RECALIBRATING THE INTERNATIONAL INVESTMENT REGIME THROUGH NARROWED JURISDICTION

Javier García Olmedo*

Abstract The legitimacy crisis confronting the international investment regime has called for reforms to eliminate the asymmetric and troubled nature of investment treaties. These instruments grant extensive investor protections without offering reciprocal safeguards for host States wishing to preserve regulatory space. This article argues that any reform designed to redress imbalances in the existing regime should first aim at narrowing the personal jurisdiction of investment tribunals. Problematically, access to most investment treaties depends on broad nationality requirements, which have enabled investors to use corporations or passports of convenience to obtain treaty protection. This practice exacerbates the unbalanced relationship between host States and investors. It increases host States' exposure to investment treaty claims and allows investors to circumvent newer, more State-oriented investment treaties. Using as an example the novel anti-nationality planning approach embraced in the 2019 Dutch Model BIT, this article suggests effective treaty mechanisms that States can adopt to restrict the range of investors that are entitled to claim.

Keywords: private international law, Investor–State arbitration, investment treaties, dual nationality, corporate structuring, multiple claims, treaty drafting.

INTRODUCTION

The international investment regime is undergoing a turbulent transitional phase. Growing discontent with this regime has spread across the globe, prompting several States to denounce international investment agreements (IIAs) containing investor–State dispute settlement (ISDS) provisions or to exclude ISDS from these agreements.[1] By the end of 2018, the number of

* Research Fellow, Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law; Associate Lecturer, Queen Mary University of London, javier.garciaolmedo@gmail.com. An earlier version of this article was presented at the International Economic Law Interest Group Session of the 2018 ESIL Conference in Manchester. I am grateful for the questions and comments received there, and to the Max Planck Institute Luxembourg for its financial support for my attendance at the conference. Valuable comments and criticisms of Professor Hélène Ruiz Fabri, Jérémy Faivre, Michael De Boeck and the members of the Department of International Law are acknowledged. The views expressed and the errors or omissions made are the responsibility of the author alone.

[1] See, for instance, the 2018 United States–Mexico–Canada Agreement, which eliminates ISDS between the United States and Canada, or the decision of the Member States of the

terminated IIAs, including bilateral investment treaties (BITs) and free trade agreements (FTAs), has reached 309, a figure bound to increase in the coming years.[2]

Withdrawing consent to ISDS or terminating IIAs is not, however, the solution for the great majority of States, which have preferred instead to embark on the arduous task of reform. The narrative on IIA reform has frequently been framed in terms of the need to mitigate the asymmetry prevalent in international investment law. As presently drafted, most IIAs provide foreign investors with an unprecedented level of substantive and procedural protection but offer very little to host countries in terms of safeguards. The imbalanced normative nature of IIAs, combined with the expansive and inconsistent interpretations of treaty provisions by investment tribunals, have spurred allegations that international investment law overprotects foreign investors at the expense of the host State's regulatory space.

In response to these concerns, States and other stakeholders have turned to reforms that aim at aligning investment protection with other policy objectives.[3] For instance, States have attempted to modernise their IIAs by incorporating provisions that promote sustainable development, reduce the role of investor expectations in fair and equitable treatment and limit the scope of the expropriation standard.[4] The European Union (EU) has promoted a multilateral investment court system where, although investors retain standing to file claims, judges will be selected from a roster designated by States.[5] The EU has already concluded agreements containing such a system, such as the EU–Singapore FTA.[6] At the multilateral level, Working Group III of the United Nations Commission on International Trade Law (UNCITRAL) has proposed to reform the procedural aspects of ISDS, including mechanisms for the appointment of arbitrators, the regulation of third-party funding and duration and costs of the arbitration.[7]

The central claim of this article is that the above-mentioned reforms will be fruitless unless States amend their IIAs in order to prevent the practice of nationality planning. Access to virtually all IIAs depends on the claimant

European Union to terminate their intra-EU BITs in line with the *Achmea* judgment <https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf>.

[2] United Nations Conference on Trade and Development (UNCTAD), World Investment Report (2019) (UNCTAD's World Investment Report 2019) 99–100.

[3] UNCTAD, Recent Developments in the International Investment Regime, 1 IIA Issue Note (May 2018) 3.

[4] UNCTAD's World Investment Report 2019 (n 2) 105–9.

[5] European Commission, 'European Court of Justice confirms compatibility of Investment Court System with EU Treaties', Dispute settlement, Brussels, Press Release (30 April 2019).

[6] Free Trade Agreement between the European Union and the Republic of Singapore Comprehensive Economic and Trade Agreement (2018). The agreement will replace the 12 existing bilateral investment treaties between Singapore and 13 EU Member States.

[7] For a full list of reform options see UNCITRAL's Working Group III website at <https://uncitral.un.org/en/working_groups/3/investor-state>.

investor qualifying as a national of one of the Contracting Parties (ie the home State). Many IIAs, however, along with the Convention providing for arbitration at the International Centre for the Settlement of Investment Disputes (ICSID),[8] are premised on a rather rudimentary set of provisions defining who is an eligible national or investor. With the support of investment jurisprudence, broad definitions of investor have enabled corporations and individuals to create diversity of nationality with the purpose of gaining access to ISDS or benefiting from the most liberal IIAs. For instance, a French corporation investing in Venezuela that wants to come under the favourable investment protection standards of the Netherlands–Venezuela BIT can acquire Dutch nationality by purchasing shares of a holding company constituted in the Netherlands. An individual holding Italian–United States nationality, who manifested himself as an Italian national to make an investment in Costa Rica, can opportunistically invoke his United States nationality to sue Costa Rica under the Dominican Republic–Central America Free Trade Agreement (DR-CAFTA).

Nationality planning significantly contributes to the asymmetry of the international investment regime, as it grants an unlimited, and sometimes unidentifiable, number of otherwise unqualified investors access to treaty protection. Most worryingly, in allowing investors to 'shop around' for the friendliest IIAs, nationality planning gives investors the possibility to circumvent newer IIAs containing more State-oriented provisions. Accordingly, an essential preliminary step to redress the imbalanced nature of international investment law should be restricting the range of protected natural and legal persons.

This article will start by providing a survey of key nationality provisions in IIAs that grant personal jurisdiction to investment tribunals. It will then turn to describing the most common and recent methods of nationality planning, such as corporate restructuring, multiple claims, and the strategic invocation of IIAs by dual nationals. This is followed by a discussion of the position adopted by investment tribunals towards nationality planning, taking into account the recent decisions in *Aven v Costa Rica*, *Isolux v Spain* and *Orascom v Algeria*. It will be shown that the general reluctance of arbitrators to depart from investor-friendly definitions in IIAs has considerably encouraged the use of ISDS, leading several States to terminate their IIAs. Using as an example the 2019 Dutch Model BIT and other newly concluded IIAs, this article concludes by providing effective, and as yet underexplored, treaty drafting approaches that can make States less vulnerable to nationality planning practices. Three approaches will be discussed here: the rule of dominant and effective nationality, 'self-invoking' denial of benefits (DOB) clauses and waiver provisions.

[8] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1966).

https://doi.org/10.1017/S0020589320000044 Published online by Cambridge University Press

I. Nationality as a Basis for the Jurisdiction of Investment Tribunals

As of the end of 2018, the IIA universe was composed of 3,317 IIAs, 83 per cent of which were concluded between the 1900s and the early 2000s.[9] These IIAs have at times been referred to as 'old-generation' IIAs. A point worthy of consideration is that 'virtually all of the known treaty-based ISDS cases [have] been filed pursuant to' these treaties.[10] Old-generation IIAs signed in the 1990s alone account for a staggering 77 per cent of all IIAs invoked in known ISDS claims.[11] This is not surprising if one considers that most, if not all, old-generation IIAs incorporate broadly worded definitions and vague substantive provisions. These treaties require that, in order to access investment protection, the investor must be a national of the home State. Likewise, the preferred instrument for the settlement of ISDS disputes, the ICSID Convention, limits its jurisdiction to nationals of Contracting States. Thus, determining which nationals are protected by the treaty is an issue of fundamental importance, 'an issue that reveals the asymmetry' in investment treaty making.[12] Indeed, as Wells explains, States agreed to definitions of individual and corporate nationality that 'were far more inclusive than more knowledgeable and experienced negotiators would have sought'.[13]

A. Individual Investors

The vast majority of IIAs define who is a protected natural person only by reference to the State of nationality of that person. Article 1 of the Egypt–Finland BIT provides a typical definition: '[t]he term "investor" means, for either Contracting Party, … (a) any natural person who is a national of either Contracting Party in accordance with its laws'.[14] Some IIAs directly use the term 'national' instead of investor. For instance, under the Country-Specific Definitions of the Chile–Canada FTA, for Chile, a protected 'national' includes 'a Chilean as defined in Article 10 of the *Political Constitution of the Republic of Chile*'.[15] Some IIAs considerably extend the scope of nationality by basing the personal jurisdiction of the tribunal on permanent residency only, rather than on the nationality of the investor. This is the case of the Energy Charter Treaty (ECT) and the North American Free Trade Agreement (NAFTA). Article 1(7) of the ECT defines investor as '[a] natural person having the citizenship or nationality of or who is permanently residing in [a] Contracting Party in accordance with its applicable law'.[16] For its part,

[9] UNCTAD, Phase 2 of the IIA Reform: Modernizing the Existing Stock of Old-Generation Treaties, 2 IIA Issue Note (June 2017) 3.
[10] ibid 4.
[11] ibid.
[12] JW Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (1990) 24(3) The International Lawyer 665.
[13] LT Wells, 'The Emerging Global Regime for Investment: A Response to Jeswald W. Salacuse' (2010) 51 HarvIntlLJ 427, 48.
[14] Finland–Egypt BIT (2005) art 1(3).
[15] Canada–Chile FTA (1997) Annex B-01.1.
[16] The ECT (1998) art 1(7).

Article 201 of NAFTA provides that a qualifying '[n]ational means a natural person who is a citizen or permanent resident of a Party'.[17]

Accordingly, to avail themselves of the protection afforded by IIAs, it suffices that the investor holds the nationality of the home State party or, when applicable, resides in that State. Very rarely do IIAs depart from these formalistic criteria, failing to impose restrictions on investors with dual or multiple nationality. UNCTAD's Investment Policy Hub shows that only 81 out of 2,577 mapped IIAs contain this kind of restrictions.[18] One of such treaties is the Uruguay–Armenia BIT, Article 1(2)(c) of which provides that '[*e*]*ste Acuerdo no será aplicable a inversiones de personas físicas que sean nacionales de ambas Partes Contratantes*'.[19] Article 25(2)(a) of the ICSID Convention provides a similar restraint upon natural persons. It excludes from '[t]he jurisdiction of the Centre' investors who had the nationality of the Contracting Party to the dispute … on the date on which the parties consented to submit [the] dispute to … arbitration as well as on the date on which the request was registered'.[20]

As we discuss in more detail in Parts II and III, even where IIAs contain a more restrictive definition of national, such as the one in the Uruguay–Armenia BIT, investors have been able to bypass them and access the treaty in question.

