The ICSID Convention and Nationals of Another Contracting State that are Owned by Nationals of the Respondent State: Back to Basics

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RESUMO: O Tribunal CIRDI de Venoklim Holding B.V. *v.* República Bolivariana da Venezuela entendeu em sua sentença que o demandante, sediado na Holanda, não se qualificou como investidor estrangeiro segundo a Convenção CIRDI porque era de propriedade de cidadãos venezuelanos. Todavia, esse entendimento é contrário ao significado claro da Convenção CIRDI e vai de encontro à jurisprudência estabelecida sobre o assunto. Assim, o propósito do presente artigo é rever a Convenção CIRDI e a jurisprudência CIRDI relevante para demonstrar que a Venoklim Holding B.V. e todas as pessoas jurídicas que são de propriedade de cidadãos dos Estados demandados devem ser considerados investidores estrangeiros segundo a Convenção CIRDI sobre a qual um tribunal CIRDI tem jurisdição.

ABSTRACT: The ICSID tribunal in *Venoklim Holding B.V. v. the Bolivarian Republic of Venezuela* held in its award that the claimant, though incorporated in The Netherlands, did not qualify as a foreign investor under the ICSID Convention because it was owned by Venezuelan nationals. However, this holding is contrary to the plain meaning of the ICSID Convention and runs counter to established case law on the issue. Thus, the purpose of this article is to review the ICSID Convention and relevant ICSID jurisprudence to show that Venoklim Holding B.V. and all foreign juridical persons that are owned by nationals of the respondent State should be considered as foreign investors under the ICSID Convention over which an ICSID tribunal has jurisdiction.

SUMMARY: Introduction; Part I – The ICSID Convention; Part II – ICSID Case Law regarding Foreign Juridical Persons that are Owned by Nationals of the Respondent State or Other Third Party Nationals; Conclusion.

INTRODUCTION

On April 3, 2015, an arbitral tribunal composed of Yves Derains, Enrique Gòmez Pinzòn, and Rodrigo Oreamuno Blanco issued an award in *Venoklim Holding B.V. v. the Bolivarian Republic of Venezuela* under the auspices of the International Center for Settlement of Investment Disputes ("ICSID" or "Center"). The tribunal declared that it did not have jurisdiction over the claimant, Venoklim Holding B.V. ("Venoklim"), a company incorporated in The Netherlands, because it was controlled by Venezuelan nationals.

1 The views expressed in this article are personal to the author and do not necessarily reflect or represent the views of King & Spalding LLP or its clients.

Venoklim initiated the arbitration pursuant to Article 22 of the Venezuelan Law on the Promotion and Protection of Investments of October 3, 1999 ("Investments Law") after Venezuela allegedly expropriated the assets of five of its subsidiaries[2]. In accordance with Article 22 of the Investments Law, which refers to a treaty or agreement in force, regarding the promotion and protection of investments, between Venezuela and the international investor's country of origin, Venoklim also invoked the bilateral investment treaty between The Netherlands and Venezuela, and in particular Article 9, the dispute resolution clause[3], to secure the jurisdiction of ICSID and the tribunal[4]. Following an objection by the respondent, the tribunal confirmed that the treaty did not constitute, in the circumstances of the case, an independent source of jurisdiction that Venoklim could rely upon[5]. Rather, the claimant first had to show that it complied with the nationality requirements of the Investments Law in order to then benefit from Article 9 of the Netherlands-Venezuela bilateral investment treaty and secure the jurisdiction of ICSID and the tribunal[6].

Article 3(2) of the Investments Law defines "international investment" as an investment that it is owned or effectively controlled by foreign natural or juridical persons[7]. Article 3(4) defines "international investor" as the owner of an international investment or as the person who effectively controls it[8]. The tribunal only addressed "the effective control requirement" because the parties had focused their pleadings on that issue[9]. The tribunal found that Venoklim was the majority owner of the five Venezuelan companies that were the

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2 *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/22, Award, April 3, 2015, ¶¶ 7-8, 44. Article 22 of the Investments Law provides as follows: "Disputes that arise between an international investor, whose country of origin has a treaty or agreement in force with Venezuela regarding the promotion and protection of investments, or disputes in respect of which the provisions of the Convention Establishing the Multilateral Investment Guarantee Agency (OMGI – MIGA) or the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) are applicable, shall be submitted to international arbitration pursuant to the respective treaty or agreement, if it so provides, without prejudice to the possibility, where appropriate, of having recourse to litigation in accordance with the Venezuelan legislation that is in force" ("*Las controversias que surjan entre un inversionista internacional, cuyo país de origen tenga vigente con Venezuela un tratado o acuerdo sobre promoción y protección de inversiones, o las controversias respecto de las cuales sean aplicables las disposiciones del Convenio Constitutivo del Organismo Multilateral de Garantía de Inversiones (OMGI – MIGA) o del Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de Otros Estados (CIADI), serán sometidas al arbitraje internacional en los términos del respectivo tratado o acuerdo, si así éste lo establece, sin perjuicio de la posibilidad de hacer uso, cuando proceda, de las vías contenciosas contempladas en la legislación venezolana vigente*").

3 Article 9(1) of the bilateral investment treaty between The Netherlands and Venezuela provides as follows: "Disputes between one Contracting Party and a national of the other Contracting Party concerning an obligation of the former under this Agreement in relation to an investment of the latter, shall at the request of the national concerned be submitted to the International Center for Settlement of Investment Disputes, for settlement by arbitration [or] conciliation under the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington on 18 March 1965."

4 *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/22, Award, April 3, 2015, ¶¶ 119, 126.

5 *Id.* at ¶ 129.

6 *Id.*

7 *Id.* at ¶ 141: "*Artículo 3(2), Inversión internacional: La inversión que es propiedad de, o que es efectivamente controlada por personas naturales o jurídicas extranjeras*."

8 *Id.*: "*Artículo 3(4), Inversionista internacional: El propietario de una inversión internacional, o quien efectivamente la controle*."

9 *Id.* at ¶ 142.

subject of the dispute[10]. But the tribunal concluded that the claimant was not an "international investor" in accordance with Article 3(4) of the Investments Law because it did not effectively control the five Venezuelan companies, Venoklim being controlled by a Venezuelan company that itself was owned by Venezuelan nationals[11].

Since Venoklim did not meet the nationality requirements of the Investments Law, the tribunal ruled that it was not entitled to invoke Article 9 of the Netherlands-Venezuela bilateral investment treaty to secure the jurisdiction of ICSID and the tribunal[12]. The tribunal ultimately declined jurisdiction over the claimant[13].

