



Investment structuring under bilateral investment treaties

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Contents

- I. The investor's perspective:
nationality planning or treaty
shopping**
- II. The State's perspective:
denial of benefits**

BIT jurisdictional requirement: diversity of nationality

Any dispute between either **Contracting Party and a national of the other **Contracting Party** concerning an investment of that national in the territory of the former Party . . . [shall be submitted to international arbitration].**

Ukraine-Netherlands BIT, art. 9.

BIT - nationality

(b) the term 'nationals' shall comprise with regard to either Contracting Party:

- i. natural persons** having the nationality of that Contracting Party;
- ii. legal persons constituted under the law of that Contracting Party;**
- iii. legal persons** not constituted under the law of that Contracting Party but **controlled, directly or indirectly, by natural persons as defined in (i) or by legal persons as defined in (ii) above.**

Ukraine-Netherlands BIT, art. 1.

ICSID jurisdictional requirement: diversity of nationality

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

ICSID Convention, art. 25(1).

ICSID – nationality based on foreign control

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

and any juridical person which had the nationality of the Contracting State party to the dispute . . . 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.

ICSID Convention, art. 25(2).

Nationality planning (or treaty shopping) for physical persons



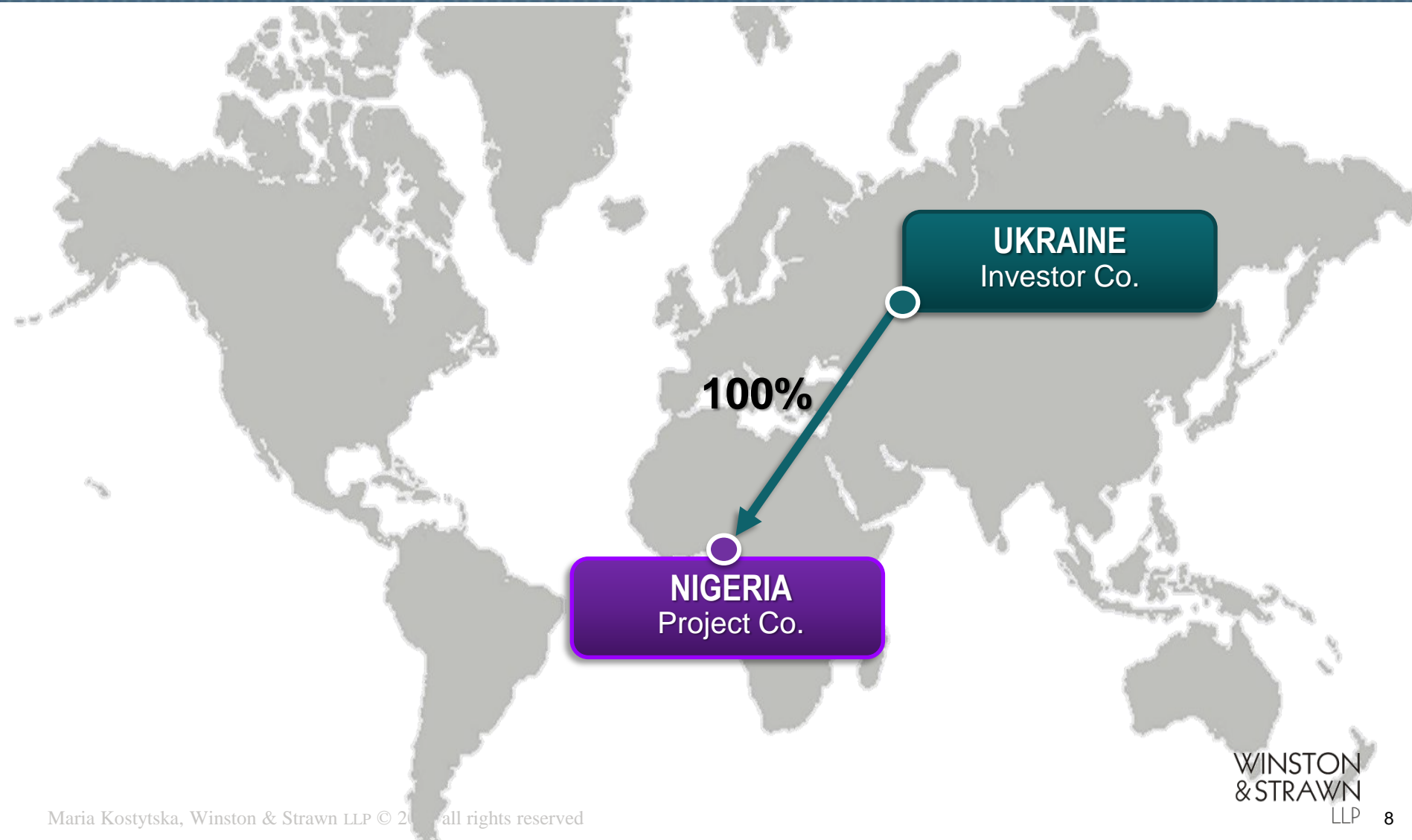
Got 650,000 Euros?



