

FLORIDA JOURNAL OF INTERNATIONAL LAW

UNIVERSITY OF FLORIDA LEVIN COLLEGE OF LAW

ARTICLES

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RIGHTS AND SUSTAINABLE
DEVELOPMENT: AN APPRAISAL
OF AUSTRALIAN INDUSTRIAL
KILLING LAWS

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CORPORATE MANSLAUGHTER, HUMAN RIGHTS AND SUSTAINABLE DEVELOPMENT: AN APPRAISAL OF AUSTRALIAN INDUSTRIAL KILLING LAWS

*S. M. Solaiman**

Abstract

The right to life is a universally recognized human right, which is the utmost critical right of any human being residing anywhere in the world with any identity. Despite this, many workers are getting killed while working for a living. The International Labor Organization (ILO) estimates that a total of 2.3 million workers currently die from work-related injuries and diseases worldwide every year, numbering over 6,000 deaths every single day, and another 160 million breadwinners suffer from nonfatal diseases. They are being killed largely with impunity, although they are the mainspring of development, which cannot be sustainable without protecting workers from peril. Australia is no exception, where corporate homicides used to be tried under common law with little or no success, primarily because of the legal complexity invoked by the pro-corporation organic theory. To ease the conviction of corporate offenders and promote justice by circumventing this theory, several Australian jurisdictions have recently introduced statutory industrial manslaughter laws that demonstrate both convergence and divergence in definitions of the offense and offenders. This Article aims to appraise the efficacy of these laws of three Australian jurisdictions in terms of facilitation of conviction with a view to promoting sustainable development by protecting workers.

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I. INTRODUCTION

The concept of capitalism rests on competition amongst the market players that necessitates competitive production cost to win the race and maximize profits. For this, sometimes disproportionate pressures are meted out to workers making them the ultimate victims and the sole

object of inhuman exploitation. The ILO estimates that currently a total of 2.3 million workers die from work-related injuries and diseases worldwide every year, numbering over 6,000 deaths every single day, and another 160 million breadwinners suffer from nonfatal diseases.¹ They are being killed largely with impunity, although they are the mainspring of development, which cannot be sustainable without protecting workers from peril. Maximizing profits for one stakeholder at the cost of another amounts to a zero-sum game, threatening corporate sustainability with eventual instability. The two constituent components of the concept of sustainable development (SD) are development and sustainability. They originally emerged independently but are now integrated into a single concept of SD in which one is integral to the other in order to produce enduring benefits for all stakeholders of business ventures. Neoclassical economists accentuate that there is no incongruity between development and sustainability,² whilst Sachs, emphasizing their interplay, argues that one cannot persist without the other.³ Both are thus regarded as a critical consideration in the contemporary workplace.

The responsibility of businesses to respect all human rights is stated to be a minimum standard, rather than a legal obligation.⁴ The right to development is “an inalienable human right by virtue of which all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development.”⁵ Accordingly, all people are capable of realizing all human rights and fundamental freedoms, as proclaimed by the U.N. Declaration on the Right to Development 1986 (RTD Declaration).⁶ However, both the contents and obligations set out in the RTD Declaration are still disputed, despite the Vienna World Conference on Human Rights⁷ and the U.N. Agenda for Sustainable Development Goals 2030 (SDGs)⁸ reinforcing them as a pivotal part of the international

1. *The enormous burden of poor working conditions*, INTERNATIONAL LABOR ORGANIZATION, https://www.ilo.org/moscow/areas-of-work/occupational-safety-and-health/WCMS_249278/lang--en/index.htm [https://perma.cc/K5QJ-RGP7].

2. Sharachchandra M. Lélé, *Sustainable Development: A Critical Review*, 19 WORLD DEV. 607, 609 (1991).

3. Wolfgang Sachs, *Environment*, THE DEVELOPMENT DICTIONARY: A GUIDE TO KNOWLEDGE AS POWER 24, 28 (Wolfgang Sachs ed., 2d ed. 2010).

4. Audrey Guaghan, *Business and Human Rights and the Right to Water*, 106 AM. SOC'Y INT'L L. PROC. 52, 52 (2012).

5. G.A. Res. 41/128, Declaration on the Right to Development art. 1 (Dec. 4, 1986).

6. *Id.*

7. World Conference on Human Rights, *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF. 157/23 (June 25, 1993).

8. G.A. Res. 70/1, Transforming Our World, the 2030 Agenda for Sustainable Development, 10, 35 (Sept. 25, 2015), <https://sdgs.un.org/2030agenda> [https://perma.cc/EY5D-GNXX].

human rights framework.⁹ The SDGs appear to be a tenacious initiative to put state and non-state actors together to shoulder the responsibility for development with a sharing spirit.¹⁰ In parallel, the U.N. Global Compact is engaged in promoting their ten principles and driving progress towards achieving SDGs, with a missionary vision that business is a force for good.¹¹

SDG 17 especially aims to strengthen the means of implementation and revitalize the global partnership for SD. The SDGs have been instrumental in understanding the notion of international SD.¹² Businesses operate with a social license, implicitly earned through “consistent and trustworthy behavior and interactions with stakeholders”¹³ comprised of the members of the society where they bring their activities to bear by using corporate influence to provide service. This is termed a “social contract” between businesses and respective societies,¹⁴ which, by implication, ethically requires the former not to harm the latter whose acquiescence enables commercial enterprises to operate and make profit. This view has visibly blossomed in the corporate sector in many countries, particularly in Australia, during the 1990s.¹⁵ Despite such international initiatives to protect stakeholders residing in relevant places and the recognition of social contracts to avoid harm, a study conducted by the Special Representative of the Secretary-General of the United Nations (SRSG) discovered corporate violations of all categories of human rights across several industries.¹⁶

9. Tamo Atabongawung, *A Legally-Binding Instrument on Business and Human Rights: Implications for the Right to Development in Africa*, 21 AFR. HUM. RTS. L. J. 262, 263 (2021).

10. *Id.* at 271.

11. U.N. Global Compact, *Business as a Force for Good*, <https://www.unglobalcompact.org/what-is-gc/mission> [<https://perma.cc/8A7K-HKPB>] (last visited Jan. 13, 2023).

12. Jennifer Wills, *Sustainable Development Is Good for Business*, 48 TRENDS 12, 13 (2017).

13. LEEORA BLACK, *THE SOCIAL LICENSE TO OPERATE: YOUR MANAGEMENT FRAMEWORK FOR COMPLEX TIMES* 18 (2013).

14. JOHN MORRISON, *THE SOCIAL LICENSE: HOW TO KEEP YOUR ORGANIZATION LEGITIMATE* 23–26 (2014).

15. *Id.* at 14.

16. See Special Representative of the Secretary-General of the United Nations (SRSG), *CORPORATIONS AND HUMAN RIGHTS: A SURVEY OF THE SCOPE AND PATTERNS OF ALLEGED CORPORATE-RELATED HUMAN RIGHTS ABUSE* (U.N. Doc. A/HRC/8/5/Add.2, May 23, 2008), <https://undocs.org/A/HRC/8/5/Add.2> [<https://perma.cc/RG77-JT4H>], summarized in JOHN GERALD RUGGIE, *JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS* 19–27 (2013); PETER T. MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW* 560–61 (3d ed. 2021).

Industrial killings continue to grow, even in developed economies, such as the United States of America¹⁷ and European Union.¹⁸ Conversely, the statutory industrial manslaughter regimes in Australia have started to decrease such fatalities,¹⁹ which stimulates the undertaking of the present study. To stay within an acceptable length, this Article examines, the Australian Capital Territory (ACT), Queensland, and the Northern Territory (NT) statutory laws of industrial manslaughter focusing on the similarities and dissimilarities between the laws by employing a comparative method, aimed at assessing their efficacy by drawing on archival primary and secondary materials. These three jurisdictions have been chosen as they introduced statutory manslaughter laws before others in Australia. The pioneering industrial manslaughter law of Australia recently lost its original “home and content” following its relocation from the crime legislation to the work health and safety (WHS) law of the ACT. This endeavor, nonetheless, incorporates an examination of the relevant parts of that previous law of the ACT as the foundation of the statutory laws concerning workplace deaths in Australia.

The current pieces of state and territory WHS legislation have been drafted based on the Australian federal statute titled the *Work Health and Safety Act 2011* (Cth). The federal parliament initially enacted this framework legislation in consultation with states and territories in Australia in order “to provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces” and “to facilitate a consistent national approach to work health and safety” in the country.²⁰ States and territories then individually embraced the federal legislation as their own, and they have subsequently modified as they like, which has created some disparity. The original version of the federal legislation did not have any industrial manslaughter provisions, which have been incorporated recently by some of the jurisdictions at different times, whilst others still rely on the common law for this offense.

17. AFL-CIO, *Death on the Job: The Toll of Neglect, 2022* (Order the Death on the Job Report) (Apr. 26, 2022), <https://aflcio.org/reports/death-job-toll-neglect-2022> [<https://perma.cc/QVD5-ZS7X>]; Walter Jones, *Number of Worker Deaths in Construction Continues to Rise* (Feb. 2018), <https://www.lhsfna.org/number-of-worker-deaths-in-construction-continues-to-rise/> [<https://perma.cc/GT2F-B75B>].

18. The European Trade Union Confederation (E.T.U.C.), *Workplace Deaths Rising in 12 EU Countries* (Oct. 28, 2022), <https://www.etuc.org/en/pressrelease/workplace-deaths-rising-12-eu-countries> [<https://perma.cc/75HN-4DWZ>].

19. Worksafe-Queensland, *New Statistics Reveal Continued Fall in Workplace Fatalities*, <https://www.worksafe.qld.gov.au/news-and-events/newsletters/esafe-newsletters/esafe-editions/esafe/december-2021/new-statistics-reveal-continued-fall-in-workplace-fatalities> [<https://perma.cc/S86R-C2QL>].

20. *Work Health and Safety Act 2011* (Cth), s 3 (Austl.).

This Article is split into seven parts. Part I, as above, introduces the topic referring to the distressing fatalities of industrial manslaughter, which violate human rights and hinder sustainable development. Part II seeks to demonstrate the interplay amongst business, human rights, and sustainable development. Part III segregates corporate killings from other types of culpable homicides, whilst Part IV explains the inception of the statutory industrial manslaughter laws in Australia. Part V carries out a comparative appraisal of various aspects of the physical elements of corporate manslaughter laws in three selected jurisdictions in Australia. Part VI critically analyses the mental elements of the offense by way of comparison amongst the laws of the chosen jurisdictions. Part VII concludes this Article with eleven specific recommendations to improve the relevant laws of Australia that may also be useful for other nations in addressing their workplace deaths.

For clarity, deaths at work are expressed in different terms. These include corporate manslaughter, industrial manslaughter, corporate homicide, workplace manslaughter, workplace death, and so on. All these terms are used synonymously in the present research. Companies and corporations are also used interchangeably.

II. BUSINESS, HUMAN RIGHTS, AND SUSTAINABLE DEVELOPMENT— CONCEPTUAL UNDERPINNINGS AND INTERPLAY

A. *Business*

The overwhelming majority of large business organizations are corporations which are regarded as “organs of society,” however, they are specialized economic organs, rather than democratic public interest establishments.²¹ Professor John Ruggie who had previously worked on the establishment of the U.N. Global Compact said as the SRSG that “business and human rights is a microcosm of a larger crisis in contemporary governance: the widening gaps between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences.”²² Scottish economist Adam Smith is widely believed to be the father of the modern economic theory of capitalism for his ground-breaking publication in 1776, briefly known as *The Wealth of Nations*.²³ Smith strongly opposed government intervention in the market in describing the industrialized capitalist

21. SRSG, PROTECT, RESPECT AND REMEDY: A FRAMEWORK FOR BUSINESS AND HUMAN RIGHTS ¶ 53 (U.N. Doc. A/HRC/8/5, Apr. 7, 2008), <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf> [<https://perma.cc/TY7C-CCYW>].

22. RUGGIE, *supra* note 16, at xxiii.

23. *See generally* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Edwin Cannan ed., Univ. of Chicago 1997) (1776) (commonly known as “The Wealth of Nations”).

system. He argued that the force of the invisible hand would regulate the market. This old concept has lost its usefulness these days.²⁴ Smith's proponent, Nobel laureate Milton Friedman seriously postulated in 1970 that the only social responsibility of business enterprises had been to maximize profits.²⁵ This view is also preponderantly redundant in the present corporate climate. The rise of corporate power has resulted in sixty-nine of the richest one-hundred economies worldwide being corporations, not states.²⁶

Following massive corporate misdeeds inflicting harm on humans, biodiversity, and global warming, the concept of absolute freedom of corporations is now effectively excluded from the legal discourse. Such freedom has been displaced by the widely acceptable view of corporate social responsibility (CSR), which at present, is an ingrained part of modern corporate strategy. Consequently, the profit maximization theory, favoring exclusively stockholders, has been overridden by the stakeholder theory, requiring businesses to pursue hybrid goals of achieving social good and economic gains.²⁷ This essentially entails useful workplace safety laws that compel businesses to stay within the rules of the game. This safety is instinctively connected with human rights.

B. Human Rights

Corporate compliance with human rights is an integral part of the social contract referred to earlier.²⁸ The perception of human rights vis-a-vis business now extends to even global warming, as exemplified by the Hague District Court's holdin in *Milieudefensie et al. v. Royal Dutch Shell* that the company was legally obligated to reduce carbon emissions.²⁹ Consistently, the Supreme Court of Canada in *Nevsun Resources v. Araya* held that workers, who had been forcibly conscripted to work and had suffered abuse of their fundamental human rights at

24. See John Lauritz Larson, *An Inquiry into the Nature and Causes of the Wealth of Nations*, 35 J. EARLY REPUB. 1, 12 (2015).

25. Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES (Sept. 13, 1970).

26. *69 of the Richest 100 Entities on the Planet are Corporations, Not Governments, Figures Show*, GLOB. JUST. NOW (Oct. 17, 2018), <https://www.globaljustice.org.uk/news/69-richest-100-entities-planet-are-corporations-not-governments-figures-show/> [<https://perma.cc/CNN5-AGDV>].

27. Andreas Nilsson & David T. Robinson, *What Is the Business of Business*, 18 INNOVATION POL'Y & ECON. 79, 79–80 (2018).

28. MUCHLINSKI, *supra* note 16, at 563.

29. PETER T. MUCHLINSKI, *ADVANCED INTRODUCTION TO BUSINESS AND HUMAN RIGHTS* 96 (2022) (citing *Milieudefensie v. Royal Dutch Shell PLC*, District Court of the Hague, May 26, 2021, ECLI:NL:RBDHA:2021:5339 (English translation available at <https://uitspraken.rechtpraak.nl/#/details?id=ECLI:NL:RBDHA:2021:5339>) [<https://perma.cc/7U4N-AB8A>]).

work, could bring an international human rights-based claim before the courts in Canada against the company's Canadian parent.³⁰ Likewise, pursuant to Principle 1 of the U.N. Global Compact, business organizations should support and respect the protection of internationally recognized human rights.³¹ It further requires businesses to take voluntary actions to positively contribute to the protection and fulfillment of human rights.³² The Principle further clarifies that the positive actions of businesses supporting human rights should be a complement to, and not a substitute for, actions to respect human rights.³³ Similarly, the SDGs also impose positive obligations on businesses by implication to promote human rights and avoid negative impacts by embracing the standards contained in the 2011 U.N. Guiding Principles on Business and Human Rights (UNGPs).³⁴ Going beyond the sanctions of law, Nobel laureate Amartya Sen posits that the concept of human rights is not rooted purely in law, rather it is chiefly a concern of moral and ethical virtue, hence, their observance does not necessarily entail recognizing legal force behind them.³⁵ It means, businesses are obligated to respect human rights beyond the prescription of positive laws.

The 2003 U.N. Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (U.N. Norms) and the UNGPs both contribute to normative roots of businesses' responsibility for human rights, and the latter covers their obligation to respect all internationally recognized human rights enshrined in major international instruments within the United Nations system.³⁶ The UNGPs do not create a new law establishing legally enforceable obligations, rather they reflect existing insights into human rights in conformity with other soft law instruments and the Organization for Economic Co-operation and Development Guidelines for Multinational Enterprises (OECD Guidelines).³⁷ The UNGPs remain a non-binding human rights instrument.³⁸ Whilst UNGP 17 relates to the

30. *Id.* at 99 (citing *Nevsun Resources v. Araya*, [2020] 1 S.C.R. 166 (Can.)).

31. *The 10 Principles of the UN Global Compact, Principle One: Human Rights*, U.N. GLOB. COMPACT, <https://unglobalcompact.org/what-is-gc/mission/principles/principle-1> [<https://perma.cc/HVS6-FRSM>].

32. *Id.*

33. *Id.*

34. MUCHLINSKI, *supra* note 16, at 64 (citing Shift Project, Oxfam and Global Compact Network Netherlands, *Doing Business with Respect for Human Rights: A Guidance Tool for Companies*, SHIFT PROJECT 114–16 (Nov. 22, 2016)).

35. See Amartya Sen, *Elements of a Theory of Human Rights*, 32(4) PHILOS. PUB. AFF. 315, 315 (2004); Amartya Sen, *Human Rights and the Limits of Law*, 27 CARDOZO L. REV. 2913 (2006).

36. MUCHLINSKI, *supra* note 29, at 61–62.

37. *Id.* at 100.

38. *Id.*

present topic,³⁹ Principle 13 relates to both direct and indirect involvement of businesses in violating human rights as it requires them to “avoid causing or contributing to adverse human rights impacts through their own activities” and to productively deal with negative consequences when they occur. It also requires business enterprises to take positive action “to prevent or mitigate adverse impacts on human rights that are directly linked to their operations, products or services by their business relationships, even if they have not affected to those impacts.”⁴⁰ The OECD Guidelines adopt this approach of the UNGPs.⁴¹

Distressingly, a 2020 study of the European Union found that corporate motivation for respecting human rights comes predominantly from contemplation of avoiding reputational harms, whilst compliance with the law and regulation is one of the least important motives.⁴² This is again a self-centric consideration, devoid of public good. That selfish forethought should be discarded. Business organizations are development actors, and the concept of human rights is linked to development. As human lives are directly affected by the level of development of the land they live on, the right to development is sometimes termed an “umbrella right” encompassing all other rights of humankind.⁴³

Business enterprises are profit-hungry by nature. The economic globalization, resting on trade liberalization, has promoted competition which implicitly induces large business enterprises to undermine workers’ rights in favor of profit maximization. This situation calls for re-contextualization of our traditional human rights perceptions where only states can be human rights violators by tying non-state actors to the human rights regime.⁴⁴ The state participants at the 1996 World Summit on Social Development unanimously enunciated the due role of business

39. *Id.* at 102.

40. U.N. Office of the High Commissioner on Human Rights, *Guiding Principles on Business and Human Rights (U.N.G.Ps)*, Principle 13, https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf [<https://perma.cc/8XTB-TQCX>].

41. Org. for Econ. Coop. and Dev. [OECD], *The Organization for Economic Co-operation and Development Guidelines for Multinational Enterprises*, at 31 (2023) (“Enterprises should . . . : 1. Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved; 2. Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur; 3. Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship . . .”).

42. *Study on Due Diligence Requirements Through the Supply Chain: Final Report*, at 16 (2020), <https://op.europa.eu/s/yZ79> [<https://perma.cc/JWB7-2F9S>].

43. Atabongawung, *supra* note 9, at 263.

44. Bard A. Andreassen, *Development and the Human Rights Responsibilities of Non-State Actors*, DEVELOPMENT AS A HUMAN RIGHT: LEGAL, POLITICAL AND ECONOMIC DIMENSIONS 149, 150 (Bard A. Andreassen & Stephen P. Marks eds., 2d ed. 2010).

actors as “vehicles for social development,”⁴⁵ the concept of which is inherently linked to human rights. It is thus argued that corporations must be held fully accountable for the deleterious impacts of their operations on human rights.⁴⁶ It is also suggested that the members of the society where the corporation operates must be entitled to “have all of their human rights fully respected, protected, promoted, and fulfilled.”⁴⁷ In recognition of the legitimacy of the widespread demand for corporate accountability, an international effort is currently underway to formulate a legally binding instrument imposing human rights obligations on business enterprises following the adoption of the Human Rights Council Resolution 26/9.⁴⁸ It is further recommended that the legally binding instrument should be applied to all types of businesses operating at both the domestic and transnational levels, and should require businesses to adhere to all major international instruments on human rights and fundamental freedoms, including those of the ILO to which the state is a party.⁴⁹ Additionally, they should respect customary international law as well.⁵⁰ The international community is waiting to see whether the current effort will eventually result in global consensus on accepting legally enforceable obligations of businesses to respect human rights.⁵¹

To conclude, currently there are some guidelines and principles urging or encouraging businesses to respect human rights, but no legally enforceable binding obligations are in place at the international level. The global community, however, is highly expecting that international human rights obligations will be firmly imposed on all types of business organizations through binding instruments under the auspices of the United Nations.⁵²

45. States represented at the World Summit for Social Development held in Copenhagen in March 1995 resolutely agreed on the need to place people at the center of development. See UNITED NATIONS, PEACE, DIGNITY AND EQUALITY ON A HEALTHY PLANET, <https://www.un.org/development/desa/dspd/world-summit-for-social-development-1995.html> (last accessed Jan. 26, 2022).

46. Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111(3) YALE L.J. 443, 448 (2001); U.N. Office of the High Commissioner on Human Rights, *Corporations Must Be Held Accountable for Human Rights Violations* (Feb. 20, 2012), <https://www.ohchr.org/en/stories/2012/02/corporations-must-be-held-accountable-human-rights-violations> [<https://perma.cc/DZ4B-WJFJ>].

47. Clarence J. Dias, *Corporate Human Rights Accountability and the Human Right to Development: the Relevance and Role of Corporate Social Responsibility*, 4 NUJS L. REV. 495, 513 (2011).

48. Human Rights Council Res. 26/9, U.N. Doc. A/HRC/RES/26/9 (June 26, 2014). See Atabongawung, *supra* note 9, at 276.

49. Atabongawung, *supra* note 9, at 287.

50. *Id.*

51. *Id.* at 289; MUCHLINSKI, *supra* note 29, at 118.

52. MUCHLINSKI, *supra* note 29, at 118.

C. Sustainable Development

The word “development,” as viewed by several neoliberal and modern development theories established over the past sixty years⁵³ merges with the contemporary understanding of the term to refer to a process, the outcomes of which are dedicated to improving quality of life and strengthening self-sufficiency in the capability of national economies.⁵⁴ The phrase “sustainable development” was first used with respect to preservation of forestry and afforestation viewed from an ecological perspective.⁵⁵ SD with its broad meaning is defined as “development which meets the needs of the present without compromising the ability of future generations to meet their own needs.”⁵⁶ SD is now widely regarded as a cohesive concept comprised of three pillars: environmental protection, economic improvement and social wellbeing.⁵⁷ Alongside legal prescriptions, SD is obviously a strong ethical or moral consideration of relevant authorities in making decisions,⁵⁸ focusing particularly on generational public good. Quite consistently, the concept of SD from a moral perspective is further argued to have three ethical imperatives: satisfying human needs, ensuring social equity, and respecting environmental limits.⁵⁹ All three of them are critical concerns of global communities, and they obviously relate to human rights. Hence, they have now been critical considerations in assessing social and economic aspects of development across the globe. Business enterprises are thus incorporating the principles of SD into their decisions and operations in order to reduce risk, foster innovation, and protect their stakeholders.⁶⁰

The forgoing discourse demonstrates the interplay between business, human rights and SD. Workers’ protection at work is a fundamental human right attached to the right to life. The ensuing discussion concentrates on protecting human lives at the workplace under work health and safety laws in three selected Australian jurisdictions that

53. KATIE WILLIS, THEORIES AND PRACTICES OF DEVELOPMENT 27 (1st ed. 2005).

54. Joseph Remenyi, *What is Development?*, KEY ISSUES IN DEVELOPMENT 22, 22 (Damien Kingsbury et al., eds. 2004).

55. Tomislav Klarin, *The Concept of Sustainable Development: From Its Beginning to the Contemporary Issues*, 21 ZAGREB INT. REV. ECON. BUS. 67, 70 (2018).

56. MONASH SUSTAINABLE DEV. INST., *What Is Sustainable Development?*, <https://www.monash.edu/msdi/about/sustainable-development/what-is-it> [https://perma.cc/74V6-J6WK].

57. Eleni Sinakou, Jelle B. Pauw, Maarten Goossens & Peter V. Petegem, *Academics in the Field of Education for Sustainable Development: Their Conceptions of Sustainable Development*, 184 J. CLEAN. PROD. 321, 321 (2018).

58. Erling Holden et al., *The Imperatives of Sustainable Development*, 25 SUSTAIN. DEV. 213, 215 (2017).

59. *Id.*

60. Wills, *supra* note 12, at 12.

introduced their industrial manslaughter laws before others. Its beginning seeks to define industrial manslaughter.

III. INDUSTRIAL MANSLAUGHTER—ITS LEGAL CHARACTERIZATION

Corporate manslaughter tacitly denies the right to life. Manslaughter is incontrovertibly a serious offense in every legal system across the globe. However, industrial manslaughter is not incontestably accepted universally with equal prominence despite its palpable fatal consequence.⁶¹ As an artificial person, the civil and administrative liabilities of corporations are well accepted worldwide. However, its criminal liability still remains a complex and contentious issue in law.⁶² Homicide, as a generic name of unlawful killings, is a serious crime across the globe. This crime is broadly split into two—murder and manslaughter. The differentiation between the two is made based on the fault or mental state of an offender, whilst the conduct element may remain the same or differ, with an identical consequence of death of a human being in both cases. To distinguish in simple terms, murder requires unlawful intentional killing of another person without justification or a valid excuse, whilst manslaughter refers to death of a person caused by another person unintentionally, or intentionally with justification or a valid excuse.⁶³ Australian laws further break up manslaughter into two, manslaughter by an unlawful and dangerous act, and manslaughter by criminally negligent conduct that includes both acts and omissions.⁶⁴ However, the term may vary between jurisdictions, such as culpable homicide, negligent manslaughter, manslaughter by criminal negligence, negligent killing, or unintentional killing—all these terms are used equivalently.

Industrial manslaughter is generally characterised as being manslaughter by criminal negligence (MCN). It takes place while at

61. Muirgen O'Seighin & Andrew Wydmanski, *Industrial Manslaughter Laws Around Australia*, ALLENS (Jan. 31, 2022), <https://www.allens.com.au/insights-news/insights/2022/01/Industrial-manslaughter-laws-around-Australia/> [<https://perma.cc/XNY2-LL94>] (explaining that three out of eight Australian jurisdictions, Tasmania, New South Wales, and South Australia, have not enacted laws about industrial manslaughter; although the latter two have previously unsuccessfully attempted to pass such laws).

62. See, e.g., D. R. Fischel & A. O. Sykes, *Corporate Crime*, 25 J. LEG. STUD. 319, 319 (1996); Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J. L. PUB. POL'Y 833 (2000); V. S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477 (1996); John C. Coffee, *No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1981); Joseph F. C. DiMento, Gilbert Geis & Julia M. Gelfand, *Corporate Criminal Liability: A Bibliography*, 28 WEST. STATE UNIV. LAW REV. 1 (2000).

63. See, e.g., *The Queen v Lavender* (2005) 222 CLR 67 (Austl.); *Lane v R* [2013] NSWLR 317 (Austl.); *Grant v R* [2014] NSWLR 67 (Austl.).

64. DAVID BROWN ET AL., *CRIMINAL LAWS: MATERIALS AND COMMENTARY ON CRIMINAL LAW AND PROCESS IN NEW SOUTH WALES* 775–866 (7th ed. 2020).

work, not necessarily at the usual workplace of an employee. The victim may die instantly at the workplace, or receive serious injuries resulting in subsequent death. Victims typically include workers, however, they can also be visitors or clients of the business, depending on the coverage by a particular law.

IV. INCEPTION OF STATUTORY INDUSTRIAL MANSLAUGHTER LAWS IN AUSTRALIA

The Australian Capital Territory (ACT), the capital of the nation, has been the pioneer in legislating corporate manslaughter law in the common law world since 2003.⁶⁵ The ACT enacted the industrial manslaughter provisions and incorporated them initially into its Crimes Act 1900 (ACT-CA1900) in 2003 with effect from March 2004. However, it shifted them to the Work Health and Safety Act 2011 (ACT-Act) in August 2021 with effect from November 12, 2021. The United Kingdom followed this lead by legislating its Corporate Manslaughter and Corporate Homicide Act 2007 (UK-CMA2007) that came into force in April 2008, which is described as a “landmark in law.”⁶⁶ However, unlike the industrial manslaughter provisions in the ACT-CA1900 which was applicable to both business entities and their executives, the UK-CMA2007 can be applied to only business organizations, leaving executives’ liability under the common law negligent manslaughter.⁶⁷ Business organizations can be found guilty of this offense based on serious management failures constituting a gross violation of a duty of care occasioning death at work, as prescribed in the UK-CMA2007 for the first time in the United Kingdom.⁶⁸ Following the enactment of industrial manslaughter laws in the ACT and the United Kingdom, four other Australian jurisdictions have gradually inserted industrial manslaughter provisions into their respective occupational health and safety legislation. These jurisdictions include Queensland, the Northern Territory, Victoria, and Western Australia. The remaining three jurisdictions (New South Wales, South Australia and Tasmania) still remain reliant on the common law of negligent manslaughter, the enforcement of which is complicated by the application of the “directing mind and will theory” or the “identification theory” or “organic theory”

65. See Marsh McLennan, *Industrial Manslaughter Laws Australia: What You Need to Know*, <https://www.marsh.com/au/services/workers-compensation/insights/industrial-manslaughter-in-australia.html> [https://perma.cc/UY4P-V3MW].

66. Health and Safety Executive, *About Corporate Manslaughter*, <https://www.hse.gov.uk/corpmanslaughter/about.htm> [https://perma.cc/E9KC-AZXR].

67. Corporate Manslaughter and Corporate Homicide Act 2007, c. 19 (UK).

68. G. Keith Still, *Crowd Safety and Crowd Risk Analysis*, GK STILL BLOG, <https://www.gkstill.com/Support/Links/CorporateManslaughter.html> [https://perma.cc/HG8C-SF9S].

of corporations (all three used interchangeably) for *mens rea* elements of manslaughter. However, the process of enacting such a law is underway in both New South Wales and South Australia.⁶⁹

The ACT's industrial manslaughter law which was enacted in 2003 was a product of the common law's failure and criminal legislation's shortcoming in convicting businesses of this offense.⁷⁰ The law imposed liability only on the business entities and their executives, excluding other employees whose offenses were to be tried separately under the general manslaughter law. A new Part 2A comprised of sections 49A–49E contained the industrial manslaughter provisions, which kept section 15 of the ACT-CA1900 dedicated to dealing with other manslaughter cases committed beyond the scope of industrial manslaughter.⁷¹ Sections 49A–49E created new offenses which were not covered under the general criminal law and occupational safety law of the time. These provisions of the first enactment by the ACT are helpful to adequately understanding the progression of Australian statutory manslaughter laws, even though they are no longer in force as part of the crime legislation as of November 2021. This is so because those were the foundation of the statutory industrial manslaughter laws in Australia, and subsequent developments can be assessed in the light of their kernel.

The ACT-CA1900 separately defined the offense of the employer and its senior officers in identical words. Section 49C created the manslaughter liability of employers in the following terms:

An employer commits an offense if—(a) a worker of the employer—(i) dies in the course of employment by, or providing services to, or in relation to, the employer; or (ii) is injured in the course of employment by, or providing services to, or in relation to, the employer and later dies; and (b) the employer's conduct causes the death of the worker; and (c) the employer is—(i) reckless about causing serious harm to the worker, or any other worker of the employer, by the conduct; or—(ii) negligent about causing the death of the worker, or any other worker of the employer, by the conduct.

Senior officers of the employer could be held criminally liable for manslaughter under section 49D of the ACT-CA1900. These two sections are worded in identical terms with a single modification in

69. See Work Health and Safety Amendment (Industrial Manslaughter) Bill 2021 (NSW) (Austl.); see also Government of South Australia, *Draft Industrial Manslaughter Laws Enter Next Phase* (Oct. 5, 2023), <https://www.safework.sa.gov.au/news-and-alerts/news/news/2022/have-a-say-on-industrial-manslaughter-laws> [<https://perma.cc/8J8N-MM6A>] (last visited Jan. 19, 2023).

70. See S. M. Solaiman, *Liability for Industrial Manslaughter Caused by Robots under Statutory Laws in Australia*, 38 CO. LAW. 225, 226 (2017) (discussing industrial manslaughter laws passed for Australian Capital Territory (Dec. 20, 2003)).

71. See *Crimes Act 1900* (ACT), ss 49A–49E (Austl.).

section 49D replacing “employer” with “senior officers.” Although the penalties are also identical in terms of the length of incarceration and penalty units, the latter’s value significantly vary between business entities and individual offenders, which make the pecuniary penalties markedly different as will be discussed later.⁷²

The above stated laws no longer exist in the ACT-CA1900, as they have been relocated to the ACT-Act with notable modifications by the *Work Health and Safety Amendment Act 2021*.⁷³ Section 10 of the amending legislation declares that the industrial manslaughter offense means an offense against section 34A of the ACT-Act.

V. A COMPARATIVE APPRAISAL OF ASPECTS OF THE PHYSICAL ELEMENTS OF INDUSTRIAL MANSLAUGHTER LAWS IN AUSTRALIA

Admitting the general principle of criminal law, both *actus reus* and *mens rea* elements are required to commit industrial manslaughter as a truly criminal or an indicatable offense. Hence, discussions that ensue carry out a comparative analysis of these constituent elements along with the identification of defendants and victims and the determination of causation as prescribed in the selected jurisdictions. The terms *actus reus* or physical or conduct element are used synonymously to mean the external element of the offense while for the internal element, *mens rea* or fault or mental element are regarded as interchangeable.

A. Statutory Physical Element of Industrial Manslaughter

As can be seen in the above-stated lately defunct sections 49C and 49D of the ACT-CA1900, two separate definitions were provided for the liability of employers and officers.⁷⁴ Unlike its predecessor, section 34A(1) of the ACT-Act defines “industrial manslaughter” itself by replacing “employer” with the word “person” and changing a “senior officer” to an “officer.” It reads:

A person commits an offense if—(a) the person conducts a business or undertaking, or is an officer of a person who conducts a business or undertaking; and (b) the person has a health and safety duty; and (c) the person engages in conduct; and (d) the conduct results in a breach of the health and safety duty; and (e) the conduct causes— (i) the death of a worker; or (ii) an injury to a worker and the injury later causes the death of the worker; or (iii) the death of another

72. See *Legislation Act 2001* (ACT) s 133(2) (Austl.) (providing that a penalty unit is \$160 AUD for an offense committed by an individual, and \$810 AUD when the offender is a corporation).

73. *Work Health and Safety Amendment Act 2021* (ACT) (Austl.).

74. Respectively section 49C and section 49D of the ACT-CA1900 which existed before the 2021 amendment.

person; and (f) the person is reckless or negligent about causing the death of the worker or other person by the conduct.

This section outlines all relevant factors, such as persons to be held liable, conduct triggering liability, fault incriminating a defendant, and conditions to be satisfied for conviction.

B. *Persons to be Held Liable*

The identity of the defendant is critical to the enforcement of the law. The first distinctive point to make is thus the usage of a single word, “person,” to mean both “an employer” and “a senior officer,” which were previously separate potential defendants. Potential defendants are now “persons” and “officers.” The meaning of “employer” used in the previous law was provided in section 49A of the ACT-CA1900,⁷⁵ stating that “a person is an ‘employer’ of a worker if—the person engages the worker as a worker of the person; or an agent of the person engages the worker as a worker of the agent.” So workers were those who were recruited by the employer or the employer’s agent who engaged workers as the agent’s workers for the purposes of the employer’s services. It means that both the employer and its agent (deemed an employer) could be held liable for industrial manslaughter. The conduct of an individual worker could be automatically attributed to an employer directly or via an agent.

Conduct includes both actions and omissions. Since an action requires doing something by a human actor, it needs to be attributed to corporations to hold them liable, simply because a corporation cannot do anything without its human agent. However, unlike an action, an omission represents inaction; therefore, no involvement of a human actor is required to commit an omission by a company. Thus the omission of a worker as a conduct element need not be attributed to corporations as a common law principle,⁷⁶ which is reinforced by section 50 of the ACT’s *Criminal Code 2002* (ACT-CC2002). The ACT-CC2002 applies to all pieces of legislation of the ACT where relevant. Section 50 of the ACT-CC2002 concerns conduct elements and reads, “[a] physical element of an offense consisting of conduct is taken to be committed by a corporation if it is committed by an employee, agent or officer of the corporation acting within the actual or apparent scope of his or her employment or within his or her actual or apparent authority.”

75. Section 49A of the ACT-CA1900 was the “dictionary section” for all the terms used in the industrial manslaughter provisions.

76. *Linework Ltd. v. Department of Labor* [2001] 2 NZLR 639 at [25] per Blanchard J (N.Z.).

The definition of employer is broad, encompassing all types of business organizations, and needing no formal attribution of human conduct to corporations as a separate person.

A flaw in section 34A(1) mentioned above is evident in that while “person” and “officer” are separately mentioned in subsection (a), the rest of the section does not include “officer” with respect to the relevant duty, or breach thereof, or causing the victim’s death. It results, by implication, that only a person conducting a business or undertaking (the PCBU) can be held liable for the offense at hand. It needs to be clarified that both the PCBU and its officers engaged in the prohibited conduct will be liable for industrial manslaughter, subject to satisfaction of certain conditions, as will be discussed shortly below.

Section 27 of the ACT-Act offers the meaning of “person” which includes a corporation, an unincorporated association and a partnership. Section 5 of the ACT-Act provides an extensive definition of a PCBU, which effectively encompass all types of businesses, regardless of whether or not they are for profit or are conducted alone by a single individual or with others, but it excludes volunteer associations where volunteers themselves work together for one or more community purposes without having to appoint any worker. If the business or undertaking is run by a general partnership, the word “person” will refer to each of the partners, whilst incorporated partnerships will be treated alike with corporations as having separate legal personality. Further, section 160 of the *Legislation Act 2001* (ACT), which applies to all statutes of the jurisdiction, clarifies that a person generally includes a corporation and individual. Taken together, it is clear that the word “person” covers both business entities and individuals. However, additional clarification in section 34A(1) about the liability of both would be helpful because they are mentioned separately in the section. Officers remain effectively detached from the requirements of the offense.

There is a terminological difference about human actors between the provisions of the previous ACT-CA1900 and the current ACT-Act, as the former used “senior officers” whilst the latter designates them “officers.” The previous section 49A adopted the definition of officers from s9 of the *Corporations Act 2001* (Cth) as it was at the time of commencement of the industrial manslaughter law, which was sufficiently broad. Section 49A defined “senior officers” as encompassing both employees of government as well as those of corporations who occupied executive positions and who had the power to make, or take part in making, decisions affecting all or a substantial part of the functions of the government or corporation. The offense definition in the ACT-Act has combined both government and corporate officers in a wider manner under the general designation of “officers” in place of “senior officers.” However, the imbedded dictionary of the ACT-Act describes the meaning

of an “officer” evidencing no substantial difference between the previous law and the current law when it comes to defendants—other than the separate mentions of business entities and their officers in the old law. Whilst the current law provides wider coverage of businesses, a clear assertion of officers’ liability linking to other requirements of the offense would arguably be helpful with respect to both the creation of deterrence and facilitation of conviction. Otherwise, individual officers will look for legal loopholes to escape liability.

Queensland was the second jurisdiction to follow suit in enacting industrial manslaughter law. However, unlike the ACT, Queensland incorporated the provisions into the *Work Health and Safety Act 2011* (Qld-Act) from the beginning. The *Work Health and Safety and Other Legislation Amendment Act 2017* inserted Part 2A containing sections 34A–D into the Qld-Act. Section 34A of the Qld-Act offers definitions of the terms and concepts critical to industrial manslaughter, whilst section 34B notes the exceptions by excluding liability of certain persons in specific circumstances. Section 34C defines the offense of business entities, and section 34D imposes liability on ‘senior officers’ of the business. Similar to section 34A of the ACT-Act, section 34C(1) of the Qld-Act defines “industrial manslaughter” in terms of a PCBU as:

A person conducting a business or undertaking commits an offense if— (a) a worker— (i) dies in the course of carrying out work for the business or undertaking; or (ii) is injured in the course of carrying out work for the business or undertaking and later dies; and (b) the person’s conduct causes the death of the worker; and (c) the person is negligent about causing the death of the worker by the conduct.

This is followed by section 34C(2), which simply mentions that an offense against subsection (1) is a crime, implying that it is an indictable offense.

Unlike the ACT-Act, the Qld-Act defines an officer’s crime separately but in identical terms, as was the case in the previous provisions of the ACT-CA1900. The meaning of a PCBU is defined in the same way in section 5 of the Qld-Act as in section 5 of the ACT-Act, with only one additional exclusion in the Qld-Act, that an elected member of a local government does not in that capacity conduct a business or undertaking. Therefore, unlike the laws of the ACT, there is no ambiguity with respect to potential individual offenders in Queensland in which both business entities and individuals can be held liable simultaneously for a single offense, by imputing human actions to the artificial person.

However, the Qld-Act defines “senior officer” differently from the definition of “officer” in the ACT. According to section 34A(1) of the Qld-Act, a senior officer of a PCBU “means—(a) if the person is a

corporation—an executive officer of the corporation; or (b) otherwise—the holder of an executive position (however described) in relation to the person who makes, or takes part in making, decisions affecting all, or a substantial part, of the person’s functions.” The same section also defines an “executive officer” of a corporation as being “a person who is concerned with, or takes part in, the corporation’s management, whether or not the person is a director or the person’s position is given the name of executive officer.” If the two definitions are read together, an “officer” in the ACT and a “senior officer” in Queensland carry the same meaning particularly with respect to their roles.

The NT is the third jurisdiction to introduce a statutory industrial manslaughter law in its *Work Health and Safety Act 2011* (NT-Act), which came into force on February 1, 2020. It defines industrial manslaughter in much the same way as the ACT does in terms of defendants and *actus reus* ingredients, with a noticeable variation that the person’s engagement in the prohibited conduct needs to be intentional.⁷⁷ The purpose of the mention of “intention” with respect to engagement is not clear because subsection (2) does not make this engagement a strict liability provision. Limb (e) of section 34B(1) adds *mens rea* elements applicable to the commission of this offense except for limbs (a) and (b) which are strict liability provisions under section 34B(2). The usefulness of the additional requirement of intentional engagement in conduct is questionable because, as a matter of general principle, no one can be punished for involuntary or unintentional conduct constituting an indictable offense (i.e., except regulatory offenses, such as breaching traffic regulations). Although the NT-Act does not declare it an indictable offense, its equivalents in the ACT and Queensland do. As per the decision of the High Court of Australia (HCA) in *He Kaw Teh v. The Queen*,⁷⁸ one of the considerations in adding *mens rea*, where the legislation is silent, is to take into account whether the offense is truly criminal. Given the maximum punishment of a life sentence under section 34B(1), the offense is overtly truly criminal which warrants voluntary or intentional acts. This additional requirement can create a scope for the offenders to circumvent liability if the prosecution fails to prove that the act was intentional, which follows purely a subjective test. This additional explicit requirement giving extra incentive to defendants should be removed to avoid unnecessary complexity.

Section 5 of the NT-Act replicates the definition of PCBU from the Qld-Act in identical terms including the exclusion of elected person of local government council is not a PCBU. The term “officer” is defined in section 4 of the NT-Act by adopting the definition from the *Corporations*

77. *Work Health and Safety Act 2011* (NT) s 34B (Austl.).