The tribunal then proceeded to discuss Article 25 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention"), which addresses the jurisdiction of ICSID tribunals. The tribunal noted that the guiding principle of ICSID *ratione personae* jurisdiction was to avoid having nationals acting against their own States while ensuring that nationals of the host State that are controlled by foreign entities could benefit from the ICSID dispute resolution mechanism[14]. The tribunal concluded that it would be contrary to the object and purpose of the ICSID Convention to consider Venoklim's investment at issue in the dispute as a foreign investment only because the claimant was incorporated in The Netherlands, when in reality that investment belonged to Venezuelan juridical persons[15].

Even though the tribunal's statement regarding the nature of Venoklim's investment appears to be *obiter dicta*, it is nevertheless contrary to the plain meaning of the ICSID Convention and runs counter to established case law on the subject. Thus, the purpose of this article is to review the ICSID Convention (Part I) and the relevant jurisprudence (Part II) to argue that, under the ICSID Convention, Venoklim, together will all foreign juridical persons that are owned by nationals of the respondent State, are undoubtedly foreign investors over which an ICSID tribunal would have jurisdiction. It is especially important to clarify this issue so that investors are made aware of the rules and can, accordingly, structure their investments prior to investing in the host State such that recourse to ICSID arbitration is available in the event of a dispute with the host State.

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10 *Id.* at ¶ 147.
11 *Id.* at ¶ 148.
12 *Id.* at ¶¶ 148-149.
13 *Id.* at ¶ 150.
14 *Id.* at ¶ 154: "*Para el Tribunal, es evidente que el principio rector de la jurisdicción* ratione personae *del CIADI, en lo que concierne al inversionista, busca evitar que nacionales actúen contra sus propios Estados y busca permitir que personas jurídicas nacionales controladas por extranjeros tengan la oportunidad de arbitrar sus controversias ante esa jurisdicción*."
15 *Id.* at ¶ 156: "*Pretender que se considere como una inversión extranjera la efectuada por Venoklim por el solo hecho de ser esta una compañía incorporada en los Paises Bajos, aunque la inversión objeto de la disputa sea en definitiva propiedad de personas jurídicas venezolanas, sería permitir que prevalezca el formalismo sobre la realidad y traicionar el objeto y el fin del Convenio CIADI*."

PART I: THE ICSID CONVENTION

The 1965 ICSID Convention is an international agreement concluded between States in written form and governed by international law. Although the Vienna Convention on the Law of Treaties ("Vienna Convention") was concluded four years after, on May 23, 1969, it has been persuasively demonstrated that its provisions on interpretation of treaties reflect customary international law, and are therefore applicable to treaties concluded before, such as the ICSID Convention[16].

The Vienna Convention contains, at Article 31, a general rule of interpretation of treaties that the International Court of Justice has recognized as reflecting customary international law[17]. Article 31(1) 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"[18]. Article 31(2) further provides that "[t]he context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; and (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty"[19].

According to the International Law Commission, the different elements set out in Article 31 must be considered together to arrive at the legally relevant interpretation[20]. The guiding principle of Article 31 is that the text of the particular treaty to be interpreted "must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties"[21].

Article 32 of the Vienna Convention states that supplementary means of interpretation, such as a treaty's preparatory work and the circumstances of

16 *See* Barton Legum and Caline Mouawad, "The meaning of 'investment' in the ICSID Convention," in Pieter Bekker, Rudolf Dolzer & Michael Waibel, eds., *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts* (Cambridge University Press, 2010) 326, 333-335.

17 *See*, *e.g.*, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, 109-110 (¶ 160).

18 Vienna Convention, Art. 31(1).

19 *Id.* at Art. 31(2). The rest of Article 31 provides as follows: "(3) There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) Any relevant rules of international law applicable in the relations between the parties. (4) A special meaning shall be given to a term if it is established that the parties so intended."

20 International Law Commission, Draft Articles on the Law of Treaties with commentaries, *Yearbook of the International Law Commission, 1996*, Vol. II, 187 at 219-220 (¶ (8)): "All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation."

21 *Id.* at 220 (¶ (11)).

its conclusion, may be used only "to confirm the meaning resulting from the application of [A]rticle 31, or to determine the meaning when the interpretation according to [A]rticle 31: (a) [l]eaves the meaning ambiguous or obscure; or (b) [l]eads to a result which is manifestly absurd or unreasonable"[22].

It is on the basis of these principles that we proceed to interpret Article 25 of the ICSID Convention, which addresses the jurisdiction of ICSID tribunals.

Article 25(1) of the ICSID Convention provides that an ICSID tribunal has jurisdiction over any legal dispute arising directly out of an investment between a Contracting State and a national of another Contracting State[23]. The ICSID Convention defines "national of another Contracting State" as, *inter alia*, "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"[24]. The ICSID Convention does not specify how to determine a juridical person's nationality.

The key terms of Article 25 for the purposes of this analysis are "national of another Contracting State" and the definition of that expression in respect of juridical persons, which is set out in Article 25(2)(b). Upon reviewing Article 25 of the ICSID Convention, it appears that the ordinary meaning of "national of another Contracting State" in respect of juridical persons corresponds to precisely that which is specified in the first limb of Article 25(2)(b), namely that a national of another Contracting State means a juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date of consent. Article 25 does not indicate that the nationality of the juridical person's owner should be considered to determine whether that juridical person qualifies as a "national of another Contracting State".

Christoph Schreuer appears to agree with that proposition. In his treatise on the ICSID Convention, he too interpreted Article 25(2)(b) and held that the control test – the practice of piercing the corporate veil and looking at the natio-

22 Vienna Convention, Art. 32.

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

24 *Id.* at Art. 25(2)(b). This article will not be dealing with juridical persons which have the nationality of the Contracting State party to the dispute. Thus, any subsequent reference in this article to a juridical person should be understood to mean a juridical person which has the nationality of a Contracting State other than the State party to the dispute.

nality of the controlling interest, notably that of the shareholders[25], could not be used to determine the nationality of a "national of another Contracting State"[26]. Professor Schreuer based his analysis on the second limb of Article 25(2)(b) and argued that because the exception to host State nationality was based on the control test, host State nationality itself, and by extension the nationality of a national of another Contracting State, could not be[27]. Thus, Professor Schreuer's analysis supports the contention that, under the ICSID Convention, the nationality of a juridical person's owner is not relevant to determining whether that juridical person qualifies as a national of another Contracting State.

The preamble of the ICSID Convention, which contains a statement of the object and purpose of the treaty[28], cites the expression "Contracting States and nationals of other Contracting States" twice[29]. However, the preamble does not shed any light on how "nationals of other Contracting States" should be interpreted. Moreover, the preamble does not allude to the possibility that a national of another Contracting State that is owned by a national of the Contracting State in relation to which there is a dispute (*i.e.*, the respondent State), would somehow be excluded from the dispute settlement mechanism implemented by the ICSID Convention.

