

# Investment Treaty Disputes and Restructuring an Investment: What You Should And Should Not Do



**Presentation for  
Kiev Arbitrations Days Conference  
Kiev, Ukraine, 17-18 November  
2011**

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# What is meant by “restructuring”

- Changes in ownership AFTER initial investment
  
- Examples of restructuring:
  - Changes in upstream corporate ownership
  - Sale or transfers of investment to third parties
  - Separation of arbitration rights
  
- Reasons for restructuring:
  - Improve position in an investment dispute (“treaty-shopping”)
  - Facilitate funding/conducting of arbitration
  - Corporate reasons unrelated to dispute settlement

# Key Jurisdictional Issues in Restructuring

## 1. Nationality:

Form versus Substance in Corporate Nationality

## 2. Transferability:

Assignable versus Non-Assignable rights

## 3. Timing:

Pre-Dispute versus Post-Dispute transfers

# Nationality: Form versus Substance

- **General Rule – Formal approach**
- Treaties often contain broad definitions for corporate nationality (e.g. any company constituted under the laws of OR having its principal place of business in country X)
- Tribunals reluctant to look beyond place of incorporation to effective ownership/control
  - Lithuanian company owned and controlled by Ukrainian nationals – OK. Tokios Tokelés v. Ukraine (but see dissenting opinion of Tribunal president)
  - Dutch shell company is nothing but instrumentality of UK parent – OK. Saluka v. Czech Republic
  - Showing of abuse of corporate form required to lift corporate veil. ICJ decision in Barcelona Traction (but decision criticized by some)
- Note: claims by shareholders also allowed and treated as direct claims. Azurix v. Argentina

# Nationality: Form versus Substance

- **Exception – Denial of Benefits Clauses**
- Denial of Protection for Shell Companies under Special Clause in Treaty (ECT, NAFTA , some BITs)
- Not present in all treaties but included in some major ones (e.g. Energy Charter Treaty Article 17(1), NAFTA Article 1113, US-Ukraine BIT)
  - **ECT Article 17:** “Each contracting Party reserves the rights 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;...”
- Test of “substantial business activities”
- Advance notification requirement may be implied to defeat reliance on the clause  
Plama v. Bulgaria, Yukos v Russia
- Burden of Proof on Respondent Generation Ukraine v. Ukraine

# Transferability: Valid v Invalid Assignments

## ■ General Rule Is Assignment Allowed

- Transfers may be expressly allowed in treaty. Upstream change of control not even considered a transfer. Noble Energy v. Ecuador
- Transfer for which permission was obtained included right to arbitration, even if not spelled out explicitly. Amco v. Indonesia

## ■ Caveats

- May lose access to arbitration on account of nationality of transferee. Holidays Inns v. Morocco
- Transfer cannot be a sham, with real beneficial ownership retained by transferor. Fakes v. Turkey
- Intuitu Personae rights/obligations may not be transferred. Issue raised in Vannessa Ventures v Venezuela (see Decision on Jurisdiction)
- May overlap with question of what is a bona fide investment (Phoenix Action v Czech Republic)

# Timing: Pre v. Post-Investment

## Pre-Dispute Treaty Shopping Generally Upheld

- Protection of investments by gaining access to ICSID arbitration through the BIT “a perfectly legitimate goal as far as it concerned future disputes.”

Mobil v Venezuela (Decision on Jurisdiction)

- Transparency may help.

Aucon v. Venezuela

- Consider whether company at issue is purely a shell and whether any other legitimate grounds for transfer exist. Aguas del Tunari v. Bolivia

# Timing: Pre v. Post-Investment

## Post-Dispute Treaty Shopping Generally NOT Upheld

- May be considered “abuse of right” or “bad faith”
- “[T]o restructure investments only in order to gain jurisdiction under a BIT for such disputes would constitute, to take the words of the Phoenix Tribunal, “an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs.” Mobil v. Venezuela (decision on jurisdiction)
- Rearrangement of assets purely to take advantage of ICSID jurisdiction for pre-existing dispute is abuse of right Phoenix Action v. Czech Republic

## Difficult questions

- When can a dispute be said to arise?
- What constitutes a single ongoing dispute versus different disputes?  
Lucchetti v. Peru (Award and Decision on Annulment)