78. *He Kaw Teh v The Queen* [1985] HCA 43 (Austl.).

Act 2001 (Cth),⁷⁹ and additionally adding officers of the Crown and those of public authority. However, it follows the ACT-Act in articulating the imposition of liability on a PCBU. Consequently the same ambiguity in relation to officers, as noted in discussing the law of ACT exists, which requires clarification for the efficacy of the law of NT as well. Other than this opacity, the definition of potential defendants sounds fine and consistent with others.

C. *Conduct Required to be Satisfied for Conviction*

Both the previous and current laws of the ACT require the prohibited conduct to cause the victim's immediate or subsequent death as a consequence of the workplace injury. The term "conduct" was not defined in the previous law, instead it referred to the ACT-CC2002 for its meaning.⁸⁰ Section 13 of the ACT-CC2002 defines "conduct" as "an act, an omission to do an act or a state of affairs." Although "conduct" was not defined, for the purposes of the offense at hand, sections 49B(1)–(2) of the ACT-CA1900 described an omission as a conduct element being established if it was an "omission" to perform the duty to prevent or avoid danger to the human life or safety or health of a worker of the employer when the danger arises from: (a) an act of the employer or the senior officer; or (b) anything in the employer's or the senior officer's possession or control; or (c) any undertaking of the employer or the senior officer. It evidently means that employers or senior officers had a duty to avoid or prevent harm to the life, safety or health of workers. Failure to do so would be breach of that duty, satisfying the *actus reus* element of omission. This was a good description of omission, but it does not exist any longer since the repeal of the whole part 2A of the ACT-CA1900 in 2021.

No definition of the word "act" is found in either the ACT-CA1900 or in the ACT-CCA2002. Therefore, the legislation implicitly accepts its dictionary meaning. As defined in Black's Law Dictionary for legal purposes, an act is "something done voluntarily by a person; the exercise of an individual's power" In a more technical sense, it means something done voluntarily by a person, and of such a nature that certain legal consequences attach to it.⁸¹ The UK High Court of Justice (Chancery Division) in *Piggott v. Middlesex County Council* interprets

79. *Corporations Act 2001* (Cth) s 9 (Austl.).

80. Section 49A of the ACT-CA1900 referred to section 13 of the ACT-CC2002 for the definitions of others terms including "conduct," which had not been defined in that dictionary section for industrial manslaughter. Section 13 of the ACT-CA1900 defines "conduct" for all offenses created by the legislation.

81. Black's Law Dictionary (6th ed. 1990).

an act in law as being any act which a person is legally bound to do, or is done under statutory compulsion.⁸²

The ACT-Act does not define the word “conduct” either. It however proffers the meaning of “engage in conduct” which denotes doing an act or omitting to do an act.⁸³ The ACT-Act thus succinctly includes both actions and omissions, similar to the previous law stated above. In brief, the conduct which is prohibited under the industrial manslaughter law embraces both actions and inactions, any breach thereof may trigger prosecution and end up in conviction, if other requirements are met. However, an omission in the context of manslaughter is a crucial part of prohibited conduct, and the repealed sections 49B(1)–(2) of the ACT-CA1900 provided a good definition of “omissions” as stated above. It is recommended that the ACT-Act incorporate this definition, which is well crafted especially for industrial manslaughter purposes. This recommendation can be premised on its clarity against the ambiguity of its current alternative general description of the term contained in section 13 of the ACT-CC2002.

Unlike the ACT law, the Qld-Act provides a concise definition of “conduct” for the purposes of industrial manslaughter, as it stipulates, conduct means an act or omission to perform an act. Unlike its counterparts in the ACT and Queensland, the NT-Act does not have any dictionary as a separate schedule. Instead, its section 4 provides definitions of important terms used in this legislation. However, section 4 does not provide any separate definition of conduct, although it describes the meaning of “engage in conduct” as being doing an act or omitting to do an act.

Therefore, the relevant conduct for industrial manslaughter in all of these three jurisdictions covers both actions and omissions causing death of a victim. It represents a standard brief meaning of conduct. However, given the significance of an omission in the context of manslaughter, the definition of omissions provided in section 49B(1) of the ACT-CA1900 was drafted with a greater clarity for the present purposes, which could be more helpful for the efficacy of the law.

D. Duty to be Breached by the Defendant’s Conduct

Any valid complaint should involve a breach of a legally defined duty resulting in infringement on another’s right, sometimes regardless of the actual outcome. Similarly, an occurrence of industrial manslaughter warrants a breach of duty by the defendant’s conduct directly or indirectly by imputation. However, the old provision in the ACT did not provide any definition of the duty. Instead, it mentioned that defendant’s “conduct

82. *Piggott v. Middlesex Cnty. Council*, [1909] 1 Ch 134, 142 (U.K.).

83. *Work Health and Safety Act 2011* (ACT) (Austl.).

causes” the consequence of worker’s death. Filling in that gap, section 34A(1)(b) of the ACT-Act specifies that the defendant has a “health and safety duty” (typically owed to the victim), and the defendant’s conduct results in a breach of that duty. More appreciably, section 34A(4) expounds in great detail the meaning of the “health and safety duty,” referring to a duty imposed under section 19 (Div. 2.2), sections 20–26 (Div. 2.3) or section 27, as below.

As pronounced in section 19 of the ACT-Act, a PCBU, as its primary duty of care, must ensure, so far as is reasonably practicable, the health and safety of workers and other persons while at work, and provide a safe work environment, and impart adequate training to workers on health and safety. The preceding section 18 explains the phrase “reasonably practicable” in relation to this duty as that “which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters,” such as hazards, risks, concerns actually or reasonably known to the persons, the availability and suitability of ways to eliminate or minimize the risk, and whether the cost to eliminate or minimize the risk is grossly disproportionate to the risk.

To be brief, a close reading of all these defining sections (sections 18–27) suggest that they all concern WHS and obligate the defendants to exercise reasonable care and diligence to avoid any harm to workers or others that may attract this liability. Accordingly, both business entities and their officers must exercise due care and diligence in discharging their WHS responsibilities and strictly comply with them. Such a detailed explanation of the relevant duty is good for both successful enforcement and deterrence.

Unlike the ACT-Act, its Queensland equivalent defines “industrial manslaughter” much the same way as the ACT-CA1900 did. Thus, the offense defining sections are silent about the relevant duty and instead require the defendant’s conduct to cause the death of the worker.⁸⁴ There seems to be a “hide and seek” game about the definition of “health and safety duty.” This is so because the dictionary in Schedule 5 of the Qld-Act refers to section 30 for the definition of “health and safety duty,” which in turn suggests to see its sections 2–4 for the meaning of the duty. Frustratingly, none of the sections 2, 3 and 4 contains any definition of the duty in question. Instated, section 2 is about the commencement of the Act, section 3 is dedicated to narrating the objects of the legislation, whilst section 4 suggests to look up the dictionary for definitions in Schedule 5. In the end, the meaning of “health and safety duty” remains hidden from the readers. This is a considerable loophole in the legislation. Certainly in any law, clarity is always desirable for the sake of its efficacy

84. *Work Health and Safety Act 2011* (Qld) pt 3 ss 34C, 34D (Austl.).

because any legal uncertainty inhibits proper enforcement and eventually accords the defendant the benefit of the doubt culminating in acquittal. This shortcoming should be addressed in line with the duty provisions in the ACT-Act as alluded to earlier, as well as corresponding provisions of the NT-Act, as follows.

The NT-Act highlights the duty with a greater emphasis compared to its ACT counterparts. To commit the offense, the defendant is required to have a health and safety duty under section 34B(1)(a) of the NT-Act. Section 4, containing its dictionary, states that health and safety duty means a duty imposed under Part 2, Division 2, 3 or 4 consisting of sections 13–26. Notably, Part 2 of the legislation is dedicated to health and safety duties, and detailed meanings of the duty in sections 19–27 capture every aspect of workplace safety and protection of individuals irrespective of the person’s official identity. The description of the duty can be followed by others. The commission of manslaughter requires breach of the relevant duty by engaging in conduct, discussed below.

E. Breaching the Duty by Engaging in Conduct

Notably, the repealed provisions of the ACT-CA1900 did not include any specific requirement of breach, nor did it define “health and safety duty,” although the defendants had “the duty to avoid or prevent danger to the life, safety or health of a worker of the employer if the danger arises.”⁸⁵ So the deemed duty was a “health and safety” duty by implication. However, the ACT-Act and NT-Act clearly define the duty while Queensland’s law remains silent like the ACT-CA1900.

The defined and deemed duty in all three jurisdictions is a “health and safety duty” which is required to be breached in order to commit the offense in question. As needed under the ACT⁸⁶ and NT⁸⁷ laws, the conduct must breach the duty. The designated duty can only be breached by engaging in conduct which means doing a prohibited act or omitting to do a legally obligated act. However, the NT law adds a further requirement that the defendant *intentionally* engages in the conduct breaching the duty.⁸⁸ The purpose of this additional word has not been clarified anywhere in the legislation. It may create unnecessary complexities, placing a huge burden on the prosecution, which is likely to struggle with proving the defendant’s intentionality or disproving the complainant’s or prosecutor’s claim of lack of intention. Voluntariness as an *actus reus* element is a generic and implied requirement,⁸⁹ which will suffice to serve the purpose.

85. *Crimes (Industrial Manslaughter) Amendment Act 2003* (ACT) s 49B (Austl.).

86. *Work Health and Safety Act 2011* (ACT) s 34A(1)(d) (Austl.).

87. *Work Health and Safety Act 2011* (NT) s 34B(1)(d) (Austl.).

88. *Id.* at s 34B(1)(c).

89. *See Criminal Code 2002* (ACT) s 15 (Austl.).

Unlike the ACT and NT, the Qld-Act does not directly necessitate a breach of the relevant duty, instead, it rests on causing death by the conduct. Although causation is a separate element, it can be argued that the word “breach” is embedded in the expression that the defendant’s conduct must cause the victim’s death. Nevertheless, precision with adequate eloquence is always helpful in law. Hence, the Queensland law is recommended to be clarified in line with the other two by adding the requirement of breach of the duty in question.

F. Persons Whose Death May Constitute Industrial Manslaughter

The protection of workers remain a central concern of the laws of industrial manslaughter. The previous section 49A of the ACT-CA1900 defined the term “worker” very broadly by encompassing an employee, an independent contractor, an outworker, an apprentice, a trainee and a volunteer. Adding further clarity, all of these were precisely defined separately in section 49A adopting their ordinary meanings. Of them, “outworker” seems to be distinctive, which was defined to be “an individual engaged by a person (the principal) under a contract for services to treat or manufacture articles or materials, or to perform other services in the outworker’s own home, or on other premises not under the control or management of the principal.”⁹⁰ The contract with the outworkers must be to “provide services” to, or in relation to, a person which includes performing work for, or in relation to, the person.

When the above-stated provisions were shifted to the WHS legislation, the definition became even broader. Workers covered by the ACT-Act are identified in its section 7 which spells out that a person is a worker if he/she carries out work in any capacity for a PCBU. The list of these persons includes an employee, a contractor or subcontractor, an employee of a contractor or subcontractor, an employee of a labor hire company who has been assigned to work in PCBU, an outworker, an apprentice or trainee, a student gaining work experience, a volunteer, and a person of a prescribed class (not defined this class). Notably, even a police officer while on duty and the PCBU, if the person is an individual and carries out work in that business or undertaking, can be a worker within this definition for the purposes of ACT-Act. The new definition of worker is obviously broader than its previous counterpart. The protection of such remote workers and other persons on duty, including police officers, is appreciable from the perspective of WHS.

The Qld-Act imposes liability for the death of only workers, who are identified in section 34A(3) for the present purposes. According to section 34A(3), workers include “a worker who is at a workplace to carry out work for the business or undertaking, including during a work break.”

90. *Crimes Act 1900* (ACT) s 49A (Austl.).

This definition is much narrower compared to its ACT counterpart in that the Qld-Act considers the safety of only a worker who is physically at the workplace, excluding the safety of the same person when working for the PCBU outside the physical boundary of the workplace, let alone protecting others and outworkers as defined in the ACT law. This narrow-down is not appreciable. Such a narrow scope of coverage evidently undermines the protection of workers while staying away though working directly or indirectly for a given PCBU.

The definition of the protected persons under the NT-Act looks wider than its Queensland equivalent, though may be narrower than its counterpart in the ACT-Act. The NT-Act extends its protection to “an individual” to whom the relevant duty is owed.⁹¹ In one sense, this provision is appreciable as it aims to protect any persons irrespective of their employment relation with the PCBU, which is distinctive from the other two. The true extent of its protection will be directly affected by the explicit condition of owing the duty to the victim, unlike other laws. This condition requires the adoption of the common law “neighbor doctrine,”⁹² which would be very useful for widening the coverage. This is because anyone whose harm was reasonably foreseeable would be protected under the neighbor doctrine. Otherwise, a statutory clarification is needed to determine whether it applies to only workers, or outworkers and visitors as well. The neighbor doctrine embraces all of them. The lack of clarity is likely to inhibit its enforcement in a desired manner to achieve the core objectives of the legislation.

G. Causation of Victim's Demise

The causation requirement is the nucleus of the offense at hand, and can be a game changer in that conviction will greatly rely on the level of impact the defendant's conduct had on the victim's death as an essential consideration. It is thus unquestionably agreeable that the death of the victim must be caused by the defendant's conduct. The question, however, is whether the conduct has to be the sole cause, or a major or substantial and operating cause, or just a cause. The ACT-CA1900 required the death to be caused by the employer's or its senior officer's conduct.⁹³ This causal link is also an essential condition in common law manslaughter as held, for example, in *R v. Taktak*.⁹⁴ However, the erstwhile industrial manslaughter provisions of the ACT-CA1900 did not provide any elucidation of causation, and its complementary law, the ACT-CC2002, remained equally silent. Further, neither of the two

91. *Work Health and Safety Act 2011* (NT) s 34B(1)(b) (Austl.).

92. *Donoghue v. Stevenson* [1932] AC 562 (HL) 564 (appeal taken from Scot.).

93. *Crimes (Industrial Manslaughter) Amendment Act 2003* (ACT) amended the *Crimes Act 1900* (ACT) and inserted ss 49C(b), 49D(b).

94. *R v Taktak* [1988] 14 NSWLR 226, 237 (Austl.).

previous sections, 49C and 49D, explained the meaning of the expression “conduct causes the death.” The complete taciturnity about such a critical issue was a weakness of those statutory provisions, impliedly suggesting to look for the judicial interpretation of the term.

The determination of causation would be less complex, if the victim having no pre-existing condition, had died immediately. The intricacy, however, may arise when the death of a worker with a pre-existing health condition occurred instantly, or at a later point of time from a relevant injury where there had been some intervening cause(s). These situations were also mentioned in the previous ACT law, though without offering any guidance on the applicable type or extent of causation.⁹⁵ Consequently, under the old regime, its meaning had to be drawn from the principles of judge-made law. In this respect, Lord Justice Joff, bringing out the complexity, observed in *R v. Pagett* that “[p]roblems of causation have troubled philosophers and lawyers throughout the ages; and it would be rash in the extreme for us to trespass beyond the boundaries of our immediate problem.”⁹⁶

As a welcome revision, the current provisions in section 34A(4) of the ACT-Act appreciably simplify this issue by stipulating that “a person’s conduct causes death if the conduct substantially contributes to the death.” Hence there is no need for the defendant’s conduct to be the sole or a major cause, rather it will suffice if the conduct was a substantial cause, which appears to have been borrowed from the common law (discussed below). However, there is no further explanation of “substantial contribution” in the legislation. Therefore, reliance on common law is again required for its judicial interpretation, which proffers further guidance.

Pursuant to the common law doctrine of causation, the disputed conduct in the present context has to be one of the causes, rather than being the only cause, as declared in *R v. Pagett*.⁹⁷ However, it needs to be an “operating and substantial cause” of the death in question, and it must be something more than *de minimis*.⁹⁸ The court further clarifies that such a cause need not be a major cause,⁹⁹ and to determine whether or not it was a substantial cause, the trier of facts will apply an objective test.¹⁰⁰ To be fair to both parties or deliver justice to the community, the trier of facts should also pay due regard to a *novus actus* (a supervening or

95. *Crimes Act 1900* (ACT) ss 49C(a)(ii), 49D(a)(ii) (Austl.).

96. *R v. Pagett* (1983) 76 Cr. App. R. 279 (UK).

97. *Id.* at 288.

98. *R v. Hennigan* (1971) 55 Cr. App. R. 262, 265 (UK).

99. *Pagett*, 76 Cr. App. R. at 288.

100. *Royall v R.* (1991) 172 CLR 378, 412 (Austl.); see also Gavin Ruddy, *R v Southampton and Fatal Medical Negligence: An Anomaly or a Sign of Things to Come?*, 3 PLYMOUTH L. REV. 81 (2010).

intervening act or event) that might have potentially broken the chain of causation—if there was any. Affirming the need for this consideration, the Supreme Court of Western Australia in *Krakouer v. Western Australia* pronounced that in deciding whether or not the defendant's conduct was an operating and substantial cause of the victim's demise, any supervening act, which could be an act of anyone, including that of the victim, should be taken into account to determine whether a *novus actus* broke the chain of causation.¹⁰¹ In this respect, the HCA in *Burns v. The Queen*, in determining whether the act of the victim taking a prescribed medicine together with methadone supplied by the defendant was sufficient to break the chain of causation, held that:

The deceased was a sane adult. It is not suggested that his decision to take the methadone was vitiated by mistake or duress. His ability to reason as to the wisdom of taking methadone is likely to have been affected by the drugs that he had already taken but this is not to deny that his act was voluntary and informed. It was informed because he knew that he was taking methadone. He chose to take methadone not knowing what effect that drug would have in combination with the drugs he had already taken. A foolish decision to take a prohibited drug not knowing its likely effects is nonetheless the drug taker's voluntary and informed decision.¹⁰²

The court reinforced that the determination on the supervening act should follow the standard requirement of proof beyond reasonable doubt.¹⁰³ The importance of a *novus actus* factor cannot be gainsaid for the sake of justice in that such an intervention does not necessarily repudiate the potential of defendant's conduct being an operating and substantial cause. To this effect, Lord Parker CJ ruled in *R v. Smith* that “[i]t seems to the court that if at the time of death the original wound is still an operating cause and a substantial cause, then the death can properly be said to be the result of the wound.”¹⁰⁴ A defendant can, however, be absolved from liability banking on an intervening event only, when it is proved beyond reasonable doubt by applying an objective test that the intervention was “so independent of the act of the accused that it should be regarded in law as the cause of the victim's death, to the exclusion of the act of the accused.”¹⁰⁵ The U.K. Divisional Court in the negligent manslaughter case of *DPP Ex p. Jones (Timothy)*, involving a worker's death following

101. *Krakouer v. WA* (2006) 161 A Crim R 347 (Austl.).

102. *Burns v. The Queen* (2012) 246 CLR 334 (Austl.).

103. *See Krakouer*, 161 A Crim R at 347.

104. *R v. Smith* (1959) 2 QB 35, 42–43 (UK).

105. *R v. Pagett* (1983) 76 Cr. App. R 279, 288 (UK); *see also R v. Hallett*, [1969] SASR 141, 149 (Austl.).

an inadvertent act of another employee, pronounced about the employer's liability that the conduct of any employee within the defendant corporation may not be sufficiently independent to constitute a *novus actus interveniens*.¹⁰⁶ The Court in this case further held that:

His [another employee, the crane operator's] inadvertent act was not sufficient to break the chain of causation. An act of gross negligence, independent of any negligence in the system of work, perhaps would have done; but, as far as the evidence went, he was an innocent, or semi-innocent, agent The real cause of the death was the failure to establish a safe system of work in breach of the personal duty imposed by the common law upon an employer . . . and its . . . [senior executives].¹⁰⁷

Now an inference can be plausibly drawn relying on the analysis above that the ACT-Act presents more useful guidance on the determination of causation compared to its recently defunct equivalent. It is certain that the current law requires for the defendant's conduct to be a substantial and operating cause, and with respect to intervening events that break the chain of causation, such an event needs to be completely independent of the defendant's conduct. It is also now established that the victim can be blamed for breaking the chain only for his/her voluntary act with the knowledge of the wrongdoing that it may contribute to his/her own unnatural demise. The law of Queensland, the Qld-Act, also requires the defendant's conduct to be a substantial cause,¹⁰⁸ however, the NT-Act is silent, which may mean the sole cause, given its succinct assertion of the breach "causes the death." Therefore, the NT-Act should be revised by adding that the causation element will be satisfied if the defendant's conduct is proved to be a substantial and operating cause, as analyzed above.

The forgoing appraisal and analysis covers various relevant aspects of *actus reus*, defendants, and workers or victim. It demonstrates loopholes in some laws which can be addressed by their better crafted equivalents in other laws, as identified and recommended. Since it is not a strict or absolute liability offense, its commission entails the mental state of the defendant which must meet the physical element at the time of the offense being committed, as the discussion ensues.

VI. MENTAL ELEMENTS OF INDUSTRIAL MANSLAUGHTER

Mens rea literally refers to criminal intent or "guilty mind" of an accused. As held by the Supreme Court of the United States in *Staples v.*

106. R v. DPP Ex p Jones, [2000] IRLR 373, CRIM. L.R. 858, 859–60 (UK).

107. *Id.*

108. *Work Health and Safety Act 2011* (Qld) s 34A(2) (Austl.).

United States, a *mens rea* element denotes the state of mind legally required to be proved by the prosecution in order to convict a given defendant of a certain crime.¹⁰⁹ The presumption of innocence is a golden thread of criminal law.¹¹⁰ The guilt or fault of an offender comes from *mens rea*. Thus, as a general principle of criminal law, *mens rea* is an essential element, and perhaps the most guilty-centric constituent of a crime that distinguishes a civil wrong from a criminal offense, except for strict and absolute liability offenses. An offense generally occurs when the conduct element meets the corresponding fault element, unless the statute creating the offense provides otherwise.¹¹¹

The mental elements of the defendant's conduct were "recklessness" and "negligence" for both artificial and natural persons under the ACT-CA1900.¹¹² The common law recognizes only grossly or wickedly negligent conduct.¹¹³ The statute deliberately deviates from the common law requirements with a view to facilitating conviction in the backdrop of the latter's inefficacy to hook up the crook. Both of these fault elements are discussed below in turn with reference to the statutes at hand and case law.

A. *Recklessness as the Mens Rea of Industrial Manslaughter—Individual Defendants*

Proving recklessness in the workplace context is a difficult task, because of its requirement of subjective "foresight of, or advertence to, the consequences of an act as either probable or possible and a willingness to take the risk of the occurrence of those consequences."¹¹⁴ The ACT-CA1900 itself did not provide any interpretation of "recklessness" for the present purpose. Instead, as referred to earlier in discussing the conduct element, the ACT-CC2002 provides meanings for mental elements as well. The ACT-CC2002 contains separately two sets of rules to explain the elements of relevant offenses, one for individuals and another for corporations. Sections 17–22 of the ACT-CC2002 contain the provisions for fault elements of individuals, whilst sections 49–55 are dedicated to corporate faults. About an individual's recklessness respecting the consequence and circumstance of an offense, section 20 of the ACT-CA2002 lays down that:

(1) A person is reckless in relation to a result if—(a) the person is aware of a substantial risk that the result will

109. See *Staples v. U.S.*, 511 U.S. 600 (1994).

110. *Woolmington v. DPP*, [1935] AC 462 (HL) 469–70, 480–82 (appeal taken from Eng.).

111. See *Criminal Code 2002* (ACT) ss 11–12 (Austl.).

112. *Crimes Act 1900* (ACT) ss 49C(c)(i), 49D(c)(i) (Austl.).

113. See *Cittadini v. R.*, [2009] NSWCCA 302 (Austl.); *R v. Bateman* (1925) 19 Cr. App. R 8 (HL) (UK); *R v. Adomako*, [1995] 1 AC 171 (HL) (UK).

114. NSW Law Reform Commission, *Report 122: Workplace Deaths* (July 2009), 4 [4.11].

happen; and (b) having regard to the circumstances known to the person, it is unjustifiable to take the risk. (2) A person is reckless in relation to a circumstance if—(a) the person is aware of a substantial risk that the circumstance exists or will exist; and (b) having regard to the circumstances known to the person, it is unjustifiable to take the risk [emphasis original].

The articulation of the above meanings perceptibly shows that recklessness is a subjective fault element, and the prosecution is required to prove that the defendant was personally aware of a substantial risk of the death of a worker or another person happening, called industrial manslaughter in the present context.¹¹⁵ To clarify, the doctrine of transfer of *mens rea* (malice)¹¹⁶ applies when the defendant was reckless about one worker's serious harm, but eventually and albeit lamentably ended up killing another worker. The subjectivity in the test is fortified by the further onus to prove that the defendant actually knew that it was unjustified to take the risk of causing death (result), given the circumstances surrounding the event. Any subjective *men rea* element is difficult to be made out, unless the defendant pleads guilty voluntarily. This is so because no defendants have any obligation to incriminate themselves, rather remaining silent,¹¹⁷ or outright denial of any wrongdoing or the claim of innocence is a legal right, regardless of the facts.¹¹⁸ In Australia, the right to remain silent is recognized by all courts at state and federal levels as a fundamental common law right.¹¹⁹ A general principle of criminal law is that a person is innocent until proven guilty,¹²⁰ and the burden is on the state to prove the accused's guilt.¹²¹ Hence the recklessness fault element effectively favors defendants. This favor is arguably intensified by the additional requirement that the defendant truly knew that taking of the risk was unjustified given the relevant circumstance. The defendant thus has a choice to claim without any legal burden that he/she was unable to properly judge the

115. Read section 20 of the ACT-CC2002 in combination with previous sections 49C and 49D of the ACT-CA1900.

116. See Shachar Eldar, *The Limits of Transferred Malice*, 32(4) OXF. J. LEG. STUD. 633, 633–58 (2012).

117. See JEREMY GANS, CRIMINAL PROCESS AND HUMAN RIGHTS 204 (2011); Janet Ainsworth, *The Meaning of Silence in the Right to Remain Silent*, THE OXFORD HANDBOOK OF LANGUAGE AND LAW 287–98 (Lawrence M. Solan & Peter M. Tiersma eds., 2012).

118. See *RPS v. The Queen* (2000) 199 CLR 620, 630 (Austl.); *Jones v. R.* [2005] NSWCCA 443 (Austl.); *Sanchez v. R.* (2009) 196 A Crim. R. 472 ¶¶ 47–52 (Austl.).

119. Adam Guest, *Do You Have the Right to Remain Silent in Australia?* (Feb. 14, 2022), <https://guestlawyers.com.au/do-you-have-the-right-to-remain-silent-in-australia/> [<https://perma.cc/S8G4-56CD>] (last visited Jan. 3, 2023).

120. *Momcilovic v. The Queen* (2011) 245 CLR 1 (Austl.).

121. *CB v. Director of Public Prosecutions (NSW)*, [2014] NSWCA 134 at [45] (Austl.).

circumstance leading to an inadvertent misjudgement, which may result in acquittal of a true offender.

The remainder of the statutory interpretation of recklessness, being subsections (3) and (4) of section 20 of the ACT-CC2002 ascertains that the determination of whether risk-taking is unjustifiable is a question of fact, meaning that the jury as the trier of facts will determine the justifiability of defendant's judgment to take the risk. This is an appreciable clarification in that the jury is comprised of ordinary members of the community where the offense has been committed. Further guidance is included in section 20(4) which provides for evidentiary purposes that the defendant's recklessness can be established by proving his/her intention, knowledge or recklessness. However, this may not be very useful, given that all are subjective fault elements, and therefore are harder to prove by the prosecution.

*B. Recklessness as the Mens Rea of Industrial Manslaughter—
Corporate Defendants*

Corporations cannot do anything without their human agents. Like the physical element, their mental elements are also to be derived from humans. As regards corporate "recklessness," section 51 of the ACT-CC2002 provides details of how to prove corporate *mens rea* other than negligence. It relies effectively on a deeming provision. It provides that to prove the existence of corporate intention, knowledge or recklessness as *mens rea* of an offense, the element is taken to exist if the corporation expressly, tacitly or impliedly authorizes or permits the commission of the offense. It also directs the ways in which this authorization or permission may be established referring to proof of certain facts. As listed in section 51(2), these facts include, if proved that: (a) the board of directors of the defendant corporation intentionally, knowingly or recklessly engaged in the conduct or expressly, tacitly or impliedly authorised or permitted the commission of the offense; or (b) a high managerial agent of the corporate defendant intentionally, knowingly or recklessly engaged in the conduct or expressly, tacitly or impliedly authorised or permitted the commission of the offense; or (c) a corporate culture existed within the corporations that directed, encouraged, tolerated or led to noncompliance with the law which has been flouted; or finally, (d) the artificial person failed to create and maintain a corporate culture requiring compliance with the law that has been violated.¹²² These factual scenarios include both actions and inactions of the corporation for which the entity can be held liable, whereas recklessness of individuals can be proved by actions alone while inactions will come under

122. *Criminal Code 2002* (ACT) s 51(2) (Austl.).

negligence. These deeming provisions will certainly help avoid the common law requirement of the organic theory.

Section 51(3) of the ACT-CC2002 exempts a corporation from liability if it is grounded on the above subsection (2)(b) (high managerial agent of the corporation) where it is proved that it exercised due or appropriate diligence to prevent the conduct, or the authorization or permission to breach the law. This exemption is acceptable given the proven attempt of the entity to avoid the contravention of law.

Section 51(4) adds explanations as to the factors linked to the grounds (c)¹²³ and (d)¹²⁴ of section 51(2): that consideration be given whether a high managerial agent gave authority to commit an offense of the same or a similar character; and the individuals (employee, agent or officer) of the corporation who committed the offense reasonably believed, or had a reasonable expectation, that a high managerial agent of the corporation would have authorised or permitted the commission of the offense. Both of these two factors highlight the role of the high managerial agents who are considered to be the mind and will of the company.¹²⁵ It means that corporations can be held liable where high managerial agents played a contributory role in committing the offense. The beauty of the phrase “high managerial agent” lies in its focus on the responsibility of an employee rather than the corporate executive position held, as opposed to the common law organic theory which highlights the high executive position. This is so because, the meaning of the expression “high managerial agent” seems to be helpful for the proof of corporate guilt, as for the purposes of section 51 this denotes “an employee, agent or officer of the corporation whose conduct may fairly be assumed to represent the corporation’s policy because of the level of responsibility of his or her duties.” The justification of these explanations can be premised on paying due regard to the fact that the efficacy of this law is likely to be lost to a great extent if a corporation is held liable for manslaughter for the fault of any employee irrespective of managerial authority. If any individual employee’s fault is attributed to the corporation, it may open the floodgates for litigation and convictions of manslaughter affecting the productive performance of the corporate sector, discouraging its growth and eventually diminishing the value of separate personality.

Corporate culture can be even more reasonably applied to convict corporations. Section 51(5) clarifies that subsection (2) applies to exclusively corporate recklessness, not to any other fault elements. Finally section 51(6) seeks to define “corporate culture” and the “high managerial agent.” As defined in subsection (6), “corporate culture”

123. Proving the existence of a corporate culture to prove *mens rea*.

124. Proving corporate failure to create and maintain a corporate culture in favor of workplace safety.

125. Tesco Supermarkets Ltd. v. Nattrass (1971) 2 All ER 127 (UK).

connotes “an attitude, policy, rule, course of conduct or practice existing within the corporation generally or in the part of the corporation where the relevant conduct happens.” The meaning is quite broad and the culture can be conveniently proved with reference to the policies and practices of a defendant corporation, even the practice is confined to a certain part of business where the crime took place. The adoption of this principle clearly deviates from the organic theory, paving the way for corporate conviction. Overall, the provisions contained in section 51 are arguably helpful for corporate conviction, as opposed to the reliance on the identification theory as alluded to earlier. It is pertinent to note that the ACT-CC2002 derived its corporate liability provisions from the *Criminal Code Act 1995* (Cth), which is a national guide for Australia (CCA1995).¹²⁶

Corporate culture as evidence of corporate *mens rea* element is a comparatively new consideration. The communitarian theory of corporations sturdily supports the view of criminal liability of corporations as a social institution with a pronounced legal personality.¹²⁷ Hence, corporate culture can be viewed as a social or communitarian aspect of corporations. It is widely accepted that corporate culture is presently the most compelling approach to hold corporations criminally liable.¹²⁸ This view is further promoted by Cavanagh who asserts that corporate culture is “the most suitable model for imposing liability upon a corporation” as applied in Australia.¹²⁹ Likewise, Pieth went even further in labelling the Australian law about corporate culture as the best model in the common law world.¹³⁰ Appreciably, the federal law of Australia regarding organizational fault has drawn attention of many countries.¹³¹

Finally, in view of the preceding discussion, recklessness may be difficult to prove against individuals because of subjective test, but it

126. Section 12.3(6) of the *Criminal Code Act 1995* (Cth) defines corporate culture: “Corporate culture, for a corporation, means an attitude, policy, rule, course of conduct or practice existing within the corporation generally or in the part of the corporation where the relevant conduct happens.”

127. See, e.g., Julian Velasco, *The Fundamental Rights of the Shareholder*, 40(2) U.C. DAVIS L. REV. 407, 455 (2006); Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1374–76 (2009); Miriam H. Baer, *Organizational Liability and the Tension between Corporate and Criminal Law*, 19(1) J.L. & POL’Y 1, 4 (2010).

128. Olivia Dixon, *Corporate Criminal Liability: The Influence of Corporate Culture*, INTEGRITY, RISK AND ACCOUNTABILITY IN CAPITAL MARKETS: REGULATING CULTURE 251–68 (Justin O’Brien & George Gilligan eds., 2013).

129. Neil Cavanagh, *Corporate Criminal Liability: An Assessment of the Models of Fault*, 75(5) J. CRIM. LAW 414, 416 (2011).

130. THE OECD CONVENTION ON BRIBERY: A COMMENTARY (Mark Pieth, Lucinda A. Low & Peter J. Cullen eds., 2007), <https://www.oecd.org/daf/anti-bribery/39200754.pdf> [https://perma.cc/3DD9-KCFP] (last visited Jan. 23, 2023).

131. *Id.*

would be convenient for the prosecution to establish recklessness against corporations. When recklessness cannot be proved against individuals, gross negligence can be argued as a statutory alternative fault element. Hence the provisions of recklessness rests in the positive territory.

Section 34A(f) of the ACT-Act retains recklessness as a fault element alongside negligence, without having to provide any specific meaning. Therefore, its meaning discussed above applies to the section 34A manslaughter offense in the ACT. The other two jurisdictions exclusively rely on negligence as *mens rea*.

C. Negligence as the *Mens Rea* of Industrial Manslaughter—Individual Defendants

The ACT-CC2002 had adopted the meaning of negligence of a natural person from the CCA1995.¹³² Section 21 of the ACT-CC2002 elucidates the meaning of “negligence” as *mens rea* of a natural person by stating that a person is negligent concerning a conduct element of an offense “if the person’s conduct merits criminal punishment for the offense because it involves—(a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and (b) such a high risk that the physical element exists or will exist.”¹³³ The first limb¹³⁴ about the standard of conduct is originally borrowed from common law as discussed shortly below, and thereby it has assumed a recognized formulation of the objective duty of care. However, the second limb,¹³⁵ combining a high risk and the existence of a conduct element, is unclear. Instead of referring to the risk of the existence of an unspecified high risk in terms of conduct, it should have included the high risk of certain consequences being causing death, or grievous bodily harm (GBH), as interpreted by the judiciary for common law manslaughter.¹³⁶ Moreover, it does not mention anything about the sole ultimate consequence of death. Perceptively, section 21 of the ACT-CC2002 carries a generic interpretation, but it should be noted that negligence usually breeds civil liability, whilst it is considered *mens rea* only when the consequence is death caused by gross negligence¹³⁷ as a substantial and operating cause of the death. Hence, the result of the physical element where negligence

132. *Criminal Code Act 1995* (Cth) pt 2.2, s 5.5 (Austl.) (“The elements of an offense.”).

133. *Criminal Code 2002* (ACT) s 21 (Austl.).

134. *Id.* s 21(a).

135. *Id.* s 21(b).

136. *Nydam v. R* (1977) 50 VR 430, 445 (Austl.); *The Queen v. Lavender* (2005) 222 CLR ¶¶ 67, 17, 60, 72, 136 (Austl.); *Burns v. The Queen* (2012) 246 CLR 334 ¶ 19 (Austl.). In contrast, the U.K. common law requires high risk death only as in *R v. Rose* [2018] EWCA (Crim) 1168 (appeal taken from Eng.); *R v. Zaman* [2017] EWCA (Crim) 1783, 24 (appeal taken from Eng.).

137. J. R. Spencer & Marie-Aimée Brajeux, *Criminal Liability for Negligence—A Lesson from Across the Channel?*, 59 INT. COMP. LAW Q. 1, 3 (2010).

is *mens rea* warrants being categorically mentioned. This is arguably a flaw in section 21. This needs to be addressed by the legislature.

For the proper application of negligence as *mens rea*, the courts are expected to follow the common law principles. Although negligence originally gained prominence in a civil tort case as an alternative remedy in the absence of privity of contract between contending parties, invented by the U.K. House of Lords,¹³⁸ it has been getting increasingly popular as a fault element in both common law and statutory law manslaughter regimes. Although this Article is focused on the industrial manslaughter under legislation, judicial interpretations of criminal negligence still need to be explored in order to clarify the statutory meanings of criminal negligence.

The inception of common law of negligence dates back to the late nineteenth century when Brett M.R. in *Heaven v. Pender* pronounced in *obiter dicta* that

whenever one person is by circumstances placed in such a position with regard to another that anyone of ordinary sense who did think would at once recognize that, if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.¹³⁹

However, it has to be acknowledged that the modern law of negligence is ingrained in the common law “neighbor principle” articulated by Lord Atkin in *Donoghue v. Stevenson* in 1932.¹⁴⁰ His oft-quoted principle spells out:

The rule that you are to love your neighbor becomes in law, you must not injure your neighbor; and the lawyer’s question, Who is my neighbor? . . . You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor. Who, then, in law is my neighbor? . . . [P]ersons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.¹⁴¹

The neighbor principle applies to manslaughter offenses alongside its pertinence to civil suits. The endorsement of the application of the neighbor principle to manslaughter or criminal negligence came from its

138. *Donoghue v. Stevenson* [1932] AC (HL) 562 (appeal taken from Scot.).

139. *Heaven v. Pender* (1883) 11 QB 503 (UK).

140. *Stevenson*, AC (HL) at [562].

141. *Id.* at 580.

creating authority itself. The House of Lords in *R v. Adomako* affirmed that the ordinary principles of the law of negligence governing civil disputes apply to MCN in the determination of the existence of duty and the breach thereof.¹⁴² Accordingly, the principle has been utilized in the U.K. in many criminal cases.¹⁴³ Consistently, for example, the HCA in *Burns v. R*, involving a negligent killing, applied the neighbor principle.¹⁴⁴ The principle has thus become part of the common law of Australia, and is applied by its state and territory jurisdictions.¹⁴⁵ Highlighting the nature or level of negligence needed for criminal charges, Simpson JA of the NSW Court of Criminal Appeal in *R v. Moore* asserts that “[t]he offense of manslaughter by gross criminal negligence is derived from the tort of negligence, with an additional important element, which is grossness or wicked in negligence.”¹⁴⁶ The NSW Court of Criminal Appeal has applied and analyzed the elements of corporate common law negligent manslaughter case of *Cittadini v. R* in conformity with the directions of the HCA.¹⁴⁷ Based on this case, the four elements of common law MCN are as follows:

1. *Existence of duty of care*: That the accused owed a duty of care to the deceased.

2. *Breach of duty of care by negligent conduct*: That the accused was negligent in that, he/she breached the duty of care by his/her act(s) or omission(s), meaning he/she did something that a reasonable person in his/her position would not have done or he/she failed to do something that a reasonable person in his/her position would have done.

3. *Grossly or wickedly negligent conduct*: That the breach of duty fell so far short of the standard of care that a reasonable person in his/her position would have exercised, and it involved such a risk of death or serious bodily harm as to constitute, “gross” or “wicked” negligence and be treated as criminal conduct.

4. *Causation*: The act or omission of the accused caused the death of the deceased.¹⁴⁸

It means the negligence should be gross, the risk of death or serious physical harm should be in the elements, and an objective test applies in

142. *R v. Adomako* (1995) 1 HL 171–72 (appeal taken from EWCA (Civ)) (UK).

143. *E.g.*, *Mitchell v. Glasgow City Council* [2009] 3 All ER 205, 893 (Scot.); *R v. Miller* (1983) 2 HL 161, 179 (UK); *R v. Evans* [2009] EWCA (Crim) 650 (UK).

144. *Burns v. The Queen* (2012) 246 CLR 334 (Austl.); *see also* *The Queen v. Lavender* (2005) 222 CLR 67 (Austl.).

145. *E.g.*, *R v. Moore* [2015] NSWCCA 316 (Austl.); *Nydam v. R* (1977) 50 VR 430 (Austl.).

146. *R v. Moore* [2015] NSWCCA 316, 142 (Austl.).

147. *Cittadini v. R* [2009] NSWCCA 302 ¶ 29 (Austl.).

148. *Id.*

determining corporate criminal negligence for industrial manslaughter. There is no judicial interpretation suggesting to measure the standard of negligence set by the common law by applying a subjective test.¹⁴⁹

The above-stated elements of MCN apply to both natural and artificial persons for industrial manslaughter in common law jurisdictions unless legislation provides otherwise. Consistently, section 12.4 (corporate negligence) of the CCA1995 referring to section 5.5 (natural person's negligence) overtly confirms that the same test applies to statutory criminal negligence. Likewise, an additional note attached to section 52 directs that the test of negligence for a corporation is the same as set out in section 21. This maintains the need for consideration of judicial interpretations of this *mens rea* in further detail in order to have adequate clarity.

Regarding the above stated four elements of MCN, it should be noted that the English Court of Criminal Appeal in *R v. Bateman* involving MCN¹⁵⁰ set out a similar set of four requirements as above, which have been reinforced by the House of Lords in *R v. Adomako*.¹⁵¹ However, recently the U.K. Court of Appeal (Criminal Division) in *R v. Rose*,¹⁵² *R v. Zaman*¹⁵³ and *R v. Kuddus*¹⁵⁴ ascertained five elements. These are: (i) the existence of a duty of care owed by the defendant to the victim; (ii) a breach of that duty by the defendant; (iii) reasonable foreseeability that the breach caused an obvious and serious risk of death; (iv) gross negligence on the part of the defendant; and (v) a causal link between the defendant's breach of the duty and victim's death.¹⁵⁵

There is no fundamental difference between the two sets of elements, because points (ii) and (iii) in the U.K. are subsumed in (ii) in the aforesaid NSW articulation. More recently, the U.K. Court of Appeal in *R v. Broughton* split those five into six elements by segregating the above U.K. element (iii) into two—first, a serious and obvious risk of death at the time of the breach of duty making it as element (iii), and second, reasonable foreseeability that the breach created an obvious and serious risk of death element separating as element (iv). This has been argued to be nothing more than a cosmetic rearrangement of the prevailing five elements.¹⁵⁶

149. *Nydam v. R* (1977) 50 VR 430, 445 (Austl.). The HCA further approved the application of the objective test in *Wilson v. R* (1992) 174 CLR 313, 341 (Austl.).

150. *R v. Bateman* [1925] 19 (HL) Crim. App. ¶ 8 (UK).

151. (1995) 1 AC (HL) 171, [9] (UK).

152. [2018] QB 328 at [41] (Sir Brian Leveson P) (UK).

