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The Investor/Investment Dichotomy in Investment Treaty Law

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I SUBSTANCE AND FORM IN THE DEFINITION OF CORPORATE INVESTORS

In 2010, not long after I completed my Diploma in International Commercial Arbitration, David Williams QC (as he then was) asked me to co-author with him a chapter for *Evolution in Investment Treaty Law and Arbitration* on the definition of an "investment" in investment treaty law.[1] I knew little then about the Convention on the Settlement of Investment Disputes between States and the Nationals of Other States (ICSID Convention),[2] and the world of investment treaties, let alone about the jurisdictional concepts of an investment and a foreign investor. I soon learned.

In a curious twist of fate, not long after David and I submitted the chapter to Chester Brown and Kate Miles for their book, David was approached to act as counsel for Philip Morris in its investment treaty claim against Australia regarding plain packaging of cigarettes. The first issue on which counsel's advice was required with some urgency related to art 25 of the ICSID Convention. David duly arranged for me to assist him and as a result I found my way on to the counsel team as well.

That case, in turn, inspired my doctoral thesis on treaty shopping in which I examine the decision on jurisdiction in *Philip Morris Asia Ltd v Australia*,[3] and the concept of corporate nationality and treaty shopping in the context of investment treaty law.[4] Through this series of events, and more generally, both personally and professionally, David has had a profound impact on my career for which I am very grateful.

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1 David AR Williams and Simon Foote "Recent developments in the approach to identifying an 'investment' pursuant to Article 25(1) of the ICSID Convention" in Chester Brown and Kate Miles (eds) *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, Cambridge (UK), 2011) 42.

2 Convention on the Settlement of Investment Disputes between States and the Nationals of Other States 575 UNTS 159 (opened for signature 18 March 1965, entered into force 14 October 1966) [ICSID Convention].

3 *Philip Morris Asia Ltd v Australia (Jurisdiction and Admissibility)* PCA 2012-12, 17 December 2015.

4 Simon Foote "The Bona Fide Investor: Corporate Nationality and Treaty Shopping in Investment Treaty Law" (PhD Thesis, Victoria University of Wellington, 2020).

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Accordingly, it is appropriate that my contribution (with the learned assistance of Samuel Jeffs) to the volume of the Auckland University Law Review which honours David's contribution to the law of arbitration, deals with an investment treaty jurisdictional concept: the distinct jurisprudential approaches to the concepts of an investor and an investment.

We observe in this article that while the concepts of investor (jurisdiction ratione materiae) and investment (jurisdiction ratione materiae) are inextricably linked as the jurisdictional gatekeepers of the ICSID Convention and investment treaties (a qualifying investor must make a qualifying investment to procure coverage of a treaty or the Convention), the jurisprudential approach to the existence of each concept is different. Whether a protected investment exists is assessed in a substantive economic sense, while the foreign nature of a qualifying corporate investor is determined in a formal or literal way, which eschews an economic reality test unless expressly provided for in the relevant treaty instrument. Further, the reasons expressed by tribunals for resisting a substantive economic approach to the nationality of a corporate investor — primarily, the sanctity of express treaty language and a concern for lack of sufficient certainty for putative investors — are not considered obstacles to a substantive approach to the existence of an investment.

This dichotomy of interpretational approach is curious given that the concepts of investment and investor work in conjunction to do the same job: to prescribe the boundaries of who and what are entitled to the substantive protections of an investment treaty and investor/state dispute resolution mechanisms. It is important also because the reluctance of tribunals to approach the concept of an investor in a substantive way abets treaty shopping to a degree that some commentators argue undermines the legitimacy of the investment treaty regime.[5]

This article begins in Part 2 by explaining the respective concepts of investment and investor pursuant to art 25 of the ICSID Convention. In the discussion of the concept of investor, it explains how the literal approach to the nationality of a corporate investor permits a broad scope for treaty shoppers. In Part 3, it analyses the dichotomy of approach between the two concepts and suggests that

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5 See John Lee "Resolving Concerns of Treaty Shopping in International Investment Arbitration" (2015) 6 JIDS 355 at 357 and 378–379. See also Robert D Sloane "Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality" (2009) 50 Harv Intl LJ 1 at 41; Mark Feldman "Setting Limits on Corporate Nationality Planning in Investment Treaty Arbitration" (2012) 27 ICSID Rev 281; and Verónica Lavista "Corporate Nationality: Principles of Diplomatic Protection, A Beacon for ICSID?" (29 May 2015) LADI at 12.

the two concepts should be interpreted consistently in a substantive, economic and teleological way as per the approach to investment.

II JURISDICTION UNDER THE ICSID CONVENTION

Investment treaties are bilateral or multilateral trade treaties which afford certain protections (such as protection against expropriation and a guarantee of fair and equitable treatment) to investments by foreign investors from the state parties to a treaty (the contracting states). Claims by investors with the nationality of one contracting state (the home state) that their investments have been dealt with by another contracting state (the host state of the investment) in a manner that breaches the treaty protections are heard by international arbitration tribunals established in accordance with dispute resolution processes in each investment treaty. Very often, investment treaty tribunals are established and operate pursuant to the ICSID Convention, which affords enforceability for investment tribunal awards in all states party to the Convention. Others are conducted under the United Nations Commission on International Trade Law Rules or as *ad hoc* arbitrations.

