EFFECTIVENESS OF MEASURES TO PREVENT INVESTMENT TREATY SHOPPING: CURBING ACCESS TO CERTAIN MALLS

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ABSTRACT

In recent years, states have increasingly included explicit restrictions on treaty shopping in their investment treaties. As a result, newly signed investment treaties frequently include substantive ratione personae requirements, denial of benefits clauses, and anti-circumvention clauses. Along with these new drafting trends, arbitral tribunals have developed an implicit constraint in the form of the abuse of process doctrine to sanction the most flagrant forms of treaty shopping.

Treaty shopping in itself is permissible if the treaty does not have any restrictions barring it. However, measures such as those mentioned above, are undertaken to prevent misuse of the protection afforded to certain investors. The question is whether these measures have any efficiency? While these drafting trends and arbitral practice can help to mitigate some of the negative consequences of treaty shopping, this article argues that only a multilateral reform effort can truly prevent this practice from occurring.

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1. INTRODUCTION

The debate over investment treaty shopping via corporate structuring is more pertinent than ever today. When an investor engages in treaty shopping, they take proactive steps to gain access to an investment treaty that was previously unavailable.[1] The most frequently used technique for accomplishing this goal is corporate structuring,[2] which is the subject of this article. Through corporate structuring, an investor can establish a wholly new entity in a targeted jurisdiction or transfer shares between two already existing entities part of the same corporate chain.[3] This practice has generally been considered legal as long as the applicable investment treaty permits it and the company is restructured before the occurrence or foreseeable occurrence of a specific dispute. However, states have taken proactive steps to curb this practice in recent years through their treaty drafting practices. Unfortunately, these drafting efforts are accompanied by implicit limitations imposed by arbitral tribunals tasked with resolving jurisdictional issues involving corporate structuring.

These are not isolated efforts. They were taken at a time when many states are attempting to rebalance their investment treaties through more balanced protection standards. Additionally, the United Nations Commission on International Trade Law ("UNCITRAL") is currently debating a procedural reform of investor-state dispute settlement ("ISDS"). None of these efforts, however, will be fully effective unless treaty shopping practices are prioritized. Any attempt at recalibration may be thwarted by investors who restructure their enterprises to fall within the scope of an outdated investment treaty with unbalanced protection standards. As a result, systemic measures to discourage treaty shopping must be developed.

In Part A, the author introduces the topic and sets the scope of the paper. In Part B, the author discusses the general legitimacy of treaty shopping and the need for measures curbing treaty shopping. In Part C, the author will examine the efficacy of explicit limitations that are increasingly being incorporated into investment treaties. In Part D, the author will then discuss some implicit limitations that have been addressed in arbitral practice. In Part E, both types of constraints will then be combined to demonstrate that treaty shopping cannot be

[1] Jorun Baumgartner, 'Treaty Shopping in International Investment Law' 11 (OUP 2016).

[2] Dolzer & Schreuer (n 13).

[3] Zachary Douglas, 'The International Law of Investment Claims' 290 (CUP 2009); Javier García Olmedo, 'Recalibrating the International Investment Regime Through Narrowed Jurisdiction', 69 Int'l & Comparative L. Q. 301, 307–314 (2020); Hanno Wehland, 'Forum Shopping: Investment Arbitration', in *Max Planck Encyclopaedia of International Procedural Law* (OUP 2020), [1 ff].

effectively curbed without a concerted multilateral reform effort. Part F will then conclude and sum up the article.

2. NEED FOR ENQUIRY

Any discussion of the legitimacy of treaty shopping must begin with the recognition that such practise is not expressly prohibited in international investment law.[4] Corporate structuring does not have to conflict with the policy objectives of states when they negotiate investment treaties.[5] In general, states enter into investment treaties to strengthen domestic investor protection abroad and promote foreign investment in their domestic markets.[6] When it comes to attracting foreign investment, the ultimate source of the capital may be irrelevant to the host state.[7] Capital-importing countries frequently seek to attract foreign investors by offering preferential tax treatment, low employment costs, and other favourable regulatory conditions.[8] The conclusion of investment treaties that include a broad definition of corporate nationality may also serve as a comparative advantage in attracting foreign investment flows.

Thus, states could theoretically choose to protect foreign investors in general rather than limiting the benefits of a treaty to investors from specific countries. A liberal economist would argue that an international legal commitment to protect all investments made on a state's territory would benefit the state's domestic economy.[9] However, no investment treaty takes such a liberal stance. They all restrict the protection provided by international law to specific investors and investments. Moreover, the protections guaranteed by such treaties apply only to qualified investors on a reciprocal basis, not *erga omnes*.[10] Many states are averse to bearing sovereignty risks to benefit investors from free-riding home states that have

[4] Christoph Schreuer, *Nationality Planning, in Contemporary Issues in International Arbitration and Mediation* 17, 19 (Arthur Rovine ed., Brill 2013).

[5] UNCTAD, 'Investor–State Disputes: Prevention and Alternatives to Arbitration' (United Nations 2010).

[6] Jeswald Salacuse, 'The Emerging Global Regime for Investment', 51 Harv. Int'l L. J. 427, 436–444 (2010).

[7] Barton Legum, 'Defining Investment and Investor: Who Is Entitled to Claim?', 22 Arb. Int'l 521, 525 (2006); Stephan Schill, 'The Multilateralization of International Investment Law' 235 (CUP 2009); UNCTAD, 'Scope and Definition', UNCTAD Series on Issues in International Investment Agreements II, United Nations 93 (2011).

[8] Martin J. Valasek & Patrick Dumberry, 'Developments in the Legal Standing of Shareholders and Holding Corporations in Investor-State Disputes', 26 ICSID Rev. 34, 59 (2011); Zachary Elkins et al., 'Competing for Capital: The Diffusion of Bilateral Investment Treaties', 1960–2000, U. Illinois L. Rev. 265, 279 (2008).

[9] Kenneth J. Vandevelde, 'The Political Economy of Bilateral Investment Treaty', 92 Am. J. Int'l L. 621, 636–639 (1998).

[10] Baumgartner (n 1) 42–45.

not committed to the same level of protection.[11] As a result, because investment treaties promote foreign investment between two or more specific countries, rather than between all nations,[12] treaty shopping must be constrained.

However, reciprocity does not function as a traditional quid pro quo between investment treaty contracting parties. These treaties benefit not only the contracting parties but also host states and foreign investors.[13] States can specify the degree of reciprocity they wish to provide in their investment treaties by including or excluding certain restrictions on treaty shopping.[14] Thus, in the absence of explicit limitations in the applicable investment treaty, prospective corporate structuring has generally been deemed legitimate.[15] In the context of prospective corporate structuring, an enterprise acquires the nationality of a country to benefit from treaty protection in the event of future investment disputes.[16] One could argue that treaty shopping via prospective corporate structuring stimulates foreign investment flows, which many states desire.[17] An investor who chooses its home country (as well as the host state for its investment) based on the treaty protection available responds to the treaty's incentive. Numerous arbitral tribunals have even held that prudent investors should plan their investments in advance to take advantage of available treaty protection.[18] Thus, arbitral tribunals have limited the legitimacy of prospective treaty shopping to the presence of express limitations in the applicable investment treaty.[19] If the relevant treaty contains no restrictions, prospective corporate structuring is generally regarded as legitimate.

