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PIERCING THE CORPORATE VEIL IN INTERNATIONAL ARBITRATION

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ABSTRACT

This article examines the application of the piercing the corporate veil concept in international arbitration. Interpretation of this concept is inconsistent even within one domestic legal system, and it is even less predictable in international arbitration when several legal systems come into play. Piercing the corporate veil may help to give a concrete practical meaning to the purpose of an arbitration agreement or a bilateral investment treaty. However, there are downsides of such piercing because it negates many of the benefits which the corporate form offers.

Domestic courts are likely not to recognize and enforce an arbitration award piercing the corporate veil in the absence of a written arbitration agreement. Jurisprudence under the International Centre for Settlement of Investment Disputes ("ICSID") Convention allows one to avoid the enforcement problem. However, the

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approaches of ICSID tribunals are inconsistent. This article identifies three major conceptual approaches ICSID tribunals took in the past, namely: (1) declining jurisdiction in the absence of an explicit arbitration agreement, (2) piercing the veil by looking into the issue of foreign control, and (3) piercing the veil on the basis of interpretation of the concept of "investment" in accordance with the intent of parties to the arbitration agreement or purpose of an international treaty.

The practical advice offered by this article is to make written arbitration clauses as inclusive as possible, to avoid dealing with piercing the corporate veil altogether.

I. INTRODUCTION

King Solomon ended up not splitting the baby when he understood who the real parent of the child was.[2] Almost three thousand years after King Solomon, the judges and arbitrators might be fully aware of the real parent of the company, but it is very difficult to predict whether they would split the rights and liabilities, or treat the group of companies as one entity.

When parties conclude a number of contracts at realization of a common economic transaction, advance planning for dispute resolution becomes an inherently complex issue.[3] One of these complexities involves piercing the corporate veil. The primary impression such piercing leaves is that of uncertainty and unpredictability. Such uncertainties are detrimental to the legitimate expectations of the parties to a contractual relationship, and involve serious risks associated with the enforcement of arbitration awards.

Although tribunals refer to the theory of group companies and other theories for piercing the corporate veil, they often use them without a clear explanation. As one commentator warned, "[i]n debating whether to pierce the corporate veil or treat the principal as the alter ego of the subsidiary, the arbitration community often appears to rely on 'worn epithets' as a substitute for 'rigorous analysis.'"[4] This article purports to shed more light on the concept of piercing the corporate veil in international arbitration, both commercially and arising out of bilateral investment treaties (BITs).

Part I discusses the concepts of corporate personality, limited liability, and piercing the corporate veil in the theory of corporate law. It first summarizes the main benefits of corporate form–separation of assets, improved monitoring, and ease of coordination with creditors. Then it looks into conceptual foundations of unlimited corporate liability and veil piercing.

The article continues with the analysis of piercing the corporate veil in international commercial arbitration. Part II examines and explains specific problems that arise when the concept is examined through the lenses of several domestic and international legal regimes. Problems arise at the jurisdictional stage and when the tribunals consider the merits. Even if a tribunal decides to pierce the corporate veil, the award may be set aside in national courts that have jurisdiction over the arbitration venue. Because of the veil piercing, the award can be contested when the interested party enforces it in domestic courts under the New York

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[2] 1 *Kings* 12:19.

[3] Gillis Wetter, *A Multi-Party Arbitration Scheme for International Joint Ventures*, 3 ARB. INT'L 2 (1987).

[4] First Nat'l City Bank v. Banco Para El Comercio Exterior, 462 U.S. 611, 623 (1983).

Convention. At each of these stages, the arbitrators or judges may reach completely different results with respect to veil piercing.

Part III focuses on ICSID jurisprudence. ICSID awards do not need to be recognized in national courts or defended at the arbitration venue. Review of ICSID jurisprudence shows that even under the special procedural regime of the ICSID Convention, the attitudes of ICSID tribunals are inconsistent. Some tribunals refuse to assert jurisdiction over corporations that have not signed the arbitration agreement on the basis of absence of consent. Other tribunals look into the issue of foreign control to decide whether to extend jurisdiction. Finally, some ICSID tribunals look at corporate entities as a part of investment, and extend subject matter and personal jurisdiction over corporations that have not signed the arbitration agreement. The latter approach is justified by looking into the purpose of BITs that are concluded to protect foreign investments from host States.

Part IV concludes by summarizing the pros and cons of piercing the corporate veil and suggests careful drafting of arbitration clauses to avoid taking chances with such piercing in international arbitration.

II. CORPORATE FORM AND VEIL PIERCING

A. The Rationale Behind the Corporate Form

To better understand the concept of piercing the corporate veil, it is helpful to examine the need for having the corporate form in the first place.

Arguably, the main function of corporate law is defining the property rights over which the participants in a firm can enter into contracts.[5] Henry Hansmann and Rainier Kraakman explained that "the essential role of . . . organizational law is to provide for the creation of a pattern of creditors' rights – a form of 'asset partitioning'–that could not be practically established otherwise."[6]

Corporate law scholars divide the benefits of corporate limited liability into three groups – separation of assets, improved monitoring, and ease of coordination with creditors. Ronald Coase was the first to explain corporate form by the need for the reduction of transaction costs of market coordination with third parties.[7] Limited liability facilitates the transfer of ownership by allowing owners to separate corporate liabilities from their own.[8] While, in theory, partitioning of assets with each and every creditor separately may be technically possible, the transaction costs would be prohibitively high.[9]

Corporate asset partitioning therefore shifts the burden of monitoring the firm's managers from the owners to the creditors.[10] Other benefits of asset partition include

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5 Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 440 (2000).

