The Transfer of Treaty Claims and Treaty-Shopping in Investor-State Disputes

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INTRODUCTION

A significant factor of unease in treaty arbitrations is the possibility of "treaty-shopping" for a "home country of convenience" that has treaties with the host State of investment.¹ Such a potential for "treaty shopping" is recognized in Chapter 11 of the North American Free Trade Agreement ("NAFTA"), which contains a provision indicating that a party may deny the benefits of a treaty to investors with "no substantial business" in their alleged home country.² Similar provisions are found in various Bilateral Investment Treaties ("BITS"), such as those enacted by the United States and ASEAN, illustrating an intention to protect only good faith investments in host States of investment.

However, many BITS do not contain similar provisions, potentially opening the door for an investor to transfer its rights to an investment to a third party located in a State which has enacted a BIT with the host State of investment, and thereby creating jurisdiction for the investor to bring a treaty claim against the host State of investment.

It is clear that the need to change the nationality of an investor (or to assign potential treaty claims to another juridical entity located in a third State) can be highly tempting for certain investors seeking protection under a BIT, as many States – even those that are parties to the ICSID Convention of March 18, 1965 (the "ICSID Convention") – have enacted relatively few BITS protecting the rights of investors and giving consent for treaty claims to be brought against them when the host State of investment breaches a BIT.

For example, UNCTAD’s list of country-specific BITS³ shows that the majority of sub-Saharan African countries have enacted relatively few BITS to protect the rights of investors, thereby precluding jus standi of an investor to sue a sub-Saharan African State

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² Id. See, e.g., NAFTA, Article 1113.2.
³ Id. pp. 21-22.
in which it has invested before a neutral international arbitration tribunal (unless an investment agreement, internal law, specific consent, a multilateral agreement giving consent to ICSID jurisdiction or another means of bringing treaty claims had been agreed upon between the investor and the host State of investment). This lack of enacted BITS is also true of many other developing countries. By way of comparison, the United Kingdom alone has enacted over 916 BITS with other countries, whereas all sub-Saharan African States – other than South Africa, Ethiopia, Mozambique, Nigeria, and Sudan – have enacted no more than eight BITS with other States worldwide.

This paucity of BITS – and the consent to international arbitration typically contained therein – has the practical effect of precluding jurisdiction for many investors from bringing ICSID, ICC, or UNCITRAL treaty claims against host States of investments which are also parties to the ICSID Convention. This both precludes the protections afforded by BITS for certain investors making investments in host States and arguably may decrease the number of investments made in said host States and their economic development.

Of course, ideally, any investment would – at the outset – be structured so that the juridical entity making the investment in another State had verified that a BIT was in force between the investor's State and the host State of investment, in case problems were to arise with respect to the investment. Not every investor, however, necessarily has the foresight to ensure that the juridical entity making investments in the host State of investment is protected by a BIT, as the investor may be distracted by many other factors, such as taxation matters.

For example, in the Autopista Concesionada de Venezuela CA v. Bolivarian Republic of Venezuela arbitration, the initial investors were from Mexico, which did not possess a BIT with the host State of investment, Venezuela. The Mexican investors therefore transferred their shares to a company in the United States, which did have a BIT in force with Venezuela. Luckily for the Mexican investors, Venezuela was found by the Arbitral Tribunal to have accepted this share transfer, allowing the Mexican investors to bring a treaty claim against Venezuela under the US-Venezuela BIT.

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9 Id. p.22.
In the absence of a BIT between the investor and the host State of investment, investors may be tempted to seek to assign and/or transfer a potential treaty claim or their shares to another juridical entity located in a different State that has enacted a BIT with the host State of investment in order to ensure that the investor is protected by a BIT and can, if required, bring a treaty claim before a neutral arbitral forum.

This article therefore examines the question of when an initial investor from a State that has not enacted a BIT with the host State of investment may or may not assign its claim (or assign its shares and its rights to an investment) to a company in a third State that has enacted a BIT with the host State of investment in order to take advantage of said BIT. In other words, this article examines the circumstances where what is sometimes pejoratively termed “treaty-shopping” may or may not be permissible, especially in the ICSID (and UNCITRAL) contexts.

To this end, this article reviews what appear to be the most pertinent awards of Arbitral Tribunals dealing with the assignment of treaty claims and “treaty-shopping” in order to determine when such assignments are permissible and, if so, the conditions under which such assignments of treaty claims should arguably be made. It also examines the effect of an investor establishing a juridical entity in a third State that has enacted a BIT with the host State of investment and the best timing for any change in nationality of the juridical investor for the purpose of ensuring jurisdiction before a neutral Arbitral Tribunal.

As this article will show, various Arbitral Tribunals have come to different conclusions regarding the validity of the assignment of treaty claims, as well as the creation of new juridical entities in third States by the initial investor in anticipation of a dispute and in order to take advantage of a BIT enacted with the host State of investment. While a definite conclusion as to the validity of assigning treaty claims under arbitral case law depends largely on the circumstances surrounding the creation of the investment vehicle ultimately adopted by the investor – as well as the terms of the BIT enacted with the host State of investment and the new State of the investor – arbitral case law does suggest certain means for an investor lacking a BIT with the host State of investment to avoid negative charges of “treaty-shopping” while potentially gaining access to jurisdiction to bring a treaty claim against a host State of investment.

This article will begin with a review of (1) general considerations regarding jurisdiction ratione personae in treaty arbitrations, followed by (2) a description and analysis of relevant treaty awards brought by investors directly against host States of investment, then by (3) a review and an analysis of pertinent treaty awards brought on the basis of the “foreign control” of a locally-incorporated corporation in the host State of investment, and finally (4) conclusions that may be drawn from the arbitral case law that is reviewed herein.
1. **Jurisdiction Rationae Personae in Treaty Arbitrations**

Many treaty arbitrations are brought under the auspices of the ICSID Convention, although ICC treaty claims and ad hoc UNCITRAL treaty claims are also brought, as well as treaty claims under multilateral agreements such as NAFTA and ASEAN. As much of the pertinent arbitral case law regarding the transfer of treaty claims in investor-State disputes stems from published ICSID awards, this article will principally – but not exclusively – focus on ICSID case law.

Article 25 of the ICSID Convention defines the conditions *ratione personae* which allow an investor from a Contracting State to bring against a Contracting host State (assuming that the other jurisdictional conditions contained in the ICSID Convention are satisfied). According to Article 25 of the ICSID Convention:

(1) *The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State ... and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.*

(2) “National of another Contracting State)” means:

(...)

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

Of course, as noted above, BITs signed between Contracting States may add further conditions as to the requisite conditions *ratione personae* to gain *jus standi* to bring claims against host States of investment. For example, permanent residence is sometimes used as an alternative to citizenship or nationality for there to be standing under BITs. Other BITs require a company to have real activities – and not merely to be shell companies – before they may be granted standing under a BIT to bring a treaty claim. In addition, as noted above, other BITs allow a party to deny the benefits of the treaty to entities of the other party that are controlled by foreign nationals and that “do not engage in substantial business activity in the territory of the other party,” such as the Ukraine–United States BIT.

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The first clause of Article 25(2)(b) makes no mention of the assignment of claims to another juridical entity or the timing of when this must be done. This could potentially be read to suggest that as long as a claimant established a new investment vehicle in a State possessing a BIT with the host State of investment, the assignment of an ICSID claim to said company would not pose a problem under the ICSID Convention and would satisfy ICSID's requirements ratione personae for jurisdiction (keeping in mind, of course, restrictions that may have been negotiated in BITs between specific States).

The following review of treaty awards, however, suggests divergent views as to the acceptability of the assignment of treaty claims to companies located in third States for the purposes of gaining jurisdiction to bring a treaty claim.

2. Review and Analysis of Treaty Claims Brought Directly by Investors Against Host States of Investment

A. Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka

This section will first review the ICSID Award Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka14 ("Mihaly"), where the limits to transferring treaty claims were discussed in detail.


The claimant maintained that it was organized under the laws of California in the United States and was thus fully entitled to protection under Article 25(2)(b) of the ICSID Convention.15 The claimant also set forth the theory that under the laws of California, where it was incorporated, the partnership formed between the claimant and its Canadian counterpart (Mihaly International Corporation, organized under the laws of Ontario, Canada), gave the claimant the right to file a claim on its own behalf as well as on behalf of its Canadian partner.16 (Despite the fact that Canada was, at the time, not a State party to the ICSID Convention.)

The claimant further argued that it was the lawful assignee of all the rights, interests, and claims of its Canadian partner, and that under the assignment instrument, the claimant was authorized to bring a claim for all the rights and interests that Mihaly International Corporation of Canada had against Sri Lanka.