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[11] Vandevelde (n 9) 639.

[12] Robert Hunter, 'Is a Corporation's Entitlement to the Protection of an Investment Treaty a Question Solely of Form or Is it Also a Question of Substance?', in *The Determination of the Nationality of Investors Under Investment Protection Treaties* 37, 40 (ILA German Branch/Working Group ed., 2011); Douglas (n 3) 135.

[13] Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* 20 (2d ed., OUP 2012).

[14] Baumgartner (n 1) 47.

[15] *Mobil Corp., Venezuela Holdings, B.V., et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction (10 June 2010), [204]; *Renée Rose Levy & Gremcitel S.A. v. Republic of Peru,* ICSID Case No. ARB/11/17, Award (9 Jan. 2015), [184]; *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al.v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction (8 Feb. 2013), [184]; *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections (1 June 2012), [2.47].

[16] *Mobil Corp. v. Venezuela* (n 15) [204].

[17] Douglas (n 3) 190, 290; UNCTAD (n 6) 18.

[18] *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction (21 Oct. 2005), [330]–[332]; Dolzer & Schreuer, (n 12) 52; Valasek & Dumberry, (n 8) 59.

[19] *Aguas del Tunari v. Bolivia* (n 18) [184]; *Tokio Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction (29 Apr. 2014) [52].

3. SPECIFIC LIMITATIONS ON CORPORATE STRUCTURING

Through (prospective) corporate structuring, various drafting techniques are available to limit treaty shopping.[20] To that end, the most appropriate tools are substantive *ratione personae* requirements (i) and denial of benefits ("DOB") clauses (ii). Separately, the current drafting trends for both mechanisms will be discussed (iii).

3.1 REQUIREMENTS FOR SUBSTANTIVE RATIONE PERSONAE

The investor's nationality is the deciding factor in determining whether they are covered by a particular investment treaty's personal scope of application. In the case of natural persons, nationality continues to be a meaningful criterion that does not change rapidly or frequently.[21] However, for corporate investors, the connection to a particular state is commonly reduced to a trivial formality that can be easily changed.[22] As a result, investment treaties define corporate nationality in various ways, including the place of incorporation, the location of the company's headquarters, the nationality of the controlling shareholders, and the presence of substantial business activities in the purported home state.

Historically, the place of incorporation has been the most frequently used criterion in investment treaties to define corporate nationality.[23] It benefits from being a predictable criterion, which provides a high degree of legal certainty.[24] However, if the place of incorporation is used as the sole criterion for determining corporate nationality, there is considerable room for treaty shopping.[25] It enables multinational corporations to obtain treaty protection simply by diversifying their nationalities and establishing subsidiaries and

[20] Björn Ebert, 'Forum Shopping in International Investment Law: Forum Planning, Forum Enhancement, and Facilitation of procedure: Assessments and Limits' 229 ff (Mohr Siebeck 2017).

[21] Schill (n 7) 199.

[22] Anthony Sinclair, 'The Substance of Nationality Requirements in Investment Treaty Arbitration', 20 ICSID Rev. 357, 362–367 (2005); Douglas (n 3) 316.

[23] Florian Franke, 'Der personelle Anwendungsbereich des internationalen Investitionsschutzrechts' 144 (Nomos 2013).

[24] Rachel Thorn & Jennifer Doucleff, 'Disregarding the Corporate Veil and Denial of Benefits Clauses: Testing Treaty Language and the Concept of Investor', in *The Backlash Against Investment Arbitration. Perceptions and Reality* 3, 7 (Michael Waibel et al. eds, Wolters Kluwer 2010); UNCTAD (n 7) 82 ff.

[25] Jörn Griebel, *Internationales Investitionsschutzrecht* 132 (C.H. BECK 2008); Gus van Harten & Martin Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law', 17 Eur. J. Int'l 121, 138 (2006).

affiliates in various jurisdictions.[26] Under the seat theory, a corporation is considered a national of the state in which it has its central administration or effective management.[27] In *Capital Financial Holdings Luxembourg v Cameroon*, the tribunal determined that a company's seat is its 'actual headquarters,' which can be determined by four factors: the location of the shareholders' general meetings; the location of the board of directors meetings; the location of the company's accounting; and the location of the company's and accounting documents.[28] Taking all of these factors into account, including a seat requirement in an investment treaty, creates an additional barrier to treaty shopping. Economically, it is improbable that businesses would establish their primary administrative headquarters in a state solely to obtain treaty protection.[29] However, there are exceptions: *Capital Financial Holdings versus Cameroon* determined that the investor's formal existence in Luxembourg was abusive due to its abrupt and artificial revival of activities following notification of the dispute.[30] This demonstrates that, while a seat requirement may impose an additional impediment, it does not entirely eliminate treaty shopping.

In *Barcelona Traction*, the International Court of Justice ("ICJ") held that the place of incorporation and the actual seat is the primary criteria for determining corporate nationality under international law.[31] However, some investment treaties go beyond these formal requirements by requiring the corporate investor and its home state to have a particular economic relationship.

One possibility is to include an additional control test that requires arbitral tribunals to determine the nationality of controlling shareholders.[32] Because this criterion is frequently used in lieu of incorporation location, it is easily avoided.[33] Even if the alternative control

[26] Ulrich Klemm, 'Investment Through Third Countries: State Practice and needs of Investors', 24 ICSID Rev. 528, 532 (2009); Panayotis M. Protopsaltis, 'The Challenge of the Barcelona Traction Hypothesis: Barcelona Traction Clauses and Denial of Benefits Clauses in BITs and IIAs', 11 J. World Inv. & Trade 561, 563 (2010).

[27] Jean-François Hébert, 'Issues of Corporate Nationality in Investment Arbitration, in Improving International Investment Agreements' 230, 237 (Armand de Mestral & Céline Lévesque eds, Routledge 2013).

[28] *Capital Financial Holdings Luxembourg S.A. v. Republic of Cameroon*, ICSID Case No. ARB/15/18, Award of the Tribunal (22 June 2017) [237].

[29] Hébert (n 27) 239; Sven Lange, *Denial-of-Benefits-Klauseln in internationalen Schiedsverfahren* 53 (Nomos 2016); Schill (n 6) 222.

[30] *Capital Financial Holdings v. Republic of Cameroon* (n 28) [356], [364 ff].

[31] *Case Concerning the Barcelona Traction, Light and Power Company, Ltd*., International Court of Justice, Judgment (5 Feb. 1970) [70].