6 *Id.* at 390.

7 *See* R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

8 Hansmann & Kraakman, *supra* note 5, at 426.

9 *Id.* at 406-07.

10 *Id.* at 425.

shielding the assets of a firm from the personal creditors of individual owners,[11] and the costs of conducting business through the creation of subsidiaries.[12]

There are two major theories concerning corporate personality – the theory of legal fiction, and the entity theory. According to the legal fiction theory, a corporation is a nexus of contracts, a more convenient way of structuring relationships with third parties, thereby limiting the participants' liability.[13] The entity theory is based on the premise that the state created the corporation by granting it a charter, and, therefore, it has a separate "personhood."[14]

The legal fiction supporters argue that the property might be given special qualities by the state or through contract, but remains property all the same.[15] Thus, the existence of a corporation independent of its owners is a fiction: "the rights and duties of an incorporated association are in reality the rights and duties of the persons who compose it, and not of an imaginary being."[16] The entity theory school regards a corporation as an autonomous institutional actor separable from those with an interest in it.[17]

Very often, reorganization of corporate structure in corporate groups involves segregation of especially risky activities in selected subsidiaries to shield the group as a whole from tort liabilities.[18] As Professor Blumberg put it, in such business planning, traditional entity law is being utilized to attempt to create a safe harbor for corporate groups seeking to externalize the costs of a subsidiary's negligence in conducting highly risky activities.[19]

The principles of state sovereignty and political territoriality make separation of assets even more attractive. When corporations are dispersed across jurisdictions with different rules of corporate law, the corporate form allows even more flexibility for the owners to structure their assets and limit the reach of creditors.

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[11] *Id.* at 393-94.

[12] *Id.* at 398, 402.

[13] "The private corporation or firm is simply one form of legal fiction which serves as a nexus for contracting relationships and which is also characterized by existence of divisible residual claims on the assets and cash flows of the organization which can generally be sold without permission of the other contracting individuals." *See, e.g.* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305, 311 (1976).

[14] See, e.g., Mark Hager, *Bodies Politic: The Progressive History of Organizational 'Real Entity' Theory,* 50 U. PITT. L. REV. 575, 575-77 (1989).

[15] VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS 2 (2d ed. 1886).

[16] *Id.* at 3.

[17] Gunther Teubner, *Enterprise Corporatism: New Industrial Policy and the "Essence" of the Legal Person*, 36 AM. J. COMP. L. 130 (1988).

[18] See, e.g. Richard Rothman, *A Veiled Threat: Minimizing Parental Liability for U.S. Subsidiaries*, PRACTICAL LAW COMPANY, August 23, 2007.

[19] PHILLIP BLUMBERG, THE LAW OF CORPORATE GROUPS: TORT, CONTRACT, AND OTHER COMMON LAW PROBLEMS IN THE SUBSTANTIVE LAW OF PARENT AND SUBSIDIARY CORPORATIONS (Little, Brown and Co. 1987).

The commercial world regards the principle of separation of legal identity and liability between different companies as a universal legal assumption. All major industrial countries recognize this principle.[20] The development of sophisticated multinational corporate structures was a response to various commercial factors, such as business expansion and diversification, the need for specialization and efficient productive processes, raising capital finance, or reducing taxation liabilities.

B. The Concept of Piercing the Corporate Veil

Piercing the corporate veil essentially means disregarding the separation between entities organized in corporate form with limited liability of shareholders.

A typical corporate veil piercing case involves a controlling shareholder who sets up an undercapitalized corporation to incur obligations to a third party. When the debt is due, the corporation does not have enough assets to repay it, and the controlling shareholder relies on the concept of limited liability to avoid personal liability. The result is that the third party ends up bearing the risk of the non-payment of the debt.[21] In such situations, the court or tribunal may intervene to prevent such injustice and pierce the corporate veil by holding the controlling shareholder liable.[22]

"Reverse veil piercing" involves situations where a creditor of the controlling shareholder is allowed to ignore the separateness of the corporation and its shareholder to reach the corporation's assets to satisfy the shareholder's obligation. Reverse corporate piercing is ordinarily available only against one-person corporations to prevent recovery from other innocent shareholders.[23]

Despite various theories justifying piercing the corporate veil, the general rule of corporate law is to maintain the legal separateness of the corporate form. Piercing the veil remains an exception. Approaches towards piercing the veil differ not only from one jurisdiction to another, but also within one national system of law.[24] The following sections of this article analyze interpretation of piercing the corporate veil in international arbitration.

III. PIERCING THE CORPORATE VEIL IN INTERNATIONAL COMMERCIAL ARBITRATION

A. Approaches of International Tribunals

In the context of international arbitration, piercing the corporate veil involves bringing in the parties that have not signed an arbitration agreement. These could be parent companies, subsidiaries, private individuals, governmental and quasi-governmental entities, and states. Piercing the corporate veil can occur in various

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[20] OECD, RESPONSIBILITY OF PARENT COMPANIES FOR THEIR SUBSIDIARIES 6, 24 (1980).

[21] Lee Buchheit et al., *The Dilemma of Odious Debts*, 56 DUKE L. J. 1201, 1248 (2007).

[22] *Id.*

[23] *Id.* at 1250.