The Report of the Executive Directors on the ICSID Convention ("Report of the Executive Directors"), which can be interpreted as being part of the context of the ICSID Convention[30], does not provide any further indications on this issue. It states that "[f]or a dispute to be within the jurisdiction of the Centre one of the parties must be a Contracting State [...] and the other party must be a 'national of another Contracting State'"[31]. The Report of the Executive Directors does not comment on the first limb of Article 25(2)(b) of the ICSID Convention. It simply notes that the definition of "national of another Contracting State" in respect of juridical persons is more flexible than in respect of natural persons

25 Christoph H. Schreuer, *The ICSID Convention: A Commentary*, 2nd edition (Cambridge University Press, 2009) p. 279, ¶ 694.

26 *Id.* at p. 279, ¶ 697.

27 *Id.* at p. 280, ¶ 697: "By relying on control for the exception to host State nationality, the provision implies that host State nationality is not based on control. Therefore, it is clear that the control test cannot be applied to explain the word 'nationality' in the second clause of Art. 25(2)(b). It is unlikely that the word 'nationality' used earlier on in the same sentence in a more general context has a different meaning. It is improbable that the nationality of a Contracting State other than the host State should be determined differently from nationality of the host State. Practice does not demonstrate any convincing reasons to the contrary. Therefore it must be assumed that the word appearing twice in the same sentence has the same meaning in both instances."

28 In accordance with the Vienna Convention, the International Court of Justice has often relied on a treaty's preamble, which normally contains a statement of that treaty's object and purpose, to interpret a specific provision of the treaty. *See*, *e.g.*, *Case concerning rights of nationals of the United States of America in Morocco*, Judgment of August 27th, 1952, I.C.J. Reports 1952, p. 176, 197-198.

29 *See* "Bearing in mind the possibility that from time to time disputes may arise in connection with such investment between Contracting States and nationals of other Contracting States;" and "Attaching particular importance to the availability of facilities for international conciliation or arbitration to which Contracting States and nationals of other Contracting States may submit such disputes if they so desire;" (emphasis in original).

30 *See* Barton Legum and William Kirtley, "The Status of the Report of the Executive Directors on the ICSID Convention" (2012), 27 ICSID Review – Foreign Investment Law Journal 159.

31 Report of the Executive Directors on the ICSID Convention, March 18, 1965, ¶ 28.

because juridical persons that are nationals of the respondent State can still qualify as "nationals of another Contracting State"[32].

Thus, in accordance with the general rule of interpretation of treaties as set out at Article 31 of the Vienna Convention, which presumes that the text of the treaty is the "authentic expression of the intentions of the parties", the expression "national of another Contracting State" simply means, in respect of juridical persons, juridical persons that have the nationality of a Contracting State other than the State party to the dispute. There is neither indication in the ICSID Convention nor in the treaty's context, object, and purpose that the nationality of the owner of a juridical person is material to assessing whether that juridical person qualifies as a "national of another Contracting State".

As noted above, Article 32 of the Vienna Convention provides that recourse can be filed to a treaty's preparatory work to confirm the meaning of a provision that was determined by applying the interpretation rule of Article 31. The *travaux préparatoires* of the ICSID Convention show that the drafters' intention regarding the ICSID Convention and the issue of nationality was for the instrument to be as broad and as flexible as possible to grant Contracting States the freedom to determine, in their own investment agreements and bilateral investment treaties, more specific nationality criteria. This confirms the validity of the simple interpretation of "national of another Contracting State" outlined in the preceding paragraph.

Article X of the Preliminary Draft of the ICSID Convention provided several specific definitions for the expression "nationals of a Contracting State":

> Article X
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> 1. "National of a Contracting State" means a person natural or juridical possessing the nationality of any Contracting State on the date on which that person's consent to the jurisdiction of the Center pursuant to Section 2 of Article II became effective, and includes (a) any company which under the domestic law of that State is its national, and (b) any company in which the nationals of that State have a controlling interest. "Company" includes any association of natural or juridical persons, whether or not such association is recognized by the domestic law of the Contracting State concerned as having juridical personality.
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> 2. "National of another Contracting State" means any national of a Contracting State other than the State party to the dispute, notwithstanding that such person may possess concurrently the nationality of a State not party to this Convention or of the State party to the dispute.[33]

Despite these definitions, Aron Broches, the General Counsel of the International Bank for Reconstruction and Development who spearheaded the

32 *Id.* at ¶ 30.

33 History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the ICSID Convention, Volume I (ICSID Publication, 1970) p. 122.

ICSID Convention, noted that "the aim had been to leave the Contracting States maximum freedom to decide that a person was to be regarded as foreign, if he had multiple nationality, even if one nationality were that of the State in question, so that the Convention would make such an agreement effective"[34]. This objective of maximum freedom for Contracting States led Mr. Broches to consider removing the definitions from Article X altogether:

> At all four consultative meetings Article X gave rise to considerable confusion and on reflection it would appear that the terms "national of a Contracting State" and "national of another Contracting State" may be used without further elaboration in the Convention and consequently that the definitions in Article X could be deleted without serious disadvantage. Each State may be relied upon to ascertain to its own satisfaction whether an individual or association of individuals (incorporated or unincorporated) is (a) one which from a legal and practical point of view is capable of assuming and discharging contractual obligations and (b) one which should be treated as a national of another Contracting State. In this way the element of freedom of contract obviates the need to law down in the Convention detailed rules for treatment of problems like dual nationality, nationalities of convenience, effective nationality, minority shareholders nationality, etc.[35]

The definitions in Article X were ultimately removed in the subsequent iterations of the ICSID Convention[36]. The evolution of the various drafts of the Convention thus established the drafters' intention to adopt the simplest

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34 Settlement of Investment Disputes, Consultative Meeting of Legal Experts, Santiago, Chile, February 3-7, 1964, Summary Record of Proceedings, June 12, 1964, Third Session, p. 25, *in* History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the ICSID Convention, Volume II-1 (ICSID Publication, 2001) p. 324. See also Settlement of Investment Disputes, Consultative Meeting of Legal Experts, Bangkok, Thailand, April 27-May 1, 1964, Summary Record of Proceedings, July 20, 1964, Fourth Session, p. 80: "As to the more general observations regarding the definitions [of Article X], it was necessary to bear in mind the essential flexibility provided through the consensual character of recourse to the Center. It was always open to a State to choose which investors it would regard as foreign for the purpose of conferring on them the capacity to institute proceedings before the Center" *in* History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the ICSID Convention, Volume II-1 (ICSID Publication, 2001) p. 539.

35 Regional Consultative Meetings of Legal Experts on Settlement of Investment Disputes, Chairman's Report on Issues Raised and Suggestions Made With Respect to the Preliminary Draft of a Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, July 9, 1964, ¶ 113, *in* History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the ICSID Convention, Volume II-1 (ICSID Publication, 2001) pp. 581-582.