15 See id. ¶ 13.
16 See id. ¶ 14.
Sri Lanka, on the other hand, argued that said assignment was invalid as it had not given consent to such an assignment to Mihaly (USA). 17

The Arbitral Tribunal ultimately found that the existence of an international partnership, wherever and however formed, "could neither add to, nor subtract from, the capacity of Mihaly (USA) to file a claim against the respondent for whatever rights or interests it may be able to substantiate on the merits in connection with the proposed power project in Sri Lanka, upon fulfillment of the other requirements of ICSID jurisdiction." 18 The Arbitral Tribunal went on to note that the "fact remains undisputed that the undisputed Claimant in the case at bar is unmistakably Mihaly (USA) eo nomine and not the Mihaly International or Binational Partnership (USA and Canada)." 19

The Arbitral Tribunal also noted that Mihaly (Canada) could not bring a claim, as Canada was not a party to the ICSID convention, and that "whatever rights Mihaly (Canada) had or did not have against Sri Lanka could not have been improved by the process of assignment, with or without, and especially without, the express consent of Sri Lanka, on the ground that nemo dat quod non habet or nemo potiorem potest trans ferre quam ipse habet. That is, no one could transfer a better title than what he really has." 20

The Arbitral Tribunal went on to indicate that "if Mihaly (Canada) had a claim which was procedurally defective against Sri Lanka before ICSID because of Mihaly (Canada's) inability to invoke the ICSID Convention -- as Canada was not a party to the Convention -- this defect could not be perfected via its assignment to Mihaly (USA). According to the Arbitral Tribunal, to allow such an assignment to operate in favor of Mihaly (Canada) would defeat the object and purpose of the ICSID Convention and the sanctity of the privity of international agreements not intended to create rights and obligations for non-Parties." The Arbitral Tribunal then went on to stress that "[a] claim under the ICSID Convention with its carefully structured system is not a readily assignable chose in action as shares in the stock-exchange market or other types of negotiable instruments, such as promissory notes or letters of credit." 21

The Arbitral Tribunal, however, did note that the claimant Mihaly (USA) was entitled to file a claim in its own name against Sri Lanka "in respect of the rights and interests it may be able subsequently to establish in the [proposed investment]." 22 The Tribunal also noted that Mihaly (USA) could potentially have locus standi before the Arbitral Tribunal, if it could prove the existence of jurisdiction ratione materiae (i.e., whether the US corporation could prove it was party to a legal dispute arising directly out of an investment). 23

17 See id. ¶ 16(b)(ii).
18 See id. ¶ 22.
19 See id.
20 See id. ¶ 24.
21 See id.
22 See id. ¶ 26.
23 See id. ¶ 26-27.
A.1. Analysis of the Mihaly Award

It should first be noted that there is no indication in the Mihaly Award of whether the assignment to Mihaly (USA) took place before or after the dispute arose. This is important, because if the assignment took place after the dispute had arisen (or the request for arbitration had been filed), then it would be likely that the assignment in question would be viewed as merely an attempt by the claimant to gain access to ICSID jurisdiction — i.e., an example of “treaty shopping” in order for the investor to obtain jurisdiction to bring a claim before the Arbitral Tribunal by the assignment of all the rights, interests, and claims of its Canadian partner to a juridical entity based in a Contracting State to ICSID which possessed a BIT with Sri Lanka (here, the USA).

Interestingly, the Mihaly Arbitral Tribunal stressed that “[a] claim under the ICSID Convention ... is not a readily assignable chose in action as shares in the stock-exchange market or other types of negotiable interests”, which would appear to express the view that isolated claims under the ICSID Convention should not be assignable to other juridical entities. This suggests that rather than attempting to simply assign an isolated treaty claim to another juridical entity, an investor seeking to transfer a potential treaty claim should rather create a new juridical entity (or transfer its shares to a juridical entity) located in a State that has already enacted a BIT with the host State of investment to which all rights of the initial investor — and not simply an isolated treaty claim — are assigned.

Moreover, it is important to note that the Mihaly Arbitral Tribunal indicated that “whatever rights Mihaly (Canada) had or did not have against Sri Lanka could not have been improved by the process of assignment, with or without, and especially without, the express consent of Sri Lanka, on the ground that nemo dat quod non habet or nemo potiorem potest transfere quam ipse habet. That is, no one could transfer a better title than what he really has.”24 This statement illustrates two potential problems regarding the transfer of treaty claims by an investor seeking jurisdiction before an arbitral forum:

a. First, as noted above, according to the Mihaly Arbitral Tribunal, an investor lacking rights against the host State cannot “transfer a better title than what he really has.” This could be problematic for an investor which lacks a BIT with a host State of investment, yet assigns all of the right to its investment to a company located in a State that has enacted a BIT with the host State of investment. This is troublesome because such an initial investor would lack jurisdiction to bring a treaty claim prior to the transfer of its rights, as no BIT existed between the initial investor and the host State of investment, and as it is in BITS that States typically give their consent to submit disputes to ICSID, ICC, or UNCITRAL arbitration (indeed, this consent is a necessary condition for jurisdiction under Article 25(1) of the ICSID Convention). Thus, an initial investor which makes an investment

24 See id.
but lacks a BIT with the host State of investment and subsequently transfers the rights to its investment to a juridical entity located in a third State that has enacted a BIT with the host State of investment could arguably be attempting to assign a “better title than what he really has.” This, in turn, would potentially not confer jurisdiction to the assignee juridical entity, as the initial investor never possessed consent by the host State to permit the initial investor to commence an ICSID claim and therefore could not transfer a better title than it really had.

b. Second, as noted by the Mihaly Arbitral Tribunal, the need for consent of the host State of investment for the assignee to have jus standi is especially true when an assignment has been made without the express consent of the host State of investment. While, as noted above, in the Autopista Concesionada de Venezuela CA v. Bolivarian Republic of Venezuela arbitration,25 Venezuela was found by the Arbitral Tribunal to have accepted a share transfer, allowing Mexican investors (who lacked a BIT with Venezuela) to bring a treaty claim against Venezuela under the US–Venezuela BIT,26 it is difficult to imagine many host States of investment agreeing to such transfers – especially if a dispute appeared imminent – and if they were aware that such transfers might permit an investor to initiate treaty claims against them.

Finally, as noted in paragraphs 26 to 27 of the Mihaly Award, the Mihaly Arbitral Tribunal did find that the US assignee was entitled to file a claim in its own name against Sri Lanka, as long as it could prove that it had “rights and interests” that it could establish in the proposed investment. (Emphasis added.) Thus, the Mihaly Award suggests that a juridical investor – which lacked a BIT in force with the host State of investment – could potentially assign all of its rights to another juridical entity located in a third State which had a BIT in force with the Contracting host State. In such a case, were this assignee able to prove that it had rights and interests deriving from the investment – and if it also satisfied the conditions for jurisdiction rationae materiae (i.e., that the assignee was involved in a “legal dispute arising directly out of an investment”),27 any investments made by the assignee could potentially be protected by a BIT concluded with the host State of investment, and a treaty claim could possibly be raised by said assignee.

B. BANRO AMERICAN RESOURCES INC., AND SOCIÉTÉ AURIFÈRE DU KIVU ET DU MANIEMA S.A.R.L. v. DEMOCRATIC REPUBLIC OF CONGO

In the Banro American Resources Inc., and Société Aurifère du Kivu et du Maniema

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27 Mihaly ¶¶ 28-29.
S.A.R.L. v. the Democratic Republic of Congo Award ("Banro"), the Arbitral Tribunal ruled that ICSID jurisdiction was lacking for the claimant to bring a claim using a similar line of reasoning as in the Mihaly Award.

The Arbitral Tribunal's finding of lack of jurisdiction was on the basis that the claimant's parent company, Banro Resources (a Canadian enterprise), assigned its shares in its Congolese investment to its subsidiary, Banro American (a U.S. enterprise). Here, as in Mihaly, the Arbitral Tribunal similarly stated that the named claimant, Banro American, could not avail itself of the consent expressed by its parent, Banro Resources, because Banro Resources (a Canadian company) was at the time a non-contracting party to the ICSID Convention and could therefore never have validly consented to ICSID arbitration, and thus could not transfer any valid consent to ICSID arbitration to its U.S. subsidiary.

As the Banro Arbitral Tribunal stated, "Banro Resource, a Canadian company, never had, at any time, jus standi before ICSID. Having never existed for the benefit of Banro Resource, the right of access to ICSID cannot be viewed as having been 'extended' or 'transferred' to its affiliate, Banro America."29

B.1. ANALYSIS OF THE BANRO AWARD

The Banro Award does not directly answer the question of whether an investor located in an ICSID Contracting State - but which lacks a BIT with the host State of investment - may transfer its shares to a juridical entity situated in another Contracting State to gain access to ICSID jurisdiction, as the basis of the Arbitral Tribunal's finding of the claimant's lack of jus standi was that the assignment of the shares in question took place between a non-Contracting State (Canada) and a Contracting State (the United States).

This decision, however, does express a clear stance that manipulative assignments (i.e., "treaty-shopping") in order to gain access to ICSID jurisdiction should not be tolerated and should not lead to jurisdiction for the initial investor's assignee before an Arbitral Tribunal. (Note that this position is slightly different to the Arbitral Tribunal's position in the Mihaly Award, where the Mihaly Arbitral Tribunal indicated that the assignee could potentially have locus standi before the Arbitral Tribunal if it could prove the existence of jurisdiction ratione materiae and the assignee could prove that it had rights arising from the investment, as noted above.)

Moreover, as noted with regard to the Mihaly Award, a respondent could quite plausibly argue that an initial investor from a Contracting State which never had jus standi before ICSID.


29 See id. ¶ 5.
standi - because it had never enacted a BIT with the host State giving the host State's consent to ICSID jurisdiction (a condition under Article 25(1) of the ICSID Convention) - could similarly not assign a right of access to ICSID that never existed due to the host State's lack of consent to arbitration (which, as noted supra in the Introduction, is typically found in the relevant BIT enacted by the host State of investment).

C. SOCIÉTÉ GÉNÉRALE IN RESPECT OF DR ENERGY HOLDINGS LIMITED AND EMPRESA DISTRIBUIDORA DE ELECTRICIDAD DEL ESTE, S.A. ("EDE ESTÉ") V. THE DOMINICAN REPUBLIC

In the recent treaty claim Société Générale ("SG") In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic (LCIA Case No. UN 7927), decided under the UNCITRAL Arbitration Rules, the Arbitral Tribunal indicated that the transfer of investments was a normal feature of the global economy: "the question of transfer of investments has also been discussed in the instant case. This has become a normal feature of a global economy and the transfers are not as such disqualified from treaty protection. The transfer of AES's investment in EDE Este to the Claimant thus does not preclude the existence of a protected asset, and there are no indications that this case might have involved a strategy such as was the case in Mihaly and Banro."31

Nevertheless, according to the Arbitral Tribunal, "a claimant must have the nationality of the relevant Contracting Party at the time of the breach ... unless a different rule is expressed, and it will apply whether the claim is introduced directly by the individual or company concerned or by the State of nationality on its behalf."32

According to the Arbitral Tribunal, this finding did not mean that the transfers of rights eventually giving rise to claims under a treaty could not take place, but that questions of nationality, as discussed in Vivendi33 (even if in dictum), set a limit as to the application of investment treaties to such transactions.