Articles 25–27 of the ICSID Convention outline the jurisdiction of the International Centre for Settlement of Investment Disputes (ICSID) and its activities. Of those articles, art 25 is the most important, as it contains the requirements for the subject matter jurisdiction (ratione materiae) and personal jurisdiction (ratione personae) of a dispute. The purpose of art 25 is “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 party thereto”.[6]

Jurisdiction ratione materiae: the “investment”

Article 25(1) of the ICSID Convention provides that the jurisdiction of the Centre extends to any legal dispute “arising out of an investment”. Although the concept of investment is central to subject matter jurisdiction, the Convention does not define it. That was a deliberate choice by the drafters of the Convention after they had

6 Aron Broches *Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law* (Martinus Nijhoff, Dordrecht, 1995).

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considered, but failed to agree upon, a definition. The Report of the Executive Directors notes:[7]

> No attempt was made to define the term "investment" given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4)).

The parties to an investment treaty therefore have discretion to agree and define the type of investments covered by an investment treaty.[8] States almost invariably adopt a boilerplate definition comprising a "broad, general description followed by a non-exhaustive list of typical rights" that includes "every kind of asset" or "any kind of asset" and sets out a non-exhaustive list of examples including property, shares, contractual rights, intellectual property rights and rights conferred by law.[9]

Every commercial transaction can be described to involve "property" or "contractual rights" or "rights conferred by law". Accordingly, on the natural and ordinary meaning of this boilerplate definition, it is difficult to conceive of a commercial transaction that would not be defined as an "investment" for the purposes of the relevant investment treaty. However, when it comes to determining whether a certain investment qualifies for protection under the ICSID regime, the matter is not left entirely to the parties' discretion. The ICSID Convention has supremacy over a treaty and states are not free to qualify any transaction as an investment.[10] It is subject to an overarching test of economic substance. In *Phoenix Action Ltd v The Czech Republic*, the Tribunal explained:[11]

> There is nothing like a total discretion, even if the definition developed by ICSID case law is quite broad and encompassing. There are indeed some basic criteria and parties are not free to decide in BITs that anything – like a sale of goods or a dowry for example – is an investment.

7 International Bank for Reconstruction and Development *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (18 March 1965) at [27].

8 Aron Broches "The Convention on the Settlement of Investment Disputes between States and Nationals of Other States" (1972) 136 Recueil Des Cours 331 at 360–361.

9 Christoph H Schreuer and others *The ICSID Convention: A Commentary* (2nd ed, Cambridge University Press, Cambridge (UK), 2009) at 122–123.

10 *Mitchell v Democratic Republic of Congo (Annulment)* ICSID ARB/99/7, 1 November 2006 at [31]. See also *TSA Spectrum de Argentina SA v Argentina (Award)* ICSID ARB/05/5, 19 December 2008 at [134].

11 *Phoenix Action Ltd v The Czech Republic (Award)* ICSID ARB/06/5, 15 April 2009 at [82].

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While there are no basic criteria for an investment enunciated in the ICSID Convention or in the vast majority of investment treaties, limits are fashioned and imposed by tribunals by way of an inherent meaning of the concept of an "investment". The parties' choice is limited by the purpose of the ICSID Convention to promote "international cooperation for economic development".[12] This expression of object and purpose suggests that an investment must be of an international character and be designed to promote or contribute to the economic development of the host state to be deemed as an investment pursuant to the Convention.[13]

Beginning with the decision in *Fedax v Venezuela*, investment treaty tribunals have fashioned criteria to evidence the economic materialisation of an investment (a contribution to a durable economic enterprise in the host state with an assumption of risk).[14] Such criteria (contribution, duration and risk) have now found their way into the express text of investment and free trade agreements, but where they are not express in a treaty, they are implied.[15]

What are now known as the *Salini* criteria do not seek to override definitions of investment in a treaty or agreement.[16] An agreed definition of investment remains an important element to determine jurisdiction ratione materiae. Fulfilment of treaty criteria agreed by the parties creates "a strong presumption" that the parties consider the investment to be within the ambit of the ICSID Convention.[17] But, it is a presumption that can be rebutted. Cases such as *Fedax* and *Salini Costruttori SPA v Morocco* limit the freedom of the parties to define an investment for their own purposes. These cases preserve the "outer limits" of art 25(1) as interpreted in light of the object and purpose of the Convention: in this context, to encourage economically substantive, lasting investments in the contracting states.

The boundaries and exact definitions of each of the *Salini* criteria is not settled; it "has given rise to many awards, many theses, many discussions and many colloquiums".[18] The point for present

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12 ICSID Convention, preamble.

13 *Ceskoslovenska Obchodni Banka AS v The Slovak Republic (Jurisdiction)* (1999) 5 ICSID Rep 330 at [64], [73] and [76].

14 *Fedax NV v Venezuela (Jurisdiction)* (1998) 5 ICSID Rep 183 at 199.

15 See United States–Morocco Free Trade Agreement (signed 15 June 2004, entered into force 1 January 2006), art 10.27; United States–Singapore Free Trade Agreement (signed 6 May 2003, entered into force 1 January 2004), art 15.1.13; and Trans–Pacific Partnership Agreement (signed 4 February 2016), art 9.1.