[24] KARL-HEINZ BOECKSTIEGEL, ARBITRATION AND STATE ENTERPRISES: SURVEY OF THE NATIONAL AND INTERNATIONAL STATE OF LAW AND PRACTICE 41 (1984).

contexts, such as human rights,[25] environment,[26] and tax,[27] and the principles on which the adjudicators rely are even more diverse.

In their determination of the merits of a particular dispute, arbitration tribunals are usually bound by domestic law. As already mentioned, there is no consistency across national legal systems on the issue of piercing the corporate veil. Not surprisingly, the approaches of international tribunals also vary.

Generally, arbitrators distinguish between "consenting non-signatories" to arbitration agreements that seek to arbitrate, and "non-consenting non-signatories" that resist arbitration.[28] The tribunals that join non-signatories rely either on implied consent or disregard of corporate personality.[29] There is no clear line between these two justifications, however, as tribunals often pierce the corporate veil as a means to enforce the parties' original intent.

One of the most well-known examples of piercing the corporate veil for the benefit of consenting non-signatories is the *Dow Chemical* International Chamber of Commerce arbitration.[30] In that case, the tribunal allowed parent companies to be claimants despite the fact that the arbitration clauses were between the defendant and subsidiary companies of the same parent group.[31]

The tribunal relied on "the common intent of the parties . . . such as it appears from the circumstances that surround the conclusion and characterize the performance and later the termination of contracts."[32] The tribunal also followed "usages conforming to the needs of international commerce, in particular in the presence of group of companies."[33] According to the single entity theory applied by the tribunal, "[a] group of companies, despite the legal status of each of the companies, represents a single economic reality which the arbitral tribunal must take into account when ruling on its jurisdiction."[34]

However, application of the "group of companies" doctrine remains uncommon. Some authorities suggest only one out of every four cases that purport to apply the

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[25] See, e.g., Yaraslau Kryvoi, *Enforcing Labor Rights Against Multinational Corporate Groups in Europe*, 46 INDUS. REL. 366 (2007).

[26] See, e.g., David Bakst, *Piercing the Corporate Veil for Environmental Torts in the United States and the European Union: The Case for the Proposed Civil Liability Directive*, 19 B. C. INT'L & COMP. L. REV. 323 (1996).

[27] See, e.g., William W. Park, *Fiscal Jurisdiction and Accrual Basis Taxation: Lifting the Corporate Veil to Tax Foreign Company Profits*, 78 COLUM. L. REV. 1609 (1978).

[28] *See* William W. Park, *Non-Signatories and the New York Convention*, 2 J. DISP. RESOL. INT'L 84, 105 (2008).

[29] *Id*. at 107.

[30] *Id.* at 103 (citing Dow Chemical v. Isover St. Gobain, ICC Case No. 4131, 1983 J. Dr. Int'l 899 (1932)).

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] Interim Award of September 23, 1982 in No.4131 (original in French), reprinted in IX ICCA Yearbook of Commercial Arbitration 131, 134 (1984).

"group of companies" doctrine did actually extend jurisdiction over non-signatories.[35]

When it comes to arbitration under bilateral investment treaties, the legal regime is somewhat different. It has been suggested that the rules relevant to shareholder claims under investment protection treaties need to be regarded as *lex specialis* as established by specific treaties.[36] This is so despite the fact that, under the national law of most jurisdictions, shareholders are not allowed to bring claims on behalf of the company in which they own shares.[37] The inclusion of shareholdings into the definition of investment in a bilateral investment treaty would normally result in piercing the corporate veil for the benefit of the shareholder.[38]

It is not enough to persuade the tribunal to pierce the corporate veil under applicable law. The enforcement of awards piercing the corporate veil creates additional problems.

B. Enforcement of Awards

Unlike national courts, arbitration tribunals do not have enforcement mechanisms of their own and need to resort to national courts. If they render an award against a party that is not subject to an arbitration agreement, it might lead to problems at the enforcement stage. According to the principle of autonomy of the arbitration agreement, such agreements do not necessarily have to be governed by the same substantive law as the main contract.[39]

The application of corporate veil piercing in international arbitration is dependent upon domestic courts' recognition and enforcement of arbitration awards. The special procedure is established by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, better known as the New York Convention.[40]

Article V of the New York Convention provides five procedural defects, on which national courts can rely to refuse recognition and enforcement of arbitration awards. These are (1) lack of valid arbitration agreement; (2) denial of opportunity to be heard; (3) an excess of jurisdiction by an arbitrator in deciding matters beyond

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[35] Park, *supra* note 28, at 106-07 (citing JEAN-FRANCOIS POUDRET & SEBASTIEN BESSON, DROIT COMPARE DE L'ARBITRAGE INTERNATIONAL ¶¶ 253-54 (2d ed. 2007)).

[36] Abbey Cohen Smutny, *Claims of Shareholders in International Investment Law*, *in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 363 (Christina Binder et al. eds., 2009).

[37] *See* OECD, *supra* note 20.

[38] For instance, Article 1(6) of the Energy Treaty Charter provides that "Investment" protected by the Charter includes "a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise." The Energy Charter Treaty art. 1(6), Dec. 17, 1994, 34 I.L.M. 360 (1995).

[39] *See* NIGEL BLACKABY, CONSTANTINE PARTASIDES, ALAN REDFERN, & MARTIN HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 117-21 (2009).