B. Corporate Investors

IIAs generally use three criteria for determining the nationality of a corporation: (i) its place of incorporation; (iii) the location of its main seat; and (iii) the nationality of its controlling persons. Each of these criteria can be incorporated in the treaty 'alone, in combination, or as alternatives'.[21] A recent study found that approximately 40 per cent of IIAs use incorporation in the home State party as the sole test.[22] The incorporation criterion plays a prominent role in IIAs entered into by the Netherlands, Portugal, Spain or the United Kingdom.[23] The United Kingdom–El Salvador BIT provides a standard definition. The treaty covers, with respect to the United Kingdom,

[17] NAFTA (1994) art 201.

[18] UNCTAD, Investment Policy Hub, International Investment Agreements Navigator 2019 (UNCTAD's IIA Mapping) <https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping>.

[19] Uruguay–Armenia BIT (2002). ('this treaty will not apply to investments made by natural persons who hold the nationality of both Contracting Parties', translation by the author).

[20] ICSID Convention (n 8) art 25(2)(a).

[21] M Perkams, 'The Determination of Nationality of Investors in International Investment Agreements (IIAs) – Taking Stock of the Criteria Used in Modern Investment Law' in ILA German Branch, Working Group, *The Determination of the Nationality of Investors under Investment Protection Treaties* (106 Heft 2011) 13.

[22] F Franke, *Der personelle Anwendungsbereich des internationalen Investitionsschutzrechts* (Nomos/Hart Publishing 2013) 138.

[23] Perkams (n 21) 15. eg United Kingdom–El Salvador BIT (2001) art 1(c)(i).

'corporations, firms and associations incorporated or constituted under the law in force in any part of the United Kingdom'.[24]

It is also common to find IIAs that combine the place of incorporation with the main seat criterion. Most French IIAs require that a legal person must be incorporated and have its '*siège social*' and/or place of administration in the home State to qualify as a protected investor. The France–Libya BIT provides a typical formulation: '*le terme « sociétés » désigne toute personne morale constituée sur le territoire de l'une des Parties contractantes conformément à la législation de celle-ci et y possédant son siège social*'.[25] Spanish and Italian IIAs also tend to combine the incorporation and seat criterion.[26]

Few IIAs refer to the control criterion. States that use this criterion often do so to broaden the scope of the treaty to include companies constituted in the host State or in a non-signatory country, but indirectly or directly controlled by an investor from the home State.[27] One of these countries is the Netherlands, a State known for having signed IIAs with the most liberal definitions of corporate investor.[28] The Netherlands–Bahrain BIT, for instance, covers both 'legal persons incorporated under the law of a Contracting State or legal persons incorporated in [a third] state, but controlled directly or indirectly by nationals of a Contracting State'.[29]

Another example of a treaty that employs the control criterion to the benefit of investors is the ICSID Convention. Similar to natural persons, Article 25(2)(b) defines 'National of a Contracting State' as: '[a]ny juridical person which had the nationality of a Contracting State other than the State party to the dispute'. However, an exception to that principle is set out in the second sentence of that provision, which extends ICSID jurisdiction to domestic legal entities insofar as the Parties to the applicable IIA agree that, 'because of foreign control', such entities 'should be treated as a national of [the home] Contracting State for the purposes of [the] Convention'.[30]

Definitions of corporate investor are sometimes accompanied by a Denial of Benefits (DOB) clause.[31] As we shall see, the underlying objective of DOB clauses is to ensure that the putative investor maintains a genuine economic connection with its State of incorporation, thereby excluding holding or shell companies. This primary limitation is rarely found in IIAs. UNCTAD's

[24] United Kingdom–El Salvador BIT (2001) art 1(c)(i).

[25] France–Libya BIT (2006) art 1(2)(b). ('the term "company" means a juridical person constituted in the territory of a contracting party in accordance with its national legislation and having its seat in that state', translation by the author).

[26] See Perkams (n 21) 14.

[27] See eg, Netherlands–Bahrain BIT (2007) art 1(b)(ii) and (iii).

[28] R van Os, 'Dutch Bilateral Investment Treaties: A Gateway to "Treaty Shopping" for Investment Protection by Multinational Companies' (2011) Amsterdam/SOMO.

[29] Netherlands–Bahrain BIT (2002) art 1(b)(ii) and (iii). The criterion in all Dutch IIAs is worded as controlled directly or indirectly by natural or legal persons; see also art 1(b)(iii) of the Netherlands–Brazil BIT or art 1(b)(iii) of the Netherlands–Ethiopia BIT.

[30] ICSID Convention (n 8) art 25(2)(b).

[31] ECT (no 16) art 1(7).

Investment Policy Hub shows that only 215 out of 2,577 mapped IIAS contain a DOB clause.[32] Moreover, as currently drafted in many IIAs, DOB clauses have proven to be ineffective on numerous occasions.

Provisions determining the legal entities that qualify as protected nationals need to be read in conjunction with provisions defining the term 'investment'. Most IIAs generously include shares or participations in companies as a form of investment, but fail to specify what level of ownership is necessary for an investor to hold standing in relation to a particular investment claim.[33] Taken together, nationality and investment definitions allow 'shareholders-qua-investors' to initiate investment disputes against host States based on an injury to the corporation causing incidental diminution in share value.[34] Moreover, these provisions empower entities within the same corporate structure to submit related arbitration claims against the same host State under different IIAs.

II Individual and Corporate Nationality Planning

As the analysis above shows, personal jurisdiction under IIAs is largely based on expansive definitions of nationality and investment, which, coupled with the establishment of a vast network of IIAs, have facilitated ample opportunities for nationality planning. Nationality planning can be defined as the practice whereby investors use a passport or a corporation of convenience to benefit either from an IIA providing for ISDS when none would otherwise be available or from an IIA that offers higher levels of protection in procedural and/or substantive terms. Given space constraints, this article focuses on the most commonly used methods of nationality planning and those that have triggered jurisdictional objections by host States in recent cases.

A. *Nationality Planning by Individuals*

Discussions on the practice of nationality planning has almost exclusively focused on legal persons. This is understandable given that corporations bring the vast majority of ISDS claims. As Baumgartner observes, however, 'it is not excluded that natural persons strategically change nationalities or acquire dual (or multiple) nationalities needed for trying to come under the protection of different investment treaties'.[35] Likewise, it is possible, and

32 UNCTAD's IIA Mapping (n 18).

33 RF Hansen, 'Parallel Proceedings in Investor-State Treaty Arbitration: Responses for Treaty-Drafters, Arbitrators and Parties' 2010 73(4) MLR 542–3; P Dumberry, 'The Legal Standing of Shareholders before Arbitral Tribunals: Has Any Rule of Customary International Law Crystallised?' 2010 3(18) MicSJIL 360.

34 J Arato, 'Reforming Shareholder Claims in ISDS' (2019) Academic Forum on ISDS Concept Paper 2019/9 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3433465>.

35 J Baumgartner, *Treaty Shopping in International Investment Law* (Oxford University Press 2016) 12.

even more probable, that individual investors who already hold 'dual (or multiple) nationalities' conveniently invoke the relevant nationality to avail themselves of treaty protection. For present purposes, dual nationality involves two scenarios: a) when the investor holds the nationality of both Contracting Parties to the applicable IIA (dual home–host State nationality) and b) when the investor holds the nationality of the home State and a non-signatory State (dual home–third State nationality).

1. Claims by dual nationals against their State of nationality

We have already determined that most IIAs protect individual investors who possess the nationality of the home State party under its domestic legislation. Where the home State nationality is the only relevant criterion, a tribunal may have to decide on the recognition of this nationality in cases where the investor seeking protection is also a national of the host State. If this factual scenario arises in ICSID proceedings, the tribunal should decline jurisdiction.[36] However, what if, for economic reasons or otherwise, the investor holding dual home–host State nationality decides to institute proceedings under a different dispute settlement mechanism, such UNCITRAL Arbitration?

Unlike the ICSID Convention, the UNCITRAL Arbitration Rules are silent on the standing of dual nationals. Thus, in the event of an UNCITRAL-based IIA claim, the tribunal will have to determine whether being a national of the home State is sufficient for a dual home–host State national to sue his or her own State of nationality. Put differently, the question is whether, in the absence of express language to the contrary in the applicable IIA, an investor holding the nationality of both Contracting Parties should be entitled to treaty protection. Recent investment tribunals have answered this question inconsistently, adding a further layer of uncertainty in international investment law.

The point of departure was the decision in *Serafín García Armas and Karina García Gruber v Venezuela* (*García Armas I*), considered as the first publicly known ISDS case in which a dual home–host State national has brought an investment treaty claim outside the ICSID Convention Regime.[37] In this case, two Venezuelan–Spanish nationals brought a claim against Venezuela for alleged breaches of the Spain–Venezuela BIT. By virtue of the ISDS clause

[36] ICSID Convention (n 8) art 25(2)(a). As explained above, this provision precludes any consent by parties to ICSID jurisdiction where the claimant has the nationality of the respondent Contracting State at the relevant dates.

[37] *Serafín García Armas* and *Karina García Gruber v The Bolivarian Republic of Venezuela*, PCA Case No 2013-3, Decision on Jurisdiction (15 December 2014). The author was legal counsel for the Bolivarian Republic of Venezuela in this case. The views stated here are solely those of the author and do not necessarily represent the views of the Bolivarian Republic of Venezuela or any other State or entity.

in the BIT, which provides for both ICSID and ad hoc UNCITRAL arbitration, the claimants chose to resort to UNCITRAL arbitration. This was perhaps because Venezuela's withdrawal from the ICSID Convention in 2012. The BIT contains the typical broad definition of 'investor', only requiring that investors hold the nationality of the home State (Spain in this case).[38] Despite this, Venezuela objected to jurisdiction, arguing that the Spanish nationality of the claimants was a mere formality used conveniently with the intention of making their own State a respondent before an international tribunal. In support of its objection, Venezuela relied on the customary international law rule of 'dominant and effective' nationality.[39] This rule is codified in the 2006 International Law Commission (ILC) Draft Articles on Diplomatic Protection, Draft Article 7 of which provides that:

> A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the date of injury and at the date of the official presentation of the claim.[40]

According to this provision, a State may exercise diplomatic protection in respect of a dual home–host State national only if he or she does not have stronger connections (personal, economic, political, etc) with the respondent State. It was undisputed that the claimants' dominant and effective nationality was that of Venezuela, given the long-standing relationship that they had developed with that country for several years.[41]

The tribunal rejected the objection on the premise that IIAs are 'special law', meaning that its jurisdiction should exclusively be based on the nationality criteria of the BIT. In making this finding, the tribunal examined the legal nature of diplomatic protection and IIAs. It observed that the rules relating to diplomatic protection—such as the dominant and effective nationality test—were developed at a time when States were the only bearers of rights and obligations under international law. However, the tribunal continued, IIAs have departed from the traditional system of diplomatic protection by enabling investors to vindicate their own rights before international tribunals. According to the tribunal, by providing direct access to international arbitration, IIAs have created a self-contained regime that derogates from the customary law of diplomatic protection. In other words, the fact that the claimants were also Venezuelan nationals and had strong connections with that State mattered little to the tribunal.[42] As Spanish nationals, the tribunal concluded, the claimants qualify as investors.