[32] Schill (n 7) 222.

[33] Chieh Lee, 'Resolving Nationality Planning Issue Through the Application of the Doctrine of Piercing the Corporate Veil' in *International Investment Arbitration*, 9 Contemp. Asia Arb. J. 87, 98 (2016) .

criterion is applicable, it may be ineffective in preventing undesirable corporate structuring, given the high fungibility of capital today. For example, suppose control is defined primarily in terms of ownership of the company's shares. In that case, access to a particular treaty can easily be obtained by transferring the majority of the company's shares. Additionally, control is frequently challenging to establish, as multinational corporations' shareholders may be of diverse nationalities.[34] As a result, the majority of investment treaties do not use control to define corporate nationality.[35]

Finally, an economic activity requirement excludes shell companies that lack a sufficient economic connection to their home state from the scope of application of the respective investment treaty.[36] Incorporating an economic substance test requires an arbitral tribunal to look beyond an enterprise's legal structure and consider the materiality of its business activities in the ostensible home country.[37] Arguably, this is the most effective explicit limitation, given how frequently shell companies are used for treaty shopping purposes. Artificial commercial transactions often satisfy formal nationality requirements but fail an economic substance test.

3.2 DOB CLAUSES

DOB clauses have the potential to have the same effect as substantive *ratione personae* requirements.[38] Such clauses deny investors who have no real economic ties to the contracting state party in which they have incorporated the benefits of an investment treaty. As a result, a similar effect to that of an economic substance test is achieved.[39] In addition, by

[34] Stanimir Alexandrov, 'The 'Baby Boom' of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as Investors and Jurisdiction Ratione Temporis', 4 L. & Practice Int'l Courts & Tribunals 19, 37 (2005).

[35] Markus Perkams, 'The Determination of Nationality of Investors in International Investment Agreements (IIAs) – Taking Stock of the Criteria Used in Modern Investment Law', in *The Determination of the Nationality of Investors Under Investment Protection Treaties* 13, 16 (ILA German Branch/Working Group ed., 2011); Ebert (n 22) 176 ff.; John Lee, 'Resolving Concerns of Treaty Shopping in International Investment Arbitration', 6 J. Int'l Dispute Settlement 355, 364 (2015).

[36] See Baumgartner (n 1) 112.

[37] *Limited Liability Company AMTO v. Ukraine*, SCC Case No. 080/2005, Final Award (26 Mar. 2008) [69]. As noted by the tribunal in *NextEra Energy v. Spain*, there is not yet a significant jurisprudence on the concept of 'substantial business activities'. *NextEra Energy Global Holding B.V. et al. v. Spain*, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles (12 Mar. 2019) [260]; *Gran Colombia Gold Corp. v. Colombia*, ICSID Case No. ARB/18/23, Decision on the Bifurcated Jurisdictional Issue (23 Nov. 2020)[137].

[38] Lee (n 35) 366; Mathew Skinner et al., 'Access and Advantage in Investor- State Arbitration: The Law and Practice of Treaty Shopping', 3 J. World Energy L. & Bus. 260, 271 (2010).

[39] *Caratube Int'l Oil Co. LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award (5 June 2012), [354]; Loukas A. Mistelis & Crina Baltag, 'Denial of Benefits Clauses in Investment Treaty Arbitration', Queen

excluding shell companies from the scope of the applicable investment treaty, DOB clauses may effectively prevent treaty shopping via corporate structuring.[40]

While DOB clauses operate on a case-by-case basis, substantive *ratione personae* requirements apply ex-ante to all investors seeking protection under the relevant investment treaty.[41] As a result, DOB clauses enable the host state to decide on an individual basis, for each investment, whether to extend or deny the treaty's benefits to the protected investor, provided that the clause's specific requirements are met. As a result, the effects of DOB clauses are not automatic but require the denying state to exercise them actively. While there is broad agreement among commentators[42] and in arbitral practise[43] on this point, due to the ambiguity of treaty language, it remains unclear when and how states must exercise their right to deny.

Certain investment treaties expressly require the denying state to notify the investor when exercising the right to deny.[44] Even in the absence of explicit language, some tribunals have interpreted such a notification requirement into the treaty text, stating that the investor must be informed before the state may [exercise its right to deny.[45] By contrast, other tribunals have held that it is sufficient for the denying state to communicate its decision during the

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Mary School of Law Legal Studies Research Paper no. 293, 1 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3300618> accessed 18 Aug 2021; See Yas Banifatemi, 'Taking Into Account Control Under Denial of Benefits Clauses, in Jurisdiction in Investment Treaty Arbitration' 223 (Yas Banifatemi ed., JurisNet 2018).

[40] Lindsay Gastrell & Paul-Jean Le Cannu, 'Procedural Requirements of Denial-of-Benefits Clauses in Investment Treaties: A Review of Arbitral Decisions', 30 ICSID Rev. 78, 81 (2015); Ebert (n 20) 109.

[41] Gastrell and Le Cannu (n 40) 81; Hébert (n 26) 241 f.

[42] Ebert (n 20) 201; Mistelis & Baltag (n 39) 13; see Banifatemi (n 39) 246; Jordan Behlman, 'Out on a Rim: Pacific Rim's Venture Into CAFTA's Denial of Benefits Clause', 45 U. Miami Inter-Am. L. Rev. 397, 422 (2014).

[43] *Khan Resources Inc., Khan Resources B.V., & Cauc Holding Co. Ltd. v. Government of Mongolia*, UNCITRAL, Decision on Jurisdiction (25 July 2012) [419], [421]; *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (8 Feb. 2005) [155]–[157]; *Hulley Enterprises Ltd. (Cyprus) v. Russian Federation*, PCA Case No. 2005–03/AA226, UNCITRAL, Interim Award on Jurisdiction and Admissibility (30 Nov. 2009) [455]–[458]; *Yukos Universal Ltd. (Isle of Man) v. Russian Federation*, PCA Case No. 2005–04/AA227, UNCITRAL, Interim Award on Jurisdiction and Admissibility (30 Nov. 2009) [456]–[459]; *Veteran Petroleum Ltd. (Cyprus) v. Russian Federation*, PCA Case No. 2005–05/AA228, UNCITRAL, Interim Award on Jurisdiction and Admissibility (30 Nov. 2009) [512]–[515].

[44] See e.g., Central America-Republic of Korea FTA, Art 9.12(2), which reads '[t]he denying Party shall, to the extent practicable, notify the other Party before denying the benefits under this paragraph'.

