ISSN: 3048-4782

VOL. III ISSUE I

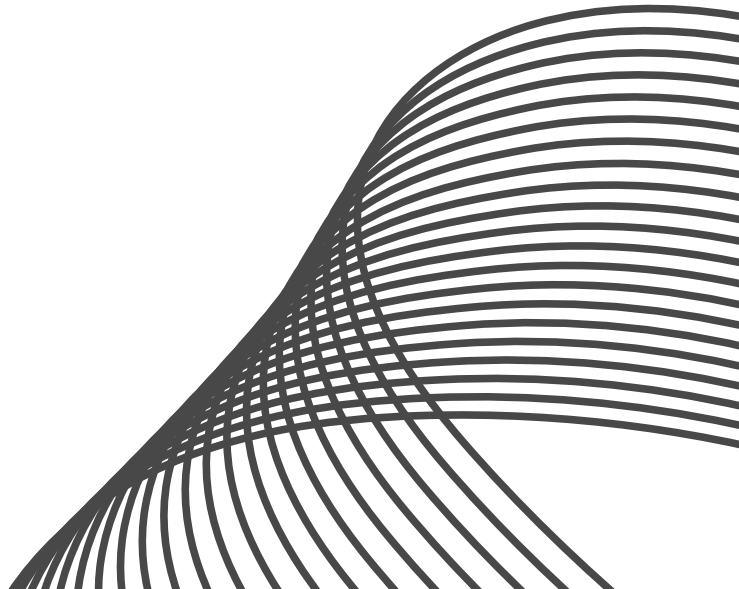
BEYOND BRIEFS LAW REVIEW

VOLUME III
ISSUE I

DATE OF PUBLICATION: 31.12.2025

FREQUENCY: BI-ANNUAL

PUBLICATION CYCLE: (JULY - DECEMBER) 2025



ISSN: 3048-4782

VOL. III ISSUE I

DISCLAIMER

DENIAL OF BENEFITS CLAUSES: REASSESSING NATIONALITY PLANNING AND TREATY SHOPPING POST-PHENIX ACTION

~ *Atreyee Dey* [1]

Abstract

The Mathura rape case (Tukaram v State of Maharashtra, 1978) is one of the biggest failures of Indian criminal jurisprudence, which revealed the deep entrenchment in patriarchal, casteist, and heteronormative assumptions of the Indian Judiciary. This article revisits and rewrites the case from a queer-feminist lens, by reframing the legal analysis around the matters of consent, coercion, institutional injustice, victim's vulnerability and legal morality. This article highlights that the Supreme Court's reasoning based on absence of any injuries, prior sexual history, and silence of the victim have created colonial and patriarchal beliefs about the idea of consent. By re-interpreting the case through feminist jurisprudence, intersectionality, and updated constitutional standards, this article proposes doctrinal and institutional reforms essential to building a gender-just legal system.

Keyworks

Nationality of individuals, nationality of corporations, treaty shopping, nationality planning, denial of benefits clause.

[1] You may contact the author at the following email address: atreyeedey67@gmail.com.

INTRODUCTION:

Given the inherent tension between a host State's right to regulate its own affairs and an investor's private commercial interests including the legitimate expectations arising from the representations forwarded by the host state, bilateral and multilateral investment treaties were adopted to calibrate this relationship and establish a balanced legal framework for foreign investment. As States remain the primary actors in international law, **nationality** has always constituted a foundational principle for determining the jurisdiction of International Convention for the Settlement of International Disputes (herein referred to as ICSID or the Centre) [2]. An individual's nationality is determined primarily by the law of the country whose nationality is at issue [3]. Corporate nationality is considerably more complex and the most used criteria for determining the same are incorporation or the main seat of business ('*Siège social'*) [4]. Therefore, it is simple to determine the nationality of an individual as compared to incorporated entities.

NATIONALITY OF AN INDIVIDUAL AND DIPLOMATIC PROTECTION

One of the most significant decisions on determining an investor's nationality is *Liechtenstein v. Guatemala*, widely known as the *Nottebohm case*[5]. In this case, the International Court of Justice (ICJ) ruled in favour of Guatemala by applying the "dominant and effective nationality" test, a well-established principle of customary international law. The Court noted that this test requires demonstrating "genuine connections" between the individual and the State whose nationality is invoked[6]. Applying this principle, the Court held that Nottebohm's links with Liechtenstein were exceedingly weak, especially when contrasted with the deep, long-standing connection he maintained with Guatemala, where he had established business interests. His naturalisation in Liechtenstein, obtained at the onset of the Second World War, was motivated by his fear of facing prosecution, as a German national in Guatemala, and by the expectation that Liechtenstein's nationality would receive international recognition. The Court, however, declined to give effect to this naturalisation, holding that the claimant had "no real ties" with the state and Liechtenstein