[40] UNCITRAL.org, Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention), http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/1958_NYC_CTC-e.pdf.

the scope of the arbitration submission; (4) procedure contrary to the parties' agreement; and (5) annulment of the award in the country where rendered.[41]

Arguably, an award rendered against a non-signatory can be challenged on the basis of any of these grounds, especially if there was no explicit arbitration agreement. For instance, a company that has not signed the arbitration agreement is unlikely to be present at the hearings, and is, thus, denied an opportunity to be heard. Local courts might set aside an arbitration award against the parent company if the arbitration agreement is only signed by its subsidiary. Moreover, it could indeed be unfair for a parent company to defend itself in all national jurisdictions where it can be held liable for the debts of its subsidiary.[42]

Article II(2) of the 1958 New York Convention, as well as most national legal systems, provide that the agreement to arbitrate should be in writing. The requirement that the arbitration agreement be in writing serves a number of functions, which include providing evidence as to (1) the conclusion of the agreement, (2) identification of the parties to the agreement, and (3) providing warning as to the importance of renouncing rights of recourse to the courts.[43] If there is no agreement in writing, tribunals may decide to pierce the corporate veil.

One of the most common grounds for refusal to enforce arbitration awards under the New York Convention arises from problems connected with a party's identity in the absence of a special agreement in writing.[44] There are an increasing number of cases in which the respondent summoned in the arbitration takes the position that it is not a party to the contract containing the arbitration clause, and, therefore, the arbitrators lack competence to decide the case as far as the summoned respondent is concerned.[45]

Domestic courts apply the New York Convention and limit the enforcement of arbitral awards to the parties to the arbitration agreement,[46] even though the parties belong to the same corporate group.[47] For instance, English courts are not very enthusiastic about piercing the corporate veil. In *Peterson Farms Inc. v. C&M Farming Ltd.*, the arbitration award was successfully challenged in England on the basis that the tribunal had no jurisdiction to entertain claims by entities that were not specifically named as parties to the arbitration agreement.[48]

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[41] *Id.* at art.V.

[42] William W. Park, *Private Adjudicators and the Public Interest: The Expanding Scope of International Arbitration*, 12 BROOK. J. INT'L L. 658, 659 (1986).

[43] U.N. Commission on International Trade Law [COITL], *Report of the Working Group on Arbitration on the Work of its Thirty Second Session* (Vienna, 20-31 March 2000), ¶ 89, U.N. Doc. A/CN.9/468 (April 10, 2000).

[44] Albert Jan van den Berg, *New York Convention of 1958: Refusals of Enforcement*, 18 I.C.C. INTERNATIONAL COURT OF ARBITRATION BULLETIN 1, 28 (2007).

[45] Javor v. Francoeur, 2003 BSCS 330, 13 B.C.L.R. (4th) 195 (Can.).

[46] Van den Berg, *supra* note 44.

[47] *See, e.g.*, Glencore Grain Limited v. Sociedad Ibérica de Molturación, S.A., STS, Jan. 14, 2003 (R.J., 38).

[48] Petersen Farms, Inc. v. C&M Farming Ltd., [2004] EWHC (Comm) 121, [2004] 1 LLOYD'S REPORTS 614.

Many domestic legal systems establish a mandatory requirement that the arbitration agreement be in writing.[49] The United Nations Commission on International Trade Law ("UNCITRAL") Working Group on Arbitration proposed that the "group of companies" fact pattern might not require a written arbitration agreement.[50] The report noted that the "group of companies" theory has been applied in a number of arbitrations and has met the approval of some courts.[51] According to the report, the concept requires proof of the following:

1) that the legally distinct company being brought under the arbitration agreement is part of a group of companies that constitutes one economic reality (*une réalité économique unique*);
2) that the company played an active role in the conclusion and performance of the contract; and
3) that including the company under the arbitration agreement reflects the mutual intention of all parties to the proceedings.[52]

However, as UNCITRAL noted, national courts increasingly adopt a liberal interpretation of the requirement of a written contract, construing it in accordance with international practice and the expectations of the parties.[53] UNCITRAL is particularly concerned that doubts on the interpretation of this requirement, and a lack of uniformity in its interpretation would reduce the predictability and certainty of international contractual commitments.[54]

Despite these new developments at UNCITRAL, the unpredictability with respect to arbitrations that involves piercing the corporate veil remains a serious problem. Not only is it unclear whether a particular tribunal would be sympathetic towards piercing the corporate veil under applicable domestic law, but the parties must face even greater challenges at the stage of enforcement. ICSID jurisprudence is of particular interest because it is regulated by the ICSID Convention,[55] a special international treaty that eliminates some of the problems identified above.

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[49] *See, e.g.*, United States Uniform Arbitration Act, 9 U.S.C. §§ 2, 6 (2000); Arbitration Act, 1996, c. 23, §6 (UK); Federal Law of the Russian Federation on International Commercial Arbitration, http://www.jus.uio.no/lm/russia.international.commercial.arbitration .1993/doc.html.

[50] The Secretary General, Report of the Secretary General on Possible Uniform Rules on Certain Issues Concerning Settlement of Commercial Disputes: Conciliation, Interim Measures of Protection, Written Form for Arbitration Agreement, Addendum ¶¶ 11, 12(m), and 12 n.1 delivered to the U.N. Commission on International Trade Law [COITL], Working Group on Arbitration, U.N. Doc. A/CN.9/WG.II/WP.108/Add. 1 (Jan. 26, 2000).

[51] *Id.*

[52] *Id.*

[53] *Id.* at 3, ¶ 8.

[54] *Id.*

[55] ICSID Convention, Regulations and Rules, 575 U.N.T.S. 159 *available at* http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.