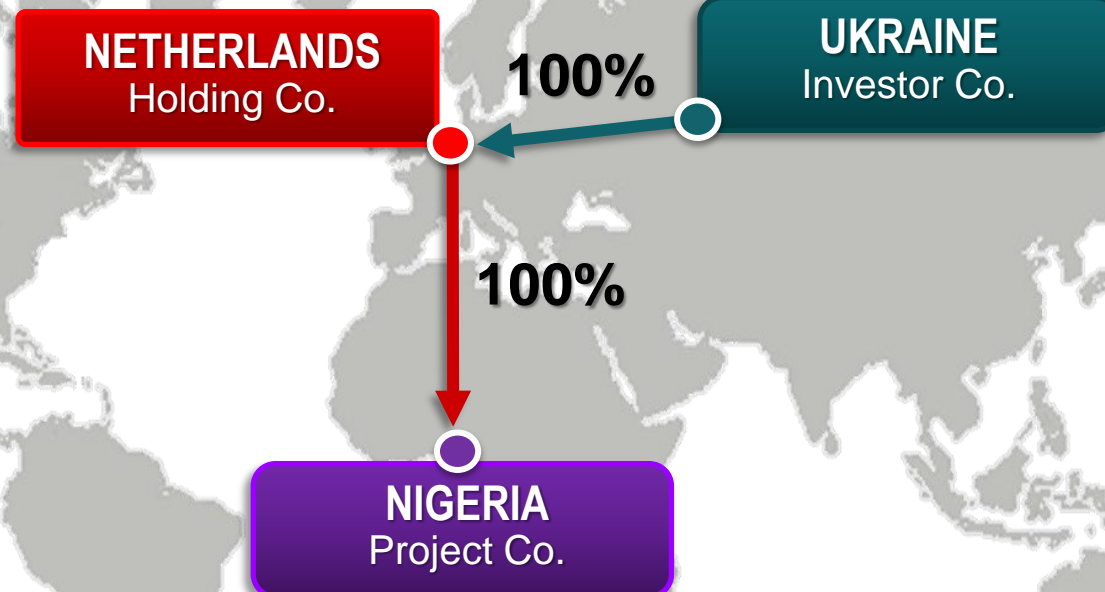
Nationality planning (or tax rate shopping) for high net worth individuals