This decision has set a new precedent in investment treaty practice, a precedent that has opened the floodgates for claims by dual home–host State

[38] Spain–Venezuela BIT (1995) art 1.
[39] *García Armas I v Venezuela* (n 37) paras 107–117.
[40] International Law Commission, Draft Articles on Diplomatic Protection (2006) art 7.
[41] *García Armas I v Venezuela* (n 37) paras 56–67.
[42] ibid, paras 159–166.

nationals. Shortly after the tribunal rendered its jurisdictional award in *García Armas I*, an increasing number of investors brought treaty claims against their States of nationality outside the ICSID Regime.[43] These investors include other dual Venezuelan–Spanish nationals belonging to the García Armas family who were also affected by Venezuela's actions.[44]

Tribunals have already rendered decisions in some of these cases. In at least three awards, tribunals have followed the literal approach to treaty interpretation adopted in *García Armas I*.[45] For instance, in *Rawat v Mauritius* the tribunal had to determine 'whether the term *"ressortissant"* [or national], as used throughout the France-Mauritius BIT includes or excludes dual nationals'.[46] In response to an objection by Mauritius, the tribunal held that silence in the treaty on the standing of dual home–host State nationals 'would also point to the outcome of including, rather than excluding, dual nationals as protected 'ressortissants within the ambit of the BIT'.[47]

Other tribunals have taken a different view.[48] Most recently, in *Manuel García Armas and others v Venezuela* (*García Armas II*) the tribunal held that the Spain–Venezuela BIT should not apply in isolation from the nationality rules of the customary international law of diplomatic protection.[49] The tribunal reasoned that '*el derecho internacional sobre arbitraje de inversiones* [*no ha*] *evolucionado hasta el punto de admitir los*

[43] See eg *Antonio Valle Ruiz and others v Kingdom of Spain*, *ad hoc* UNCITRAL arbitration, Notice of Arbitration (23 August 2018); *Michael Ballantine and others v The Dominican Republic*, PCA Case No 2016-17, Final Award (3 September 2019); *Alberto Carrizosa Gelzis and others v The Republic of Colombia,* Notice of Arbitration (23 February 2018) PCA Case No 2018-56; *Carlos Esteban Sastre v United Mexican States*, *ad hoc* UNCITRAL arbitration, Notice of Arbitration (29 December 2017); *Sergei Viktorovich Pugachev v the Russian Federation*, *ad hoc* UNCITRAL arbitration, Notice of Arbitration (21 September 2015); *Dawood Rawat v The Republic of Mauritius*, PCA Case No 2016-20, Award on Jurisdiction (6 April 2018); *Julio Miguel Orlandini-Agreda and others v Bolivia*, PCA Case No. 2018-39 *Jorge Heemsen and Enrique Heemsen v The Bolivarian Republic of Venezuela*, *ad hoc* UNCITRAL arbitration, Award on Jurisdiction (29 October 2019).

[44] *Manuel García Armas and others v The Bolivarian Republic of Venezuela*, PCA Case No 2016-08, Award on Jurisdiction (13 December 2019).

[45] *Mohamed Abdel Raouf Bahgat v Arab Republic of Egypt*, PCA Case No. 2012-07, Decision on Jurisdiction (30 November 2017); *Rawat v Mauritius* (n 43); *Cem Cenzig Uzan v Republic of Turkey*, SCC Arbitration V 2014/023, Award on Respondent's Bifurcated Preliminary Objection (20 April 2016).

[46] *Rawat v Mauritius* (n 43) para 168.

[47] ibid, paras 170–172. The tribunal ultimately declined jurisdiction because the France–Mauritius BIT only allows investors to submit their disputes to ICSID through an investment contract. The tribunal first rejected the claimant's attempt to use the MFN clause in the BIT to import the UNCITRAL dispute settlement mechanism from another investment treaty. It then held that the reference to the ICSID Convention in the BIT meant that, since under art 25(2)(a) of the Convention there would be no jurisdiction over a dual French–Mauritius national, the claimant could not qualify as investor. This notwithstanding, the tribunal was still consistent with the findings in *García Armas I* that the BIT's silence on dual home–host State nationals should be understood as an implicit agreement by the Contracting Parties to be sued by their own nationals. Put another way, if the ISDS clause in the France–Mauritius BIT also provided for UNCITRAL arbitration, the tribunal would have had upheld jurisdiction.

[48] *García Armas II v Venezuela* (n 44) and *Heemsen v Venezuela* (n 43).

[49] *García Armas II v Venezuela* (n 44) para 702.

reclamos de doble nacionales sin restricciones'.[50] For the tribunal, therefore, the fact that the BIT did not regulate dual home–host State nationality justified the application of the customary rule of dominant and effective nationality, a position that completely contradicts the award in *García Armas I*. After considering the claimants' links with Spain and Venezuela, the tribunal found that the claimants were predominantly Venezuelan. The tribunal's analysis did not stop there.

As previously explained, the Spain–Venezuela BIT offers ICSID and UNCITRAL arbitration as fora to resolve investment disputes under the treaty. The BIT, however, prioritises ICSID over UNCITRAL, the latter being a fallback option. Interestingly, the tribunal reasoned that, '*debido a esta estructura que impone la prioridad u obligatoriedad de los arbitrajes bajo el Sistema CIADI*', the exclusion of dual home–host State nationals in Article 25(2)(a) of the Convention pervaded the BIT.[51] According to the tribunal, this conclusion emanates from the interpretive rules of the Vienna Convention on the Law of Treaties, which requires that the tribunal interpret the definition of 'investor' in its 'context', that is, by reference to other provisions of the BIT. Hence, '[*m*]*ediante la referencia al Sistema CIADI*',[52] the tribunal concluded, '*las Partes Contratantes "han implícita, pero necesariamente, excluido a los dobles nacionales* [*españoles-venezolanos*] *del ámbito de aplicación del TBI"*'.[53] The tribunal added that '[*l*]*a consecuencia práctica de dicha conclusión es que la definición de 'inversor' en el Tratado no tiene diferentes significados según el foro al que se recurra*'.[54] The tribunal made this determination, and declined jurisdiction, despite the fact that the arbitration was being conducted under the UNCITRAL Arbitration Rules and that Venezuela denounced the ICSID Convention in 2012.

Inconsistency now reigns over the question whether broad nationality requirements should be interpreted as extending protection to dual home–host State nationals. Time will tell if tribunals in the remaining cases follow the permissive approach adopted in *García Armas I* or if, on the contrary, they apply the limitations imposed by the tribunal in *García Armas II*. In making this assessment, arbitrators should consider that, in addition to increasing host

[50] ibid, para 695 ('international investment law [has not] evolved to the extent of allowing claims by dual home–host State nationals without any limitations', translation by the author).

[51] ibid, para 721 ('given this hierarchy that imposes the priority or obligation of ICSID arbitration', translation by the author).

[52] ibid ('through the explicit reference to ICSID', translation by the author).

[53] ibid ('the Contracting Parties "have implicitly, but necessarily, excluded dual nationals [Spanish–Venezuelan nationals] from the scope of application of the BIT"', translation by the author). On this point, the tribunal quoted the tribunal in *Rawat v Mauritius* at para 179.

[54] ibid, para 172 ('[t]he practical consequence of this conclusion is that the definition of "investor" in the BIT does not have different meanings depending on the forum resorted to', translation by the author).

States' exposure to ISDS, claims by dual home–host State nationals have other repercussions.

For one, by allowing claims of this nature, arbitrators place dual home–host State nationals in a favourable position with respect to domestic investors lacking the nationality of the home State. Indeed, as opposed to dual home–host State nationals, who can 'pick and choose' among two nationalities to claim against either Contracting Party or even both, domestic investors with one nationality only have access to local remedies. This creates an incentive for domestic investors to 'internationalise' their claims through the acquisition of a second passport. An increasing number of States facilitate this practice through 'Golden Visa programs', which allow wealthy individuals to obtain residency and nationality through investment.[55]

The unwillingness of investment tribunals to impose limitations on dual home–host State nationals has also resulted in the initiation of parallel ISDS proceedings under the same BIT but pursuant to different dispute resolution mechanisms. On 23 August 2018, 43 investors initiated ICSID and UNCITRAL arbitrations against Spain under the Spain–Mexico BIT for the same cause of action. In the UNCITRAL request for arbitration, eight of these investors clarify that 'they are dual nationals holding both Mexican and Spanish citizenship, and therefore are prevented from participating in the ICSID arbitration'.[56] Presumably cognisant of the *García Armas I* award, these eight investors further state with confidence that 'their concurrent Spanish nationality does not affect their rights under the treaty'.[57]

2. *Claims by dual nationals from third States*

Dual home–host state nationals are not alone in benefiting from broadly worded definitions of 'investor'. An investor who is a national of the home State party and a non-State party can also strategically rely on one or both nationalities to gain access to IIAs. Respondent States have equally opposed claims by dual home–third State nationals. Here too, tribunals have embraced investor-friendly interpretations,[58] even in the presence of potential restrictions in the relevant IIA.

The most recent example is the decision in *Aven v Costa Rica*. Mr David Aven, a dual United States–Italian national, instituted UNCITRAL proceedings against Costa Rica under DR-CAFTA.[59] Article 10.28 of

[55] A Millington, '23 Countries Where Money Can Buy You a Second Passport or "Elite Residency"' *Business Insider* (27 December 2018).

[56] *Antonio Valle Ruiz and others v Spain* (n 43) para 2.

[57] ibid.

[58] See, eg, *Olguin v Paraguay*, ICSID Case No ARB/98/5, Award (26 July 2001); *Saba Fakes v Turkey*, ICSID Case No ARB/07/20, Award (14 July 2010); *Hussein Nuaman Soufraki v United Arab Emirates*, ICSID Case No ARB/02/7, Award (7 July 2004).

[59] *David R. Aven and others v The Republic of Costa Rica*, Case No UNCT/15/3, UNCITRAL, Final Award (18 September 2018).

DR-CAFTA defines 'investor' as 'a national […] of a Party [here the United States]; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality'. Notably, whilst Mr Aven invoked his United States nationality to claim under the treaty as an investor of the home State, he used his Italian nationality to establish and operate its investment in Costa Rica. Costa Rica objected to jurisdiction on two grounds. First, the State argued that, since Mr Aven maintained more links with Italy, his dominant nationality was Italian and therefore his United States nationality was not opposable to Costa Rica as per the test in Article 10.28 of DR-CAFTA.[60] Second, Costa Rica contended that Mr Aven's convenient switch of nationality to take advantage of DR-CAFTA constituted an 'exercise of [nationality planning], the consequence of which should be to deny him the protection of' the treaty.[61]

The tribunal disagreed with Costa Rica on both fronts. It held that, in line with the customary law of diplomatic protection, the 'dominant and effective' nationality test in Article 10.28 should be construed as applying in a dual home–host State nationality scenario, and not where, as in the present case, the second nationality involves that of a third State.[62] The tribunal then ruled that Mr Aven's use of his United States and Italian nationalities (one to make the investment and the other to access the treaty) was simply 'the privilege of holding two passports in, at times, a hostile world' and thus did not amount to illegitimate nationality planning'.[63]

The *Aven* tribunal is not the first to find that the 'dominant and effective' nationality test does not cover dual home–third State nationals. In *Adel v Oman*, an ICSID panel opined obiter dicta that the 'dominant and effective' nationality test in the United States–Oman FTA, which is identical to that of DR-CAFTA, 'aimed at preventing claims by dual nationals of ***both*** State parties … from seeking to use the FTA to claim against their own State of … nationality'.[64]

Latest developments in international investment law concerning the nationality of individuals allow a conclusion that arbitrators have increased the range of qualified investors beyond what treaty parties could have anticipated at the time they signed their IIAs. Depending on who you ask (or perhaps more importantly, who you appoint as arbitrator), investors from both Contracting Parties enjoy the benefit of having two nationalities that can freely invoke against either party or even both. Moreover, irrespective of a potential agreement to the contrary in an IIA, nationals from the home country and a State that is not a party to the reciprocal arrangements embodied in the treaty can now opportunistically rely on one or both nationalities to benefit from these arrangements. This lenient approach to

[60] ibid, para 188. [61] ibid. [62] ibid, para 215. [63] ibid, para 242.
[64] *Adel A Hamadi Al Tamimi v Sultanate of Oman*, ICSID Case No ARB/11/33, Award (3 November 2015) para 274.

individual nationality planning exacerbates material inequities between already unequal disputing parties.