IV. PIERCING THE CORPORATE VEIL IN ICSID PROCEEDINGS

A. The Legal Regime Under the ICSID Convention

The empowerment of private parties to submit claims against sovereign states is one of the most known achievements of the ICSID Convention.[56] A less widely recognized development of international law brought by ICSID jurisprudence is the increasing willingness of tribunals to pierce the corporate veil.

Unlike awards of other arbitration tribunals, ICSID awards do not need to be enforced in accordance with the New York Convention. The awards are subject to recognition in ICSID Contracting States as if they were a final judgment by a domestic court in that State.[57] Under Article 53(1) of the ICSID Convention, the awards are binding on the parties immediately upon rendering.[58]

ICSID awards should be recognized and enforced by States as a public international law obligation. It is a generally recognized principle of international law that a State may not excuse or cure a breach of its obligations by pleading provisions of its own law.[59] Therefore even though parties to the ICSID Convention may take a very cautious view towards piercing the corporate veil in their domestic courts, ICSID awards nevertheless will obligate them, even if they are inconsistent with the domestic law of the enforcing country.

When it comes to piercing the corporate veil, ICSID tribunals permit corporate parties of ICSID proceedings to submit claims on behalf of non-parties to the proceedings.[60] These non-parties are typically either the investor's shareholders or subsidiaries. Because tribunals usually do not "implead" such third parties, such claims amount to piercing the corporate veil.

It must be noted that the parties may agree to join a non-signatory corporation as a party to ICSID proceedings at any time.[61] However, most controversies arise when one of the parties does not agree to join a new party and there is a need to pierce the corporate veil despite one party's objections.

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[56] The International Centre for Settlement of Investment Disputes (ICSID) is a leading international arbitration institution in the field of investor-State dispute settlement. It was established in 1966 as a part of the World Bank pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. *See* YARASLAU KRYVOI, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (Kluwer Law International, 2010).

[57] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Oct. 17, 1966, 575 U.N.T.S. 159, art. 53(1).

[58] *Id.*

[59] *See* Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331; IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 34, 35 (2008).

[60] *See* discussion *infra* Part III(b).

[61] *See, e.g., S. Pac. Prop. (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3 (Apr. 14, 1988) Decision on Jurisdiction and Dissenting Opinion (Apr. 14, 1988) (ruling that joining the local company was permissible even despite subsequent objections of the State, because the parties voluntarily agreed to join a local company and it did not have any claims different from those of the parent company).

The issues associated with jurisdiction of ICSID tribunals are resolved in accordance with international, not national, law.[62] The tribunals rely on the ICSID Convention and applicable BITs, as well as on their own jurisprudence, to decide on the feasibility of piercing the corporate veil.[63] According to Article 25(2)(b) of the ICSID Convention:

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

From a reading of Article 25(2)(b), two criteria for the determination of personal jurisdiction over corporate entities are apparent. "Nationality" is a formal legal criterion, while determination of "foreign control is an objective criterion, which seeks to reach the real control over a juridical person. The issue of establishing control was heavily debated during the negotiations of the ICSID Convention.[64] Although no definition was adopted, the Convention's drafters thought that it should be left to each arbitral tribunal to decide the question of control.[65]

The following section discusses the jurisprudence of ICSID tribunals on the issue of piercing the corporate veil.

B. Approaches of ICSID Tribunals

1. Formalistic Approach

ICSID Institution Rule 2 provides that the parties to the arbitration shall be precisely designated, and the parties to the dispute should consent in writing to submit their dispute to ICSID arbitration.[66] A number of ICSID tribunals have refused to exercise personal jurisdiction over non-signatories to ICSID arbitration clauses as discussed below.

Some ICSID tribunals construe ICSID Institution Rule 2 and other similar provisions narrowly, and are unwilling to extend their jurisdiction over non-signatories. In *Tshinvali v. Georgia*, the investor submitted claims on behalf of itself as well as its three shareholders.[67] The tribunal analyzed the issue of standing and

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[62] *See, e.g.*, *S. P. Prop. (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction, (April 14, 1988).

[63] *Id.*

[64] See C.F. Amerasinghe, *Jurisdiction Ratione Personae under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 1974 BRIT. Y.B. INT'L L. 227, 264.

[65] CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY 361 (2001).

[66] Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings R. 2 (Jan. 1, 1968).

[67] Zhinvali Development Ltd. v. Republic of Georgia, ICSID Case No. ARB/84/3, ¶¶ 392-405 (Jan. 24, 2003).

noted that the three shareholders had not been registered as claimants in those ICSID proceedings and on this ground ruled that the claimant was not entitled to claim on behalf of its shareholders.[68]

The *Tshinvali* tribunal distinguished its case from other ICSID jurisprudence by pointing out that there was no parent company where "the ICSID clause is designed to work for its benefit."[69] The tribunal pointed out that Rule 2 of the ICSID requires that the request of arbitration precisely designate each party to the dispute, and that Rule 47 of the ICSID Arbitration Rules provides that the award should contain "a precise designation of each party."[70] The tribunal explained that:

> [N]either the ICSID Convention nor the ICSID Arbitration Rules contain any express provision permitting parties to assert claims on behalf of non-parties. . . . [A]ny such right to of a complaining party requires the agreement or "consent" of the respondent Contracting State.[71]

The *Tshinvali* tribunal noted that it was not aware of any ICSID cases where "one single party asserted claims not only on its own behalf but also on behalf of other non-party entities which were not implicated with a specific written agreement that constituted the 'consent' of the host Contracting State to such an assertion on their behalf."[72]

In other cases, tribunals refrained from going beyond the nationality of the claimant corporation to examine whether it is foreign-controlled. In *Rumeli Telecom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Kazakhstan*, the tribunal noted "nowhere in the ICSID Convention is there a basis for piercing the corporate veil of a designated claimant."[73] The arbitrators rejected the application of the effective nationality test[74] to pierce the corporate veil and reach the real controllers of the corporate group.[75] It must be noted, that in this case by piercing the corporate veil, the tribunal understood disregarding the separateness of legal entities and looked into the issue of objective foreign control.