36 *See* First Draft of the ICSID Convention, Art. 30: "For the purpose of this Chapter [...] (iii) "national of another Contracting State" means (a) any natural person who possessed the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to jurisdiction of the Center in respect of that dispute as well as on the date on which proceedings were instituted pursuant to this Convention; and (b) any juridical person which possessed the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to the jurisdiction of the Center in respect of that dispute, and any juridical person which the parties have agreed shall be treated as a "national of another Contracting State" and Revised Draft of the ICSID Convention, Art. 28: "For the purpose of this Convention 'national of another Contracting State' means: (a) any natural person who 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 as well as on the date on which the request was registered in accordance with the provisions of paragraph (3) of Article 29 or paragraph (3) of Article 37, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and (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

definition possible for the expression "national of another Contracting State". For example, a proposal by the United States to reintroduce the "controlling interest" criterion in the definition of "national of another Contracting State" at Article 30 of the First Draft of the ICSID Convention was soundly defeated[37]. Mr. Broches' willingness to avoid having to address specific nationality issues within the Convention is also noteworthy.

The *travaux préparatoires* of the ICSID Convention also confirm that the legal experts that reviewed the early drafts of the Convention were not concerned about the owners of foreign juridical persons. Instead, the debate regarding nationality at the regional consultative meetings focused on natural persons who had dual nationality and on juridical persons who were incorporated in the host State but controlled by nationals of another Contracting State[38]. Only on one occasion during these meetings did a legal expert argue that it would be necessary to pierce the corporate veil to ascertain the identity of the real owners of a given investment. However, Mr. Broches dismissed that suggestion as being too complicated to implement:

> Mr. Gould (South Africa) said that it was necessary to look behind the corporate veil to the shareholders or physical persons affected by adverse action. If that could be done the difficulties raised by such questions as the nationality of the Company and problems created by the existence of holding Companies, nominees, voting arrangements, trusts and various forms of disguised ownership would be eliminated. Careful investigation would be necessary, but in his view that was the only way to afford full protection to the individual foreign persons who had real patrimonial interests in the host country. The suggestion put forward by the representative of Germany that any company recognized by another Contracting State as its national should be acceptable would open the door to abuses and allow nationals of non-contracting States to benefit by the protection afforded by the Convention. With regard to the definition of a "controlling interest", owing to the different classes of shares, with and without voting powers, control defined in terms of shareholders representing 51 per cent of the voting power was an artificial conception; that control could in fact be acquired by persons holding only 25 per cent of the Company's capital.

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of another Contracting State for the purposes of this Convention" *in* History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the ICSID Convention, Volume I (ICSID Publication, 1970) p. 124.

37 The United States suggested adding the following language to the definition of "national of another Contracting State" at Article 30 of the First Draft of the ICSID Convention: "'national of another Contracting State' means [...] and any other juridical person in which the controlling interest on said date is directly or indirectly in the nationals of a Contracting State other than the State party to the dispute, or in such Contracting State itself". That proposal was defeated by a majority of 25 to 7 at a Legal Committee Meeting. *See* History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the ICSID Convention, Volume II-2 (ICSID Publication, 1968) pp. 837, 871.

38 *See* Settlement of Investment Disputes, Consultative Meeting of Legal Experts, Santiago, Chile, February 3-7, 1964, Summary Record of Proceedings, June 12, 1964, Eighth Session, p. 60: "The Chairman stated that, as had been borne out by the discussion at earlier sessions, the main issue raised by Article X was that of dual nationality, this form being used in the sense of two nationalities, one of which was that of the host State" *in* History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the ICSID Convention, Volume II-1 (ICSID Publication, 2001) p. 359.

> The Chairman feared that the suggestion made by the representative of South Africa would involve an immense amount of investigation in each case and be unduly complicated. He felt that it should be left to the State concerned to carry out at the time of signing the agreement whatever investigations it felt to be necessary. It also had to be remembered that the Convention was based on consent and that the purpose of the definition was to establish the outer limits within which this consent could be exercised.[39]

Mr. Broches' response to Mr. Gould's comment is proof that the drafters of the ICSID Convention never intended to include a cumbersome definition of nationality that involved piercing the corporate veil of juridical persons. Rather, Mr. Broches noted that the definition of nationality in the ICSID Convention was meant to act as the "outer limits" within which consent could be exercised, *i.e.*, the bare minimum requirements that a claimant needed to meet in order to be considered to be within the jurisdiction of the Center[40]. That bare minimum requirement, in respect of nationality, is being "a national of another Contracting State".

Therefore, the *travaux préparatoires* of the ICSID Convention confirm the interpretation of "national of another Contracting State" arrived at by applying the general rule of interpretation of treaties of Article 31 of the Vienna Convention. In respect of juridical persons, the expression simply refers to juridical persons that have the nationality of a Contracting State other than the State party to the dispute. The nationality of the owner of that juridical person is not material to determining whether it is or is not a national of another Contracting State, and thus whether the Center has jurisdiction over that juridical person.

Mr. Broches' lectures at the Hague Academy of International Law on the ICSID Convention confirm that conclusion. He noted that juridical persons that had the nationality of a Contracting State other than the State party to the dispute on the relevant date met the nationality criterion of the ICSID Convention[41]. He did not mention that there existed an exception to that rule in the event that the juridical person's owner was a national of the State party to the dispute. Mr. Broches also referred to the definitions relating to "nationals of a Contracting State" that were included in Article X of the Preliminary Draft, and the criticism

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39 *See* Settlement of Investment Disputes, Consultative Meeting of Legal Experts, Geneva, February 17-22, 1964, Summary Record of Proceedings, June 1, 1964, Eighth Session, pp. 79-80, *in* History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the ICSID Convention, Volume II-1 (ICSID Publication, 2001) pp. 447-448.

40 *See* Aron Broches, "The Convention on the Settlement of Investment Disputes between States and Nationals of Other States" (1972-II), 136 Recueil des Cours – Collected Courses of The Hague Academy of International Law 331, 351: "The drafters nevertheless decided to speak of jurisdiction of the Centre as a convenient expression to indicate the scope of the Convention, or to put it differently, to indicate the outer limits within which the Centre, as the administrative organ for the implementation of the Convention, can act" and 360-361: "The purpose of [Article 25(2)(b)], as well as of Article 25(1), 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 parties thereto."

41 *Id.* at 358.

that was leveled at those definitions by the legal experts that reviewed the early drafts of the Convention[42]. Finally, Mr. Broches recounted the drafters' ultimate decision to abandon any attempt at defining the expression, preferring instead "to give the greatest possible latitude to the parties to decide under what circumstances a company could be treated as a 'national of another Contracting State'"[43].

