adopted in the ICSID Convention is one of "foreign control."[43] The question that

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38. *Id.*
39. *Id.*
40. *See* ZACHARY DOUGLAS, *supra* note 21, at 299-308.
41. *Id.*
42. ICSID Convention, *supra* note 6, art. 25(2)(b).
43. *Id.*

therefore arises is whether this standard is tautological or antithetic to the notion of control examined above, be it effective, direct, indirect, immediate, or intermediate.

C. "Foreign Control" Under the ICSID Convention: A Preliminary

The jurisdiction of the ICSID, similar to the investment treaties referred to above, also extends to locally incorporated entities.[44] In contrast, the test adopted is one of "foreign control." In particular, article 25(2)(b) of the ICSID Convention provides that the jurisdiction of the Centre shall extend to:

> any juridical person which had the nationality of a Contracting State other than the State party to the dispute . . . and any juridical person which had the nationality of the Contracting State party to the dispute . . . 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.[45]

The meaning and interpretation of "foreign control" is discussed in depth in the next Part. Suffice to say, that two questions may arise at the outset of this provision's application. The first is whether effective and foreign control are tautological or rather separate, free-standing tests. The second is whether an investment treaty that does not explicitly qualify locally incorporated entities as protected investors, but nevertheless includes an ICSID arbitration clause, can be regarded as allowing locally incorporated entities to bring ICSID claims under that investment treaty.

With respect to the second question, the answer may be less complex when the text of an investment treaty expressly refers to the ICSID Convention. For example, article 1(7) of the ECT provides that an investor of a Contracting Party to the ECT means "a company or other organization organized in accordance with the law applicable in that Contracting Party."[46] This definition adopts the test of incorporation.[47] Nevertheless, article 26(7) also provides that:

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44. *Id.* art. 25(1).

45. *Id.* art. 25(2)(b).

46. Energy Charter Treaty, *supra* note 4, annex I. For the treaty, see generally CRINA BALTAG, THE ENERGY CHARTER TREATY: THE NOTION OF INVESTOR (2012); ROE & HAPPOLOD, *supra* note 36; THOMAS W. WALDE, THE ENERGY CHARTER TREATY: AN EAST-WEST GATEWAY FOR INVESTMENT AND TRADE (1996).

47. BALTAG, *supra* note 46, at 106.

> "[A]ccording to Article 31 of the VCLT, a treaty must be interpreted first on the basis of its plain language. On its face, Article 1(7)(a)(ii) of the ECT contains no requirement other than that the claimant company be duly organized in accordance with the law applicable in a Contracting Party. . . . The Treaty imposes no further

> [a]n Investor other than a natural person which has the nationality of a Contracting Party party to the dispute . . . and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contracting Party, shall for the purpose of article 25(2)(b) of the ICSID Convention be treated as a 'national of another Contracting State' and shall for the purpose of article 1(6) of the Additional Facility Rules be treated as a 'national of another State.'[48]

This provision of the ECT therefore enables locally incorporated entities to file investor-state claims against the host state, that is, against the state of their incorporation. However, the express reference of article 26(7) in the ECT to article 25(2)(b) of the ICSID Convention appears to limit the standing of locally incorporated entities to those claims falling under the ICSID Convention and Additional Facility Rules. In essence, the provision of article 26(7) ECT could be regarded as superfluous if article 25(2)(b) *limb b* of the ICISD Convention enables locally incorporated entities to file ICSID claims regardless of whether they are listed as covered investors under an investment treaty. Special care is needed in approaching the reference of article 25(2)(b) *limb b* to an agreement of the parties to treat a locally incorporated entity as a national of another Contracting State because of foreign control.[49] This issue is discussed again below, but suffice to say that an implicit agreement would most likely satisfy the agreement requirement of the latter provision. Therefore, a mere reference to ICSID arbitration in the investor-state arbitration clause of an investment treaty could be interpreted to implicitly encapsulate an agreement under article 25(2)(b) *limb b*. Based on the above, it would appear that an investment treaty that allows for ICSID arbitration without any further qualification enables the filing of ICSID claims by locally incorporated entities regardless of whether such entities are expressly covered in the definition of covered investors of the investment treaty. This seems consistent inasmuch as a reference to ICSID arbitration includes article 25(2)(b) *limb b*. On the contrary, if an investment treaty expressly includes locally incorporated entities in its definition of covered investors, then claims by such entities will be