[45] *Anatolie Stati, Gabriel Stati, Ascom Group S.A., & Terra Raf Trans Trading Ltd. v. Kazakhstan*, SCC Case No. V 116/2010, Award (19 Dec. 2013) [745]; *Khan Resources v. Mongolia* (n 43) [426]–[429]; *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award (16 May 2018) [234]–[236].

arbitration proceeding's jurisdictional stage.[46] Additionally, some arbitral tribunals have determined that DOB clauses only apply prospectively,[47] while others have determined that they apply equally retrospectively.[48] In the first scenario, a host state would be able to deny the benefits of the investment treaty only in future disputes after exercising its right. The second scenario allows for a retroactive denial of investment treaty benefits, even after an investment dispute has arisen.

These distinctions are critical when evaluating DOB clauses as tools for preventing treaty shopping through corporate structuring. Only DOB clauses with a retroactive effect that can be invoked during the arbitration's jurisdictional stage are fully effective for this purpose.[49] Moreover, investors are not required to obtain formal government approval before investing in liberal investment regimes.[50] This means that, in the event of a prior notice requirement coupled with prospective effects,[51] states would be required to monitor all investment projects within their borders before exercising their right to deny.[52] Under such a restrictive reading, DOB clauses would be rendered virtually useless in addressing treaty shopping practices.[53] In sum, DOB clauses primarily serve as flexible tools for states to engage in treaty shopping by incorporating shell companies on an as-needed basis. However, substantive *ratione pers*onae requirements are more effective in the aggregate, given the uncertainty associated with the proper exercise of DOB clauses. Additionally, substantive *ratione personae* requirements provide investors with legal certainty from the start regarding their eligibility for a particular treaty. By contrast, the host state determines whether a DOB clause is invoked or not in each case.

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[46] *Empresa Eléctrica del Ecuador, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/05/9, Award (2 June 2009) [71]; *Ulysseas Inc. v. Ecuador*, UNCITRAL, Interim Award (28 Sept. 2010) [172 ff]; *Guaracachi America, Inc. & Rurelec PLC v. Plurinational State of Bolivia*, PCA Case No. 2011–17, UNCITRAL, Award (31 Jan. 2014) [376].

[47] *Plama v. Bulgaria* (n 42) [162]; *Masdar Solar v. Spain* (n 44) [239]; *Liman Caspian Oil B.V. & NCL Dutch Investment B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award (22 June 2010) [225 ff].

[48] *Ulysseas v. Ecuador* (n 46) [173]; *Guaracachi v. Bolivia* (n 46) [376].

[49] *Baumgartner* (n 1) 117; *Douglas* (n 3) 470–472; *Hébert* (n 27) 244; *Sinclair* (n 22) 385; Tania Voon et al., 'Legal Responses to Corporate Manoeuvring in International Investment Arbitration', 5 J. Int'l Dispute Settlement 41, 54 ff (2014).

[50] Hébert (n 27) 244.

[51] See Banifatemi (n 39) 246–257.

[52] *Pac Rim Cayman v. El Salvador* (n 15) [3], [6]; Ebert (n 20) 207–209; Mark Feldman, 'Setting Limits on Corporate Nationality Planning in Investment Treaty Arbitration', 27 ICSID Rev. – Foreign Inv. L. J. 281, 301 (2012).

[53] Thorn & Doucleff (n 24) 26.

3.2.1 Current Trends in the Drafting Of Treaties

In current treaty drafting practice, states have increasingly included explicit restrictions on corporate structuring in investment treaties. In most investment treaties signed between 2018 and March 2021,[54] the requirement of substantial economic activities in the purported home state is included in the definition of corporate nationality.[55] In comparison to 2013, when approximately 40% of all investment treaties used the incorporation test as the sole criterion,[56] recent years have seen a marked shift in policy. Even the Netherlands[57] opted for a definition of corporate nationality based on substantive economic criteria in its 2019 Model Bilateral Investment Treaty ("BIT").[58] Additionally, in most newly signed investment treaties, contracting states negotiated DOB clauses targeting shell companies owned or controlled by investors from a third country or the host state.[59] By incorporating companies with the host state's nationality, these clauses also serve as an effective mechanism to combat the internationalisation of domestic disputes via the practice of 'round-tripping.'[60]

Additionally, several recent DOB clauses address the uncertainty surrounding their exercise by explicitly stating that they may be invoked at any time.[61] This drafting technique enables states to exercise their right to withhold benefits even after an investment dispute has arisen, with retrospective effect.

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[54] UNCTAD, <https://investmentpolicy.unctad.org/international-investment-agreements> accessed 18 Aug. 2021.

[55] See e.g., Morocco-Japan BIT (2020), Art 1(b)(ii); EU-Vietnam Investment Protection Agreement (2019), Art 1.2(c); Australia-Uruguay BIT (2019), Art 1(a); Cabo Verde- Hungary BIT (2019), Art 1(2)(b); Australia-Hong Kong BIT (2019), Art 1(a); USMCA (2018), Art 14.1; United Arab Emirates-Uruguay BIT (2018), Art 1(b); EU-Singapore Investment Protection Agreement (2018), Art 1(5); Belarus-India BIT (2018), Art 1.6(b); Cambodia-Turkey BIT (2018), Art 1(2)(b); Belarus-Turkey BIT (2018).

[56] Franke (n 23) 144.

[57] See in general Roos Van Os & Roeline Knottnerus, 'Dutch Bilateral Investment Treaties, a Gateway to 'Treaty Shopping' for Investment Protection by Multinational Companies', SOMO 2011, <https://bibalex.org/baifa/Attachment/Documents/343802.pdf> accessed 18 Aug 2021.

[58] 2019 Netherlands Model BIT, Art 1(b)(ii) and (iii).

[59] Out of the forty-two investment treaties consulted by the author, forty-two contained a DOB clause. Examples are: Morocco-Japan BIT (2020), Art 20(1)(b); Armenia-Singapore BIT (2019), Art 3.24; Hong Kong-United Arab Emirates BIT (2019), Art 11(1)(b); Australia-Uruguay BIT (2019), Art 11(1)(a)(i); USMCA (2018), Art 14.14(a); United Arab Emirates-Uruguay BIT (2018), Art 17(2); Armenia-Korea BIT (2018), Art 14(2); Kazakhstan-Singapore BIT (2018), Art 18; Canada-Moldova BIT (2018), Art 18(1); Japan-United Arab Emirates (2018), Art 25(1); Central America-Republic of Korea FTA (2018), Art 9.12(2); Belarus-Turkey BIT (2018), Art 11(1); Armenia-Japan BIT (2018), Art 22(2).

[60] The term 'round-tripping' refers to the practice of transferring funds to a foreign state and then redirecting those funds into the investor's home state, internationalizing a dispute that is domestic in terms of economic substance. See M. Sornarajah, *The International Law on Foreign Investment* 328 (3rd ed., CUP 2010).

[61] See e.g., Hong Kong-United Arab Emirates BIT (2018), Art 11(1); Australia-Uruguay BIT (2018), Art 11(1)(a); Australia-Hong Kong BIT (2018), Art 14; Belarus-India BIT (2018), Art 35(i).