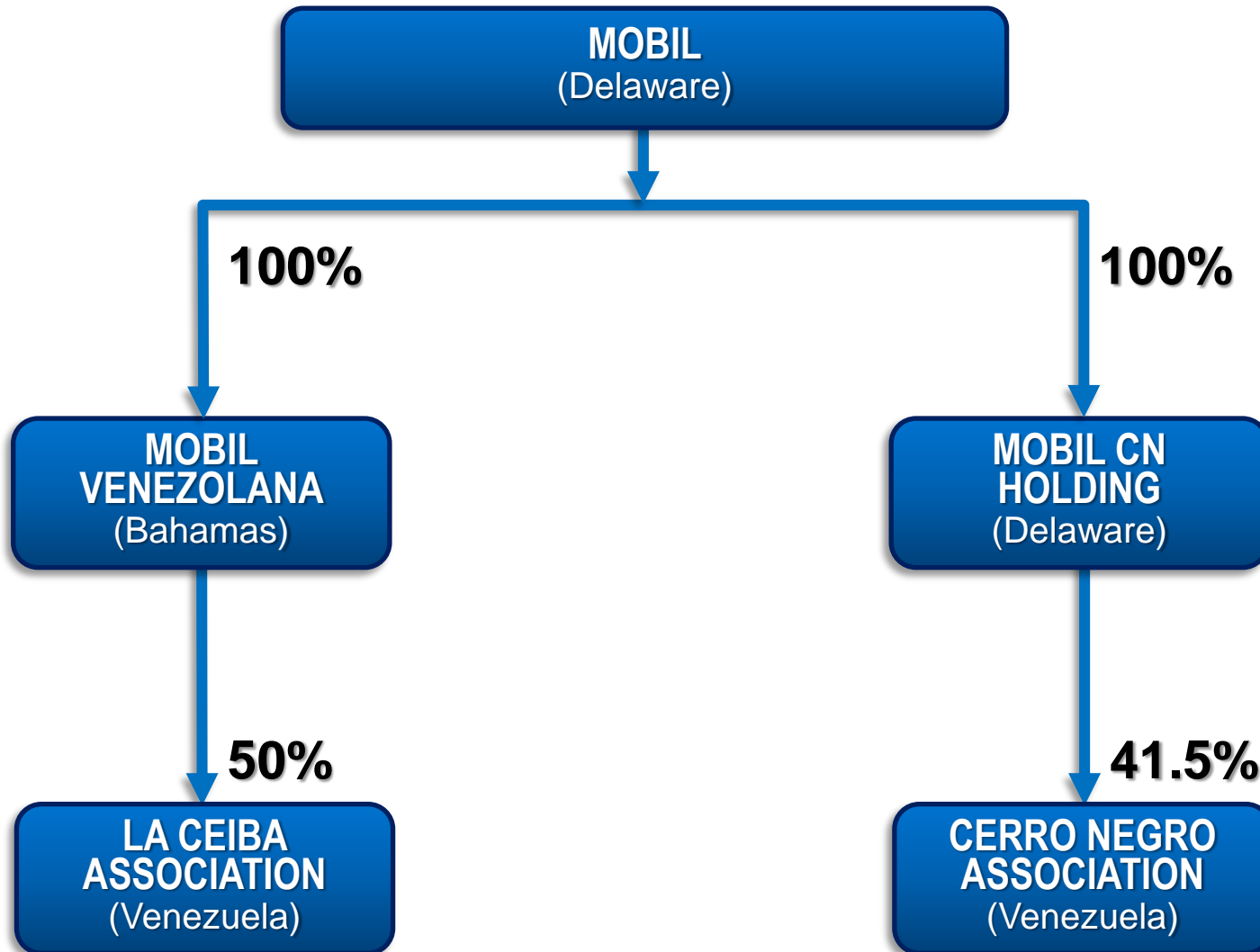
Nationality planning (or treaty shopping) for legal persons