Finally, according to the SG Arbitral Tribunal, one such limit is that the transaction in question must be a bona fide transaction and "not devised to allow a national of a State not qualifying for protection under a treaty to obtain an inappropriate jurisdictional advantage otherwise unavailable by transferring its rights after-the-fact to a qualifying national, as occurred in Mihaly and Banro."34

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31 See id. ¶ 44.
32 See id. ¶ 109.
34 See SG ¶ 110.
C.1. Analysis of Société Générale in Respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic

This interesting UNCITRAL treaty Award takes a strong stance against last-minute “treaty-shopping”\(^\text{35}\) insofar as the SG Arbitral Tribunal indicated that any transfer in question “must not be devised to allow a national of a State not qualifying for protection to obtain an inappropriate jurisdictional advantage otherwise unavailable by transferring its rights after-the-fact to a qualifying national”\(^\text{36}\) and that “a claimant must have the nationality of the relevant Contracting Party at the time of the breach.”\(^\text{37}\)

Thus, although the SG Arbitral Tribunal emphasized that the transfer of investments was a normal feature of the global economy, the Arbitral Tribunal in this case would be hard-pressed to accept that an investor could transfer its shares or assign a treaty claim to another qualifying juridical entity (i.e., to a juridical entity located in a third State which had enacted a BIT protecting the investor’s investment from the host State of investment) after the time of the host State of investment’s breach. Hence, this Award clearly underscores a view that “treaty-shopping” following the host State of investment’s treaty breach for the purposes of gaining jurisdiction should be considered illegitimate.

Yet, as this Arbitral Tribunal merely noted that it was obtaining an inappropriate jurisdictional advantage “after-the-fact” (of the breach by the host State of investment) that should be considered illegitimate, this ruling leaves open the possibility for an investor to transfer its rights in an investment prior to any treaty breach to a qualifying national, which reinforces the notion that any investor lacking a BIT with a host State should transfer its investment rights to a qualifying national (with a BIT in force with the host State of investment) as soon as practicable in order to increase the chances that it may seek protection under a BIT and potentially have jurisdiction to bring a treaty claim.

D. Loewen Group, Inc. and Raymond Loewen v. United States of America

In Loewen Group, Inc. and Raymond Loewen v. United States of America (“Loewen”),\(^\text{38}\) brought under NAFTA, the Arbitral Tribunal refused to find jurisdiction for the claimant by piercing the named claimant’s “corporate veil” and also expressed limits to transferring treaty claims by an investor.

Here, a Canadian claimant declared bankruptcy during arbitral proceedings and, immediately prior to going out of business, assigned its treaty claim to a newly-created Canadian corporation whose sole asset was its claim against the United States.\(^\text{39}\)

\(^{35}\) Despite the SG Arbitral Tribunal’s Statements to the contrary. See, e.g., SG ¶ 39.

\(^{36}\) See id. ¶ 110.

\(^{37}\) See id. ¶ 109.


\(^{39}\) See id. ¶ 220, 240.
This new company was wholly-owned and controlled by the U.S. enterprise that had emerged from the earlier bankruptcy proceedings. Despite the fact that the claim remained in the possession of a Canadian enterprise, the Loewen Arbitral Tribunal held that the “assignment of the claim changed the nationality of the claimant from Canadian to U.S. nationality.”

Importantly, the Arbitral Tribunal indicated that “[i]n international law parlance, there must be continuous national identity from the date of the events giving rise to the claim, which date is known as the dies a quo through the date of the resolution of the claim, which date is known as the dies ad quem.”40 Here — similarly to the SG Arbitral Tribunal’s decision — the Loewen Arbitral Tribunal found that because the claimant’s nationality was not continuous from the date of the events giving rise to the claim (i.e., the breach(es) in question) through the date of the resolution of the claim, the claimant lacked jurisdiction to bring a treaty claim.41

Moreover, while the Arbitral Tribunal denied that it pierced the claimant’s corporate veil,42 in fact this is precisely what it did, as the Arbitral Tribunal could not have concluded that the nationality of the claimant had changed from Canadian to U.S. origin without piercing the claimant’s corporate veil.

D.1. ANALYSIS OF LOEVEN GROUP, INC. AND RAYMOND LOEVEN V. UNITED STATES OF AMERICA

Certainly, if — as indicated by the Loewen Arbitral Tribunal and the SG Award — the nationality of the claimant cannot be changed under customary international law from the date giving rise to the claim until the date of the resolution of the claim, this would preclude an investor from changing its nationality or transferring its shares to a foreign entity possessing a BIT with the host State of investment after the host State of investment had committed a breach giving rise to the claimant’s potential treaty claim. This would have the effect of precluding the protection of an investor by a BIT if the breach in dispute had already occurred, unless the initial juridical investor had already reincorporated itself in a State with a BIT protecting the investor from breaches by the host State prior to the date of the breach giving rise to a claim.

In addition, despite the Arbitral Tribunal’s denial, the Loewen decision shows that Arbitral Tribunals may potentially pierce the corporate veil of a named claimant pursuing a treaty claim. Thus, were an initial investor lacking a BIT with the host State of investment to assign its claim or transfer its shares to a company based in a State which had ratified a BIT with the host State of investment, Loewen suggests that the corporate veil of such a newly-created company could potentially be pierced. Were the corporate veil of this new company to be pierced, then there is a potential that the Loewen

40 See id. ¶ 225.
41 See id. ¶ 225.
42 See id. ¶ 237.
Arbitral Tribunal would determine that the “true juridical investor” was the initial investor which had assigned its claims and/or changed its corporate nationality to take advantage of a BIT with the host State of investment. If such a decision were made by the Arbitral Tribunal, of course, the investor would be unable to take advantage of the BIT concluded between its new State of nationality and the host State of investment, and the investor would have no standing to bring a treaty claim against said host State of Investment.

E. The Majority Opinion in Tokios Tokelès v. Ukraine

Another often cited ICSID decision related to the issue of “treaty-shopping” – but which does not deal with the transfer of treaty claims directly – is Tokios Tokelès v. Ukraine.\(^43\)

In Tokios Tokelès, the claimant was a business enterprise established under the laws of Lithuania, which was engaged primarily in the business of advertising, publishing and printing in Lithuania and outside of its borders. A dispute arose due to actions taken by Ukraine, the respondent, against Taki Spravy, a wholly-owned subsidiary established by Tokios Tokelès in Ukraine. Tokios Tokelès thus initiated an ICSID claim against Ukraine alleging Ukraine’s breach of the Lithuanian-Ukrainian Bilateral Investment Treaty.\(^44\)

The respondent, however, argued that the claimant was not a “genuine entity” in Lithuania because it was owned and controlled predominantly by Ukrainian nationals and thus did not satisfy the jurisdictional requirements to bring an ICSID claim.\(^45\) Indeed, there was no dispute that Ukrainian nationals owned 99% of the outstanding shares of Tokios Tokelès and that 2/3 of the management of Tokios Tokelès was comprised of Ukrainian nationals.\(^46\)

Ukraine therefore claimed that Tokios Tokelès was – in terms of economic substance – a Ukrainian investor in Ukraine, rather than a Lithuanian investor in Ukraine and should not have jurisdiction to raise a treaty claim.\(^47\) It therefore requested the Arbitral Tribunal to “pierce the corporate veil” of Tokios Tokelès on the basis that “allowing an enterprise that is established in Lithuania but owned and controlled predominantly by Ukrainians to pursue an ICSID arbitration against Ukraine is contrary to the object and purpose of the ICSID Convention and the Ukraine–Lithuanian BIT, namely, to provide a forum for the settlement of international disputes... “\(^48\)

\(^44\) See Agreement between the Governent of Ukaine and the Governent of the Republic of Lithuania for the Promotion and Reciprocal Protection ofInvestrents, February 8, 1994 (entered into force on February 27, 1995).
\(^45\) See Tokios Tokelès ¶ 21.
\(^46\) See id. ¶ 21.
\(^47\) See id. ¶ 21.
\(^48\) See id. ¶ 23.
The Arbitral Tribunal, however, rejected the respondent’s arguments. It noted that the purpose of Article 25(2)(b) was not to define corporate nationality but, as explained by Mr. Broches, to “indicate the outer limits within which disputes may be submitted to conciliation or arbitration under the auspices of the Centre with the consent of the parties thereto. Therefore the parties should be given the widest possible latitude to agree on the meaning of ‘nationality’ and any stipulation of nationality made in connection with a conciliation or arbitration clause which is based on a reasonable criterion.”

The Arbitral Tribunal also went on to add that in the context of BITs, Professor Schreuer has noted that Contracting Parties to the ICSID Convention enjoy broad discretion in defining corporate nationality: “[d]efinitions of corporate nationality in national legislation or in treaties providing for ICSID’s jurisdiction will be controlling for the determination of whether the nationality requirements of Article 25(2)(b) have been met.” Professor Schreuer also indicated that “any reasonable determination of the nationality of juridical persons contained in national legislation or in a treaty should be accepted by an ICSID commission or tribunal.”

The Arbitral Tribunal then noted that Article 1(2)(b) of the Ukrainian-Lithuanian BIT defines the term “investor,” with regard to Lithuania, as “any entity established in the territory of the Republic of Lithuania in conformity with its laws and regulations.” The Arbitral Tribunal also stressed that Tokios Tokelès was duly established by the municipal government of Vilnius, Lithuania in 1989.

The Arbitral Tribunal also noted that the claimant clearly did not create Tokios Tokelès for the purpose of gaining access to ICSID arbitration (i.e., for “treaty-shopping” purposes), as it was founded six years before the BIT between Ukraine and Lithuania even entered into force.