16 See *Salini Costruttori SPA v Morocco (Jurisdiction)* (2003) 42 ILM 609. See also Schreuer and others, above n 9, at 129–134, where the authors discuss the jurisprudence concerning each of the various *Salini* criteria.

17 *Ceskoslovenska,* above n 13, at [66]. See also, for example, *Generation Ukraine Inc v Ukraine (Award)* (2003) 10 ICSID Rep 236 at [8.2].

18 Brigitte Stern "The Contours of the Notion of Protected Investment" (2009) 24 ICSID Rev 534 at 534.

purposes is to observe that arbitral tribunals fill the definitional lacuna in regard to the concept of "investment" by subjecting the ordinary and natural meaning of the definition used by contracting states to substantive economic considerations designed to protect the object and purpose of the investment treaty regime. The *Salini* criteria function as an implied economic reality check on acceptance of a commercial transaction as an investment protected by the investment treaty regime.

Jurisdiction ratione personae

In respect of the nationality of an investor to satisfy jurisdiction ratione personae, art 25(1) of the ICSID Convention provides that the jurisdiction of the Centre extends to any legal dispute "between a Contracting State … and a national of another Contracting State". Article 25(2)(b) defines two categories of corporate nationals within the ambit of the Convention: a juridical person with the nationality of a contracting state other than the host state (first clause); and any juridical person with the nationality of the host state but which, because of foreign control, the parties have agreed should be treated as a national of another contracting state (second clause).

The inquiry under each clause is the same: the nationality of a juridical person. In respect of the first clause, it is to ensure the nationality of the juridical person is of a contracting state other than the host state of the investment. In the second clause, what is ultimately at issue is not only "the objective existence of foreign control … but the *nationality of this foreign control*".[19]

However, art 25 does not prescribe how the nationality of a juridical person is to be determined by contracting states and therefore is silent as to the point at which the outer limits of nationality are to be drawn. As with the concept of "investment", the negotiating parties to the ICSID Convention abandoned attempts to define "national" in favour of permitting the parties to an investment treaty:[20]

> … the widest possible latitude to agree on the meaning of "nationality" and any stipulation of nationality made in connection

19 *TSA Spectrum*, above n 10, at [149] (emphasis added).

20 Broches, above n 8, at 361. See also Broches, above n 6, at 259–260; Schreuer and others, above n 9, at [461]–[462]; and Lavista, above n 5, at 4–6. Both a control test and a requirement for effective nationality were proposed at various stages of the negotiation of the text, but ultimately were not adopted: CF Amerasinghe "Jurisdiction *Ratione Personae* under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States" (1975) 47 BYBIL 227 at 254–255 and 267; and International Centre for Settlement of Investment Disputes *History of the ICSID Convention* (Washington, DC, 1968) vol 2 at 361, 446–448, 538, 581 and 876.

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> with a conciliation or arbitration clause which is based on a reasonable criterion …

Jurisdiction ratione personae tends to be relatively straightforward for investors who are natural persons. Invariably, the nationality of a natural person is determined by reference to municipal law regarding citizenship. The odd case may cause difficulties, for example, if fraud in obtaining citizenship is alleged. However, more often than not, it is relatively simple to determine one's nationality by reference to municipal laws of nationality and, consequentially, to determine whether there is personal jurisdiction over that individual.

The same cannot be said for corporations. As Judge Jessup stated: "[t]hat corporations have a nationality, is a legal fiction."[21] States tend not to have municipal laws that ascribe a nationality to a corporation. Instead, nationality for corporations exists only through an analogy drawn by international law to the concept of nationality applied to individuals in municipal law.[22] For that reason, states include criteria in investment treaties to ascribe nationality to corporations, which in turn inform whether there is jurisdiction ratione personae over that corporation.

There are approximately 3,000 investment treaties that contain investor-state arbitration mechanisms.[23] A variety of tests are applied to determine whether a juridical person qualifies as a national investor of a state party to a treaty. Four predominant criteria determine corporate nationality.[24] They are incorporation, as prevails in Anglo-American common law systems; the seat or place of management

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21 *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase)* [1970] ICJ Rep 3 at 195 per Judge Jessup.

22 WE Beckett "Diplomatic Claims in Respect of Injuries to Companies" (1931) 17 Transactions of the Grotius Society 175 at 175; Robert Jennings and Arthur Watts *Oppenheim's International Law* (9th ed, Longman, London, 1992) vol 1 Peace at 859–861; and Peter Muchlinski "The Diplomatic Protection of Foreign Investors: A Tale of Judicial Caution" in Christina Binder and others (eds) *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, Oxford, 2009) 341 at 348.

23 The investment treaties cited in this article are all available at <www.italaw.com>.

24 See Christoph Benedict and others *The Determination of the Nationality of Investors under Investment Protection Treaties* (Institute of Economic Law (Transnational Economic Law Research Center), Halle-Wittenberg (Germany), March 2011) at 13 and 46; AA Fatouros "National Legal Persons in International Law" in Rudolf L Bindschedler and others (eds) *Encyclopedia of Public International Law* (Elsevier Science, Amsterdam, 1997) vol 3 495 at 495–496; Schreuer and others, above n 9, at 460; Roos van Os and Roeline Knottnerus *Dutch Bilateral Investment Treaties: A gateway to 'treaty shopping' for investment protection by multinational companies* (Stichting Onderzoek Multinationale Ondernemingen (Centre for Research on Multinational Corporations), October 2011) at 23; and Feldman, above n 5. One author confines the field to two criteria – incorporation or the seat – and considers the control criterion as a device to expand or restrict the application of the two principal criteria: Engela C Schlemmer "Investment, Investor, Nationality, and Shareholders" in Peter T Muchlinski, Federico Ortino and Christoph Schreuer (eds) *The Oxford Handbook of International Investment Law* (Oxford University Press, New York, 2008) 49 at 76–77.

