



Parallel Commercial and Treaty-Based Arbitrations:

Sisyphean Cleverness or Sisyphean Labor

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As a matter of general principle, the same set of facts can give rise to different claims grounded on differing legal orders: the municipal and the international legal orders

SGS v. Pakistan
(ICSID)

Parallel, Related, Multiple or Concurring?

Parallel:

- same parties
- same causes of action

Art. 27 European Council Regulation No. 44/2001 (Brussels Regulation)

NB: Case C-351/96 *Drouot Assurances S.A.* (identity of interests);
Case C-39/02 *Mærsk Olie & Gas A/S* (facts and legal rule)

Related:

- closely connected
- the risk of irreconcilable judgments

Art. 28 of the Brussels Regulation

Core Differences

Source of rights

Applicable law

Content of rights

Liability of the host
State

Parties to claim

Parallel, Related, Multiple, Concurring

True parallel proceedings:

- BIT arbitration v. BIT arbitration
- BIT arbitration v. other international treaty proceeding
- “Internationalised contract” arbitration v. treaty-based arbitration

Multiple/related proceedings:

- True parallel proceedings
- BIT and contract arbitration
- Contract arbitration and national court
- BIT arbitration and national court
- Diplomatic protection

True Parallel Proceedings: Shareholders' Standing

The right of shareholders to claim independently of the affected local entity

Asian Agricultural Products Ltd. v. Sri Lanka (ICSID)

Goetz v. Burundi (ICSID)

CMS Gas Transmission Co. v. Argentine Republic (ICSID)

Azurix Corp. v. Argentine Republic (ICSID)

Minority shareholding

Enron Corp. v. Argentina (ICSID)

Shareholders' nationality

Autopista Concesionada de Venezuela (ICSID):

- the place of incorporation or registered office;
- in the alternative: the place of the central administration or effective seat

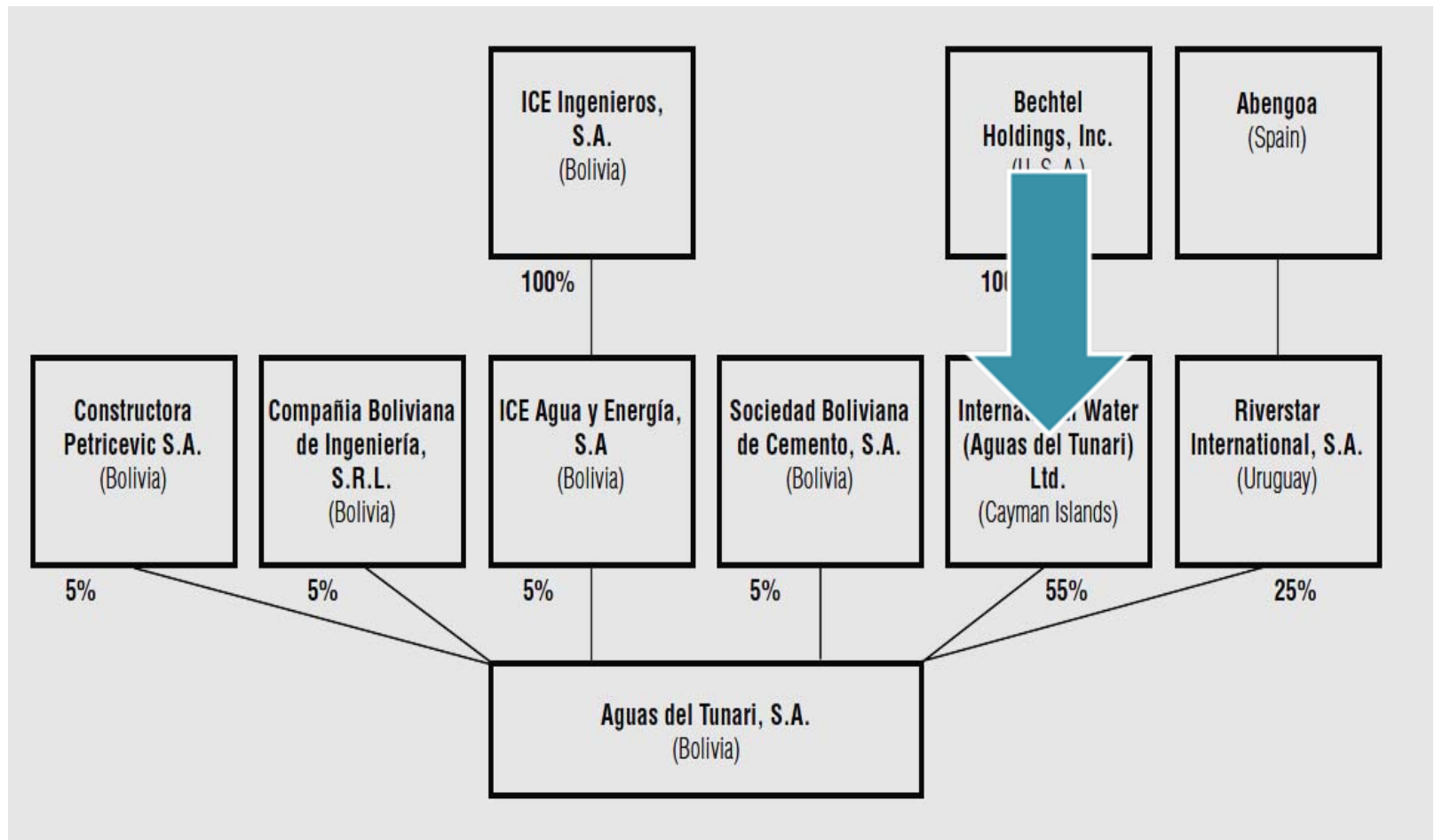
Tokios Tokeles v. Ukraine (ICSID):