153. [2017] EWCA Crim 1783 at [24] (Hickinbottom LJ) (UK).

154. [2019] EWCA Crim 837 (UK).

155. See Tony Storey, *Causing Death by Failing to Seek Medical Help*, 85(1) J. CRIM. L. 62, 63–64 (2021); G. R. Sullivan & A. P. Simester, *Omissions, Duties, Causation and Time*, 137 LAW Q. REV. 358, 359–60 (2021).

156. Storey, *supra* note 155, at 64.

The discussion of the common law elements presented above digs out the weaknesses in section 21 of the ACT-CC2002 which needs to be enriched following the common law interpretation of criminal negligence, particularly the risk factor. This is because the consequence is the pivot of criminalizing negligence. However, a sharp distinction is evident between the requirements in Australia and their U.K. counterparts in that the former make the scope of the industrial manslaughter law wider by adding the reasonable foreseeability of death or serious bodily harm. As explained in the dictionary appended to the ACT-CC2002, “serious harm” refers to “any harm (including the cumulative effect of more than one harm) that—(a) endangers, or is likely to endanger, human life; or (b) is, or is likely to be, significant and longstanding.” The U.K. common law is restricted to only the foreseeability of death of the victim. The statutory meanings of negligence of individual offenders in Queensland and the NT is shown after the common law corporate negligence, as below.

D. Negligence as the Mens Rea of Industrial Manslaughter—Corporate Defendants

The statutory law obtains the concept from common law concerning corporate negligence, however, the latter’s efficacy is frustrating because of the directing mind and will theory of corporations,¹⁵⁷ which is extensively argued to be an obstacle to corporate conviction.¹⁵⁸ Statutory laws, therefore, intend to bypass the common law organic theory to facilitate corporate conviction. Moreover, the application of the concepts of imputation of conduct and fault elements of a crime from humans to corporations is generally held to be enigmatic.¹⁵⁹ This Article puts the attribution complexities aside because legislation offers guidance independently of common law on such imputation, which is to be followed in the present pursuit as it is concerned with statutory manslaughter. However, the judicial interpretations of corporate criminal negligence still needs to be pondered for the application of statutory guidance and differentiation between the two sources.

As is the case with individual negligence, the ACT-CC2002 replicates the corporate negligence provisions from the CCA1995.¹⁶⁰ The ACT-CC2002, as regards the criminal negligence of corporations, in section

157. See S. M. Solaiman, *Legal Personality of Robots, Corporations, Idols and Chimpanzees: A Quest for Legitimacy*, 25(2) ARTIF. INTELL. L. 155 (2017); S. M. Solaiman, *Laws Governing Manslaughter by Food Safety Crimes in the United Kingdom, Australia, Bangladesh and India: A Critical Review*, 47(1) N.C. J. INT’L L. 75 (2022).

158. See Rebecca Rose, *Corporate Criminal Liability: A Paradox of Hope*, 14 WAI. L. REV. 52, 62–65 (2006).

159. Cavanagh, *supra* note 129, at 414.

160. *Criminal Code Act 1995* (Cth) pt. 2.5, s 12.4 (Austl.).

52(2) provides that the “fault element of negligence may exist for the corporation in relation to the physical element if the corporation’s conduct is negligent when viewed as a whole (that is, by aggregating the conduct of a number of its employees, agents or officers).” Subsection (1) of section 52 clarifies that this section applies where a corporation has a conduct element of an offense in the absence of negligence on the part of any individual employee, agent or officer of a corporation. It distinctly embraces the “aggregate theory” from the CCA1995 to be applied to determine corporate negligence in sharp contrast to the common law principles.

These statutory corporate criminal negligence provisions aim to circumvent the common law organic theory, which requires proof of negligence of a senior executive who acts as, rather than for, the corporation. In other words, executives are known as the embodiment of the company.¹⁶¹ The identification theory is founded on Lord Denning’s comment by analogy in *HL Bolton (Engineering) Co. Ltd. v. TJ Graham & Sons Ltd.* in 1957 that:

A company may in many ways be likened to a human body. It has a brain and nerve center which controls what it does. It also has hands which hold the tools and act in accordance with directions from the center. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.¹⁶²

Hence, the determination of the mind and will of a large company becomes exceedingly difficult when the organic theory is applied.¹⁶³ Consequently, this theory made conviction of large corporations for manslaughter “almost impossible.”¹⁶⁴ The refusal of the judiciary to apply the aggregate theory,¹⁶⁵ meaning considering the actions of a

161. *Tesco Supermarkets Ltd. v. Natrass* (1971) 2 All ER 127 (UK).

162. (1957) 1 QB 159 at 172.

163. *See Natrass*, 2 All ER at [127] (UK).

164. The House of Commons Home Affairs and Work and Pensions Committees, UK, DRAFT CORPORATE MANSLAUGHTER BILL, *First Joint Report of Session 2005-2006*, Volume 1: Report, HC 540-I (2005) at 3.

165. The aggregate, or associational, theory of the corporation posits that corporations are nothing more than products of both contractual agreements between the government and natural persons and agreements between individual natural persons to conduct a joint business’s, Ryne T. Duffy, *Corporate Rights and Moral Theory: The Need for a Coherent Theoretical Justification of Corporate Rights*, 12(2) WASH. U. JUR. REV. 267, 283 (2020). For details of corporate theories,

number of individuals within a corporate structure, striving to establish corporation's liability, deepened the problem.¹⁶⁶ That situation discouraged prosecution of manslaughter and led to seeking remedies under the WHS legislation for less serious wrongs by ignoring the manslaughter charges in the U.K. prior to enacting the corporate manslaughter legislation.¹⁶⁷ Therefore, pieces of legislation discussed above have adopted the aggregate theory of corporations by divorcing from the common law restrictive organic theory. This legislative overhaul is expected to be helpful for corporate conviction. The following section considers statutory recklessness and negligence under the WHS legislation in light of the afore-discussed criminal law and common law principles.

E. Viewing Recklessness and Negligence Contained in the WHS Legislation Through the Prism of Criminal Codes and Common Law

The foregoing discussion of recklessness and negligence *mens rea* elements provides an overview of the original industrial manslaughter law of Australia and the current common law, which will be instrumental in examining those elements presently contained in the WHS legislation of the ACT, Queensland and the NT.

The ACT-Act retains both recklessness and negligence,¹⁶⁸ and the NT-Act follows that lead,¹⁶⁹ however, the Qld-Act adopts only negligence. This disparity goes against the avowed consistency across the jurisdictions in Australia. Apart from this difference, they additionally differ from one another with regard to the statutory meanings of the fault elements. Also, the adoption of the old law in the current WHS legislation is one thing, and its interpretation is another. So the meanings of the *mens rea* elements incorporated into the WHS laws need to be analyzed in order to determine their usefulness and efficacy.

The ACT-Act states that "the person is reckless or negligent about causing the death of the worker or other person by the conduct."¹⁷⁰ As suggested in section 12B of the ACT-Act, the ACT-CC2002 applies to all offenses against the ACT-Act, and it particularly mentions the

see Susanna Kim Ripken, *Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle*, 15(1) *FORDHAM J. CORP. & FIN. L.* 97, 106–12 (2009); Jess M. Krannich, *The Corporate 'Person': A New Analytical Approach to A Flawed Method of Constitutional Interpretation*, 37(1) *LOY. U. CHI. L.J.* 37, 61, 63 (2005).

166. A-G's Reference (No 2 of 1999) [2000] QB 796 (UK); Victoria Roper, *The Corporate Manslaughter and Corporate Homicide Act 2007 - A 10-Year Review*, 82(1) *J. CRIM. L.* 48, 52 (2018).

167. C. M. V. Clarkson, *Corporate Manslaughter: Yet More Government Proposals*, 9 *CRIM. L. REV.* 677, 678 (2005).

168. *Work Health and Safety Act 2011* (ACT) s 34A(1)(f) (Austl.).

169. *Work Health and Safety Act 2011* (NT) 34B(1)(e) (Austl.).

170. *Work Health and Safety Act 2011* (ACT) s 34A(1)(f) (Austl.).

applicability to the meaning of “recklessness.” As alluded to earlier, section 20 of the ACT-CC2002 contains the meaning of “recklessness” for individuals, and its limitation has been discussed earlier in the context of the old ACT law of corporate manslaughter, which remains equally valid for the present ACT-Act.

The NT-Act explains recklessness as *mens rea* of “persons” in sections 31, 245(3) and 251, without having to mention anything about PCBU or corporations. Section 31, which is identical to section 31 of the ACT-Act, provides that a person having a health and safety duty commits an offense¹⁷¹—if the person engages in conduct without reasonable excuse that exposes an individual, to whom that duty is owed, to a risk of death or serious injury or illness; and the person is reckless as to the risk to an individual of death or serious injury or illness. This does not seem to apply to industrial manslaughter which requires “causing” death,¹⁷² whereas section 31 applies to the allegation of “exposing” an individual to the risk of death or injury or illness. Also section 245(3) and section 251(2) reference recklessness, but they do not provide any guidance to prove recklessness as they state “[i]f an offense under this Act requires proof of knowledge, intention or recklessness, it is sufficient . . . for that offense to prove that the person referred to . . . had the relevant knowledge, intention or recklessness.”¹⁷³ Section 12A of the NT-Act declares that Part IIAA of the *Criminal Code Act 1983* (NT-CCA1983) applies to an offense against the NT-Act. This Part IIAA contains provisions for corporate criminal responsibility (sections 43BK–43BN). As regards recklessness, section 43BK of the NT-CCA1983 is equivalent to section 51 of the ACT-CC2002 with a single difference—section 51 prescribes a deeming provision that corporate subjective fault elements (intention, knowledge, recklessness) “is taken to exist” if it is proved that the corporation expressly, tacitly or impliedly authorised or permitted the commission of the offense. Section 43BM of the NT-CCA1983 enunciates that these mental elements “must be attributed to” a corporate body. The NT directly follows the words of the federal legislation, CCA-1995, by using the emphatic expression being “must be attributed.”¹⁷⁴ Though both are positive, the NT law is even stronger in its wording, and thus better for the prosecution to prove the critical element of corporate *mens rea*. The recklessness can be proved by corporate culture as is the case with the ACT.¹⁷⁵ The definitions of “corporate culture” and “high

171. The offense refers to “Reckless Conduct- Category 1 offense.” Sections 31–33 of the NT-Act describe offenses of three categories, only section 31 requires recklessness.

172. *Work Health and Safety Act 2011* (NT) s 34B(1) (Austl.).

173. The ACT-Act has identical provisions in sections 245(3) and 251(2). They are equally unhelpful to prove recklessness.

174. *Criminal Code Act 1995* (Cth) div. 12, pt. 2.5, s 12.3(1) (Austl.).

175. *Criminal Code Act 1983* (NT) s 43BM(2) (Austl.).

managerial agents” in the NT are also identical to that of the ACT and the CCA1995. In accordance with these statutory interpretations, the recklessness of a corporation can be proven by both actions and inactions resulting in failure to create and maintain corporate culture requiring compliance with law. As a whole, the discussion of corporate recklessness presented earlier with respect to the ACT, equally applies to the NT with a positive note that these are facilitative to corporate conviction.

Unlike the other two, the Qld-Act does not recognize “recklessness” as *mens rea*. Given the benefits of using corporate culture in proving this mental element, it is recommended that Queensland adopts this in the same way their counterparts have done in line with the federal guidance provided by the CCA1995.

As regards to “negligence,” all three of the jurisdictions have commonly incorporated this objective mental element.¹⁷⁶ Without repeating the previous discussions, it can be noted that that criminal negligence as *mens rea* against natural persons can be established by applying an objective test as explained in this Article’s preceding Section 5(C), subtitled “negligence as the *mens rea* of industrial manslaughter—individual defendants.” Complexity arises in proving corporate negligence.

Section 52 of the ACT-CC2002 paves the way for proving corporate negligence by employing the aggregate theory, and it applies when negligence of no individual employee, agent or officer of a corporation can be proved. Section 52(2) provides that “negligence may exist for the corporation in relation to the physical element if the corporation’s conduct is negligent when viewed as a whole (that is, by aggregating the conduct of a number of its employees, agents or officers).” So the aggregate theory and an objective test apply to corporations as devised in section 21 of the ACT-Act.¹⁷⁷

Section 43BN of the NT-CCA1983 sets out the rules regarding corporate negligence, which is worded differently from its ACT counterpart, though the meaning remains similar in that the aggregate theory has been accepted to be applied in the absence of proven negligence of any employee, agent or officer of the corporate body.¹⁷⁸ Both the ACT and NT have adopted the aggregation provisions from the CCA1995.¹⁷⁹ However, going beyond the CCA1995, section 43BN of the NT-CCA1983 adds subsection (4), which declares that corporate

176. *Work Health and Safety Act 2011* (ACT) s 34A(1)(f) (Austl.); *Work Health and Safety Act 2011* (Qld) ss 34C(1)(ii), 34D(1)(c) (Austl.); *Work Health and Safety Act 2011* (NT), s 34B(1)(e) (Austl.).

177. As noted in section 52 of the ACT-Act.

178. *Criminal Code Act 1983* (NT) s 43BN(2)–(3) (Austl.).

179. *Criminal Code Act 1995* (Cth) div. 12, pt. 2.5, s 12.4 (Austl.).

negligence can be evidenced by the fact that the proscribed conduct was substantially attributable to: “(a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.”¹⁸⁰ This supplementary clause may work in either way. It may be helpful if administrative or managerial weaknesses can be easily established; and conversely, it may inhibit proving corporate negligence if such weaknesses are not easily detectable. This clause is absent from both the ACT-CC2002 and CCA1995. The enforcement of the law would arguably be more convenient for the prosecution without this additional provision of proof of corporate negligence. Being different from the other two, Queensland does not have any specific guidance regarding proof of negligence of the PCBU or individuals. It does not even specify the degree of negligence required. This implies that Queensland is reliant on the common law for the interpretation of negligence, its sole *mens rea*.¹⁸¹ Whilst it should be fine to follow the common law principles of gross negligence and the pertinent objective test as analyzed earlier, the proof of corporate negligence requires a statutory rule overriding the common law identification doctrine. It is therefore recommended that Queensland incorporate statutory provisions from the other two jurisdictions which have adopted the interpretation from the CCA1995¹⁸² to simplify proving corporate guilt and enhancing its efficacy.

VII. CONCLUSIONS

The foregoing analysis of *actus reus* and *mens rea* of industrial manslaughter along with the critical terms attached thereto in the statutory laws of the ACT, Queensland and NT reveals both similarities and dissimilarities amongst them in relation to statutory language, and sometimes in consideration of core factors, such as the consequence of the offense and mental elements. These become more evident when the elements are analyzed in light of the relevant case law and their statutory meanings provided. The propulsion enacting the statutes at hand was to avoid the application of the common law organic theory in the determination of corporate guilt. This has been attempted in discernible ways by introducing separate liability provisions for officers and incorporating the corporate culture and aggregate theories for companies. However, certain flaws exist in all of the three pieces of legislation that are sometimes common in all of them and other times specific to one or two. Below are the recommendations to address them in order to enhance

180. *Criminal Code Act 1983* (NT) s 43BN(4) (Austl.).

181. *Work Health and Safety Act 2011* (Qld) ss 34C(1), 34D(1) (Austl.).

182. *Criminal Code Act 1995* (Cth) div. 12, pt. 2.5, ss 12.3, 12.4 (Austl.).

the efficacy of these laws towards achieving their predominant objective of facilitating corporate conviction and workers' protection.

A. *Potential Defendants*

All of the three jurisdictions impose liability on both business entities and their certain officers as potential defendants of corporate manslaughter. The original provisions of the ACT-CA1900 had two separate sections for businesses and officers, whereas the current ACT-Act has combined them in a single section. Incorporated organizations with separate legal personality will face separate charges, whilst managerial executives of unincorporated businesses themselves will be held responsible for the commission of industrial manslaughter. Corporations and their defined executives are to be liable separately. These provisions sound mostly fine. However, two issues need to be clarified. First, the *actus reus* and associated other requirements need to be satisfied for officers are not clear in the ACT-Act. The Qld-Act can be followed in adding this clarification. Second, the NT-Act explicitly adds an extra requirement that their acts must be "intentional." This Article argues that this requirement will impose a huge burden on the prosecution and offer a safeguard to offenders. Voluntariness is a standard implied requirement which should be good enough to defend the innocent. Hence this requirement should be removed bringing the NT provision in parity with the other two laws.

B. *Physical Element of the Offense*

The erstwhile criminal law provisions of the ACT did not fully define conduct, rather it referred to the ACT-CC2002 for the definition. However, the ACT-CA1900 defined "omissions" in an appreciable manner. The ACT-Act does not directly define "conduct" as such although it adds a description of "engage in conduct" encompassing both actions and omissions. The meaning of "acts" can be taken from the ACT-CC2002, however, the ACT-Act should incorporate the definition of "omissions" from the repealed section 49B of the ACT-CA1900. This is because although section 16 of the ACT-2002 provides a general definition of "omissions," the old section 49B definition was carefully crafted specifically for industrial manslaughter, which justifies this recommendation for adoption. The Qld-Act simply mentions that "conduct means an act or omission to perform an act." Its NT counterpart describes conduct in the same way as the Queensland law does. The meaning of "omissions" is better captured in the old ACT law. As opposed to omissions, the "act component" of conduct is not well defined in the legislation. Therefore, a useful definition of "acts" can be articulated drawing on the earlier discussion presented referring to case

law and dictionary meanings. To add greater clarity to all three laws, the old ACT-CA1900 definition of “omissions” should be adopted by all.

C. Defendant’s Relevant Duty To Be Breached

The predecessor, the ACT-CA1900, did not define the duty that needs to be breached to commit the crime, it just mentioned that “conduct causes death.” However, the successor ACT-Act offers a fairly detailed definition of the relevant duty called “health and safety duty.” Its Queensland equivalent is identical to the ACT’s previous law. The NT-Act proffers the clearest definition of the duty amongst the three. Hence it is recommended that others follow the NT definition.

D. Breaching the Duty

A breach of the relevant duty is essentially required in both the ACT-Act and its NT counterpart. However, Queensland remains silent probably following the repealed ACT-CA1900 provisions. Breach is a pressing need, so a clear mention of this requirement is reasonably expected to facilitate conviction by precluding the unscrupulous defendant from arguing otherwise. Hence, Queensland should follow the other two.

E. Persons Who Can Be Victims

The ACT-CA1900 defined “workers” fairly broadly by including outworkers who will be working for the defendant outside of the main workplace on a contractual basis. Its successor, the ACT-Act provides a definition which is even more encompassing that includes volunteers and police officers. The Queensland law offers a very narrow definition protecting only workers who are physically present at the PCBU’s workplace. The NT definition is certainly wider than its Queensland equivalent but narrower than the ACT coverage. However, the NT protects any persons irrespective of their employment relations, who are not covered by the other two. The ACT and NT can mutually learn from each other, whilst Queensland should follow both of the other two.

F. Causation of Victim’s Death

It is crucial whether the defendant’s conduct was the sole cause, or just a cause, of the victim’s death. None of the three laws adequately explain this issue, however, some are better than others. The ACT-CA1900 provided no elucidation on this requirement, so its silence was a weakness. Its successor, the ACT-Act, simplifies the requirement by stating that the defendant’s conduct causes death if the conduct substantially contributes to the demise. Similarly, the Qld-Act requires the conduct to be a substantial cause, whilst the NT-Act is completely

silent on this. The NT law just mentions that “the conduct causes death” of the victim, which may mean the conduct shall be the sole cause. The defense may arguably claim so, in order to avoid liability in certain cases. For example, for a victim who might have some previous health condition contributing to his/her death, the defense may argue that the defendant’s conduct was not the sole cause, hence they are not liable. All three laws should be revisited with reference to the common law interpretations in respect of manslaughter that the defendant’s conduct should be an “operating and substantial cause,” which need not be a major cause, of the death but must be more than *de minimis*.¹⁸³ Such a flexible meaning will be helpful for conviction.

G. Test to Determine Causation

None of the selected laws provide any guidance on the appropriate test to be applied in determining whether the causation requirement is met. As discussed previously, an objective test is recommended to be adopted by all pursuant to the common law principle.¹⁸⁴ Statutory certainty of the applicability of this test will bring about predictability of outcome in prosecution by informing both parties of the judicial consideration of resolving their dispute beforehand. Such a stipulation will also help create deterrence, because an objective test is always instrumental in succeeding in trial compared to the application of a subjective view.

H. Recklessness of Individual as Mens Rea

The ACT-CA1900 adopted “recklessness” as *mens rea*. The ACT-Act retains this fault element and the NT follows suit. However, Queensland does not accept recklessness as *mens rea*. The WHS laws do not provide any guidance as to how this element can be made out. Pursuant to section 20 of the ACT-CC2002, however, a purely subjective test applies to prove that the defendant was personally aware of a substantial risk and nonetheless he/she took the risk unjustifiably. Similar guidance is contained in section 43AK of the NT-CCA1983. This subjectivity is also maintained by case law discussed previously. The test is, therefore, “subjective,” which makes the prosecution’s job harder. This is not all negative though. If the prosecution fails to prove recklessness, proof of negligence will suffice to convict. However, if recklessness can be proved, the prosecution can demand an enhanced minimum penalty because of the higher degree of culpability. Queensland may incorporate recklessness for the sake of consistency, which is a proclaimed objective of enacting the framework legislation by the federal parliament as a guide

183. R v. Hennigan (1971) 55 Cr. App. R 262, 265 (Lord Parker CJ) (UK).

184. Royall v. R (1991) 172 CLR 378, 412 (Deane and Dawson JJ) (Austl.); see also Ruddy, *supra* note 100, at 81–92.

for all Australian jurisdictions.¹⁸⁵ This objective is echoed in section 3 of the Qld-Act too.

I. Recklessness of Corporations

Both the ACT and NT laws adopt “recklessness” as a fault element for corporations as well, but Queensland stays away from it. Corporate recklessness can be proved in different ways, as prescribed in the CCA1995 and adopted by both the ACT-CC2002 and the NT-CCA1983. Of the various ways, the most convenient means seems to be reliance on the “corporate culture theory,” as alluded to earlier. The culture theory implicitly displaces the common law identification theory, easing the proof of corporate recklessness. Like the case against an individual, if recklessness can be proved, the prosecution can seek a greater penalty to reflect the higher level of corporate criminality. Queensland can follow suit, again to maintain uniformity.

J. Negligence of Individual Defendants

The original industrial manslaughter law of the ACT relied on the ACT-CC2002 for the meaning of “negligence” of an individual and accordingly, its current WHS legislation also accepts the same meaning. The statutory meaning is focused on the high risk of “the existence of a physical element,” whereas the common law principle considers “the high risk of consequences” that include death or serious bodily harm of another person. The statutory meaning is thus generally inconceivable at its best and inconsistent with the common law principle at its worst. There is no mention of consequence in the legislation, although only the end result of death makes certain negligence criminal in law. This inconsistency needs to be addressed so as to make the law more useful. A similarly flawed expression is provided by the NT-CCA1983, whilst the Qld-Act highlights the consequence of death, and relies on case law for the interpretation of negligence. The judicial interpretation of negligence in the present context of industrial manslaughter would provide more appropriate guidance than that provided by the criminal codes couched for all offenses with no particular reference to manslaughter. So the common law principles of negligence crafted for negligent manslaughter should be adopted by all selected WHS legislation specifically for this offense.

K. Proving Corporate Negligence

All three pieces of legislation have embraced the aggregate theory for proving corporate negligence from the CCA1995. The common law identification theory denies the aggregation of the negligent conduct of a

185. *Work Health and Safety Act 2011* (Cth) s 3 (Austl.).

number of employees, agents or officers of a defendant corporation. This demonstrates the legislators' commitment to holding corporations to account for criminal negligence, which is due to exalt the efficacy of law.

A person's right to life must be respected by all others equally, always and ubiquitously. Accordingly, workers are entitled to have this inalienable right respected by their employers while at work.

The common law created a stumbling block by the organic theory with respect to corporate conviction of industrial manslaughter. The pieces of legislation at issue have attempted to circumvent the common law theory in order to promote corporate conviction alongside their officers. However, perfection in drafting law can rarely be achieved given the changing nature of societal expectations and human limitations in anticipation. Besides, a legislature is typically composed of members with diverse views which are needed to be accommodated in making a law. Hence, flaws in laws generally persist and the WHS statutes in question are no exception.

Despite the presence of some imperfections, the legislative initiative to address the serious concern of industrial manslaughter is appreciable, and the current laws can be improved further by addressing the issues discussed above taking into consideration the suggestions furnished in this Article. These enactments are consistent with the protection of human rights and achievement of sustainable development in Australia. However, in addition to the selected jurisdictions in Australia, both the laws discussed and recommendations proffered can be regarded as guidance for other jurisdictions nationally and internationally having similar problems with workplace deaths.

A CRITICAL REVIEW OF THE ANTI-TREATY SHOPPING FEATURES OF THE INDO-TAIWAN BIT

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Abstract

As one of the very few *Bilateral Investment Treaties* (BITs) signed by India *post*-revision of Model BIT in 2015, the Indo-Taiwan BIT is remarkable in several respects, especially from an anti-treaty shopping point of view. Recognizing that “indirect investment” poses some of the major treaty shopping concerns, the BIT defined “indirect investment” and mandated that the disputing investor may submit a claim under the BIT only if certain mandatory waivers are filed along with the claim. Also, by granting conditional access to investor-state arbitration, the BIT prescribed several rigorous conditions in the form of waivers against parallel actions to deter investors from pursuing parallel or multiple proceedings, especially when they are considering investor-state dispute settlement as an effective option. Moreover, in addition to the provision for a stronger denial of benefits clause, the BIT also provides for a novel ground for denial of benefits i.e., an investment or investor that has been established or restructured with the primary purpose of gaining access to the dispute resolution mechanism. However, the same BIT, by providing for a loose definition of the term “investor,” chose not to lay down any criteria to determine the nationality of individuals. It did not recognize the test of dominant and effective nationality. It also did not incorporate any specific provision to exclude claims by investors who hold the nationality of the disputing party. In this connection, this Article critically analyses the Indo-Taiwan BIT regime and finally concludes that the BIT has great potential to effectively fight against treaty shopping.

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INTRODUCTION

In the absence of a global instrument governing the protection of foreign investment, *Bilateral Investment Treaties* (BITs) have remained the default form of legal protection of foreign investments.¹ Even though there were certain attempts to push for multilateralization of the existing international investment instruments through treaty negotiations, interpretation, and arbitral decisions, to date, the investment law discourse has remained largely bilateral.² A BIT, in essence, means that

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1. See Nicolette Butler & Surya Subedi, *Future of International Investment Regulation: Towards a World Investment Organization*, 64 NETH. INT’L L. REV. 43–72 (2017) (emphasis added).

2. *But see* Agreement between the United States of America, the United Mexican States, and Canada, art. 14.14, Nov. 30, 2018 [hereinafter USMCA], <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/14-Investment.pdf> [<https://perma.cc/GFY8-248H>] (does not contain any similar notification requirement); ASEAN Comprehensive Investment Agreement, Feb. 26, 2009, <https://agreement.asean.org/media/download/20140119035519.pdf> [<https://perma.cc/BN9-EJ4A>] [hereinafter ACIA]; Energy Charter Treaty, Dec. 17, 1994, 2080 U.N.T.S. 95.

investors of each contracting state are protected in the territory of the other contracting state. This implies that an investor of any other third state ordinarily cannot bring a dispute complaining of breaches of the terms of the treaty.³ It is a carefully negotiated arrangement between two states, and accordingly, it is applicable only with respect to those states.

However, this arrangement works within its scope only so long as the text of the treaty intends to achieve that result. In other words, if a BIT sets a lower threshold defining who constitutes an investor, then any other natural or juridical person, who does not actually hail from the relevant contracting state to the BIT, may acquire the desired nationality or citizenship and thereby be eligible to claim protection under the BIT. One of the most important problems with these practices is that while an investor of a non-contracting state unduly benefits from the BIT, investors within the BIT states are unable to demand the same treatment from the third-party state in the absence of a corresponding BIT with that state. This phenomenon of seeking *useful nationality* or a *home-country of convenience* for better investment protection is otherwise known as treaty-shopping in international investment law.

Hence, to ensure that the benefit of investment treaty protection is available only to the investors of the intended nationalities, it is necessary that BITs lay down strict criteria for determination of who is an investor. In practice, a BIT's definition of investor usually has two components: (a) one for natural or physical persons and (b) another for legal or juridical persons. In the case of natural persons, nationality is usually determined by the domestic law of the country whose nationality is being claimed.⁴ However, a mere enumeration of this requirement proves to be inadequate as it can always be met by acquisition of desired nationality

Some regional investment treaties or regional trade instrument with investment chapters are also in existence and operation. For example, agreements between the United States of America, United Mexican States, and Canada (USMCA) and the ASEAN Comprehensive Investment Agreement. In addition, the Energy Charter Treaty, a multilateral framework for energy cooperation, also establishes a framework for investment protection. Moreover, negotiations for several mega trade deals with investment provisions are also currently underway.

3. Though, generally, an investor of a third country may not complain of the violations of the provisions of the BIT, some of the current investment instruments, including the ICSID Convention provides for amicus briefs and third-party interventions. See A. Saravanan & S.R. Subramanian, *The Participation of Amicus Curiae in Investment Treaty Arbitration*, 5 J. CIV. & LEGAL SCI., 201 (2016). See also 2014 Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration, UNCITRAL, <https://uncitral.un.org/en/texts/arbitration/conventions/transparency> (last visited Sept. 30, 2023); UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, UNCITRAL, <https://uncitral.un.org/en/texts/arbitration/contractual/texts/transparency> (last visited Sept. 30, 2023).

4. The 2018 India-Belarus BIT lays down in Article 1.6(a), among others, that investor means "a natural person who is a national or citizen of a Party in accordance with its law." Permanent Court of Arbitration, *Belarus-India BIT 2018*, art. 1.6(a), <https://docs.pca-cpa.org/2016/01/Belarus-India-BIT-2018-2.pdf> [<https://perma.cc/2KDS-5LRC>].

(dual nationality) by the investors. To overcome this abuse, BITs should ideally require that the test of dominant and effective nationality is used to determine the applicable nationality of dual nationals. Moreover, a national of the host-state may also acquire (or happen to have) the (dual) nationality of the other contracting state (to the BIT) and claim his nationality as that of the other contracting state. However, such claims are considered highly unacceptable by the states as BITs offer legal protection only in respect of *foreign* investors.⁵ States wishing to avoid such claims stipulate in their BIT that a national of the state where investments are made is ineligible to claim investment protection under the BIT.⁶

On the other hand, identifying a legal person for purposes of investment protection is quite complex and complicated. The practice also broadly varies among states. BITs usually include the following criteria either singly or in combination: (a) place of incorporation; (b) seat or head office; or (c) ownership or control. In fact, the first two criteria are reflective of the different approaches followed by common law and continental law systems, respectively. While the former identifies the legal person with the state in which the company is formally incorporated, the latter specifies that the nationality of the company should be determined by the place where the seat or head office of the company is located. Out of these two criteria, though the seat requirement lays down a relatively deeper link with the state, both the requirements are (also) susceptible to abuse. In the case of “place of incorporation” criterion, the companies may just create a mailbox company with the postal address in the state in which they desire treaty protection but without any stronger involvement with the jurisdiction such as employment of persons or generation of turnover and still claim legal rights under the BIT. Similarly, in the case of “seat or head office” criterion also, the companies desiring to change the nationality can change the location of the head office to that state and thereby they can opt for legal protection under the intended BIT. However, states are not left without any solution, as they can always combine both the place of incorporation and the seat or head office criteria, probably with an additional requirement of “substantial business activities” to surely discourage treaty shopping.

5. See ICSID Convention, art. 25 (emphasis added), Oct. 14, 1966, 575 U.N.T.S. 160. See also Mathew Skinner et al., *Access and Advantage in Investor-State Arbitration: The Law and Practice of Treaty Shopping*, 3 J. WORLD ENERGY L. & BUS., 278 (2010) (on the question of whether Tokios was a foreign investor).

6. Treaty between the Republic of Belarus and the Republic of India on Investments, Belr.-Inida, art. 1.6(a), Sept. 24, 2018, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5724/download> [<https://perma.cc/DH5Y-KV9E>] [hereinafter Belarus-India BIT].

In addition to such broad textually indeterminate clauses which give rise to the occasion for treaty shopping, certain structural factors were also found to contribute to the phenomenon of treaty shopping. Jorun Baumgartner in her pioneering study on treaty shopping listed them as: (a) the proliferation of investment treaties and the absence of a multilateral investment agreement; (b) “a direct right of access of the foreign investor to international arbitration”; and (c) “the ease with which” [...] the legal entities may be brought into existence and the high fungibility of shareholding.⁷ Also, it is interesting to observe that while the first two factors provide the major attraction for the tendency to engage in treaty shopping, the last factor offers the method through which the treaty shopping can be accomplished. Yet, she considered the exponential increase of investment treaties as the most important factor for the increase in treaty shopping.⁸

Currently, the International Investment Agreements (IIA) universe consists of more than 3,300 agreements which include 2,871 BITs and 429 other IIAs such as Free Trade Agreements (FTA) with investment provisions and economic partnership agreements.⁹ While the vastness of IIA universe is not in doubt, only a total number of 2,346 of BITs and 313 treaties with investment provisions are in force.¹⁰ Out of the total number of investment treaties signed, a total of 243 IIAs have been terminated,¹¹ while another 480 IIAs have not been ratified for over 10 years even after their signature.¹² Moreover, if we calculate the total number of BITs signed by economies, a total of 130 economies have signed less than 40 BITs each and out of which 50 economies have signed only single digit BITs (1 to 9), while 50 economies have not signed any BIT.¹³ On the other hand, 7 countries have signed more than 100 BITs

7. JORUN BAUMGARTNER, *TREATY SHOPPING IN INTERNATIONAL INVESTMENT LAW* 21–22 (2016).

8. *Id.*

9. U.N. Conference on Trade and Development, *IIA Issues Note: International Investment Agreements, International Investment Treaty Regime and Climate Action*, Issue 3 (Sept. 2022), https://unctad.org/system/files/official-document/diaepcbinf2022d6_en.pdf [<https://perma.cc/TL7W-8VLW>].

10. Petra Dühaupt & Hansjörg Herr, *Catching Up in a Time of Constraints: Industrial Policy under World Trade Organization Rules, Free Trade Agreements and Bilateral Investment Agreements*, FRIEDRICH EBERT STIFTUNG, 22 (June 2020), <https://library.fes.de/pdf-files/bueros/singapur/16373.pdf> [<https://perma.cc/T7D2-RPPB>].

11. U.N. Conference on Trade and Development, *IIA Issues Note: International Investment Agreements, Recent Developments in International Investment Regime*, Issue 1, 9 (May 2018).

12. *Id.* at 6.

13. *IIAs by Economy*, UNCTAD, <https://investmentpolicy.unctad.org/international-investment-agreements/by-economy> [<https://perma.cc/M2KZ-EFPC>] (last visited Jan. 10, 2023) (basing on total BITs signed by each country, irrespective whether they are in force or not).

each.¹⁴ This indicates the possibility that every country may not have the investment treaty relationship with the other country with which it has an actual investment partnership. This fact may also force the investor to restructure his investment in such manner so as to bring it under the cover of investment protection.¹⁵

India is a bit of a late adopter of IIA instruments. Though it participated in the negotiations of the International Convention for Settlement of Investment Disputes (ICSID Convention)¹⁶ and was a vocal supporter of United Nations General Assembly Resolution 1803 (XVII) on permanent sovereignty over natural resources,¹⁷ it neither signed nor ratified the ICSID Convention. However, subsequent to the unveiling of its new economic policy of liberalization, privatization and globalization (LPG), it had started to build its IIA program to attract more foreign investment. It signed its first BIT with the United Kingdom in 1994. India currently has only 20 BITs and 9 treaties with investment provisions in force. It is pertinent to note that India had signed 84 BITs¹⁸ before the *en masse* termination of 58 BITs in July 2016, a consequence of the revision of its Model BIT in 2015.¹⁹ It was generally assumed that this backlash

14. *Id.*; see also Carrie E. Anderer, *Bilateral Investment Treaties and the EU Legal Order: Implications of the Lisbon Treaty*, 35 BROOK. J. INT'L L. 864 (2010).

15. See Wolfgang Alschner & Dmitry Skougarevskiy, *Mapping investment treaties.com: Uncovering the Secrets of the Investment Treaty Universe*, IISD INV. TREATY NEWS (May 16, 2016), <https://www.iisd.org/itn/en/2016/05/16/mappinginvestmenttreaties-com-uncovering-the-secrets-of-the-investment-treaty-universe-wolfgang-alschner-dmitriy-skougarevskiy/> [https://perma.cc/BZ6G-DYF5].

16. See generally *History of the ICSID Convention*, 2 INT'L CTR. FOR SETTLEMENT OF INV. DISP. 1 (1968); James Nedumpara & Aditya Laddha, *India Joining the ICSID: Is It a Valid Debate*, 2 TRANSNAT'L DISP. MGMT. 12, 12 (2017) (referring to India's participation in the drafting of the ICSID Convention).

17. G.A. Res. 1803 (XVII) (Dec. 14, 1962); Arindrajit Basu, *Sovereignty in a 'Datafied' Field: A Framework for Indian Policy*, OBSERVER RSCH. FOUND. (May 2, 2021), <https://www.orfonline.org/expert-speak/sovereignty-datafied-world-framework-indian-diplomacy/> [https://perma.cc/H74S-NFVV]; Abhisar Vidyarthi, *Revisiting India's Position to Not to Join the ICSID Convention*, KLUWER ARB. BLOG (Aug. 2, 2020), <https://arbitrationblog.kluwerarbitration.com/2020/08/02/revisiting-indias-position-to-not-join-the-icsid-convention/> [https://perma.cc/K6MQ-Y9G7].

18. Rajendra Beniwal & Kumar Sumit, *Bilateral Investment Treaty and Investment Arbitration: A Critique from India's Perspective*, SCC ONLINE (June 26, 2020), <https://www.sconline.com/blog/post/2020/06/26/bilateral-investment-treaty-and-investment-arbitration-a-critique-from-india-perspective/> [https://perma.cc/U74V-VQTB].

19. *Id.*; see also, Amiti Sen & Surabhi, *India's Bilateral Investment Pacts Under Cloud*, HINDU BUSINESSLINE (Apr. 09, 2017), <https://www.thehindubusinessline.com/economy/indias-bilateral-investment-pacts-under-cloud/article9625580.ece> [https://perma.cc/GZ33-UXX5]; Rian Mathews & Nandakumar Ponniya, *Withdrawal from Investment Treaties: An Omen for Waning Investor Protection in AP*, BAKER MCKENZIE (May 12, 2017), <https://www.bakermckenzie.com/en/insight/publications/2017/05/withdrawal-from-investment-treaties> (last visited Sept. 30, 2023) (considering 2015 as the year of approval of the Model BIT, in view of the issuance of the news

was due to the strong public opinion against the decision in the case of *White Industries v. India*²⁰ and several other investment disputes which were initiated before and after the decision.²¹

In this scenario, especially, thanks to public pressures,²² the government of India proposed to revise the then existing Model BIT of 2003 and subsequently released the draft Model BIT in March 2015 for wider circulation and public consultations.²³ Later, in December, it also released a modified version of the Model BIT as approved by the Cabinet.²⁴ The treaty template is generally known for its curtailment and *rigorous* restriction of various investor rights²⁵ and in particular, the

bulletin by the Press Information Bureau in this regard. Also, the memorandum accompanying the revised Model BIT was issued on December 28, 2015, with details of the decision of approval of the Cabinet.).

20. *White Indus. v. India*, Final Award (2011), <https://www.italaw.com/sites/default/files/case-documents/ita0906.pdf> [<https://perma.cc/KP7D-KKA6>]; *Why India's Model Bilateral Investment Treaty Needs A Thorough Relook*, BUS. STANDARD (Feb. 13, 2019), https://www.business-standard.com/article/economy-policy/why-india-s-model-bilateral-investment-treaty-needs-a-thorough-relook-118123100150_1.html [<https://perma.cc/4ERT-N8A4>] (marked the cataclysmic change in India's approach towards BITs). *See also*, Saravanan & S.R. Subramanian, *Role of Domestic Courts in the Investor-State Dispute Settlement Process: The Case of South Asian BITs*, 2 INT'L ARB. L. REV. 43 (2017).

21. In fact, nine investment disputes have been launched against India prior to the decision in *White Industries Australia Limited v. Republic of India*. However, the relevant details were not in the public domain.

22. Biswajit Dhar et al., *India's Bilateral Investment Agreements: Time to Review*, 47 ECON. & POL'Y WKLY 113, 113 (2012); Kavaljit Singh, *Whither India's Bilateral Investment Treaty Framework*, MADHYAM BRIEFING PAPER No. 15 (2013); LAW COMMISSION OF INDIA, AMENDMENTS TO THE ARBITRATION AND CONCILIATION ACT, 1996, REPORT No. 246 (2014).

23. *See* Law Commission of India, *Analysis of the 2015 Draft Model Indian Bilateral Investment Treaty* (260th Report) (Aug. 2015). It may be noted that the government of India did not directly commission any study towards the overhauling of the Indian BIT regime. Rather, the Indian Law Commission which had inquired into the (commercial) arbitration conducted a *suo moto* study on the draft Indian Model BIT and submitted its report to the government.

24. The revised Model BIT is available at <https://edit.wti.org/document/show/d0eac9a8-2de6-44a8-9e9f-2986b8817aa9> [<https://perma.cc/G49G-7XAA>]. For a comparative view of the two versions of BIT, *see* Grant Hanessian & Kabir Duggal, *The Final 2015 Indian Model BIT: Is This the Change the World Wishes to See*, 32 ICSID REV. FOREIGN INV. L.J. 216 (2017). For a general view of the use of Model BIT, *see* Jeongho Nam, *Model BIT: An Ideal Prototype Or a Tool for Efficient Breach*, 48 GEO. J. INT'L L. 1275 (2017).

25. *India's Bilateral Investment Pacts Restrictive: Arvind Panagariya*, ECON. TIMES (Aug. 9, 2016) (emphasis added), <https://economictimes.indiatimes.com/jobs/mid-career/how-to-become-an-hr-manager/articleshow/102808109.cms> [<https://perma.cc/9GB7-FZGJ>] (last visited Sept. 30, 2023); Aditi Shah, *India's Proposed Investment Treaty Terms Leave Foreign Investors Cold*, REUTERS (Jan. 19, 2018), <https://www.reuters.com/article/india-investment-treaty/indias-proposed-investment-treaty-terms-leave-foreign-partners-cold-idUSL4N1P72N1> [<https://perma.cc/X5WX-CD7M>]; Kshama Loya Modhani, *Why India's Model Bilateral Investment Treaty Needs a Re-look*, BUS. STANDARD (Dec. 31, 2018), <https://www.business-standard.com/article/economy-policy/why-india-s-model-bilateral-investment-treaty-needs-a-thorough-relook->

mandatory exhaustion of local remedies for a period of five years before claiming the remedy of international (investment) arbitration.²⁶ The revised Indian Model BIT was the subject of severe criticism both within India and overseas.²⁷ Regardless, the government of India declared its intention to negotiate (or renegotiate) existing as well as future BITs on the basis of the revised Model BIT. Accordingly, it issued notices for termination of several BITs, which completed their mandatory duration of fixed years, through a series of actions.²⁸ Also, to be effective from April 1, 2017, it terminated *en masse* 58 BITs, which included investment instruments with 22 members of the European Union (such as the U.K., France, Germany and Switzerland) as well as China, Australia, South Korea, Taiwan, Indonesia, Thailand and Vietnam in the Asia-Pacific region.