It is reasonable to expect that claims by dual nationals will continue to arise and that more tribunals will contribute to the growing and inconsistent investment jurisprudence in in this area. All States can do for now is to incorporate additional nationality criteria in their IIAs with the purpose of reducing exposure to ISDS and avoiding the legal uncertainty generated by investment jurisprudence. By doing so, States will ensure that these instruments only cover international investment disputes, that is to say, disputes between States and 'foreign' investors.[65] After all, that the investor is foreign 'is critical to the architecture of the system of international investment arbitration [and] without that criterion, the system would provide an impermissible forum for purely domestic disputes'.[66]

B. Nationality Planning by Corporate Investors

The use of nationalities of convenience by corporations more evidently contributes to the asymmetry of the current international investment regime. The nationality of corporations raises more complex issues than the nationality of natural persons. As Yannaca-Small explains: '[c]ompanies today operate in ways that make it very difficult to determine nationality because of the several layers of shareholders … operating from and in different countries'.[67] Openly-worded definitions of 'corporate investor' in IIAs, combined with the ease with which corporations may be brought in Zexistence in many jurisdictions, give multinational corporations flexibility to 'create diversity of nationality and to thus become eligible for protection under more favorable investment treaties'.[68] This article examines two methods of corporate nationality planning that investors commonly use to secure jurisdiction under IIAs: corporate structuring and the initiation of multiple proceedings.

1. Corporate structuring

As previously explained, in addition to merely requiring incorporation in the home State party, most IIAs cover indirect investors or investments. A company within the same corporate group can therefore bring a treaty claim

[65] J García Olmedo, 'Claims by Dual Nationals under Investment Treaties: Are Investors Entitled to Sue Their Own States?' (2017) 8(4) JIDS 32.

[66] L Reed and JE Davis, 'Who Is a Protected Investor?' in M Bungenberg *et al.* (eds), *International Investment Law: A Handbook* (Hart Publishing 2015) 614.

[67] K Yannaca-Small, 'Who Is Entitled to Claim? The Definition of Nationality in Investment Arbitration' in K Yannaca-Small (ed), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (2nd edn, Oxford University Press 2018) 129–60.

[68] Baumgartner (n 35) 13.

through an intermediate subsidiary and/or its shareholders, both minority and controlling. Likewise, a company can alter its organisational structure with the purpose of gaining access to an IIA signed by a State that offers more favourable protection than the one available in the company's original home State. The company can, for instance, incorporate a legal entity in the State Party to the targeted IIA and insert it into the corporate chain, thereby becoming a protected home State national. The company can also benefit from the treaty by purchasing shares in an existing holding company that has the nationality of the targeted home State. A domestic investor can equally employ this kind of corporate manoeuvrings, claiming, as a 'round tripper',[69] the status of a 'foreign' investor. Indeed, domestic companies can 'expatriate' their investments through a legal entity located in a State that has concluded an IIA with their State of nationality.

The corporate vehicles typically used in these scenarios are shell or mailbox companies lacking an economic connection with the State of incorporation. Moreover, the company owing or controlling the corporate vehicle often remains a national of a non-treaty Party or the host State. The underlying objective of corporate structuring therefore becomes apparent: to disguise the real national origin of the claimant investor.

To understand the frequency with which corporate structuring occurs in practice,[70] one simply needs to look at recent trends regarding the most frequent home States of claimants in ISDS disputes. As of 1 January 2019, the total number of publicly known ISDS claims had reached 942. Purported Dutch investors have brought 108 of these claims, making the Netherlands the second most popular home State of claimants after the United States.[71] According to a study by the Centre for Research on Multinational Corporations (SOMO) 'over 75 per cent of Dutch BIT cases were brought by mailbox companies with no real economic substance in the Netherlands',[72] companies whose ultimate or controlling parent was based in a country other than the Netherlands. The Netherlands is not alone however in providing a 'base camp' for corporate restructuring. Claimants also frequently use Cyprus and Luxembourg as a home country of convenience.[73]

Corporate nationality planning has proven a fertile area for jurisdictional objections. In cases where the claimant was a shell company or was

[69] Wells (n 13) 49.

[70] For a study on the frequency of corporate structuring, see E Lee, 'Treaty Shopping in International Investment Arbitration: How Often Has It Occurred and How Has It Been Perceived by Tribunals?' (2015) LSE Working Paper Series 15/167 <http://www.lse.ac.uk/internationalDevelopment/pdf/Dissertations/WP167.pdf>.

[71] UNCTAD, Fact Sheet on Investor–State Dispute Settlement Cases in 2018, Recent Developments in the International Investment Regime, 2 IIA Issue Note (May 2019).

[72] R Knottnerus, 'Socialising Losses, Privatising Gains: How Dutch Investment Treaties Harm the Public Interest' (2015) SOMO, Amsterdam.

[73] RL Wellhausen, *The Shield of Nationality: When Governments Break Contracts with Foreign Firms* (Cambridge University Press 2015).

controlled by third or host State nationals, respondent States have asked tribunals to dismiss the claim on the basis that the claimant was not the 'real' investor ultimately benefiting from the claim. The argument commonly advanced in this context is that, when ascertaining jurisdiction, tribunals should rely on considerations that are not found in the text of the applicable IIA, including the more restrictive diplomatic protection rules on corporate nationality (ie 'genuine connection') as well as the principles of abuse of process and lifting the corporate veil.[74] Similar to natural persons, however, arbitral tribunals have shown marked reluctance to apply additional nationality criteria, preferring instead to adhere to the express wording of IIAs.[75] For these tribunals, the structuring of an investment to obtain treaty protection for future disputes is considered as a 'perfectly legitimate goal',[76] a position that has also been supported by most scholars.[77] This formalistic approach extends to determinations of nationality under Article 25(2)(b) of the ICSID Convention, for tribunals are, in principle, bound to accept the definition of corporate nationality contained in IIAs when establishing ICSID jurisdiction.[78]

An illustrative and recent example of a strict textual interpretation of the definition of corporate investor is the recent decision in *Isolux v Spain*.[79] In that case, Isolux Infrastructure Netherlands, B.V. (IIN), a mailbox company constituted in the Netherlands, initiated arbitration proceedings against Spain

[74] J Lee, 'Resolving Concerns of Treaty Shopping in International Investment Arbitration' (2015) 6(2) JIDS 355–79.

[75] An analysis of 72 awards by GV Harten shows that in nearly all of these decisions (85 per cent) arbitrators have adopted an 'expansive approach' to the definition of 'corporate person investor'. See GV Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication (Part Two): An Examination of Hypotheses of Bias in Investment Treaty Arbitration' (2016) 53(2) Osgoode Hall Law Journal 558.

[76] *Tidewater Inc and others v Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/5, Decision on Jurisdiction (8 February 2013) para 184. For a comprehensive analysis on arbitral decisions endorsing the narrow reading of broad definitions of national and favouring the practice of corporate structuring see Baumgartner (n 35) 26.

[77] See eg E Gaillard, 'Abuse of Process in International Arbitration' (2017) 32(1) ICSIDRev 19–20; SW Schill and HL Bray, 'Good Faith Limitations on Protected Investments and Corporate Restructuring' in AD Mitchell, M Sornarajah and T Voon (eds), *Good Faith and International Economic Law* (Oxford University Press 2015) 88–114; C Schreuer, 'Nationality Planning in Contemporary Issues In International Arbitration And Mediation' (2013)The Fordham Papers 19 and 26.

[78] C Schreuer *et al.*, *The ICSID Convention: A Commentary* (Cambridge University Press 2009) para 273. With respect to locally incorporated companies bringing claims under the second limb of art 25(2)(b) of the Convention, States must agree in their treaty, or other instrument, to treat these companies as nationals of the home State because of 'foreign control'. This has raised the question whether the investor must satisfy a 'subjective control test' pursuant to the treaty, an 'objective control test' under the ICSID Convention, or both. Arbitral jurisprudence is inconsistent on this point. See, eg, *TSA Spectrum de Argentina SA v the Argentine Republic*, Award (19 December 2008) ICSID Case No ARB/05/5; and *Quiborax SA v Bolivia*, Decision on Jurisdiction (27 September 2012) ICSID Case No ARB/06/2.

[79] *Isolux Netherlands, BV v Kingdom of Spain*, SCC Case V2013/153, Final Award (17 July 2016).

under the ECT. IIN was jointly controlled by a Spanish company and a Canadian company. Both had acquired INN and, thus, the qualifying Dutch nationality only two months before the enactment of Spain's long-anticipated energy regulatory framework subject to the claim. Spain challenged jurisdiction on grounds of corporate formality and abuse of process, arguing that INN's ownership was acquired for the sole purpose of gaining access to the ECT. In rejecting the objection, the tribunal first held that, as an entity established in the Netherlands, INN satisfied '*los requisitos formales del Artículo 1(7) TCE* [*ie incorporation*]', irrespective of that company being owned by a national of the host State (ie Spain) and of a non-ECT signatory (Canada).[80] The tribunal then held that IIN's acquisition did not constitute an abusive manipulation of the ECT, for '*el conflicto es posterior a la restructuración discutida y a la colocación de la inversión en una sociedad holandesa*'.[81]

At this stage, it is important to mention that a number of tribunals have begun to set limits to corporate nationality planning in extreme cases, where the investor structured its investment shortly after the dispute arose (eg at the date on which the State adopted the relevant measure) or when the dispute was clearly foreseeable by the investor. Yet these tribunals represent the small minority. A well-known example is the decision in *Philip Morris v Australia*.[82] This dispute arose out of the so-called plain packaging legislation that Australia passed in November 2011. The legislation affected the shares held by the Swiss branch of the Philip Morris International (PMI) group in Philip Morris Australia (PM Australia). There is no BIT between Switzerland and Australia. In a failed attempt to access ISDS, the claimant, Philip Morris Asia Ltd, acquired all shares of PM Australia, becoming prima facie a protected investor under the Australia–Hong Kong BIT. The acquisition was completed almost a year after the Australian Government announced its intention to introduce the plain packaging measures, a period during which PMI has clearly stated its strong opposition to their enactment. The tribunal upheld an objection by Australia that the restructuring of the investment amounted to an abuse of process.