The issue of determination of foreign control is so controversial that it forced a prominent arbitrator to resign from an ICSID panel in one case. In *Tokios Tokeles v. Ukraine*, one of arbitrators resigned because he disagreed with the approach of other

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[68] *Id.*

[69] *Id.* ¶ 402.

[70] *Id.* ¶ 403.

[71] *Id.*

[72] *Id.* ¶ 400.

[73] *Id.* ¶ 186.

[74] The essence of effective nationality is that "nationality must correspond with the factual situation", i.e. by examining the genuine connection with the state. BROWNLIE, *supra* note 59, at 413-17.

[75] Telekom A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award (July 29, 2008).

arbitrators, who extended jurisdiction over a company incorporated in a foreign state, and 99% of which was controlled by nationals of the Respondent State.[76]

The arbitrator argued that such a formalistic approach was against the objectives of the ICSID Convention to not facilitate resolution of international investment disputes between States and their own nationals.[77] The arbitrator also noted that the issue of piercing the corporate veil under the International Court of Justice's decision in *Barcelona Traction*,[78] and the fact that no fraud was involved were beside the point, given the clear object and purpose of the ICSID Convention.[79]

In all the ICSID cases discussed above, tribunals followed a formalistic approach and failed to pierce the corporate veil. The logic is simple: if a corporation is not a party to ICSID proceedings, and has not signed an arbitration clause, there is no jurisdiction over it.

2. Treating Non-Signatory Corporations as "Investors"

Other ICSID panels do pierce the corporate veil to see whether the corporation is indeed controlled by a "foreign investor" under the definition of the ICSID Convention. Two ICSID cases–*Vacuum Salt Products Ltd. v. Republic of Ghana*[80] and *TSA v. Argentina*,[81] focused precisely on the objective existence of foreign control under Article 25(2)(b) of the Convention.

In *Vacuum Salt Products Ltd. v. Republic of Ghana*, the issue was whether the company was under foreign control, or under the control of Ghana nationals, and as such, fell outside of the scope of the tribunal's personal jurisdiction.[82] The tribunal noted that because the Government of Ghana agreed to treat the company as a foreign national, it created a rebuttable presumption of foreign control for the purpose of Article 25 of the Convention.[83]

The *Vacuum Salt* tribunal noted that the reference in Article 25(2)(b) to "foreign control" necessarily sets an objective limit beyond which ICSID jurisdiction cannot

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[76] Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Dissenting Opinion, (Apr. 29, 2004).

[77] *Id.* ¶ 19 (dissenting opinion).

[78] Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain) 1970 I.C.J. 3 (Feb. 5) (*Barcelona Traction* concerned the issue of piercing the corporate veil for purposes of diplomatic protection of shareholders. The Government of Belgium brought a claim against Spain on behalf of its nationals, who owned shares in the Canadian corporation Barcelona Traction. In its Judgment, the ICJ provided that "[a]n act infringing only the company's rights did not involve responsibility towards the shareholders, even if their interests were affected." (quoting Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain) 1970 I.C.J. 3 (Feb. 5))).

[79] *Tokios Tokelés*, *supra* note 76, ¶ 21 (dissenting opinion).

[80] Vacuum Salt Products Ltd. v. Republic of Ghana, ICSID Case No. ARB/92/1, ¶ 30 (Feb. 16, 1994) (Award), reprinted in 4 ICSID 329 (1997).

[81] TSA Spectrum de Argentina S.A. v. Argentine Republic, ICSID Case No. ARB/05/5, ¶147 (Dec. 19, 2008) (Award).

[82] *See generally Vacuum Salt*, ICSID Case No. ARB/92/1, ¶ 2.

[83] *Id.* ¶ 38.

exist, and parties therefore lack power to invoke the same "no matter how devoutly they desire to do so."[84] The tribunal ruled that if the juridical person not controlled by foreign investors were allowed to proceed with ICSID claims, the Convention would be used for purposes for which it was not intended.[85]

The *TSA v. Argentina* tribunal also highlighted the importance of determining real foreign control by noting that it would be inconsistent with Article 25 of the ICSID Convention if in establishing foreign control,

> [i]t would be directed to pierce the veil of the corporate entity national of the host State and to stop short at the second corporate layer it meets, rather than pursuing its objective identification of foreign control up to its real source, using the same criterion with which it started.[86]

The tribunal ruled that because of the absence of foreign control, it lacked jurisdiction to examine the merits of the dispute.[87]

Many commentators favor the extension of ICSID tribunals' personal jurisdiction by piercing the corporate veil of foreign-controlled corporations. Christoph Schreuer points out that having more than one party on the investor's side in one set of proceedings is acceptable because it is a consequence of one investment operation where companies claimed jointly with their parent companies or their subsidiaries.[88]

The criteria put forward by Schreuer in relation to jurisdiction over locally incorporated, but foreign controlled companies, are useful. First, he argues that there need not be an explicit consent to permit claims, as was the case in *SPP v. Egypt*.[89] Second, the fact of foreign control must be established as a question of fact, determined not just by shareholding.[90] Third, not only direct control, but also indirect control over a locally incorporated company might suffice to establish such control.[91] Schreuer further noted that:

> Where companies other than those named in the consent agreement are not necessary parties but are merely economically associated with the investment of the investor, they will not be given standing in ICSID

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[84] *Id.* ¶ 36.