Also, due to major differences between the current approaches to BITs amongst the leading economic powers, India is unable to replace any of the terminated BITs. Its efforts to conclude BITs or FTAs with many countries are now deadlocked or moving at a slow pace. For instance, the European Union, which gained exclusive competence in matters of foreign investment after the Treaty of Lisbon, insisted that both India and the E.U. should first negotiate a BIT before resuming FTA-level talks. Thereby indicating that the two sides should first agree on the basic aspects of investor protection and dispute settlement.²⁹ Similarly, India

118123100150_1.html [https://perma.cc/RGX7-HX 9N]. For a stand on the defense of India's Model BIT, see Gordon Blanke, *India's Revised Model BIT: Every bit worth it*, KLUWER ARB. BLOG (Mar. 20, 2016), <http://arbitrationblog.kluwerarbitration.com/2016/03/20/indias-revised-model-bit-every-bit-worth-it/> [https://perma.cc/5RAY-WP4W].

26. Model Text for the Indian Bilateral Investment Treaty, art. 15.2, Jan. 1, 2015, <https://edit.wti.org/wti-filesystem/20210512/3161457a-df2c-4794-9853-0e9b46a7b315/India%20Model%20BIT%202015.pdf> [https://perma.cc/9AKT-KZ6Q] [hereinafter 2015 Indian Model BIT].

27. Jarrod Hepburn & Ridhi Kabra, *India's New Model Investment Treaty: Fit for Purpose?*, 1 INDIAN L. REV. 95 (2017); Jesse Coleman & Kanika Gupta, *India's Revised Model BIT: Two Steps Forward, One Step Backward*, OUP INV. CLAIMS (Oct. 4, 2017), <https://oxia.oupilaw.com/page/India-BIT> [https://perma.cc/9HUP-UJ6Z]; Prabash Ranjan, *The Future of India's Investment Treaty Practice: An Important Parliamentary Intervention*, 19 MANCHESTER J. INT'L ECON. L. 112 (2022).

28. Nicholas Peacock & Nihal Joseph, *Mixed Messages to Investors as India Quietly Terminates Bilateral Investment Treaties with 58 Countries*, HERBERT SMITH FREEHILLS, ARB. NOTES (Mar. 16, 2017), <https://hsfnotes.com/arbitration/2017/03/16/mixed-messages-to-investors-as-india-quietly-terminates-bilateral-investment-treaties-with-58-countries/> [https://perma.cc/5PE9-LTCQ].

29. Asit Ranjan Mishra, *India on Collision Course with EU over Trade Treaty*, LIVEMINT (Feb. 21, 2017), <https://www.livemint.com/Politics/UKLWUwDn33uBuwRrmBRE5M/India-on-collision-course-with-EU-over-trade-treaty.html> [https://perma.cc/7ZRN-HV49]. Also, for a recent update in the post-Brexit scenario, see Asit Ranjan Mishra, *In a Post-Brexit scenario, EU may Rework FTA with India*, LIVEMINT (Nov. 22, 2018), <https://www.livemint.com/>

and the U.S. have reportedly given up on negotiating a BIT after several years of unproductive talks,³⁰ mainly due to India's insistence on seeking remedies in Indian courts.³¹ On the other hand, China is very much interested in signing a BIT as well as a FTA with India³² to adequately protect its investments in India³³ although it has some reservations as to the restrictive provisions of India's revised Model BIT.³⁴ India, however, is not very keen to expedite the BIT negotiations, ostensibly due to a rising trade deficit between the two countries.³⁵ Similarly, no significant progress has been reported in negotiations to conclude a BIT with Thailand,³⁶ Indonesia, and South Korea.³⁷ Post-revised Model BIT, India has concluded only two BITs.³⁸ The new Taiwan-India Bilateral Investment Agreement (BIT or Indo-Taiwan BIT) (2018) is one of them.

Politics/jbN79my4EwLIhGIBlxES9I/EU-unveils-policy-paper-on-boosting-ties-with-India.html [https://perma.cc/QGP6-8MHQ].

30. Richard M. Rossow, *US-India Insight: Do Not Give Up On the Bilateral Investment Treaty*, CSIS (Nov. 28, 2017), <https://www.csis.org/analysis/us-india-insight-do-not-give-bilateral-investment-treaty> [https://perma.cc/5THU-X584].

31. Nayanima Basu, *US Junks Bilateral Investment Treaty Talks*, THE HINDU BUSINESSLINE (Jan. 12, 2018), <https://www.thehindubusinessline.com/economy/policy/us-junks-bilateral-investment-treaty-talks/article9740501.ece> [https://perma.cc/MF4W-SL3K].

32. *China Seeks FTA with India to Boost Trade Opportunities*, LIVEMINT (Apr. 28, 2018), <https://www.livemint.com/Politics/YSK6poamZ5unLf6O0Y3WCL/China-seeks-FTA-with-India-to-boost-trade-opportunities.html> [https://perma.cc/9453-TNE3].

33. *China Keen to Negotiate Bilateral Investment Treaty, Set Up Industrial Parks*, THE HINDU BUSINESSLINE (Dec. 7, 2021), <https://www.thehindubusinessline.com/news/national/china-keen-to-negotiate-bilateral-investment-treaty-set-up-industrial-parks/article23375699.ece> [https://perma.cc/4GHA-HTN9].

34. *Why India's Model Bilateral Investment Treaty Needs a Thorough Relook*, MONDAQ (Feb. 13, 2019), <http://www.mondaq.com/india/x/780336/Inward+Foreign+Investment/Why+Indias+Model+Bilateral+Investment+Treaty+Needs+A+Thorough+Relook> [https://perma.cc/YT82-RL3R].

35. For some of the reasons why India is not very keen on having a FTA with China, see V.K. Saraswat, Prachi Priya & Aniruddha Ghosh, *India Must Tread Carefully on Free Trade Agreements*, ECON. TIMES (May 7, 2018), <https://economictimes.indiatimes.com/news/economy/foreign-trade/view-india-must-tread-carefully-on-free-trade-agreements/articleshow/64055496.cms> [https://perma.cc/S7E4-2CSW].

36. *India-Thailand Joint Statement during Visit of Primer Minster of Thailand to India*, MINISTRY OF EXTERNAL AFFS. (June 17, 2016), https://www.mea.gov.in/bilateral-documents.htm?dtl/26923/IndiaThailand_Joint_Statement_during_the_visit_of_Prime_Minister_of_Thailand_to_India [https://perma.cc/Z4J4-B4T8].

37. However, India has signed the ASEAN Investment Agreement under the Framework Agreement on Comprehensive Economic Cooperation between the ASEAN and the Republic of India which provides for an investment relationship with the members of ASEAN.

38. In addition to these two instruments, two Joint Interpretative Notes/Declarations (JIN/JID) to the existing BITs have been signed with Bangladesh and Colombia post-2015. However, this does not include the Investment Cooperation and Facilitation Treaty between Brazil and India and the Comprehensive Economic Partnership Agreement (CEPA) between India and United Arab Emirates signed after the conclusion of Indian Model BIT of 2015.

Taiwan, originally recognized as one of the four East Asian Tigers, is the 7th largest economy in Asia.³⁹ Its economy is largely driven by exports of technology goods, machinery, and petrochemicals. Recently, it has also emerged as the 21st largest economy in the world by nominal GDP.⁴⁰ As a growing number of Taiwanese companies are interested in investing abroad, Taiwan is actively seeking to improve trade and investment opportunities by concluding trade and investment agreements and treaties. However, its legal capacity under international law to freely conclude investment treaties and for that matter, any treaties, is hampered by its relationship with the People's Republic of China (PRC).⁴¹ The Constitution of the PRC proclaims that "Taiwan is part of the sacred territory of Peoples' Republic of China," popularly known as the "One-China Policy."⁴² Towards this end, PRC has successfully persuaded states with which it has diplomatic relations to endorse the "One-China policy."⁴³ Nevertheless, Taiwan has managed to establish a decent IIA program by use of certain legal devices.⁴⁴ It has so far signed, according to the U.N. Conference on Trade and Development (UNCTAD), a total of 26 bilateral investment instruments and 6 trade agreements with investment provisions, out of which 16 bilateral investment instruments

39. *Taiwan*, EAST ASIA NAT'L RES. CTR., GEO. WASH. UNIV. (July 2017), <https://cpb-us-e1.wpmucdn.com/blogs.gwu.edu/dist/6/2325/files/2019/07/Taiwan-Overview.pdf> [<https://perma.cc/6LPR-87RL>].

40. Prableen Bajpai, *An Overview of Taiwan's Economy*, NASDAQ (Oct. 18, 2022), <https://www.nasdaq.com/articles/an-overview-of-taiwans-economy#:~:text=According%20to%20the%20IMF%20data,all%20the%20192%20nations%20covered> [<https://perma.cc/C8QY-ZRRF>].

41. Chien-Huei-Wu, *The Many Faces of States in International Investment Law: Supranational Organizations, Unrecognized States, and Substate Entities*, *ROLE OF THE STATE IN INVESTOR-STATE ARB.* 415–16 (Shaheza Lalani & Rodrigo Polanco Lazo eds., 2015); Pasha L. Hsieh, *The Taiwan Question and the One-China Policy: Legal Challenges with Renewed Momentum*, 84 *DIE FRIEDENS-WARTE: J. INT'L PEACE & ORG.* 59 (2009).

42. XIANFA pmbl. (Mar. 14, 2004) (China), <http://en.npc.gov.cn.cdurl.cn/constitution.html> [<https://perma.cc/QLD4-BUWJ>].

43. See generally Clive Williams, *Does Australia have a 'One China', 'Two Chinas' or 'One China, One Taiwan' Policy or All Three*, *CORAL BELL SCH. OF ASIA PAC. AFFS.* (Aug. 2, 2021), <https://sdsc.bellschool.anu.edu.au/news-events/news/8141/does-australia-have-one-china-two-chinas-or-one-china-one-taiwan-policy-or-all> [<https://perma.cc/EX79-R5VR>] (reporting that Taiwan is recognized by fourteen states and on the other hand, the PRC is recognized by 179 countries).

44. See Chien-Huei-Wu, *supra* note 41 for a detailed discussion of how it is accomplished by delegation of treaty-making power to designated state agencies and semi-state entities.

and 5 trade agreements with investment provisions are in force.⁴⁵ However, Taiwan is not a party to the ICSID Convention.⁴⁶

While India did recognize Taiwan as an independent state between 1947 and 1950, since April 1, 1950, it recognizes the PRC as the only Chinese state and considers the island of Taiwan to be part of Chinese territory.⁴⁷ Although India has continued to maintain its people-to-people contact with Taiwan, and it fell short of officially recognizing Taiwan mainly to avoid a stand-off with the PRC.⁴⁸ In particular, since 1995, with the establishment of the India-Taipei Association (in Taiwan) and subsequently, the Taipei Economic and Cultural Center (in India), the two countries have committed to develop and improve the economic, cultural and scientific cooperation between them.⁴⁹

Moreover, as a part of this increased cooperation, the two sides also signed a Bilateral Investment Promotion and Protection Agreement in 2002.⁵⁰ This Agreement was negotiated and signed by the representatives of the India-Taipei Association and the Taipei Economic and Cultural Center. It was generally based on the pre-existing 1993 Indian Model BIT. As a typical first-generation Indian BIT, it had all the semblances of a capital-exporting country BIT.⁵¹ It provided for a broader asset-based definition of investment and a liberal definition of investor. It had other usual features such as full protection and security, fair and equitable treatment, an *unrestrictive* concept of expropriation, and compensation.

45. According to UNCTAD, ten bilateral investment instruments and one trade agreement with investment provisions are either not in force or terminated. See *International Investment Agreements Navigator*, UNCTAD, <https://investmentpolicy.unctad.org/international-investment-agreements/countries/205/taiwan-province-of-china?type=bits> [https://perma.cc/LPL9-FZA3]. For different accounts on the size of Taiwanese BITs, see also Stephen Wilske, *Protection of Taiwanese Investors under Third Party Bilateral Investment Treaties? – Ways, Means and Limits of Treaty Shopping*, 4 CONTEMP. ASIA ARB. J. 149–56 (2011); Horia Ciurtin, *A New Era in Cross-Strait Relations? A Post-Sovereign Enquiry in Taiwan's Investment Treaty System*, CHINA'S INTERNATIONAL INVESTMENT STRATEGY: BILATERAL, REGIONAL, AND GLOBAL LAW AND POLICY 298–301 (Julien Chaisse ed., 2019).

46. CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 1275 (2001).

47. D.P. TRIPATHI & B.R. DEEPAK, *INDIA AND TAIWAN: FROM BENIGN NEGLECT TO PRAGMATISM* (2016); Jeff M. Smith, *Taiwandia: The Slow, Quiet Development of India-Taiwan Relations*, HERITAGE FOUND. (June 22, 2022), <https://www.heritage.org/asia/commentary/taiwandia-the-slow-quiet-development-india-taiwan-relations> [https://perma.cc/7FLK-H3S9].

48. See sources cited *supra* note 47.

49. *Taiwan India Relations*, MINISTRY OF FOREIGN AFFS., REPUBLIC OF CHINA (TAIWAN) (July 11, 2016), https://www.roc-taiwan.org/in_en/post/39.html [https://perma.cc/YM8D-PAZS].

50. See India-Taiwan Province of China BIT (2002), UNCTAD, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1606/download> [https://perma.cc/CG4J-JEPD] (though strictly speaking, the investment instrument signed by India and Taiwan should be referred to as a “bilateral investment agreement,” this paper conveniently addresses it as a “bilateral investment treaty.”)

51. See James J. Nedumpara & Rodrigo Polanco Lazo, *Does India Need a Model BIT?*, 7(2) JINDAL GLOB. L. REV. 117, 118 (2016).

Also, reflective of India's strategic relationship with Taiwan, the BIT's provision for investor-state arbitration is noteworthy as it envisages a reference to the International Chamber of Commerce (ICC) Court of Arbitration, in case an *ad hoc* arbitration under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules could not commence within the specified period.⁵² This is notable as none of the other BITs signed by India has ever stipulated ICC arbitration as an option.

More than ever in India, there is increased recognition that commercial and economic relations with Taiwan are vital and mutually beneficial, and probably geopolitically important.⁵³ Moreover, it is supported by complementary economic structures between the two states.⁵⁴ Similar reasons also make maintaining economic relations important to Taiwan as demonstrated by the unveiling of the New Southbound Policy (NSP).⁵⁵ This policy provides for enhancement of cooperation and exchanges with the countries in South East Asia, South Asia and Australasia, mainly to reduce Taiwan's dependency on China.⁵⁶ This mutual understanding made possible the adoption of the new BIT in 2018 in place of the terminated instrument. The new BIT made sweeping changes in almost all aspects of bilateral investment protection:⁵⁷ a limited definition of investment, customary international law (international minimum) standard of treatment, a step-by-step enumeration of investor-state arbitration process,⁵⁸ addition of a powerful denial of benefits clause, and all-encompassing general and security exceptions clauses. It entered into force on February 14, 2019.⁵⁹

52. See UNCTAD, *supra* note 50.

53. See generally Teshu Singh, *India-Taiwan Relations: Burgeoning Economic Engagements*, 14 INDIAN FOREIGN AFF. J. 222–34 (2019).

54. See Antara Ghosal Singh, *Chinese Anxiety over Deepening India-Taiwan Ties*, OBSERVER RSCH. FOUND. (2022), <https://www.orfonline.org/expert-speak/chinese-anxiety-over-deepening-india-taiwan-ties> [<https://perma.cc/88Q3-DQ77>] (showing that while India is known for software exports, Taiwan is a reputed computer hardware manufacturer).

55. See generally Bonnie S. Glaser, Scott Kennedy, Derek Mitchell & Matthew P. Funairole, *New Southbound Policy: Deepening Taiwan's Regional Integration*, CTR. FOR STRATEGIC & INT'L STUD. (Jan. 1, 2018), https://csis-website-prod.s3.amazonaws.com/s3fs-public/2022-10/180613_Glaser_NewSouthboundPolicy_Web.pdf?VersionId=cbs.Isc0WZ7FhB3I9OvdL1L_Gr42Gh52 [<https://perma.cc/5YG8-MVLX>].

56. *Id.* at 1.

57. Hepburn & Kabra, *supra* note 27, at 97–100.

58. See S.R. Subramanian, *Disclosure, and Challenge of Arbitrators under the Indian Model BIT: A Step Towards Enhancing the Legitimacy of Investment Arbitration?*, 18 ASIAN INT'L ARB. J. 113 (2022).

59. Bilateral Investment Agreement Between the India Taipei Association in Taipei and the Taipei Economic and Cultural Center in India, Dec. 18, 2018, India-Taiwan, FAWUBU FAGUI ZILIAOKU (Taiwan), <https://edit.wti.org/wti-filesystem/20220303/fdeb2be7-48d3-402b-9e12-4f74f95454be/BIA%20between%20ITA%20and%20TECC.pdf> [<https://perma.cc/Z2PZ-CEK8>] [hereinafter 2018 Indo-Taiwan BIT].

At the present time, a press statement posted on the website of the government of Taiwan states that “the revised agreement not only covers direct investments made by Taiwanese businesses in India, but also indirect investments *via* a third location.”⁶⁰ While another Taiwanese report stated that “the agreement [covers] indirect investments made by Taiwanese business people from places like Vietnam and Singapore.”⁶¹ This implied that the Agreement, in view of the incorporation of necessary flexibilities, will not only protect the direct investments made by the Taiwanese nationals but it will also protect indirect investments by Taiwanese diaspora. These reports raise potential questions concerning treaty shopping under the BIT.

However, this Article, relying upon the selected provisions of the BIT, such as the definition of investment, scope of indirect investment, conditional access to investor-state arbitration and the denial of benefits clause, as well as the absence of Most-Favored Nation (MFN) and umbrella clauses, argues that the BIT predominantly carries anti-treaty shopping features (Part II to Part VII).⁶² Yet, this Article admits that the BIT’s definition of investor is broadly designed to allow for treaty shopping (Part VIII). Finally, based on the overall study, this Article concludes that the BIT allows liberal indirect investments by Taiwanese nationals with adequate safeguards and conditions (Part IX).

I. DEFINITION OF INVESTMENT

A. *Enterprise-Based Definition of “Investment”*

It is a well-recognized fact that the broader the definition of “investment,” the higher the possibility of treaty-shopping. Towards this end, the BIT has brought about a fundamental change in the format of the definition of investment.⁶³ It has replaced the previously existing broad, open-ended, asset-based definition of “investment” with an enterprise-based definition of “investment.” It is pertinent to note that while an asset-based definition lists the types of property or rights which are considered as protected investments, an enterprise-based definition lists

60. *Taiwan and India Have Signed Two Bilateral Agreements on December 18, 2018 to Further Boost Trade and Investment Between the Two Countries*, TAIPEI ECON. & CULTURAL CTR. IN CHENNAI (Dec. 18, 2018), https://www.roc-taiwan.org/inmaa_en/post/5095.html [https://perma.cc/PX9G-AGKB].

61. Stacy Hsu, *Taiwan, India Sign Updated Bilateral Investment Pact*, TAIPEI TIMES (Dec. 19, 2018), <https://www.taipetimes.com/News/taiwan/archives/2018/12/19/2003706400> [https://perma.cc/M5GS-6RQW].

62. However, as no previous study is available on the general analysis of these provisions, this paper takes upon itself the task of general analysis before embarking on the analysis of potentiality of treaty shopping under the BIT.

63. See Suzy H. Nikiema, *Best Practices: Definition of Investor*, INT’L INST. SUSTAINABLE DEV. 1, 11 (Mar. 2012).

the assets as they belong to the enterprise which makes the investment.⁶⁴ One of the direct implications of adoption of such a definition is that the assets of affiliates or subsidiaries will be considered as an independent investment.⁶⁵ As a result, the BIT joins the group of states which discourage treaty shopping by preferring the enterprise-based definition of investment.⁶⁶

B. *Characteristics of Investment*

Moreover, the BIT's definitional clause, apart from referencing the conditions of qualified enterprises,⁶⁷ explicitly lists five expected characteristics of investments: (a) the commitment of capital or other resources; (b) commitment for a certain duration; (c) the expectation of gain or profit; (d) the assumption of risk by the investor; and (e) sufficient contribution to the development of the host-state. As both India and Taiwan are not signatories to the ICSID Convention, the BIT-specified characteristics assumes an added importance.⁶⁸

These characteristics of investment are almost the same as the five criteria of investment originally suggested by Professor Christoph Schreuer⁶⁹ and later adopted by the decisions of *Fedax v. Venezuela*⁷⁰ and *Salini v. Morocco*.⁷¹ Though the "typical characteristics" approach of

64. However, Professor Sornarajah maintains that no significant difference exists between these two models. M. SORNARAJAH, *INTERNATIONAL LAW OF FOREIGN INVESTMENT*, 10 (2010). For further support on this point, see Huan Qi, *The Definition of Investment and Its Development: For the Reference of the Future BIT between China and Canada*, 45 *REVUE JURIDIQUE THEMIS* 54 (2011).

65. Wenhua Shan & Lu Wang, *Concept of Investment: Treaty Definitions and Arbitration Interpretations*, *HANDBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY*, 25–26 (Julien Chaisse et al. eds., 2021).

66. Baumgartner, *supra* note 7, at 141. In addition, the Contracting States to the Indo-Taiwan BIT have added several other provisions to make the definition of "investment" unassailable. For instance, the definition not only contained the list of assets which may be possessed by the enterprise, but also the assets which may not be considered as an investment.

67. Article 1.2 defines the term "enterprise."

68. *KT Asia Investment Grp. v. Kazakhstan*, ICSID Case No. ARB/09/8, Award, ¶ 160 (Oct. 17, 2013).

69. CHRISTOPH SCHREUER ET AL., *ICSID CONVENTION: A COMMENTARY* 128, ¶ 153 (2d ed. 2009). Professor Schreuer has clarified in his 2009 edition of the Commentary that these features should not be identified as jurisdictional requirements and instead should be understood as "typical characteristics" of investments under the Convention.

70. *Fedax v. Venezuela*, ICSID Case No. ARB/96/3, Decision on Jurisdiction, ¶ 43 (July 11, 1997) (involving "a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host state's development.").

71. *Salini Costruttori v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (July 23, 2011) (according to the arbitral tribunal, the elements of investment are "contributions, a certain duration of performance of the contract and a participation in the risks of the transaction" and additionally, "contribution to the development of the host-state."). Zachary

Fedax has been followed by the *Salini* tribunal, the latter tribunal has elevated these characteristics as objective criteria for determination of a qualified investment for the purposes of Article 25(1) of the ICSID Convention.⁷² Though some scholars opine that there is not much distinction between the two tests,⁷³ the *Salini* test rests on interpreting the ICSID Convention in the context of the jurisdiction of the Centre.⁷⁴ However, as both India and Taiwan are not currently members of the ICSID Convention, it is not necessary for the disputing parties to meet the requirements of the double-barreled test,⁷⁵ as laid down in the case of *Fedax v. Venezuela*.⁷⁶ Instead, it is sufficient for the disputants to meet the requirements of the definition of investment in the BIT.

Though the general approach outside the ICSID framework is to apply the requirements as specified in the BIT, there are certain cases in which the tribunals have applied it as the objective criteria.⁷⁷ For instance, in the case of *Romak v. Uzbekistan*,⁷⁸ the tribunal observed that the term “investment” has “an inherent meaning” denoting “a contribution that extends over a certain period of time and that involves some risk.”⁷⁹ It has further clarified that these hallmarks of investment will apply

Douglas summarizes this test with five elements: (a) to (e), ZACHARY DOUGLAS, INTERNATIONAL LAW OF INVESTMENT CLAIMS 190, 401 (2009). Yet, he recommends the three elements test as objective criteria of investment. *Id.* at 403. See also Julian Davis Mortenson, *Quiborax S.A. et al. v. Plurinational State of Bolivia: The Uneasy Role of Precedent in Defining Investment*, 28 ICSID REV. FOREIGN INV. L.J. 254, 254–61 (2013).

72. *Salini Costruttori SPA v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (July 23, 2001), 42 I.L.M. 609 (2003).

73. Scholars like Guiguo Wang, comparing the two tests, opined that “the objective constituent elements of ‘investment’ put forward in *Fedax* and *Salini* are in substance nearly identical.” GUIGUO WANG, INTERNATIONAL INVESTMENT LAW: A CHINESE PERSPECTIVE, 150 (2015). For distinction between the *Fedax* and *Salini* tribunals and further discussions in this regard, see Felix O. Okpe, *The Definition of Investment and ICSID Convention: Matters Arising under the Nigerian Investment Promotion Act and International Investment Law*, 8 J. SUSTAINABLE INV. L. & POL’Y 133, 145–49 (2017).

74. See SORNARAJAH, *supra* note 64, at 313–14.

75. Under the test, for an investment to be qualified for investment at the ICSID, shall meet not only the requirements of BIT, but it must also meet the objective criteria of investment given under the ICSID Convention. See *Fedax N.V. v. Republic of Venez.*, ICSID Case No. ARB/96/3, Decision on Jurisdiction, ¶ 29 (July 11, 1997).

76. *Id.*

77. See *Romak S.A. v. Republic of Uzbekistan*, PCA Case Repository AA280, Award, ¶ 207 (Nov. 26, 2009); *Mytilineos Holdings S.A. v. Serbia*, PCA Case Repository 2014-30, Partial Award on Jurisdiction, ¶ 112 (Sept. 8, 2006). Some scholars also give the impression that the objective criteria of investment will be applicable to all investment arbitrations. For instance, Zachary Douglas opines that “[i]t is an essential that ‘an investment’ have both the requisite legal and economic characteristics.” DOUGLAS, *supra* note 71, ¶ 340.

78. *Romak S.A.*, Award, ¶ 207.

79. *Id.* ¶ 207. For application of ICSID-like features in non-ICSID arbitration, see Ilyas Musurmanov, *The Implications of Romak v. Uzbekistan for Defining the Concept of Investment*, 18 AUSTL. INT’L L. J. 105, 126 (2011).

“irrespective of whether the investor resorts to ICSID or [UNCITRAL] arbitral proceedings.”⁸⁰

Similarly, in the case of *Mytilineos Holdings SA v. Serbia*,⁸¹ despite that it was an arbitration under the UNCITRAL arbitration rules, the tribunal attempted to relate the objective criteria to that arbitration.⁸² Yet, the tribunal finally ruled that the “*ratione materiae* test for the existence of an investment” is very “specific to the ICSID Convention” and “does not apply in the context of *ad hoc* arbitration provided for in BITs as an alternative to ICSID.”⁸³ Coincidentally, the relevant BITs under which the above proceedings were conducted have provided for both ICSID and *ad hoc* arbitrations, which could have prompted the tribunals to resort to the above interpretative reasoning.⁸⁴

Moreover, the case history of the *White Industries v. Republic of India* also provides an important background to India’s current notion of investment.⁸⁵ In that case, a dispute under the 1999 Australia-India BIT involving an open-ended, asset-based definition of investment, India argued that the pertinent elements of investment as defined in the case of *Salini* should be made applicable to the case. However, the arbitral tribunal observing that the *Salini* test was a standard to define investment under the ICSID Convention, ruled that the test or even Zachary Douglas’s summary of the test is “simply not applicable” to the *White Industries* dispute.⁸⁶ It is apparent that such failures have caused India to incorporate the typical characteristics of investment into the BIT’s definition of “investment.”

80. *Id.*

81. *Mytilineos Holdings S.A.*, Partial Award on Jurisdiction, ¶ 112 (Sept. 8, 2006).

82. *Id.* ¶ 112–13.

83. *Id.* ¶ 117.

84. The provisions involved are Article 9 of the Switzerland-Uzbekistan BIT and Article 9(3)(a) of the Greece-Yugoslavia BIT. Agreement Between the Swiss Confederation and the Republic of Uzbekistan on the Promotion and Reciprocal Protection of Investments, Switz.-Uzb., art. 9, Apr. 16, 1993, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2328/download> [<https://perma.cc/9RZ7-N87F>] [hereinafter Switzerland-Uzbekistan BIT]; Agreement Between The Government Of The Hellenic Republic And The Federal Government Of Yugoslavia On The Reciprocal Promotion And Protection Of Investments, Greece-Yugoslavia, art. 9(3)(a), June 25, 1997, <https://edit.wti.org/document/show/807cd792-152b-44c4-ac48-ed4cd60e56d2> [<https://perma.cc/4LWV-PD6A>] [hereinafter Greece-Yugoslavia BIT]. It is significant to note that the revised Indo-Taiwan BIT does not even mention recourse to ICSID as an option. *Cf.* 2015 Indian Model BIT, *supra* note 26, art. 16.1.

85. A. SARAVANAN & S.R. SUBRAMANIAN, *ROLE OF DOMESTIC COURTS IN THE SETTLEMENT OF INVESTOR-STATE DISPUTES: THE INDIAN SCENARIO* 98 (2020).

86. *White Indus. Austl. Ltd. v. Republic of India (Austl. v. India)*, Final Award, ¶ 7.4.9 (Claims Resolution Trib. 2011), <https://www.italaw.com/sites/default/files/case-documents/ita0906.pdf> [<https://perma.cc/C53J-K83S>]. However, it is surprising to note that the tribunal made an extensive analysis of the test with reference to the facts and finally noted that it was “clear from White’s operation under the Contract as a whole that it has made an investment in India for the purposes of the *Salini* Test.” *Id.* ¶ 7.4.19. *See also* DOUGLAS, *supra* note 71, ¶ 403.

C. Contribution To Economic Development as A Criterion

The Indo-Taiwan BIT's detailed characteristics also settle the uncertainty as to whether contribution to the economic development of the host-state should also be a requirement of a qualified investment under the BIT. Conversely, under the ICSID jurisprudence, it is one of the most controversial criteria for defining a qualified investment.⁸⁷

It is interesting to note that both those who claim that it is a full-fledged criterion and those who argue otherwise both rely on the language of the ICSID Convention.⁸⁸ Even the decisions of arbitral tribunals are no exception to this. Also, Professor Christoph Schreuer in his (original) Commentary to the ICSID Convention did not give a clean chit to the criterion of economic development, unlike the other characteristics of investment.⁸⁹ He has included the feature of "significance for the host-state's development" with certain qualifying observations.⁹⁰ He observed that the fifth and final feature "is not necessarily characteristic of investments in general," though "the wording of the Preamble and the Executive Directors' Report suggest that development is part of the Convention's object."⁹¹ Accordingly, he insisted that "[t]hese features should not necessarily be [viewed] as jurisdictional requirements but merely as typical characteristics of investments under the Convention."⁹²

Several other distinguished scholars and practitioners also belong to the same school of thought. Emmanuel Gaillard expressed the opinion that the requirement of "positive and significant contribution to the economic development" of the host-state "ignores the intention of

87. The scholars and tribunals who mainly support the "typical characteristics" approach of investment rely upon the following historical materials for their views. *The History of the ICSID Convention*, ICSID vol. 1–4 (1968–1970); A. Broches, *The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction*, 5 COLUM. J. TRANSNAT'L L. 261–80 (1966); Int'l Bank for Reconstruction & Dev., *Report of the Executive Directors on the Convention of the Settlement of Investment Disputes between States and Nationals of Other States*, 1 ICSID Reports (1993). However, sometimes, the same and other materials have also been relied upon by those who support the jurisdictional approach. For instance, the *Phoenix* decision noted that "adherence to the Convention by a country would provide additional inducement and stimulate a larger flow of private international investment into its territories, which is the primary purpose of the Convention." *Phoenix Action v. Czech Republic (Isr.-Czech)*, ICSID Case No. ARB/06/5, Award, ¶ 87 (Apr. 9, 2009). See also Dai Tamada, *Must Investments Contribute to the Development of the Host-state: The Salini Test Scrutinized*, in LAW AND DEVELOPMENT: BALANCING PRINCIPLES AND VALUES, 96 (2019).

88. See also Alex Grabowski, *The Definition of Investment under the ICSID Convention: A Defense of Salini*, 15 CHINESE J. INT'L L. 287 (2014).

89. SCHREUER, *supra* note 69, ¶¶ 152–74.

90. *Id.* ¶ 153.

91. *Id.* The convention's preamble stipulates that the contracting states while agreeing to the text of the Convention considered the "need for international cooperation for economic development."

92. *Id.*

drafters of the ICSID Convention.”⁹³ Zachary Douglas too opined that “this is an unworkable criterion for the existence of an investment because of its subjective nature” and remarked that “whether or not a commitment of capital or resources ultimately proves to have contributed to the economic development of the host state” can be contentious.⁹⁴

On the other hand, the *Fedax* and *Salini* decisions, some of the early decisions on the above issue, cite Professor Schreuer in recognizing that economic development shall form part of the determination of investment.⁹⁵ While the *Fedax* tribunal ruled in unequivocal terms that “[t]he basic features of an investment”⁹⁶ include “a significance for the host State’s development,”⁹⁷ the *Salini* tribunal agreed to “add the contribution to the economic development of the host State of the investment as an additional condition.”⁹⁸ It is interesting to note that when Professor Schreuer was not even willing to concede “economic development” the status of one of the *characteristics* of investment, *Salini* laying down the jurisdictional approach, conferred it the status of an “additional condition” of *jurisdiction* of the Centre, citing the “Convention’s preamble.”⁹⁹ The above diverging trends is also noticeable in a series of decisions¹⁰⁰ and continues to date.

93. Emmanuel Gaillard, *Identify or Define? Reflections on the Evolution of Concept of Investment in ICSID Practice*, INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 415–16 (Christina Binder et al. eds., 2009). He is of the view that while typical characteristics of investment can be identified, applying the features as a requirement of the definition of investment is against the spirit of the ICSID Convention.

94. DOUGLAS, *supra* note 71, ¶ 408.

95. The *Fedax* tribunal’s Decision on Jurisdiction cited the original Commentary on ICSID Convention by Christoph Schreuer. On the other hand, in the *Salini* decision, though there is no direct mention of Commentary to the ICSID Convention, it cites the preambular language of the Convention similar to the Commentary for its opinion. *See also* Tamada, *supra* note 87, at 97.

96. *Fedax N.V. v. Republic of Venez.*, ICSID Case No. ARB/96/3, Decision on Jurisdiction, ¶ 43 (July 11, 1997).

97. *Id.*

98. *Salini Costruttori SPA v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (July 23, 2001), 42 I.L.M. 609 (2003).

99. *Id.*

100. *CSOB v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, ¶ 64 (May 24, 1999) (The preambular language of the ICSID Convention “permits an inference that an international transaction which contributes to cooperation designed to promote the economic development of a Contracting State may be deemed to be an investment.”); *Patrick Mitchell v. Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Award, ¶ 56 (Feb. 9, 2004) (The concept of investment includes “‘smaller’ investments of shorter duration and with more limited benefit to the host-state’s economy.”); *Patrick Mitchell v. Democratic Republic of Congo*, Decision on Annulment, ¶¶ 28–29 (Nov. 1, 2006) (The Committee referring to the conclusion of the ICSID Convention “under the auspices of the International Bank for Reconstruction and Development,” opined that the criterion of economic development “has always been taken into account, explicitly or implicitly, by ICSID arbitral tribunals in the context of their reasoning in

Moreover, these legal controversies due to divergence are not merely confined to ICSID arbitrations. In the case of *Romak v. Uzbekistan*,¹⁰¹ a dispute decided under the UNCITRAL Arbitration Rules, the arbitral tribunal decided to apply the objective criteria of a three-prong test: contribution, duration, and risk, which leaves behind the criterion of economic development of the host-state.¹⁰² Under this approach, better known as the “criteria limited in number” approach,¹⁰³ the tribunal has considered the ordinary meaning of the term “investment” as an objective requirement along with the specific requirements of IIA.¹⁰⁴ It may be noted that although the Swiss-Uzbekistan BIT has declared the “economic cooperation to the mutual benefit of both States” and “foster[ing] the economic prosperity of both States” as its object and purpose,¹⁰⁵ the operative part of the BIT, especially its definition of “investment” does not contain any specific requirement as to the

applying the Convention.”). Again, at ¶ 33, it observed that “economic development” is an “unquestionable criterion of the investment.” *Malaysian Historical Salvors v. Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, ¶ 66 (May 17, 2007) (The Panel favoring the adoption of “a teleological approach to the interpretation of the ICSID Convention,” observed that “a tribunal ought to interpret the word ‘investment’ so as to encourage, facilitate and to promote cross-border economic cooperation and development.”). Again, at ¶ 123, it also opined that “the weight of the authorities” examined in the award favor the requirement of “significant contribution to be made to the host State’s economy.” *Malaysian Historical Salvors v. Malaysia*, Decision on Annulment, ¶ 80 (Apr. 16, 2009) (considering the contribution to the economic development of the host State as a jurisdictional condition would not be in consonance with the *travaux* and the “decisions of the drafters of the ICSID Convention” to “leave ‘investment’ undefined”); *Jan de Nul v. Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, ¶ 91 (Jan. 16, 2006) (“Contribution to the host State’s development” is “indicative of an ‘investment.’”); *Victor Pey Casado v. Chile*, ICSID Case No. ARB/98/2, Award, ¶ 232 (May 8, 2008) (“[T]he development of the host State is” not “a constitutive element of the notion of investment.”); *Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, ¶ 220 (Sept. 27, 2012) (“[C]ontribution to the development of the host-state” may “well be the consequence of a successful investment; it does not appear as a requirement.”). It is interesting to note that Professor Sornarajah reflects on this problem through the prism of North-South divide. He comments that the issue of “economic development as a characteristic of investment” is “intertwined with the classic dispute between the capital-importing and capital-exporting states.” SORNARAJAH, *supra* note 64, at 313.

101. *Romak S.A. v. Uzbekistan*, PCA Case Repository AA280, Award (Nov. 26, 2009), <https://pcacases.com/web/sendAttach/491>.

102. *Id.* ¶ 205–07.

103. Emmanuel Gaillard & Yas Banifatemi, ‘*Biwater*,’ *Classic Investment Bases: Input, Risk, Duration*, 240 N.Y. L.J. 2 (2008).

104. *Romak S.A.*, Award, ¶ 183 (“[A] construction based solely on the ‘ordinary meaning’ of the terms of the . . . BIT . . . is inconsistent with the given context and ignores the object and purposes of the BIT.”). The panel also emphasized the importance of the terms of the BIT in cases when investment arbitration is conducted outside the ICSID framework. *Id.* ¶ 205 (“[C]ontracting states are free to deem any kind of asset or economic transaction to constitute an investment as subject to treaty protection. Contracting States can even go as far as stipulating that a ‘pure’ one-off sales contract constitutes an investment . . .”).

105. *Id.* ¶ 189.

“economic development of host-state.”¹⁰⁶ As a result, the tribunal merely took into account the “economic activity” in relation to the host-state,¹⁰⁷ rather than considering the economic development as an independent criterion. Therefore, it is argued that even if we take into consideration the approach of *Romak*, in view of the specific requirements of the Indo-Taiwan BIT, the criterion of economic development will be upheld.

D. Level Of Contribution

As the criterion of contribution to the economic development itself is disputed, the question of level of contribution generally does not arise. As a result, the investment literature is almost silent on the level of contribution to economic development required to meet the definition of “investment.” However, as the Indo-Taiwan BIT (“sufficient contribution”) deviates from the prescription of India’s revised Model BIT of 2015 (“significance for the development of the Party”), an examination of the level of contribution is unavoidable.¹⁰⁸

As is the case with reference to the criterion of economic development, tribunals have given varied interpretations with regard to what level of contribution to the economic development of the host-state is required. While the trend-setting *Salini* decision did not explicitly require any specific level of contribution,¹⁰⁹ many other decisions may be interpreted as having such requirement.¹¹⁰ In the *Joy Mining* dispute, the panel ruled that “significant contribution” to the host-state’s development is one of the “elements that an activity must have in order to qualify as an investment.”¹¹¹ Similarly, the *Bayindir* tribunal is also of the opinion

106. *Id.* ¶ 174. The BIT’s definition of the term “investment” is unusually broad. *Id.* It provided that “[t]he term ‘investments’ shall include every kind of assets” and then starts listing the assets which are *particularly* considered as assets. *Id.*

107. *Id.* ¶ 206.

108. Compare 2018 Indo-Taiwan BIT, *supra* note 59, art. 1.3, with 2015 Indian Model BIT, *supra* note 26, art. 1.4.

109. *Salini Costruttori SPA v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (July 23, 2001), 42 I.L.M. 609 (2003); *see also* *Malaysian Historical Salvors Sdn, Bhd v. Government of Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, ¶ 113 (May 17, 2007), https://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C247/DC654_En.pdf [<https://perma.cc/MTQ3-5AHF>] (noting that *Salini* decision did not stress that contribution must be significant).

110. *Ceskoslovenska Obchodni Banka, AS v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, ¶ 88 (May 24, 1999), 14 ICSID Rev. 251 (1999) (“undertaking involved a significant contribution by CSOB to the economic development of the Slovak Republic”); *Jan de Nul NV v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, ¶ 92 (June 16, 2006), <https://www.italaw.com/sites/default/files/case-documents/ita0439.pdf> [<https://perma.cc/F2S2-GGYH>] (“one cannot seriously deny that the operation of the [enterprise] [was] of “paramount significance for Egypt’s economy and development.”).

111. *Joy Mining Machinery Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, ¶ 53 (Aug. 6, 2004).

that the project claiming investment protection “must represent a significant contribution to the host State’s development.”¹¹²

However, the *Malaysian Salvors* decision on jurisdiction is quite instructive in this regard. In that case, the panel distinguished between the political, cultural or commercial benefits arising from the contract on the one hand and the significant contribution to the economy on the other.¹¹³ It observed that for a determination as to whether there is an investment, the tribunal “must assess whether the benefits from the Contract were simply a commercial benefit arising from the Contract or whether the Contract provided a significant contribution to the” economy of the host-state.¹¹⁴ Based on this standard, the tribunal recorded its finding that since there were no “substantial benefits” to Malaysia, the contribution cannot be treated as a “substantial contribution.”¹¹⁵ The tribunal further clarified that a “substantial contribution” means one that results in “some form of positive economic development.”¹¹⁶

On the other hand, the *ad hoc* committee in the *Patrick Mitchell* case made one of the most emphatic assertions of economic development as an “unquestionable criterion of the investment,” remarking that the “ICSID tribunals do not have to evaluate the real contribution of the operation in question” and it is “suffic[ient] for the operation to contribute in one way or another to the economic development of the host-state.”¹¹⁷ It further observed that the “concept of economic development” is “in any event, extremely broad but also variable depending on the case.”¹¹⁸ The contribution of investment does not have to be “sizable or successful.”¹¹⁹

Out of the two approaches to the evaluation of contribution to economic development, the current BIT by its explicit language of “sufficient contribution to the development of the Party” strongly indicates the possibility to adhere to the *Salvors* standard mentioned above. It may be noted that the above ICSID jurisprudence has been developed despite the fact that in many cases the concerned BITs are silent as to the requirement of economic development,¹²⁰ never mind any

112. Bayındır İnşaat Turizm Ticaret ve Sanayi A.Ş. v. Islamic Republic of Pak., ICSID Case No. ARB/03/29, Decision on Jurisdiction, ¶ 137 (Nov. 14, 2005).

113. *Malaysian Historical Salvors v. Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, ¶ 138 (May 17, 2007).

114. *Id.*

115. *Id.* ¶ 143.

116. *Id.* ¶ 139.

117. *Patrick Mitchell v. Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Award, ¶ 33 (Feb. 9, 2004).