Relying on past investment jurisprudence,[83] the tribunal held that 'the initiation of a treaty-based investor-State arbitration constitutes an [abuse of

[80] ibid, para 668 ('the formal requirements of Article 1(7) of the ECT [ie incorporation]', translation by the author).

[81] ibid, para 704. ('the dispute arose after the aforementioned restructuring and the interposition of the investment in a Dutch entity', translation by the author). For another recent case recent case on the acceptance of shell companies see *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v Republic of Estonia*, ICSID Case No ARB/14/24, Award (21 June 2019).

[82] *Philip Morris Asia Limited v The Commonwealth of Australia*, Award on Jurisdiction and Admissibility (17 December 2015) UNCITRAL, PCA Case No 2012-12, para 554.

[83] For a discussion on investment jurisprudence setting limits on corporate structuring see D Watson and T Brebner, 'Nationality Planning and Abuse of Process: A Coherent Framework', (2018) ICSIDRev 33(1) 302–29.

process] when investor has changed its corporate structure to gain the protection of an investment treaty at a point in time when a specific dispute was foreseeable'.[84] In the present case, the tribunal concluded, the claimant changed its corporate structure at a time when 'it was reasonably foreseeable' that the plain packaging legislation 'would eventually be enacted and, consequently, a dispute would arise'.[85] All claims were, therefore, deemed inadmissible. Respondent States involved in ongoing investment arbitrations are relying on this decision in the hope of barring nationality planners from accessing their treaties.[86]

It remains to be seen whether tribunals adopt a more balanced approach to the interpretation of treaty provisions defining eligible corporate investors, as the tribunal did in *Philip Morris*. Admittedly, the current state of affairs suggests otherwise. As it stands, arbitral practice leads to the conclusion that, with limited exceptions, arbitrators have been unwilling to prevent the use of corporations of convenience, which has significantly increased the range of qualified investors. Corporate restructuring is not, however, the only factor increasing host States' exposure to ISDS claims. In their existing form, IIAs provide an extra layer of procedural protection in addition to broad nationality requirements: the possibility for companies to initiate multiple proceedings.

2. *Multiple proceedings*

We have seen how, when making an investment through a chain of companies incorporated in different States, part owners (ie minority or majority shareholders) and owners at various levels of the same group will become eligible nationals under various IIAs. Each of these entities can file its own separate claim against the host State for the same treaty breach in an effort to maximise their chances of success. For instance, both a foreign company established in the home State and the local subsidiary on which it holds shares could launch proceedings under the same IIA. Another possibility is that two or more entities within the group initiate multiple proceedings against the same host State but under different IIAs.[87] 'In more colloquial terms', vague definitions of 'corporate investor' enable investors to have 'several bites at the cherry'.[88] The occurrence of multiple proceedings is not uncommon in practice.[89]

[84] *Philip Morris v Australia* (n 82) para 554.

[85] ibid, paras 555–569.

[86] See eg *Glencore Finance Ltd.v The Plurinational State of Bolivia*, PCA Case No. 2016-39, Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation (18 December 2017) paras 296–297.

[87] For a recent analysis of the different types of parallel claims see G Zarra, *Parallel Proceedings in Investment Arbitration* (Eleven International Publishing 2017).

[88] Z Douglas, *The International Law of Investment Claims* (Cambridge University Press 2015) 153.

[89] M Friedman, 'Treaties as Agreements to Arbitrate – Related Dispute Resolution Regimes: Parallel Proceedings in BIT Arbitration' in AJ van den Berg (ed), *International Arbitration 2006:*

For example, the Dutch company OI European Group (OIEG) and its majority local shareholder, Owens-Illinois de Venezuela C.A. (OIdV), brought two parallel ICSID claims against Venezuela under the Netherlands–Venezuela BIT. Both disputes concerned the expropriation of the two largest glass container production plants in Venezuela. In the first arbitration, initiated by OIEG, the tribunal rendered an award in favour of the claimant.[90] As a result, Venezuela sought to suspend the second arbitration. It contended that allowing OIdV to proceed with that arbitration would potentially result in 'double recovery' by the same company and 'would constitute an abuse of process'.[91] In a decision of 13 November 2017, the tribunal refused Venezuela's application without providing reasons for doing so and despite acknowledging that '[t]he [the first arbitration] addresses mostly the same substantive matters at issue in the [second] proceedings'.[92]

In the very same year, another ICSID tribunal permitted the continuation of an ECT claim against Italy brought by Eskosol S.p.A., a locally incorporated company that was 80 per cent controlled by Blusun S.A., a Belgium company.[93] The claim arose out of Italy's 2011 regulatory rollback on feed-in tariffs. Italy challenged jurisdiction on the basis that Eskosol's Belgian shareholder, Blusun, had previously initiated, and lost, another ICSID arbitration under the ECT against Italy for the same regulatory action.[94] The tribunal saw nothing objectionable about Eskosol's claim. It considered that, since Blusun 'only' owned 80 per cent of Eskosol, it was difficult to treat both claimants as 'effectively the same party'.[95]

The tribunals' treatment of multiple claims in the *OIdV* and *Eskosol* is the rule rather than the exception, a rule that undeniably exacerbates existing imbalances in the investment protection regime. Other side effects of the rule that are troublesome for respondent States include excessive costs, duplication of compensation and procedural unfairness. A further risk associated with multiple proceedings is the potential for contradictory outcomes.[96] As one author puts it: '[b]eyond the manifest unfairness of allowing one party to "play 'till you win," the ISDS approach [to multiple proceedings] also

Back to Basics? (Kluwer Law International 2007). The author reviewed awards in 78 completed cases and found evidence of concurrent proceedings in 41 per cent of them. See also Zarra (n 87).

[90] *OI European Group B.V. v Venezuela*, ICSID Case No ARB/11/25, Award (10 March 2015).

[91] *Fábrica de Vidrios Los Andes C.A. & Owens-Illinois De Venezuela, C.A. and Venezuela*, ICSID Case No ARB/12/2, Award (13 November 2017) para 168. The tribunal ultimately declined to exercise jurisdiction for reasons concerning Venezuela's denunciation of the ICSID Convention in 2012.

[92] ibid, para 9.

[93] *Eskosol S.p.A. in liquidazione v Italy*, ICSID Case No ARB/15/50, Decision on Respondent's Application under Rule 41(5) (20 March 2017). Request for arbitration filed on 9 December 2015. Proceedings are still pending on the merits.

[94] *Blusun S.A., and others v Italy*, ICSID Case No ARB/14/3, Award (20 December 2016). Request for arbitration filed on 21 February 2014. The award was rendered in favour of the State.

[95] *Eskosol v Italy* (n 93) para 169.

[96] UNCITRAL, 'Concurrent Proceedings in International Arbitration', Note by the Secretariat, A/CN.9/881 (April 2016).

distorts incentives on all sides at the settlement stage, and facilitates opportunistic hold ups'.[97]

One may, however, take some comfort in the fact that, here too, investment tribunals are becoming more sensitive to this type of nationality planning. In a departure from earlier jurisprudence, the recent award in *Orascom v Algeria* relied on the doctrine of abuse of process to reject a claim resulting in parallel proceedings under different IIAs.[98] In that case, a company registered in Luxembourg, *Orascom TMT Investments*, instituted ICSID proceedings under the Algeria–Belgium and Luxembourg BIT against Algeria. The company's ultimate shareholder had previously sued Algeria under other BITs for the same treaty breach by invoking the nationality of several subsidiary entities in the corporate chain. The tribunal held that, although structuring an investment to access an IIA 'is not illegitimate', an investor 'may commit an abuse' if it sues a host State 'multiple times [through] various entities under the same control that are part of the vertical chain in relation to the same investment, the same measures and the same harm'.[99]

The Indian Government will likely invoke the decision in *Orascom* as part of its jurisdictional objections in two parallel UNCITRAL arbitrations initiated by the Vodafone Group against the State, one by Vodafone's Dutch subsidiary under the Netherlands-India BIT[100] and the other by Vodafone's UK companies under the UK-India BIT.[101]

As a decision that imposes restrictions on nationality planning, *Orascom* is a positive development that sympathises with the objective for a more balanced regime. Once again, however, this decision represents an exception to the prevailing view that arbitrators should refrain from relying on non-treaty sources of general international law. In addition, although the principle of abuse of process can be seen as a useful tool to limit the use of nationalities of convenience, its application has been 'rooted in highly abstract terms and raises its own problems of certainty and consistency'.[102] Put another way, international investment law lacks a consistent line of jurisprudence clarifying the dividing line between legitimate nationality planning and abuse of process.[103]

The foregoing discussion encapsulates a rather obvious, yet fundamental, statement: any effort to combat the practice of nationality planning ultimately lies in the hands of States. States are, after all, the 'masters of the treaties' and are accordingly advised to take all necessary steps to reduce the exposure

[97] J Arato, 'The Private Law Critique of International Investment Law' (2019) 113(1) AJIL 53.
[98] *Orascom TMT Investments v Algeria*, ICSID Case No ARB/12/35, Award (31 May 2017).
[99] ibid, para 553.
[100] *Vodafone International Holdings BV v India* (I), PCA Case No 2016-35.
[101] *Vodafone Group Plc and Vodafone Consolidated Holdings Limited v India* (II), *ad hoc* UNCITRAL arbitration. For more details on the case see, TW Chiang, 'Anti-Arbitration Injunctions in Investment Arbitration: Lessons Learnt from the *India v. Vodafone* Case' (2018) 11(2) Contemporary Asian Arbitration Journal 254–7.
[102] Lee (n 74) 378.
[103] Watson and Brebner (n 83) 329.

created by the expansive nationality requirements with the aim of recalibrating the international investment regime.

III Towards a More Balanced Regime: Curbing Nationality Planning

Unilateral withdrawal from IIAs may, at first glance, be considered as the most efficient solution to 'eradicate' the practice of nationality planning. An increasing number of States, such as Venezuela and South Africa, have terminated their IIAs with counterparts that facilitate this practice.[104] The effectiveness of treaty termination is nonetheless questionable. Most IIAs contain the so-called 'sunset clauses', which protect investments made prior to termination for a period of 15, sometimes even 20 years. This means that, after denouncing an IIA, investors that were operating in the host State can continue to rely on the protections of the treaty. Moreover, and perhaps more importantly, exiting *one* IIA will not suffice to curb nationality planning as investors can always invoke the remaining IIAs concluded by the host State. Venezuela, for instance, is still party to 25 IIAs, including the Barbados–Venezuela BIT, an attractive treaty for shell corporations owned by Venezuelan nationals.[105]

With these considerations in mind, States may want to consider other alternatives, such as amending the text of the treaty throughout their IIA network. Space constraints naturally preclude a comprehensive examination of the numerous ways in which States can draft their treaties to be less vulnerable to the use of nationalities of convenience. The focus here is therefore on some underexplored, yet potentially effective, treaty adjustments that can prevent the aforementioned methods of nationality planning. For the purposes of the following analysis, recent IIAs and IIA models will be examined, including the new Dutch Model BIT adopted in 2019.[106]

This Part will be of interest to States that, in the hope to mitigate the asymmetric nature of IIAs, are considering amendments to their old-generation IIAs and signing new-generation IIAs. UNCTAD highlights that 'modern treaty making include a sustainable development orientation, preservation of regulatory space, and improvements to or omissions of investment dispute settlement'. In this context, most IIAs concluded in 2018 contain clauses that 'limit or clarify obligations (e.g. by omitting or including more detailed clauses on FET (all 29 IIAs) and/or indirect expropriation (23 IIAs)'.[107] Moreover, 19 IIAs signed that year 'have general exceptions – for example, for the protection of human, animal or plant life or health, or the

[104] RL Wellhausen, 'Recent Trends in Investor–State Dispute Settlement' (2016) 7(1) JIDS 642–3.
[105] U Topcan, 'Abuse of the Right to Access ICSID Arbitration' (2014) 29(3) ICSIDRev 19–20.
[106] Agreement on Reciprocal Promotion and Protection and of Investments between ___ and the Kingdom of the Netherlands (22 March 2019) <https://www.rijksoverheid.nl/ministeries/ministerie-van-buitenlandse-zaken/documenten/publicaties/2019/03/22/nieuwe-modeltekst-investeringsakkoorden>.
[107] UNCTAD World Investment Report 2019 (n 2) 105.

https://doi.org/10.1017/S0020589320000044 Published online by Cambridge University Press

conservation of exhaustible natural resources'.[108] These reforms will prove futile if the other IIAs signed by the host State do not incorporate restrictive nationality requirements. Indeed, as previously explained, investors with a little bit of legal creativity can always bypass newer, more robust IIAs by qualifying as national of an IIA with broadly worded definitions and vague substantive provisions.