On these bases, amongst others, the Arbitral Tribunal concluded that Tokios Tokelès was an “investor” of Lithuania under Article 1(2)(b) of the Lithuania-Ukraine BIT and a “national of another Contracting State” under Article 25 of the ICSID Convention and hence had standing to bring a treaty claim against Ukraine.

E.1. ANALYSIS OF THE MAJORITY’S DECISION IN TOKIOS TOKELÈS V. UKRAINE

Here, the Arbitral Tribunal clearly found it necessary to conclude that Tokios Tokelès had not been created for “treaty-shopping” purposes, and the primary basis of
the Arbitral Tribunal’s majority decision to grant jurisdiction to Tokios Tokelès was a strict reading of Article 25(2)(b) of the ICSID Convention and the Lithuania-Ukraine BIT. Having satisfied the conditions of the first clause of Article 25(2)(b) (Tokios Tokelès was a “juridical person which had the nationality of a Contracting State other than the State party to the dispute”) and Article 1(2)(b) of the Lithuania-Ukraine BIT (Tokios Tokelès was a “national of another Contracting State”), the majority of the Arbitral Tribunal chose to go no further in its analysis that Tokios Tokelès had standing to bring a treaty claim, despite the fact that Ukrainians were clearly in control and owned the outstanding shares of Tokios Tokelès and were suing Ukraine, rather than settling their differences before a national court of Ukraine.

Thus, this Arbitral Tribunal’s majority Award suggests that the creation of a legal entity in a third State that has enacted a BIT with the host Contracting State — as long as the conditions of Article 25(2)(b) and the relevant BIT are fulfilled — may permit an investor to initiate a treaty claim against the host State of investment, especially if it can be shown that the juridical entity bringing the treaty claim had not been created solely to gain jurisdiction before ICSID (which was shown in this instance by the fact that Tokios Tokelès was founded six years before the Lithuania-Ukraine BIT even entered into force).

This decision also suggests that one possibility for a juridical investor to prove that it was not guilty of “treaty-shopping” (and to gain access to ICSID jurisdiction) would be to establish a company or to transfer its shares to a company located in a third State which did not yet have a BIT that had entered into force with the host State of investment. This, however, would be a very problematic means for an investor to gain access to ICSID jurisdiction, as it would be extremely difficult for an investor to know when or whether a BIT between the third State and the host State of investment would be enacted/ratified (although it would be relatively easy for an investor to locate information showing whether a BIT had been signed with the host State of investment).

A better solution for the investor would, of course, be simply for the investor to establish a juridical entity (or to transfer its shares to a juridical entity) in a third State that had already enacted a BIT with the host State of investment — prior to any breach by the host State, as stressed in both Loewen and SG — which would then be the vehicle the investor would use to bring its treaty claim against the host State of investment.

F. THE CHAIRMAN OF THE ARBITRAL TRIBUNAL’S DISSenting OPINION IN TOKIOS TOKELÈS V. UKRAINE

The Chairman in Tokios Tokelès expressed a very different view than the Arbitral Tribunal’s majority opinion, stating that the majority’s decision “is in my view at odds with the object and purpose of the ICSID Convention....”

As noted by the Chairman, the *Report of the Executive Directors of the Convention* explains that the creation of ICSID was "designed to facilitate the settlement of disputes between States and foreign investors" with a goal of "stimulating a larger flow of private international capital into those countries which wish to attract it."57

The Chairman went on to stress that the ICSID arbitration mechanism is "meant for international investment disputes, that is to say, for disputes between States and foreign investors," which he found clearly not to be the case in Tokios Tokelès.

He also cited Article 31 of the Vienna Convention on the law of Treaties, which the International Court of Justice has repeatedly described as an expression of customary international law, insofar as "[a] treaty shall be interpreted ... in accordance with the ordinary meaning to be given to its terms in their context in the light of its object and purpose."58

Finally, the Chairman asserted that "[t]he ICSID mechanism and remedy are not meant for, and are not to be construed as, allowing — and even less encouraging — nationals of a State party to the ICSID Convention to use a foreign corporation, whether pre-existent or created for that purpose, as a means of evading the jurisdiction of their domestic courts and the application of their national law."59

F.1. ANALYSIS OF THE CHAIRMAN'S DISSenting OPINION IN TOKIOS TOKELÈS V. UKRAINE

While it is true that Chairman's dissenting opinion was largely focused on the question of whether the Ukrainian investors that had owned and controlled a company in Lithuania had jurisdiction to sue Ukraine under the ICSID Convention, and whether a foreign investment had truly been made given that the investors were Ukrainian, this dissenting opinion is indirectly relevant to the question of whether investors possessing no BIT with a host State of investment should be allowed to transfer a potential treaty claim or shares to a foreign corporation in order to gain access to ICSID jurisdiction.

For, as the dissenting opinion stressed, investors should not be allowed "to use a foreign corporation, whether pre-existent or created for that purpose, as a means of evading the jurisdiction of their domestic courts and the application of their national law." Reasoning by analogy, an investor that lacks a BIT (or another law or investment agreement giving consent to the investor to initiate a treaty claim) with the host State of investment would normally have to bring any claim before a national court — where the applicable law would be determined by the rules of private international law — and it would be unable to pursue a treaty claim before a neutral Arbitral Tribunal.

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57 See id., ¶ 1; citing *Report of the Executive Directors*, ¶ 9.
58 See Tokios Tokelès, Dissenting Opinion of Prosper Weil, ¶ 19.
59 See id., ¶ 30.
Thus, given the Chairman’s negative view on the creation of foreign corporations to gain access to ICSID jurisdiction in order to avoid claims before national courts, it is possible that the Chairman would analogously rule that an assignment of a claim or the transfer of shares to a company in another State (that had enacted a BIT with the host State of investment) to avoid the jurisdiction of local courts should not give the investor *jus standi* to pursue a treaty claim before an Arbitral Tribunal.

### G. THE ROMPETROL GROUP N.V. v. ROMANIA

*The Rompetrol Group N.V. (“Rompetrol”) v. Romania (ARB/06/3)* is also of interest regarding the assignment of treaty claims.⁶⁰

Rompetrol involved a dispute arising from the claimant’s investment in the Romanian oil sector and, in particular, its purchase of shares by Rompetrol in Rompetrol Rafinara S.A., a privatized Romanian company which owned a gas refinery and a petrochemical complex.

At the time of the filing of its Request for Arbitration, Rompetrol was a company established in The Netherlands under Dutch law, but which was wholly owned by a Swiss Company (Rompetrol Holding), which itself held shares in multiple Romanian companies and was owned by a Romanian national.⁶¹

In this case – similarly to the respondent’s arguments in Tokios Tokelès – the respondent argued that the Rompetrol dispute had not been brought against the Romanian State by a “foreign investor” and did not concern a foreign investment. According to the respondent, “[t]he dispute amounts in its essence to a complaint by a Romanian national against Romanian authorities and in relation to activities in Romania.” Romania also accused the named claimant of being merely a “shell company” incorporated in the Netherlands.⁶²

To support its arguments, the respondent relied on the Dissenting Opinion of Professor Weil, President of the Arbitral Tribunal in Tokios Tokelès, discussed *supra* at §2.F., to argue that allowing claims by a nation’s own nationals through the device of a foreign shell company would constitute a radical change from established international law and would have a negative impact on the network of BITs in place.

The respondent also argued that while international courts and Arbitral Tribunals generally do not need to go beyond the “formal test of where a legal person is ‘constituted under the law’”, to consider issues such as the nationality of the natural persons owning or controlling the legal entity in question, or its effective seat (*siège réel*),

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⁶¹ See id. ¶ 44.

⁶² See id. ¶ 50.
that there is an exception to this where it can be shown that the real and effective nationality of the legal entity in question is that of the Respondent State."

The claimant, on the other hand, argued that the wording of the Netherlands-Romania BIT was clear on its face: this BIT defined an investor as “(ii) legal persons constituted under the law of the Contracting Party,” i.e., the Netherlands. The claimant also argued that it is well-established under general international law that a company has the nationality of its place of incorporation or its siège social. The claimant went on to assert that ICSID Arbitral Tribunals have uniformly adopted the test of the place of incorporation or seat, rather than control, to determine the nationality of a juridical person.

The claimant also stressed that it had been open to Romania to limit protection to legal persons constituted under the law of a Contracting State only if they have “substantial activities” or “real economic activities” in said State, as in other Romanian BITs, yet Romania did not choose to do this with respect to the Netherlands-Romania BIT.

The claimant also firmly rejected the respondent’s allegation that Rompetrol’s incorporation in the Netherlands was merely a case of “forum-shopping” with this arbitration in mind, pointing out the fact that the search for jurisdictions to make the relevant investment took place six years before the treaty arbitration was commenced, and that the Netherlands was ultimately chosen because it had multiple appealing features such as good corporate governance laws, good infrastructure, and a favorable tax treaty.

As regards the Arbitral Tribunal, it stated that jurisdiction “is determined by the twin pillars of chapter II of the ICSID Convention ... and Article 8 of the Netherlands-Romania BIT....” And, as indicated by the Arbitral Tribunal, Romania conceded that Rompetrol met the formal requirements of the ICSID Convention and the BIT. The Arbitral Tribunal noted, however, that Romania contended that these requirements do not suffice if, on the basis of “ownership and control, effective seat, or source of the funds used for the investment” Romania could prove that the claimant’s “real and effective” nationality is that of Romania.

The Arbitral Tribunal went on to note that each Contracting Party to a treaty has the sole authority to determine the status of juridical entities under its own law, but that

63 See id. ¶ 54. The respondent relied primarily on the International Court of Justice’s judgment in the Nottenbohm Case, which found that the acquired nationality of a natural person whose real and effective links are with the Respondent State is not opposable to that State and argued that, similarly, a foreign nationality asserted by a corporation that is owned and controlled by a Romanian citizen and has its real seat in Romania should not be opposable to Romania.