118. *Id.*

119. *Id.*

120. See *Salini Costruttori SPA v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (July 23, 2001), 42 I.L.M. 609 (2003). See also *Tra il Governo Dello*

stipulation on the level of contribution. Moreover, it may also be noted that the current BIT, though it seems to diminish the level of contribution in comparison to the 2015 Indian Model BIT requirement of “significance for the development of the Party,”¹²¹ the arbitral decisions examined above do not indicate much distinction between the two formulations.¹²² From a treaty shopping point of view, investors will not be able to claim any investment as covered investment under the BIT unless they have made at least a sufficient contribution to economic development. Under the *Malaysian Salvors* standard, it would mean “tangible benefits” to the economy and/or “some positive impact on development.”¹²³

E. Compliance With Domestic Law and Good Faith Requirements

The Indo-Taiwan BIT, in addition to specifying the common characteristics of investment which mainly emanate from the ICSID jurisprudence, also explicitly incorporates certain additional requirements as a part of its definition of investment: compliance with domestic law and the principle of good faith.¹²⁴ The inclusion of such clauses is not common amongst the modern IIAs. Yet, developing countries usually prefer to include them in their BITs so that legal protection may be declined to illegal investments.¹²⁵ Although elements of such requirements are also found in other parts of the same BIT,¹²⁶ incorporation of such requirements as a part of the definition of investment assumes an added legal significance. It is desirable and convenient to examine these two requirements together as they seem to arise from identical situations (and also as some of the investment tribunals have dealt with it).

In *Fraport v. Philippines*, one of the early decisions involving an explicit “in accordance with the law” requirement, the tribunal held that

Repubblica Italiana e il Governo Regno del Marocco sulla Promozione e Protezione degli Investimenti, It.-Morocco, art. 1(1), July 18, 1990, Legge 14 dicembre 1994, n. 714, G.U. Dec. 27, 1994, n. 301 (It.); *Ceskoslovenska Obchodni Banka, AS v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, art. 1(1)(a) (May 24, 1999), 14 ICSID Rev. 251 (1999); *Malaysian Historical Salvors v. Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction (May 17, 2007); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Malaysia for the Promotion and Protection of Investments, U.K.-Malay., art. 1(1)(a), May 21, 1981, GR. BRIT. TS NO. 16 (1989) (Cd. 707).

121. 2015 Indian Model BIT, *supra* note 26, art. 1.4.

122. *Malaysian Historical Salvors*, Award on Jurisdiction, ¶ 143 (examining the requirement of development and significant contribution, and finding that the investor did not make sufficient contribution to the economic development).

123. *See id.* ¶¶ 67, 125, 138, 142; *see also*, SCHREUER et al., *supra* note 69, at 132–33 (illustrating Professor Christoph Schreuer’s observations in this regard).

124. *See* 2018 Indo-Taiwan BIT, *supra* note 59, art. 1.3.

125. *See* WANG, *supra* note 73, at 177.

126. *E.g.*, 2018 Indo-Taiwan BIT, *supra* note 59, arts. 6.3, 29.1, 35.1 (referencing the notion of good faith).

it lacked jurisdiction over the dispute as the consent of the Philippines to dispute settlement was subject to the condition that the investment must be valid according to the BIT.¹²⁷ The tribunal observed that by entering into a secret shareholder agreement in violation of the Philippines Anti-Dummy Law which restrained such arrangements, the claimant failed to meet the requirements of a qualified investment.¹²⁸ It also noted that repeated references to domestic law requirements in the BIT indicated the importance of this condition.¹²⁹

However, there are other cases in which both domestic law and good faith requirements might simultaneously arise. In the case of *Inceysa v. El Salvador*, probably for the first time, an ICSID tribunal denied itself jurisdiction on the ground of lack of compliance with local law and the principle of good faith.¹³⁰ In this case, the tribunal agreed with the submission of El Salvador that Inceysa had misrepresented its “experience in the field of vehicle inspections and its relationship with its supposed strategic partner.”¹³¹ It ruled that the claimant had not only violated the domestic law requirements of the Spain-El Salvador BIT but also the principle of good faith, “which governs legal relations in all their aspects and content.”¹³² The tribunal opined that not excluding Inceysa from the protection of BIT would constitute a violation of international public policy as the “in accordance with law” clause “is a clear manifestation of said international public policy.”¹³³

Subsequent decisions also establish that when a BIT specifically includes compliance with domestic law as a part of the definition of investment, it should be viewed as a condition to the consent of investor-

127. See *Fraport v. Philippines*, ICSID Case No. ARB/03/25, Award, ¶ 404 (Aug. 16, 2007), <https://www.italaw.com/sites/default/files/case-documents/ita0340.pdf> [<https://perma.cc/S3MV-SU7V>].

128. See *id.* ¶ 401.

129. See *id.* ¶ 36 (dissenting opinion of Mr. Bernardo M. Cremades who recorded his powerful dissent due to his view that the good faith requirement is applicable to both host-state and the claimant). See also *Fraport*, Annulment Proceeding, ¶ 84 (Dec. 23, 2010), <https://www.italaw.com/sites/default/files/case-documents/ita0341.pdf> [<https://perma.cc/28NF-42MU>] (noting that though the decision was subject to annulment proceedings, the Committee did not alter any findings on the pertinent regard).

130. See *Inceysa v. El Salvador*, ICSID Case No. ARB/03/26, Award, ¶¶ 335–37 (Aug. 2, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0424_0.pdf [<https://perma.cc/SM2K-AAVD>]. See also *id.*, Decision on Jurisdiction, ¶¶ 212–39 (Aug. 2, 2006), <https://jsumundi.com/en/document/decision/en-inceysa-vallisoletana-s-l-v-republic-of-el-salvador-award-wednesday-2nd-august-2006> [<https://perma.cc/PL3B-STX4>].

131. See *Inceysa*, Decision on Jurisdiction, ¶ 53 (Aug. 2, 2006), <https://jsumundi.com/en/document/decision/en-inceysa-vallisoletana-s-l-v-republic-of-el-salvador-award-wednesday-2nd-august-2006> [<https://perma.cc/F6HW-EE4G>].

132. *Id.* ¶ 230.

133. *Id.* ¶ 246.

state dispute settlement.¹³⁴ However, as observed in the case of *Fakes v Turkey*, not every infraction of any of the host-state's laws "would result in the illegality of the investment."¹³⁵ It considered compliance with domestic law requirements in BITs to be mainly limited to the admission of investment in the host-state. However, if any question of compliance with domestic law arises subsequently, especially of those laws "that are unrelated to the very nature of investment regulation," denial of investment protection to such investment on the ground that it is an illegal investment would not be legally correct as "that would run counter to the object and purpose of investment protection."¹³⁶

Similarly, the decision in *Plama v. Bulgaria*¹³⁷ also reiterated the relevance of good faith in the making of investments and the consequent implied nature of legality requirements. However, it is the *Phoenix* decision which represents a paradigm-shift by extending the compliance requirements to general principles of international law.¹³⁸ It held that investments made in violation of the general principles of international law would not be qualified for legal protection. In effect, it would mean that investments must conform not only to the terms of the explicit requirements of a BIT but also to general principles of international law.¹³⁹

In light of the above discussions, it is clear that though some investment tribunals consider the requirement of compliance with domestic law or good faith or even general principles of international law as implicit, to apply the test of legality, especially in non-ICSID arbitrations, it is preferable that the BIT contain an explicit mention of

134. *E.g.*, *Abaclat v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶ 648 (Aug. 4, 2011), https://jsumundi.com/en/document/decision/en-abacat-and-others-formerly-giovanna-a-beccara-and-others-v-argentine-republic-decision-on-jurisdiction-and-admissibility-thursday-4th-august-2011#decision_403 [<https://perma.cc/TW26-BFAR>].

135. *Fakes v. Turkey*, ICSID Case No. ARB/07/20, Award, ¶ 119 (July 14, 2010), <https://jsumundi.com/en/document/decision/en-saba-fakes-v-republic-of-turkey-award-wednesday-14th-july-2010> [<https://perma.cc/W47M-G98D>].

136. *Id.*

137. *See Plama Consortium Ltd. v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, ¶¶ 117, 147, 164 (Feb. 8, 2005), <https://jsumundi.com/en/document/decision/en-plama-consortium-limited-v-republic-of-bulgaria-decision-on-jurisdiction-tuesday-8th-february-2005> [<https://perma.cc/SR9Q-P92S>].

138. *See Phoenix Action v. Czech Republic (Isr.-Czech)*, ICSID Case No. ARB/06/5, Award, ¶¶ 106, 111 (Apr. 9, 2009).

139. *Id.* ¶ 77 (quoting the opinion of the WTO Appellate Body in the Gasoline dispute: "The General Agreement is not to be read in clinical isolation from public international law" and Joost Pauwelyn's influential observation that "[s]tates in their treaty relations may not 'contract out of the system of international law.'").

the domestic law requirements.¹⁴⁰ However, the above clauses cannot be stretched to such an extent that the BIT's notion of investment is indefinitely referable to the law of the host-state.¹⁴¹ Moreover, the use of the words "such as" while illustrating the characteristics of investment in the Indo-Taiwan BIT's definition of investment indicates that these conformities with general principles of international law or fundamental principles of international law may also be implied in the definition of investment.

II. SCOPE OF INDIRECT INVESTMENT

A. *The Clarification*

The revised Indo-Taiwan BIT includes several limitations to control indirect investment. Though investment tribunals have consistently ruled that both direct investments and indirect investments will always be covered by the term "investment,"¹⁴² the BIT explicitly recognizes "indirect investment" in two provisions: (a) by use of the phrase "directly or indirectly" in the chapeau of the definition of investment¹⁴³ and (b)

140. See Rahim Moloo & Alex Khachaturian, *The Compliance with the Law Requirement in International Investment Law*, 34 FORDHAM INT'L L.J. 1473, 1475 (2011) (observing that the "lack of clarity with respect to the emerging implicit obligation for investments to accord with the law may leave investors, states and tribunals with an uncertain understanding as to when the substantive protections of investment treaty should be denied to an investor").

141. See KATHRIN BETZ, PROVING BRIBERY, FRAUD AND MONEY LAUNDERING IN INTERNATIONAL ARBITRATION: ON APPLICABLE CRIMINAL LAW AND EVIDENCE 18 (2017). See also WANG, *supra* note 73, at 179.

142. E.g., *Siemens v. Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, ¶ 137 (Aug. 3, 2004), <https://jsumundi.com/en/document/decision/en-siemens-a-g-v-the-argentine-republic-decision-on-jurisdiction-tuesday-3rd-august-2004> [<https://perma.cc/HMM3-9934>] (explaining that though the Argentina-Germany BIT does not contain the phrase "directly or indirectly" to support the inference of indirect investment, tribunal ruled that the unqualified definition "does not support the allegation that the definition of investment excludes indirect investment."); *Standard Chartered Bank v. Tanzania*, ICSID Case No. ARB/10/12, Award, ¶ 240 (Nov. 2, 2012), <https://jsumundi.com/en/document/decision/en-standard-chartered-bank-v-united-republic-of-tanzania-award-friday-2nd-november-2012> [<https://perma.cc/F469-9L23>]; *Deutsche Telekom A.G. v. Republic of India*, PCA Case Repository 2014-10, Interim Award, ¶¶ 136-53 (Dec. 13, 2017) (rejecting the argument that, on the basis of the comparative treaty practices of both India and Germany, many bilateral instruments had explicit provisions for coverage of indirect investments because "different formulations may have precisely the same effect."). See also *Teinver v. Argentina*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, ¶ 23 (Dec. 21, 2012), <https://jsumundi.com/en/document/decision/en-teinver-s-a-transportes-de-cercanias-s-a-and-autobuses-urbanos-del-sur-s-a-v-argentine-republic-decision-on-jurisdiction-friday-21st-december-2012> [<https://perma.cc/29G7-6QQM>] (opinion by Dr. Kamal Hossain).

143. It may be noted that the usage of the phrase "directly or indirectly" is unavoidable in International Investment Agreements which opt for an enterprise-based definition of investment. As under this model, the assets of parent enterprise are considered different from its local subsidiary. Moreover, it is significant to note that the 2018 Indo-Taiwan BIT, *supra* note 59, art.

through a specific clarification in the later part of the same definition. While the first usage enables investment through intermediaries, better known as indirect investment, the latter part explicitly acknowledges the category of “indirect investment.” It defines “indirect investment” as an “investment made by an investor through a legal entity of a territory of a non-Party where such legal entity is substantially owned or controlled, directly by the investor.”¹⁴⁴ It is probably one of the rarest occasions where an investment instrument has expressly defined the expression “indirect investment.” It may be noted that though the language of the chapeau itself is sufficient to allow indirect investment,¹⁴⁵ the purpose of incorporating a specific clarifying definition is to limit “indirect investment” to investments made by an investor through a legal entity of a non-party and subject those investments to certain additional jurisdictional requirements.¹⁴⁶

Such explicit recognition of investments through intermediaries of third states has a number of precedents, though the actual scope of each formulation varies.¹⁴⁷ For instance, the Canada-Ecuador BIT and the China-The Netherlands BIT may be cited in this regard.¹⁴⁸ The Canada-Ecuador BIT, as a part of its definition of investment, stipulated that “investment” means “any kind of asset owned or controlled either directly, or indirectly ‘through an investor of a third State’ by an investor of one Contracting Party in the territory of the other Contracting Party.”¹⁴⁹ Similarly, the Protocol to the China-The Netherlands BIT deemed “‘investments of legal persons of a third State’ which are owned or controlled by investors of one Contracting Party and which have been

1.3, uses the qualifiers “directly” and “indirectly” in a different way than the way it has been used by the existing investment instruments. In the current BIT the words “owned or controlled” were preceded by adverbial qualifiers “directly or indirectly.” On the other hand, NAFTA Chapter 11 uses the language, “owned or controlled directly or indirectly.” These changes in the order of words along with the use of comma at the end of the qualifiers suggest that the phrase “directly or indirectly” not only qualifies the word “controlled” but modifies both “owned” and “controlled” with the effect of bringing indirectly owned investments within the scope of the term “investment.”

144. See 2018 Indo-Taiwan BIT, *supra* note 59, art. 1.3.

145. See DOUGLAS, *supra* note 71, ¶ 578 (“effect be given to the expansive terms ‘directly and indirectly’”).

146. See 2018 Indo-Taiwan BIT, *supra* note 59, art. 15.4(f). See also discussion *infra* Part III, Conditional Access to Investor-State Arbitration.

147. See DOUGLAS, *supra* note 71, ¶ 560 (listing some applicable instruments).

148. North American Free Trade Agreement, Can.-Mex.-U.S., art. 1113, Dec. 17, 1992, 32 I.L.M. 289 (1993) (defining “investor of a non-party” by using the idea in the context of only denial of benefits provision and not for its definition of investment).

149. Agreement between the Government of Canada and the Republic of Ecuador for the Promotion and Reciprocal Protection of Investments, Can.-Ecuador, art. I(g), Apr. 29, 1996, http://www.sice.oas.org/Investment/BITSbyCountry/BITs/CAN_Ecuador_e.asp [https://perma.cc/R7EM-MRFL].

made in the territory of the other Contracting Party” as “investment.”¹⁵⁰ Despite the involvement of a third state in the flow of such investments, the one major reason for allowing such investment is to allow Trans-National Corporations (TNCs) and their group companies to participate in the investment activity, where the investors of contracting states are the ultimate beneficiaries of the investment.¹⁵¹

It may be noted that the Indo-Taiwan BIT’s definition recognizes only investment made through an intermediary in a non-Contracting Party as an “indirect investment.”¹⁵² This implies that the definition does not recognize investments made by so-called investors *from* a non-contracting party through an intermediary established in the contracting party.¹⁵³ For instance, investment made by a parent company organized under the laws of a non-Party through an intermediary of a Party will not be considered as “indirect investment” for the purposes of the BIT. Such an interpretation emerges from the language “investment made by an investor through a legal entity of a non-Party” in the above definition clause. Yet, it is interesting to note that while such an investment will not come within the scope of the specific definition, it may still fall within the scope of the main provision (i.e., *vide chapeau* of the definition of the term “investment,”) an investment can be made either “directly or indirectly.”¹⁵⁴

The above discussion makes it clear that the BIT seems to distinguish between indirectly-held investment and the distinct category of “indirect investment.”¹⁵⁵ Also, references to the other provisions of the BIT show that the purpose of creating a strict category of “indirect investment” is

150. Agreement on encouragement and reciprocal protection of investments between the government of the Netherlands and the Government of the People’s Republic of China, China-Neth., art. 1, Nov. 26, 2001, 2369 U.N.T.S. 219, <https://treaties.un.org/doc/Publication/UNTS/Volume%202369/v2369.pdf> [<https://perma.cc/94SV-5UXF>] [hereinafter China-Netherlands BIT].

151. See generally U.N. CONFERENCE ON TRADE AND DEVELOPMENT, SCOPE AND DEFINITION: UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II 66–72 (2011), https://unctad.org/system/files/official-document/diaeia20102_en.pdf [<https://perma.cc/9U5H-55PL>].

152. See *id.*, at 86–92 (stating that, according to UNCTAD, investment through intermediaries can arise in 3 major ways: (i) investment from non-contracting state through intermediary established in a contracting state; (ii) investment from the host-state through an intermediary established in a contracting state; and (iii) investment through intermediary incorporated in a non-contracting state).

153. *Id.* at 112 (emphasis added).

154. See 2018 Indo-Taiwan BIT, *supra* note 59, art. 1.4 (explaining that such investor may not be able to meet the requirements of the definition of “investor” contained in the BIT, as the alleged investor is not “a natural or juridical person ‘of’ a territory.”).

155. See *id.* (emphasizing that if the clarification, instead of the current formulation, had provided that in the case of indirect investment through legal entity of non-Party, the same will be subjected to certain additional requirements, the other forms of indirect investment would not have been affected).

to impose certain additional requirements and conditions on “indirect investment” for access to investor-state dispute settlement.¹⁵⁶ The BIT provides that in case of “indirect investment,” the disputing investor may submit a claim under the BIT only if certain mandatory waivers are filed along with the claim.

In this regard, it is necessary to understand why the BIT contains certain specific provisions concerning indirect investment. Indirect investment is important for a number of stakeholders in the investment scenario. It is one of the chief means through which TNCs channel their foreign investment through their group subsidiaries.¹⁵⁷ Accordingly, capital-importing states always devise their investment policies in such a way as to attract foreign investment from TNCs. However, from a regulatory perspective, states hosting investment have increasingly felt that indirect investment also poses some of the serious treaty-shopping concerns.¹⁵⁸ The inclusion of “shares” as permissible assets in most modern IIAs and the investment tribunals’ general tendency to uphold even minority and non-controlling shareholding as “investment” paves the way for easy manipulation of the ownership or control requirements needed to avail the protection of a BIT.¹⁵⁹ Added to this, the investment jurisprudence also supports the notion that the right of a parent company or immediate controlling company to bring a claim is distinct from the right of the local subsidiary to access dispute resolution.¹⁶⁰ Similarly, investment tribunals have also recognized the right of each intermediary to submit their own claims for injuries suffered by the local subsidiary as a reflective loss.¹⁶¹

Two types of problems primarily arise out of this reduced threshold for legal standing of shareholders under investment law: one is multiple (or parallel) claims and another is remoteness of claims. While the Indo-

156. *Id.*, arts. 15.4(f)–(g).

157. For a definition of the term “transnational corporations,” see Subcomm. on the Promotion and Prot. of Hum. Rts. on Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Hum. Rts., UN Doc. No. E/CN.4/Sub.2/2003/12/Rev.2, at 7 (Aug. 26, 2003). For influence of TNCs on the world, see LEVIATHANS: MULTINATIONAL CORPORATIONS AND THE NEW GLOBAL HISTORY (Alfred D. Chandler & Bruce Mazlish eds., 2005); Jed Greer & Kavaljit Singh, *A Brief History of Transnational Corporations*, GLOB. POL’Y F., <https://archive.globalpolicy.org/component/content/article/221-transnational-corporations/47068-a-brief-history-of-transnational-corporations.html> [<https://perma.cc/6UDR-CKES>].

158. BAUMGARTNER, *supra* note 7, at 262.

159. It is relevant to note that a company may be directly or indirectly owned by another company or *by a group of other companies*. See discussion *infra* Part III, Remoteness of Indirect Shareholders and the Need for Cut-off point.

160. Patrick Dumberry, *Legal Standing of Shareholders Before Arbitral Tribunals: Has Any Rule of Customary International Law Crystallized?*, 18 MICH. STATE UNIV. J. INT’L L. 357 (2010).

161. LUKAS VANHONNAEKER, SHAREHOLDER CLAIMS FOR REFLECTIVE LOSS IN INTERNATIONAL INVESTMENT LAW 32–53 (Lorand Bartels et al. eds., 2020).

Taiwan BIT does not address the problem of remoteness specifically (which is discussed in more detail later in this Part), it is noteworthy for its framework concerning conditional access to investor-state arbitration in the form of waivers. As these waivers specifically deal with “indirect investment,” it becomes necessary to define and clarify the same. Such clarification is available as a part of the BIT’s definition of investment.

1. “Substantially” and “Directly”

After identifying “investment made by an investor through a legal entity of a territory of a non-Party” as an “indirect investment,” the BIT further clarifies what constituted indirect investment by imposing two additional requirements with regard to ownership or control of such a legal entity by a qualified investor: “substantially” and “directly” (“such legal entity” should be “substantially owned or controlled, directly by the investor”). In other words, when a qualified investor makes an investment through an intermediary of a non-Party state, instead of investing directly in the local subsidiary, such intermediary should be “substantially owned or controlled, directly” by the investor.¹⁶² Though some countries are wary of *unconditional* indirect investment and some precedent is available where IIAs have imposed certain restrictions, restrictions of this nature are rarely noticed.¹⁶³

In the world of corporate governance, ownership or control of one enterprise by another enterprise or by one or more individual investors can happen in a variety of ways: ownership of capital or funds or loans or other contribution in the enterprise by the investor; the right to appoint directors or management; provision for a voting agreement or a shareholder agreement or a partnership agreement or any similar agreement through which decision-making in the enterprise can be influenced by the investor.¹⁶⁴ The same is applicable to ownership or

162. In this requirement, the focus is not about investor’s control over investment (though that is also a requirement through other provisions) but it is about investor’s control over the legal entity of a non-party through which the investment is made. Similarly, the provision also needs to be distinguished from investor’s control over the investment vehicle in his home-state (which requirement is postulated in the definition of investor).

163. For example, the Protocol to the China-Netherlands BIT through its Ad Article 1, stipulated that “the relevant provisions of this Agreement shall apply to such investments (i.e., investments of legal persons of a third state) only when such third state has no right or abandons the right to claim compensation after the investments have been expropriated by the other Contracting Party.”

164. Reference may also be made to the draft Revised Indian Model BIT of 2015 which defined the terms both “owned” and “controlled.” However, it was not favored by many as it was meant to apply to all references of such expression throughout the BIT, without any discretion. The draft of the Revised Indian Model BIT of 2015 is available at https://www.bilaterals.org/IMG/pdf/model_text_for_the_indian_bilateral_investment_treaty.pdf [<https://perma.cc/Z9WN-EV3Y>] [hereinafter Draft Indian Model BIT].

control of a third-party intermediary by an investor. Though the provision is broader and covers ownership or control of any assets and is not limited to shares, in practice shareholding is the major way through which it arises in indirect investment.

While the position of “shares” as permissible assets for purposes of “investment” is well-established in modern investment treaty practice, the independent right of shareholders to access remedies under investment treaties is very controversial.¹⁶⁵ Moreover, as the decisions of investment tribunals take the view that there is no material distinction between majority and minority shareholders for jurisdictional purposes, even minority non-controlling shareholders are equally entitled to seek redress from investment tribunals.¹⁶⁶ Similarly, the investment tribunals do not differentiate between whether the shareholder was holding the shares either directly in the enterprise of the host-state or indirectly through one or more intermediaries.¹⁶⁷

The BIT seeks to plug the above loopholes by establishing certain criteria of ownership or control (i.e., “substantial” and “direct” ownership or control of legal entity of non-party) by the investor. The BIT supposes that if these twin requirements are met in the process of indirect investment, despite the involvement of certain non-parties, the benefit will eventually accrue to the contracting parties and the concerns of treaty shopping inherent in indirect investment may be addressed. It may also be noted that while the Draft Indian Model BIT of 2015¹⁶⁸ proposed, among others, ownership of 50% of capital or the right to appoint majority of directors as criteria to determine ownership or control, the current formulation is very moderate and realistic. While the requirement

165. Though the International Court of Justice (ICJ) decision in the case of *ELSI* seems to settle this question, it is seriously objected to by certain leading publicists. The fact that the *ELSI* decision does not refer to or clarify the *Barcelona Traction* was also frequently highlighted. See *Barcelona Traction, Light & Power Co., Ltd. (Belgium v. Spain)*, Judgment, 1970 I.C.J. 3 (Feb. 5); *Elettronica Sicula S.p.A (ELSI) (United States v. Italy)*, Judgment, 1989 I.C.J. Rep. 15 (July 20); *Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo)*, Preliminary Objections, 2007 I.C.J. 103 (May 24). See also Patrick Dumberry, *Legal Standing of Shareholders Before Arbitral Tribunals: Has Any Rule of Customary International Law Crystallized?*, 18 MICH. STATE UNIV. J. OF INT’L L. 357 (2010); Christoph Schreuer, *Shareholder Protection in International Investment Law*, 3 TRANSNAT’L DISP. MGMT. (2005).

166. David Gaukrodger, *Investment Treaties And Shareholder Claims: Analysis of Treaty Practice*, 23 OECD WORKING PAPERS ON INTERNATIONAL INVESTMENT (2014), <https://www.oecd.org/Investment/investment-policy/WP-2014-3.pdf>.

167. In fact, a number of well-known investment arbitral pronouncements such as *Siemens v. Argentina*, *Enron v. Argentina*, *Waste Management v. United Mexican States*, *Azurix v. Argentina*, *Aguas del Tunari v. Bolivia*, and *TSA Spectrum v. Argentina* adequately demonstrate that investors with a mere minority shareholding and/or indirect control may also establish themselves as investors successfully. For more detailed discussion in this regard, see VANHONNAEKER, *supra* note 167.

168. See Draft Indian Model BIT, *supra* note 170.

of “substantially” is more focused on the quantum of ownership or control, the “directly” requirement is related to the manner of ownership or control.

2. “Substantially”

This threshold, though definitely lesser than a majority, in view of the exceptional nature of the provision, should mean *considerable* ownership or control. I argue that legal clarification may not be needed just to emphasize a *substantive* (or minimal) ownership or control. Though the tribunal in *AMTO v. Ukraine*¹⁶⁹ observed that the term “substantial” should mean something “of substance and not merely of form,” in view of the contextual difference, the same should not be applied to the interpretation of the expression.¹⁷⁰

Moreover, no investment decision has directly addressed this issue so far. Even whatever investment arbitral decisions are available, where remarks or observations are made in this connection, the panels are generally reluctant to require any specific minimum ownership or control in the absence of any explicit requirements in the Indo-Taiwan BIT. Yet, some observations in *Waste Management*,¹⁷¹ *Enron*,¹⁷² and *Standard Chartered Bank*¹⁷³ are helpful to understand the background. In the case of *Waste Management v. Mexico*,¹⁷⁴ the tribunal observed that under the North American Free Trade Area (NAFTA) regime, investment may be “held through companies or enterprises of non-NAFTA States, if the *beneficial* ownership” is “with a NAFTA investor.”¹⁷⁵ In this case,

169. *AMTO v. Ukraine*, SCC Case No. 080/2005, Final Award (Mar. 26, 2008).

170. *Id.* § 69. The tribunal further noted that the adjective “does not mean ‘large,’ and the materiality, not the magnitude.”

171. *Waste Management v. Mexico*, ICSID Case No. ARB (AF)/00/3, Award (Apr. 30, 2004).

172. *Enron v. Argentina*, ICSID Case No. ARB/01/3, Award (May 22, 2007).

173. *Standard Chartered Bank v. Tanzania*, ICSID Case No. ARB/10/12, Award, ¶ 240 (Nov. 2, 2012), <https://jusmundi.com/en/document/decision/en-standard-chartered-bank-v-united-republic-of-tanzania-award-friday-2nd-november-2012> [<https://perma.cc/KK2M-4RED>].

174. *Waste Management*, Award (Apr. 30, 2004). The local subsidiary, Acaverde was owned by Sun Investment Co., through a holding company known as Acaverde Holding Co.—both Cayman Islands companies. Acaverde Holding Co. was later purchased by Sanifill Inc., a U.S. company which was merged with USA Waste Services Inc., which later became Waste Management Inc.

175. *Id.*, Award, ¶ 80 (Apr. 30, 2004). The tribunal made certain other references in terms of the threshold of “substantially.” It ruled that the provisions of denial of benefits under the NAFTA regime will apply when “the investor is simply an intermediary for interests ‘substantially’ foreign.” *Id.* A comparison of the NAFTA and the revised Indo-Taiwan BIT brings interesting insights. While the new Indo-Taiwan BIT provides that entity of non-party should be owned or controlled by the investor of a Party, the denial of benefits provision of the NAFTA provides that if investors of non-Party own or control the enterprise of a Party, they may be denied the protection

Mexico objected to the jurisdiction of the tribunal as Waste Management Inc., though an investor from the United States, made its investments through two holding companies incorporated in a third state, the Cayman Islands.¹⁷⁶ However, the tribunal reasoned that NAFTA allows claims by investors on behalf of a local subsidiary¹⁷⁷ and rejected the objection. It agreed with the submission of the Claimant that Acaverde was a wholly-owned subsidiary of Waste Management Inc. (although, indirectly) “at all relevant times.”¹⁷⁸

In the case of *Enron v. Argentina*,¹⁷⁹ the claimants jointly with other indirect shareholders involving several layers of complex ownership structure held 35.263% of total shares in TGS, the local subsidiary.¹⁸⁰ However, as the claimants clarified that they were making the claim on their own and independent of TGS, the tribunal merely noted that in the absence of any treaty provision, it is not possible for the tribunal to “exclude claims by minority or non-controlling shareholders.”¹⁸¹ The tribunal also seems to have been persuaded by the fact that the claimants made their investment “in a string of locally incorporated companies” participating in the project, prompting only “marginal” investment in TGS.¹⁸²

On the other hand, in the case of *Standard Chartered Bank v. Tanzania*,¹⁸³ wherein the tribunal had propounded the active contribution requirements, made certain observations touching upon the point of ownership. Noting the direct ownership of Standard Chartered Bank Hong Kong (SCB HK) by Standard Chartered Bank UK (SCB UK) of only 38.8%, the tribunal observed that “[e]ven applying the *Cemex* standard,” where the Dutch claimants had 100% ownership in a Cayman Islands subsidiary, the “Claimant would fail to demonstrate its control over the relevant subsidiary.”¹⁸⁴ It may be noted that the panel did not

of the investment treaty. In fact, the revised Indo-Taiwan BIT’s denial of benefits provision is also devised on the same lines. It is submitted that the formulations of these two IIAs are different ways of saying the same things.

176. In this case, Mexico challenged the legality of investment through third party intermediary.

177. For this finding, the tribunal mainly relied on the following points: firstly, the definition of enterprise includes “corporations established under the law of a third state;” secondly, Article 1117 allows claims by enterprise owned or controlled “directly or indirectly,” which means that through an intermediary of a third state. *Waste Management*, Award, ¶¶ 81, 84 (Apr. 30, 2004).

178. *Id.* ¶¶ 40, 80. In this case, the quantum of ownership or control was not in dispute.

179. *Enron v. Argentina*, ICSID Case No. ARB/01/3, Award (May 22, 2007).

180. *Id.* ¶ 52.

181. *Id.*, Decision on Jurisdiction, ¶ 44 (Jan. 14, 2004).

182. *Id.* ¶ 50.

183. *Standard Chartered Bank v. Tanzania*, ICSID Case No. ARB/10/12, Award, ¶ 240 (Nov. 2, 2012), <https://jsumundi.com/en/document/decision/en-standard-chartered-bank-v-united-republic-of-tanzania-award-friday-2nd-november-2012> [<https://perma.cc/Y4UC-EP8X>].

184. *Id.* ¶ 253.

consider the indirect majority shareholding in the Hong Kong subsidiary through Standard Chartered Sherwood (SC Sherwood). Moreover, the tribunal did not favor any specific threshold on the quantum of ownership or control of the entity in question.

In *Louis Dreyfus Armateurs v. India*,¹⁸⁵ the question of indirect ownership was mainly in dispute. The claimant, Louis Dreyfus Armateurs (LDA), alleged damage of its business interests in Haldia Bulk Terminals Private Ltd. (HBT), its local subsidiary in India, which was indirectly owned through ALBA Asia Private Ltd. (ALBA), a joint venture company also incorporated in India.¹⁸⁶ However, LDA merely held 49% of ALBA's shares, while the remaining 51% was held by another Indian company known as ABG Ports, although ALBA for its part, held a 63% equity stake in HBT.¹⁸⁷ Relying upon the "scope of the agreement" in Article 2(1) of the India-France BIT,¹⁸⁸ the tribunal refused to consider LDA's indirect investment in HBT as qualified investment as LDA owned less than 51% in the intermediate investment vehicle, ALBA.¹⁸⁹

Finally, the influential *Phoenix* decision has been quite instructive with regard to the minimal extent of control which should not generally qualify as "investment."¹⁹⁰ In that case, the tribunal observed that "some concern has indeed been voiced by international tribunals, and is shared by this Tribunal, that not any minor portion of indirectly owned shares should necessarily be considered as an investment."¹⁹¹

Though the above analysis seems to indicate the probable interpretation, the true scope of the provision will be known only when the tribunal under the BIT gives a decision on this point. As of now, the *Phoenix* decision offers limited guidance that any minor portion of investment held indirectly will not qualify as "investment." Yet, we may

185. *Louis Dreyfus Armateurs v. India*, PCA Case Repository 2014-26, Final Award (Sept. 11, 2018), <https://www.italaw.com/sites/default/files/case-documents/italaw11242.pdf> [https://perma.cc/7V4C-7X3H].

186. *See generally id.*, Decision on Jurisdiction (Dec. 22, 2015), <https://www.italaw.com/sites/default/files/case-documents/italaw11241.pdf> [https://perma.cc/747R-M9E9]. In this case, the intermediate entities through which the investment was routed was located in the host-state itself.

187. *Louis Dreyfus Armateurs*, Final Award, ¶¶ 88–89 (Sept. 11, 2018).

188. It provided that the agreement shall apply to "any investment made by investors of either Contracting Party in the area of the other Contracting Party, including an indirect investment made through another company, wherever located, which is owned to an extent of at least 51 percent by such investors."

189. *Louis Dreyfus Armateurs*, Final Award, ¶ 138 (Sept. 11, 2018). As the provision focused on the extent of foreign investor's stake in the intermediate vehicle, the provision may be considered as the precursor to the 2018 Indo-Taiwan BIT's clarification.

190. *Phoenix Action v. Czech Republic (Isr.-Czech)*, ICSID Case No. ARB/06/5, Award, ¶ 87 (Apr. 9, 2009).

191. *Id.* ¶ 122.

hope that a future panel will lay down some criteria to assess substantiality rather than adopting a case-to-case approach towards the interpretation of this requirement.

3. “Directly” (In “Indirect Investment”)

The clarification offered in the BIT not only requires that “investment made by an investor through a legal entity of a territory of a non-Party” be “substantially owned or controlled” but it should also be “owned or controlled, directly” by the investor.¹⁹² The purpose of prescription of a higher threshold through a dedicated provision would not be of much use if the provision merely prescribed the criteria of “substantially owned or controlled” as the foreign investor may be able to show, without any difficulty in most cases, the required quantum of ownership or control through an indirect relationship.¹⁹³

Moreover, the occurrence of the word “directly” after the words “substantially owned or controlled” was intended to give an emphasis different from the usage of “substantially and directly, owned or controlled.” It is posited that the BIT drafters were consciously seeking to impose certain requirements of “direct[ness]” to an “indirect investment” and accordingly they chose the current order of words. In the type of investment in question, both direct and indirect elements are contemplated: while such investment is “indirect” in the sense that it is made through an intermediary (of a non-party), the control or ownership of that entity by the qualified investor should be “direct.”

Since most BITs do not explicitly provide for indirect investment as a separate category, the question of imposing any limitations or restrictions on such investments does not arise. As a result, the current clarification looks unprecedented and its scope completely untested. Yet, the subject of substantial links between third-party legal entities and the investor has been touched upon by some investment arbitral tribunals, often in conjunction with the claims of indirect shareholders and the issues of remoteness of claims and the cut-off point.¹⁹⁴

192. See 2018 Indo-Taiwan BIT, *supra* note 59, art. 1.3.

193. This would also mean that the “substantial” ownership or control is to be calculated only on the basis of directly owned or controlled assets.

194. Though the decision in *Standard Chartered Bank v. Tanzania* is concerned with the requirement of “active contribution” and is more related to the relationship between investor and investment, its citation of *Cemex* with approval and its observations may be used to support the need for a reasonably good relationship between the investor and the legal entity of a non-party. It considered that it is unreasonable to read the BIT to permit a national of UK with subsidiaries all around the world to claim under the UK-Tanzania BIT “for each and every one of the investments around the world by th[e] daughter or grand-daughter entities.” *Standard Chartered Bank v. Tanzania*, ICSID Case No. ARB/10/12, Award, ¶¶ 247–53, 270 (Nov. 2, 2012), <https://jsumundi.com/en/document/decision/en-standard-chartered-bank-v-united-republic-of-tanzania-award-friday-2nd-november-2012> [<https://perma.cc/82CY-FMZ4>].

In several well-known decisions, despite the presence of complicated ownership structures spread over multiple layers of intermediaries (and the claimant's fragile links to third-party entities), the tribunals dismissed objections based on the indirect nature of the claims.¹⁹⁵ They often cite the broad scope of the definition of "investment" in the applicable IIA, such as the asset-based definition of "investment," as the major reason for upholding such claims.

In the case of *Waste Management v. Mexico*, the tribunal ruled that when an investor of a party makes an investment through an intermediary of a third party, what is required to entertain the claim is that the third-party intermediary should be *beneficially owned* by a NAFTA investor during relevant times.¹⁹⁶ Relatedly, it also distinguished between nationality of investors and nationality of investment; and further remarked that under NAFTA, neither the nationality of intermediary entities nor the nationality of investments is relevant.¹⁹⁷ On the contrary, the Indo-Taiwan BIT is not satisfied with the minimum threshold of beneficial ownership or control. It requires "direct" ownership or control of the relevant entity by the investor-claimant.

B. Active Contribution Requirements

Besides the above requirements of the BIT, the definition of "investment" contained in the BIT also seems to require "active contribution," as canvassed in the case of *Standard Chartered Bank v. Tanzania*.¹⁹⁸ This decision reasoned that when a parent company or its subsidiaries make a claim for protection of assets in the hands of their local subsidiaries, the claiming entities must demonstrate that they have

195. *Azurix v. Argentina*, ICSID Case No. ARB/01/12, Award (July 14, 2006); *Enron v. Argentina*, ICSID Case No. ARB/01/3, Award (May 22, 2007); *Aguas del Tunari v. Bolivia*, ICISD Case No. ARB/02/3, Decision on Respondent's Objection to Jurisdiction (Oct. 21, 2005).

196. *Waste Management v. Mexico*, ICSID Case No. ARB (AF)/00/3, Award (Apr. 30, 2004), ¶ 80.

197. *Id.* ¶ 83.

198. *Standard Chartered Bank*, Award, ¶¶ 206–32 (Nov. 2, 2012). See generally JESWALD W. SALACUSE, *THE LAW OF INVESTMENT TREATIES* (3d ed. 2021); Roland Ziadé & Lorenzo Melchionda, *Structuring and Restructuring of Investment in Investment Treaty Arbitration*, in *CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS* 370 (Arthur W. Rovine, ed., 2015). Although the decision in *Alapli Elektrik B.V. v. Turk.*, ICSID Case No. ARB/08/13 (July 16, 2012) should ideally be considered as the first case in which the active contribution requirement was originally laid down, in view of the non-publication of the award, its contents were largely unknown. Currently, the excerpts of the award are available at <https://www.italaw.com/sites/default/files/case-documents/italaw4306.pdf> [<https://perma.cc/ZV57-MNWF>].

actively contributed to the investment in some way, without which they will not be able to meet the jurisdictional requirements.¹⁹⁹

In that case, a claim was brought by SCB UK, a company incorporated in the United Kingdom, with respect to construction of a power plant in Tanzania for which financial arrangements were made by SCB HK.²⁰⁰ For this purpose, the Claimant relied on its direct shareholding of 38.8% in SCB HK as well as indirect ownership of the entire shareholding in SC Sherwood (i.e., 61.2%).²⁰¹ Citing the dispute settlement provisions of the UK-Tanzania BIT, Tanzania argued that an investment tribunal may exercise jurisdiction in a dispute between itself and a company from the United Kingdom only if it is “an investment of the latter in the territory of the former.”²⁰² It further argued that in any case, the credit arrangements by SCB HK may not be considered as an investment of SCB UK.²⁰³ The tribunal agreed with the above argument and reached the conclusion that the Claimant lacked the status of an investor. It reasoned that “[t]o benefit from Article 8(1)’s arbitration provision,” a “[p]assive ownership of shares in a company not controlled by the claimant where that company in turn owns the investment is not sufficient” and instead the “claimant must demonstrate that the investment was made at the claimant’s direction, that the claimant funded the investment or that the claimant controlled the investment in an active and direct manner.”²⁰⁴

To reach a conclusion as to whether the BIT required an active or passive relationship, the tribunal used the following methodology. Its focus was whether the investment is merely *held or owned* by the investor or whether it is *made* by the investor.²⁰⁵ For this purpose, it primarily looked to the language employed by the BIT. It found several words, prepositions and phrases to support its conclusion: “of,”²⁰⁶ “by,”²⁰⁷

199. See BAUMGARTNER, *supra* note 7, at 265 (commenting that though the decision requires further clarification, states seeking to avoid treaty shopping should consider including the provision); Jorge E. Viñuales, *Too Many Butterflies? The Micro-Drivers of the International Investment Law System*, 9 J. INT’L DISP. SETTLEMENT 628–53 (2018) (for similar, yet varied approach involving indirect shareholder claims, in the light of the decision in *Poštová Banka & Istrokapital v. Greece*, ICSID Case No. ARB/13/8); Odysseas G. Repousis, *The Use of Trusts in Investment Arbitration*, 34 ARB. INT’L 274 (2018) (characterizing the decision in *Standard Chartered Bank v. Tanzania* as “overly formalistic”).

200. *Standard Chartered Bank*, Award, ¶¶ 196, 200 (Nov. 2, 2012).

201. *Id.* ¶ 60.

202. *Id.* ¶ 70 (quoting Resp. Reply PHB, ¶ 57).

203. *Id.* ¶¶ 200, 208.

204. *Id.* ¶ 230.

205. *Id.* ¶¶ 75, 221, 257.

206. *Id.* ¶¶ 208–10, 213–14, 230.

207. *Id.* ¶¶ 213–14, 219–20.