(siège social), as applied in civil law countries; control, that is, the state of nationality of controlling shareholders; and some investment agreements limit the scope of the treaty by requiring that a juridical person must have substantial or effective economic activities in its state of incorporation.[25] The predominance of each of the four criteria depends to some extent on the different generations of investment treaties. [26]

Investment treaties concluded up until the mid-1990s remain the large majority of investment treaties. Predominantly, they define the nationality of a corporate investor by reference solely to its state of incorporation.[27]

The vast majority of foreign direct investments are made by corporate entities, rather than natural persons.[28] The relative ease with which corporate entities can be created and structured creates opportunities for nationality criteria in any treaty to be met in a literal sense so as to procure investment treaty benefits.[29] Shell companies can be established and inserted in the chain of ownership of an investment to meet the incorporation criterion for an investor in a desired investment treaty and procure its coverage of the investment. Definitions of "investor" or "national" in investment treaties that attribute corporate nationality of a contracting state on the basis of simple incorporation or formal seat in a jurisdiction thereby "opens up the possibility of a nationality of convenience",[30] to enable the process of what is known as "treaty shopping".

25 Benedict and others, above n 24, at 14.

26 Commentators distinguish between bilateral investment treaties (BITs) signed between 1959 and 1988 (the first generation), those signed between 1988 and 1995 (the second generation), and those concluded from 1995 to the present day (the third generation). The third generation tend to have drawn on a body of investment treaty jurisprudence regarding the interpretation of investment treaties "leading to the evolution of new drafting techniques as nations responded to decisions of arbitral tribunals" so as "to exclude purported strangers to the agreement": Matthew Skinner, Cameron A Miles and Sam Luttrell "Access and advantage in investor-state arbitration: The law and practice of treaty shopping" (2010) 3 JWELB 260 at 262–263 and 270. See also Andrew Newcombe and Lluís Paradell *Law and Practice of Investment Treaties: Standards of Treatment* (Wolters Kluwer, the Netherlands, 2009) at 46–48; M Sornarajah "A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration" in Karl P Sauvant and Michael Chiswick-Patterson (eds) *Appeals Mechanism in International Investment Disputes* (Oxford University Press, New York, 2008) 39; and van Os and Knottnerus, above n 24, at 8–9.

27 Skinner, Miles and Luttrell, above n 26, at 270.

28 Benedict and others, above n 24, at 11.

29 Jorun Baumgartner *Treaty Shopping in International Investment Law* (Oxford University Press, Oxford, 2016) at [1.2.3].

30 Frank Berman "The Relevance of the Law on Diplomatic Protection in Investment Arbitration" in Federico Ortino and others (eds) *Investment Treaty Law: Current Issues II—Nationality and Investment Treaty Claims; Fair and Equitable Treatment in Investment Treaty Law* (British Institute of International and Comparative Law, London, 2007) 67 at 70. See also Zachary Douglas *The International Law of Investment Claims* (Cambridge University Press, Cambridge (UK), 2009) at [586]; Stephan W Schill *The Multilateralization of International Investment Law* (Cambridge University Press,

While the same restriction on state autonomy with regard to the concept of investment is recognised in principle in respect of the nationality requirement in art 25(2)(b) of the ICSID Convention,[31] definitions of national or investor in investment treaties are approached by tribunals in a literal way and without application of inherent limits imposed by the object and purpose of the ICSID Convention or the relevant investment treaty. An "overwhelming consensus" of investment treaty tribunals have concluded that literal compliance with nationality criteria to meet jurisdiction ratione personae is sufficient:[32] no substantive economic role in the investment or other substantive degree of attachment to the corporate's home state is required unless expressly incorporated in the instant treaty. Thereby, treaty shopping by manipulation of corporate nationality is not illegal.[33]

Most controversially, even nationals of a contracting state can manufacture a foreign investment from a domestic one by incorporating a company in the other contracting state and routing its domestic investment through that company.[34] As a result, arguably "the nationality of corporate investors has become as fungible as capital in global markets" to the point that "corporate nationality no longer functions effectively as a distinguishing criterion".[35] Indeed, "virtually any investor from virtually any country is capable of opting into virtually any BIT regime".[36] Hence, to comply with an investment treaty, contracting states must treat their obligations as owed to every state and every company.[37]

Cambridge (UK), 2009) at 200–201, 204–209, 221 and 223–224; and Anthony C Sinclair "The Substance of Nationality Requirements in Investment Treaty Arbitration" (2005) 20 ICSID Rev 357 at 360.

31 *Capital Financial Holdings Luxembourg SA v Cameroon (Award)* ICSID ARB/15/18, 22 June 2017 at [281].