64 See id. ¶ 61.
65 See id. ¶ 62.
66 See id. ¶ 67.
67 See id. ¶¶ 77-78.
68 See id. ¶ 78.
the "Contracting Parties jointly have the sole authority to determine the criteria by which juridical persons with a defined status under each other's law may enjoy the protections of their BIT." 69

The Arbitral Tribunal concluded that "[i]t does not, in the Tribunal's view, require any extended discussion to conclude that within the framework of Article 25(2)(b) of the Convention, it is open to the Contracting Parties to a BIT to adopt incorporation under their own law as a necessary and also sufficient criterion of nationality for purposes of ICSID jurisdiction, without requiring in addition an examination of ownership or control, of the source of investment of funds, or of the corporate body's effective seat." 70 It also went on to hold that the definition of national status given in the Netherlands-Romanian BIT was decisive for the purpose of establishing its jurisdiction. 71

Nevertheless, Romania continued to insist that allowing jurisdiction in such a case would be an abuse of the ICSID mechanism, again relying on the dissenting opinion of Professor Weil in Tokios Tókelés. 72 The Arbitral Tribunal, however, indicated that the view expressed by Professor Weil had not been widely approved in academic and professional literature, or generally adopted by other Arbitral Tribunals. 73 The Arbitral Tribunal also stated that Professor Weil's approach could not be reconciled with Article 31 of the Vienna Convention on the Law of Treaties, which indicates that the primary element of interpretation should be "the ordinary meaning given to the terms of the treaty." 74

Thus, the Arbitral Tribunal found that it did have jurisdiction over the Rompetrol treaty claim.

G.1. ANALYSIS OF ROMPETROL GROUP N.V. v. ROMANIA

According to the Rompetrol Arbitral Tribunal, on the basis of the Vienna Law of Treaties, the primary element of interpretation should be the "ordinary meaning" given to the terms of the treaty. Thus, the plain meaning of Article 25(2)(b) should apply as to the jurisdiction of the Centre under the ICSID Convention, namely that "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" should have jurisdiction before the Centre (assuming that the other criteria for jurisdiction are satisfied). Therefore, according to this decision — and assuming that the relevant BIT contained similar terms defining an "investor" as the Netherlands-Romania BIT — an investor could arguably assign its claim or change its nationality to that of another State that had enacted a BIT with the host State of investment, as long as all requisite formalities had been complied with.

69 See id. ¶ 81.
70 See id. ¶ 83.
71 See id.
72 See id. ¶ 85.
73 See id.
74 See id.
It is again important to underscore that to avoid the appearance of “treaty-shopping” any change of nationality of an investor which lacks a BIT with the host State of investment — by way of the transfer of shares or otherwise — should take place as early as possible and should potentially be supported by good reasons for making such a change (here, for example, the claimant cited the favorable features of locating the investment vehicle in Holland, which included good corporate governance laws, good infrastructure, and a favorable tax treaty, and it noted that the investment vehicle was created in Holland six years before the arbitration was even commenced).  

To conclude, the Rompetrol decision appears to allow for a change of nationality of the investment vehicle created by the initial investor (who could then take advantage of the protections afforded by the BIT between the State of the investment vehicle and the State of investment). As the Rompetrol Arbitral Tribunal focused on the “ordinary meaning”76 given to the terms of the treaty and the BIT in question, were an investor to incorporate a juridical entity in a State with a BIT enacted with the host State of investment, then the Rompetrol Arbitral Tribunal — depending on the terms of the BIT in question — might well find that an investor which had changed its nationality to a State that had enacted a BIT with the host State well prior to the commencement of arbitration — and especially if it had rational reasons for doing so, as noted supra at §2.G. — would satisfy the requirements ratione personae for ICSID jurisdiction.

H. RUMELI TELEKOM A.S. AND TELSIM MOBIL TELEKOMIKASYON HIZMETLERI A.S. V. REPUBLIC OF KAZAKHSTAN

Rumeli Telekom A.S. (“Rumeli”) and Telsim Mobil Telekomikasyon Hizmetleri A.S. (“Telsim”) v. Republic of Kazakhstan77 involved the Turkish companies Rumeli and Telsim’s claim against Kazakhstan relating to various breaches of the Turkey-Kazakhstan BIT concerning a telecom company in Kazakhstan created by Rumeli and Telsim and local Kazakh partners.

Here, at the time the claimants’ Request for Arbitration was brought, Rumeli and Telsim had already been seized by the Turkish Savings Deposit Insurance Fund (“TSDIF”) — an agency of the Turkish State — due to alleged crimes committed by the owners of Rumeli and Telsim.78

Although the TSDIF was a State entity which already managed Telsim and Rumeli at the time of their request for arbitration, the claimants argued that they were legal entities registered in Turkey, and as such were nationals of another Contracting State, satisfying Article 25 of the ICSID Convention, as they were still incorporated and

75 See id. ¶ 67.
76 Pursuant to Article 31 of the Vienna Convention on the Law Treaties.
78 See id. ¶ 160.
headquartered in Turkey at the time of their consent to ICSID arbitration. The claimants also stressed that Telsim and Rumeli were clearly never created for “treaty-shopping” purposes, nor did they fall under the control of the TSDIF for this purpose.79

The claimants further disputed the respondent’s accusations that Rumeli & Telsim were mere “shell” companies and argued that – even if they had become mere “shell” companies – this would, in any event, not constitute a bar to the Arbitral Tribunal’s jurisdiction under the ICSID Convention or the Turkey-Kazakhstan BIT.80

The claimants finally alleged that the TSDIF’s appointment of managers at Telsim and Rumeli did not put an end to the corporate existence of the claimants or to the claimants’ ownership of their claims against Kazakhstan, arguing that this was supported by the Autopista ICSID case, whereby the Arbitral Tribunal rejected the respondent’s argument that “the pervasive control by Mexican nationals over, and involvement in the affairs of the local company should lead the Arbitral Tribunal to decline jurisdiction under Article 25 of the ICSID Convention.”81

The claimants further stated – in response to the respondent’s arguments – that there was no justification to pierce the corporate veil of Rumeli and Telsim, relying on the International Court of Justice decision Barcelona Traction and Tokios Tokelès. They noted that although the International Court of Justice had held that piercing the corporate veil might be justified to prevent the misuse of the corporation’s legal personality in the case of fraud or malfeasance, to protect creditors or purchasers, or to prevent the evasion of legal requirements or obligations, none of these conditions were present in this case.82

Kazakhstan, on the other hand, argued that TSDIF’s seizure of Rumeli & Telsim was identical in legal and economic effect to the assignment of the claimants’ cause of action to the Turkish State, which obviously would not have standing to bring a claim before an ICSID Arbitral Tribunal as TSDIF was a public entity rather than a private investor.83 The respondent also argued that the corporate veil of Rumeli & Telsim must be pierced, claiming that the filing of a claim by the nominal claimants was a sham designed to conceal the reality of a claimant (TSDIF) which failed to satisfy the ICSID jurisdictional requirements because it was a State entity.84

The Arbitral Tribunal, however, held that: “In this case, Claimants are companies incorporated and existing under the laws of Turkey. Turkey has ratified the ICSID Convention on March 3, 1989. Claimants appear therefore prima facie as nationals of a

79 See id. ¶ 187.
80 See id. ¶ 186.
82 Rumeli & Telsim ¶ 203.
83 See id. ¶ 267.
84 See id. ¶ 278.
Contracting State in the meaning of Article 25." The Arbitral Tribunal also noted that
the TSDIF was not the named claimant in the arbitration. Rather, the case was initiated
by Rumeli and Telsim, who were clearly the claimants in this arbitration.

The Arbitral Tribunal also stressed that Rumeli & Telsim “have certainly not been
created for treating-shopping purposes” — as they had existed long before any dispute
arose — and noted that the Turkey-Kazakhstan BIT “does not provide a basis for looking
beyond a company on the alleged basis that it was a shell company and does not exclude
such companies from its scope of application from the moment it is incorporated in
another contracting State.”

The Arbitral Tribunal also found that the record did not support the respondent’s
allegation that the claimants’ claim was assigned to the TSDIF and found no reason to
pierce the claimants’ corporate veil as requested by the respondent. As noted by the
Arbitral Tribunal, according the case ADC Affiliate Limited & ADMC Management Limited
v. Republic of Hungary (ICSID Case No. ARB/03/16), “the principle of 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,” which was found not to be the case here.

On these bases, the Arbitral Tribunal found that the claimants did have jurisdiction
to bring their claims and that the Arbitral Tribunal had jurisdiction to hear the dispute
under Article 25 of the ICSID Convention and Article 7 of the Turkey-Kazakhstan BIT.

H.1. ANALYSIS OF RUMELI TELEKOM A.S. AND TELSIM MOBIL TELEKOMIKASYON
HIZMETLERI A.S. V. REPUBLIC OF KAZAKHSTAN

First, it is important to note the pains taken by the claimants to stress that this was
not a case of “treaty-shopping,” and the Arbitral Tribunal’s agreement that this was not
a case of “treaty-shopping”. Proof that this was not case of “treaty-shopping” to gain
access to ICSID jurisdiction was supplied by the fact that claimants were pre-existing legal
entities based in Turkey well prior to the dispute in question, despite the fact that they
were under the management of a State entity when they commenced ICSID proceedings.

It is also worth noting that the Arbitral Tribunal’s ruling allowed Rumeli & Telsim
— who allegedly had become shell companies — to initiate a request for arbitration, on
the basis that nothing in the Turkey-Kazakhstan BIT or the ICSID Convention
forbid this.