Notably, several recently signed investment treaties incorporate substantive *ratione personae* requirements alongside DOB clauses.[62] One example is the Comprehensive Economic and Trade Agreement ("CETA"), which requires substantial business activities or control to qualify as protected investors under Article 8.1 while also providing a right to deny treaty benefits under Article 8.16(a) if the enterprise is owned or controlled by a third-country investor. This dual restriction reflects a firm policy stance against treaty shopping. However, most enterprises managed or owned by a third-country investor will have been weeded out during the *ratione personae* jurisdictional requirements examination. As a result, the DOB clause in Article 8.16(a) CETA is likely to be infrequently invoked.[63] A DOB clause is more useful in investment treaties with a broad definition of protected investors, and mainly when the sole criterion for defining corporate nationality is incorporation.[64] These new trends in treaty drafting reflect states' desire to curtail treaty shopping through corporate structuring. By introducing substantive *ratione personae* requirements and DOB clauses, many states have demonstrated a strong interest in excluding shell companies from investment treaty protection. Nevertheless, in comparison to the new generation of investment treaties, most older treaties lack specific provisions addressing corporate structuring. Moreover, numerous arbitral tribunals have discussed the existence of additional implicit restrictions on the practice of investment treaty shopping in relation to these treaties.[65]

4. IMPLICIT LIMITATIONS OF CORPORATE STRUCTURING:

Without explicit limitations in the applicable investment treaty, respondent host states frequently assert that certain treaty shopping practices are implicitly restricted.[66] Various propositions have been advanced in this context, including implicit *ratione personae* requirements in the form of a 'genuine connection' or 'origin of capital' test (i) and the application of the doctrine of abuse of process (ii).

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[62] UNCTAD (n 54).

[63] Celine Lévesque, 'Article 8.16, Denial of Benefits, in CETA Investment Law, Article-by- Article Commentary' (Marc Bungenberg & August Reinisch eds, forthcoming).

[64] Lange (n 29) 60 ff.

[65] *ADC Affiliate Ltd. & ADC & ADMC Management Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award (2 Oct. 2006); *Tokio Tokelés v. Ukraine* (n 18); *Philip Morris Asia Ltd. v. Commonwealth of Australia*, PCA Case No. 2012–12, UNCITRAL, Award on Jurisdiction and Admissibility (17 Dec. 2015).

[66] *Tokio Tokelés v. Ukraine* (n 19) [21]; *ADC Affiliate v. Hungary* (n 65) [335 ff.]; *Pac Rim Cayman v. El Salvador* (n 15) [2.16]–[2.20].

4.1 IMPLICIT REQUIREMENTS FOR RATIONE PERSONAE

Implicit *ratione personae* requirements are those that cannot be determined directly from the text of the treaty. One possible implicit requirement is the 'genuine connection' test, which has been developed in the context of natural person nationality under customary international law. In *ADC Affiliate versus Hungary*,[67] the respondent host state contended that, despite meeting the *ratione personae* requirements, the claimant was not a 'real' investor due to their lack of genuine ties to the purported home state.[68] The arbitral tribunal disagreed, concluding that the incorporation test outlined in the applicable investment treaty constituted *lex specialis*, superseding any principles of customary international law.[69] This conclusion is consistent with the *Nottebohm case*, in which the ICJ developed the 'genuine connection' test for natural persons in the context of diplomatic protection.[70] One could argue that the test is inadequate for defining the nationality of multinational corporations with intricate corporate structures.

The 'origin of capital' test is another possible implicit *ratione personae* requirement. Prof. Weil popularised this test in his Dissenting Opinion in *Tokio Tokelés v. Ukraine*.[71] He contended that the origin of capital was an implicit requirement of nationality, ensuring that only international, not domestic, disputes are brought under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention"), in accordance with the Convention's object and purpose.[72] According to Prof. Weil, ICSID tribunals would have jurisdiction over disputes involving both foreign and domestic capital. This proposition is equally problematic, given that public international law provides no legal basis for an 'origin of capital' requirement.[73] As a result, both propositions have been

[67] *ADC Affiliate v. Hungary* (n 65).

[68] ibid [335 ff].

[69] ibid [357]. Similarly, *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award (17 Mar. 2006) [240 ff].

[70] *Nottebohm Case (Liechtenstein v. Guatemala)*, International Court of Justice, Judgment (6 Apr. 1955) [23]; see also *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award (17 Oct. 2013) [127].

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

[72] ibid [20].

[73] See Campbell McLachlan et al., *International Investment Arbitration: Substantive Principles* 193 (2d ed., OUP 2017).

consistently rejected in investment treaty tribunals' arbitral practise.[74] One could argue that acknowledgement of implicit *ratione personae*.

The treaty text's requirements are inconsistent with the customary international law rules governing treaty interpretation codified in Article 31(1) of the Vienna Convention on the Law of Treaties ("VCLT"). Article 31(1) of the VCLT requires that treaty terms be interpreted in good faith and in accordance with their ordinary meaning. A reading of an incorporation test that incorporates additional *ratione personae* requirements would violate the term's ordinary meaning.[75] States may include substantive *ratione personae* requirements or DOB clauses in their treaties at their discretion.[76] If they opt out, this absence of express limitations must be interpreted as a broad definition of the corporate nationality preference. Otherwise, the use of explicit constraints would be meaningless, as their presence or absence would result in the same result.[77] Furthermore, states do not always agree on the same nationality test in all of their investment treaties. They may choose one or more tests in each treaty based on their respective negotiating positions.[78] As a result, the treaty text is the most reliable source of information about the contracting parties' intentions.

The only interpretive rule that could provide a legal basis for recognising implicit *ratione personae* requirements is Article 31(1) VCLT's object and purpose of investment treaties.[79] One could argue that treaty shopping is incompatible with the concept of reciprocity or, in the case of 'round-tripping,' with the international nature of protected investments. However, as previously stated, the contracting parties' desired degree of reciprocity is not always the same. Additionally, a legal argument based solely on a teleological interpretation is relatively weak

[74] *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (22 Sept. 2014), [252]; *KT Asia Investment v. Kazakhstan* (n 69) [129]; *Rumeli Telekom A.S. & Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award (29 July 2008) [326]; *The Rompetrol Group N. V. v. Romani*a, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility (18 Apr. 2008) [83]; *Saluka v. Czech Republic* (n 69) [240 ff]; *Waste Management, Inc. v. United Mexican States,* (No. 2), ICSID Case No. ARB(AF)/00/3, Award (30 Apr. 2004) [85].

[75] *KT Asia Investment v. Kazakhstan* (n 70) [116]; *Hulley Enterprises Ltd. v. Russian Federation* (n 43) [415]. See Anastasios Gourgourinis, 'The Distinction Between Interpretation and Application of Norms in International Adjudication', 2 J. Int'l Dispute Settlement 31, 44 (2011).

[76] Douglas (n 3) 317; McLachlan et al. (n 73) 158.