32 Campbell McLachlan, Laurence Shore and Matthew Weiniger *International Investment Arbitration: Substantive Principles* (2nd ed, Oxford University Press, Oxford, 2017) at [5.133]. See also *Waste Management Inc v Mexico (Award)* (2004) 43 ILM 967; *Aguas del Tunari SA v Bolivia (Jurisdiction)* (2005) 16 ICSID Rep 297; *Saluka Investments BV (The Netherlands) v The Czech Republic (Partial Award)* (2006) 15 ICSID Rep 250; *The Rompetrol Group NV v Romania (Jurisdiction and Admissibility)* ICSID ARB/06/3, 18 April 2008; and *KT Asia Investment Group BV v Kazakhstan (Award)* ICSID ARB/09/8, 17 October 2013.

33 See *Aguas del Tunari*, above n 32, at [330] and [332]; *Mobil Corp v Venezuela (Jurisdiction)* ICSID ARB/07/27, 10 June 2010; *Pac Rim Cayman LLC v El Salvador (Jurisdiction)* ICSID ARB/09/12, 1 June 2012; *Tidewater Inc v Venezuela (Jurisdiction)* ICSID ARB/10/5, 8 February 2013; and *ConocoPhillips Petrozuata BV v Venezuela (Jurisdiction and Merits)* ICSID ARB/07/30, 3 September 2013.

34 See *Tokios Tokelés v Ukraine (Jurisdiction)* (2004) 11 ICSID Rep 305; *TSA Spectrum*, above n 10; and *Yukos Universal Ltd (Isle of Man) v Russia (Jurisdiction and Admissibility)* (2009) 18 ICSID Rep 331.

35 Schill, above n 30, at 238–239. See also 198 and 219.

36 At 238.

37 See Barton Legum "Defining Investment and Investor: Who is Entitled to Claim?" (2006) 22 Arb Intl 521 at 524. There are diverging opinions as to whether this state of affairs is desirable and in accordance with the object and purpose of the investment treaty regime. For examples of those who say yes, see Douglas, above n 30, at [586]; and Schill, above n 30, at

On this literal approach, the plain words of the treaty are paramount and there is no room for implying additional requirements into the definition of corporate nationality to require a substantive relationship between a claimant and its home state. The reasoning is that if contracting states had wished to impose a substantive link between a corporate investor and its state of incorporation, they could have said so in the treaty.[38] As the nationality of a corporation is not defined in the ICSID Convention, but rather left to the contracting states in any particular treaty,[39] the literal authorities emphasise the importance of party autonomy and say 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".[40]

Classic examples include *Saluka Investments v Czech Republic,* in which the Tribunal had "some sympathy" for the respondent's argument that a shell company controlled by a company from a third, non-contracting state should not access the benefits of an investment treaty.[41] However it could not:[42]

> … in effect impose upon the parties a definition of "investor" other than that which they themselves agreed. That agreed definition required only that the claimant-investor should be constituted under the laws of (in the present case) The Netherlands, and it is not open to the Tribunal to add other requirements which the parties could themselves have added but which they omitted to add.

Similarly, in *ADC Affiliate Ltd v Hungary*,[43] Canadian nationals established two Cypriot companies to contract with Hungary in relation to the construction of new facilities at Budapest airport. The use of the Cypriot companies in the ownership chain of the investment permitted access to the protections afforded by the Cyprus–Hungary BIT because the BIT attributed corporate nationality of an investor

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200–201, 204–209, 221 and 223–224. For examples of those who say no, see Foote, above n 4; Schlemmer, above n 24, at 87; Robin F Hansen "Parallel Proceedings in Investor-State Treaty Arbitration: Responses for Treaty-Drafters, Arbitrators and Parties" (2010) 73 MLR 523; and Sinclair, above n 30, at 363.

38 See *Waste Management*, above n 32, at [85]. See also *Aguas del Tunari*, above n 32, at [330] and [332]; *Saluka Investments*, above n 32, at [229] and [241]; *Rompetrol Group*, above n 32, at [85]; *KT Asia*, above n 32, at [115]–[121]; *Yukos Universal*, above n 34, at [411]–[413]; and *Tokios Tokelés*, above n 34, at [63].

39 Broches, above n 8, at 361.

40 Schreuer and others, above n 9, at 287.

41 *Saluka Investments*, above n 32, at [240].

42 At [241]. See also [229]; and *Waste Management*, above n 32, at [85].

43 *ADC Affiliate Ltd v Hungary (Award)* (2006) 15 ICSID Rep 534.

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solely by the place of incorporation.[44] The Tribunal found that the state parties to the treaty could have included a genuine economic connection requirement for corporate nationality, but presumably chose not to do so: "[t]he Tribunal cannot read more into the BIT than one can discern from its plain text."[45]

In the well-known case of *Tokios Tokelés v Ukraine*, nationals of Ukraine routed an investment in Ukraine through a company incorporated in Lithuania, the shares of which they owned, to achieve the protection of the Ukraine–Lithuania BIT. The Tribunal found in accordance with the express wording of that Treaty, "the only relevant consideration is whether the Claimant is established under the laws of Lithuania".[46] The Tribunal emphasised the consent of the contracting states, who "are free to define their consent to jurisdiction in terms that are broad or narrow" and once that consent is defined, "tribunals should give effect to it, unless doing so would allow the Convention to be used for purposes for which it clearly was not intended".[47]