[2] P. Ghaffari, "Jurisdictional Requirements under Article 25 of the ICSID Convention: Literature Review" (2011) 12 *Journal of World Investment & Trade* 603,604.
[3] M Hirsch, *The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes* (1993) 76.
[4] *Autopista Concesionada de Venezuela, CA v Bolivarian Republic of Venezuela,* ICSID Case No ARB/00/5, Decision on Jurisdiction (27 September 2001) para 107.
[5] *Nottebohm (Liechtenstein v Guatemala)* (Second Phase) (Judgment) [1955] ICJ Rep 4.
[6] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001) art 7.

could not extend diplomatic protection to Nottebohm against Guatemala, rendering the claim inadmissible.

DUAL NATIONALITY AND INVOCATION OF ARTICLE 25 OF ICSID

Article 25(2)(a) of ICSID[7] explicitly excludes dual nationals if one of their nationalities is that of the host state. This has been iterated exceptionally well in *Champion Trading v Egypt*[8]. Three of the Claimants had dual nationalities- one of Egypt and the other of United States of America. Even though living in America, they continued to renew their Egyptian personal identity card therefore essentially maintaining their Egyptian citizenship. The Tribunal noted that ICSID Convention had a clear and specific rule against a person who also has a nationality of the host state from bringing a claim against the host state under the Convention. Nonetheless, nationality should not be equated with permanent residence of an individual. In *Feldman v Mexico*[9], the claimant was a citizen of US but had a permanent residence in the host state, i.e., Mexico. The Tribunal held that *"citizenship rather than residence is the main connecting factor between the individual and the state whose nationality is being invoked."*

NATIONALITY OF JURIDICAL PERSONS AND THE TESTS TO DETERMINE THE SAME

As mentioned before, there are two criteria for determining the nationality of a corporation- either it is the seat of incorporation or the '*Siège social'*. Many treaties follow either one of the criteria. The Bilateral Treaty (herein referred to as BIT) between Poland and United Kingdom[10] defines corporate investors as "*any corporations, firms, organisations, associations incorporated under the law in force in that Contracting Party*."

Tokios Tokeles v Ukraine [11] was one such award that emphasised the 'seat of incorporation test'. Here, the business was incorporated under the laws of Lithuania and was qualified to be considered

[7] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) art 25(2)(a).
[8] *Champion Trading Company and Ameritrade International, Inc v Arab Republic of Egypt,* ICSID Case No ARB/02/9, Decision on Jurisdiction (21 October 2003) para 3.
[9] *Marvin Roy Feldman Karpa v United Mexican States*, ICSID Case No ARB(AF)/99/1, Decision on Jurisdiction (6 December 2000) para 30.
[10] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Polish People's Republic for the Promotion and Protection of Investments (signed 17 June 1987, entered into force 1 January 1989) art 1(e).
[11] *Tokios Tokelės v Ukraine,* ICSID Case No ARB/02/18, Decision on Jurisdiction (29 April 2004) para 28.

an investor under Article 1(2)(b) of Lithuania Ukraine BIT[12]. Nonetheless, the respondent argued that the Claimant was not a 'Lithuanian investor in Ukraine' but was an 'Ukrainian investor in Lithuania' since nationals of Ukraine owned 99 percent of its share and two thirds of its management comprised of Ukrainian nationals. However, majority of the Tribunal shared the same opinion that the incorporated entity was a 'national of another Contracting party' under Article 25 of ICSID[13].

Another common trend in civil law countries is the adoption of the '*Siège social test'*, commonly known as the seat theory. Here the nationality of the corporation is determined, taking into consideration the place of central administration[14]. This is the place where the decisions that are fundamental to the company's management are taken and executed. Therefore, a mere seat will not suffice and a more "genuine link" has to be established between the entity and the state whose nationality has been invoked. The Cambodia Turkey BIT[15] for instance require that the legal person carries out "*substantial business activities in the territory of that Contracting Party*" or "*real economic activities*". Where there is an amalgamation of the two, i.e., where the '*Siège social'* test is accompanied by the 'incorporation theory', tribunals have commonly understood that there should be substantial evidence in addition to a mere registered address of the company in the state where it is incorporated.

In *Alps Finance v Slovak Republic*[16], tribunal interpreted 'corporate seat' as "*effective centre of administration*" and therefore required the showcasing of additional evidence like where the board of directors met regularly, whether the company had active employees or not, etc.