Mr. Broches' lectures make clear that the ICSID Convention, in and of itself, provides simply that a "national of another Contracting State" is, regarding juridical persons, a juridical person that has the nationality of a Contracting State other than the State party to the dispute. Parties are of course entitled to make additional stipulations regarding nationality in an arbitration agreement or bilateral investment treaty[44], and such stipulations may even include taking into account the nationality of the owner of the juridical person that initiated the dispute. But that is certainly not a criterion as far as the ICSID Convention is concerned, a fact that is reaffirmed many times over by ICSID case law.

PART II: ICSID CASE LAW REGARDING FOREIGN JURIDICAL PERSONS THAT ARE OWNED BY NATIONALS OF THE RESPONDENT STATE OR OTHER THIRD PARTY NATIONALS

Every single ICSID arbitral tribunal, with the exception of the *Venoklim Holding B.V. v. the Bolivarian Republic of Venezuela* tribunal[45], that has addressed the issue of a claimant that is a national of another Contracting State, but that is owned by nationals of the respondent State or other third party nationals, has found that it had jurisdiction over that claimant. That pattern strongly implies that the ICSID Convention is not concerned with the nationality of the claimant's owner.

Four ICSID tribunals found, in circumstances where the claimant's owner was a national of the respondent State, that the claimant's nationality should be determined only on the basis of the requirements of the relevant BIT, with no regard for the nationality of the claimant's owner. In those four cases, the tribunals held that they had jurisdiction over the claimant and its dispute.

In *Longreef v. Venezuela*, the respondent contended that the claimant, though duly incorporated in The Netherlands, was in fact a shell company that belonged to Venezuelan nationals and that should accordingly be denied

42 *Id.* at 359-360.

43 *Id.* at 360. Mr. Broches notes, however, that the ICSID Convention implicitly assumes that incorporation is a criterion of nationality.

44 *Id.* at 361: "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 should be accepted."

45 The only other exception appears to be Prosper Weil's dissent to the arbitral tribunal's April 29, 2004 decision on jurisdiction in the *Tokios Tokeles v. Ukraine* case (ICSID Case No. ARB/02/18).

jurisdiction[46]. The tribunal rejected the respondent's contention, holding that the claimant's nationality should be ascertained only on the basis of the Netherlands-Venezuela BIT[47]. That treaty defines investors, *inter alia*, as juridical persons duly incorporated in accordance with the laws of one of the Contracting Parties[48]. The claimant was duly incorporated in The Netherlands and, therefore, satisfied the BIT's definition of an investor[49]. In the circumstances of the case, the tribunal did not find any good reason to pierce the corporate veil, and concluded that Longreef was a protected investor under the BIT[50].

In *KT Asia v. Kazakhstan*, the respondent contended that the claimant, though duly incorporated in The Netherlands, was ultimately owned by a Kazakh national and should accordingly be denied jurisdiction[51]. The tribunal rejected the respondent's contention by relying on the same reasoning as the *Longreef* tribunal, namely that the claimant's nationality should be determined only on the basis of the applicable BIT[52]. It concluded that the claimant should be deemed a Dutch national for the purposes of jurisdiction in the arbitration[53].

In *Rompetrol v. Romania*, the respondent contended that the tribunal should deny jurisdiction over the claimant because even though it was duly incorporated in The Netherlands, the claimant's "real and effective" nationality was Romanian[54]. The tribunal rejected the respondent's contention by relying on the same reasoning as the *Longreef* tribunal[55]. In particular, the tribunal held that "there is no room for an argument that a supposed rule of 'real and effective' nationality should override either the permissive terms of Article 25 of the ICSID Convention or the prescriptive definitions incorporated in the BIT"[56]. The tribunal concluded that the claimant was a Dutch national in accordance with the terms of the Netherlands-Romania BIT[57], and that as a result the tribunal had jurisdiction over its claims[58].

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46 *Longreef A.V.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/5, Decision on Jurisdiction, February 12, 2014, ¶ 199.
47 *Id.* at ¶ 202.
48 *Id.* at ¶¶ 203-204. Article 1(b)(ii) of the Netherlands-Venezuela BIT provides: "*El término "nacionales" comprenderá, en relación a cualquiera de las Partes Contratantes [...] personas jurídicas constituidas bajo las leyes de dicha Parte Contratante*" (The term "nationals" shall comprise with regard to either Contracting Party [...] legal persons constituted under the law of that Contracting Party).
49 *Id.* at ¶¶ 203-206.
50 *Id.* at ¶ 229.
51 *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, October 17, 2013, ¶¶ 110-111.
52 *Id.* at ¶¶ 112-116.
53 *Id.* at ¶ 139. Article 1(b)(ii) of the Netherlands-Kazakhstan BIT provides: "The term 'nationals' shall comprise with regard to either Contracting Party [...] legal persons constituted under the law of that Contracting Party."
54 *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, April 18, 2008, ¶ 78.
55 *Id.* at ¶¶ 79-83.
56 *Id.* at ¶ 93.
57 Article 1(b)(ii) of the Netherlands-Romania BIT provides: "The term "investors" shall comprise with regard to either Contracting Party [...] legal persons constituted under the law of that Contracting Party."
58 *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, April 18, 2008, ¶ 110.

In *Tokios Tokeles v. Ukraine*, the respondent contended that the claimant, though a legally established entity under the laws of Lithuania, was in fact owned and controlled predominantly by Ukrainian nationals, and should as a result be denied jurisdiction[59]. The tribunal rejected the respondent's contention by relying on the same reasoning as the *Longreef* tribunal[60]. It found that the claimant qualified as an investor under the Lithuania-Ukraine BIT[61], and as a national of another Contracting State under the ICSID Convention[62], and that the tribunal accordingly had jurisdiction over its claims.

In addition to those four cases, three other ICSID tribunals found that they had *ratione personae* jurisdiction over a claimant whose ultimate owner was a national of the respondent State simply because that claimant met the criteria established under Article 25(2)(b) of the ICSID Convention.

In *Burimi SRL et al. v. Albania*, the respondent contended that the claimant Burimi, though incorporated in Italy, was in fact majority owned by an Albanian national and should accordingly be denied jurisdiction[63]. The tribunal rejected the respondent's argument, finding that Burimi met the definition of "national of another Contracting State" under Article 25(2)(b) of the ICSID Convention, in that it was a juridical person with the nationality of a Contracting State (Italy) other than the State party to the dispute (Albania)[64]. The tribunal concluded that it had jurisdiction *ratione personae* with respect to Burimi's claims[65].