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> requirements with respect to shareholding, management, *siège social* or location of its business activities . . . . Companies incorporated in Contracting Parties are embraced by the definition, regardless of the nationality of shareholders, the origin of investment capital or the nationality of directors or management."

Yukos Universal Ltd. v. Russian Federation, Case No. AA 227, Interim Award on Jurisdiction and Admissibility, ¶ 411 (Perm. Ct. Arb. Nov. 30, 2009).

48. Energy Charter Treaty, *supra* note 4, art. 26(7).

49. ICSID Convention, *supra* note 6, art. 25(2)(b).

possible regardless of whether they are under the ICSID Convention or not (for example, under the United Nations Commission on International Trade Law's arbitration rules).[50]

However, the above does not answer the first question, whether effective or actual control is tautological or antithetic to foreign control under the ICSID Convention.[51] As the next Part shows, ICSID tribunals have started to interpret foreign control in a rather restrictive manner, which leads to the exclusion of claims filed by locally incorporated entities controlled by nationals of the host state.

III. ARTICLE 25(2)(B) LIMB B & ARTICLE 25(1) ICSID CONVENTION[52]

The previous Part laid down the general grounds for the discussion of the "foreign control" requirement under the ICSID Convention. As already indicated, article 25(2)(b) *limb b* of the ICSID Convention extends the jurisdiction of the Centre to "any juridical person which had the nationality of the Contracting State party to the dispute . . . 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."[53] This Part analyzes this provision by examining its relationship with article 25(1) ICSID Convention, that extends the jurisdiction of the Centre "to any legal dispute . . . between a Contracting State . . . and a national of another Contracting State."[54] In particular, two questions are of crucial importance.

First, what is the relevance of foreign control to the tests of actual or effective control discussed in the previous Part? Second, can locally incorporated entities controlled by nationals of the host state satisfy foreign control, or would that be contrary to the plain meaning of article

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50. UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW [UNCITRAL], UNCITRAL ARBITRATION RULES (2010), https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf.

51. NEWCOMBE & PARADELL, *supra* note 34, at 69.

52. *See* Chittharanjan F. Amerasinghe, *Interpretation of Article 25(2)(B) of the ICSID Convention*, *in* INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS "JUDICIALIZATION" AND UNIFORMITY 223 (R. Lillich & Charles Brower eds., 1993); LUCY REED ET AL., GUIDE TO ICSID ARBITRATION 26-31 (2010); SCHREUER, *supra* note 27, at 296-337; Anthony C. Sinclair, *The "Foreign Nationality"—Requirements in ICSID Arbitration*, *in* THE INTERNATIONAL CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES (ICSID): TAKING STOCK AFTER 40 YEARS 129, 129-40 (Rainer Hofmann & Christian J. Tams eds., 2007). *See generally* Yaraslau Kryvoi, *Piercing the Corporate Veil in International Arbitration*, 1 GLOBAL BUS. L. REV. 169, 178-86 (2011); Christoph Schreuer, *Access to ICSID Dispute Settlement for Locally Incorporated Companies*, INT'L ECON. L. HUM. FACE 497, 497-512 (Friedl Weiss et al. eds., 1998).

53. ICSID Convention, *supra* note 6, art. 25(2)(b).

54. *Id.* art. 25(1).