On a final note, the Arbitral Tribunal found that managerial control by another

85 See id. ¶ 313.
86 See id. ¶ 325.
87 See id. ¶ 326.
88 See id.
89 See id. ¶ 328.
90 See id.
91 See id. ¶ 331.
entity (in this case a State entity) is not the same as an assignment of a claim to that entity and that there was no assignment in this case. Thus, as common sense would dictate, the assignment of a claim must respect the rules of a formal legal assignment and must not merely have the "economic effect" of an assignment (as the respondent had argued).

3. REVIEW AND ANALYSIS OF PERTINENT TREATY AWARDS BROUGHT ON THE BASIS OF THE "FOREIGN CONTROL" OF A LOCALLY-INCORPORATED CORPORATION IN THE HOST STATE OF INVESTMENT

A. AGUAS DEL TUNARI, S.A. v. REPUBLIC OF BOLIVIA

The ICSID case Aguas del Tunari, S.A. ("ADT") v. Republic of Bolivia ("Bolivia") (ARB/02/03) concerned the locally-incorporated ADT's claim that Bolivia breached various provisions of the Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Republic of Bolivia (the "Netherlands-Bolivia BIT").

In ADT, Bolivia argued that the Concession Agreement in question was structured so as to preclude any changes in the foreign ownership of ADT that could bring it within the coverage of a BIT, arguing that the creation by claimant of various juridical entities — such as the Dutch entities that were created and ultimately used by the claimant to bring a claim under the Netherlands-Bolivian BIT — were new legal entities and new undefined shareholders of ADT. Bolivia moreover argued that the creation of these new companies were a series of "unilateral private share transactions" that were unauthorized by Bolivia.

The claimant, on the other hand, conceded that a change in ownership by a "founding shareholder" (as termed under the Concession Agreement in question) would have required the permission of Bolivia, but argued that the transfer of ADT's stock was merely a "migration" of a corporation from the Cayman Islands (a legal term used in certain jurisdictions). As to the additional changes in corporate structure that occurred upstream, the claimant argued that the Concession agreement did not address ownership changes above the first tier of owners of ADT. In addition, according to the claimant, the Concession Agreement did not concern the "ultimate shareholders", i.e., the US-based company Bechtel in this case (at a time when the US had not ratified a BIT with Bolivia). The Arbitral Tribunal ultimately agreed with the claimant on these issues.

93 See id. ¶ 156.
94 See id.
95 See id. ¶ 158.
96 See id. ¶ 37.
97 See id. ¶ 159.
98 See id. ¶ 180.
The respondent also argued that two corporate entities that had been created in Holland—IWT B.V. and IWH B.V.—Dutch companies that allegedly controlled ADT, were mere “shells” that did not in fact “control” the claimant.99

The claimant, on the other hand, argued that ADT qualified as a Dutch national under the Netherlands-Bolivia BIT because it was incorporated in Bolivia but became controlled, “directly or indirectly,” by the aforementioned Dutch juridical entities under the second clause of Article 25(2)(b) of the ICSID Convention.100 It also argued that IWT B.V. and IWH B.V. were not merely “shells” created for the purpose of gaining ICSID jurisdiction.101

Ultimately, the majority of the Arbitral Tribunal sided with the claimant, ruling that ADT was a Bolivian legal person indirectly controlled by Dutch companies under the second clause of Article 25(2)(b) of the ICSID Convention and therefore the Arbitral Tribunal had jurisdiction over the claim pursuant to the Netherlands-Bolivia BIT.

A.1. ANALYSIS OF AGUAS DEL TUNARI, S.A. V. REPUBLIC OF BOLIVIA

As noted by Alexandre de Gramont102 in his article entitled After the Water War: The Battle For Jurisdiction In Aguas Del Tunari, S.A. v. Republic of Bolivia, “[i]t is of particular significance that, at the time ADT signed the Concession Agreement on September 3, 1999, its upstream ownership did not afford ADT with a basis on which to assert a claim to ICSID jurisdiction because of ADT’s initial ownership structure.”103

Here, unilateral corporate changes made by Bechtel—allegedly for tax reasons—transferred ownership of ADT to Dutch-based companies.104 What is interesting, according to this commentator, is that “the Dutch holding companies on which ADT based ICSID jurisdiction were inserted into ADT’s intermediate ownership structure after problems arose with the investment— and when it was arguably foreseeable that ADT might want to pursue a claim against Bolivia in a forum other than the courts or tribunals of Bolivia.”105

As also noted by the author, the majority of the Arbitral Tribunal did not see anything wrong with a corporate reorganization designed to take advantage of a particular BIT “at any time (or at least any time prior to the alleged treaty violation at issue.)”106

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99 See id. ¶ 208.
100 See id. ¶ 211.
101 See id. ¶ 212.
102 Alexandre de Gramont, After the Water War: The Battle For Jurisdiction In Aguas Del Tunari, S.A. v. Republic of Bolivia, TRANSNATIONAL DISPUTE MANAGEMENT, Volume 3, Issue 05 (December 2006). (Note that Alexandre de Gramont was a lawyer for Bolivia in this treaty arbitration.)
103 See id. p. 9.
104 See id. p. 13.
105 See id. p. 24.
106 See id. p. 25.
Thus, while the ADT Arbitral Tribunal did not discuss the assignment of a treaty claim per se, it is clear that this Arbitral Tribunal allowed a corporate restructuring that transferred ownership (and control) of ADT to Dutch companies when it was foreseeable that ADT might want to pursue a treaty claim, and it was only on the basis of this corporate restructuring that the Arbitral Tribunal found that the claimant had jurisdiction to pursue a claim under the Netherlands-Bolivia BIT. Here, the Arbitral Tribunal found nothing wrong with this last-minute restructuring (as long as it was prior to the alleged treaty violation at issue) and granted jurisdiction to the claimant to bring a treaty claim.

Moreover, by way of analogy, it is possible that the ADT Arbitral Tribunal would allow an investor lacking a BIT with a host State to transfer its shares to a juridical entity that had enacted a BIT with the host State of investment at any time prior to the alleged treaty violation at issue — and even after it was foreseeable that the investor might wish to pursue a claim. This would potentially allow the investor to pursue a treaty claim against the host State of investment, even if the change in nationality of the investor to take advantage of a BIT with the host State was made at a very late point in time, as in ADT, where the restructuring granting access to ICSID jurisdiction was made at a time when it was foreseeable that a treaty claim could be imminent.

This decision may thus be seen as being complementary to the Loewen (and SG) decisions, which, as noted supra at §2.D., indicated that "there must be continuous national identity from the date of the events giving rise to the claim, which date is known as the dies a quo, through the date of the resolution of the claim, which date is known as the dies ad quem"107, yet would appear to go somewhat further by granting an investor lacking a BIT with the host State the ability to transfer its shares to a party located in a third State even when it was foreseeable that the investor might wish to pursue a treaty claim.

B. African Holding Company Of America, Inc Et Société Africaine De Construction Au Congo S.A.R.L. v. La République Démocratique Du Congo

African Holding Company Of America, Inc ("African Holding") Et Société Africaine De Construction Au Congo S.A.R.L. ("SAFRICAS") v. La République Démocratique Du Congo ("RDC") (ARB/05/21) also dealt with the issue of the assignment of a treaty claim in the context of the “foreign control” of a locally-incorporated company.

In Africa Holding, SAFRICAS, a locally-incorporated company in the RDC, assigned its debt to African Holding, a company incorporated in the United States,108 prior to initiating an ICSID claim.

107 See Loewen ¶ 225.
The claimant argued that this assignment to the US-based African Holding had the effect of substituting the assignee for the assignor, thus allowing African Holding to inherit all rights of SAFRICAS, including the investments that SAFRICAS had made in the RDC. The claimant also noted that the assignment had taken place from SAFRICAS, incorporated in a Contracting Party to the ICSID Convention, to African Holding, which was also incorporated in a Contracting Party to the ICSID Convention. Moreover, this assignment took place on October 1, 2004, prior to the initiation of arbitral proceedings on September 2, 2005.

The Arbitral Tribunal agreed with the claimant that all the rights held by SAFRICAS had been effectively assigned to the US-based African Holding, including SAFRICAS’ debt and the consent to arbitration expressed in the US-RDC BIT by the host State of investment. The Arbitral Tribunal based this finding on the fact that the State of the investors benefiting from the consent expressed in the US-RDC BIT had not changed (here, under the second clause of Article 25(2)(b) of the ICSID Convention, the Arbitral Tribunal found that SAFRICAS was under the “foreign control” of American citizens at the time of the assignment). The Arbitral Tribunal also noted that this situation was clearly different from that in Mihaly and Banro, where Canadian enterprises attempted to assign rights that they did not possess.

The Arbitral Tribunal also stressed that it could not accept a solution consisting in discharging a State of its payment obligations each time that there was an assignment of rights.

Although the Arbitral Tribunal eventually determined that it lacked jurisdiction to hear the claimant’s claim because it found that the starting date of the conflict preceded the control of SAFRICAS by American investors, which was a condition required under the US-RDC BIT to bring a treaty claim, it is important to note that the Arbitral Tribunal did find that the assignment from SAFRICAS to the US-based African Holding was valid and that all the rights held by SAFRICAS had been effectively assigned to African Holding, including SAFRICAS’ debt and the consent to arbitration of the RDC as expressed in the BIT between the US and the RDC.

109 See id. ¶ 59.
110 See id. ¶ 62.
111 See id. ¶ 57.
112 See id. ¶ 63, 101-104.
113 See id. ¶ 63.
114 See id. ¶ 81.
115 Here, the Tribunal found that before the dispute commenced SAFRICAS was controlled by Belgian investors. And according to Article VI of the US-RDC BIT: “[A]ny company duly constituted according to the laws pertaining to one or the other of the parties but which, before the event or the events leading to the dispute, was the property or under the control of foreigners or by a company of the other party, shall be treated as a foreigner or a company of that other party.” As the Tribunal found that the events leading to the dispute preceded the control of SAFRICAS by American investors, the Tribunal found that it lacked jurisdiction to hear this case on this ground.