Accordingly, narrowing the scope of personal jurisdiction under IIAs is indispensable for ensuring the establishment of a more-State oriented regime. This will not only reduce ISDS deficits but it will also prevent investors from circumventing newly concluded IIAs with less generous investment protection standards.

A. Individuals: Preventing Claims by Dual Nationals

Claims by dual nationals can be restricted through the incorporation in IIAs of the rule of non-responsibility or the rule of dominant and effective nationality.

1. The rule of non-responsibility (dual home–host State nationals)

Recognised as customary international law, the rule non-responsibility posits that, as a corollary of the principle of equality of States, a State is not responsible for injuries caused to their own nationals.[109] The ICSID Convention incorporates this rule in Article 25(2)(a) which, as explained above, provides that jurisdiction does not extend to nationals of the respondent State. A very small number of IIAs include the rule of non-responsibility.[110] One of these treaties is the Mauritius–Egypt BIT, which defines 'investor' as 'a natural person who derives his or her nationality in virtue of the laws of one of the Contracting Parties and who is not simultaneously a national of the other Contracting Party'.[111]

States that decide to incorporate the rule of non-responsibility in their IIAs should also consider specifying the time at which the investor has to hold the nationality of a State party other than the respondent State. The ICSID Convention, for instance, provides a double test of time in that regard: the investor must not be a national of both Contracting Parties 'on the date the parties consented to submit the dispute to [arbitration] as well as on the date on which the request was registered' by the Centre.[112] This timing of nationality requirements, which mainly focuses on the date of the presentation of the claim, may result in an opportunistic renouncement of the nationality of the respondent State after the events given rise to the dispute have occurred. This is precisely what happened in *Pey Casado v Chile*, where the claimant, a dual Spanish–Chilean national, bypassed the dual nationality restriction in the ICSID Convention by renouncing his

[108] ibid. [109] Olmedo (n 65) 8. [110] UNCTAD's IIA Mapping (n 18).
[111] Mauritius–Egypt BIT (2014) art 1(3)(b). [112] ICSID Convention (n 8) art 25(2)(a).

Chilean nationality only two weeks before instituting ICSID proceedings.[113] Lenient timings requirements may also enable a domestic investor to 'internationalise' their claims through the ex post facto acquisition of a second, qualifying nationality.

To counter the above-described opportunistic behaviours, States should consider incorporating additional dates of nationality, requiring that, besides the date of the submission of the claim, the investor must have the nationality of a Contracting Party other than the respondent State on the date when the injury giving rise to the claim occurred. An illustrative, and rare, example of such dates of nationality can be found in Article 1(3)(a) the Slovak Republic–Iran BIT:

> 'investor' means the following natural persons [who] on the date on which the alleged breach of this agreement occurred as well as on the date on which the claim was submitted to arbitration are: a) … nationals of the Home State … and [who do not] have … the nationality of the Host State.[114]

These timing requirements, which reflect the position under customary international law,[115] are justifiable. Indeed, logic dictates that, to claim substantive protection under an IIA, an investor should also qualify as a national at the time when the treaty obligation was allegedly breached (eg by government regulatory measures affecting the investment). This date will normally precede the date of the presentation of the claim.

Another date that States are advised to consider is when the investor made the investment in the host State. In this regard, States should be mindful of the underlying purpose of IIAs, namely to promote and protect *foreign* investments, that is, investment made by nationals of the home State in the host State. As Dolzer and Schreuer rightly state: 'the foreignness of an investment is determined by the investor's nationality'.[116] In this regard, it is difficult to see how an investment made by a dual home-host State national will qualify as 'foreign',[117] especially if the investor has benefited from their status as domestic investor to make the investment or if they have developed a stronger connection with the host State.

In brief, States may prevent nationality planning by dual home–host State nationals by incorporating the rule of non-responsibility in their IIAs. That rule should be accompanied by three relevant dates on which the investor must have the nationality of a State Party other than the respondent State: (a) the time the investor submits the dispute to arbitration; (b) the time the

[113] *Victor Pey Casado and President Allende Foundation v Chile*, ICSID Case No ARB/98/2, Award (8 May 2008) para 317.

[114] Slovak Republic–Iran BIT (2016) art 1(3)(a).

[115] ILC Draft Articles on Diplomatic Protection (n 40) art 7.

[116] R Dolzer and C Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 44.

[117] See Dissenting Opinion of arbitrator Oreamuno in *García Armas v Venezuela I* (n 37) 102, where he observed that an investment qualifies for BIT protection only if, as was the case at hand, the investor held the nationality of the home State party at the time his or her investment was made.

alleged interference with the investment occurred or commenced; and (c) the time the investment was made.

2. The rule of dominant and effective nationality (dual home–host State nationals and dual home–third State nationals)

States that wish to limit claims by their own investors in a non-absolute manner can incorporate the customary rule of dominant and effective nationality into their IIAs. As explained above, this rule provides an exception to the rule of non-responsibility in cases where it can be established that the aggravated dual home–host State national maintains stronger connections (personal, economic, political, etc) with the home State. Although the rule is limited to dual home–host State nationals in the realm of diplomatic protection, this does not mean that Sates are prevented from extending its scope of application to dual home–third State nationals.

Some IIAs contain the rule of dominant and effective nationality as part of the definition of protected natural persons.[118] The standard formulation can be found in the above-mentioned Article 10.28 of DR-CAFTA:

> investor of a Party means a national … of a Party [who] has made an investment in the territory of another Party provided; however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality.

The wording of this provision is problematic on at least three levels. First, it fails to indicate the category of dual nationals who fall under its scope of application, a drafting defect that may result in unintended interpretations. As previously explained, the tribunal in *Aven* rejected Costa Rica's argument that Article 10.28 of DR-CAFTA applied to both dual home–host State nationals and dual home–third State nationals. The tribunal reasoned that: '[t]hrough inclusion of the expression "dominant and effective nationality" in Article 10.28, the DR-CAFTA Parties *intended* to incorporate … customary international law for the treatment of multiple nationality in diplomatic protection cases'.[119] This reasoning sits poorly with the *lex specialis* maxim and the terms of Article 10.28.

One must first note that the dispute between Mr Aven and Costa Rica was not a diplomatic protection case, but rather a dispute between a State and a private investor arising from an investment treaty. Consistent with this observation, nothing in Article 10.28 suggests that the parties 'intended' to apply the customary law version of the rule of dominant and effective nationality. That provision simply refers to 'a natural person who is a dual national', without specifying the States of nationality of that person. If we follow the reasoning

[118] UNCTAD's IIA Mapping (n 18).
[119] *Aven v Costa Rica* (n 59) para 205 (emphasis added).

of the tribunal in *Rawat v Mauritius*, silence of Article 10.28 on the category of dual nationals would seem to point to the inclusion, rather than the exclusion, of investors who hold the nationality of the home contracting party and a State other than the respondent State.

To avoid interpretations such as that in *Aven*, States are advised to clarify the categories of dual nationals that fall within the scope of application of the dominant and effective nationality test. This is what Iran and the Slovak Republic did in their BIT. Besides excluding dual home–host State nationals through the rule of non-responsibility, the BIT provides that '[a] natural person that is a dual national of either Contracting Party and any non-Contracting Party, shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality'.[120] In contrast, the Netherlands has proposed to limit the test to dual home–host State nationals.

On 22 March 2019, the Dutch Ministry of Foreign Affairs published the final version of its new model BIT, which the Netherlands intends to use for the renegotiation of 78 Dutch BITs with non-EU countries.[121] To the surprise of many, the Dutch model BIT contains provisions that aim at preventing individual and corporate nationality planning. With respect to individuals, Article 1(b)(ii) provides that '[a] natural person who has the nationality of the Kingdom of the Netherlands and the other Contracting Party is deemed to be exclusively a natural person of the Contracting Party of his or her dominant and effective nationality'.[122]

Should States wish to apply the rule of dominant and effective nationality to both categories of dual nationals, they should follow the treaty drafting approach of the Iran–Slovak Republic BIT.

The second drafting defect of the standard formulation of the rule of dominant and effective nationality is the absence of criteria of dominance. The relevant enquiry here is to establish, by reference to factual ties with each country, which of the two 'conflicting' nationalities (home/host State, or if applicable, home/third State) is the prevalent one. More specifically, the test should focus on establishing whether a dual national is 'foreign' enough, that is, sufficiently connected to the home State, to render 'international' a dispute with the respondent State.

In *Ballantines v Dominican Republic*, another dispute initiated under DR-CAFTA, a tribunal offered some guidance regarding the standard to determine the dominant and effective nationality in the absence of an express agreement in the treaty. This time the claimants were dual home–host State nationals from the United States and the Dominican Republic. The tribunal rendered an award on 3 September 2019 deciding by a majority that the claimants' dominant and effective nationality was that of the respondent State

[120] Slovak Republic–Iran BIT (2016) art 1(3)(b).
[121] A Schurink, 'New Dutch Model BIT: Negotiations to Commence Soon' Freshfields Risk & Compliance Archive (18 June 2019).
[122] Dutch Model BIT (n 106).

and, thus, that it lacked jurisdiction under DR-CAFTA.[123] To the best of the author's knowledge, this is the first tribunal that has interpreted de facto the dominant and effective test under an IIA. In line with the reasoning adopted in *Aven*, the tribunal first noted that 'the expression "dominant and effective" [in DR-CAFTA] is [undoubtedly] rooted on customary international law', thereby accepting that the test's scope is limited to dual home–host State nationals.[124] It then considered that, since 'the treaty does not prescribe' the criteria of dominance, it is necessary to 'take guidance from customary international law'.[125]

After engaging in its own exegesis of non-ISDS cases on dual nationality, such as *Case No. A/18* brought before the Iran–United States Claims Tribunal, the tribunal held that relevant factors to assess the effective and dominant nationality of investors include 'the State of habitual residence, the circumstances in which the second nationality was acquired, the individual's personal attachment for a particular country, … the center of the person's economic, social and family life'.[126] The tribunal added that 'the specific context of DR-CAFTA' required the examination of other relevant factors', such as 'the investment itself, the status of investor as well as other circumstances surrounding those elements'.[127]

Although not exhaustive, the tribunal's list establishes an objective factual inquiry that can serve as a point of reference for States that want to incorporate the dominant and effective nationality requirement into their IIAs. The 2019 Australia–Hong Kong BIT contains a similar list.[128] However, it is advisable that, when negotiating the criteria of dominance, States include the facts surrounding the investment as a strong indicator of dominant nationality and, in particular, the status upon which the investor relied to obtain the benefits deriving from the investment. It is doubtful whether an investor who, for instance, presents him or herself as a domestic investor to establish and operate the investment in the host State (see *García Armas I*) should qualify as investor having home State nationality.