- veil-piercing – only when formal legal nationality used for improper purposes

But: Art. 8(4) of the Chile-Ukraine BIT

Treaty Shopping: Aguas del Tunari

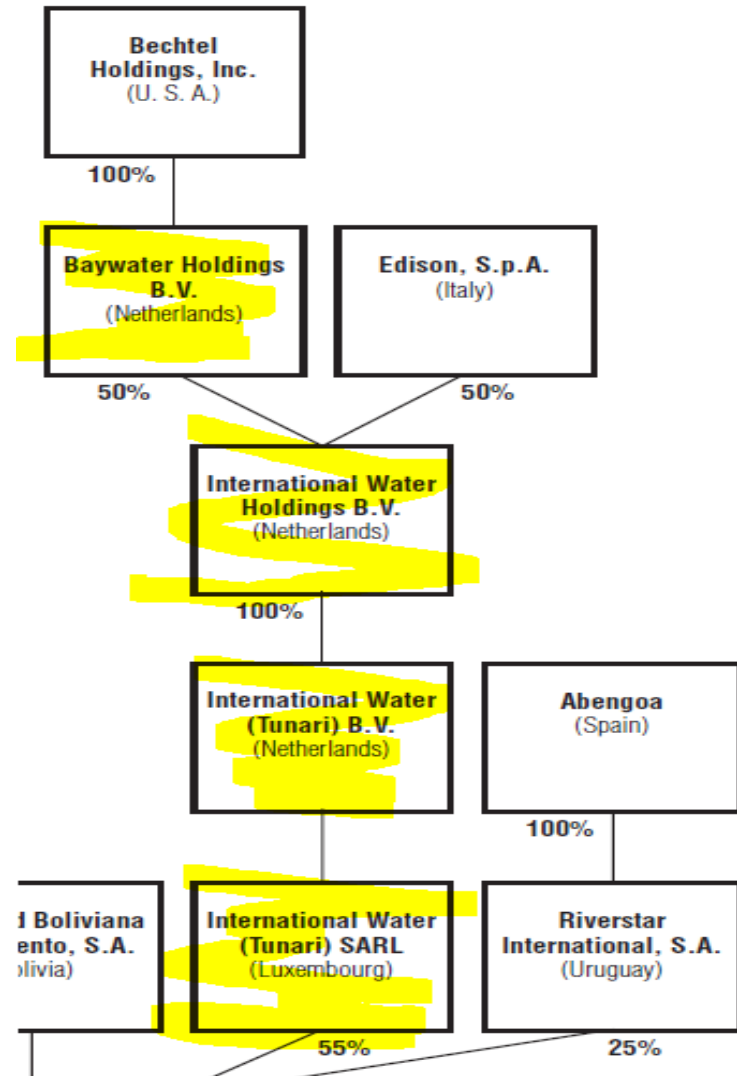
Corporate structure as of the date of concession



Treaty Shopping: *Aguas del Tunari* – cont'd

Reorganization of the ownership structure

Bolivia-
Netherlands BIT



Treaty Shopping: *Aguas del Tunari* – cont'd

No “ultimate controller” or “actual control” tests

Control accompanies ownership

Controlled directly or indirectly = legal capacity to control the other entity

BIT and Other Treaty Proceedings: the ECHR

European Convention on the Protection of Human Rights and Fundamental Freedoms and protocols

Article 6

fair trial rights (access to court, fair proceedings, execution of judgments)

Article I of the First Protocol

right to peaceful enjoyment of possession

Greek Refineries v. Greece

legislative action to prevent enforcement of arbitral award

Sovtransavto v. Ukraine

fairness of judicial proceedings and fraudulent delusion of foreign shareholding

Tre Traktörer AB v. Sweden

revocation of a trade license

Kohlhofer and Minarik v. the Czech Republic

foreign minority shareholders' rights

Marini v. Albania

foreign investment agreement under the joint-venture violated by the State, deprivation of effective control, subsequent winding up of the joint-venture