“made,”²⁰⁸ “to invest”²⁰⁹ and “an investment of the latter in the territory of the former.”²¹⁰ Though the preferred locations to find these expressions are the dispute settlement provisions and the definitional clause of investment—if “active contribution” requirements are to serve as jurisdictional requirements—the *Standard Chartered Bank* panel also relied upon provisions concerning the application of other rules,²¹¹ such as the promotion and protection of investment,²¹² the preamble,²¹³ and the objects and purposes²¹⁴ of the BIT. Moreover, the decision also demonstrated that while an indicative preposition may be found in one section of the BIT, its associated verb may be found in another section.²¹⁵

In the opinion of the tribunal, the most important provision which may tilt the balance in favor of concluding an active relationship is required in the dispute settlement clause of the UK-Tanzania BIT contained in Article 8(1). It provides that the contracting parties consent to the jurisdiction of the tribunal with respect to “any legal dispute arising between that Contracting Party and a national or company of the other Contracting Party concerning an ‘investment of the latter in the territory of the former.’”²¹⁶ However, the tribunal could not make any decisive conclusion in that case, as it was not able to confirm whether the preposition “of” was used in a possessive or contributory context.²¹⁷ As a result, it consulted the other important segment of the BIT, the definitional clause of investment, where the associated verb (“made”) was used twice, thus clearly indicating a requirement of active contribution. While the first use referred to the “territory of the Contracting State in which the investment is *made*,” the other instance brought within its ambit “all investments, whether *made* before or after the date of entry into force of this Agreement.”²¹⁸ Taking a cumulative view of these and other provisions of BIT,²¹⁹ the tribunal finally

208. *Id.* ¶¶ 222, 225.

209. *Id.* ¶ 229.

210. *Id.* ¶¶ 208, 230.

211. *Id.* ¶ 219.

212. *Id.* ¶ 229.

213. *Id.* ¶ 227.

214. *Id.* ¶ 228.

215. *Id.* ¶ 208. In this case, while the suggestive preposition *of* was found in art. 8(1), its associated verb “made” was located in art. 1(a).

216. *Id.* ¶ 215 (emphasis added).

217. *Id.* ¶ 217 (noting the ambivalent nature of the phrase “investment of the latter”); *Id.* ¶ 221 (Similarly, with regard to the preposition “by,” it noted that “no such verb appears in the phrase in art. 8(1).”).

218. *Id.* ¶ 222.

219. *Id.* ¶¶ 222–23. The tribunal also relied upon the language of art. 14 providing for extension of the duration of protection in respect of “investments made” while the instrument is in force. Moreover, the panel recorded that it could not find any evidence as to the requirement of passive relationship within the framework of the treaty.

concluded that “an active relationship [exists] between the investor and the investment” which is essential for the exercise of jurisdiction of the tribunal.²²⁰

In the Indo-Taiwan BIT, there are ample references indicating the requirement of a stronger and active relationship between investment and investor are present throughout the BIT. In fact, the phrase “investment is made,” incorporating the active verb “made,” is used twice in the description of the term “investment.”²²¹ Also, the phrase is used in two other instances in the definition of the term “enterprise,” which itself shall be considered as an integral part of the notion of investment as the BIT provides for an enterprise-based definition of “investment.”²²² Moreover, the same crucial phrase occurs sixteen times in the whole of the instrument including in its provisions dealing with admission of investment,²²³ and the conditions precedent to submission of a claim to arbitration.²²⁴

Yet, the most-striking provision in this regard is found in the clarification concerning indirect investment forming part of the definition of “investment.” It contains the phrase “investment made by an investor” with an active verb “made” demonstrating a stronger relationship between the investment and the investor.²²⁵ Its use in the clarification is intended to ensure that the active contribution requirement would at least apply to indirect investment, though in view of the specific language of the definition and other provisions of BIT, it should also be generally applicable to all investments.²²⁶

Further, in its chapter on “Settlement of Investment Disputes,” the BIT contains several strong indications as to the applicability of active contribution requirements.²²⁷ The dispute resolution framework definitionally provides that the benefit of treaty protection can be extended only to “a dispute between the authorities of a territory and an investor of the other territory with respect to ‘its investment.’”²²⁸ It is argued that the use of a possessive pronoun in the context of investment

220. *Id.* ¶ 230.

221. 2018 Indo-Taiwan BIT, *supra* note 59, art. 1.3.

222. *Id.* art. 1.2.

223. *Id.* art. 2.1.

224. *Id.* art. 15.3–4.

225. *Standard Chartered Bank v. Tanzania*, ICSID Case No. ARB/10/12, Award, ¶ 230 (Nov. 2, 2012), <https://jsumundi.com/en/document/decision/en-standard-chartered-bank-v-united-republic-of-tanzania-award-friday-2nd-november-2012> [<https://perma.cc/DXN4-YURF>]. A similar expression is also found in the provision on treatment of investments: “Investments made by investors,” art. 3.1.

226. A clear indication of the requirement has been given in the clarification to strengthen the BIT’s provision relating to indirect investments.

227. 2018 Indo-Taiwan BIT, *supra* note 59, ch. IV.

228. *Id.* art. 13.2.

indicates the necessity of a stronger relationship between the investor and the investment.²²⁹ This increases the likelihood that the active contribution requirement is held applicable to the BIT.

Moreover, the provision laying down the requirement of exhaustion of local remedies repeats the expression “investment is made.”²³⁰ The conditions precedent to investor-state dispute settlement provides that “a disputing investor may submit a claim to arbitration . . . *only if* . . .” he fulfils the condition of submitting his claim “before the relevant domestic courts or administrative bodies in the territory in which the investment is made.”²³¹ It is submitted that since the relevant terminology of “investment is made” is part of the dispute settlement framework, future tribunals will have no difficulty in holding active contribution by investors to be a jurisdictional requirement.²³²

Further still, in certain other provisions, such as the definition of “investor”—“a natural or juridical person” who “has made an investment”²³³—and the expropriation clause—“investment of an investor”—the BIT uses the preposition “of” to indicate an active relationship.²³⁴ Similarly, certain elements in the BIT’s preamble also signify active control over the investment by investors. The objects and purposes of the BIT recognize that the “promotion and protection of *investments of investors*” will be “conducive to the stimulation of mutually beneficial business activity.”²³⁵ It is apt to note that the expression “mutually beneficial” can be considered synonymous with the formulation “reciprocal protection” found in the UK-Tanzania BIT encountered in the *Standard Chartered Bank* case, *v. Tanzania*, which prompted the tribunal to observe that: “‘reciprocal protection’ and ‘reciprocal’ must have some meaning.”²³⁶

On the other hand, there is no evidence in the BIT that it merely requires a passive relationship between the investment and the investor. It does not use the word “held” or “owned” in connection with the

229. Baumgartner, *supra* note 7, at 267. The words “its investment” implying investor’s investment has been repeatedly used in the BIT (nine times), including in its provisions concerning the admission of investment, expropriation and dispute settlement.

230. 2018 Indo-Taiwan BIT, *supra* note 59, art. 15.4.

231. *Id.* (emphasis added).

232. See 2018 Indo-Taiwan BIT, *supra* note 59, art. 15.3; see also *Standard Chartered Bank v. Tanzania*, ICSID Case No. ARB/10/12, Award, ¶ 271 (Nov. 2, 2012), <https://jsumundi.com/en/document/decision/en-standard-chartered-bank-v-united-republic-of-tanzania-award-friday-2nd-november-2012> [<https://perma.cc/7UT4-XC3K>]. Similarly, the dispute settlement framework uses the same phrase in the context of amicable settlement of disputes, such as consultation or negotiation.

233. 2018 Indo-Taiwan BIT, *supra* note 59, art. 1.4.

234. *Id.* art. 5.1.

235. *Id.* preamble (emphasis added).

236. *Standard Chartered Bank*, ¶ 270 (citing 2018 Indo-Taiwan BIT, *supra* note 59, preamble).

relationship between the investor and the investment. It uses the word “hold” only in relation to conduct of arbitral proceedings²³⁷ or transparency in arbitral proceedings,²³⁸ and not for any purposes of substantive investment protection. Similarly, the word “owned” is frequently used in the BIT,²³⁹ but such usage is mostly in connection with investment through controlled subsidiaries and it does not imply that investment (passively) held or owned by the investor is sufficient for purposes of legal protection. Hence, it is certain that the active contribution requirement will be held applicable to the Indo-Taiwan BIT.

C. Remoteness of Indirect Shareholders and the Need for a Cut-Off Point

As examined so far, to deal with the problems arising out of indirect investment, the BIT adopts two strategies: one is provisions for waiver as a part of conditional access to investor state arbitration and the other is an active contribution requirement. While the conditional access targets parallel and multiple proceedings by identical indirect investors in the same corporate chain, the active contribution requirements anticipate that (indirect) investors should have actively contributed to the investment. Yet, the two strategies are not intended to address the problem of the extent to which a remote claim, that is an investment claim by indirect shareholders across multiple layers of intermediaries, may be allowed.²⁴⁰

237. 2018 Indo-Taiwan BIT, *supra* note 59, art. 19.1.

238. *Id.* art. 21.2.

239. Overall, the word “owned” is used seven times in the BIT.

240. The problem of remoteness in indirect investment mainly arises out of the shareholders’ direct right of legal action under international investment law. On the question of whether the shareholders are entitled to make direct claim under international law and investment law, the following sources are indispensable. For international judicial decisions on this point, *see* *Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain)*, Judgment, 1970 I.C.J. 3 (Feb. 5) (The International Court ruled that foreign shareholders are not entitled to any legal protection under international law for harms suffered by them in consequence of acts and omissions committed by the host-state. It observed that though “a wrong done to the company frequently causes a prejudice to its shareholders,” “the mere fact that damage is sustained by both company and shareholder does not imply that both are entitled to claim compensation.” It clarified that in those circumstances, “no doubt, the interests of the aggrieved are affected, but not their rights”), *id.* ¶ 44; *Elektronika Sicala S.p.A (ELSI) (United States v. Italy)*, Judgment, 1989 I.C.J. Rep. 15 (July 20) (In this case, the court without any reference or discussion to its previous decision in *Barcelona Traction*, assumed that U.S. was entitled to make submissions on behalf of its shareholders in the ELSI under the U.S.-Italy BIT. However, Judge Oda in his separate but concurring opinion examined this issue in a detailed manner and observed that the shareholders for whatever material rights that they have vis-à-vis the company are to be protected only by participation in the management and operation of a company and not by direct claim). *Id.* at 84–85. For judicial views on legal protection of shareholders in a comparative perspective under both diplomatic protection and investment treaty law, *see* *Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo)*, Preliminary Objections, 2007 I.C.J. 103 (May 24). For decisions of investment arbitral

Though it is true that an insistence on active contribution requirements will reduce the problem of remoteness of claims to some extent,²⁴¹ the dilution of the active contribution requirement itself by the *South American Silver* decision²⁴² increases the relevance of a cut-off point with reference to which the question of remoteness may be decided.²⁴³ Moreover, despite the strong indication that an active contribution requirement exists in the BIT, there is no guarantee that a future tribunal will hold such a requirement applicable to the BIT. This underlines the need for a cut-off point.

The *Enron* tribunal was the first to formally acknowledge this problem.²⁴⁴ It noted that “while investors can claim in their own right

tribunals, mainly, *CMS v. Argentina*, ICSID Case No. ARB/01/8 (May 12, 2005), and *Enron v. Argentina*, ICSID Case No. ARB/01/3, Award (May 22, 2007).

For scholarly works on this subject, see Christoph Schreuer, *Shareholder Protection in International Investment Law*, 3 TRANSNAT'L DISP. MGMT. (2005) (“It is now generally accepted on the basis of treaty provisions, that shareholding in a company is a form of investment that enjoys protection”); Stanimir A. Alexandrov, *The Baby Boom of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as Investors under Investment Treaties*, 6 J. WORLD INV. & TRADE 387 (2005). Under the ICSID jurisprudence, “a shareholder has standing independent of the corporation whose equity is held,” *id.* at 410. See DOUGLAS, *supra* note 71, ¶ 743 (observing that tribunal may exercise both *ratione personae* and *ratione materiae* jurisdiction over claims of shareholder); Martin J. Valasek & Patrick Dumberry, *Developments in the Legal Standing of Shareholders and Holding Corporations in Investor-State Disputes*, 26 ICSID REV.-FOREIGN INV. L.J., 34 (2011) (acknowledging the right of shareholders to act against the interference with their investment); Dumberry, *supra* note 166, at 353 (though argues that no customary international law exists providing shareholders the right to claims before international tribunals, yet admits that IIAs grant unprecedented substantive and procedural rights to shareholders to access the specialist investment tribunals); Baumgartner, *supra* note 7, at 2 (observing that “investment treaties usually contain a very broad investor standing, protecting not only direct but also indirect shareholding, and often even minority shareholding”); GABRIEL BOTTINI, ADMISSIBILITY OF SHAREHOLDER CLAIMS UNDER INVESTMENT TREATIES 5 (2020) (“Shareholder claims under IIAs for measures causing harm to a company in which, directly or indirectly, they hold shares are nowadays a significant part of investment arbitration”).

241. Mark Feldman considers the active contribution requirement as one of the solutions to the problem of remoteness of claims. While the lack of active contribution, in view of the parameters of *Standard Chartered Bank v. Tanzania* decision, affects jurisdiction, the legal standing of indirect shareholders and the considerations of remoteness is a question of admissibility. Mark Feldman, *Multinational Enterprises and Investment Treaties*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2015–2016 175 (L. Sachs & L. eds., 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2895680# [<https://perma.cc/NZ6T-FN8R>].

242. *South American Silver Ltd. v. Bolivia*, Award, ¶ 331 (Perm. Ct. Arb. 2018), <https://www.italaw.com/sites/default/files/case-documents/italaw10361.pdf> [<https://perma.cc/NB5H-7TB9>].

243. The later decisions clarified that the *Standard Chartered Bank v. Tanzania* ruling may not be applicable to cases where the assets sought to be protected are “shares” or where the shareholder controls the entity making the investment, albeit indirectly.

244. *Enron v. Argentina*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, ¶ 44 (Jan. 14, 2004). In this case, the claimant disputed certain tax assessments by Argentine provinces as illegal

under the provisions of the treaty, there is indeed a need to establish a cut-off point beyond which claims would not be permissible as they would have only a remote connection to the affected company.”²⁴⁵ However, the tribunal was of the opinion that it is merely “a question of admissibility of claims,”²⁴⁶ which can be determined by reference to the dispute settlement provisions of the treaty²⁴⁷ although it finally decided

under Argentine law, which it argued as tantamount to an expropriation under the Argentina-United States BIT. *Id.* ¶¶ 22, 25. The convoluted nature of the indirect investment involved in the case is explained by the tribunal in the following words:

Claimants’ participation concerns the privatization of Transportadora de Gas del Sur (“TGS”), one of the major networks for the transportation and distribution of gas produced in the provinces of the South of Argentina. The Claimants own 50% of the shares of CIESA, an Argentine incorporated company that controls TGS by owning 55.30% of its shares; the Claimants’ participation in CIESA is held by two wholly-owned companies, EPCA and EACH. The Claimants, through EPCA, EACH and ECIL, another corporation controlled by the Claimants, also own 75.93% of EDIDESCA, another Argentine corporation that owns 10% of the shares of TGS; and they also have an acquired an additional 0.02% of TGS through EPCA. The investment as a whole, it is explained, amounts to 35.263% of TGS.

Id. ¶ 21. The tribunal remarking on the multiple layers of intermediaries, although in the context of multiplication of claims, observed that:

The Argentine Republic has rightly raised a concern about the fact that if minority shareholders can claim independently from the affected corporation, this could trigger an endless chain of claims, as any shareholder making an investment in a company that makes an investment in another company, and so on, could invoke a direct right of action for measures affecting a corporation at the end of the chain.

Id. ¶ 50.

245. *Id.* ¶ 52. Zachary Douglas also support this view. He observed that “[t]he need for such a definition certainly did arise.” DOUGLAS, *supra* note 71, at 823. On the other hand, Professor Christoph Schreuer took a diametrically opposite view. He opined that the *Enron*’s call for a cut-off point was without any “legal foundation.” Instead, he favored the search for alternative solutions without deprivation of the legal standing of shareholders, especially for problems of multiplicity of claims emanating from indirect investment. Schreuer, *supra* note 246, at 14.

246. Highlighting the enormous significance of this point, Zachary Douglas emphatically observed, “the single greatest misconception” that is confronting the investment treaty arbitration is the “incorrect characterization of the problem [of claims by shareholders] as one of jurisdiction rather than admissibility.” DOUGLAS, *supra* note 71, at 743.

247. *Enron*, Decision on Jurisdiction, ¶ 44 (Jan. 14, 2004). The tribunal elaborated further and stated the rule as:

If consent has been given in respect of an investor and an investment, it can be reasonably concluded that the claims brought by such investor are admissible under the treaty. If the consent cannot be considered as extending to another investor or investment, these other claims should then be considered

the issue on a different ground altogether.²⁴⁸ Noting that the claimants had been personally invited by the government of Argentina to participate in the investment, it opined that the *Enron* dispute fell within the scope of consent to arbitration.²⁴⁹ As a result, it concluded that Enron cannot be considered only remotely connected to the local company TGS. The above discussion indicates that though the *Enron* decision is generally appreciative of the problem of remoteness of claims, it was neither able to define the problem of remoteness nor was it in a position to lay down any broad parameters regarding when a corporate relationship should be considered too remote.²⁵⁰

In the later decision of *Noble Energy v. Ecuador*,²⁵¹ though more or less the same position continued, the tribunal moved the discussion forward and attempted certain practical solutions.²⁵² Reflecting its deeper understanding of the issue, the tribunal underscored the following questions which are inherent in the problem of remoteness: “[H]ow indirect can a shareholder be and still qualify as an investor for treaty purposes? Is there a limit[?] [H]ow many layers or corporations can there

inadmissible as being only remotely connected with the affected company and the scope of the legal system protecting that investment.

Id. ¶ 52.

248. The tribunal reasoned that the participation of the claimants was specifically sought and hence it is thus included within the consent to arbitration given by Argentina. *Id.* ¶ 56. For a critique of the tribunal decision in this regard, see Schreuer, *supra* note 246, at 13 (arguing that the tribunal’s reliance on invitation by the host-state is contrary to the basic notion of investment arbitration, i.e., arbitration without privity).

249. *Enron*, Decision on Jurisdiction, ¶¶ 54–56 (Jan. 14, 2004). For a critique of the panel approach, see Gabriel Bottini, *Indirect Claims under the ICSID Convention*, 29 U. PA. J. INT’L L. 563, 610 (2008) (“if the host-state invited the foreign investor...it cannot invoke the ‘formalities’”). Similarly, in the case *Société Générale v. The Dominican Republic*, considering the fact that “the Respondent was informed of the Claimant’s interest and specific meetings took place between officials of the Claimant and the Respondent” before finalization of investment, the tribunal concluded that the host-state was aware of the claimant’s interest in the investment and hence the claimant was not remotely positioned over the investment. *Société Générale v. The Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, ¶¶ 27, 50 (Sept. 19, 2008).

250. Some scholars have also expressed opinion on this issue. Valasek and Dumberry opined that the “issue of remoteness of claims is likely to be one of the most contentious in the future.” Valasek & Dumberry, *supra* note 248, at 73. Similarly, acknowledging the need for a legal test to judge remoteness, Zachary Douglas remarked that such need “certainly did arise.” DOUGLAS, *supra* note 71, at 823.

251. *Noble Energy v. Ecuador*, ICSID Case No. ARB/05/12, Decision on Jurisdiction (Mar. 5, 2008).

252. The case involved two levels of intermediaries between MachalaPower and Noble Energy. While MachalaPower is fully and directly owned by Noble Energy International Ltd., a Cayman Islands company, which is directly owned by Samedan of North Africa, Inc., a U.S. company, which is again directly owned by Noble Energy. *Id.* ¶ 80.

be between the direct shareholders and the indirect investor?”²⁵³ Yet, it could only generally agree with the need for a cut-off point as canvassed by the *Enron* tribunal and observed that “[t]here may well be a cut-off point somewhere, and future tribunals may be called upon to define it.”²⁵⁴ Nevertheless, it made a worthwhile observation that, so far as the present case is concerned, there is no such need as “the cut-off point, whatever it may be,” as the limit “is not reached with [just] two intermediate layers.”²⁵⁵ Observing that there are only “two intermediate layers between MachalaPower and Noble Energy,”²⁵⁶ it was of the opinion that in the present case, “[t]he relationship between the investment and the direct shareholder, on the one hand, and the indirect shareholder, on the other, is not too remote.”²⁵⁷

The trend echoed in the decision of *Standard Chartered Bank v. Tanzania*.²⁵⁸ Noting the minority nature of indirect investment involved in the dispute, the tribunal conceded that “[n]o bright line exists to determine how remote or near a corporate relationship should be in order to be relevant.”²⁵⁹ While making it clear that “the [t]ribunal attempts no such line-drawing, [it] merely indicate[d] its hesitancy to find the type of indirect investment in *Cemex* was present in the instant case.”²⁶⁰ On the other hand, Mark Feldman is of the opinion that the active contribution requirement propounded in the decision is nothing but a cut-off point.²⁶¹ He argued that such a requirement “strengthens the connection between

253. *Id.*

254. *Id.* ¶ 82.

255. *Id.*

256. *Id.* ¶ 80.

257. *Id.* ¶ 82.

258. *Standard Chartered Bank v. Tanzania*, ICSID Case No. ARB/10/12, Award (Nov. 2, 2012), <https://jsumundi.com/en/document/decision/en-standard-chartered-bank-v-united-republic-of-tanzania-award-friday-2nd-november-2012> [<https://perma.cc/W6YK-9A5H>].

259. *Id.* ¶ 253.

260. *Id.* In the above mentioned case, Cemex Caracas, a Dutch company and one of the claimants owned 100% of the other claimant and also a Dutch company, Cemex Caracas II. Cemex Caracas II fully owned Vencement Investments, a Cayman Islands company, which in turn owned 75.7% of Cemex Venezuela, whose assets were allegedly dispossessed in Venezuela. *CEMEX v. Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, ¶ 19 (Dec. 30, 2010).

261. *See generally* Feldman, *supra* note 249. Likewise, Jorun Baumgartner remarked that the “element of contribution” advocated by *Standard Chartered Bank v. Tanzania* could play an important “role in separating the investments of the ‘wrong kind’ from those of the ‘right kind.’” Baumgartner, *supra* note 7, at 158. Mark Feldman cited one more decision to support his viewpoint. In the case of *State Enterprise “Energorynok” v. Moldova*, the tribunal refused to consider the claimant’s stand-alone claim to money as investment as it did not have any ownership or control or interest in the investment apart from the claim to money in Moldova. *State Enterprise “Energorynok” v. Moldova*, SCC Case No. (2012/175), Final Award (Jan. 29, 2015).

the investor and its host-state investment, which in turn strengthens the reciprocal foundation of IIAs.”²⁶²

Recently, in the decision of *Ambiente v. Argentina*,²⁶³ wherein the dispute arose out of Argentina’s default on sovereign bonds, the respondent demanded that the tribunal should apply a cut-off point as the connection between the investors and the investment was very weak.²⁶⁴ It argued that since the claimants acquired their status as holders of security entitlements through countless intermediaries, they are only remotely connected to the underlying bonds.²⁶⁵ The tribunal, however, invoking the doctrine of single economic operation and the principle of economic unity, held that “the relation[ship] between the Claimants and Argentina” is not regarded as “too remote” such that warranting a cut-off point should be applied.²⁶⁶

It should be noted that at least since the decision in *Enron v. Argentina*,²⁶⁷ remoteness of claims is increasingly considered as an intractable problem allowing indirect investment without any limitation. Though leading decisions and scholars alike acknowledge the importance of the problem, investment tribunals generally tend to avoid laying down any rule as to when the cut-off point should be applied, especially in view of the sensitive nature of the underlying issues involved.

While an active contribution requirement is seen as a potential remedy by some,²⁶⁸ it needs to be realized that it may reduce the problem of remoteness only to some extent. Moreover, it will be highly challenging to assess over the multiple layers of intermediaries whether the claimant has actively contributed to the investment in question or not. Also, in broad economic terms, it will not be practicable for state parties to a treaty

262. Feldman, *supra* note 249, at 222.

263. *Ambiente Ufficio S.p.A v. Argentina Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (Feb. 8, 2013).

264. *Id.* ¶¶ 327, 432–34; *see also* Sadie Blanchard, *Ambiente Ufficio S.p.A v. Argentina Republic*, 15 J. WORLD INV. & TRADE, 314–23 (2014). For similar contentions before investment tribunals, *see also* Giovanni Alemanni v. Argentine Republic, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility, ¶¶ 67, 165 (Nov. 17, 2014).

265. *Ambiente Ufficio S.p.A*, Decision on Jurisdiction and Admissibility, ¶¶ 327, 432 (Feb. 8, 2013). Justifying the ground of remoteness, the Respondent argued that the “dispute brings together contractually unrelated persons. It involves security entitlements regarding 55 different bond series with different applicable laws, issuance dates, types of currency and amounts, and which were acquired in different places, at very different prices and on different dates.” (internal citations omitted). *Id.* ¶ 77.

266. *Id.* ¶¶ 327, 429, 434.

267. *Enron v. Argentina*, ICSID Case No. ARB/01/3, Award (May 22, 2007).

268. Feldman, *supra* note 249, at 179 (expressing the hope that the “further development of a ‘remoteness’ limitation can be guided by the key insight of the *Standard Chartered* tribunal”).

to ascertain whether mutual economic benefits are gained out of the investment made.²⁶⁹

The Indo-Taiwan BIT, while encouraging all types of investments, seems to deny remote claims access to investor-state dispute settlement. In particular, its dispute settlement provisions restrict access to only disputes “between the authorities of a territory and an investor of the other territory with respect to its investment.”²⁷⁰ However, as is the case with other IIAs, the BIT does not provide any specific guidance as to when a relationship may be considered remote. In the absence of such clarification, indirect shareholders with barely sufficient interest and remote connection may end up claiming treaty protection, increasing the risks for potential abuse of treaty rights with concerns of treaty shopping.

III. CONDITIONAL ACCESS TO INVESTOR-STATE ARBITRATION

It is a well-accepted notion that unconditional access to investor-state dispute settlement will promote treaty shopping. In recognition of this fact, the Indo-Taiwan BIT, prescribes several rigorous conditions for limiting access to dispute settlement to investors. In the pre-2015 era, the Indian BITs rarely contained provisions on host-state controls over the offer to arbitrate.²⁷¹ The 2007 India-Mexico BIT is a rare example of limitations on the access to investor-state arbitration along the lines of Article 1121 of NAFTA.²⁷² Subsequently, when the revision to the Indian Model BIT was undertaken in 2015, more limitations in the form of conditions precedent to access investor-state arbitration were added.

The Indo-Taiwan BIT, in accordance with its policy of restrictive BIT access, requires that a Notice of Arbitration include written waivers from both the investor and the investment of any right to initiate or continue any proceedings before any administrative tribunal or court under the law of the host state, or other applicable dispute settlement procedures with respect to any measure alleged to constitute a breach of the obligations under the BIT.²⁷³ In addition to the above-mentioned general waiver of the right to initiate or continue relevant proceedings by the disputing

269. See *Standard Chartered Bank v. Tanzania*, ICSID Case No. ARB/10/12, Award (Nov. 2, 2012).

270. 2018 Indo-Taiwan BIT, *supra* note 59, art. 13.2.

271. The 2003 Indian Model BIT did not contain any provision limiting access to investor-state arbitration.

272. Agreement Between the Government of the United Mexican States and the Government of the Republic of India on the Promotion and Protection of Investments, Mex.-India, art. 12(4)(d)–(f), May 21, 2007, 2553 U.N.T.S. 45552; North American Free Trade Agreement, ch. 11, art. 1121, Dec. 17, 1992, 32 I.L.M. 289 [hereinafter NAFTA].

273. 2018 Indo-Taiwan BIT, *supra* note 59, art. 15.4(e). The exemption in respect of injunctive, declaratory or other extraordinary relief not involving the payment of damages originally available under the NAFTA provision is not available under the revised Indo-Taiwan BIT.

investor or the locally established enterprise, the BIT also imposes one more condition, a requirement of waiver with regard to the loss or damage to the interests in an enterprise owned or controlled by the disputing investor.²⁷⁴ Moreover, as the BIT intended to protect both direct and indirect investments explicitly, it enumerates two additional conditions with respect to indirect investment for accessing the dispute settlement process.²⁷⁵ This Article examines each of the four conditions required for access to dispute resolution.²⁷⁶

Firstly, under the BIT, depending on who is bringing the claim, the disputing investor or the locally established enterprise, the other shall waive their right to initiate or continue the relevant proceedings.²⁷⁷ This ensures that both the parent company and the local subsidiary will be tied to the same investor-state dispute settlement proceeding. Once any party brings a claim under the BIT, the provision seeks to limit the other person from initiating or continuing any other proceedings before any local authority under the law of the territory of either state party or even under other dispute settlement procedures.²⁷⁸

Secondly, in case of indirect investment, the disputing investor will be able to submit an investment claim under the BIT, only if the person along with the legal entity of the other territory through which the investment has been made (i.e., the vehicle of investment) waive their right to initiate or continue *any proceeding*, including the right to avail themselves of investor-state dispute settlement under any IIA.²⁷⁹ It may be noted that the scope of this provision is exceptionally broad as it not only limits the investor-claimant's right to make use of investor-state dispute settlement mechanisms under the current BIT but also under any other IIA. In fact, the limitation includes the right to commence or continue litigation or arbitration proceedings in any jurisdiction with regard to the dispute in question. It is significant to note that such a broad provision will not only dissuade treaty shopping but also maneuvers to

274. *Id.* art. 15.4(h). The latter rule is also designed on the lines of NAFTA's Article 1121 (1). Also, Article 13.2 of the 2018 Indo-Taiwan BIT provides that the obligations relating to entry and sojourn of personnel and transparency covered under Articles 9 and 10 of the BIT will not be subject to investor-state arbitration.

275. *Id.* art. 15.4(f)–(g). However, this is a departure from the Indian Model BIT. As the Model instrument did not explicitly seek to protect “indirect investment”, it did not prescribe any additional conditions applicable to “indirect investments.” 2015 Indian Model BIT, *supra* note 26, arts. 15.5(iii)–(iv).

276. 2018 Indo-Taiwan BIT, *supra* note 59, arts. 15.4(e)–(h).

277. *Id.* art. 15.4(e).

278. However, article 15.4(h)(i)(iii) provides that the waivers may not be required in cases where the claimant alleges and proves that the Defending Party has deprived the disputing investor of control of an enterprise. *Id.*

279. *Id.* art. 15.4(f)(i).

engage in forum shopping.²⁸⁰ Further, the provision also stipulates the method through which the waiver shall be communicated.²⁸¹ It prescribes that waivers shall be provided in writing by the disputing investor and the legal entity of any other territory through which the investment has been made to the opposing party.

Thirdly, the BIT added one more condition relating to indirect investments. It prescribed that no two proceedings (including proceedings under other IIAs) shall be launched by the disputing investor or the legal entity of any other territory with respect to the same dispute or series of disputes.²⁸² It should be noted that such a provision is helpful in avoiding the situations encountered in the *CME*,²⁸³ *Lauder*²⁸⁴ and *Yukos Oil*²⁸⁵ controversies. In these cases, the host-state is confronted with two parallel arbitrations under two BITs arising from the same set of facts.

Fourthly, where the disputing investor complains of loss or damage to its interest in an enterprise it owns or controls in the opposing party's, that enterprise should waive its right to initiate or continue other proceedings.²⁸⁶ This ensures that disputing investors and the enterprises owned or controlled by them cannot bring two independent claims.²⁸⁷ In effect, this also ensures that investors or shareholders from the same corporate chain such as in TNCs do not bring separate investor-state dispute settlement proceedings under the BIT, even if it individually affects them although arising out of same facts.

280. Nicolette Butler & Surya Subedi, *The Future of International Investment Regulation: Towards a World Investment Organization*, 64 NETH. INT'L L. REV. 43, 49–50 (2017).

281. The prescribed communication of waiver is applicable only to this circumstance. On the contrary, under the 2006 Mexico-Spain BIT, the requirement of communication and service was made applicable for all types of waivers. Agreement On The Promotion And Reciprocal Protection Of Investments, Mex.-Spain, art. X, ¶ 7, Oct. 10, 2006, 2553 U.N.T.S. 294 [hereinafter Mexico-Spain BIT].

282. 2018 Indo-Taiwan BIT, *supra* note 59, art. 15.4(g).

283. *CME Czech Republic B.V. v. The Czech Republic*, Partial Award, ¶ 412 (Sept. 13, 2001).

284. *Ronald S. Lauder v. The Czech Republic*, 2001 IIC 205, Final Award, ¶¶ 171–72 (Sept. 3, 2001). For detailed discussion on this issue, *see also* MARIEL DIMSEY, *THE RESOLUTION OF INTERNATIONAL INVESTMENT DISPUTES: CHALLENGES AND SOLUTIONS* 93–96 (Ingeborg Schwenzer ed., 2008).

285. For comprehensive coverage of the post-arbitration scenario in this case, *see Yukos Universal Ltd. v. The Russian Federation*, PCA Case Repository 2005-04/AA227, Final Award, (July 18, 2014). Also, for detailed discussion on this issue, *see* ANDREA BIONDI & GIORGIA SANGIUOLO, *THE EU AND THE RULE OF LAW IN INTERNATIONAL ECONOMIC RELATIONS: AN AGENDA FOR AN ENHANCED DIALOGUE* 80–82 (Andrea Biondi & Giorgia Sangiuolo eds., 2021).

286. 2018 Indo-Taiwan BIT, *supra* note 59, art. 15.4(h).

287. For a different formulation of the same provision, *see Mexico Spain*, *supra* note 290, art. X, ¶ 6. For a critique of the distinction between corporation and shareholders in intentional investment law, *see Sornarajah*, *supra* note 64, at 329.

Such wide-ranging provisions bring several tangible advantages to contracting parties to the BIT. When a state is confronted by multiplicity of suits or legal proceedings, whether domestic, cross-border or international, arising out of the same or similar facts, or causes of action involving similar or identical parties, these waivers are expected to act as jurisdictional limitations on the claims of an investor.²⁸⁸ It also has the potential to discourage speculative or frivolous legal proceedings, such as proceedings which are launched with the sole motivation of gaining publicity or coercing the host-state to take an expected position. As these provisions are in the nature of the conditions to the host-state's offer to arbitrate, in the absence of fulfilment of conditions, the same cannot be validly accepted by the investor, and accordingly, it would completely deprive the tribunal of any jurisdiction to settle the dispute. In effect, they broadly ensure that the host-state is only answerable to the genuine claims brought by investors from other contracting states from whom reciprocal benefits can be expected.

Moreover, the above changes are welcome additions to the Indian BIT practices as arbitral tribunals have not found a satisfactory way to deal with these problems so far.²⁸⁹ Also, as the current BIT has explicitly included indirect investment within its ambit, additional conditions relating to indirect investment are very crucial to limit the chances of treaty shopping to protect indirect investments.

Recently, however, attempts have been made to dilute the instruments of waivers as demonstrated in the case of *Renco Group v. Peru*.²⁹⁰ In this case, a question arose as to whether an investor retains some right of legal recourse such as domestic litigation or arbitration if the investment arbitral tribunal fails to consider its claim for lack of jurisdiction or admissibility rather than on merits. In this case, the investor, the Renco Group, revised its original waiver submitted along with the Notice of Arbitration and declared that “[t]o the extent that the Tribunal may decline to hear any claims asserted herein on jurisdictional or admissibility grounds, Claimant reserves the right to bring such claims in another forum for resolution on the merits.”²⁹¹ Renco argued that the

288. See Baumgartner, *supra* note 7, at 1–33; Tania Voon, Andrew D. Mitchell & James Munro, *Good Faith in Parallel Trade and Investment Disputes*, in *GOOD FAITH AND INTERNATIONAL ECONOMIC LAW* 60, 69–75 (Andrew D. Mitchell, M. Sornarajah & Tania Voon eds., 2015); U.N. CONFERENCE ON TRADE AND DEVELOPMENT, *INVESTOR STATE DISPUTE SETTLEMENT UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II* 86–90 (2014); August Reinisch, *The Issues Raised by Parallel Proceedings and Possible Solutions*, in *BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY* 113–26 (Michael Waibel, et al. eds., 2010).

289. Baumgartner, *supra* note 7, at 18.

290. *Renco Group v. Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction (July 15, 2016).

291. *Id.* ¶ 58.

amended waiver would not violate the formal or material requirements for a valid waiver, if the tribunal were to dismiss all claims on jurisdictional or admissibility grounds, as “there would be no risk of concurrent proceedings, double recovery, or inconsistent findings of fact or law.”²⁹² However, the panel, which heard the case under the US-Peru Trade Promotion Agreement, ruled that such defective waiver is contrary to the provisions of the treaty and accordingly the same is unacceptable. Moreover, as the investor cannot unilaterally change the terms of waiver, the defective waiver affected the jurisdictional competence of the tribunal to render a decision on the merits.²⁹³ The panel reasoned that the “risk of a multiplicity of proceedings arises whether or not the proceedings are commenced in parallel or sequentially.”²⁹⁴

In summary, waivers against parallel actions play a greater role in deterring the investors from pursuing parallel or multiple proceedings, especially when they are actively considering investor-state dispute settlement as an effective option. Such jurisdictional objections may be raised to stop an investor from bringing a claim which is considered an abuse of the process of investor-state dispute settlement by the host-state.

IV. DENIAL OF BENEFIT CLAUSE

A. Background

The practice of investment treaty arbitration shows us that the denial of benefits clauses, along with the definitional clauses of “investment” and “investor” in the investment treaty, play a very crucial role in acting against the so-called shell companies.²⁹⁵ In recognition of this fact, the Indo-Taiwan BIT’s denial of benefits provision was specifically and robustly built to deter treaty shopping.

Right from the time of early Friendship, Commerce and Navigation treaties (FCN), some IIAs have included a provision called a “Denial of Benefits Clause”²⁹⁶ to refuse legal protection to investors if they are owned or controlled by persons from officially sanctioned non-party

292. *Id.* ¶ 86.

293. *Id.* ¶ 160.

294. *Id.* ¶ 87.

295. See Lindsay Gastrell & Paul-Jean Le Cannu, *Procedural Requirements of ‘Denial-of-Benefits’ Clauses in Investment Treaties: A Review of Arbitral Decisions*, 30 ICSID REV. FOREIGN INV. L.J. 78, 78–97 (2015).

296. Out of a total of 2,572 IIAs screened, available in the UNCTAD Investment Policy Hub, only 215 IIAs (nearly 8% of screened IIAs) have denial of benefits clause. Loukas Mistelis & Crina Baltag, *Denial of Benefits Clause*, in MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL PROCEDURAL LAW. See also U.N. Conference on Trade and Development, *World Investment Report 2016: Investor Nationality: Policy Challenges* 174 (2016) (explaining they “are becoming widely used in modern treaty practice”).

territories.²⁹⁷ However, over the years, the purposes for which such clauses can be used have undergone several changes. The states, considering the reciprocal nature of IIAs, attempt to restrict the benefit of the agreement only to such investors who strictly possess the nationality of the other contracting party. In other words, by use of such clauses, states reiterate their power to deny the advantages of the investment agreement to such investors for whom the benefits are not intended to be given, though they may technically meet the requirements of the treaty.

Under the denial of benefits clauses, an investor or investment may generally be denied legal protection on the following grounds:²⁹⁸ (a) the denying party does not maintain official diplomatic relations with the state where the ownership or control is located;²⁹⁹ (b) the denying party has prohibited transactions with investors of that state and if benefits of treaty protection were given, it would constitute violation or circumvention of measures of the denying party;³⁰⁰ (c) investors of a non-party state own or control the enterprise and the enterprise has no substantial business activities in the territory of the party under whose law it is constituted or organized;³⁰¹ (d) the investor made an investment in locally reserved areas in breach of the domestic laws of the denying state by misrepresentation of its ownership;³⁰² and (e) the investor established or restructured his investment with the primary purpose of gaining access to the dispute resolution mechanism under the investment treaty.³⁰³

In India, none of the earlier Model BITs contained any provision as to denial of benefits. However, based on the dynamics of the economic

297. For comparison with WTO GATS provision in this regard, see Antoine P. Martin & Bryan Mercurio, *TPP Promoting Financial Services as an Investment Playground: Crystallizing A Change in Approach from GATS?*, in PARADIGM SHIFT IN INTERNATIONAL ECONOMIC LAW RULE-MAKING: TPP AS A NEW MODEL FOR TRADE AGREEMENTS? 223, 234 (Julien Chaisse, Henry Gao & Chang-fa Lo eds., 2017).

298. Although the text of every IIA is unique, an attempt has been made here to give/classify the major grounds, to drive home the point of varied purposes.

299. See NAFTA, *supra* note 281, art. 1113(1)(a); 2012 U.S. Model Bilateral Investment Treaty, art. 17(1)(a), <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> [<https://perma.cc/H4UQ-63V4>] [hereinafter 2012 U.S. Model BIT]; ACIA, *supra* note 2, art. 19(1)(c).

300. E.g., NAFTA, *supra* note 281, art. 1113(1)(b); 2004 Canadian Model Foreign Investment Protection Agreement, art. 18(1), <https://edit.wti.org/document/show/d15e4f5d-0310-4db4-a1ed-85e5d19f8ee1> [<https://perma.cc/C3SN-GG3W>] [hereinafter 2004 Canadian Model FIPA]; 2014 Canadian Model Foreign Investment Protection Agreement, art. 19(a) [hereinafter 2014 Canadian Model FIPA]; 2012 U.S. Model BIT, *supra* note 309, art. 17(1)(b).

301. See 2004 Canadian Model FIPA, *supra* note 310, art. 18(2); 2012 U.S. Model BIT, *supra* note 309, art. 17(2); ACIA, *supra* note 2, art. 19(1)(a); Trans-Pacific Partnership Agreement, art. IX, ¶ 15(1), Feb. 4, 2016 (yet to enter into force).

302. See also ACIA, *supra* note 2, art. 19(2).

303. See Draft Indian Model BIT, *supra* note 170, arts. 20.1, 35.

relationship between India and the BIT-negotiating country, sometimes, such clauses were included even before the adoption of the current Model BIT. For instance, the 2009 India-Colombia BIT contained a denial of benefits clause.³⁰⁴ However, subsequent to changes in the investment protection policy in India, culminating in the adoption of the revised Indian Model BIT in 2015, inclusion of denial of benefits clauses has become an inevitable feature of every Indian investment treaty.³⁰⁵ Accordingly, the same provision was also incorporated in the revised Indo-Taiwan BIT.³⁰⁶

B. *Scope of Denial of Benefits Clause*

The Indo-Taiwan BIT's denial of benefits clause has added several vital features to limit treaty shopping. Firstly, the clause clarifies that the denial may be invoked either before or after the institution of arbitral proceedings. This is in stark contrast to what the investment tribunal ruled in the case of *Khan Resources v. Mongolia*.³⁰⁷ In that case, the tribunal held that the respondent-state must issue the notice to the investor before it invokes the provision of denial of benefits clause.³⁰⁸ However, now in view of the provision, the respondent-state may seek denial of benefits even after the state becomes aware of the launch of the arbitration proceedings.

Secondly, the scope of the denial is also phrased very broadly: “deny the benefits of this Agreement.”³⁰⁹ This is a better and more expansive formulation as compared to the formulation of Energy Charter Treaty which reads, “to deny the advantages of this Part.”³¹⁰ It is relevant to note that in the *Khan Resources* case,³¹¹ an arbitration held under the Energy Charter Treaty, the investor argued that even if the investor is denied the benefits of Part III (of which Article 17 dealing with the denial of benefits is a part), he will still be entitled to access the investor-state dispute settlement which is contained in Part V.³¹² The BIT provision seeks to avoid such pitfalls. The object of the provision is to ensure that once the

304. 2018 Indo-Taiwan BIT, *supra* note 59, art. 11.

305. See Draft Indian Model BIT, *supra* note 170, art. 35. Besides the 2018 Indo-Taiwan BIT, two other BITs signed by India subsequent to the revision of the Model BIT also feature the denial of benefits clause: 2018 India-Belarus BIT and 2019 India-Kyrgyzstan BIT. However, the provision does not find a place in the 2020 India-Brazil BIT, which is strictly speaking an investment facilitation agreement.