Lastly, States are encouraged to define the relevant times in which a tribunal should conduct any dominance analysis. Here, this article recommends that States refer to the same dates as for the rule of non-responsibility. As such, the home State nationality should be the dominant one on the date the investor submitted the dispute to arbitration, the date the alleged treaty breach and the date the investment was made. With these timings of nationality requirements, States will reduce the possibility that a dual national disguises his or her 'real' dominant or effective nationality before bringing the claim under the treaty.

123 *Michael Ballantine et al v The Dominican Republic*, UNCITRAL, PCA Case No 2016-17, Final Award (3 September 2019).
124 ibid, para 531.
125 ibid, para 530.
126 ibid, para 559.
127 ibid, para 554.
128 Australia–Hong Kong BIT (2019) art 1.

B. Corporations: Preventing Corporate Structuring and Multiple Claims

As has been seen in preceding paragraphs, broad definitions of corporate investor have, in many cases, allowed investors to structure their investments through corporate layers with divergent nationalities. Investors commonly do so by incorporating a (shell) company in a home country that has a (more favourable) IIA with the host State or by selling their distressed assets to a subsidiary already established in that country. Corporate structuring can be prevented by incorporating a provision codifying 'pre-existing/foreseeable dispute' jurisprudence or a 'self-invoking' denial of benefit (DOB) clause.

Broad definitions of corporate investors have also enabled legally distinct but economically related entities to initiate multiple proceedings under different IIAs. This article proposes waiver provisions as a tool to curb the occurrence of multiple proceedings.

1. Codification of 'pre-existing/foreseeable dispute' jurisprudence and 'self-invoking' denial of benefits clauses

Drafting approaches to prevent corporate structuring can vary.[129] A rare, innovative approach found in some recently concluded IIAs is the codification of arbitral decisions declining jurisdiction on grounds of abuse of process. As an illustration, Article 16(3) of the Dutch Model BIT provides:

> The Tribunal shall decline jurisdiction if an investor within the meaning of Article 1(b) of this Agreement, which has changed its corporate structure with a main purpose to gain the protection of this Agreement at a point in time where a dispute had arisen or was foreseeable. This particularly includes situations where an investor has changed its corporate structure with a main purpose to submit a claim to its original home state.[130]

This provision is a welcome attempt on the part of the Netherlands to incorporate the essence of the test applied by the tribunal in *Philip Morris*. The clause delegitimatises a change of nationality with the purpose of accessing the treaty if there was a pre-existing dispute or a future dispute was foreseeable. The second sentence reinforces the application of this test to domestic investors that channel their investments through a State Party to an IIA in order to sue their country of origin. While Article 16(3) is a welcome effort to combat corporate nationality planning, its wording is not without problems.

For one, it does not define the term 'dispute' and its materialisation, nor does it prescribe the elements necessary to categorise a dispute as 'foreseeable'. Does, for instance, a dispute arise at the time the investor knew of the State's intention to adopt the legislation harming the investment? If so, should the

[129] Baumgartner (n 35) Ch 8.

[130] Dutch Model BIT (n 106). Other IIAs containing similar provisions include the EU–Singapore FTA (2018) and the Rwanda–United Arab Emirates BIT (2017).

investor also oppose the enactment of that legislation for the dispute to materialise? Moreover, Article 16(3) fails to define the factors that the tribunal should consider when determining whether the purpose of the investment structuring was to 'gain access to the treaty'. States willing to follow the approach adopted by the Netherlands are advised to clarify these issues in order to limit the interpretive discretion of arbitrators, ensuring that the treaty will be applied in accordance with the intention of the parties.

Another, more effective alternative to prevent corporate structuring is the inclusion of a self-invoking DOB clause. Feldman writes that '[w]hen available, a [DOB] provision, rather than the principle of abuse of right, should be a respondent's first choice when facing a claim brought by a company that appears to lack any genuine connection to its purported home State'.[131]

The function of DOB clauses is twofold. First, they exclude from treaty coverage shell companies that are controlled by third or host State nationals. Second, and as a result, DOB clauses prevent the use of corporations of convenience through corporate structuring.[132] While having gained increasing popularity in investment treaty making, DOB clauses are not a typical feature of IIAs.[133] In addition, as presently drafted in IIAs, DOB clauses have created undesirable room for interpretation by arbitrators.

Generally, DOB clauses in IIAs contain wording such as '[e]ach Contracting Party reserves the right to deny', as in Article 17(1) of the ECT, or '[a] Party may deny the benefits', as in Article 10.12(2) of the United States–Peru FTA:

> A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of any Party, other than the denying Party, and persons of a non-Party, or of the denying Party, own or control the enterprise.[134]

Assuming that the substantive conditions of a DOB clause (eg substantive business activities and control) are fulfilled, the standard language of the clause has raised the question whether the denying State can benefit from the automatic application of the provision or, to the contrary, whether the it must deny benefits before the putative investor initiates proceedings. It seems logical to assert that a respondent State should be entitled to deny treaty benefits at the time such benefits are sought by the investor through a request for arbitration. Several tribunals, most of them constituted under the ECT, have however held that host States must proactively deny treaty benefits and

[131] M Feldman, 'Setting Limits on Corporate Nationality Planning in Investment Treaty Arbitration', (2012) 27(2) ICSIDRev 283.
[132] L Mistelis and C Mihaela Baltag, 'Denial of Benefits and Article 17 of the Energy Charter Treaty' (2009) 113 Penn State Law Review 1320–1.
[133] UNCTAD's IIA Mapping (n 18).
[134] United States–Peru FTA (2009) art 10.12(2).

give notice before a dispute arises, leaving the utility of such clauses in doubt.[135]

The tribunal in *Plama v Bulgaria* was first in holding that a DOB clause has mere prospective effect.[136] In that case, Bulgaria exercised its right under Article 17(1) of the ECT to deny the substantive investment protections of the treaty to Plama Consortium Limited, a mailbox company established in Cyprus and controlled by nationals of a non-ECT party. Bulgaria claimed that Article 17(1) operated retroactively from the time the investor initiated arbitration. The tribunal disagreed, finding that Bulgaria's exercise of the DOB right would not accord with the object and purpose of the ECT to 'promote long-term co-operation in the energy field'.[137] On this point, the tribunal reasoned that accepting a retrospective denial from the time proceedings are commenced would prevent the investor from planning in the long term for such an effect and would lure the investor with 'false' legitimate expectations.[138] According to the tribunal, before becoming a respondent, the host State should 'properly' notify the investor 'of the potential effect of Article 17(1) […]' through, for instance, 'a statutory provision in investment or other laws'.[139]

ECT tribunals have so far followed this approach, the most recent being the tribunal in *Masdar v Spain*.[140] The claimant in that case was Masdar Solar & Wind Cooperatief U.A., a Dutch 'special purpose vehicle' controlled by an Abu Dhabi company. Abu Dhabi is not a party to the ECT. In an award of 16 May 2018, the tribunal found that, concordantly with 'a majority of tribunals', the host State must exercise its DOB right before the dispute arises, 'whether by adopting legislation denying benefits generally (or to a specific sector or sectors) or by promulgating measures directed at specific investors'.[141]

It should be noted, however, that the position in favour of the retroactive application of DOB clauses extends beyond ECT arbitrations.[142] In *Ampal v Egypt*, an ICSID tribunal held that Egypt's pre-arbitration exercise of the DOB clause in the US–Egypt BIT did not vitiate its jurisdiction. Referring to Article 25(1) of the ICSID Convention, the tribunal found that ICSID jurisdiction 'is to be assessed at the time […] the investor's Request for

[135] For a comprehensive analysis of arbitral decisions favouring the prospective application of DOB clauses, see Y Banifatemi, 'Taking into Account Control under Denial of Benefits Clauses' in Y Banifatemi and E Gaillard (eds), *Jurisdiction in Investment Treaty Arbitration* IAI Series on International Arbitration No 8 (Juris Publishing 2018). She also examines decisions where tribunals have reached a different conclusion on the timing and effect of these clauses, finding that a DOB right can be exercised by the respondent State at the time when treaty benefits are sought by the investor through a request for arbitration. See eg *Ulysseas Incorporated v Ecuador*, PCA Case No 2009-19, Interim Award (12 June 2012).

[136] *Plama Consortium Limited v Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction 8 (February 2005). [137] ibid, para 161. [138] ibid, para 162. [139] ibid, para 157.

[140] See eg *Masdar Solar and Wind Cooperatief UA v Spain*, Award, ICSID Case No ARB/14/1 (16 May 2018). [141] ibid, para 239.

[142] *Ampal-American Israel Corporation and others v Egypt*, Decision on jurisdiction, ICSID Case No ARB/12/11 (1 February 2016).

Arbitration is registered by the Centre', and 'there cannot be an embedded conditionality in the Treaty which could be triggered after' that date.[143]

A requirement for a pre-arbitration invocation of a DOB clause appears somewhat detached from realities on the ground. As a practical matter, it is difficult to see how the host State will be able to assess the investor's compliance with the substantive conditions of a DOB clause before a dispute with the investor has arisen. It is in fact when the host State becomes a respondent in an investment arbitration that it becomes aware of the corporate structure and economic activities of investors investing in its territory. When restructuring their investments through third States or from the host State to access treaty protection, investors should simultaneously accept the risk envisaged in a DOB clause. States that agree with this view and wish to avoid the disabling of DOB clauses by investor-friendly interpretations, are advised to consider drafting DOB clauses in a way that treaty benefits can be denied automatically (eg 'benefits shall be denied' or 'benefits shall not be available to an investor').

Strikingly, according to UNCTAD, only nine out of 2,577 mapped IIAs contain this restrictive wording. The new Belgium–Luxembourg Economic Union (BLEU) Model BIT is among those treaties. Its DOB clause states that '[f]or avoidance of any doubt, the benefits of this Agreement shall be denied if the preconditions set down in paragraph 1 are fulfilled at time when the claim is submitted pursuant to Article 19(D)'.[144] The Serbia–United Arab Emirates BIT contains similar language.[145]A provision of this nature will guarantee not only that the investor will be denied treaty benefits after the initiation of the proceedings but also that the denial will apply retroactively from that date.