In this ICSID Award, despite the fact that the Arbitral Tribunal found that it ultimately lacked jurisdiction, the Arbitral Tribunal clearly set forth the proposition that investments (in this case debt owed to SAFRICAS) and the consent to arbitration expressed in the US-RDC BIT could be assigned to another company.

However, it also set forth two conditions for such assignments. Namely, (1) the assignee needed to be a national of a Contracting State to the ICSID Convention and (2) the assignment needed to be made to a national of the same Contracting State that initially had possession of the claim (here, by way of “foreign control” of a local company by Americans under the second clause of Article 25(2)(b)).

Tellingly, however, this Award did not indicate that a locally-incorporated company in the host State that was foreign-controlled could assign all of its rights to a company that was not a national of the same Contracting State (pursuant to the second clause of Article 25(2)(b)). Thus, while the Arbitral Tribunal did stress that it could not accept a solution consisting in discharging a State of its payment obligations each time that there was an assignment of rights, it is unclear whether the Arbitral Tribunal would accept an assignment of all rights of a locally-incorporated company to an investor in a Contracting State with a different nationality than that of the original investor.

If this were the case, which is unclear from the Award, this would not assist an investor located in a Contracting State lacking a BIT with the host State of investment (which assigned its rights of “foreign control” to a company based in a third State that had enacted a BIT with the Contracting host State), as the nationality of the initial “controlling” investor lacking a BIT with the host State of investment would necessarily have been changed.

C. TSA Spectrum de Argentina S.A. v. Argentine Republic

Finally, this article analyzes the recent case TSA Spectrum de Argentina S.A. (“TSA”) v. the Argentine Republic, which dealt with a Concession Contract won by TSA that was subsequently terminated by the Argentine Republic. This led TSA to bring an ICSID claim on the basis of the Netherlands-Argentine Republic BIT against Argentina.

TSA was a locally-incorporated company in Argentina, which was a wholly owned subsidiary of TSI Spectrum International N.V. (“TSI”), a company registered in Holland.

In the context of this dispute, Argentina noted that regarding the second clause of Article 25(2)(b) of the ICSID Convention, the critical date for analyzing the “foreign
control" of a locally-incorporated company – in this case TSA – for jurisdictional purposes, was the date on which the parties agreed to ICSID jurisdiction.

According to Argentina, Article 10(6) of the Netherlands-Argentina BIT accepts ICSID jurisdiction in those cases where Argentine companies are “controlled” by nationals of another Contracting Party to the ICSID Convention.117 Argentina, however, argued that in this case there was no company that was actually controlled by a Dutch company.118 Thus, according to Argentina, the “corporate veil must be pierced as the Dutch company that claims to have control over the local company is not controlling but a mere vehicle to control the [locally-incorporated] Argentine company through other companies.”119

Argentina further argued that the comments made by Professor Weil in his dissenting opinion in Tokios Tokelès should be applied, such that only genuine foreign investments should be protected by the ICSID mechanism.120

Argentina also stressed (i) the lack of Dutch citizens in the establishment of TSA and on its board of directors, noting the presence of French citizens until 2002 and of Argentine citizens from 2002 onwards, (ii) the difference between the corporate capital of the allegedly “controlling” company and the “controlled” locally-incorporated corporation; (iii) that the corporate seat for the Dutch company TSI was registered at the same address as 225 other corporations in Holland; and (iv) doubts about TSI’s actual corporate activities.121

According to Argentina, the fact that there were 225 companies registered at the same head office as the Dutch company TSI had to lead to the conclusion that the “head office” TSI did not actually exist. As noted by Argentina, TSI was created on August 15, 1996 with the purpose of investing in a concession for the Argentine radio-electric spectrum which was granted on June 11, 1997. Yet, on August 20, 1996 – 5 days after the establishment of TSI – TSA was created. Thus, according to Argentina, TSI was merely a “vehicle company” used by the true controllers of TSA to carry out their investment.122

Argentina also alleged that TSA had not furnished any proof that the Dutch company TSI actually controlled TSA, noting that according to the ICSID Convention and the relevant BIT there must be “effective control” in order to extend ICSID jurisdiction through the second clause of Article 25(2)(b) of the ICSID Convention. According to Argentina, company stockholding was not enough to show such control.123

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117 See id. ¶ 116.
118 See id.
119 See id.
120 See id. ¶ 118.
121 See id. ¶ 119.
122 See id. ¶ 120.
123 See id. ¶ 121.
On these bases, Argentina requested the Arbitral Tribunal to find that no Dutch foreign investor existed, as TSA was not controlled by TSI (Holland), and that therefore TSA lacked jurisdiction to bring a claim under the second clause of Article 25(2)(b).

In response, the claimant TSA argued that it was controlled by TSI (Holland) in terms of the second clause of Article 25(2)(b) and the relevant provisions of the Netherlands-Argentina BIT. TSA argued that TSI (Holland) owned TSA’s shares and therefore met the “control” criterion set forth in the ICSID Convention.

TSA also argued that Argentina and the Netherlands had agreed that TSA should be treated as a national of another Contracting State for the purposes of Article 25(2)(b) of the ICSID Convention and through provisions of the Netherlands-Argentina BIT. TSA further noted that according to Article 25(2)(b) of the ICSID Convention, the relevant date as regards the nationality of the juridical person is the date on which the parties consented to submit the dispute to arbitration. Yet, according to Article 10(6) of the BIT, the critical date for the purposes of “foreign control” was the date before the dispute arose. TSA went on to assert that TSA was incorporated in Argentina well before the dispute arose, at which point in time it was under foreign control because TSI (Holland) owned TSA’s shares.

The Arbitral Tribunal noted that a significant difference between the two clauses contained in Article 25(2)(b) of the ICSID Convention was that the first uses a formal legal criterion of nationality, whereas the latter uses the criterion of “foreign control” in order to “pierce the corporate veil and reach for the reality behind the cover of nationality.”

The Arbitral Tribunal went on to indicate that in the two cases Tokios Tokelès and Rompetrol, those Arbitral Tribunals had adopted a strict constructionist interpretation in spite of the control of the foreign companies by nationals of the host States. According to the Arbitral Tribunal, this interpretation has not always been accepted, citing the dissenting opinion of the President in Tokios Tokelès.

The TSA Arbitral Tribunal then indicated that “the existence and materiality of this foreign control have to be objectively proven in order for them to establish ICSID jurisdiction by their agreement. It would not be consistent with the text, if the tribunal, when establishing whether there is foreign control, would be directed to pierce the corporate veil of the corporate entity national of the host State and to stop short at the second corporate layer it met, rather than pursuing its objective identification of foreign control up to its real source, using the same criterion with which it started.”

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124 See id. ¶ 123.
125 See id. ¶ 124.
126 See id. ¶ 125.
127 See id. ¶ 129.
128 See id. ¶ 140.
129 See id. ¶ 146.
130 See id. ¶ 147.
Arbitral Tribunal also cited Schreuer, who wrote that "the better approach would appear to be a realistic look at the true controller thereby blocking access to the Centre for juridical persons that are controlled directly or indirectly by nationals of non-Contracting States or nationals of the Host State."\(^{131}\)

Thus, the Arbitral Tribunal ruled that under the second clause of Article 25(2)(b), it was necessary to pierce the corporate veil and establish whether or not the domestic company TSA was "objectively" under Dutch foreign control.\(^{132}\)

The Arbitral Tribunal went on to hold that, based on the information provided by the claimant, there was no indication that at the time of consent to arbitration TSA was under the "objective" control of a Dutch entity.\(^{133}\)

On this basis, the Arbitral Tribunal ruled that "whatever interpretation is given to the BIT between Argentina and the Netherlands, including the Protocol to the BIT, TSA cannot be treated, for the purposes of Article 25(2)(b) of the ICSID Convention, as a national of the Netherlands because of absence of 'foreign control' and that the Arbitral Tribunal therefore lacks jurisdiction to examine TSA's claims."\(^{134}\)

C.1. ANALYSIS OF TSA SPECTRUM DE ARGENTINA S.A. V. ARGENTINE REPUBLIC

This recent decision is only relevant to the situation where an investor has established a locally-incorporated corporation in the host State of investment. In such a case, the second clause of Article 25(2)(b) of the ICSID Convention is relevant to determine the "foreign control" of the locally-incorporated corporation for the purposes of determining the nationality of the potential claimant and whether the ICSID Convention grants jurisdiction for a claim. Thus, for the purposes of this article, TSA is only relevant to situations where an investor – who lacks a BIT with the host State – has established a locally-incorporated corporation in a host State of investment but has allegedly transferred "control" of the local investment to another juridical entity located in a third State (that has enacted a BIT with the host State) in order to obtain jurisdiction under the ICSID Convention.

What is of importance is that the TSA Arbitral Tribunal ruled that the "objective identification" of foreign control must be pursued to its "real source." This could be problematic for a foreign investor which had allegedly transferred "control" of the local investment to another juridical entity that had a BIT in force with the host State, as, using the TSA Arbitral Tribunal's logic, it is plausible that the Arbitral Tribunal would determine that true "foreign control" remained with the initial investor (the "real source" of foreign control) which had never possessed a BIT with the host State. If this were the Arbitral Tribunal's finding, then the TSA Arbitral Tribunal could conceivably

\(^{132}\) See id. ¶ 160.
\(^{133}\) See id. ¶ 161.
\(^{134}\) See id. ¶ 162.
find that it lacked jurisdiction over the claimant’s claim, as the “real source” of foreign control had never enacted a BIT with the host State of investment and thus would lack consent to ICSID jurisdiction (given that BITs typically grant investors the right to bring treaty claims, as noted supra in the Introduction to this article).