306. 2018 Indo-Taiwan BIT, *supra* note 59, art. 34.

307. *Khan Resources Inc. v. Mongolia*, PCA Case Repository 2011-09, Decision on Jurisdiction (Jul. 25, 2012).

308. *Id.* ¶¶ 293, 426–29.

309. 2018 Indo-Taiwan BIT, *supra* note 59, art. 34.

310. Energy Charter Treaty, *supra* note 2, art. 17.

311. *Khan Resources*, Decision on Jurisdiction (July 25, 2012).

312. *Id.* ¶ 411.

power of denial is invoked, the investor is not only prevented from availing substantive protections under the treaty but will also be prevented from using any other provisions of the BIT including investor-state dispute settlement.

Thirdly, under the BIT's provision, the denial is not merely confined to investors from third states but it even extends to investors from the territory of the denying state, that is, from its own territory. It stipulates that the authorities of a state may deny the benefits of investment protection to investors, if they are "owned or controlled by persons of a non-Party territory or of the territory of the denying authority."³¹³ Unlike the denial of benefits clauses under both NAFTA and the Energy Charter Treaty frameworks which are limited in scope as they can only be exercised against investors from third states,³¹⁴ the current provision additionally targets a round-tripping method of treaty shopping.

Fourthly, the power to deny benefits under the revised Indo-Taiwan BIT may be exercised with respect to both natural persons and juridical persons, as it uses the broader expression "investor."³¹⁵ On the other hand, the formulation in the Energy Charter Treaty uses the expression "legal entity."³¹⁶ The latter choice prompted one investment tribunal to observe that the denial of benefits clause in the Energy Charter Treaty "affects only juridical rather than natural persons."³¹⁷ A similar limitation also appears in NAFTA, wherein it is provided that "[a] Party may deny the benefits of this Chapter to an investor of another Party 'that is an enterprise' of such Party and to investments of 'such investor.'"³¹⁸ Similarly, the 2009 Association of Southeast Asian Nations (ASEAN) Comprehensive Investment Agreement also provides that the benefits of the Agreement may be denied to "an investor of another Member State that is a juridical person of such other Member State."³¹⁹ Hence, it is reasoned that in comparison to the Energy Charter Treaty, NAFTA and the ASEAN instruments, the current BIT is broader in scope. This point assumes an added importance in view of the fluid nature of the BIT's

313. 2018 Indo-Taiwan BIT, *supra* note 59, art. 34.

314. NAFTA, *supra* note 281, art. 1113(1)(a); Energy Charter Treaty, *supra* note 2, art. 17. See Jean-Francois Hebert, *Issues of Corporate Nationality in Investment Arbitration*, in *IMPROVING INTERNATIONAL INVESTMENT AGREEMENTS* 242 (Armand De Mestral & Celine Levesque eds., 2013).

315. 2018 Indo-Taiwan BIT, *supra* note 59, art. 34.

316. Energy Charter Treaty, *supra* note 2, art. 17.

317. *AMTO v. Ukraine*, SCC Case No. 080/2005, Final Award, ¶ 62 (Mar. 26, 2008). Even the plain language of Article 17 of the Energy Charter Treaty stipulates that each Contracting Party reserves the right to deny the advantages of Part III to a legal entity.

318. NAFTA, *supra* note 281, art. 1113 (emphasis added).

319. ACIA, *supra* note 2, art. 19. While Article 19(1)(a) and (c) deals with "investor of a non-member state," Article 19(1)(b) is concerned with "investor of the denying member state."

definition of “investor,” which will make the denial of benefits applicable even with respect to natural persons.

Fifthly, in addition to the regular ground of ownership or control by non-contracting states or the home-state, the BIT also provides for a supplementary ground of denial of benefits: where “an investment or investor that has been established or restructured with the primary purpose of gaining access to the dispute resolution mechanisms” provided under the BIT, they may be denied the advantages of the BIT. This option seems to be completely different from the earlier investment treaty practices, as contracting states have so far included only the grounds relating to trade, economic or national security reasons for denial of benefits.³²⁰ In other words, they mainly target free-riding and round-tripping methods of treaty shopping. However, this novel provision expressly includes, probably for the first-time, treaty shopping as a ground for denial of benefits. While there will be no doubt as to the deterrent effect of this provision on treaty shopping, the utility of the ground will depend on how the requirement of “primary purpose” will be interpreted by the tribunals and how it will be contrasted with the *sole* or secondary purpose of (re)structuring of investment, in the light of facts and circumstances of each case.³²¹

However, the clause suffers from certain crucial pitfalls. It does not define or at least lay down any general parameters to identify or assess the fulfilment of “ownership,” “control” or “substantial business activities.”³²² It is true that IIAs generally avoid a detailed definition in this regard as the negotiators fear that it would discourage investment or

320. See U.N. Conf. on Trade & Dev., *The Protection of National Security in IIAs*, 32–33 (2009), https://unctad.org/system/files/official-document/diaeia20085_en.pdf [<https://perma.cc/Q54R-UVTK>].

321. Baumgartner, *supra* note 7, at 253–54.

322. Although the clause does not refer to the condition of “substantial business activities,” the requirement will be applicable for determination of the status of investor as it is provided under the definition of “investor” in Article 1 of the BIT. While the provision on denial of benefits is very rare in the Indian investment treaty practice in the pre-2015 era, as already mentioned, it is interesting to note that the 2009 India-Colombia BIT incorporated the requirement of “substantial business activities” as a part of its denial of benefits clause. It provides that:

A contracting Party may deny the benefits of this Agreement to an investor of the other Contracting Party that is a company of such other Party and to investments of that investor if the company has no *substantial business activities* in the territory of the other Contracting Party and persons of a non-Party, or of the denying Contracting Party, own or control the company.

Agreement for the Promotion and Protection of Investments between the Republic of Colombia and the Republic of India, art. 11, ¶ 2, Colom.-India, Nov. 10, 2009 (emphasis added) [hereinafter Colombia-India BIT].

that it may make the provision of denial very rigid.³²³ However, it is suggested that such problems can be avoided if the provision at least incorporates certain parameters or a test by use of which the ownership or control (which will make the denial applicable) can be determined. For instance, Article 19(3) of the 2009 ASEAN Comprehensive Investment Agreement provides for certain guidelines on how such ownership or control is to be assessed as a part of its denial of benefits provision. It stipulates that while ownership is to be determined “in accordance with the laws, regulations and national policies of each Member State[,]” the control is to be evaluated on the basis of whether “the investor has the power to name a majority of its directors or otherwise to legally direct its actions.”

Similarly, the instrument does not prescribe any process or method such as notification and/or consultation through which the powers of denial can be invoked. However, some positive action will be required in order to bring into operation the denial clause as the BIT provision does not provide for an automatic denial clause.³²⁴ For instance, the 2004 Canadian Model BIT and Chapter 11 of NAFTA prescribe that in cases of denial of benefits on basis of foreign ownership or control, “prior

323. It is for such reasons the definitions contained in the draft Indian Model BIT were omitted in the finalized 2015 Model BIT. The Draft Indian Model BIT proposed that an enterprise will be considered to be “controlled” by an investor,

if such Investor has the right to appoint a majority of the directors or senior management officials or to control the management or policy decisions of such Enterprise, including by virtue of their shareholding, management, partnership or other legal rights or by virtue of shareholders agreements or voting agreements or partnership agreements or any other agreements of similar nature.

Similarly, it considers an enterprise to be “owned” by investor “if more than 50% of the capital or funds or contribution in the Enterprise is directly or beneficially owned by such Investor, or by other companies or entities which are ultimately owned and controlled by the Investor.” Draft Indian Model BIT, *supra* note 170, art. 2.6.1.

324. The 2018 Indo-Taiwan BIT adopts a discretionary denial of benefits clause (“may” deny the benefits) rather than an automatic clause (“shall deny”). 2018 Indo-Taiwan BIT, *supra* note 59, art. 34. The difference between these two types of denial of benefits assumes an added importance as the denying party in a discretionary clause may face a number of legal difficulties, as demonstrated by various decisions and hence, may not be able to use it in an effective manner. However, in the process of current drafting, the clause has carefully avoided expressions like “right” or “reserved,” which is found in the oft-quoted Energy Charter Treaty and thereby skipped controversies as to the manner of exercise of a “reserved right” (Article 17 of the Energy Charter Treaty begins with the words, “[e]ach Contracting Party reserves the right to deny the advantages of this Part”). The other leading examples for discretionary model are article 1113 in NAFTA, article 17 in the 2012 U.S. Model BIT, and article 10.2 in the Dominican Republic-Central America-United States Free Trade Agreement. The 1995 ASEAN Framework Agreement on Services is also an example of an automatic denial of benefits clause. ASEAN Framework Agreement on Services, art. V, Dec. 15, 1995, <https://investasean.asean.org/files/upload/Doc%2008%20-%20AFAS.pdf> [<https://perma.cc/W8BR-NZGC>].

notification and consultation” would be required in accordance with the provisions of the agreement.³²⁵ In this regard, some investment tribunals have observed that the required positive action of the state may be demonstrated through a range of measures including by notification to the home-state as well as through communication of decision to the investor or publication of the notification in the official gazette or by passing domestic legislation.³²⁶ However, sometimes the same provisions exempt positive action from the requirement of notification and/or consultation if the ground of denial is related to (a) non-maintenance of diplomatic relations by the denying party with the other state or (b) the denying party has prohibited transactions with the investors of that state.³²⁷ This implies that if the denial is owing to a policy decision of the denying state and is related to its relations (diplomatic or national security) with other states, no notification or consultation would be required.³²⁸ As a result, it is not clear what type of positive action will be required to bring the denial provision into operation, which uncertainty ultimately adds to the prerogatives of the denying state.

Despite the absence of a definition of “ownership,” “control” and “substantial business activities” as well as silence on the requirement of notification and/or consultation, the availability of the BIT’s denial of benefits clause is sure to act against the so-called shell companies. Moreover, though the actual scope of the new ground for denial when an investment is restructured with the sole purpose of gaining access to dispute resolution is unknown, it is at least expected to play a very crucial role in the deterrence of treaty shopping.

V. REMOVAL OF MFN TREATMENT

The use of MFN clauses to get better deals is one of the major tools to facilitate treaty shopping. They are commonly included in commercial treaties to grant its signatories “all the privileges similarly granted to all other states and such as shall be granted under subsequent treaties.”³²⁹

325. Article 18 and Article 1113, respectively. Compare HOWARD MANN ET AL., IISD MODEL INTERNATIONAL AGREEMENT ON INVESTMENT FOR SUSTAINABLE DEVELOPMENT pt. 1, art. 2(I)(iii) (2d ed. 2005) (recommending the inclusion of “prior notification and consultation with the investor” before the decision on denial of benefits), with 2014 Canadian Model FIPA, *supra* note 310, art. 19 (not including a provision for notification or consultation). See also USMCA, *supra* note 2, art. 14.14 (does not contain any similar notification requirement).

326. *Plama v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, ¶ 157 (Feb. 8, 2005). See Ramya Ramachandran, *Enabling Retrospective Application of the Denial of Benefits Clause: An Analysis of Decision of Tribunals under the Energy Charter Treaty*, 26 U. MIAMI INT’L & COMP. L. REV. 211–41 (2018).

327. See Energy Charter Treaty, *supra* note 2, art. 17.

328. See Loukas Mistelis & Crina Baltag, ‘Denial of Benefits’ Clause in Investment Treaty Arbitration, Queen Mary University of London, Legal Studies Research Paper No. 293/2018.

329. GEORGE WILSON & GEORGE TUCKER, INTERNATIONAL LAW 213 (1901).

This implies that foreign investors can rely upon the more favorable treatment provided under past or future treaties. Moreover, since the decision of *Maffezini v. Spain*,³³⁰ the MFN clause is also held applicable to investor-state dispute settlement provisions.³³¹ As a result, a foreign investor who is protected by an IIA with an MFN clause may be able to access a more favorable dispute settlement mechanism available under another treaty.³³² Sometimes even a sizeable number of countries might wish to avail themselves of a favorable provision contained in a bilateral treaty by invoking the MFN clause in a multilateral or regional instrument.³³³ However, the divergent decisions of investment arbitral tribunals on a range of vital issues such as importing substantive and procedural rules from treaties of third-party states have created an atmosphere of disbelief.³³⁴ Some countries view these tendencies as disturbing the terms of the carefully negotiated text between the specific investment partners.

So far as the Indian investment treaty practice is concerned, India's first Model BIT framed in 1993³³⁵ as well as its subsequent revision in 2003³³⁶ had MFN clauses in their texts. However, India's experience with the *White Industries* arbitration apparently forced it to reconsider its position.³³⁷ In 2011, in the case of *White Industries v. India*, even though

330. *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (Jan. 25, 2000).

331. *Id.* ¶¶ 56, 64.

332. *Id.*

333. SORNARAJAH, *supra* note 64, at 204–05.

334. See Suzy H. Nikiema, *The Most-Favoured-Nation Clause in Investment Treaties*, IISD Best Pracs. Series, Feb. 2017; TANJINA SHARMIN, APPLICATION OF MOST-FAVOURLED-NATION CLAUSES BY INVESTOR-STATE ARBITRAL TRIBUNALS: IMPLICATIONS FOR THE DEVELOPING COUNTRIES (2020); U.N. Conference on Trade and Development, *Most-Favoured Nation Treatment* (2010). However, Stephen Schill, relying upon the earlier works of International Law Commission (ILC) on MFN, opines that the MFN clauses “endorse multilateralism as an ordering paradigm for international relations.” STEPHEN SCHILL, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW 139 (2009).

335. Devashish Krishnan, *India and International Investment Laws*, 2 INDIA AND INT’L L. 297 (2008). See also Agreement between the Government of the United Kingdom and Northern Ireland and the Government of the Republic of India for the Promotion and Protection of Investments, India-U.K., art. 4, Mar. 14, 1994, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1613/download> (substantially based on the 1994 Indian Model BIT) [hereinafter 1994 India-UK BIT].

336. Indian Model Text of BIPA, art. 4, Jan. 1, 2003, <https://edit.wti.org/document/show/8a4ecc95-6831-4a9a-a71f-11b5afb11251?textBlockId=8b150510-b9d6-4565-b566-87978fdab264&page=1> [https://perma.cc/K3SZ-VCC4].

337. See Law Commission of India, *Analysis of the 2015 Draft Model Indian Bilateral Investment Treaty* (260th Report), paras. 3.4.4, 24 (Aug. 2015) (providing a critical view of the Indian position); Amrit Singh, *Avoiding the MFN Clause: One Step Forward, Two Steps Back?*, KLUWER ARB. BLOG (Dec. 1, 2018), <http://arbitrationblog.kluwerarbitration.com/2018/12/01/>

the India-Australia BIT did not impose an obligation to ensure “effective means of asserting claims,” the UNCITRAL tribunal relied on the treaty’s MFN clause to read the “effective means” provisions of the India-Kuwait BIT to hold India liable for judicial delays.³³⁸ This prompted the Indian government to decide against the incorporation of this provision in future investment treaties.

As a result, when the major overhaul of the Model BIT was taken up in 2015, India took a firm stance against including an MFN provision in the 2015 Model BIT.³³⁹ Coincidentally, its new official position on MFN clauses is well-articulated in the Joint Interpretative Notes (JIN) and the Joint Interpretative Declaration (JID) issued to the 2009 India-Bangladesh BIT³⁴⁰ and the 2009 India-Colombia BIT.³⁴¹ The joint statements commented that these provisions (inclusive of both MFN and national treatment provisions) “are designed to protect against illegitimate and intentional discrimination against an investment or investor, with respect to its investment, on the basis of nationality.”³⁴² It clarified that “the MFN obligation is not intended to alter the Agreement’s substantive content by, for example, permitting piecemeal incorporation of and reliance on provisions in other treaties, investment or otherwise.”³⁴³ In view of this new understanding and realization, the provision was omitted from the revised Indo-Taiwan BIT.

avoiding-mfn-clause-one-step-forward-two-steps-back/#comments [https://perma.cc/NWG9-RV8M]. See also *White Indus. v. India*, Final Award (2011), <https://www.italaw.com/sites/default/files/case-documents/ita0906.pdf>.

338. *White Indus.*, Final Award, ¶ 11.4.19 (2011). See also BERK DEMIRKOL, JUDICIAL ACTS AND INVESTMENT TREATY ARBITRATION (2018).

339. 2015 Indian Model BIT, *supra* note 26 (The MFN provision was omitted both in the 2015 Draft Indian Model BIT as well as in the finalized 2015 Indian Model BIT).

340. Agreement between the Government of the Republic of India and the Government of the People’s Republic of Bangladesh for the Promotion and Protection of Investments, Bangl.-India, Sept. 2, 2009, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/265/download> [https://perma.cc/UL2U-BDLV].

341. The BIT was signed on November 10, 2009 and entered into force on July 3, 2012. These joint statements/declarations to the respective BITs were necessitated due to the revision of the Indian Model BIT. As discussed in Section 1, while certain BITs were terminated, post-revision of Model BIT, other BITs which had a longer life span were suitably modified through issuance of such joint statements/declarations. For use of joint statements in international treaty law, see U.S. Dep’t of State, *International Documents of a Non-Legally Binding Character*, <https://2009-2017.state.gov/documents/organization/65728.pdf> [https://perma.cc/Z4VL-4569].

342. Joint Interpretative Notes on the Agreement between the Government of the Republic of India and the Government of the People’s Republic of Bangladesh for the Promotion and Protection of Investments, Bangl.-India, art. 4, ¶ 1, Oct. 4, 2017 [hereinafter Bangladesh-India JIN]; Joint Interpretative Declaration Between the Republic of India and the Republic of Colombia Regarding the Agreement for the Promotion and Protection of Investments, Colom.-India, Oct. 4, 2018, <https://www.mea.gov.in/Portal/LegalTreatiesDoc/CO18B3453.pdf> [https://perma.cc/5F97-AC97].

343. Bangladesh-India JIN, *supra* note 354, ¶ 2(a).

VI. REMOVAL OF UMBRELLA CLAUSE

The scope of subject-matter jurisdiction available under an IIA is an important consideration before the investor decides whether a particular treaty offers a favorable framework for him to resort to treaty shopping.³⁴⁴ While some IIAs may provide for a limited scope of *rationae materiae* jurisdiction by use of expressions like “obligations under this agreement,” others may broaden the scope to include “any dispute relating to investments” or “any obligation it has assumed with regard to investments.”³⁴⁵ As the latter type of provisions are used to transform the contract claims to treaty claims, they are known as umbrella clauses.³⁴⁶ Though there have been calls for their elimination in view of their controversial content,³⁴⁷ some of the prominent Indian BITs feature umbrella clauses.³⁴⁸

Yet, neither the 2002 Indo-Taiwan BIT, nor the 2018 Indo-Taiwan BIT provide for an “umbrella clause.” The revised Indo-Taiwan BIT specifies that Chapter IV of the BIT (“Settlement of Investment Disputes”) “shall *only* apply to a dispute between the authorities of a territory and an investor of the other territory with respect to its investment, arising out of an alleged breach of an obligation of the authorities of the territory under Chapter II of [the BIT].”³⁴⁹ Hence, it becomes clear that the BIT does not impose an umbrella clause. Not fully satisfied with this formulation, the BIT directly stipulates that the arbitral tribunal constituted under the BIT shall not decide disputes “arising solely from an alleged breach of contract between the authorities of the

344. See generally, Baumgartner, *supra* note 7. *Contra*, Katia Yannaca-Small, *Parallel Proceedings*, in OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 1046 (Peter Muchlinski et al. eds., 2008) (providing that “umbrella clauses could be seen as a preventative tool against the occurrence of the parallel proceedings”).

345. See Katia Yannaca-Small, *Interpretation of the Umbrella Clause in Investment Agreements* (Org. Econ. Coop. & Dev., Working Papers on International Development No. 03, 2006).

346. SCHILL, *supra* note 346, at 84–86; CHIN LENG LIM, JEAN HO & MARTINS PAPARINSKIS, *INTERNATIONAL INVESTMENT LAW AND ARBITRATION: COMMENTARY, AWARDS AND OTHER MATERIALS* 349–73 (2018); Sornarajah, *supra* note 64, at 304.

347. Raúl Pereira de Souza Fleury, *Umbrella Clauses: A Trend Towards Its Elimination*, 31 *ARB. INT'L* 679 (2015). Nowadays they are rarely found in IIAs. See Raúl Pereira de Souza Fleury, *Closing the Umbrella: A Dark Future for Umbrella Clauses*, KLUWER ARBITRATION BLOG (Oct. 13, 2017), <https://arbitrationblog.kluwerarbitration.com/2017/10/13/closing-umbrella-dark-future-umbrella-clauses/> [https://perma.cc/V4C2-7KDM].

348. E.g., 1994 India-U.K. BIT, *supra* note 347, art. 3(3); India and Denmark Agreement concerning the promotion and reciprocal protection of investments, Den.-India, art. 2(4), Sept. 6, 1995; Agreement between the Swiss Confederation and the Republic of India for the Promotion and Protection of Investments, India-Switz., art. 13, April 4, 1997. However, none of the Indian Model BITs except the first Model BIT of 1993 provided for an umbrella clause.

349. 2018 Indo-Taiwan BIT, *supra* note 59, art. 13.2 (emphasis added).

territory and an investor.”³⁵⁰ Therefore, contractual claims are in no way subject to the jurisdiction of the BIT’s arbitral tribunal.³⁵¹

VII. DEFINITION OF “INVESTOR”

It is found out that the revised Indo-Taiwan BIT’s definition of “investor” seems to deviate from its general approach to producing an instrument that severely restricts treaty-shopping. In fact, its approach towards the definitions of “investment” and “investor” is in sharp contrast to that goal.

A. *Nationality of Natural Persons*

It is significant to note that the current BIT while removing the criteria of the previous BIT, did not lay down any new criteria to determine the nationality of individuals.³⁵² It merely contemplates the possibility that a natural person may also be an investor. While the preceding BIT provided for a broad definition of investor without any direct reference to nationality, the current instrument skips the whole clause without specification of any requirement or criteria.³⁵³ Consequently, it is unclear which of the applicable category of nationality (i.e., nationality or citizenship or permanent residency in the relevant country) will be used for deciding questions as to the nationality of natural persons.³⁵⁴

350. *Id.* art. 13.3.

351. For understanding of the background of these reactions, see Jarrod Wong, *Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contracts, Treaty Violations, and the Divide between Developing and Developed Countries in Foreign Investment Disputes*, GEO. MASON L. REV. 137–79 (2006).

352. While the provisions of the previous BIT provided that:

‘investor’ means any natural person who is born in and/or is a permanent resident of a territory and carrying a passport or any other identification card/certificate of such nature issued by the competent authorities of that territory, or juridical persons such as corporations, firms, associations, etc, incorporated, constituted, or established under the laws in force in that territory, the current BIT simply provided that “‘investor’ means a natural or juridical person of a territory other than a branch or representative office that has made an investment in the other territory.”

Agreement between the India Taipei Association in Taipei and the Taipei Economic and Cultural Center in New Delhi on the Promotion and Protection of Investments, Oct. 17, 2002, India-Taiwan, art. 1(3), FAWUBU FAGUI ZILIAOKU (Taiwan) [hereinafter 2002 Indo-Taiwan BIT]; 2018 Indo-Taiwan BIT, *supra* note 59, art. 1.4.

353. It is pertinent to note that the 2015 Model BIT in Article 1.9 defines “natural person.” On the other hand, there is no corresponding provision under the revised Indo-Taiwan BIT.

354. As this agreement/treaty is signed between specially designated organizations rather than between states directly, there seems to be some reluctance in the use of words of nationality or citizenship. See Chien-Huei-Wu, *supra* note 41.

It is pertinent to remember that BITs generally prescribe that all persons, whether individuals or corporate legal entities, must have the nationality of one of the contracting states in accordance with its law, based on the general parameters laid down in the investment treaty.³⁵⁵ This clearly establishes that both rules set forth in investment treaties and domestic law play an important role in determining questions of nationality. However, in the case of current BIT, by mere prescription that any natural person (who makes investment in the territory) may qualify as investor, the BIT does not prescribe any eligible category of individual investors. In fact, it makes any natural person of a territory who makes investment in the other territory without any further requirement an eligible investor.

Accordingly, the tribunal will have no discretion to review the fulfilment of eligibility conditions of individual investors, even when the nationality is under challenge.³⁵⁶ In fact, it is very doubtful whether there can be any challenge as to the nationality of individuals under the provisions of the BIT, other than that he or she is not a person “of a territory” or “that [he or she] has [not] made an investment in the other territory.”³⁵⁷ It is argued that such laxity in a crucial provision will result in abuse of treaty provisions and might lead to speculative and frivolous claims. Moreover, in such circumstances, the task of the tribunal will be extremely challenging.

Further, in removing the references to proof of nationality to identify the nationality of individual investors, the new BIT has also incidentally omitted the reference to “permanent resident of a territory.” The explicit mention of “permanent resident” under the previous formulation set a lower threshold to be an eligible investor and thereby broadened the scope of the term “investor.”³⁵⁸ Regardless, the revised BIT not only avoids any direct or indirect reference to nationality, but it has altogether avoided any reference to domestic law on nationality. As a consequence, any natural person of a territory who makes investment in the other

355. DOUGLAS, *supra* note 71, at 284–327.

356. The investment arbitral tribunals are generally empowered to make their own assessment on the nationality of the claimant, based on the domestic law rules and the rules specified in the relevant BIT.

357. 2018 Indo-Taiwan BIT, *supra* note 59, art. 1.4.

358. The device of permanent resident may also be used to narrow the scope of nationality in certain contexts. For instance, Article 1(3)(b) of the 1976 Germany-Israel BIT, while explaining the term “nationals,” provided that “in respect of the State of Israel, Israeli nationals being permanent residents of the State of Israel.” Treaty between the Federal Republic of Germany and the State of Israel concerning the Encouragement and Reciprocal Protection of Investments, Ger.-Isr., art. 1(3)(b), June 24, 1976, <https://edit.wti.org/document/show/6ca1377f-5b47-4c9c-a59d-cd983296a259> [https://perma.cc/5ZMJ-932W]. However, this is justifiable in the peculiar circumstances of Israel and its Law of Return. *See generally* YAACOV YADGAR, ISRAEL’S JEWISH IDENTITY CRISIS: STATE AND POLITICS IN THE MIDDLE EAST (2020).

territory will be covered under the term “investor,” irrespective of whether he is a national or citizen or permanent resident of a territory. I argue that the current formulation is more extensive than the previous one, as at least under the earlier instrument one had to prove the status of being a permanent resident in a territory to be eligible to claim status as an investor for the purposes of the BIT. However, no such requirement or limitation is found in the revised BIT.

In addition, it is relevant to note that the flexibility associated with the very concept of permanent residency may also pose certain hurdles under the current formulation for lack of such a requirement. As the expression “permanent residents” would normally mean permanently residing non-nationals (who would ordinarily possess the nationality or citizenship of another state), it is possible that an individual may hold the nationality or citizenship of one contracting state, while being a permanent resident in the other contracting state.³⁵⁹ As a result, the possibility for multiple claims under two investment treaties (one by claiming full nationality of a contracting state, as national or citizen of that state, and the other as permanent resident of another state) may not be ruled out.³⁶⁰ Moreover, it is apparent that unregistered nationals (i.e., nationals without household registration in Taiwan) may also have a strong case to qualify as an investor.³⁶¹

Similarly, the BIT is also silent on the question of legal standing of dual nationals. It is always desirable to incorporate such a provision as nationals holding multiple nationalities may bring claims against their own states in international disputes.³⁶² To determine the real nationality of such claimants, international law readily acknowledges the use of the dominant and effective nationality test.³⁶³ The test is based on the jurisprudence of the Iran-U.S. Claims Tribunal upholding its jurisdiction over claims by Iran-U.S. dual nationals.³⁶⁴ It is surprising that the BIT

359. Baumgartner, *supra* note 7, at 248–49.

360. ALFRED M. BOLL, *MULTIPLE NATIONALITY AND INTERNATIONAL LAW* 529 (2007). The concurrent (i.e., simultaneous) protection in respect of a permanent resident was claimed. See Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award (Dec. 16, 2002).

361. Under Taiwanese nationality law, nationals are required to complete the process of household registration to be able to enjoy all civil and political rights. For preliminary information about the process of household registration in Taiwan, see DEPARTMENT OF HOUSEHOLD REGISTRATION AFFAIRS, *INTRODUCTION: HISTORY OF HOUSEHOLD REGISTRATION*, <https://www.ris.gov.tw/app/en/18> [<https://perma.cc/WL6K-PYZ2>].

362. Nikiema, *supra* note 63, at 2, 12, 20.

363. See *Nottebohm Case (Liech. v. Guat.)*, Judgment, 1955 I.C.J. 22 (Apr. 6); *Merge Case (U.S. v. It.)*, XIV R.I.A.A. 241 (June 10, 1955). See also, Official Records of the General Assembly, Sixty-First Session, Supplement No. 10 (A/61/10) at 43 (2006).

364. See CHARLES N. BROWER & JASON D. BRUESCHKE, *IRAN-UNITED STATES CLAIMS TRIBUNAL* 289–95 (1998); Michigan Law Review, *Claims of Dual Nationals in the Modern Era: The Iran-United States Claims Tribunal*, 83 MICH. L. REV. 597–624 (1984).

lacks this given the fact that the Indian Model BIT of 2015 incorporates an explicit provision in this regard: “a natural person who is a dual national or citizen shall be deemed to be exclusively a national or citizen of the country of her or his dominant and effective nationality/citizenship, where she/he permanently resides.”³⁶⁵ It is argued that absence of any provision in this regard exposes the respondent-state to unwarranted investment disputes and consequent legal uncertainty.

In the absence of an explicit provision in the BIT on claims by dual nationals, two possibilities exist before the tribunal: (a) either to follow the genuine links requirement as laid down in the *Nottebohm* case³⁶⁶ and accordingly, determine the applicable nationality; or (b) to uphold jurisdiction over claims brought by dual nationals as there is no demonstrable objection against nationals of the host-state bringing claims against itself.³⁶⁷ The opinions of investment tribunals are generally divided on this issue.³⁶⁸

On the one hand, some believe that the application of the genuine links requirement, developed more in the context of diplomatic protection, represents the correct position.³⁶⁹ Many times, arguments have been advanced by investors as well as host-states to either disregard one of the claimant’s two nationalities, or to contend that the claimant’s home-state nationality was defective or obtained by fraud etc.³⁷⁰ On the other hand, many of the leading scholars and the majority of investment arbitral tribunals have very much criticized that approach and contend that it is quite inappropriate for application in the law of investment protection.³⁷¹

365. 2015 Indian Model BIT, *supra* note 26, art. 1.9. See also Sonia E. Rolland & David M. Trubek, *Legal Innovation in Investment Law: Rhetoric and Practice in Emerging Countries*, 39 U. PA. J. INT’L L. 386 (2017) (observing that the Model BIT limits the ability of dual nationals to engage in treaty-shopping).

366. *Nottebohm Case*, Judgment, 1955 I.C.J. 22. It ruled that for invoking diplomatic protection on the ground of nationality of a person, it must be based on genuine links between the individual who has suffered injury and the state prosecuting the claim. It reasoned that only one state could bring diplomatic protection claim in respect of a person which is more closely connected to the individual concerned. MALCOLM EVANS, *INTERNATIONAL LAW* 479–82 (Malcolm Evans ed., 3d ed. 2010).

367. Chitransh Vijayvergia, *Dual Nationality of a Private Investor in Investment Treaty Arbitration: A Potential Barrier to the Exercise of Jurisdiction Ratione Personae*, 36 ICSID REV. FOREIGN INV. L.J. 156 (2021).

368. *Id.*

369. Javier Garcia, *Claims by Dual Nationals under Investment Treaties: Are Investors Entitled to Sue Their Own States*, 8 J. INT’L DISP. SETTLEMENT 726 (2017) (“Where an investment treaty fails to regulate the standing of dual nationals, an arbitral tribunal should apply the customary rule of dominant nationality and uphold jurisdiction only if the dominant nationality of the individual is that of the home state.”).

370. Baumgartner, *supra* note 7, at 93–99; DOUGLAS, *supra* note 71, at 318–25.

371. Olguin v. Paraguay, ICSID Case No. ARB/98/5, Award (July 26, 2001); Champion Trading v. Egypt, ICSID Case No. ARB/02/9, Decision on Jurisdiction (Oct. 21, 2003); Serafin Garcia v. Venezuela, PCA Case Repository 2013-3, Decision on Jurisdiction (Dec. 15, 2014).

As the latter opinion is the leading opinion of the investment arbitral tribunals, there is a greater possibility for investment tribunals under the present BIT to consider the claims of dual nationals and to uphold the *ratione personae* jurisdiction, though ultimately the issue will remain inconclusive.³⁷²

In addition, one specific provision of BIT's dispute settlement mechanism, which designates the choice of procedural rules of arbitration, also supports the latter view.³⁷³ It provides that claims may be submitted to arbitration, by default, either under the "UNCITRAL Arbitration Rules," or under "any other arbitration rules including the ICC Arbitration Rules, if mutually agreed by the disputing parties."³⁷⁴ It is submitted that as the UNCITRAL Arbitration Rules are known for supporting the claims of dual nationals, and as it does not suffer from host-state bias as in the case of ICSID arbitration,³⁷⁵ there is a greater possibility of raising claims of dual nationals under the BIT. This uncertainty concerning dual nationals might encourage investors of either

372. In the decision of *Serafin Garcia v. Venezuela*, a UNCITRAL tribunal considered the claims brought by the Spanish-Venezuela dual nationals against Venezuela, in the absence of an explicit requirement of effective nationality in the Spain-Venezuela BIT. *Serafin Garcia v. Venezuela*, PCA Case Repository 2013-3, Decision on Jurisdiction (Dec. 15, 2014). However, in a recent decision of *Lisa Ballantine v. Venezuela*, despite an explicit test of dominant and effective nationality in Article 10.28 of the Dominican Republic-Central America-United States Free Trade Agreement, the tribunal citing lack of standards for determination, relied upon the *Nottebohm Case* and rejected the claims brought by U.S.-Dominican Republic dual nationals. It considered the following factors during its determination and decided the issue: (i) the state of habitual residence; (ii) the circumstances in which the second nationality was acquired; (iii) the individual's personal attachment to a country; and (iv) the center of the person's economic, social and family life. *Ballantine v. Dominican Republic*, PCA Case Repository 2016-17, Final Award, ¶¶ 173, 548, 550 (Sept. 3, 2019). See also Pablo Mori Bregante, *New Trends for Dual National Claims. Is the Ballantine's Award Relevant for Cases Where a Dual Nationals-Related Provision Is Not Incorporated in the Relevant Treaty*, KLUWER ARBITRATION BLOG (Oct. 30, 2019), <https://arbitrationblog.kluwerarbitration.com/2019/10/30/new-trends-for-dual-nationals-claims-is-the-ballantines-award-relevant-for-cases-where-a-dual-nationals-related-provision-is-not-incorporated-in-the-relevant-treaty> [<https://perma.cc/YKH8-LG46>]; Juan Carlos, *Dominant and Effective Nationality Objection Prevails in CAFTA-DR Arbitration*, IISD INV. TREATY NEWS (Dec. 17, 2019), <https://www.iisd.org/itn/en/2019/12/17/dominant-and-effective-nationality-objection-prevails-in-cafta-dr-arbitration-michael-ballantine-and-lisa-ballantine-v-the-dominican-republic-pca-case-no-2016-17/> [<https://perma.cc/3747-F9NE>].

373. 2015 Indian Model BIT, *supra* note 26, art. 16.1.

374. *Id.*

375. Under Article 25(2)(a) of the ICSID Convention, the expression "natural person" does not include reference to any person who has the nationality of the Contracting State party to the dispute. This is otherwise known as the "host-state bias." See *Burimi & Eagle Games v. Albania*, ICSID Case No. ARB/11/18, Award, ¶¶ 120–21 (May 29, 2013); *National Gas S.A.E. v. Egypt*, ICSID Case No. ARB/11/7, Award, ¶ 123 (Apr. 3, 2014). It is relevant to note that since both Taiwan and India are not signatories to the ICSID Convention, the BIT did not provide for the option of ICSID arbitration. See *Nedumpara & Laddha, supra* note 16, at 12.

contracting state to acquire nationality of their intended home-state to be able to protect their investment in the home-state.

It is submitted that if the negotiating states consciously wished to promote liberal investment by dual nationals without any restrictions, they could have made direct and explicit provision along the lines of Article 201 of NAFTA (i.e., “a natural person who is a citizen or permanent resident of ‘a’ Party”) and thereby avoid the needless legal uncertainty.³⁷⁶ Though such a provision would also be criticized as less stringent and would encourage treaty abuses, at least the stance of the BIT would have been clearer and more self-evident.

Moreover, as the current IIA practice goes, it is well-accepted that a mere prescription of the test of real or effective nationality is not sufficient if a state wishes to exclude the protection of claims by host nationals altogether as the test is only used to determine the applicable nationality. In such a situation, it is advisable for states to incorporate a specific provision to exclude claims by investors who hold the nationality of the disputing party.³⁷⁷ In fact, such a provision is found in one of the recent BITs which India has concluded. The 2018 India-Belarus BIT provides that “[i]n no event, the investor shall be a national of a Party in whose territory the investment is made.”³⁷⁸ This demonstrates that the failure to incorporate such a provision in the revised Indo-Taiwan BIT will make the definition of “investor” ineffective when faced with situations of nationality-related abuses. It is unfortunate that some of India’s own best practices have been ignored.

However, the denial of benefits clause in the instrument provides some solace in this respect. It enables, *inter alia*, the authorities of a territory to deny the benefits of the investment treaty to investors³⁷⁹ of the territory of the denying authority. In other words, a host-state’s own nationals may be denied the benefits of investment protection if they bring claims against their home state. However, the effectiveness of the

376. One more such liberal provision is found in the 1997 Canada-Lebanon Investment Promotion Agreement. Article 1(e) provides that: “In the case of persons who have both Canadian and Lebanese citizenship, they shall be considered Canadian citizens in Canada and Lebanese citizens in Lebanon.” Agreement Between the Government of Canada and the Government of the Lebanese Republic for the Promotion and Protection of Investments, Can.-Leb., art. 1(e), Apr. 11, 1997, 1999 Can. T.S. No. 15.

377. *E.g.*, Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation between the People’s Republic of China and the Association of Southeast Asian Nations, art. 14(2)(b), Aug. 15, 2009, <https://asean.org/wp-content/uploads/images/archive/22974.pdf> [<https://perma.cc/PN3S-PAY9>].

378. Belarus-India BIT, *supra* note 6, art. 1.6(a).

379. This provision should be applicable to both natural and juridical persons. See 2004 U.S. Model Bilateral Investment Treaty, art. 17, <https://ustr.gov/sites/default/files/U.S.%20model%20BIT.pdf> [<https://perma.cc/SD3K-9UAA>] [hereinafter 2004 U.S. Model BIT]; see also NAFTA, *supra* note 281, ch. 11, art. 1113 (“A Party may deny the benefits . . . to an investor of another Party that is an enterprise of such Party.”).

provision depends on the conditions for the exercise of such power, which have already been examined in more detail in Part V. Similarly, the BIT also contains a few other provisions to emphasize the bilateral and reciprocal nature of investments, which provide some help in the process of interpretation to fix the problems discussed above. For instance, as a part of the admissions clause, the BIT mentions that “[t]his Agreement shall apply to measures adopted or maintained ‘in the territory in which investment is made,’ relating to investments of ‘investors of the other territory, in its territory.’”³⁸⁰ To the same effect, the Preamble to the BIT also contains similar wording.³⁸¹ It is likely that these points will be used by the disputing party to argue that the contracting states intended to exclude the investors from the same territory (i.e., host-state’s own nationals) from treaty protection.

B. *Nationality of Legal Entities*

In the past, IIAs rarely prescribed a specific level of connection between the corporate claimant and its state of nationality for exercise of *ratione persone* jurisdiction by the investment tribunal.³⁸² They simply prescribed the test of place of incorporation. However, with the recognition of the problem of mail-box companies, the negotiating states understood the need to incorporate certain additional conditions and requirements to have an effective check on treaty shopping by such entities. In recognition of this fact, the revised Indo-Taiwan BIT sought to lay down a strict test for determination of nationality with respect to legal persons.³⁸³

Under the BIT, a juridical person may be considered an investor when a legal entity meets either one of the following requirements: (a) it is constituted or organized under the law of the relevant party and carries on substantial business activities in that party’s territory or (b) the legal entity is constituted or organized under the law of the relevant party and is effectively owned or controlled by a natural person of that party or by another recognized legal entity which is carrying on substantial activities in that party’s territory.³⁸⁴ This implies that it is not sufficient for a legal

380. 2018 Indo-Taiwan BIT, *supra* note 59, art. 2.1.

381. *Id.* art. 1 (“[I]nvestors of the territory of a Party, in the territory of the other Party . . .”).

382. DOUGLAS, *supra* note 71, ¶ 584.

383. In this respect, the BIT differs from its approach towards the nationality of natural persons.

384. This formulation may be considered as a better option, as compared to the earlier Indo-Taiwan BIT, which prescribed a mere test of incorporation or constitution. 2015 Indian Model BIT, *supra* note 26, art. 1.4. Article 1(3) of the 2002 Indo-Taiwan BIT prescribed that “‘investor’ means any . . . juridical persons, such as corporations, firms, associations, etc., incorporated, constituted or established under the laws in force in that territory.” 2002 Indo-Taiwan BIT, *supra* note 361, art. 1(3).

entity to be merely organized under the law of the relevant party,³⁸⁵ but it should also be engaged in substantial business operations in the territory or be effectively owned or controlled by a natural or juridical person of the territory. This requirement generally ensures that mail-box companies do not qualify themselves as “investors.” However, if we look into the investment arbitral rulings on the efficacy of this test, they establish that minimal business activity such as renting a premises and a regular skeleton staff is sufficient to satisfy the test, which makes the requirement easily manageable. In other words, the requirements provide only a modest protection against nationality-related treaty abuses.

For instance, in the case of *Amto v. Ukraine*,³⁸⁶ a question arose as to “whether ‘AMTO has substantial business activities in the country in which it is organised, i.e., in Latvia’ for the purposes of Article 17(1) of Energy Charter Treaty.”³⁸⁷ The tribunal, noting that “[t]he [Energy Charter Treaty] does not contain a definition of [what constitutes] ‘substantial’ [business activities],” remarked that: “the purpose of Article 17 (1) is to exclude from [Energy Charter Treaty] protection, investors which have adopted a nationality of convenience.” It observed that:

Accordingly, ‘substantial’ in this context means ‘of substance, and not merely of form’. It does not mean ‘large’ and the materiality not the magnitude of the business activity is the decisive question. In the present case, the Tribunal is satisfied that the Claimant has substantial business activity in Latvia, on the basis of its investment related activities conducted from premises in Latvia, [...] and involving the employment of a small but permanent staff.³⁸⁸

Similarly, in a dispute between Petrobart and the Kyrgyz Republic, also involving the Energy Charter Treaty, the tribunal accepted the contention of an investor that it fulfilled the requirement of carrying out “substantial business activities” in the relevant territory although it was only able to prove that it was “managed by Pemed Ltd, a company registered in England with its principal office in London” and handled “many of Petrobart’s strategic and administrative matters.”³⁸⁹ Based on

385. See 2012 U.S. Model BIT, *supra* note 309, art. 1; Energy Charter Treaty, *supra* note 2, art. 1.7. The use of the word “under” in the above formulation is important, as it is not necessary that a legal entity to be created by the law of the relevant territory, such as statutory entities (emphasis added).

386. *AMTO v. Ukraine*, SCC Case No. 080/2005, Final Award (Mar. 26, 2008).