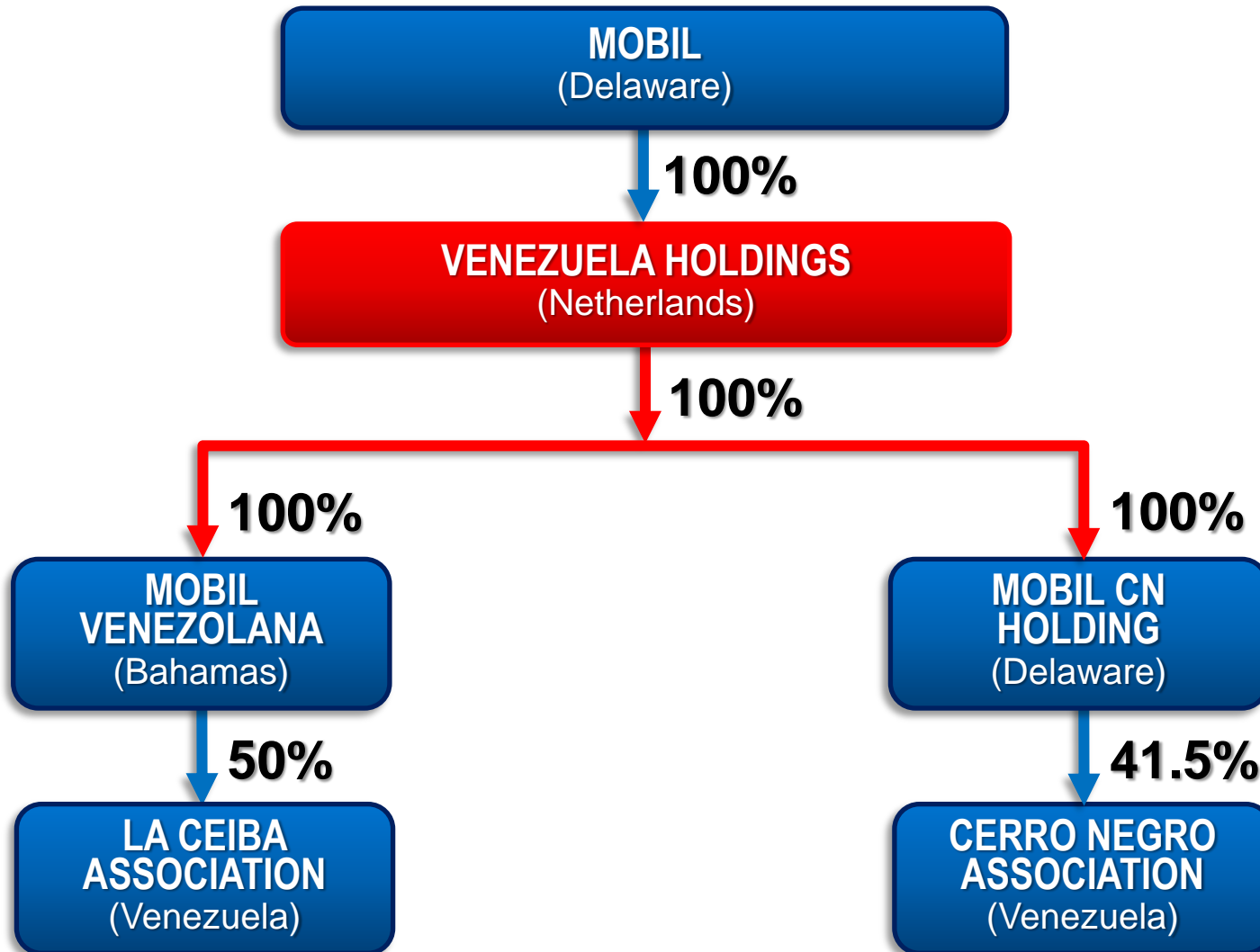
Nationality planning (or treaty shopping) for legal persons