One of the lesser invoked but important methods for determining an investor's nationality is the "control test." Rather than focusing on where a company is incorporated or where its registered office is situated, this test looks at the nationality of the persons who actually control the entity thereby treating the corporate vehicle essentially as a confidant for the real investors. In other

[12] Agreement between the Government of the Republic of Lithuania and the Government of Ukraine for the Promotion and Reciprocal Protection of Investments (Lithuania–Ukraine BIT) (signed 8 February 1994, entered into force 6 March 1995) art 1(2)(b).

[13] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) art 25.

[14] *Société Ouest-Africaine des Bétons Industriels (SOABI) v Republic of Senegal,* ICSID Case No ARB/82/1, Decision on Jurisdiction (1 August 1984) para 29.

[15] Agreement between the Government of the Republic of Turkey and the Government of the Kingdom of Cambodia on the Reciprocal Promotion and Protection of Investments (Cambodia- Turkey) (signed 23 January 2018, not yet in force) art 1(2)(b)

[16] *Alps Finance and Trade AG v Slovak Republic*, UNCITRAL, Award (5 March 2011) para 216.

words, the incorporation prerequisites are regarded as a mere formality, and nationality is assessed based on effective ownership or control by nationals of a State. For instance, the BIT entered between Switzerland and Iran incorporates a control-test clause under certain circumstances: it grants investor status either to a legal entity established under Swiss law with genuine activities in Switzerland, or, alternatively, to an entity (even if incorporated abroad) that is "effectively controlled" by natural or juridical persons of Switzerland[17].

TREATY SHOPPING- AN ACCEPTABLE VENTURE?

In general parlance, the Tribunals have held treaty shopping or nationality planning as a perfectly acceptable and within the boundaries opportunistic device to gain access to the specific rights and remedies accorded by a BIT. Originally employed in international tax matters, it has now perforated into investment arbitration and its manifestation can be seen in several forms. For example, an individual with dual nationality or through corporate restructuring of an entity treaty shopping can be invoked and as mentioned before, it is completely legal if done within the specified bounds. However, the large and growing body of arbitral decisions on this issue has produced divergent approaches, resulting in considerable uncertainty around the contours of lawful corporate nationality planning in foreign investment. In *Lao Holding v Laos*[18], the claimant was incorporated in Aruba and Aruba being a Netherlands colony, the Government contested that investor was using this as a device to profit from the rights and remedies afforded by the Laos-Netherlands BIT. The Tribunal affirmed that the investor was not doing something unlawful and that to take advantage of a BIT is not problematic if it is done during the initiation period of an investment.

The Tribunal expressed similar views in the case of *Aguas Del Tunari v Bolivia*[19], where the investor had made strategic changes in its corporate structure, relocating in a jurisdiction that provided for a more beneficial regulatory and legal environment. The Respondent contested this on the ground of fraud and abuse of corporate process. The Tribunal affirmed that some BITs and their languages explicitly allow for national routing of their investments and that is in line with the investment policies and motivations of the state parties.

[17] Agreement between the Swiss Confederation and the Islamic Republic of Iran on the Promotion and Reciprocal Protection of Investments) (Switzerland- Iran) (signed 8 March 1998, entered into force 21 April 1999) art 1(1)(b)
[18] *Lao Holding v Laos*, ICSID Case No ARB/AF/12/6, Decision on Jurisdiction (2 Feb 2014) paras 80–92, 187–210.
[19] *Aguas Del Tunari v Bolivia,* ICSID Case No ARB/02/3, Decision on Jurisdiction (21 October 2005) paras 230–245, 247–266, 317–330.

Nonetheless, not every endeavour of treaty shopping will be successful. To quote the decision of *Banro v Congo*[20], the tribunal rejected jurisdiction after noting that the claimant had transferred ownership from a Canadian company, Canada not being an ICSID member before 2013, to a U.S. entity only after the dispute had arisen and just days before initiating proceedings. The tribunal found this restructuring to be an obvious attempt to secure ICSID jurisdiction, and therefore declined to entertain the claim.