In *H&H v. Egypt*, the respondent contended that the claimant company, though duly incorporated in California, was nonetheless under the control of an Egyptian national and should thus be denied jurisdiction[66]. The tribunal rejected the respondent's contention, finding that the claimant was a legal entity incorporated in California and that, as a result, it fulfilled the objective criteria for *ratione personae* jurisdiction under Article 25(2)(b) of the ICSID Convention, as well as under the relevant BIT[67]. Moreover, the tribunal held that there was no reason in the circumstances to pierce the corporate veil or disregard the

59 *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, April 29, 2004, ¶ 21.
60 *Id.* at ¶¶ 24-26.
61 *Id.* at ¶¶ 28, 38. Article 1(2)(b) of the Lithuania-Ukraine BIT defines the term "investor" as "any entity established in the territory of the Republic of Lithuania in conformity with its laws and regulations".
62 *Id.* at ¶ 71.
63 *Burimi SRL and Eagle Games SH.A v. Republic of Albania*, ICSID Case No. ARB/11/18, Award, May 29, 2013, ¶¶ 125-127.
64 *Id.* at ¶ 130.
65 *Id.* at ¶ 133. Although the *Burimi* tribunal does not appear to have relied on the Italy-Albania BIT in its reasoning, Article 1(2) of the treaty defines "juridical person", for either Contracting Party, "as any entity having its registered office ["*sede legale*"] in its territory and that was recognized by that Contracting Party, according to its laws, as a juridical person, company or enterprise, regardless of whether the liability is limited or not".
66 *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15, The Tribunal's Decision on Respondent's Objections to Jurisdiction, June 5, 2012, ¶ 61.
67 *Id.* at ¶ 68.

claimant's nationality[68]. The tribunal concluded that it had jurisdiction over the claimant[69].

Finally, in *Champion Trading v. Egypt,* the tribunal held that it had jurisdiction over the two corporate claimants, Champion Trading Company and Ameritrade International Inc., because both were incorporated in Delaware and thus qualified as juridical persons which had the nationality of a Contracting State other than the State party to the dispute under Article 25(2)(b) of the ICSID Convention[70]. The tribunal disregarded the fact that the claimants were both wholly owned by American-Egyptian dual nationals[71].

Thus, in at least seven ICSID cases, an arbitral tribunal held that it had jurisdiction over a claimant whose owner was a national of the respondent State (or was a dual national)[72]. Moreover, five other ICSID tribunals declined to pierce the corporate veil and consider the nationality of the claimant's owner when doing so would have otherwise resulted in a finding of no jurisdiction[73].

The *Swisslion v. Macedonia* case was brought under the Switzerland--Macedonia BIT[74]. The respondent contended that the claimant, a company established in Macedonia, was not under the control of a Swiss entity (DRD Swisslion) but under the control of a Serbian national (Mr. Draskovic), and accordingly lacked jurisdiction *ratione personae*[75]. The tribunal rejected the respondent's contention, finding that the claimant was a Swiss investor in Macedonia because it met the nationality requirements under both the BIT and the ICSID Convention, "whatever the nationality of the ultimate owner of

68 *Id.*

69 Although the *H&H* tribunal does not appear to have relied on the US-Egypt BIT in its reasoning, Article I(1)(b) of the treaty defines "company of a party" as "a company duly incorporated, constituted or otherwise duly organized under the applicable laws and regulations of a Party or its political subdivisions in which (i) natural persons who are nationals of such Party, or (ii) such Party or its subdivisions or its agencies or instrumentalities have a substantial interest".

70 *Champion Trading Company et al. v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Decision on Jurisdiction, October 21, 2003, ¶¶ 3.4.2.2-3.4.2.3, 3.4.2.7.

71 *Id.* at ¶¶ 3.4.2.5-3.4.2.6. Although the *Champion Trading* tribunal does not appear to have relied on the US-Egypt BIT in its reasoning, Article I(1)(b) of the treaty defines "company of a party" as "a company duly incorporated, constituted or otherwise duly organized under the applicable laws and regulations of a Party or its political subdivisions in which (i) natural persons who are nationals of such Party, or (ii) such Party or its subdivisions or its agencies or instrumentalities have a substantial interest".

72 *See also Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Respondent's Objections to Jurisdiction, June 29, 1999. The respondent objected to the tribunal's jurisdiction because the claimant, an English company, was owned by an Egyptian national. But the respondent objected on the basis of the UK-Egypt BIT, and not the ICSID Convention. Although the tribunal dismissed the respondent's objection, it did not address the issue, under the ICSID Convention, of a claimant's owner being a national of the respondent State.

73 *See also Hussein N. Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Award, July 7, 2004. The dispute was brought under the Italy-UAE BIT. The respondent objected to the tribunal's jurisdiction because it contended that the claimant was Canadian, not Italian. Although the tribunal ultimately agreed with the respondent that the claimant was Canadian, and thus held that it did not have jurisdiction, it noted that "had Mr. Soufraki contracted with the United Arab Emirates through a corporate vehicle incorporated in Italy, rather than contracting in his personal capacity, no problem of jurisdiction would now arise" (¶ 83).

74 *Swisslion DOO Skopje v. FYR Macedonia*, ICSID Case No. ARB/09/16, Award, July 6, 2012, ¶ 1.

75 *Id.* at ¶ 127.

DRD Swisslion may be"[76]. The tribunal concluded that it had *ratione personae* jurisdiction over the claimant.

In *Rumeli v. Kazakhstan*, the respondent contended that the claimant companies were empty shells under the control of the Turkish State and that, as a result, they should be denied jurisdiction[77]. The tribunal dismissed the respondent's contention, finding that there was no basis to pierce the corporate veil either under the Turkey-Kazakhstan BIT or international law[78]. It recalled that "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"[79]. The tribunal concluded that this was not the case here, and that it had jurisdiction[80].

The *ADC v. Hungary* case was brought under the Cyprus-Hungary BIT[81]. The respondent contended that the claimant companies, though incorporated in Cyprus, were actually shell companies controlled by Canadian investors and thus did not meet the nationality requirement of the ICSID Convention[82]. The tribunal rejected the respondent's contention, finding that the claimants met the nationality requirements under the BIT and the ICSID Convention ("the matter of nationality is settled unambiguously by the Convention and the BIT")[83]. The tribunal also dismissed the respondent's request to pierce the corporate veil holding, like the *Rumeli* tribunal, that there were no circumstances in the case that warranted doing so[84]. It concluded that it had jurisdiction over the claimants' claims[85].

The *Aguas del Tunari v. Bolivia* case was brought under the Netherlands--Bolivia BIT[86]. The respondent argued that the claimant was ultimately controlled by a US company, not Dutch companies, and thus should be denied jurisdiction[87]. The tribunal refused to pierce the corporate veil in the case

76 *Id.* at ¶ 132. Article 2(2)(c) of the Switzerland-Macedonia BIT provides that: "the term 'investor' shall refer with regard to either Contracting Party to [...] juridical persons not established under the law of that Contracting Party: (i) in which more than 50 per cent of the equity interest is beneficially owned by persons of that Contracting Party; or (ii) in relation to which persons of that Contracting Party have the power to name a majority of its directors or otherwise legally direct its actions".