[77] Douglas (n 3) 318.

[78] See *KT Asia Investment v. Kazakhstan* (n 70) [123].

[79] *Tokio Tokelés v. Ukraine*, Dissenting Opinion (n 70) [19 ff]; Markus Burgstaller, 'Nationality of Corporate Investors and International Claims Against the Investor's own State', 7 J. World Investment & Trade 857, 874 (2006); Franke (n 23) 164; M. Sornarajah, *Good Faith, Corporate Nationality and Denial of Benefits, in Good Faith and International Economic Law* 117, 12 ff. (Andrew Mitchell et al. eds, OUP 2015).

and difficult to reconcile with the other treaty interpretation rules outlined in Article 31(1) VCLT.

A subjective approach based solely on the contracting parties' presumed intentions creates legal uncertainty and runs the risk of overlooking the actual intent expressed in the treaty text.[80] In other words, even if the parties were unaware of the unintended consequences of broad definitions of protected investors and investments, arbitral tribunals are not empowered to remedy these treaty defects in violation of the express text.[81]

However, this does not mean that the treaty text is the sole standard for evaluating potential restrictions on corporate structuring. International investment law is not an insular body of law.[82] Other rules or principles of general international law may become relevant, provided they can be deduced from the applicable law and do not conflict with the treaty's express provisions. For example, implicit *ratione personae* requirements such as those discussed previously are not based on applicable law. In comparison, the abuse of process doctrine developed by a number of arbitral tribunals has been recognised as a general principle of law that can be used to curb treaty shopping.

4.2 Abuse of the Process Doctrine

4.2.1 Arbitration under Investment Treaties

The doctrine of abuse of process is an outgrowth of the principle of good faith.[83] According to this doctrine, a disputing party is prohibited from misusing procedural rights to obtain an illegitimate advantage.[84] Because the doctrine is well-established in both civil and common

[80] *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (8 Dec. 2008) [78]; Lars Markert, 'International Investment Law and Treaty Interpretation – Problems, Particularities and Possible Trends', in *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration?* 53, 57 (Rainer Hofmann & Christian Tams eds, Nomos 2011).

[81] Valasek & Dumberry (n 8) 59.

[82] Campbell McLachlan, 'Investment Treaties and General International Law', 57 Int'l & Comp. L. Q. 361, 369 ff. (2008); Bruno Simma & Dirk Pulkowski, 'Two Worlds, But Not Apart: International Investment Law and General International Law', in *International Investment Law: A Handbook* 361 (Marc Bungenberg et al. eds, Nomos 2015).

[83] Robert Kolb, 'General Principles of Procedural Law', in *The Statute of the International Court of Justice: A Commentary* 794, 830 (Andreas Zimmermann et al. eds, OUP 2006); Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 122 ff. (CUP 1953). The concept of abuse of process is a special application of the abuse of right doctrine. Whereas the latter refers to the abuse of any rights, the former is confined to the abuse of procedural rights. See Charles Kotuby & Luke Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* 110 (OUP 2017).

[84] Kolb (n 83) 830.

law jurisdictions, it is a general principle of law within the meaning of Article 38(1)(c) of the ICJ Statute.[85] Several international courts and tribunals have recognised it as a general principle of law or as customary international law under public international law.[86] The doctrine is equally applicable to disputes arising out of investment treaties.[87] Arbitral tribunals must apply general international law when interpreting investment treaties in accordance with the VCLT's Article 31(3) (c) principle of systemic integration.[88]

As a result, unlike implicit *ratione personae* requirements, the abuse of process doctrine is based on applicable law and can be used to curtail abusive investment treaty shopping in principle. At the same time, due to the high degree of discretion required in its application, the abuse of process doctrine should be reserved for exceptional circumstances.[89] To limit the high degree of discretion, the doctrine's applicability in the case of abusive investment treaty shopping should be defined as precisely as possible.

4.2.2 Abusive Investment Treaties Shopping

Numerous arbitral tribunals have held that the abuse of process doctrine applies in retroactive corporate structuring cases. In contrast to prospective treaty shopping, these cases involve restructuring following the occurrence or emergence of a specific dispute. The pre-existence or foreseeability of a dispute is used to demonstrate that the investor structured their business to obtain treaty protection for a particular dispute. Once the respondent host state establishes a prima facie case of foreseeability, the investor has the opportunity to rebut the initial presumption of abuse by establishing that the restructuring was motivated by legitimate

[85] Article 38(1)(c) of the Statute of the ICJ has been recognized to constitute an expression of the formal sources of public international law. See Alain Pellet, 'Article 38', in *The Statute of the International Court of Justice: A Commentary* 677, 700–703 (Andreas Zimmermann et al eds, OUP 2006).

[86] United States – Import Prohibition of Certain Shrimp and Shrimp Products, Appellate Body Report, WTO Doc WT/DS58/AB/R (6 Nov. 1998) [158]; *Fisheries Case (United Kingdom v. Norway)*, ICJ, Judgment (18 Dec. 1951) [142]; *Case Concerning Certain German Interests in Polish Upper Silesia* (The Merits), PCIJ, Judgment (25 May 1926) [30]. General principles of law can develop into customary international law over time. See Tarcisio Gazzini, 'General Principles of Law in the Field of Foreign Investment', 10 J. World Investment & Trade 103, 105 (2009).

[87] See *Abaclat et al. v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 Aug. 2011) [646].

[88] See McLachlan (n 82) 369–372.

[89] Andreas Ziegler & Jorun Baumgartner, 'Good Faith as a General Principle of (International) Law', in *Good Faith and International Economic Law* 9, 36 (Andrew Mitchell et al. eds, OUP 2015).

business considerations.[90] This approach is consistent with the notion of treaty shopping's general legitimacy.

International investment law recognises multinational corporations' complex corporate structures. What the abuse of process doctrine sanctions are fictitious transactions designed to manipulate the investment protection regime to exploit loopholes created by broad definitions of protected investors and investments.

As the tribunal noted in *Philipp Morris versus Australia*, the arbitral practice-developed criteria for determining abusive treaty shopping are broadly analogous.[91] As a result, arbitral tribunals decide whether the restructuring occurred after a dispute arose or became foreseeable.[92] In a subsequent step, it is determined whether the restructuring was carried out to obtain access to the protection provided by the relevant investment treaty, including its dispute settlement clause, in connection with a particular dispute.[93] However, apart from these two broadly analogous criteria, the precise parameters for establishing abusive treaty shopping remain unknown.[94]

One unresolved issue is whether the abuse of process doctrine applies only to foreseeable disputes or pre-existing ones. Certain tribunals made a distinction between lack of jurisdiction *ratione temporis* and the doctrine of abuse of process.[95] Under this dichotomy, a tribunal lacks *ratione temporis* jurisdiction where an alleged treaty violation occurred before the restructuring.[96] By contrast, if a dispute were foreseen at the time of the restructuring, the

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[90] Ebert (n 20) 315–317.