The central rationale of these literal approach cases is that object and purpose is of no import if the language of the definition of the investor's nationality is clear. Where state parties could have, but did not, provide for additional criteria requiring substantial connections to a contracting state for corporate claimants,[48] "arguments of an economic nature are irrelevant".[49]

Further, the literal constructionist approach to investor nationality is concerned that an exploration of the substantive connection between corporate and home state would lead to undue uncertainty as to treaty coverage for investors and undermine the objective to encourage investment.[50] The classic expression of this rationale appears in *Aguas del Tunari SA v Bolivia* in which the Tribunal opined that a substantive inquiry into the identity of the actual, as opposed to legal, controller of an investment would be a "thicket" that was:[51]

44 Cyprus–Hungary BIT (signed 24 May 1989, entered into force 25 May 1990), art 1(3)(b); and *ADC Affiliate*, above n 43, at [295] and [333].

45 At [359]. See also *Autopista Concesionada de Venezuela CA v Venezuela (Jurisdiction)* (2001) 6 ICSID Rep 417.

46 *Tokios Tokelés*, above n 34, at [38].

47 At [39]. See also *Rompetrol Group*, above n 32, at [109]; *KT Asia*, above n 32, at [123] and [143]; and *Yukos Universal* above n 34, at [411]–[413].

48 Douglas, above n 30, at [587]. See also Martin J Valasek and Patrick Dumberry "Developments in the Legal Standing of Shareholders and Holding Corporations in Investor-State Disputes" (2011) 26 ICSID Rev 34 at 58–59; and Stavros Michalopoulos and Edward Hicks "Dual nationality revisited: a modern approach to dual nationals in non-ICSID arbitrations" (2019) 35 Arb Intl 121 at 136.

49 *Autopista Concesionada*, above n 45, at [119]–[120] as cited in *Tokios Tokelés*, above n 34, at [63].

50 *Aguas del Tunari*, above n 32, at [247]. See also *KT Asia*, above n 34, at [142].

51 *Autopista Concesionada*, above n 45, at [69] as cited in *Aguas del Tunari*, above n 32, at [246], n 219.

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> … precisely what the drafters of the ICSID Convention decided to avoid. Finding the "ultimate", or "effective", or "true" controller would often involve difficult and protracted factual investigations, without any assurance as to the result.

The only temper to the strict constructionist approach permitted by the literal tribunals is that the criterion for nationality in a treaty must be a reasonable one, in the sense of common. Given that incorporation as a criterion to establish nationality is common, it follows that its use by parties to investment treaties is reasonable and should be applied without further qualification.[52] To do otherwise, would result in "setting aside the clear language agreed upon by the treaty Parties in favour of a wide-ranging policy discussion".[53]

Schreuer and his colleagues conclude that contracting parties enjoy a broad discretion to define corporate nationality and opine that "any reasonable determination of the nationality of juridical persons contained … in a treaty should be accepted by an ICSID commission or tribunal".[54] Therefore, absent express words in a treaty requiring a substantive approach, "[i]t is not permissible to look behind the company nor to examine the existence of a genuine link" between a company and its claimed state of nationality.[55]

III AN INCONGRUOUS DICHOTOMY

The ICSID Convention treats the related concepts of investment and investor consistently: it leaves them to be defined by states, subject to undefined outer limits.[56] But the above discussion exposes the dichotomy between the respective jurisprudential attitudes to the outer limits of the concepts of "investment" on the one hand and "investor" or "national" on the other: investment tribunals take a purposive and substantive approach to the former, but not to the latter.

Investment treaty tribunals consider a treaty definition of "investment" as presumptively applicable, subject to a reality check that looks to ensure that an investment has real economic substance as measured by contribution, duration and risk. These economic indicators of the substance of an investment are very often not found

52 *Tokios Tokelés*, above n 34, at [63]; and *Rompetrol Group*, above n 32, at [78].

53 *Rompetrol Group*, above n 32, at [85].

54 Schreuer and others, above n 9, at 287 and 525.

55 At 525. See also Benedict and others, above n 24, at 52, 55 and 59–60; and J Romesh Weeramantry *Treaty Interpretation in Investment Arbitration* (Oxford University Press, Oxford, 2012) at [6.124]–[6.126].

56 International Bank for Reconstruction and Development, above n 7, at [27].

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expressly in the definition of investment, but are applied by tribunals nevertheless to protect the object and purpose of the investment treaty regime and the ICSID Convention in particular. Something that technically fulfills the treaty definition of an investment will not be sanctioned as an activity to which the treaty applies if it is not also substantively an investment in an economic sense.

Conversely, investment treaty tribunals assess the nationality of corporate investors strictly according to the literal terms of the relevant treaty definition. There is no room for consideration of the economic substance of the investor as against the object and purpose of the treaty if such is not provided for in its express terms. Thereby, a shell company with no real role to play in the investment other than to procure treaty coverage is sufficient to qualify as an investor for treaty purposes.

There is no logical or principled reason why the approach to an "investment" in art 25(1) is objective and substantive, while the approach to "nationality" in the same article eschews the application of substantive criteria.[57] It is an incongruous position for the twin gatekeepers of jurisdiction in investment treaty law.