[85] *Id.* ¶ 54.

[86] TSA Spectrum de Argentina S.A. v. Argentine Republic, ICSID Case No. ARB/05/5, ¶147 (Dec. 19, 2008) (Award).

[87] *Id.* ¶ 162.

[88] SCHREUER, *supra* note 65, at 162.

[89] Christoph Schreuer, *Access to ICSID Dispute Settlement for Locally Incorporated Companies*, *in* INTERNATIONAL ECONOMIC LAW WITH A HUMAN FACE 497, 512 (Friedl Weiss, Erik Denters & Paul de Waart eds., 1997). *See generally*, Christoph Schreuer, *The Dynamic Evolution of the ICSID System*, *in* THE INTERNATIONAL CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES (ICSID): TAKING STOCK AFTER 40 YEARS 15, 15 (Rainer Hofmann, Christian Tams eds., 2007).

[90] *Id.*

[91] *Id.*

proceedings. But the parties before the tribunal may be given the right to represent their interests and to claim on their behalf.[92]

C.F. Amerasinghe points out that an ICSID tribunal, unlike the International Court of Justice in *Barcelona Traction*,[93] may consider any other criterion, such as management, voting rights, shareholding, or any other reasonable theory in determining jurisdiction over non-signatories.[94] One of such theories appears to be treating locally incorporated companies as a part of the investment protected by the ICSID Convention or the BIT as explained below.

3. Treating Non-Signatory Corporations as "Investment"

A number of ICSID tribunals regard the use of domestically incorporated companies to channel investments as "investment" for purposes of ICSID Convention. Following this logic, if the investor creates local investment vehicles, his shares and other forms of participation in them constitute investment.

According to Article 25 of the ICSID Convention, ICSID tribunals have jurisdiction over "any legal dispute arising directly out of an investment." The drafters of the ICSID Convention deliberately decided not to provide a definition for the term "investment."[95] They assumed that this aspect of ICSID jurisdiction could be more appropriately controlled by the requirement of consent.[96] It has been noted that "the requirement that the dispute must have arisen out of an 'investment' may be merged into the requirement of consent to jurisdiction."[97]

In *CMS Gas Transmission Co. v. Argentina*, the tribunal found no bar in international law for allowing claims by shareholders independently from those of the corporation concerned.[98] The *CMS Gas* tribunal then looked at the definition of "investment" and recalled that in accordance with the Argentina-United States BIT, shares were given as an example of investment during the negotiations of the Convention.[99] The tribunal held that there is "no requirement that an investment, in order to qualify, must necessarily be made by shareholders controlling a company or owning the majority of shares."[100]

The tribunal pointed out that the principle of separation of legal entities of *Barcelona Traction* was not directly relevant to protection of shareholders.[101] The

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[92] SCHREUER, *supra* note 65, at 178.

[93] Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain) 1970 I.C.J. 3 (Feb. 5).

[94] Amerasinghe, *supra* note 64, at 264.

[95] *See* Aron Broches, *The Convention on Settlement of Investment Disputes: Some Observations on Jurisdiction*, 5 COLUM. J. TRANSNAT'L L. 263, 268 (1966).

[96] *Id.*

[97] *Id.*

[98] CMS Gas Transmission Co. v. Argentina, ICSID Case No. ARB/01/8, ¶ 48 (July 17, 2003) (Decision of the Tribunal on Objections to Jurisdiction).

[99] *Id.* ¶ 50.

[100] *Id.* ¶ 51.

[101] *Id.* ¶¶ 43-44.

tribunal explained that *Barcelona Traction* was concerned only with the exercise of diplomatic protection and "did not rule out the possibility of extending protection to shareholders in a corporation in different contexts."[102] The tribunal also found "no bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned, not even if those shareholders are minority or non-controlling shareholders."[103]

An ICSID tribunal in *Holliday Inns v. Morocco*, also focused on interpretation of the term "investment" and impleaded non-signatories on the basis of the "unity of investment doctrine."[104] In that case, two parent companies incorporated in the United States negotiated a joint venture with the government of Morocco to build hotels.[105] In order to carry out the project, the parent companies established wholly owned Swiss subsidiaries.[106] The Government of Morocco signed the "Basic Agreement" with local subsidiaries that contained a consent to ICSID arbitration clause.[107] The parent companies were not signatories to the Basic Agreement, although the agreement provided that foreign partners could assign their rights and obligations to their affiliates.[108]

The tribunal in *Holiday Inns* examined the common expectations of the parties and ruled that the non-signatory U.S. parent companies were proper parties to the arbitration according to the "unity of investment doctrine," to fulfil the common expectations of the parties.[109]

In another case, *IBM v. Ecuador*, the U.S. parent company of an Ecuadorian subsidiary requested arbitration proceedings on the basis of the United States-Ecuador BIT.[110] Ecuador alleged that the tribunal had no jurisdiction because there was no agreement to treat domestic companies as foreign nationals as required by Rule 2 of the Institution Rules.