Mobil v. Venezuela - before restructuring



Mobil v. Venezuela - after restructuring

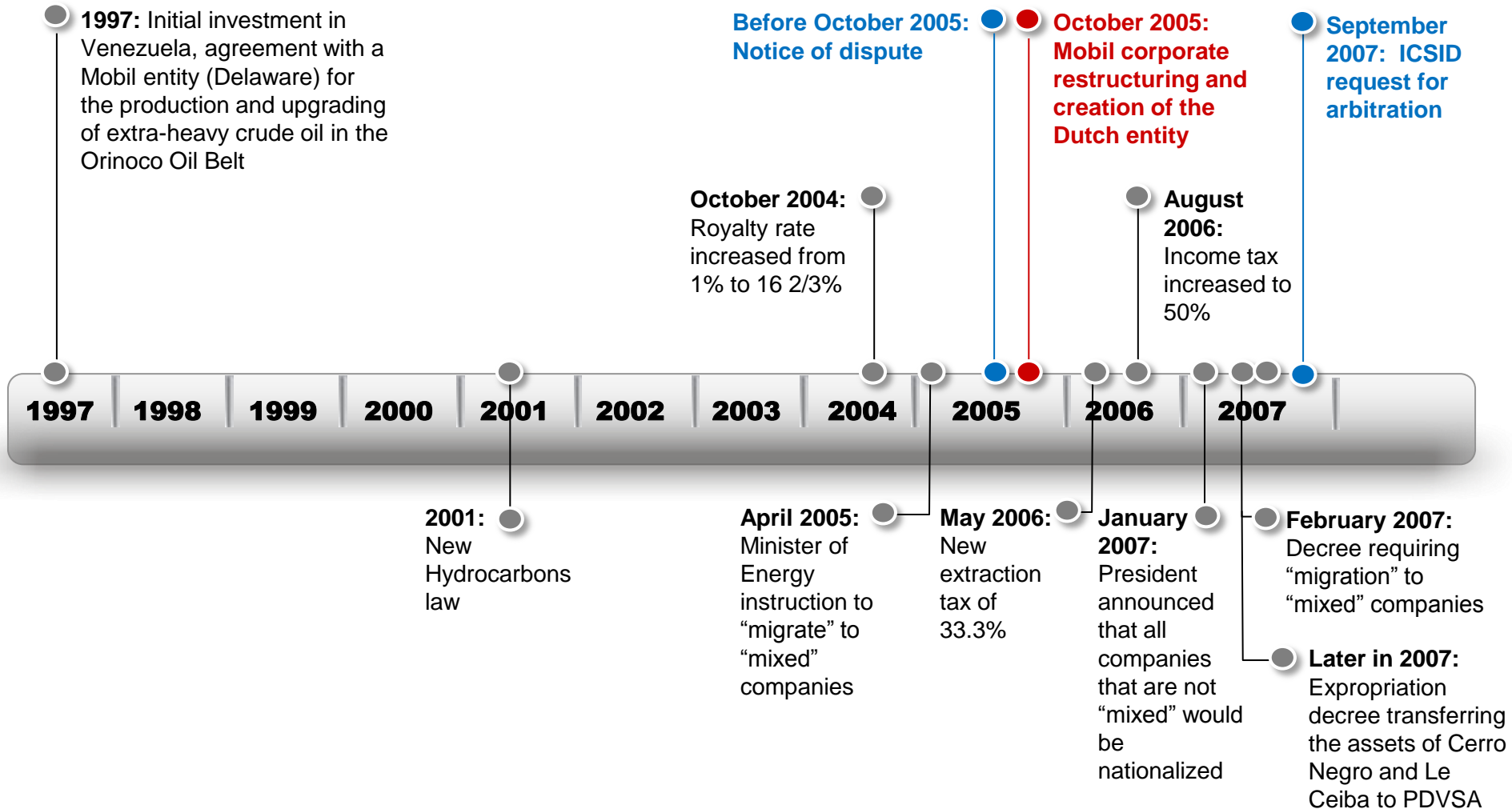


Factors in the “abuse of rights” analysis

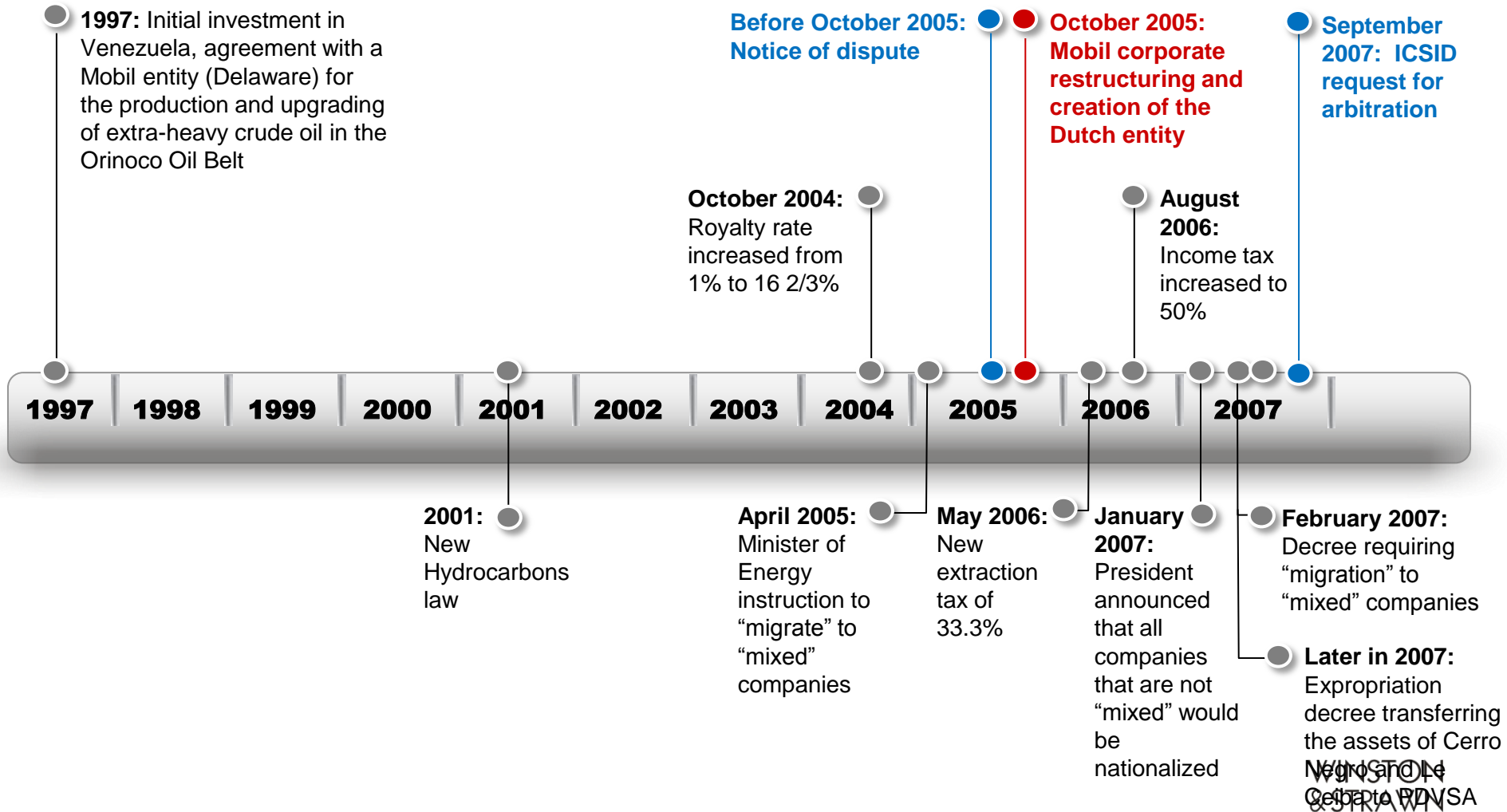
- **Timing of the original investment**
- **Timing of any subsequent investments**
- **Timing of the dispute**
- **Timing of the notice of dispute and request for arbitration**
- **Purpose of the restructuring**
- **Damages incurred before and after restructuring**

Mobil v. Venezuela; see also Autopista v. Venezuela, Aguas del Tunari v. Bolivia, Phoenix Action v. Czech Republic.

Mobil v. Venezuela - timeline



Mobil v. Venezuela - timeline



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Denial of benefits

Each Contracting Party reserves the right to deny the advantages of this Part to:

(1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized

Energy Charter Treaty, art. 17.

Denial of benefits

... A Party may deny the benefits of this Treaty to an investor of the other 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 the other Party and persons of a non-Party, or of the denying Party, own or control the enterprise.**

2012 U.S. Model BIT, art. 17; see *also* U.S.-Rwanda BIT and U.S.-Columbia FTA.

De jure

Majority
shareholding,

Voting rights,

Right to
nominate
directors.

De facto

The exercise of
a decisive
power over the
management
and operations,

A management
contract,

Influence on
decision-
making,

Involvement in
the planning of
the investment,

Involvement in
the negotiations
with the
government,

Advancing
initial
expenditures,

Handling
strategic and
administrative
matters,

Providing
know-how,

Selecting
suppliers/
distributors,

Obtaining
legal
advice.