This prohibitive arbitration vantage point can be best explained through the decision of *Phoenix Action Ltd v. The Czech Republic*[21]. The case concerned two Czech metal companies (Benet Praha and Benet Group) that were owned and controlled by the same individual, a Czech national by the name of Vladimír Beňo. Mr. Beňo was Benet Praha's executive officer when criminal investigations were initiated against him in 2001. Benet Group was involved in two lawsuits against Mr. Miroslav Raška, and Benet Praha was in a dispute with the police and the prosecution for alleged tax and custom duty evasions in which the company's assets were frozen and seized. Subsequently, Mr. Beňo fled to Israel and thereafter registered a new company named, Phoenix Action Limited under the laws of Israel. This was done in the same year when there were ongoing criminal proceedings against him. He then proceeded to purchase those two abovementioned companies at a very nominal rate from his own family members. Two months after the acquisition, Phoenix Action Ltd brought the case to arbitration before ICSID under the Czech- Israeli BIT[22] citing that Czech Republic was causing hardship to his investments. The Respondent mainly argued on two points**. Firstly,** there was no Jurisdiction *ratione temporis* as the breaches alleged by the Claimant arose before the BIT was entered into between the parties and **secondly,** and most importantly, the purchase of the two companies was no "investment" under Article 1 and 7 of the BIT and subsequently there was no Jurisdiction *ratione materiae* under Article 25 of ICSID. Additionally, the Respondent also demanded the corporate veil be lifted because the entire Phoenix Limited *"[was] nothing more than an ex post facto creation of a sham Israeli entity created by a Czech fugitive to flee from justice."*[23]

---

[20] *Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema S.A.R.L. v. Democratic Republic of the Congo*, ICSID Case No ARB/98/7, Award (1 September 2000) paras 14–20.
[21] *Phoenix Action Ltd v Czech Republic*, ICSID Case No ARB/06/5, Award (15 April 2009) paras 93–102, 104–113, 133–140, 142–144.
[22] Agreement between the Government of the Czech Republic and the Government of the State of Israel for the Reciprocal Promotion and Protection of Investments (Israel-Czech BIT) (signed 23 September 1997, entered into force 16 March 1999) art 1(3)(b).
[23] *Phoenix Action, Ltd. v. The Czech Republic* (n 92) para 34.

The Tribunal took into consideration the timings and the circumstances under which the nationality change was made. This all resulted in the breach of good faith on part of the investor. This case, although an example of Round Tripping nonetheless, the Claimants requests were dismissed in entirety since in Court's view the Claimant has misappropriated the treaty shopping clause to serve their own interests, that it was not a bona fide transaction and the purpose of the 'investment' was not to add to the economic activities of the host state but to create initiate international litigation against the host state. The Tribunal took into consideration four factors to determine whether the 'investment' should be granted protection or not.

Firstly, the timing of the investment. When it brought the two companies were bought by Phoenix, they were already embroiled in a long strenuous legal battle with the Czech authorities. **Secondly,** even before the ownership of the Benet companies was registered with the local authorities of Phoenix, they had already by that time informed Czech Republic of an investment dispute. **Thirdly,** the transaction of acquiring the companies was not arm's length but a mere futile attempt to redistribute the assets between the members of Beňo family. **Fourthly,** Phoenix had no business plans with the acquired companies.

In *Cementownia v Turkey*[24], the Claimant here was a Polish company that claimed to have acquired the shares of a Turkish company but the most bizarre part of the transaction is that it took place just 12 days before Turkey terminated the concession agreement. The Tribunal thus concluded that it was not a genuine bona fide transaction but rather an attempt to falsify jurisdiction that never should have existed in the first place.

A more recent yet important decision of *Philip Morris v. Australia*[25], distinguished between the abuse of process and jurisdiction *ratione temporis* objections. Here, certain regulatory and related measures were taken by the Australian Government in an effort to reduce smoking in the country. The regulatory measure came in the form of Australian Tobacco Plain Packaging Act of 21 November 2011 which implemented certain restrictions regarding the packaging of tobacco products. The Claimant here, PM Asia, was a Hong Kong incorporated company, serving as regional headquarters of Philip Morris International (herein referred to as PMI). Before the enactment took place, in the same year, i.e., 2011 the Juggernaut PMI transferred 100 percent of

[24] *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB (AF)/06/2, Award (17 September 2009) paras 144–180.

[25] *Philip Morris Asia Limited v. The Commonwealth of Australia,* UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (17 December 2015) paras 395–415.