Indeed, it is undesirable that different interpretative approaches apply to different terms in treaties to which the Vienna Convention on the Law of Treaties applies.[58] The Vienna Convention reflects customary international law on the interpretation of treaties.[59] Article 31(1) of the Vienna Convention provides that:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

The process of interpretation under art 31(1) is a unity, and the provisions of the article form a single, closely integrated rule to be applied as a "single combined operation",[60] with no order of importance implied by virtue of the order of the tenets.[61] The article is to be applied as a whole, not in bits.[62] According to Gardiner, "the ordinary meaning is not an element in treaty interpretation to be taken

57 ICSID Convention.

58 Vienna Convention on the Law of Treaties 1155 UNTS 331 (signed 23 May 1969, entered into force 27 January 1980).

59 Weeramantry, above n 55, at [7.04].

60 *Draft Articles on the Law of Treaties with Commentaries* [1996] vol 2 YILC 187 at 220. See also Weeramantry, above n 55, at [3.02]–[3.03].

61 Anthony Aust *Handbook of International Law* (2nd ed, Cambridge University Press, Cambridge (UK), 2010) at 89; and Weeramantry, above n 55, at [3.12].

62 Richard K Gardiner *Treaty Interpretation* (2nd ed, Oxford University Press, Oxford, 2015) at 141–142. See also *Draft Articles*, above n 60, at 220.

separately”[63] and the sense of equality of influence between these interpretive rules is enhanced by the fact they are placed in combination.[64]

For present purposes, the need to consider a treaty’s object and purpose is important, as this “adds a teleological element to the interpretation process” the role of which is “to shed light on the ordinary meaning of the terms subject to interpretation”.[65] While object and purpose should not be used as a device to allow “the general purpose of a treaty to override its text”,[66] arguably investment treaty tribunals have gone too far the other way by eschewing reliance upon object and purpose and focusing too heavily on ordinary meaning alone in interpreting the concept of the nationality of an “investor”.

To illustrate why the rationale for the literal approach to the nationality of investor is questionable, it is useful to pinpoint where the departure in reasoning occurs as between the literal “investor” cases and the substantive “investment” cases reviewed above.

First, in both cases, the treaty requires consideration of formal criteria. In the case of investment, treaties offer a non-exhaustive list of types of legal structures that will qualify as investments. But this does not exclude the substantive or material aspect—in the “investment” context, the “economic materialisation” of the investment as evidenced by an assessment of contribution, duration and risk.

As a result, for example, contractual rights to purchase coal were found not to be a substantive investment, despite technically meeting the common “contractual rights” criterion for an investment in the Canada–Venezuela BIT.[67] The same result was reached in *Romak SA (Switzerland) v Uzbekistan* in relation to contractual rights to shipments of wheat.[68]

Accordingly, the investment cases require that not only must the definition of investment be satisfied in a literal or technical sense—that is, a defined type of asset such as a contractual right—but also that the relevant property constitutes an investment in substantive economic terms.

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63 Gardiner, above n 62, at 181.

64 At 142 and 161–163. Similarly, the International Law Commission cautioned that the “ordinary meaning of a term is not to be determined in the abstract”: *Draft Articles*, above n 60, at 221.

65 Weeramantry, above n 55, at [3.70].

66 Gardiner, above n 62, at 211.

67 *Nova Scotia Power Inc (Canada) v Venezuela (Award)* ICSID ARB(AF)/11/1, 30 April 2014.

68 *Romak SA (Switzerland) v Uzbekistan (Award)* PCA AA280, 26 November 2009.

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In contradistinction, the literal cases regarding the nationality of an investor consider the relevant definition agreed by the parties and stop if the definition uses reasonable criteria, such as incorporation. They do not subject the *outcome of the application of the criteria* in the particular factual situation to any objective reasonableness test on the basis of the object and purpose of the Convention or treaty. By contrast, the "investment" cases take this additional step.

Secondly, the investment cases illustrate how substantive considerations can be imported into the ICSID Convention and to investment treaties despite their absence from the literal text of those instruments. Essentially, the *Salini* criteria are *implied* into the notion of investment. They constitute an arbitral gloss or refinement on the meaning of investment to define reasonable limits to that concept in the context of the object and purpose of the Convention or investment treaty. The gloss on the concept of "investment" is justified on the basis of an inherent or intrinsic meaning of the term "investment" as used in the instant treaty and in spite of the broad inclusive definitions employed by contracting states.

The literal nationality cases conclude that no additional qualifications can be read into the definition if the ordinary and natural meaning of the words used is clear. But there is no reason why substantive economic criteria that constitute a reality check on the nationality of a corporate investor cannot be implied into investment treaties in the same way as extra-treaty limits are recognised by tribunals in respect of the concept of investment. The ordinary meaning of express treaty words may be tempered by a treaty's object and purpose.

The tribunal in *Phoenix Action v The Czech Republic* described a "teleological test" to assess the substantive nature of an investment.[69] It determined that the interpretative principles in art 31(1)(a) of the Vienna Convention required a "*factual ... and contextual analysis of the existence of a protected investment*" and the Tribunal "must also take into consideration *the purpose of the international protection of the investment*".[70] It expressly acknowledged that reliance on the ordinary meaning of the definition of "investment" was insufficient to protect an economic operation which is:[71]

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69 Stern, above n 18, at 544–551. See also Utku Topcan "Abuse of the Right to Access ICSID Arbitration" (2014) 29 ICSID Rev 627 at 646.