25(1), which merely allows claims between a Contracting State and a national of another, not the same, Contracting State; with respect to the latter question, take for example the Netherlands-Dominican Republic BIT discussed above. Would a Dominican entity controlled by a Dutch entity that is in turn owned or controlled by nationals of the Dominican Republic satisfy "foreign control" under the ICSID Convention? Would a Dominican entity controlled by an entity incorporated in an ICSID member state other than the Netherlands or the Dominican Republic but owned or controlled by nationals of the Dominican Republic satisfy "foreign control"? Would it matter whether multiple layers of corporate entities were interposed between the Dominican entity and the nationals of the Dominican Republic that ultimately owned or controlled the first entity? And if so, what is the degree of control that the nationals of the Dominican Republic need to exercise over the Dominican entity? With respect to these questions, recall that the ICSID Convention neither defines foreign control nor makes any reference to the criteria or gradation of control.[55] As Andres Rigo Sureda has put it, the recurrent question is:

> [w]hat does control mean in these complex structures? Does it refer to the immediate controller, the ultimate controller, or to any of the companies in the chain which happen to have the nationality of a State party to the ICSID Convention and a convenient investment treaty? At what level of this structure should the search for the nationality link of a corporation with a State party stop? . . . Should indirect control by nationals of the host country be a concern? Should arbitral tribunals apply an objective or subjective test to determine foreign control under ICSID Article 25(2)(b)?[56]

To state it otherwise, one of the most highly debated issues is how "deep into the structure of a company an ICSID Tribunal must go to assess the nationality of a corporate investor"[57] and whether "foreign control" is merely "control without qualification."[58] However, these questions cannot be answered abstractly. For this reason, it is important to follow the determinations of ICSID tribunals that have dealt with the notion of foreign control. The following subparts first trace the initial conception and contours of article 25(2)(b) *limb b* (Section A), then link foreign control to actual or effective control (Section B), and finally discuss the impact of article 25(1) on 25(2)(b) *limb b* (Section C).

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55. BROCHES, *supra* note 24, at 359.
56. SUREDA, *supra* note 27, at 44.
57. *See* BADIA, *supra* note 32, at 142.
58 *Id.* at 143.

A. The Contours of "Foreign Control"

In understanding the initial conception and purpose served by article 25(2)(b) *limb b*, authoritative guidance can be sought in the writings of Aaron Broches, the first Secretary General of the ICSID. Broches points to the fact that the requirement of foreign control aimed at *expanding*, not *restricting*, the jurisdiction of the Centre.[59] Regardless of that statement, as discussed below in subpart C, the absence of a definition of foreign control in the ICSID Convention itself has led to divergent rulings. Apart from that, it is vital to emphasize that the foreign control requirement cannot be varied by agreement of the parties but must be determined by ICSID tribunals.[60] Furthermore, article 25(2)(b) *limb b* requires an agreement.[61] That is not to say that the ICSID Convention requires a specific form. Nevertheless, an agreement to treat locally incorporated companies as foreign nationals is essential.[62] This is also reflected in ICSID's model clauses.[63] In arbitral practice however, investment tribunals have also been willing to accept an implicit agreement.[64] The tendency to accept an implicit agreement by mere reference to the option of ICSID arbitration included in an investment treaty's investor-state arbitration clause somewhat diminishes the value of replicating the language of the ICSID Convention in the investment treaty itself, as is the case of article 26(7) ECT discussed above. Furthermore, the reference of article 25(2)(b) *limb b* to control being vested in a national of another Contracting State is not entirely clear inasmuch as it does not specify whether foreign control can be vested in any national (natural person or corporation) of an ICSID member. Schreuer seems to suggest that a literal interpretation of article 25(2)(b)

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59. BROCHES, *supra* note 24, at 358.

60. *See* BADIA, *supra* note 32, 143, 143 n.52; SCHREUER, *supra* note 27, at 312-13; Schreuer, *supra* note 53, at 504, 504 nn.25-26.