Philip Morris Australia and Philip Morris Limited to PM Asia, thus bringing a claim of indirect expropriation and unfair treatment against the Australian government under Hong Kong- Australia BIT. The Tribunal while deciding upon Jurisdiction *ratione temporis* observed that since the restructuring was planned out and executed before the enactment, the Tribunal did have Jurisdiction *ratione temporis.* But as far as the abuse of rights goes, the Tribunal had a different view altogether. **Firstly,** the burden of proof for finding there has been an abuse of rights is considerably high. **Secondly,** as per the various awards discussed earlier is it not illegal at the outset to initiate and carry out corporate restructuring so as to obtain benefits from a particular treaty. Nonetheless, if it is proved through cogent evidence that the restructuring was carried out with the primary motive of obtaining the benefits accrued by a particular BIT for a foreseeable dispute in the future then it might amount to abuse of rights. The Tribunal then went ahead to assess the corporate restructuring against the backdrop of the ongoing political developments in Australia. Several factors insinuated that Claimant had reasonable belief that a dispute might rise in future. In 2009, Claimant had informed the Australian Minister for Health that plain-packaging measures would interfere with its property rights. By April 2010, the Australian government publicly and unequivocally announced its plan to implement significant tobacco-control regulations along with a detailed timeline outlining the entire legislative process. Therefore, the Tribunal concluded by observing that the main objective of restructure was not to claim tax benefits and other benefits afforded by the specific treaty but rather to bring a claim under the Treaty using PM Asia. Through this award the Tribunal differentiated between Jurisdiction *ratione temporis* and abuse of rights claims by lying down a two-tier test to determine treaty shopping or nationality planning claims.

DENIAL OF BENEFITS CLAUSE – A METHOD TO COUNTERACT TREATY SHOPPING

Denial of Benefits Clause (herein referred to as DOB) is an often sought out method by the States to limit and put an end to treaty shopping via corporate nationality planning. This clause is incorporated in the treaty itself and reserves the right of the state to deny the benefits of the treaty to a third party, the third party not being a member to the Treaty. To put it into simpler words, when the company is mostly owned or controlled by individuals of third party, not being a member to the Treaty but is incorporated in a State party to the Treaty, under such circumstances the States have a right to exercise this clause. The interpretation of the clause differs from treaties to tribunals.

For instance, the DOB clause inserted in Art. 17(1)[26] of the Energy Charter Treaty extends DOB to substantive clauses and not dispute settlement mechanisms. In contrast, there are several other tribunals and treaties that has not restricted the DOB clause to mere substantive provisions and have applied it to jurisdictional issues as well.

In *AMTO v Ukraine*[27], the Tribunal explicitly stated that for the invocation of DOB clause, the burden is on the respondent to prove that such conditions of denial exist. Here, the Claimant was incorporated in Latvia, which was a party to ECT at that time. Ukraine objected to the Jurisdiction of the Tribunal by invoking Art. 17(1) of ECT and stated that AMTO had no substantial business in Latvia and that it was a third party under the Treaty. The Tribunal correctly held that 'substantial' in the context of business doesn't have to be large, that the substance of the business is taken into consideration not the form of business.

Now another important question where divergent views exist is the applicability of the clause, whether it is retrospective or prospective in nature and whether this clause operates automatically or must be exercised explicitly by the States.

In *Plama v Bulgaria*[28], the Claimant here was incorporated in the state of Cyprus. After the proceedings began, Bulgaria sent a letter to ICSID asserting that the Claimant had no substantial business activities in Cyprus, that it was controlled by nationals of states that were not a party to the treaty and DOB clause be exercised in this case. The Tribunal ruled that DOB clause is not an automatic clause and it has to be explicitly invoked by the host state. As regards to the retrospective or prospective applicability of the clause, investor friendly Tribunals and the Tribunal in the decision also laid down that the right should not be exercised in a retrospective manner. If the clause were to be exercised in a retrospective manner, then it will have severe implications on the rights of all investors alike. An investor if properly informed beforehand about the consequences of the applicability of DOB clause, like for example, the Art. 17(1) ECT, could plan his investments accordingly.

CONCLUSION

As discussed above, nationality of individuals and corporations remains a pivotal factor in determining jurisdiction under foreign investment frameworks. Genuine connections, seat of

[26] Energy Charter Treaty (signed 17 December 1994, entered into force 16 April 1998) art 17(1).
[27] *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award (26 March 2008) paras 67-70.
[28] *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction (8 February 2005) paras 157-158.

incorporation, effective control, and substantive business activity etc., serve as key criteria to determine the same. While ranging tribunal decisions permit the investors to engage in nationality planning to optimize their investment by accessing rights under specific treaties, such practices cross into abuse when designed primarily to manipulate jurisdiction or circumvent obligations. DOB clauses allow States to deny benefits under these circumstances, but their effectiveness hinges on explicit invocation by the States, the burden of proof being on them to prove that conditions of denial exist, rather than automatic application. And most importantly these clauses are not retrospective in nature to protect the legitimate interests of the investors. Therefore, through the implementation of these clauses, a delicate balance is drawn between the rights of the investors and the rights of the States to manage their sovereign affairs. By clarifying the scope, operation, and limitations of treaty planning, and DOB clauses, States can ensure that investment treaties remain both protective and equitable for investors thereby fostering a stable and predictable environment for cross-border economic engagement.