D. THE DISSenting OpINION IN TSA SPECTRUM DE ARGENTINA S.A. v. ARGENTINE REPUBLIC

The dissenting opinion by Grant Aldonas in TSA was highly critical of the majority’s decision. According to this arbitrator, “[t]he majority erred in construing Article 25 to imply a duty to look beyond the ownership of TSA Argentina by a company incorporated under Dutch law. Article 25 neither compels nor, ultimately, supports that conclusion in this case.”

He stated that “[n]ot even the Government of Argentina suggests, for example, that the Argentine national involved incorporated in the Netherlands to subvert the purposes of the treaty (i.e., for the express purpose of gaining ICSID jurisdiction).”

He also went on to state that “[t]he Netherlands ... will forfeit the right it bargained for in the context of the [Netherlands–Argentina] BIT if the majority’s opinion stands” and that the Dutch government “provided a decisional rule to guide this Tribunal in vindicating the Netherlands’ interest in ensuring its companies, regardless of their ownership, would not be prejudiced by the actions of the Argentine government....”

D.1. ANALYSIS OF THE DISSenting OPINION IN TSA SPECTRUM DE ARGENTINA S.A. v. ARGENTINE REPUBLIC

In short, the dissenting opinion in TSA suggests that the TSA Arbitral Tribunal should not have attempted to find the “real source” of foreign control by “looking through” the Dutch intermediary. Thus, the dissenting arbitrator would arguably be more likely to find that an investor (who lacked a BIT with the host State of investment) and allegedly transferred “control” of the investment to a juridical entity located in a Contracting State (that did possess a BIT with the host State of investment) would have jurisdiction to bring a treaty claim.

4. CONCLUSIONS REGARDING THE TRANSFER OF TREATY CLAIMS IN INVESTOR–STATE DISPUTES

It is clear from the above decisions that both Arbitral Tribunals and arbitration

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136 See id. ¶ 21.
137 See id. ¶ 36.
138 See id.
practitioners are extremely wary of charges of “treaty-shopping” in order to gain “illegitimate access” to ICSID jurisdiction or to jurisdiction under the UNCITRAL Rules.

The illegitimacy of “treaty-shopping” was most clearly expressed in the recent Award Société Générale In respect if DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic, where the Arbitral Tribunal clearly indicated that any transfer of rights must not be devised “to allow a national of a State not qualifying for protection under a treaty to obtain an inappropriate jurisdictional advantage otherwise unavailable by transferring its rights after-the-fact [of the breach in question] to a qualifying national...” \(^{139}\)

The decision in Loewen was similar, insofar as it indicated that “[i]n international law parlance, there must be continuous national identity from the date of the events giving rise to the claim” through the date of the resolution of the claim”, \(^{140}\) which would appear to preclude the transfer of any claim to a juridical entity located in a third State following the events giving rise to a claim, i.e., the alleged breach(es) in dispute.

For an investor to avoid accusations that it is engaged in “treaty-shopping” it appears clear from the previously cited arbitral decisions — save for the Award of the ADT Arbitral Tribunal, which allowed changes to ADT’s intermediate ownership structure after problems with the investment were foreseeable, thus allowing ADT to gain jus standi before ICSID at a very late point in time — that an investor should transfer its shares to a juridical investment vehicle in a third State that has enacted a BIT with the host State of investment as early as possible — and above all before the events giving rise to the dispute. For instance, in Rompetrol, it was clear that the claimant was not created for “treaty-shopping” purposes, as it had been incorporated six years before the arbitration commenced. \(^{141}\) Furthermore, in Rumeli & Telsim, it was clear that the juridical entities that brought their treaty claim had also been constituted well before their request for arbitration and the events giving rise to the dispute.

Another method to avoid charges of “treaty-shopping” would be for the investor to transfer its shares to a juridical entity in another State prior to a BIT with the host State of investment entering into force, as was the case in Tokios Tokelès. \(^{142}\) However, as noted supra at S2.E1, this would pose serious practical problems for an investor, as the investor might be able to determine whether a particular BIT had been signed with the host State of investment, but would find it extremely difficult or impossible to know when said BIT would be ratified.

In addition, an investor who attempts to change its nationality to that of a third State that has enacted BIT with the host State of investment runs the risk of having its corporate veil pierced — although such veil-piercing appears to be relatively rare in arbitral case law. For instance, the majority of the Arbitral Tribunal refused to pierce the

\(^{139}\) See SG ¶ 110.
\(^{140}\) See Loewen ¶ 225.
\(^{141}\) See Rompetrol ¶ 67.
\(^{142}\) See Tokios Tokelès ¶ 56.
corporate veil of Tokios Tokelès, and instead examined formal criteria to find that Tokios Tokelès was duly established in Lithuania, despite the respondent's arguments that Tokios Tokelès' veil must be pierced. The same was true with respect to the Rumeli & Telsim decision, where the Arbitral Tribunal refused to pierce the corporate veil as argued for by the respondent. This was not, however, the case in Loewen, where the Arbitral Tribunal effectively pierced the corporate veil of the claimant, finding that the nationality of the claimant had changed from Canadian to US origin, thereby precluding jus standi for Loewen's claim against the US.

Another complication that arises – such as in Mihaly – is the question of whether the host State of investment must give its consent prior to the transfer of a claim to another juridical entity. This was also an issue raised in ADT. Thus, a juridical investor lacking a BIT with the host State of investment should either ensure that nothing prevents it from requiring the consent of the host State prior to transferring a claim (or changing its nationality by a transfer of shares) or should attempt to acquire the consent of the host State for such a transfer, as was found to be the case in the Autopista Concesionada de Venezuela CA v. Bolivarian Republic of Venezuela arbitration – in order to be able to take advantage of a BIT between a third State and the host State. (Despite the fact that a host State of investment which suspected that the investor intended to bring a treaty claim against it would appear to be unlikely to grant its consent to such an assignment.)

Moreover, an investor who attempts to transfer merely a claim – and not to create a new investment vehicle in a third State to make investments in the host State – runs the risk that an Arbitral Tribunal might refuse to recognize the assignment a claim on the basis that "[a] claim under the ICSID Convention with its carefully structured system is not a readily assignable chose in action." Thus, rather than assigning an isolated treaty claim, an investor would be well-advised to assign its shares and its investment to a corporation located in a State that already possesses a BIT with the host State prior to bringing a treaty claim, rather than to simply attempt to transfer an isolated treaty claim. Again, it appears that any such transfer should be accomplished as early as possible – indeed, ideally at the outset of the structuring of the investment – because, as noted in Mihaly, were a claim to be transferred to another juridical entity in a third State, the chances of an Arbitral Tribunal finding itself to have jurisdiction to hear a claim by the assignee would be slim, unless that assignee could prove that it had "rights and interests" in the investment in question and also satisfied the conditions rationae materiae required for jurisdiction.

Another potentially problematic issue arises from the African Holding Award,
where the Arbitral Tribunal allowed the assignment of all rights from the locally-incorporated SAFRICAS to Africa Holding, but only on the basis that the State of the investors had not changed (i.e., that SAFRICAS was under the “control” of American citizens at the time of the assignment pursuant to the second clause of Article 25(2)(b) of the ICSID Convention).149 This would appear to call into question the right of an investor of a Contracting State to assign all of its rights to a juridical entity of a different nationality that had ratified a BIT with the host State and supposedly “controlled” the locally-incorporated corporation.

Indeed, the situation where an investor invests in a locally-incorporated company in the host State may be doubly problematic for an investor seeking the protection of a BIT enacted between a third State and the host State for, as the Arbitral Tribunal held in TSA, the “objective identification” of foreign control must be traced back to its “real source.”150 This could pose problems if the original investor (lacking a BIT with the host State of investment) created a new company in a third State that allegedly “controlled” the locally-incorporated company in the host State, for – at least the majority of the TSA Arbitral Tribunal – could potentially find that the true entity with “foreign control” over the locally-incorporated company remained the initial investor (or, in the terms of TSA, the “real source” of the investment), which had not ratified any BIT with the host State – and would therefore not be protected by the provisions of a BIT nor have jus standi to bring a treaty claim (as the host State of investment had never consented to arbitration with the original investor by way of any BIT).

In addition, and as noted supra at §2.A.1.a. and §2.B.1, it appears that a strong argument could be made by a respondent State that an initial investor that had transferred its shares to a juridical entity in a third State should not have jus standi to bring a claim because there was never any BIT enacted between the initial investor and the host State of investment giving the host State’s consent to jurisdiction under Article 25(1) of the ICSID Convention. And, as noted in Banro,151 and more precisely in Mihaly, “no one could transfer a better title than what he really has,”152 which would appear to be the case when an initial investor attempts to transfer a potential treaty claim against a host State of investment that had never consented to treaty arbitration by way of a BIT with the initial investor.

In conclusion, given the complex issues that arise when an investor lacking a BIT with the host State of investment attempts to assign a treaty claim to a third State which has enacted a BIT with the host State of investment, two fundamental conclusions can be drawn from the aforementioned arbitral case law: First, any transfer of treaty claims should be made as early as possible – and certainly before the alleged breach in dispute – to avoid charges of “treaty-shopping.” And second, the best way to avoid charges of

\[\text{\footnotesize \textsuperscript{149} See African Holding ¶ 63, 101-104.} \]
\[\text{\footnotesize \textsuperscript{150} See TSA ¶ 135-137.} \]
\[\text{\footnotesize \textsuperscript{151} See Banro ¶ 5.} \]
\[\text{\footnotesize \textsuperscript{152} See Mihaly ¶ 24.} \]
"treaty-shopping" is simply to structure the investment – from the very outset – so that the juridical entity making the investment has already verified that a BIT has been enacted between the investor's State and the host State of investment, precluding any need to attempt to transfer a treaty claim, while ensuring that the investor will be protected by the provisions of a BIT and will have the possibility of raising a treaty claim should a dispute arise (assuming that all other necessary jurisdictional conditions to bring a treaty claim are satisfied).