61. ICSID Convention, *supra* note 6, art. 25(2)(b). The jurisdiction of the Centre extends to locally incorporated entities, which because of foreign control should be treated as a national of another contracting state. *Id.*

62. SCHREUER, *supra* note 27, at 299.

63. ICSID Convention, Model Clause 7, *reprinted in* CHRISTOPH SCHREUER, *supra* note at 27, at 300-01 n.1039. "It is hereby agreed that, although the Investor is a national of the Host State, it is controlled by nationals of name(s) of other Contracting State(s) and shall be treated as a national of [that]/[those] State[s] for the purposes of the Convention." *Id.*

64. Klöckner v. Republic of Cameroon, ICSID Case No. ARB/81/2, Award, ¶¶ 16-18 (Oct. 21, 1983), 2 ICSID Rep. 9 (1994); Amco Asia Corp. v. Indonesia, ICSID Case No. ARB/81/1, Decision on Jurisdiction, ¶¶ 12-14 (Sept. 25, 1983), 1 ICSID Rep. 389 (1993); *see* Liberian Eastern Timber Corp. v. Republic of Liberia, ICSID Case No. ARB/83/2, Decision on Jurisdiction, 349 (Oct. 24, 1984), 2 ICSID Rep. 349 (1994); Contra Holiday Inns S.A. v. Morocco, ICSID Case No. ARB/72/1, Decision on Jurisdiction, 659-69 (July 1, 1973), 1 ICSID Rep. 645 (1993).

limb b would mean that foreign control could attach to nationals of any ICSID member.[65]

B. "Foreign Control" as Control in Fact

In regards to foreign control *per se*, ICSID tribunals generally endorse the criteria referred to above with reference to the actual or effective control.[66] Thus, majority shareholding, managerial responsibility, voting rights, nationality of board members, and other similar criteria become relevant when defining the notion of "foreign control." Indeed, in *Vacuum Salt v. Ghana*, the tribunal found that a 20% shareholding by a Greek national in a Ghanaian company was, in the circumstances, insufficient to show foreign control, given that the Greek national did not exercise anything other than a technical advisory function and the actual managerial control was in Ghanaian hands.[67] Again, similarly to the notion of control under investment treaties, what is examined is whether the locally incorporated entity is actually or effectively controlled by a foreign national. The debate that arises is not so much with respect to whether foreign control means effective or actual control, but rather whether foreign control allows for the piercing of the corporate veil for as many levels as required in order to reassure that a claim is not ultimately brought by natural persons who are nationals of the host state.

C. Nationals of the Host State and the Ultimate Control Conundrum

Until recently, ICSID tribunals were generally consistent in treating the foreign control requirement of article 25(2)(b) *limb b* as one that expands, not restricts, the jurisdiction of the Centre.[68] Nevertheless, this changed in 2008, when the tribunal in *TSA Spectrum* adopted a more

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65. *See* SCHREUER, *supra* note 27, at 216-17.

> The question whether "foreign control" means control by nationals of another Contracting State or control by nationals of any State other than the host State is not so clear at first sight. A literal interpretation could suggest that "foreign" has a different and wider meaning than "of another Contracting State." But a number of considerations strongly suggest that control by nationals of non-Contracting States would not qualify for purposes of Art. 25(2)(b).

Id.

66. *See infra* Section III.A.

67. Vacuum Salt Products Ltd v. Republic of Ghana, ICSID Case No. ARB/92/1, Award (Feb. 16, 1994).

68. *See* BROCHES, *supra* note 24, at 358.

restrictive approach.[69] Such a restrictive approach was recently affirmed in *Burimi* and *National Gas* discussed below.[70] The next parts of this Article examine ICISD cases that adopted expansive approaches and then turn to the latest cases that appear to solidify the exclusion of locally incorporated entities effectively or actually controlled by nationals of the host state.