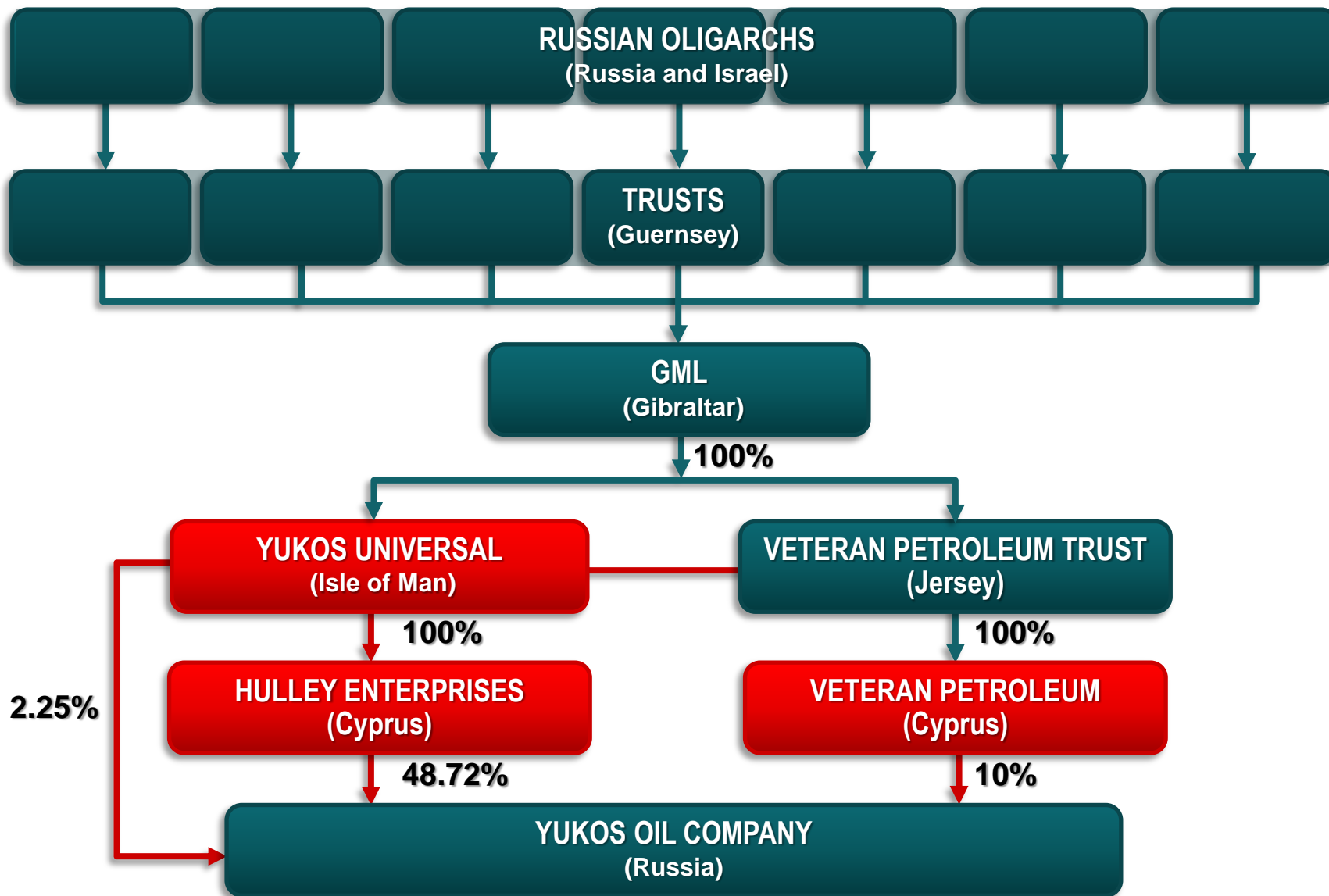
Denial of benefits + Definition of ownership and control

... Note: For the purposes of this [denial of benefits provision], an enterprise is:

- (a) “owned” by an investor if more than fifty (50) percent of the equity interest in it is owned by the investor; and
- (b) “controlled” by an investor if the investor has the power to name a majority of its directors or otherwise to legally direct its actions.

Japan-Ukraine BIT (signed in 2015, not in force); see *also* Japan-Uruguay BIT, Japan-Myanmar BIT, Japan-Kuwait BIT.

Yukos v. Russian Federation





Дякую! Thank you! Merci! Спасибо!

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