[91] *Philip Morris v. Australia* (n 65) [554].

[92] *Lao Holdings N. V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction (21 Feb. 2014) [83]; *Levy & Gremcitel v. Peru* (n 14) [185]; *Pac Rim Cayman v. El Salvador* (n 15) [2.99]; *Tidewater v. Venezuela* (n 15) [193].

[93] *Cementownia 'Nowa Huta' S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/02, Award (17 Sept. 2009) [154]; *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award (15 Apr. 2009) [93]; *Pac Rim Cayman v. El Salvador* (n 15) [2.42].

[94] Ksenia Polonskaya, 'Frivolous and Abuse of Process Claims in Investor-State Arbitration: Can Rules on Cost Allocation Become Solution?', 11 J. Int'l Dispute Settlement 589, 597 (2020); Yuka Fukunaga, 'Abuse of Process Under International Law and Investment Arbitration', 33 ICSID Rev. 181, 182 (2018); Duncan Watson & Tom Brebner, 'Nationality Planning and Abuse of Process: A Coherent Framework', 33 ICSID Rev. 302, 320 ff. (2018).

[95] *Levy & Gremcitel v. Peru* (n 15) [182]; *Pac Rim Cayman v. El Salvador* (n 15) [2.104]; *Philip Morris v. Australia* (n 65) [529].

[96] See Jorun Baumgartner, 'The Significance of the Notion of Dispute and Its Foreseeability in an Investment Claim Involving a Corporate Restructuring', 18 J. World Inv. & Trade 201 (2017); see also Noah Rubins & Ben Love, 'Ratione Temporis', in *International Investment Law: A Handbook* 481, 488–490 (Marc Bungenberg et al. eds, Nomos 2015).

claim would be barred by the abuse of process doctrine. The underlying rationale for this distinction is that jurisdictional issues are resolved prior to admissibility issues in arbitral proceedings.[97] As a result, if a tribunal lacks jurisdiction *ratione temporis*, there is no need to address inadmissibility issues. However, some tribunals investigate the existence of an abuse in the case of pre-existing disputes.[98]

Another inconsistency exists with regard to the foreseeability test's standard of proof. While the tribunals in *Levy & Gremcitel versus Peru* and *Pac Rim versus El Salvador* determined that a 'specific dispute must be foreseeable as a very high probability,'[99] the tribunal in *Philip Morris versus Australia* required only a 'reasonable prospect... that a measure that could result in a treaty breach will materialise'.[100] However, these approaches have in common that they place a premium on the timing of corporate structuring to deduce the investor's intent from objective facts.[101]

However, different standards have been applied in relation to the investor's intent. Thus, for example, while the tribunal in *Cementownia versus Turkey* set a high bar, requiring that an investment be made solely for the purpose of gaining access to international jurisdiction,[102] other tribunals required only that the restructuring's 'principal'[103] or 'main'[104] purpose was to gain access to the relevant treaty's dispute settlement clause.

In conclusion, while the fundamental elements of 'foreseeability' and 'abusive intent' have gained widespread acceptance in arbitral practice, there are still some inconsistencies that future arbitral tribunals will need to address.[105] One way to increase legal certainty is to codify the abuse of process doctrine and its associated criteria. This is becoming more prevalent in recent investment treaties.

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[97] Eric De Brabandere, 'Good Faith, Abuse of Process and the Initiation of Investment Treaty Claims', 3 J. Int'l Dispute Settlement 609, 613 (2012).

[98] See *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award (15 Apr. 2009) [144]; *Mobil Corp. v. Venezuela* (n 15) [205]; *Transglobal Green Energy, LLC & Transglobal Green Energy de Panama, S.A. v. Republic of Panama*, ICSID Case No. ARB/13/28, Award (2 June 2016) [118]; *Tidewater v. Venezuela* (n 15) [184].

[99] *Levy & Gremcitel v. Peru* (n 15) [185]; *Pac Rim v. El Salvador* (n 15) [2.99].

[100] *Philip Morris v. Australia* (n 65) [554]. The same approach was adopted by the tribunal in *Tidewater v. Venezuela* (n 15) [193].

[101] Baumgartner (n 96) 212; Voon et al. (n 49) 65; Watson & Brebner (n 94) 320. See Ebert (n 20) 314.

[102] *Cementownia v. Turkey* (n 93) [154]. See also *Phoenix v. Czech Republic* (n 92) [94].

[103] *Philip Morris v. Australia* (n 65) [587].

[104] *Pac Rim v. El Salvador* (n 15) [2.42].

[105] Fukunaga (n 94) 182–185; Voon et al. (n 49) 67.

4.2.3 Codification of the Doctrine of Process Abuse

The doctrine of abuse of process is becoming more codified in the new generation of investment treaties. This trend can be seen, for example, in the investment chapters of several of the European Union's ("EU") negotiated economic partnership agreements. For instance, Article 3.27(2) of the EU-Vietnam Investment Protection Agreement broadly references the doctrine of abuse of process. Additionally, Article 3.47 contains an 'anti-circumvention' provision[106] that requires an arbitral tribunal to decline jurisdiction if the dispute arose or was foreseeable on a high probability basis.

The 2019 Netherlands Model BIT codifies the abuse of process doctrine through a DOB clause that refers specifically to corporate structuring undertaken with the primary objective of obtaining treaty protection in light of pre-existing or foreseeable disputes.[107] The same approach can be seen in the recent United Arab Emirates-Uruguay Bilateral Investment Treaty[108] as well as the Belarus-India Bilateral Investment Treaty.[109] As a result, the trend toward the codification of the abuse of process doctrine is not limited to the EU but extends to countries with various ideological backgrounds. This trend, one could argue, reflects states' widespread approval of the arbitral practice developed in recent years. Simultaneously, the aforementioned provisions specify whether they apply to pre-existing and foreseeable disputes. Additionally, they define the applicable standard of proof, resolving previous case law inconsistencies.

However, states have addressed treaty shopping not only through retrospective structuring but also through codifying the abuse of process doctrine. As discussed previously, newly signed investment treaties indicate a more expansive trend toward excluding all shell companies from their scope of application regardless of the existence of an abuse. Investors will gain direct standing under the majority of new investment treaties only if they engage in legitimate economic activities in the purported home state. This new drafting trend may diminish the importance of the abuse of process doctrine in relation to corporate structuring. Arbitral

[106] Further examples can be found in the economic partnership agreements recently negotiated by the EU. For instance, Art 3.7(5) of the EU-Singapore Investment Protection Agreement addresses abusive treaty shopping. The EU-Mexico Investment Protection Agreement refers to the notion of abuse of process in s. X, Art. 2(3) and incorporates an 'anti-circumvention' clause in s. X, Art 16; CETA incorporates the abuse of process doctrine in Art 8.18(3).

[107] 2019 Netherlands Model BIT, Art 16(3).