The potential inclusion of a self-invoking DOB clause should be an item for discussion in the context of the negotiations for the reform of the ECT. The Energy Charter Conference, the intergovernmental body that oversees the ECT, issued a decision on 6 November 2019 approving a mandate, procedure and timeline for negotiations on the modernisation of the treaty.[146] Negotiations begun in December, following a wide-range of proposals sent by a majority of the 55 Members of the Conference.[147] A cursory read of these proposals shows that only two States (Albania and Georgia) are concerned about the position adopted by investment tribunals in favour of the retroactive application of the

[143] ibid, paras 164–169. Art 25 of the ICSID Convention (n 96) provides that 'when the parties have given their consent, no party may withdraw its consent unilaterally'.

[144] BLEU Model BIT (2019) art 13(2).

[145] Serbia–United Arab Emirates BIT (2013) art 14(1).

[146] International Energy Charter, 'Energy Charter Conference Gives Green Light for Negotiations on Modernisation of the ECT' *Media/News* (7 November 2019) <https://www.energycharter.org/media/news/article/energy-charter-conference-gives-green-light-for-negotiations-on-modernisation-of-the-ect/>.

[147] Energy Charter Secretariat, 'Policy Options for Modernisation of the ECT', CCDEC 2019 08S TR, Brussels (6 October 2019) <https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2019/CCDEC201908.pdf>

DOB clause in Article 17(1) of the treaty. Albania notes that 'the Treaty does not define when and how a Contracting Party can apply this clause'.[148] Similarly, Georgia highlights that, as practice has shown, Article 17(1) 'does not apply automatically and requires additional action from the Contracting Party to "reserve" [its] right [of denial]'.[149] Both States then propose 'to clearly define' the procedural requirements for the application of Article 17(1), but fail to formulate concrete amendments to the clause.

As previously argued, instead of embarking on the difficult task of defining the procedure for the innovation of Article 17(1), ECT Signatories should consider making the operation of the clause automatic, by replacing the discretionary wording 'reserves the right to deny' with the mandatory language the 'benefits shall be denied'. This mandatory language eliminates the interpretive discretion of tribunals, thereby ensuring that the purpose of Article 17(1) is no longer rendered meaningless.

The European Union and its Member States, and more particularly Spain, which has faced over 40 ECT claims, are advised to follow this treaty drafting approach, and to propose it during the negotiations for the modernisation of the ECT. This advice is of utmost importance here if we consider that, as it was the case in *Masdar* and *Isolux*, investors often use Dutch empty shells to obtain protection against Member States under the ECT. In its latest report, the Corporate Europe Observatory and the Transnational Institute indicate that 'an extraordinary 23 out of 24 supposedly "Dutch" investors who filed ECT-lawsuits by the end of 2017 [were] mailbox companies'.[150]

2. *Waiver provisions (multiple proceedings)*

The text of most IIAs are not oriented towards mustering the risks associated with multiple proceedings. These risks include procedural unfairness (ie the host State having to defend multiple claims related to the same investment and State measure), the potential for contradictory outcomes, additional costs and double recovery. More crucially, in the thirty-sixth meeting of the UNCITRAL Working Group III, participants pointed out that 'multiple proceedings distorted the balance of rights and interests of relevant stakeholders' and 'undermined predictability more generally'.[151] The Working Group III further noted that the text of most IIAs lack 'a framework to address multiple proceedings' and considered whether concerns relating to the risk associated with this phenomenon 'warranted some form of

[148] ibid 26
[149] ibid.
[150] P Eberhardt, 'One Treaty to Rule Them All: The Energy Charter Treaty and the Power It Gives Corporations to Halt the Energy Transition' (2018) CEO and TNI, Brussels/Amsterdam.
[151] UNCITRAL, 'Report of Working Group III (Investor–State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October–2 November 2018)' A/CN.9/964 (6 November 2018) para 42.

reform'.[152] Reform options that are often suggested to prevent multiple proceedings include 'the use of lis pendens [and] res judicata' and the 'proactive use of consolidation'.[153] These mechanisms have certain shortcomings.

The applicability of the *lis pendens* and *res judicata* doctrines in investment arbitration proceedings is questionable.[154] This is because, as we have seen, investment tribunals tend to disregard rules and principles of national and international law not found in the text of the treaty, no matter how auspicious or appropriate they may appear. With respect to *lis pendens*, for instance, Yannaca-Small explains that 'very few investment arbitration tribunals have expressed an opinion on parallel proceedings and the applicability of the *lis pendens* principle'.[155] Even if an investment tribunal was willing to consider the doctrines, it will be rather hard for the respondent State to show that the requirements of *lis pendens* and *res judicata* (identity of the parties, cause of action, and object) have been satisfied. On this point, the UNCITRAL Working Group III itself has acknowledged that the 'triple identity requirement may make it difficult to apply the doctrine[s] to concurrent proceedings' in investment treaty arbitration.[156] This is particularly true for the condition 'identity of parties', which has been narrowly construed by investment tribunals. The tribunal in *Eskosol* expressed the overall view here, that is, a company and its shareholders are legally distinct entities and consequently cannot be treated as the same party for the purposes of *lis pendens* and *res judicata*.[157]

As a procedural device that aims at aggregating two or more closely related disputes, consolidation may prove effective in limiting multiple proceedings, provided this mechanism is available under the applicable IIA. IIAs rarely contain provisions on consolidation, neither do UNCITRAL or ICSID, the most frequently used arbitral fora for investment disputes.[158] A typical consolidation provision can be found in the Dutch Model BIT. Article 19(7) provides that 'when two or more claims have been submitted separately to arbitration under' the treaty 'and the claims have a question of law or fact in

[152] ibid, para 41.
[153] UNCITRAL, 'Reform Options: Tabular Presentation of Framework for Discussion' A/CN.9/WG.III/WP.166/Add.1 (30 July 2019) 9.
[154] A Reinisch 'The Issues Raised by Parallel Proceedings and Possible Solutions' in M Waibel *et al.* (eds), *The Backlash against Investment Arbitration* (Kluwer Law International 2010) 121. JO Voss, *Impact of Investment Treaties on Contracts between Host States and Foreign Investors* (Martinus Nijhoff 2011) 278–9.
[155] K Yannaca-Small, 'Parallel Proceedings' in P Muchlinski *et al.* (eds), *The Oxford Handbook of International Investment Law* (Oxford Handbooks Online 2012) 123.
[156] UNCITRAL's Note on Concurrent Proceedings (n 96) para 50.
[157] *Eskosol v Italy* (n 93); see also SARL *Benvenuti & Bonfant v People's Republic of Congo* (Case No ARB/77/2) (15 August 1980), VIII YB Com Arb 145 (1983) para 1.14.
[158] BM Cremades and I Madalena, 'Parallel Proceedings in International Arbitration' (2008) 24 (4) Arbitration International 534.

common and arise out of the same events or circumstances, either party to the dispute may seek a consolidation order at either Tribunal'.[159]

Existing consolidation mechanisms only address situations where different investors launch claims with respect to the same State measure and the *same* IIA. However, they do not establish the possibility of cross-treaty claim consolidation, that is, consolidation of multiple proceedings arising out of *different* IIAs, an eventuality that was present in *Orascom* and *Vodafone*. This may be explained by the fact consolidation based on two or more IIAs is problematic because, as distinct sources of law, the relevant treaties might 'contain differing substantive obligations, as well as diverging time limits, procedural obligations and dispute settlement forums'.[160] Moreover, it is important to note that, regardless of the potential for (cross-treaty) consolidation, a decision to consolidate proceedings does not ultimately lie in the hands of the respondent State but the arbitrators.

A better jurisdictional device to limit multiple proceedings is a treaty provision that requires the claimant investor, including its shareholder and subsidiaries, to waive its right to seek further remedy or to pursue any pending claim, under the same or different IIAS. At this stage, it may not come as a surprise that a very limited number of IIAs contain a waiver provision, also known as 'no-U-turn'.[161] One of the more comprehensive and recent waiver provisions can be found in Article 9.17 of the EU–Singapore FTA, which, in its relevant parts, provides:

> [A] claim may be submitted to arbitration under this Section only if
> […]
> (g) the claimant: (i) withdraws any pending claim concerning the same treatment as alleged to breach the provisions of Section A (Investment Protection) submitted to another international tribunal established pursuant to this Section, or any other treaty or contract; and (ii) declares that it will not submit such a claim in the future; and
> (h) no final award concerning the same treatment as alleged to breach the provisions of Section A (Investment Protection) has been rendered in a claim submitted by the claimant to another international tribunal established pursuant to this Section, or any other treaty or contract.
> For the purposes of subparagraphs […] 1(g) and 1(h), the term 'claimant' refers to the investor and, where applicable, to the locally established company. In addition […] the term 'claimant' includes all persons who directly or indirectly have an ownership interest in, or who are controlled by the investor or, where applicable, the locally established company.[162]

The effects of this provision seem potentially far-reaching. First, the clause requires that the claimant investor, including its shareholders and

[159] Dutch Model BIT (n 106).
[160] UNCITRAL's Note on Concurrent Proceedings (n 96) para 59.
[161] UNCTAD's IIA Mapping (n 18). Only 135 out of 2,577 mapped IIAs contain some form of waiver provisions.
[162] EU–Singapore FTA (2018) art 9(7).

https://doi.org/10.1017/S0020589320000044 Published online by Cambridge University Press

subsidiaries, 'withdraws' any parallel claim 'concerning the same treatment as alleged to breach' the treaty (*OIdV v Venezuela* scenario). Second, it prevents the claimant investor from initiating arbitration proceedings if an 'award concerning the same treatment as alleged to breach' the treaty had previously been rendered in a claim brought by one of the claimant's shareholders (*Eskosol v Italy* scenario). Third, it requires that the claimant investor, including its shareholders and subsidiaries, 'withdraws any pending claim' under 'any other treaty' when those claims concern 'the same treatment as alleged to breach' the treaty (*Orascom v Algeria* and *Vodafone v India* scenario). In sum, the waiver provision contained in Article 9.17 of the EU–Singapore FTA provides a good illustration of the kind of mechanisms that can be used to avoid multiple proceedings.

CONCLUSIONS

As this article has demonstrated, the attainability of any reform aimed at mitigating the asymmetric nature of international investment law inevitability depends on narrowing the personal jurisdiction of arbitral tribunals. Broad definitions of protected corporations and individuals, together with the permissive approach towards nationality planning, have given a very large number of otherwise unqualified investors a remedy to adjudicate investment disputes. This has in turn compounded the unbalanced relationship between host States and investors.

States that find nationality planning objectionable are encouraged to amend their treaties to the effect of reducing this practice. The more restrictions treaty drafters provide in this regard, the better the chance of establishing a more equilibrated, state-centric regime. The treaty wording approaches proposed in this article represent only a taste of the various mechanisms that States can adopt to achieve this objective. Some recent IIAs contain these mechanisms, making the signatories less vulnerable to claims by dual nationals, corporate structuring and the occurrence multiple proceedings.

However, the international investment protection regime comprises more than 3,000 IIAs, most of which still contain vaguely defined nationality criteria. Owing to the highly decentralised IIA universe, in the absence of a profound overhaul, nationality planning will remain possible. Individuals and (especially) corporations will indeed continue to increase host States' exposure to ISDS and to bypass newer, more robust IIAs by using a multiplicity of national origins. States play a fundamental role in curbing the phenomenon and we can be cautiously optimistic about their ability to do so.