70 *Phoenix Action*, above n 11, at [79] (emphasis in original).

71 At [79].

> … objectively an investment, but which is not a protected investment because, for one reason or another, it is not the purpose of the multilateral or bilateral treaty … to extend protection through international arbitration to such an investment.

Applying the same reasoning to the definition of a national of a particular state, compliance with the express nationality criteria in a treaty should not be accepted to transform a corporate entity into an "investor" if the result is contrary to the object and purpose of the treaty. Words can have an inherent meaning arising from the context in which they are used. That is why art 31(1) of the Vienna Convention requires context *and* the object and purpose of the treaty to be considered equally with ordinary meaning in the treaty interpretation process.

Therefore, a substantive approach to the claimed nationality of any particular investor could arise from the inherent meaning of "a national of another Contracting State" in art 25 of the ICSID Convention, or from the concepts of "national" and "investor" in an investment treaty.[72]

Thirdly, despite the global substantive approach to the concept of "investment", no concern is expressed in the relevant tribunal decisions about consequent uncertainty for investors or contracting states. To the contrary, any suggestion of a substantive approach to corporate nationality is routinely met by an argument that such an approach would result in unworkable uncertainty for investors and states alike. It is beyond the scope of this article to wrestle with the substance of an economic test for a bona fide investor.[73] But, it is notable that uncertainty has not proven to be an insurmountable or unworkable obstacle for putative investors and states so far as determining whether a particular economic activity amounts to an investment under the ICSID Convention and investment treaties even though extra-treaty criteria are applied to that concept.

72 This interpretative approach can apply equally to investments and investors in non-ICSID cases. For example, in the United Nations Commission on International Trade Law case *Romak SA*, above n 68, at [207], the Tribunal held that the term "investment" under the BIT has an inherent meaning irrespective of whether the ICSID Convention applies. This observation answers the concern expressed in *Rompetrol Group*, above n 32, at [105] that a substantive approach to nationality based on art 25 of the ICSID Convention would not apply to non-ICSID cases, leading to an arbitrary difference in jurisdiction *ratione personae* requirements.

73 See Foote, above n 4, in which the author proposes a substantive check on corporate nationality which focuses on the purpose for the inclusion of the claimant vehicle in the ownership structure of the relevant investment. Corporates without a commercial reason to exist other than to procure treaty coverage ought not be recognised as a protected investor, even if they meet the definition of "investor" in a literal sense. Such a test is reasonably certain for an investor because the commercial purpose of an entity is a matter which must fall within the knowledge of the claimant and its owners/controllers.

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So long as the economic test of substantive nationality is known to putative investors (and states) by way of investment treaty jurisprudence (a seminal *Salini*-type decision on the concept of corporate investor nationality is required here), then investors will know the likely test and, if necessary, take advice as to the likelihood that a particular corporate vehicle will be an investor that qualifies under any particular treaty. No substantive economic test can beget complete certainty, but that is in the nature of good faith interpretation of any treaty concept which must be undertaken giving equal weight to ordinary meaning, context, and object and purpose of the relevant instrument.

IV CONCLUDING REMARKS

The "investor" cases permit a corporate investor to present a nationality based on incorporation to meet a treaty definition of investor in a literal sense, even if the investor has no substantive connection with the state or the investment in an economic sense. There is no overlaid economic reality test applied to the concept of an investor's nationality as there is to the substance of an investment. The methodology adopted in respect of the concept of investment would reject a claim to nationality which otherwise met treaty criteria if the legal right to the claimed nationality is not supported in a substantive economic sense that accorded with the purpose of the ICSID Convention and/or the instant investment treaty.

It is curious and undesirable to have these two closely related concepts approached differently in jurisprudential terms. The interpretative techniques utilised should be the same for both concepts.

The substantive jurisprudential approach to the concept of an investment provides sufficiently certain outer limits to avoid abuse of the investment treaty system. Conversely, the literal approach to the concept of corporate nationality for investors abets treaty shopping to the extent where corporate entities with no real substance or economic reason for existence, other than procurement of treaty coverage, qualify as protected investors. While not the subject of this article, it is increasingly recognised by commentators that treaty shopping by use of corporate vehicles must be attenuated to ensure the credibility of

the investment treaty system.[74] The approach to the sister concept of "investment" in investment treaty law may show the way to achieve substantive economic interpretation of corporate investor nationality.

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74 See Yael Ribco Borman "Treaty Shopping through Corporate Restructuring of Investments: Legitimate Corporate Planning or Abuse of Rights?" (2011) 24 Hague YB Intl L 359; Valasek and Dumberry, above n 48; Feldman, above n 5; Tania Voon, Andrew Mitchell and James Munro "Legal Responses to Corporate Manoeuvring in International Investment Arbitration" (2014) 5 JIDS 41; Xiao-Jing Zhang "Proper Interpretation of Corporate Nationality under International Investment Law to Prevent Treaty Shopping" (2013) 6 Contemp Asia Arb J 49; Lee, above n 5; Javier García Olmedo "Claims by Dual Nationals under Investment Treaties: Are Investors Entitled to Sue Their Own States?" (2017) 8 JIDS 695; Duncan Watson and Tom Brebner "Nationality Planning and Abuse of Process: A Coherent Framework" (2018) 33 ICSID Rev 302; and Michalopoulos and Hicks, above n 48.