[108] United Arab Emirates-Uruguay BIT, Art 17(1).

[109] Belarus-India BIT, Art 35(ii). In addition, there is a separate reference to 'abuse of process' in Art 13.3. Both provisions can equally be found in the 2015 India Model BIT.

tribunals are not required to consider the existence of an abuse if it can be established directly that a company engages in no significant economic activity in the relevant home country.

5. WHETHER THE MEASURES UNDERTAKEN ARE CURBING TREATY SHOPPING?

As previously stated, treaty shopping has been deemed acceptable as long as the applicable investment treaty permits it, except for (abusive) retrospective corporate structuring. However, states have made a concerted effort in recent years to exclude certain corporate structures from the protection afforded by newly signed investment treaties. As a result, the recent trend in treaties indicates a strong policy preference against granting standing to shell companies. These efforts are bolstered by arbitral tribunals applying the abuse of process doctrine to cases involving retrospective corporate reorganisation. While both approaches may limit investors' ability to engage in corporate structuring to obtain treaty protection to a certain extent, they are ultimately insufficient to achieve the desired effect.

Restrictive treaty language on its own is insufficient to prevent abusive corporate structuring. As a result, investors may continue to opt for older investment treaties that include broad definitions of protected investors and investments, do not include a DOB clause, and do not include an anti-circumvention provision. Moreover, the fact that recent investment treaties include mechanisms to prevent treaty shopping may even serve as an incentive for investors to avoid those treaties entirely and instead opt for older ones. In theory, a single investment treaty defining protected investors broadly combined with an effective treaty shopping strategy would be sufficient to undermine states' recent efforts.[110] As a result, it becomes clear that treaty shopping is a systemic issue that cannot be resolved in a piecemeal fashion.[111]

As a result, investment tribunals will continue to play a minor role in mitigating the effects of treaty shopping.[112] However, as developed in recent years, the abuse of process doctrine addresses only the most egregious forms of treaty shopping inconsistently. This is contrary to states' expressed intentions in recent investment treaties. The manner in which those treaties were drafted indicates that states do not intend to address retrospective corporate structuring

[110] Fabian S. Eichberger, 'Die Grenzen der Zulässigkeit des 'nationality plannings' im Investitionsschutzrecht', 58 Archiv des Völkerrechts 307, 335 (2020).

[111] About the ineffectiveness of piecemeal reforms in international investment law, see Stephan Schill, 'Reforming Investor-Dispute Settlement: A (Comparative and International) Constitutional Framework', 20 J. Int'l Econ. L. 649, 652 (2017).

[112] In addition, arbitral tribunals will have to interpret the explicit limitations introduced in recently signed investment treaties, including the rather recent phenomenon of anti-circumvention clauses.

alone but rather to impose stricter reciprocity requirements to prevent all manner of 'free riding' investors. If this is the intention of states, then the abuse of process doctrine is equally inadequate to address the issues raised by the numerous investment treaties that continue to lack explicit limitations on corporate structuring.

As a result, only a multilateral instrument ratified by a large number of states can provide a truly systemic solution. Indeed, by harmonising investment protection standards through a multilateral substantive framework, the need and incentive for treaty shopping would be eliminated entirely.[113] While there is currently no political will to advance such a common substantive instrument, states are presently deliberating at UNCITRAL on a multilateral procedural instrument on ISDS reform. Two models applicable to existing investment treaties are considered in this context to integrate the various reform options. Additionally, one of these models could be used to develop a broad-reaching, systemic solution to undesirable treaty shopping.

The first model is based on the Mauritius Transparency Convention,[114] and it entails incorporating certain standards into existing investment treaties via a single multilateral instrument.[115] Using this approach, states can agree on an economic substance test, a DOB clause, or an anti-circumvention provision that is then incorporated into existing treaties without the need to renegotiate each individual instrument.[116] The second model is based on the OECD Multilateral Convention on Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, which was adopted in 2016.[117] This model does not amend existing treaties; instead, it includes a number of optional provisions that contracting parties may choose to incorporate into their existing investment treaties. Thus, this approach would allow states to choose among the various mechanisms discussed in this article to curb treaty shopping based on their individual policy preferences.

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[113] Ebert (n 19) 476.

[114] United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York 2014).

[115] UNCITRAL, 'Possible Reform of Investor-State Dispute Settlement (ISDS) – Multilateral Instrument on ISDS Reform', Working Group III, A/CN.9/WG.III/WP.194, 16 Jan 2020, <https://undocs.org/en/A/CN.9/WG.III/WP.194> accessed 18 Aug 2021, 26–28.

[116] The abuse of process doctrine is currently being discussed at UNCITRAL in the context of multiple arbitral proceedings. See UNCITRAL, 'Possible Reform of Investor- State Dispute Settlement (ISDS) – Multiple Proceedings and Counterclaims', Working Group III, A/CN.9/WG.III/WP.193, 22 Jan. 2020, <https://undocs.org/en/A/CN.9/WG.III/WP.193> accessed 18 Aug. 2021, 24. See also John David Branson, 'The Abuse of Process Doctrine Extended: A Tool for Right Thinking People in International Arbitration', 38 J. Int'l Arb. 187 ff. (2021).

[117] UNCITRAL (n 114) 29 ff.

6. CONCLUSION

States are sovereign over the treaties they enter into. As a result, they are free to include explicit prohibitions on treaty shopping in their investment agreements. The absence or presence of these restrictions reflects a policy preference for a more liberal or more restrictive approach to investment protection. This policy choice cannot be supplanted by arbitral tribunals' implicit *ratione personae* requirements incorporated into investment treaties. While there is no legal basis for implicit *ratione personae* requirements under public international law, the abuse of process doctrine has proven to be an effective tool for sanctioning the most egregious forms of treaty shopping derived from general international law. Moreover, states have confirmed the applicability of the abuse of process doctrine, as developed in arbitral practice, in recent investment treaties.[118]

However, recent investment treaties have taken this a step further by excluding all companies with no economic ties to the purported home state from their scope of application. This new drafting trend increases legal certainty and predictability but does not preclude artificial transactions from obtaining treaty protection on their own. The concurrent existence of prior investment treaties incentivises investors to choose those treaties and structure their investments accordingly.

While the use of process doctrine as an implicit constraint can partially offset the effects of retrospective corporate structuring, only a concerted multilateral effort by states can effectively curb treaty shopping. The two models under consideration by UNCITRAL for reforming existing investment treaties can serve as a starting point for such a discussion. It is critical to address these issues at the multilateral level, as they indirectly determine the success of any reform effort (multilateral or bilateral).[119] Any attempt to rebalance investment protection standards will be successful only if treaty shopping becomes a primary focus of the multilateral reform process.

[118] See Charles Brower & Stephan Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' 9 Chi. J. Int'l L. 471, 496 (2009).

[119] García Olmedo (n 3) 360.