1. Expansive Approaches

In *Amco v. Indonesia*, the tribunal vested itself with jurisdiction by finding that PT Amco, a company incorporated in Indonesia was under foreign control, since it was wholly owned by a U.S. corporation.[71] In this finding, the tribunal disregarded the fact that the U.S. corporation was ultimately controlled by a Dutch national through an intermediate Hong Kong company.[72] In other words, the tribunal in *Amco* did not go beyond the first corporate layer and found that nationality under the ICSID Convention was "a classical one, based on the law under which the juridical person has been incorporated."[73] In *LETCO v. Liberia*, the foreign control requirement was also satisfied, but in this case, LETCO, a Liberian company, was wholly owned by French nationals.[74]

Unlike the above two cases that only examined the first corporate layer, in *SOABI v. Senegal*, the tribunal went beyond its previous findings in order to establish foreign control.[75] In particular, the claimant, a Senegalese entity, was wholly owned by a Panamanian entity, which was in turn owned by a Belgian national.[76] However, Panama, unlike Belgium, was not a party to the ICSID Convention.[77] Regardless, the tribunal pierced the corporate veil of the Panamanian entity and, finding that it was owned by a Belgian national, ruled that the requirement of

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

70. Nat'l Gas S.A.E. v. Arab Republic of Egypt, ICSID Case No. ARB/11/7, Award (April 3, 2014); Burimi SRL v. Republic of Albania, ICSID Case No. ARB/11/18, Award (May 9, 2009).

71. Amco Asia Corp. v. Indonesia, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 389 (Sept. 25, 1983) 1 ICSID Reports 389 (1993).

72. *Id.*

73. *Id.* at 396.

74. Liberian Eastern Timber Corp. v. Republic of Liberia, ICSID Case No. ARB/83/2, Decision on Jurisdiction, 351 (Oct. 24, 1984), 2 ICSID Rep. 349 (1994) (stating that "foreign control as allocated on a Liberian company wholly owned by nationals of France.").

75. Société Ouest Africaine des Bétons Industriels v. Senegal, ICSID Case No. ARB/82/1, Decision on Jurisdiction (July 19, 1984), 2 ICSID Rep. 175 (1984).

76. *Id.*

77. *Id.*

foreign control was satisfied.[78] In another case, *Wena Hotels v. Egypt*, the claim was filed by a British legal entity, but Egypt alleged that jurisdiction should be denied due to the fact that said entity was owned and controlled by an Egyptian national.[79] The tribunal did not however sustain Egypt's argument but rather found that the United Kingdom-Egypt BIT, in qualifying locally incorporated entities as covered investors, did not "reverse the consent given . . . when a Contracting State is a party to a dispute with a juridical person of the other Contracting State."[80] In *Aguas del Tunari v. Bolivia*, a claim filed under the Netherlands-Bolivia BIT, the tribunal once again went beyond the first corporate layer in order to satisfy the foreign control requirement.[81] In particular, the claimant was a Bolivian entity with 55% of its shares owned by a Luxembourgian company, which was in turn owned by two Dutch companies in string, the last of which was owned in a 50% share by a third Dutch company that was eventually entirely owned by Bechtel Holdings Inc., a U.S. company.[82] Bolivia alleged that the claimant was not a covered investor because it was ultimately and effectively controlled by a U.S. company.[83] However, the tribunal opined that reference of the Netherlands-Bolivia BIT to a legal person "controlled directly or indirectly" encompasses both actual exercise of powers or direction and the rights arising from the ownership of shares and found that:

> Claimant's view that 'control' is a quality that accompanies ownership finds support generally in the law. An entity that owns 100% of the shares of another entity necessarily possesses the power to control the second entity. The first entity may decline to exercise its control, but that is its choice. Moreover, the first entity may be held responsible under various corporate law doctrines for the actions of its subsidiary, whether or not it actually exercised control over that subsidiary's actions. Respondent contends that IWT B.V. and IWH B.V. are mere 'shells' which cannot even

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78. *Id.* at ¶ 35; BROCHES, *supra* note 24, at 201-02; *see also* Autopista Concesionada de Venez., C.A. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/00/5, Decision on Jurisdiction, ¶¶ 83-142 (Sept. 27, 2001)(discussing a claim brought by a Venezuelan company, which was immediately owned by US corporation, which in turn was owned by ICA Holding, a Mexican company).

79. Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Summary Minutes of the Session of the Tribunal (May 25, 1999), 41 I.L.M. 886, 886-89 (2002).

80. *Id.* at 889.

81. Aguas del Tunari, S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, ¶¶ 214-323 (Oct. 21, 2005).

82. *Id.* ¶¶ 227-35.

83. *Id.*

> decline to exercise its possible control. Holding companies (if that is all IWT B.V. and IWH B.V. are in this case) owning substantial assets (here the rights under the Concession) are, however, both a common and legal device for corporate organization and face the same legal obligations of corporations generally. The Tribunal acknowledges that the corporate form may be abused and that form may be set aside for fraud or on other grounds. . . . [T]he Tribunal finds no such extraordinary grounds to be present on the evidence.[84]

Similar approaches to the notion of control are also found in *AIG v. Kazakhstan*, *Perenco v. Ecuador*, *Thunderbird v. Mexico* (de facto control) and in *Mobil v. Venezuela*.[85] Of these cases, only *AIG* involved a locally incorporated enterprise.

Finally, in *African Holding v. Congo*, a claim under the U.S.-Congo BIT, one of the claimants was determined to be a Congolese entity.[86] While the majority shareholding belonged to a Cayman entity, the tribunal had no difficulty ascertaining foreign control since 99% of the latter entity was owned by U.S. nationals.[87] In sum, the rulings in *Amco*, *LETCO*, *SOABI*, *Wena*, *Aguas del Tunari*, *AIG*, and *African Holding* were consistent in treating the foreign control requirement as one that expands, not restricts, ICSID's jurisdiction. When the foreign control requirement was not met by the first corporate level, then the tribunals would pierce the corporate veil until such requirement was satisfied. Certain care is nevertheless needed before generalizing these findings inasmuch a major part of their analysis focuses more on the provisions of the respective investment treaties rather than article 25(2)(b) *limb b*. In any case, the above rulings were rendered by ICSID tribunals and, with the exception of *Wena Hotels*, the locally incorporated entities were not

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84. *Id.* ¶ 245.

85. Perenco Ecuador Ltd. v. Republic of Ecuador, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability, ¶¶ 509-30 (Sept. 12, 2014); Mobil Corp. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Decision on Jurisdiction, ¶¶ 150-207 (June 10, 2010); Int'l Thunderbird Gaming Corp. v. United Mexican States, Award, ¶¶ 106-07 (NAFTA Inv.-State Arb. Trib. Jan. 26, 2006); AIG Capital Partners, Inc. v. Republic of Kazakhstan, ICSID Case No. ARB/01/6, Award, ¶ 9.4.8(3) (Oct. 7, 2003) (finding one of the claimants was a locally incorporated entity).

86. African Holding Co. of America, Inc. v. Democratic Republic of the Congo, ICSID Case No. ARB/05/21, Decision on Jurisdiction (July 29, 2008).

87. *Id.* at ¶¶ 139-56; *see also* Treaty Between the Government of the United States of America and the Government of the People's Republic of the Congo Concerning the Reciprocal Encouragement and Protection of Investment art. 1(b), Congo-U.S., Feb. 12, 1990, S. TREATY DOC. NO. 102-1 (emphasis added) [hereinafter Congo-U.S. BIT].

ultimately controlled by nationals of the host state.[88] The following subpart now turns to those cases that construed article 25(2)(b) *limb b* in more restrictively.