77 *Rumeli Telekom A.S. et al. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, July 29, 2008, ¶ 324.

78 *Id*. at ¶¶ 326, 328. Article I(1)(b) of the Turkey-Kazakhstan BIT provides that: "the term 'investor' means [...] corporations, firms or business associations incorporated or constituted under the law in force of either of the Parties and having their headquarters in the territory of that Party".

79 *Id*. at ¶ 328.

80 *Id*. at ¶¶ 328, 331.

81 *ADC Affiliate Limited et al. v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, October 2, 2006, ¶ 11.

82 *Id.* at ¶¶ 334-335.

83 *Id.* at ¶¶ 354, 357. Article 1(3)(b) of the Cyprus-Hungary provides that: "the term 'investor' shall comprise with regard to either Contracting Party [...] legal persons constituted or incorporated in compliance with the law of that Contracting Party who, in compliance with this Agreement are making investments in the territory of the other Contracting Party".

84 *Id.* at ¶ 358.

85 *Id.* at ¶ 364.

86 *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, October 21, 2005, ¶ 3.

87 *Id.* at ¶ 207.

because the respondent had not adduced any evidence of fraud[88]. The tribunal was satisfied that the claimant was indirectly controlled by Dutch companies, thus meeting the nationality requirements of the BIT and the ICSID Convention[89].

In *Aucoven v. Venezuela*, the parties' consent to ICSID jurisdiction was conditional upon the transfer of the majority of Aucoven's shares to a national of another Contracting State of the ICSID Convention[90]. In August 1998, 75% of Aucoven's shares were transferred to Icatech, a company that was incorporated in Florida and a national of another Contracting State (the United States is a Contracting State)[91]. But the respondent objected to the tribunal's jurisdiction, contending that although the majority of Aucoven's shares had been transferred to Icatech, a national of another Contracting State, Aucoven remained ultimately controlled by ICA Holding, a Mexican company which was not a national of another Contracting State (Mexico is not a Contracting State)[92]. The tribunal refused to consider the issue of ultimate control, and held that the transfer of Aucoven's shares to Icatech was sufficient to trigger the parties' consent to ICSID arbitration[93].

Finally, although it would not necessarily have resulted in a finding of no jurisdiction, the first tribunal in *Amco Asia v. Indonesia* refused to examine the nationality of the alleged ultimate controller of the claimant PT Amco. In that case, the respondent contended that the tribunal did not have jurisdiction over PT Amco because it was unclear which foreign entity controlled it[94]. The tribunal rejected the respondent's argument, holding that the ICSID Convention did not require a tribunal to determine the nationality of the entity that controlled the "foreign controller":

> To take this argument into consideration, the Tribunal would have to admit first that for the purpose of Article 25(2)(b) of the Convention, one should not take into account the legal nationality of the foreign juridical person which controls the local one, but the nationality of the juridical or natural persons who control the controlling juridical person itself: in other words, to take care of a control at the second, and possibly third, fourth, or xth degree.
>
> Such a reasoning is, in law, not in accord with the Convention. Indeed, the concept of nationality is there a classical one, based on the law under which the

88 *Id.* at ¶ 245.
89 *Id.* at ¶ 323. Article 1(b) of the Netherlands Bolivia BIT provides that: "the term 'nationals' shall comprise with regard to either Contracting Party: [...] (ii) without prejudice to the provisions of (iii) hereafter, legal persons constituted in accordance with the law of that Contracting Party; (iii) legal persons controlled directly or indirectly by nationals of that Contracting Party, but constituted in accordance with the law of the other Contracting Party".
90 *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction, September 27, 2001, ¶ 83.
91 *Id.* at ¶¶ 15, 26.
92 *Id.* at ¶ 41.
93 *Id.* at ¶¶ 133-134, 141-142.
94 *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, September 25, 1983, ¶ 12(iii). According to Emmanuel Gaillard, although the award in *Amco Asia* was annulled, the annulment decision "left untouched the 'award' rendered on the question of jurisdiction in the same case on September 25, 1983 by the Arbitral Tribunal" (*see* 25 International Legal Materials 1440 (1986)).

> juridical person has been incorporated, the place of incorporation and the place of the social seat. An exception is brought to this concept in respect of juridical persons having the nationality, thus defined, of the Contracting State Party to the dispute, where said juridical persons are under foreign control. But no exception to the classical concept is provided for when it comes to the nationality of the foreign controller, even supposing – which is not at all clearly stated in the Convention – that the fact that the controller is the national of one or another foreign State is to be taken into account...[95].

The *Amco Asia* tribunal concluded that it had jurisdiction over PT Amco[96].

Thus, there are at least fifteen ICSID cases that support the proposition that in circumstances where a claimant is a national of another Contracting State and the claimant's owner is a national of the respondent State (or of a third State), an ICSID tribunal has jurisdiction over that claimant as long as it has met the nationality requirements under the relevant agreement or bilateral investment treaty. In other words, the ICSID Convention does not prevent an ICSID tribunal from having jurisdiction over a claimant who is a national of another Contracting State and whose owner is a national of the respondent State. The few cases – three in total – that denied jurisdiction to a claimant whose owner was a national of the respondent State did so because the claimant itself was also a national of the respondent State. As a result, the reasoning of those tribunals actually reinforces our interpretation of Article 25(2)(b) of the ICSID Convention.

In *National Gas v. Egypt*, the claimant was an Egyptian company that attempted to gain ICSID jurisdiction by arguing that it was controlled by UAE entities[97]. The respondent objected to the tribunal's jurisdiction because the UAE entities were ultimately controlled by an Egyptian national[98]. The tribunal agreed with the respondent, though its reasoning is not so clear. It held that there was a difference under Article 25(2)(b) of the ICSID Convention between control by a national of another Contracting State and control by a national of the respondent State[99]. The first situation "violates no principle of international law and is consistent with the text of the ICSID Convention" while the second situation is inconsistent with the object and purpose of the ICSID Convention[100]. Moreover, the tribunal approved the application of the control test to favor jurisdiction in the first case, and its application to reject jurisdiction in the second case[101].

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95 *Id.* at ¶ 14 (p. 396).
96 *Id.* at ¶ 15.
97 *National Gas S.A.E. v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7, Award, April 3, 2014, ¶¶ 3, 7.
98 *Id.* at ¶ 75.
99 *Id.* at ¶ 136.
100 *Id.*
101 *Id.* at ¶ 137.

The tribunal most likely meant that, contrary to the first clause of Article 25(2)(b), the second, which allows jurisdiction over a national of the respondent State in the event of "foreign control," introduces an exception to one of the major premises of the Convention, namely that it does not deal with disputes between a State and its own national investors. Because it is an exception to this general principle, a claimant that is seeking to obtain ICSID jurisdiction on the basis of foreign control must prove that it is actually or effectively controlled by a foreign national; simply showing that its immediate controller is a foreign national will not suffice[102].