BIT and Other Treaty Proceedings: the ECHR – cont'd

AMTO v. Ukraine (Stockholm / ECT):

The ECHR proceedings provide no justification to terminate or suspend the arbitration

Uzun and others v. Turkey (ECHR):

Dismissed claims on other grounds than pending ICSID proceedings

Multiple Proceedings: Shutting the Pandora's Box

General principles of law:

- Lis pendens
- Forum non conveniens
- Res judicata

Procedurals:

- Anti-suit injunction
- Consolidation of claims

Treaty or contract based:

- Waiver clause
- Fork in the road

Lis Pendens

Inapplicable under international law

MOX Plant litigation (ITLOS):

Rights and obligations under different international treaties have a separate existence from each other

AMTO v. Ukraine – Stockholm

declined to suspend proceedings in view of ECHR application

Uzun and Others v. Turkey - ECHR

declined to suspend proceedings in view of pending ICSID arbitration

Forum Non Conveniens

ECJ - C-281/02 Andrew Owusu:

the *forum non conveniens* doctrine undermines the principle of legal certainty

NB: Le Gouvernement de la Region de Kaliningrad c. Lituanie (ICC and Cour d'appel de Paris):

the BIT cannot create a remedy against international arbitral awards enforced in a state pursuant to its international commitments

Res Judicata

Prerequisites:

- Same cause of action
- Same legal grounds
- Same parties

Effects:

- Positive / conclusive
- Negative / preclusive

Under international law:

- Same legal order
- Same relief
- Same grounds
- Same parties

Res Judicata – cont'd

MOX Plant Case (ITLOS):

“...the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, *inter alia*, differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires* ”

CME v. Czech Republic (Stockholm):

“... the fact that one tribunal is competent to resolve the dispute brought before it does not necessarily affect the authority of another tribunal, constituted under a different agreement, to resolve a dispute - even if it were the “same” dispute”

Procedurals

Anti-suit injunctions

ECJ – C-159/02 Gregory Paul Turner:

Anti-suit injunction constitutes interference with the jurisdiction of the foreign court

ICSID - SGS v. Pakistan

Consolidation of claims

When:

- between two parties where there is a multiplicity of contracts or claims, or
- between a multiplicity of parties based on a single claim or a multiplicity of claims

Legal basis:

- parties' consent
- NAFTA (art. 1126)
- New US model BITs, new FTAs, new Canada model FIPAs

De facto consolidation:

ICSID Argentina crisis cases

Treaty or Contract Based

Fork in the road

the choice of forum by the investor is irrevocable

Action-based:

Argentina-Ukraine BIT (Art. 8(2))

Jordan-Ukraine BIT (Art. 10(5))

Contract-based:

Belgium-Ukraine BIT (Art. 8(1))

Italy-Ukraine BIT (Art. 9(2))

Waiver

Canada-Ukraine BIT (Art. XIII)

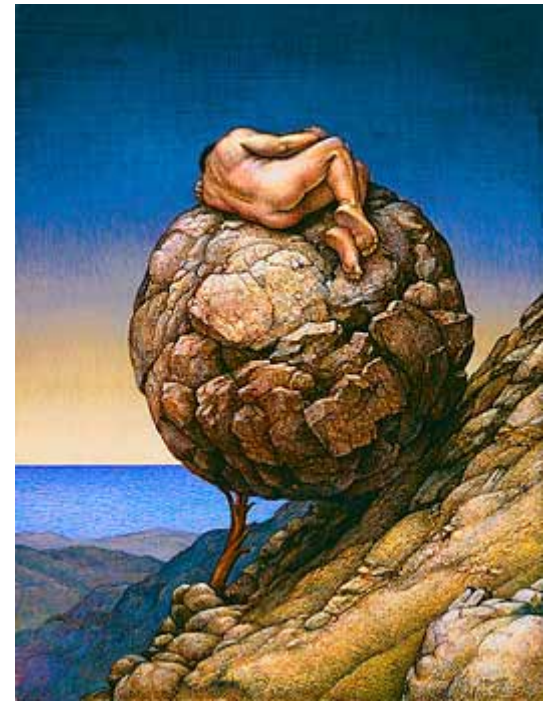
ICSID – Aguas del Tunari: *a clear waiver of ICSID jurisdiction would be effective*

But:

ICSID – Salini v. Morocco: *BIT overrides contractual arbitration clause*

The struggle itself [...] is enough to fill a man's heart. One must imagine Sisyphus happy

Albert Camus *The Myth of Sisyphus*





Thank you!