2. Restrictive Approaches

Unlike the rulings discussed above, in *TSA*, the tribunal conceived foreign control in a more restrictive way, thus finding that if the ultimate controller of a locally incorporated entity was a national of the host state, ICSID jurisdiction could not attach.[89] This case was under the Netherlands-Argentina BIT, and claimant was an Argentinian company that was wholly owned by a Dutch entity, which in turn was controlled by an Argentinian national.[90] Unlike in *Amco* or the other cases referred to above, the tribunal in *TSA Spectrum* did not stop at the first corporate layer, although that would be adequate to satisfy foreign control, given that the claimant, the Argentinian entity, was wholly owned by a Dutch legal entity.[91] On the contrary, the tribunal decided to pierce the corporate veil of the Dutch entity and thus found itself bereft of jurisdiction due to the non-satisfaction of the foreign control requirement.[92] Two recent rulings endorsed this approach.

In particular, in *Burimi*,[93] one of the claimants, Eagle Games SH.A. was an Albanian entity whose majority shareholder was Mr. Burimi, a dual national of Italy and Albania.[94] In brief, the tribunal examined article 25(1) in conjunction with article 25(2)(b) *limb b* of the ICSID Convention and found that the jurisdiction of the Centre could not attach, because article 25(1) only allows claims by nationals of another, not the same, Contracting State.[95] In the same vein, the tribunal in *National Gas* rejected a claim filed by an Egyptian legal entity under the UAE-Egypt BIT.[96] In this case, claimant was controlled by CTIP, an Emirati company, wholly owned by REGI, another Emirati company, which in turn was

88. Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Summary Minutes of the Session of the Tribunal (May 25, 1999), 41 I.L.M. 886, 886-89 (2002).

89. TSA Spectrum de Argentina S.A. v. Argentine Republic, ICSID Case No. ARB/05/5, Award, ¶¶ 1-14 (Dec. 19, 2008).

90. *Id.*

91. *Id.*

92. *Id.* ¶¶ 133-62.

93. Burimi SRL v. Republic of Albania, ICSID Case No. ARB/11/18, Award (May 29, 2013).

94. *Id.* ¶¶ 1-3, 109-22.

95. *Id.* ¶¶ 121-22.

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

wholly owned by Mr. Ginena, an Egyptian and Canadian national.[97] The tribunal, similarly to Burimi, examined article 25(2)(b) *limb b* side by side with articles 25(1) and 25(2)(a).[98] The latter provision provides that a national of another Contracting Party is "any natural person who had the nationality of a Contracting State other than the State party to the dispute."[99] On this basis, the tribunal found that the requirement of foreign control was not satisfied and sided with the TSA Spectrum and Burimi tribunals.[100] In the words of the tribunal:

> there is a significant difference under Article 25(2)(b) between (i) control exercised by a national of the Contracting State against which the Claimant asserts its claim and (ii) control by a national of another Contracting State. The latter situation violates no principle of international law and is consistent with the text of the ICSID Convention. On the other hand, the former situation violates the general limitation in Article 25(1) and the first part of Article 25(2)(a) of the ICSID Convention in regard to both Contracting States and nationals (including dual nationals). In other words, the latter is consistent with the object and purpose of the ICSID Convention; but the former is inconsistent: it would permit the use of the ICSID Convention for a purpose for which it was clearly not intended and it would breach its outer limits. As already noted above, Article 25(2)(b) operates only as a qualified exception to the general limitation to ICSID jurisdiction in Article 25: a sardine cannot swallow a whale.[101]

This finding is significant because it solidifies the difference between foreign control under the ICSID Convention and effective or actual control under investment treaties. Foreign control includes effective or actual control but when it comes to natural persons of the host state that ultimately control a locally incorporated entity, foreign control adds an additional bar by excluding such locally incorporated entities from the protective veil of the ICSID Convention.

The significance of these jurisprudential developments cannot be fully appraised without juxtaposing ICSID tribunal determinations under article 25(2)(b) *limb a*.

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97. *Id.* at ¶¶ 73-114.
98. *Id.*
99. *Id.*
100. *Id.* ¶¶ 115-49.
101. *Id.* ¶ 136.