It is on the basis of this reasoning that the *National Gas* tribunal concluded that it did not have jurisdiction over the claimant because the claimant was not under foreign control, but under Egyptian control[103].

In *Burimi SRL et al. v. Albania*, one of the claimants, Eagle Games SH.A, was an Albanian company that was majority owned by Mr. Burimi, a dual national of Italy and Albania. The tribunal held that it did not have jurisdiction *ratione personae* over Eagle Games because, for purposes of foreign control, the foreign controller could not be a dual national where one of the nationalities is that of the respondent State[104].

Finally, in *TSA Spectrum v. Argentina*, the claimant was an Argentinian company that attempted to gain ICSID jurisdiction, through the Netherlands--Argentina BIT, by arguing that it was controlled by TSI, a Dutch company[105]. The respondent objected to the tribunal's jurisdiction, contending that the claimant had not provided evidence that it was actually controlled by TSI, and that TSA Spectrum was either controlled by another foreign company from another jurisdiction or by an Argentine company or natural person[106]. The tribunal held that when a claimant attempts to gain ICSID jurisdiction on the basis of foreign control, it is appropriate to lift the corporate veil in order to objectively prove "the existence and materiality of this foreign control"[107]. After reviewing the evidence adduced by the parties, the tribunal concluded that the ultimate owner of the claimant – at the time the parties consented to ICSID arbitration – was an Argentine citizen[108]. As a result, it declared that the claimant could not be treated as a Dutch investor under the second clause

102 The *National Gas* tribunal also relied on Prof Schreuer's views on the issue of foreign control. *See* Christoph Schreuer, *The ICSID Convention: A Commentary*, 2nd ed. (Cambridge University Press, 2009) at 323, ¶ 849: "Therefore, on balance, the better approach would appear to be a realistic look at the true controllers 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."

103 *National Gas S.A.E. v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7, Award, April 3, 2014, ¶ 137.

104 *Burimi SRL et al. v. Republic of Albania*, ICSID Case No. ARB/11/18, Award, May 29, 2013, ¶¶ 121-122.

105 *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award, December 19, 2008, ¶¶ 1, 21.

106 *Id.* at ¶¶ 121-122.

107 *Id.* at ¶ 147.

108 *Id.* at ¶ 162.

of Article 25(2)(b) of the ICSID Convention, and that it lacked jurisdiction to examine the claimant's claims[109].

As is clear from the above summaries, the claimants in the *National Gas*, *Burimi*, and *TSA Spectrum* cases were incorporated in the respondent State, and the issue was one of foreign control under the second limb of Article 25(2)(b) of the ICSID Convention. It is precisely because it was an issue of foreign control that the three tribunals held that they could pierce the corporate veil to determine the nationality of the claimants' effective controller[110]. In fact, the *National Gas v. Egypt* tribunal noted that there was a "material difference" between cases where the claimant was not a national of the respondent State and the case before it, where the claimant was an Egyptian national[111].

ICSID case law on the issue of an arbitral tribunal's jurisdiction in circumstances where the claimant's owner is a national of the respondent State is therefore very consistent. If the claimant is a national of another Contracting State, in accordance with the first limb of Article 25(2)(b) of the ICSID Convention, then the nationality of the claimant's owner is irrelevant to an ICSID tribunal's determination of jurisdiction. As long as the claimant meets the nationality requirements under the relevant agreement or bilateral investment treaty, then an ICSID tribunal has *ratione personae* jurisdiction over that claimant. There is nothing in the ICSID Convention suggesting that there is an exception to that rule in the event that the claimant's owner is a national of the respondent State.

On the other hand, if the claimant is a national of the respondent State, in accordance with the second limb of Article 25(2)(b), then the nationality of the claimant's owner or "effective controller" is relevant to an ICSID tribunal's determination of jurisdiction. Indeed, the notion of foreign control requires an ICSID tribunal to identify the nationality of the claimant's effective controller to ensure that the latter is a national of another Contracting State, and not a national of the respondent State. Only if the claimant's effective controller is a national of the respondent State should an ICSID tribunal deny jurisdiction.

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109 *Id.*

110 *See also SOABI v. Republic of Senegal*, ICSID Case No. ARB/82/1, Decision on Jurisdiction, August 1, 1984. In that case, the claimant was a company incorporated in Senegal, and its sole shareholder FLEXA was incorporated in Panama, which was not a Contracting Party to the ICSID Convention (¶¶ 30, 32). The respondent thus objected to the tribunal's jurisdiction on that basis (¶ 32). The tribunal dismissed the respondent's objection, holding that the notion of foreign control at Article 25(2)(b) of the ICSID Convention referred to effective control (¶ 35: "*La nationalité de [FLEXA] qui détenait en 1975 la totalité des actions du capital souscrit de la SOABI ne serait déterminante de la nationalité des intérêts étrangers que si la convention devait être interprétée comme visant le contrôle immédiat. Mais le Tribunal ne peut pas accepter une telle interprétation qui va à l'encontre de l'objet de l'article 25(2)(b)* in fine"). The tribunal concluded that the claimant was ultimately controlled by Belgian nationals, who were nationals of another Contracting State (¶ 38), and therefore that it had jurisdiction *ratione personae* over the claimant.

111 *National Gas S.A.E. v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7, Award, April 3, 2014, ¶ 141.

CONCLUSION

The ICSID Convention sets forth a bare minimum requirement regarding nationality. In respect of juridical persons, a national of another Contracting State simply is a juridical person that has the nationality of a Contracting State other than the State party to the dispute. If a juridical person satisfies that definition, then an arbitral tribunal has no license to consider the nationality of the owners of that juridical person (absent fraud), unless of course there are additional stipulations in that respect in an arbitration agreement or bilateral investment treaty. But if there are none, any juridical person that meets the ICSID Convention's bare minimum requirement should be considered to be a national of another Contracting State, even if it is owned by nationals of the respondent State.

The arbitral tribunal in *Venoklim Holding B.V. v. the Bolivarian Republic of Venezuela* should have adopted the interpretation of Article 25(2)(b) of the ICSID Convention that is set out above, which accords with the principles of the Vienna Convention, is consistent with the intentions of the drafters of the text, and is endorsed by all ICSID arbitral tribunals that have addressed the issue. Venoklim was not incorporated in Venezuela and, as such, foreign control concerns relating to the second limb of Article 25(2)(b) of the ICSID Convention did not apply to it. Rather, Venoklim was incorporated in The Netherlands and should therefore have been considered as a juridical person that had the nationality of a Contracting State other than the State party to the dispute, in accordance with the first limb of Article 25(2)(b). In short, the tribunal should have held that in terms of the ICSID Convention, the nationality of Venoklim's owners was irrelevant.