The *IBM* tribunal focused its analysis on whether the dispute referred to an investment.[111] Because the ICSID Convention did not define the term "investment," the tribunal looked to ICSID case law and the definition of "investment" under the BIT.[112] The tribunal concluded that the dispute arose from an investment of the U.S. parent company because

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[102] *Id.* at ¶ 43.

[103] *Id.* at ¶ 48.

[104] Pierre Lalive, *The First 'World Bank' Arbitration (Holiday Inns v. Morocco)—Some Legal Problems*, 1980 BRIT. Y.B. INT'L L. 123, 159.

[105] *Id.* at 123-26.

[106] *Id.*

[107] *Id.* at 147-59.

[108] *Id.*

[109] *Id.* at 147.

[110] IBM World Trade Corp. v. Republic of Ecuador, ICSID Case No. ARB/02/10 (Dec. 22, 2002) (Decision on Jurisdiction and Competence), reprinted in 13 ICSID REP. 102 (2008).

[111] IBM World Trade Corp, ICSID Case No. ARB/02/10.

[112] *Id*. at 110.

> (1) it made a direct investment of 100% of the capital of the local entity; (2) the contract concluded by the local entity constituted an investment of the parent company, since it indirectly belonged to the parent; and (3) the right to collect money, capital and interest is a legal and contractual right derived from the contracts, with the parent company being the indirect owner of that right.[113]

The tribunal held that the contract was not only a source of obligations, but also "a mechanism through which capital flows from one country to another."[114] Ecuador's objection that the Ecuadorian nationality of the locally incorporated entity precluded its parent company from initiating ICSID arbitration had been rejected.[115]

Similarly, in *AES Corp. v. Argentina*, the ICSID tribunal concluded that because the definition of "investment" in the Argentina-United States BIT included "every kind of investment in the territory of one party owned or controlled directly or indirectly by nationals or companies of the other Party," it encompassed local companies and satisfied the requirement of recognizing an international investment.[116] The tribunal concluded that it was proper for the parent company to submit claims on behalf of locally incorporated entities it controlled.[117]

The ICSID tribunal, in *Enron v. Argentina*, also considered a claim of a foreign investor alleged on behalf of a company incorporated in the host State.[118] The dispute focused on whether the tribunal had jurisdiction over the locally incorporated company.[119] The tribunal construed the definition of investment under the Argentina-US BIT, which provided that the term "investment" included, *inter alia*, "a company or shares of stock or other interests in a company or interests in the assets thereof."[120] The tribunal extended its jurisdiction over the companies because of the definition of the term "investment" under the treaty: "This definition is the one that controls the whole discussion. It evidently includes the channelling of investments through locally incorporated companies, particularly when this is mandated by the very legal arrangements governing the privatization process in Argentina."[121]

The tribunal interpreted the BIT and concluded that "the Treaty was made with specific purpose of guaranteeing the rights of foreign investors and encouraging their

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113 *Id.*

114 *Id.* at 111.

115 *Id.* at 112.

116 AES Corporation v. Argentine Republic, ICSID Case No. ARB/02/17 (Apr. 26, 2005) (Decision on Jurisdiction), reprinted in 12 ICSID 308, 328(2007).

117 *Id.*

118 Enron Corp. v. Argentine Republic, ICSID Case No. ARB/01/3 (Aug. 2, 2004) (Decision on Jurisdiction), reprinted in 11 ICSID 268 (2007).

119 *Id.*

120 *Id.* at 300.

121 *Id.*

participation in the privatization process," which itself is sufficient to establish its personal jurisdiction over a locally incorporated company.[122]

Aaron Broches, one of the architects of the ICSID Convention also emphasized the importance of the purpose of the ICSID Convention. He noted in relation to determination of foreign control under the ICSID Convention, that "any stipulation . . . based on a reasonable criterion should be accepted," and jurisdiction should be declined "only if . . . to do so would permit parties to use the Convention for purposes for which it was clearly not intended."[123]

Indeed, the purpose of the treaty is one of the methods for treaty interpretation under the Vienna Convention on the Law of the Treaties.[124] Since BITs are usually concluded to facilitate foreign investments, piercing the corporate veil may legitimately serve that purpose.

The approach of tribunals that treat corporations as "investment" rather than as "investors" resonates with the theory of corporate law, which considers corporations as merely legal fictitious entities, not real persons, as discussed at the beginning of this article. Under this approach, ICSID tribunals focus more on subject matter jurisdiction over corporations as part of an investment protected by the BIT to establish personal jurisdiction.

V. CONCLUSION

There is no easy fix to make the corporate veil-piercing jurisprudence of international tribunals consistent and predictable. However, understanding the theory of piercing the corporate veil from the corporate law perspective, and keeping track of the principles on which tribunals rely, will certainly help to predict the outcomes.

Piercing the corporate veil may help give a concrete practical meaning to the intent of the parties to an arbitration agreement or purpose of a treaty. However, there are downsides of such piercing because it negates many of the benefits that the corporate form offers. The creditors will be in a more difficult position to monitor assets, and corporations will be unwilling to take business risks that may result in their shareholders' corporate or personal assets being exposed to liability.

As a practical matter, it is advisable to make arbitration agreements as inclusive as possible to avoid dealing with piercing the corporate veil altogether.

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[122] *Id.*

[123] Aron Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 136 RECUEIL DES COURS 331, 360-61 (1972).

[124] Vienna Convention on the Law of Treaties art. 31, May 3, 1969, 1155 U.N.T.S. 331.