IV. ARTICLE 25(2)(B) LIMB A & ARTICLE 25(1) ICSID CONVENTION

Article 25(2)(b) *limb a* extends the jurisdiction of the Centre to "any juridical person which had the nationality of a Contracting State other than the State party to the dispute."[102] Unlike *limb b*, no exception is drawn by reference to foreign control. Let us assume now that in the last case discussed above, *National Gas*, the claim was not filed by National Gas, the Egyptian entity, but by CTIP, the Emirati entity, that controlled National Gas.[103] In this case, CTIP, as an Emirati entity would fall under the scope of *limb a*, that is a juridical person that has the nationality of a Contracting State other than the State party to the dispute. This classification would also be in line with the general limitation of article 25(1) (what the National Gas tribunal called the "whale")[104] that merely extends the jurisdiction of the Centre to any legal dispute between a Contracting State and a national of another Contracting State. To state it differently, had the claim been filed by CTIP and not National Gas, the foreign control test would not kick in and thus the tribunal would have no basis to pierce the corporate veil and examine whether CTIP was ultimately controlled by Mr. Ginena, a national of Egypt and Canada.[105] In effect, the ultimate controller would be the same, but the tribunal would have no basis to deny vesting its jurisdiction.

The hesitance in adopting the above approach is vividly reflected in the split between the majority opinion and the dissenting opinion of Prosper Weil in *Tokios Tokelés v. Ukraine*.[106] In this case, the claimant was a Lithuanian company that was nevertheless owned in 99% by Ukrainian nationals.[107] The tribunal eventually upheld jurisdiction, but did not focus on the differences between article 25(2)(b) *limb a* and *limb b*.[108] It merely focused on the Lithuania-Ukraine BIT that adopts the test of incorporation instead of control, finding that no misuse of the legal personality had been made, and vested itself with jurisdiction.[109] However, Prosper Weil, the Chairman of the tribunal, disagreed and opined that the foreign control requirement of *limb b* applies equally to

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102. ICSID Convention, *supra* note 6, art. 25(2).

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

104. *Id.*

105. *Id.*

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

107. *Id.*

108. *Id.*

109. *Id.* ¶¶ 21-71.

cases falling under the ambit of *limb a* regardless of the provisions of the investment treaty itself.[110] In spite of that, for the time being, the majority opinion in *Tokios Tokelés* has not been challenged.[111] It nevertheless remains to be seen whether the decisions in *TSA Spectrum*,[112] *Burimi*,[113] and *National Gas*,[114] alongside Prosper Weil's dissent will gradually influence future rulings under article 25(2)(b) *limb a*.

110. *Id.* ¶¶ 22-25 (Chairman Prosper Weil, dissenting).

111. *See* Rumeli Telekom A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award, ¶¶ 326-31 (July 29, 2008); Rompetrol Grp. N.V. v. Romania, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility (Apr. 18, 2008) ("claimant was a Dutch company controlled by another Dutch company, owned by a Swiss company, which was in turn owned by two nationals of Romania"); ADC Affiliate Ltd. v. Republic of Hungary, ICSID Case No. ARB/03/16, Award, ¶¶ 332-62 (Oct. 2, 2006); LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Jurisdiction, ¶¶ 69-83 (Apr. 30, 2004); Waste Mgmt, Inc. v. United Mexican States (No. 2), ICSID Case No. ARB(AF)/00/3, Final Award, ¶¶ 80-85 (Apr. 30, 2004) Generation Ukr., Inc. v. Ukraine, ICSID Case No. ARB/00/9, Award, ¶¶ 15.1-15.9 (Sept. 16, 2003); CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Decision on Jurisdiction, ¶¶ 43-69 (July 17, 2003). For non-ICSID cases see Saluka Invs. B.V. v. Czech Republic, Partial Award, ¶¶ 226-44 (Perm. Ct. Arb. Mar. 17, 2006).

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

113. Burimi SRL v. Republic of Albania, ICSID Case No. ARB/11/18, Award (May 9, 2009).

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