387. *Id.*; see also Jordan Behlman, *Out on a Rim: Pacific Rim’s Venture into a CAFTA’s Denial of Benefits Clause*, 45 U. MIAMI INTER-AM. L. REV. 397–424 (2014).

388. *AMTO*, Final Award (Mar. 26, 2008).

389. *Petrobart v. Kyrgyz Republic*, Stockholm Chamber Com. Arb. Inst. 126/2003, Arbitral Award, paras. 10, 63 (Mar. 29, 2005).

this finding, the tribunal ruled that Kyrgyz Republic was not justified to invoke the denial of benefits clause.³⁹⁰

As the requirement of “substantial business activity” has been diluted by the investment tribunals, there is an increasing trend to clarify it in some way in the treaty itself.³⁹¹ In the recently unveiled Dutch Model BIT of 2019, an effort has been made to specify the “indicative” list of “substantial business activities.”³⁹² The relevant portion of the definitional clause defined “investor” as “any legal person constituted under the law of that Contracting Party and having substantial business activities in the territory of that Contracting Party.”³⁹³ For this purpose, it has provided the following “indications” of substantial business activities:

- (i) the undertaking’s registered office and/or administration is established in that Contracting Party; (ii) the undertaking’s headquarters and/or management is established in that Contracting Party; (iii) the number of employees and their qualifications based in that Contracting Party; (iv) the turnover generated in that Contracting Party; and (v) an office, production facility and/or research laboratory is established in that Contracting Party.³⁹⁴

390. However, the case has been vehemently criticized. For a critical review of this decision, see WANG, *supra* note 73, at 133.

391. See Investment Agreement for the COMESA Common Investment Area, art. 1(4), May 23, 2007; Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam of the other part, E.U.-Viet., art. 1.2(c), June 30, 2019, <https://edit.wti.org/document/show/66f74a5f-5c00-455d-97f5-709f837d2bb4> [<https://perma.cc/DY3F-JM3W>] [hereinafter E.U.-Vietnam BIT]; Investment Protection Agreement between the European Union and its Member States, of the one part, and the Republic of Singapore of the other part, E.U.-Sing., art. 1.2(5), Oct. 15, 2018. For an expert’s opinion on the utility and limitation concerning the use of such clauses, see Rachel Thorn & Jennifer Doucleff, *Disregarding the Corporate Veil and Denial of Benefits Clauses: Testing Treaty Language and the Concept of “Investor,”* in BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY 11 (Michael Waibel et al. eds., 2010).

392. In this Model BIT, the terms “substantial business activities” and “substantive business activities” have been used interchangeably. This work prefers the term “substantial business activities.” Netherlands Model Investment Agreement, art. 1(b)–(c), Mar. 22, 2019, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download>. The provision also assumes importance, as The Netherlands was for some time viewed as a gateway for investment Treaty Shopping. Roeline Knottnerus & Roos Van Os, *The Netherlands: A Gateway to ‘Treaty Shopping’ for Investment Protection*, IISD INV. TREATY NEWS (Jan. 12, 2012). See also Kabir A.N. Duggal & Laurens H van de ven, *The 2019 Netherlands Model BIT: Riding the New Investment Treaty Waves*, 35 ARB. INT’L 347–74 (2019); Nikos Lavranos, *The Changing Ecosystem of Dutch BITs*, 36 ARB. INT’L 441–57 (2020).

393. Netherlands Model Investment Agreement, *supra* note 404, art. 1(b).

394. *Id.* art. 1(c).

Further, the note appended to the above clause clarified that “[t]hese indications should be assessed in each specific case, taking into account the total number of employees and turnover of the undertaking concerned” as well as the “nature and maturity of the activities carried out by the undertaking in the Contracting Party in which it is established.”³⁹⁵ It is not clear why even such an indicative provision was not included in the Indo-Taiwan BIT.³⁹⁶

Along similar lines, the recent European Union-Vietnam Investment Protection Agreement³⁹⁷ not only explicitly incorporated the requirement of “substantive business operations” as a part of its definition of “juridical person of a Party,”³⁹⁸ but also clarified that the concept of “effective and continuous links” is equivalent to the concept of “substantive business operations.”³⁹⁹

Consequently, an indicative list of substantial business activities will be very much needed for determination of nationality of legal persons. In the context of India, this requirement will be all the more important in view of the inclusion of the denial of benefits provision in the Indo-Taiwan BIT. If the BIT negotiators were serious about making the definition of “investor” stronger against treaty shopping, they should have combined some of the criteria such as country of incorporation, country of seat, country of ownership or control instead of the currently prescribed test of constitution plus substantial business activities.

395. *Id.*

396. The 2018 Belarus-India BIT, which was one of few BITs signed by India in the post-2015 scenario, at least mandates that “[t]he concept of substantial business activity shall require an overall examination of all the circumstances on a case-by-case basis.” Belarus-India BIT, *supra* note 6, art. 1.6.

397. E.U.-Vietnam BIT, *supra* note 391.

398. *Id.* art. 1.2(c). It prescribed that a:

“juridical person of a Party” means a juridical person of the EU Party or a juridical person of Viet Nam, set up in accordance with the domestic laws and regulations of a Member State of the Union, or of Viet Nam, respectively, and *engaged in substantive business operations* in the territory of the Union or of Viet Nam, respectively.

The 2018 E.U.-Singapore Investment Protection Agreement also has a similar provision.

399. The note appended to the clause clarified that:

for a juridical person set up in accordance with the laws and regulations of Viet Nam and having only its registered office or central administration in the territory of Viet Nam, the Union and its Member States shall only apply the benefits of this Agreement if that juridical person possesses an effective and continuous link with the economy of Viet Nam.

This clarification was not given as a mutually agreed provision of the treaty but merely as an understanding of the European Union. For legal implications of current format, *see* BILLY ALEXIS MELO ARAUJO, THE EU DEEP TRADE AGENDA: LAW AND POLICY 119 (2016).

CONCLUSION

It is apparent that so long as “bilateral” instruments provide investment protection supported by the principle of MFN treatment, the issue of treaty shopping will remain possible. To overcome this problem, countries need to have stronger provisions in their BITs. Such measures include appropriately defining the terms of “investment” and “investor,” restricting access to investor-state dispute settlement, incorporating the all-encompassing denial of benefit clause and the removal of MFN and umbrella clauses.

The revised Indo-Taiwan BIT very well recognizes this fact and accordingly it incorporates the necessary strategies. As one of the important initiatives in this regard, it adopted the enterprise-based definition of investment in place of the broad, open-ended asset-based definition of investment. Also responding to the problems faced by India in the case of *White Industries v. India*, it incorporated the five expected characteristics of investment, including the most-important criterion of contribution to economic development of the host-state. Moreover, as both India and Taiwan are not members of the ICSID Convention, it is not necessary for them to meet the requirements of the double-barreled test and instead, it is sufficient for them to meet the requirements of the definition of investment contained in the BIT. Also, to decline legal protection to illegal investments, the BIT embodies the requirement of compliance with domestic law and good faith, while later decisions established these requirements as inclusive of international public policy and the general principles of international law. These features of the BIT will act as powerful tools to deter shell companies from laying claims as qualified foreign investors.

Recognizing that “indirect investment” poses some serious treaty shopping concerns, the BIT mandates that the disputing investor may submit a claim under the BIT, only if certain mandatory waivers are filed along with the claim. For instance, the BIT while encouraging TNCs to channel their foreign investment through their group subsidiaries, subjects them to certain additional jurisdictional requirements. Moreover, the BIT seems to require active contribution by controlling companies. In other words, when a parent company or its subsidiaries makes a claim for protection of assets in the hands of their local subsidiaries, they should demonstrate that they have actively contributed to the investment in some way, without which they will not be able to meet the jurisdictional threshold.

The BIT while encouraging all types of investments, seems to deny “remote” claims access to investor-state dispute settlement. In particular, its dispute settlement provisions restrict access to only disputes “between the authorities of a territory and an investor of the other territory with respect to its investment.” However, as is the case with other IIAs, the

BIT does not provide any guidance as to when a relationship may be considered “remote.” In the absence of the above clarification, indirect shareholders with barely sufficient interest and remote connection may end up claiming treaty protection, increasing the risks for potential abuse of treaty rights with concerns of treaty shopping. However, as this is a general issue arising under every instrument, the BIT cannot be faulted for lacking a specific provision for remote claims.

Also, acknowledging the fact that unconditional access to investor-state dispute settlement will promote treaty-shopping, the BIT prescribes several rigorous conditions in the form of waivers against parallel actions to deter investors from pursuing parallel or multiple proceedings especially when they are considering investor-state dispute settlement as an effective option.

Similarly, the BIT’s denial of benefits provision has been specifically built in a robust manner to deter treaty shopping. Under the BIT, it is provided that (a) once the power of denial is invoked, the investor is not only prevented from seeking substantive protections under the treaty but will also be prevented from using any other provisions of the BIT including investor-state dispute settlement; (b) the respondent-state may raise the plea of denial of benefits even after the state becomes aware of the launch of arbitration proceedings; (c) the denial is not merely confined to investors from third states, but it even extends to investors from the territory of the denying state (i.e., from its own territory); and (d) the power to deny the benefits under the BIT may be exercised with respect to both natural and legal persons as it uses the broader expression “investor.”

Moreover, in addition to the routine ground of denial of benefits (i.e., an investment or investor, owned or controlled, directly or indirectly, by persons of non-Party or of the denying Party), the BIT also provides for a new ground of denial of benefits where an investment or investor was established or restructured with the primary purpose of gaining access to the dispute resolution mechanism. Despite the difficulties associated with the invocation of this new ground, there can be no denying the fact that it will have a strong anti-treaty shopping effect.

However, on questions concerning the scope of the term “investors,” the BIT seems to contradict itself and encourage treaty abuses. For instance, it does not lay down any new criteria to determine the nationality of individuals. It merely contemplates the possibility that a natural person may also be an investor. Consequently, it is unclear which of the applicable categories of nationality (i.e., nationality, citizenship or permanent residency in the relevant country) will be used for deciding questions of nationality of natural persons.

Similarly, the BIT is silent on the issue of dual nationals. It does not recognize the test of dominant and effective nationality. It also does not

incorporate any specific provision to exclude claims by investors who hold the nationality of the disputing party. As a result, the uncertainty concerning dual nationals might encourage investors of either contracting state to acquire the nationality of their intended home-state to be able to protect their investment in the home-state. However, the aggrieved state is not left without any recourse as the power of denial of benefits available under the BIT can be exercised even with regard to home nationals of the denying authority.

Also, as to the claim of indirect investments by Taiwanese nationals from places like Vietnam or Singapore, it is submitted that the same is allowed by the BIT. However, such flow of investments, will not be totally free and will be subject to the substantiality and directness requirements laid down in the clarification appended to the definition of "investment." Moreover, as the "active contribution" requirement will be applicable to the BIT, the claimant must also demonstrate that the investment was made at the claimant's direction, that the claimant funded the investment or that the claimant controlled the investment in an active and direct manner. In addition, such indirect investments will also be subject to jurisdictional requirements and conditional access to investor-state dispute settlement of the BIT. Hence, it is submitted that such indirect investments may not raise any major concerns of treaty shopping. Overall, it is clear that the BIT has great potential to fight against the chances of treaty shopping.

CITIZENSHIP AND DENIZENSHIP IN THE INTERNATIONAL TAX CONTEXT IN AN ERA OF GLOBAL ECONOMY

Tamir Shanan & Doron Narotzki***

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INTRODUCTION

This Article addresses a fundamental issue underlying the international tax system in the 21st century: the use of citizenship as a jurisdictional basis for imposing income tax liability. As a general matter, the United States is the only developed country that allegedly taxes its citizens living overseas on their worldwide income. However, even the

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United States does not, de facto, tax the vast majority of its citizens living abroad as it offers a generous exclusion for their foreign source income.

This Article analyzes how modern developments in the global economy affect the case for citizenship-based taxation. Though citizenship is closely connected to state sovereignty, is based on the concept of nationalism, and may seem to contradict the globalization trend that is based on the concept of cosmopolitanism, we conclude that the increase of cross-border human capital mobility strengthens the relevance of citizenship-based taxation in the international tax setting.

However, since citizenship-based taxation in its current form does not gain widespread support as it may lead to unjust results, we offer a novel concept of a denizenship-based tax regime that would be easily administered and more economically meaningful.

We also argue that recent developments in international taxation¹ weaken the case for giving preferential tax treatment to income earned by citizens working abroad.

For these reasons, we propose revising the mechanisms that would eliminate double-taxation under the new regime and to incorporate a novel mechanism that would turn double-non-taxation impractical.

Part I explores the significance of citizenship and the ways it is acquired.² Part II presents the magnitude of this phenomenon, the number of cross-border migrants, and its economic impact. Part III then explores the existing rules (criteria) that determine fiscal residency for tax purposes in 38 Organization for Economic Co-operation and Development (OECD) member states, the manner in which fiscal residency is determined according to all three model tax conventions, and the way in which tax residency is determined when a taxpayer is deemed to have dual or even multiple tax residencies. Part IV explores the only true citizenship-based tax system that was set in the United States, the main voices that find it unjustified and call for abandoning it altogether, and the main voices that advocate in favor of such a system. Lastly, Part V proposes our model, explains the necessary adjustments that must be made to better enforce it, and concludes our findings.

I. DEFINING CITIZENSHIP AND DENIZENSHIP

Before discussing the different tax aspects that may arise if the international tax regime is no longer based on the personal connecting

1. Recent developments being the signing of a multilateral instrument by more than one hundred countries and the spread of exchange of information agreements and protocols among countries.

2. Acquiring the status of “citizenship” is often different from one country to another. See Thom Brooks, *Citizenship Tests*, in ROUTLEDGE HANDBOOK ON THE ETHICS OF IMMIGRATION (Sahar Akhtar ed., 2023) (forthcoming 2023) (manuscript at 14), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4390135 [<https://perma.cc/7BZH-QXTN>].

factors, but rather based on citizenship instead to enable states to tax their nationals on a worldwide basis, it is first necessary to understand what constitutes “citizenship.”³

Citizenship is one of the most important legal statuses,⁴ alongside marriage, parentage, and title of property, as it determines rights, duties, and opportunities or the lack thereof.⁵ Citizenship is a legal status that arguably indicates a legal allegiance between an individual and the state in which he or she is a citizen. As Hannah Arendt noted, “[C]itizenship is man’s basic right for it is nothing less than the right to have rights.”⁶ Citizenship is also viewed by some scholars as a basis to justify states’ decision to adopt “legalized discrimination”⁷ in favor of its citizens over its aliens.

The word “citizen” is tied to both ancient and modern concepts of self-governance through representative institutions, and it fits nicely within the framework of modern republics, which generally treat all citizens as legal equals. However, its meaning can be convoluted in the context of historical monarchies and modern governments that do not recognize formal legal equality among their people.⁸

For these reasons, citizenship policy is clearly tied to immigration policy as it determines what makes an individual a member in one society, and not in another. Traditionally, citizenship has been acquired through three main routes: by descent (*jus sanguinis*); by birth (*jus soli*); and by naturalization.⁹ Despite the common characteristics of

3. See Jo Shaw, *Introduction*, in *CITIZENSHIP AND CONSTITUTIONAL LAW* 1, 8 (Jo Shaw ed., 2018) (“Even in the face of challenges of globalization in the neo-liberal world, the model of national citizenship is remaining remarkably resilient, adjusting to allow space for new models of affinity and legal belonging, without fading away.”).

4. See David Weissbrodt & Clay Collins, *The Human Rights of Stateless Persons*, 28 HUM. RIGHTS Q. 245 (2006), <http://www.jstor.org/stable/20072730> [<https://perma.cc/98FM-PRNW>] (“Article 15 of the Universal Declaration of Human Rights (the Universal Declaration) states that ‘[e]veryone has the right to a nationality’ and that ‘no one shall be arbitrarily deprived of his nationality.’”).

5. Scott Titshaw, *Inheriting Citizenship*, 58 STAN. J. INT’L L. 1, 6–9 (2022). See *The Functionality of Citizenship*, 110 HARV. L. REV. 1814 (1997); DIMITRY KOCHENOV, *CITIZENSHIP* 8–15 (2019); see also SYLVIA DE MARS ET AL., *BORDERING TWO UNIONS: NORTHERN IRELAND AND BREXIT* 61 (1st ed. 2018) (“For those who have the ‘right’ citizenship status, belonging to the group of rights holders who enjoy the broadest range of legal protections available in a country, the significance of citizenship can be frequently overlooked.”).

6. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* (2d ed. 1958) (“However, as we would explain below other scholars oppose to this concept and believe that at an era of globalization, global standards and common practices force states to care about human rights of their nationals and aliens.”).

7. See *The Functionality of Citizenship*, *supra* note 5, at 1814.

8. Titshaw, *supra* note 5, at 7.

9. Matthew Lister, *Citizenship, in the Immigration Context*, 70 MD. L. REV. 175, 198–218 (2010). See also Kristin A. Collins, *Illegitimate Borders: ‘Jus Sanguinis’ Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134 (2014).

different citizenship legislation, each state sets its own citizenship and immigration policies as it is an inseparable element of sovereignty.¹⁰ However, such immigration policies are clearly influenced and related directly to the economic impacts they entail.¹¹

The literature identifies several models and justifications for citizenship, including:¹²

- (1) citizenship as “legal status,” which focuses on the meaning of such status and what may be the implications when an individual has an exclusive citizenship status versus dual or multiple citizenship statuses;¹³
- (2) citizenship as “rights approach” (also referred to as the Tiebout/Purchase model), which focuses on the enjoyment of certain important rights and entitlements, and duties;¹⁴
- (3) citizenship as a “political activity” approach (also referred to as the minimalist model), which considers the term citizenship as active engagement in the life of the political community;¹⁵ and
- (4) citizenship as “identity” or “solidarity” (also referred to as the psychological model), which focuses on the psychological dimension and the solidarity of the individual with groups in a particular state or possibly with groups of other people in the world.¹⁶

10. Peter J. Spiro, *A New International Law of Citizenship*, 105 AM. J. INT’L L. 694, 695 (2011). See Brooks, *supra* note 2, at 1; see also RUTH DONNER, THE REGULATION OF NATIONALITY IN INTERNATIONAL LAW 17 (2d ed. 1994) (“[n]ationality may only be handled as a problem of the choice of law, when a tribunal has to decide what nationality law to apply”).

11. Leila Adim, *Between Benefit and Abuse: Immigrant Investment Programs*, 62 ST. LOUIS U. L.J. 121 (2017).

12. Peter H. Schuck, *Three Models of Citizenship*, 151, 151–52 (Yale L. Sch. Pub. L., Working Paper No. 168, 2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1267356#paper-citations-widget [<https://perma.cc/R3LF-9KS6>] (discussing their division of citizenship into the following three categories: nationalistic, human rights, and Marshallian; analyzing each model along three normative dimensions: justification, territoriality, and entitlements). See also Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOB. LEGAL STUD. 447, 447–49 (2000).

13. Bosniak, *supra* note 12, at 456–63.

14. *Id.* at 463–70. The “rights” approach is generally associated with the work of the British sociologist T.H. Marshall during the post-world wars period, see also Edward A. Zelinsky, *Citizenship and Worldwide Taxation: Citizenship as an Administrable Proxy for Domicile*, 96 IOWA L. REV. 1289, 1307–08 (2011). However, as we indicated previously, cosmopolitans find this model unconvincing as globalism forces states to care about and protect the human rights of its nationals and aliens while dictatorships that do not care about human rights at all are also entitled to tax their nationals regardless.

15. Bosniak, *supra* note 12, at 470–79; Zelinsky, *supra* note 14, at 1303–10.

16. Bosniak, *supra* note 12, at 479–88; Zelinsky, *supra* note 14, at 1310–11; see also Engin F. Isin & Patricia K. Wood, CITIZENSHIP & IDENTITY 14–24 (1999).

The notion of citizenship can be traced back to classical time (the Greek-Polites and its Athenians or the Roman *res publica* and its Roman Latin *Civis*) when most individuals' economic relations existed within the boundaries of their locality or domestic state and were associated/identified with the nationalist perception and with the concept of state sovereignty.¹⁷ Nowadays, the economic reality is very different. While individuals are still likely to have a dominant set of domestic affiliations, many of them are also likely to have multiple foreign affiliations. In such an era of economic globalization, massive cross-border flows of assets, services, and ideas that undermine state sovereignty, fertility rates diminishing in high GDP countries, and fertility rates rising in countries with low GDP, countries are relaxing their immigration policies to attract foreign nationals, which to a certain extent comes at the immigrants' countries of origin expense.¹⁸

Accordingly, the literature in the past two decades identifies two spheres of citizenship: the traditional national (including local) sphere and the cosmopolitan or global sphere.¹⁹ To a certain degree, the spheres are contradictory, and in such contradiction, many scholars contend that citizenship is, for various reasons, of less importance today than it was several decades ago, and even more so a century ago.²⁰ Furthermore, and as we elaborate in Part II, a growing number of states relaxed the requirement of an exclusive relationship between the state and its citizens and allowed their subjects to have dual and even multiple citizenships.²¹

Accordingly, as countries realized the contribution of migration in boosting their economies,²² investor citizenship programs became

17. See J.G.A. Pocock, *The Ideal of Citizenship Since Classical Times*, in THEORIZING CITIZENSHIP 29, 29–30 (R. Beiner ed., 1995).

18. Cf. Yariv Brauner, *Brain Drain Taxation as Development Policy*, 55 ST. LOUIS U. L.J. 221, 237 (2010); see also DEVESH KAPUR & JOHN MCHALE, GIVE US YOUR BEST AND BRIGHTEST: THE GLOBAL HUNT FOR TALENT AND ITS IMPACT ON THE DEVELOPING WORLD 37 (2005); Tamir Shanan & Doron Narotzki, *Reevaluating the Allocation of Tax Collection of Immigrants Between Home Country and Host Country*, in FAIRNESS IN INTERNATIONAL TAXATION (Ira Lindsay & Matthew Benita Rose eds., forthcoming 2025).

19. Cf. Yishai Blank, *Spheres of Citizenship*, 8 THEORETICAL INQUIRIES IN LAW 411, 411, 413 (2007) (explaining that there are 3 spheres of citizenship: the local, national, and the cosmopolitan/global, and distinguishing between the territoriality of the local and national citizenships and the universal of the global citizenship).

20. Lister, *supra* note 9, at 181. See also DAVID JACOBSON, RIGHTS ACROSS BORDERS: IMMIGRATION AND THE DECLINE OF CITIZENSHIP (1996); PETER SPIRO, BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION (2008); Richard Falk, *The Decline of Citizenship in an Era of Globalization*, 4 CITIZENSHIP STUD. 5 (2000).

21. Linda Bosniak, *Multiple Nationality and the Postnational Transformation of Citizenship*, 42 VA. J. INT'L L. 979, 980 (2005); Maarten Vink et al., *The International Diffusion of Expatriate Dual Citizenship*, 7 MIGRATION STUD. 362 (2019); Peter J. Spiro, *Dual Nationality and the Meaning of Citizenship*, 46 EMORY L.J. 1411 (1997).

22. Countries like Australia and Canada are a clear example of that given their long standing pro-immigration policies.

increasingly commonplace in states' practices. As such, before exploring a novel conceptual international tax framework that would be solely based on citizenship in determining fiscal residency for tax purposes, it is imperative to examine the ways in which citizenship is acquired and the territorial relations between the state and its citizens.²³

The most common route to acquire citizenship is *jus soli*,²⁴ which offers citizenship based on location of birth.²⁵ Acquisition of citizenship via *jus soli* means that anyone born on the state's territory is entitled to citizenship regardless of the status of his or her parents in that state. Additionally, citizenship status is granted even if the child leaves the state and does not reside there after birth.

The United States is an example of such a country and despite the criticism that this version of citizenship receives, it does not seem as though it will be revoked, as its origin traces back to the Fourteenth Amendment of the U.S. Constitution.

Another more restrictive version of *jus soli* awards individuals citizenship based on the location of birth but conditions citizenship on a continued presence in the state of birth for a significant period after birth. Some versions even condition the awarding of the citizenship on the renunciation of any other citizenship he or she may have.²⁶

Another common route to acquire citizenship is *jus sanguinis*,²⁷ which offers citizenship based on "blood" or descent.²⁸ This concept is not uniform and has several categories; the strongest form equates citizenship with ethnic membership regardless of any territorial considerations.²⁹ The easy access that Jewish people have to citizenship in Israel is a good example of this version of citizenship.³⁰

A more limited version of *Jus Sanguinis* is when children inherit the citizenship of their parents. This limited version of *Jus Sanguinis* also does not account for territorial considerations. A good example of this version is the access to U.S. citizenship that children of U.S. citizens have

23. Lister, *supra* note 9, at 198–209. See also Brooks, *supra* note 2; Graziella Bertocchi & Chiara Strozzi, *The Evolution of Citizenship: Economic and Institutional Determinants*, 53 J.L. & ECON. 95, 95–106 (2010), <https://doi.org/10.1086/600080> [<https://perma.cc/A5GZ-SQNX>]; James Brown Scott, *Nationality: Jus Soli or Jus Sanguinis*, 24 AM. J. INT'L L. 58 (1930); H. S. Q. Henriques & Ernest J. Schuster, "Jus Soli" or "Jus Sanguinis"?, 3 PROBS. OF THE WAR 119 (1917).

24. See Scott, *supra* note 23, at 58–59.

25. Lister, *supra* note 9, at 198–209.

26. *Id.*

27. See Scott, *supra* note 23, at 58; see also Durward V. Sandifer, *A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality*, 29 AM. J. INT'L L. 248 (1935).

28. See Jordan Collins, *Same Laws, Different Century: The Bureau of Industry & Security's Role in Global Trade & National Security*, 15 CURRENTS: INT'L TRADE L.J. 108, 116 (2006) (stating that 141 countries confer citizenship exclusively by *jus sanguinis*).

29. See Lister, *supra* note 9, at 199.

30. See Law of Return, 5710–1950, LSI 4 114 (1950), as amended (Isr.).

even when these children were born outside the United States and even if they have not and will not reside in the United States.³¹

The last way to acquire citizenship is Naturalization, which is the most challenging route to acquire citizenship as the states condition it, and the requirements vary from one state to the other. These requirements generally require the alien who wishes to acquire citizenship to assimilate into the state. Assimilation includes a minimal period of stay in that state (residency period), to be knowledgeable of the state's culture, language, and way of life, and some states even require the alien to take an oath of allegiance or even renounce other citizenships.

These naturalization requirements serve two main purposes: (1) they ensure a commitment to the country of immigration; and (2) they ensure assimilation into the country's culture. Obviously, the two functions may be linked. Some will find the link to be necessary, arguing that an immigrant cannot be sufficiently committed to the state of immigration without being highly assimilated into that state's culture.³²

Even though acquisition of citizenship is available through any of the three routes, the vast majority of citizens in all states acquired their citizenship based on blood/descent or based on the location of birth. Neither of these paths to citizenship require the citizen to have any material relations with the country of citizenship nor do they require the citizen to ever reside in that state.

This outcome undermines the significance that is attributed to citizenship status, especially under the following two phenomena: (1) the abandonment of the exclusive nature of the citizenship status and the diffusion of dual and multiple citizenships by a growing number of states; and (2) the introduction of citizenship investment programs (CIPs), which reflects the understanding that immigration policy can be adopted to attract wealthy individuals,³³ as well as educated and skilled individuals, who are generally referred as the "best-and-brightest" to boost their domestic economies.³⁴ These two phenomena, however,

31. See Ragini Shah, *Sharing the American Dream: Towards Formalizing the Status of Long-Term Resident Undocumented Children in the United States*, 39 COLUM. HUM. RTS. L. REV. 637, 648 (2008).

32. See Lister, *supra* note 9, at 219.

33. See LEILA ADIM, RESIDENCE AND CITIZENSHIP BY INVESTMENT: AN UPDATED DATABASE ON IMMIGRANT INVESTOR PROGRAMS (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3914350 [<https://perma.cc/C3P4-Z7N2>].

34. See KAPUR & MCHALE, *supra* note 18.

explain the relatively high naturalization rates of cross-border migrants,³⁵ many of whom do not renounce their U.S. citizenship.³⁶

As we noted previously, while a century ago, or even as recent as five decades ago, the acquisition of a new citizenship was conditioned on whether the individual renounced his or her other citizenships. By now, many states have abandoned this approach, and the requirement of exclusive allegiance to the state has been relaxed by a growing number of states over the past five decades. As of 2023, more than 75% of the states accept dual and sometimes even multiple citizenships.³⁷

This change, which may have been viewed as technical or meaningless, has put a source of international tension concerning which state can claim protection of individuals holding multiple citizenships, and to which state these individuals owe allegiance, especially when their loyalty to one state contradicts with their loyalty to the other state.³⁸

However, while the trend of abandoning the exclusive citizenship requirement and allowing citizens to have multiple citizenships spreads, many states limit the ability of their aliens to exercise their political rights and limit their ability to vote. States restrict these rights under the assumption that aliens residing in another country are less involved and as such their ability to interfere with the state's domestic and foreign affairs should be restricted.³⁹

Simultaneously, as countries abandoned their exclusive citizenship requirement, they realized the opportunities in attracting the best and brightest, or the wealthiest, to boost their economies. As such, countries relaxed their immigration policies, making it selective and attracting educated and skilled individuals. This occurs especially when states' populations diminish and age, requiring more service providers, particularly in the medical field, to support their aging population.⁴⁰

35. See Liav Orgad, *Naturalization*, in OXFORD HANDBOOK OF CITIZENSHIP 337, 348–50 (Ayelet Shachar, Rainer Bauböck, Irene Bloemraad & Maarten Vink eds., 2017); JEFFREY S. PASSEL, GROWING SHARE OF IMMIGRANTS CHOOSING NATURALIZATION, 19 (2007); see also THOMAS JANOVSKI, THE IRONIES OF CITIZENSHIP 221 (2010) (analyzing naturalization rates in eighteen countries).

36. See Paul R. Organ, *Citizenship and Taxes*, 31 INT'L TAX & PUB. FIN. 404 (2022) (examining the number of individuals renouncing U.S. citizenship during the early 2000s (roughly 500 per year) and the years 2013–2018 (roughly 4,000 per year)). Despite the significant increase of the number of U.S. citizens living abroad who renounce their U.S. citizenship, it should be noted that this is still a significantly low number of all Americans residing abroad.

37. Vink et al., *supra* note 21, at 362–63.

38. *Id.* at 363–64.

39. Allison Christians, *Buying in: Residence and Citizenship by Investment*, 62 ST. LOUIS U. L.J. 51 (2017).

40. For instance, Canada adopted this approach in its immigration policy.

This phenomenon is generally referred to as “brain drain”⁴¹ and as the saying “following the food comes the appetite” goes, states then introduced a more novel phenomenon, some may say cynically abusive. This novel phenomenon offers foreign nationals citizenship on the condition that they acquire real estate within the state, invest capital, or deposit significant sums of money in their financial systems.⁴²

However, this “migration” policy, the so-called Citizenship Investment Programs (CIPs), is significantly different from the “brain drain” phenomenon, because individuals who acquire foreign citizenships pursuant to CIPs do not necessarily relocate to these new states. The acquisition of citizenship under CIPs is generally done for other purposes, mostly to obtain financial advantages.⁴³

Following the stock market and housing market crash of 2008, the literature identified a fairly new economic phenomenon in which states used their immigration policy to boost their economies and introduced new citizenship/residency/immigration investment programs (known as CIPs/RIPs/IIPs). States not only offered foreigners citizenship but also offered favorable tax treatment in an attempt to compete for these foreign nationals.⁴⁴

Over the years more and more countries introduced such programs, and even though one might think that countries with low GDP per capita might be the first to adopt such programs, an International Monetary Fund (IMF) study from 2015 tells a slightly different story.

The 2015 IMF Working Paper lists Antigua and Barbuda, Cyprus, Dominica, Grenada, Malta, St. Kitts and Nevis, Australia, Bulgaria, Canada, France, Greece, Hungary, Ireland, Latvia, New Zealand, Portugal, Singapore, Spain, United Kingdom, and the United States as jurisdictions offering citizenship and/or residency in return for investment.⁴⁵

41. Jagdish N. Bhagwati & Koichi Hamada, *The Brain Drain, International Integration of Markets for Professionals and Unemployment: A Theoretical Analysis*, 1 J. DEV. ECON. 19, 19–20 (1974); Jagdish N. Bhagwati & Koichi Hamada, *Domestic Distortions, Imperfect Information and The Brain Drain*, 2 J. DEV. ECON. 265 (1975) (extending the authors’ economic model).

42. Adim, *supra* note 11, at 122–23.

43. *Id.* at 123–24; Ayelet Shachar, *Dangerous Liaisons: Money and Citizenship*, SHOULD CITIZENSHIP BE FOR SALE? (Ayelet Shachar & Rainer Bauböck eds., 2014).

44. For instance, Italy. *See* Adim, *supra* note 11, at 123–24; ADIM, *supra* note 33.

45. Svetislav V. Kostić, *International Taxation and Migrations*, in RESEARCH HANDBOOK ON INTERNATIONAL TAXATION 353 (Yariv Brauner ed., 2020); *see* Xin Xu, Ahmed Al-Ashram & Judith Gold, *Too Much of a Good Thing? Prudent Management of Inflows Under Economic Citizenship Programs* 5 (Int’l Monetary Fund, Working Paper No. 2015/093, 2015), <https://www.imf.org/en/Publications/WP/Issues/2016/12/31/Too-Much-of-a-Good-Thing-Prudent-Management-of-Inflows-under-Economic-Citizenship-Programs-42884> [<https://perma.cc/697R-9GYU>].

It is important to understand that the list of countries is not exhaustive, and a closer look reveals that these programs offer a variety of different regulatory frameworks and condition the offering of citizenship or permanent residency differently. While some states require the alien to form a business that would employ local employees, invest in the real estate market, and purchase regular or low-interest government bonds, other states require aliens to pay an annual payment or non-refundable fees to the state.⁴⁶

The literature criticizes these programs⁴⁷ and also identifies an alternative policy that offers aliens permanent residency status (RIPs). RIPs promises a permanent status and the enjoyment of fiscal and financial rights in the state but does not award them with citizenship, this is also referred to as “denizenship.”⁴⁸ The literature considers both CIPs and RIPs to be abusive, especially when the naturalization process under these programs does not require an actual residence (physical presence) and still provides aliens an opportunity to reduce their global tax liability by using their new citizenship or permanent residency status.⁴⁹

Following Italy’s immigration program, which invited high-net-worth foreign non-Italian individuals to become Italian residents for a fixed annual payment of Euro 100,000, Professor Allison Christians conducted a study on CIPs and RIPs in 2017, examining over thirty states that introduced RIPs and CIPs. This study revealed that there is competition between smaller and poorer states and OECD member states to attract these foreigners, but the smaller states are at a distinct disadvantage to OECD member states. Accordingly, while states with lower GDP per capita offer residence/citizenship to aliens in exchange for the investment of thousands of U.S. dollars⁵⁰ or tens of thousands of U.S. dollars,⁵¹ OECD member states and states with high GDP per capita offer such

46. Adim, *supra* note 11, at 121; Christians, *supra* note 39.

47. See Alan Gamlen, et al., *Re-Thinking Immigrant Investment Funds* 20–25 (Inv. Migration Council, Working Paper No. IMC-RP 2016/2, 2016), <https://investmentmigration.org/wp-content/uploads/2020/09/Gamlen-et-al-IMC-RP1-2016.pdf> (last visited Sept. 1, 2022).

48. See Neil Walker, *Denizenship and the Deterritorialization in the EU* 1–3 (Eur. Univ. Inst., Working Paper No. LAW 2008/08, 2008), <https://cadmus.eui.eu/bitstream/handle/1814/8082/LAW-2008-08.pdf?sequence=1&isAllowed=y> (last visited Sept. 1, 2022).

49. See Rainer Bauböck, *What Is Wrong with Selling Citizenship? It Corrupts Democracy!*, in *SHOULD CITIZENSHIP BE FOR SALE?* 37, 37–38 (Rainer Bauböck ed., 2018).

50. Christians, *supra* note 39, at 56–57. The following states offer aliens permanent residency or citizenship status for thousands of U.S. dollars (between \$5,000 and \$16,400): Panama, Paraguay, Thailand, and Lithuania.

51. *Id.* at 56–57. The following states offer aliens permanent residency or citizenship status for tens of thousands of U.S. dollars (between approximately \$40,000 and \$160,000): Latvia, Costa Rica, United Kingdom, Ukraine, Colombia, Jersey, Canada (Quebec), Cayman Islands, and Brazil.

status for hundreds of thousands of U.S. dollars,⁵² and some even offer it for an investment of over one million U.S. dollars.⁵³

This phenomenon of states offering immigration investment programs has become even more popular in recent years. Following Christians's study in 2017, Professor Leila Adim presented an updated database in 2021 which clearly indicated two trends: (1) more states introduced immigration investment programs; and (2) states increased the entry requirement (the minimal investment) to be admitted to such favorable programs.⁵⁴

Despite the voices of many international law scholars who argue that the era of globalization experiences a "*decline . . . of citizenship*" and that citizenship is no longer an important normative category⁵⁵ as cross-border human capital mobility increases (as Part II shows), we nonetheless contend that citizenship remains important in general and for tax purposes in particular.

However, it seems that citizenship status that is acquired by birth (*jus soli*) or by descent (*jus sanguinis*) may be formal and meaningless in most material aspects, and as such cannot imply a territorial allegiance between the state and its national. On the other hand, citizenship status that is acquired through naturalization is more often than not difficult to acquire as it requires the foreign national to assimilate and pass "citizenship tests" although this excludes citizenship acquired through investment programs.⁵⁶ Accordingly, we argue that citizenship status that is easily proven can indeed be used in determining fiscal residency; however, citizenship or permanent residency does not suffice and an additional criterion/factor should be accompanied in such determination, such as a physical presence test.

However, even before the introduction of CIPs/RIPs/IIPs over the past several decades, more and more European states adopted a novel migration status for labor migrants who were awarded long-period working visas ("denizens"), known as denizenship status.⁵⁷

The concept of denizenation traces back to common law legal systems in the 13th century, which enabled foreign nationals to gain economic

52. *Id.* at 57. The following states offer aliens permanent residency or citizenship status for hundreds of thousands of U.S. dollars (between approximately \$250,00 and \$750,000): Andorra, Greece, Portugal, United Arab Emirates, Turks & Caicos, France, Cyprus, South Korea, China, Mauritius, United States, Ireland, Spain, and Australia.

53. *Id.* The states offer aliens permanent residency or citizenship status for over one million U.S. dollars: Seychelles, New Zealand, Netherlands, and Singapore.

54. ADIM, *supra* note 33.

55. Bosniak, *supra* note 12, at 467 (italicized in original).

56. See Ayelet Shachar, *Gated Citizenship*, 26 CITIZENSHIP STUDIES 625, 634 (2022).

57. Tomas Hammar, *Legal Time of Residence and the Status of Immigrants*, in FROM ALIENS TO CITIZENS: REDEFINING THE STATUS OF IMMIGRANTS IN EUROPE 187, 187–88 (Rainer Bauböck ed., 1994).

privileges, including the ability to own land through the operation of the royal prerogative, thus creating a new status between citizen and non-citizen.⁵⁸

This hybrid status was reintroduced in 20th-century academic literature by Tomas Hammar to describe waves of immigrants who entered northern and western Europe during the 1960s to find employment or protection and become long-term residents with many legal and social rights but lacking political citizenship. Naturally, this new hybrid status weakened the significance of citizenship status, reduced the motivation of immigrants to become full citizens, and increased the concerns of governments and its citizens that their country would lose its identity.⁵⁹

The new hybrid status can be understood and justified in three dimensions: (1) objectively, as it refers to the bundle of economic rights or obligations it encompasses to and from the denizens; (2) subjectively, as it refers to the self-identification and psychological aspects of the denizen and how she sees herself as part of the state; and (3) intersubjectively, as it refers to recognition of the denizens.⁶⁰

From our perspective, the denizenship status improves the citizenship status by supplementing a “residency” requirement in the citizenship criterion that is formal and does not require an economic proximity/territorial allegiance between the state and its citizen. This addition is highly significant in our context as citizenship-based tax systems may define individuals who do not have any presence there and have no economic ties, cultural ties, or any other affiliation with the state except for the legal right to have a passport, which is often not exercised.⁶¹

It may be that at the objective level, the idea of a distinction between citizenship and denizenship becomes increasingly fuzzy, and at the subjective and inter-subjective levels becomes overstated and perhaps redundant. In these circumstances, denizenship, or its functional and imaginary equivalent, might seek to assert itself as the master category of association with and investment in the political community rather than a residual sub-category. In other words, within its most radically transformative trajectory, the idea of denizenship ceases simply to be a label for describing, emphasizing, and reordering known dimensions of

58. Walker, *supra* note 48, at 1.

59. Hammar, *supra* note 57, at 188.

60. Walker, *supra* note 48, at 2.

61. H. Oger, *Residence as the New Inclusive Criterion for Citizenship*, 2003 WEB J. CURRENT LEGAL ISSUES, <http://www.bailii.org/uk/other/journals/WebJCLI/2003/issue5/oger5.html> [<https://perma.cc/4D4C-GRBR>].

regulation and experience; instead, it becomes the key to a new regulatory and experiential map.⁶²

That is why we therefore call to adopt the denization concept within the international tax regime as it is both relatively easily administered and, no less important, economically meaningful.

The following part explores the magnitude of human capital mobility in the 21st century, explains the economic impact this phenomenon has, and shows tax aspects (mainly tax holidays) offered by human capital importer states, which assists in analyzing the tax aspects that may result in basing citizenship status in a fiscal residency determination in the international tax regime.

II. THE DECLINE OF NATIONALISM AND RISE OF GLOBALISM

A. *Numbers*

Over the last several decades the number of cross-border migrants has grown exponentially. Based on the most recent United Nations (U.N.) survey, in 2021 there were approximately 300 million cross-border migrants, while the number of domestic migrants was estimated to be three times higher, which is approximately one-eighth of the world population. The economic and social impact and contribution of such migration is far greater than its relative representation in the population, as we will show in the following part.⁶³

Even though the percentage of cross-border migrants represents approximately only 4% of the global population, meaning only a small minority of the world's population leaves their country of birth while the overwhelming majority of the global population do not migrate across borders, it is clear that this figure has continued to grow exponentially in the last seven decades after the two World Wars.⁶⁴ While the number of cross-border migrants was approximately 50 million in the 1950s, it slightly increased to approximately 120 million people in the 1970s, and despite COVID-19 travel restrictions, the number of cross-border migrants stayed relatively significant and was approximately 300 million individuals in 2021.⁶⁵

Based on the U.N. report approximately 60% of the cross-border migrant population are considered labor migrants.⁶⁶ While intuitively one

62. Walker, *supra* note 48, at 6.

63. INT'L ORG. MIGRATION, WORLD MIGRATION REPORT 2022 (M. McAuliffe & A. Triandafyllidou eds., 2021), <https://www.un-ilibrary.org/content/books/9789292680763> [<https://perma.cc/9QTX-LKMW>] [hereinafter WORLD MIGRATION REPORT 2022].

64. *Id.* at 21.

65. *Id.* at 23. See also Catherine Wihtol de Wenden, *New Migrations*, 13 SUR INT'L J. HUM. RTS. 17 (2016).

66. See WORLD MIGRATION REPORT 2022, *supra* note 63, at 3.

may think that most cross-border migrants travel from south to north (i.e., from developing countries to developed countries), based on the U.N. report it seems that 52% of the cross-border migrants move to developing countries, while the minority of them move to developed countries.⁶⁷ Many of these migrants wish to naturalize and become citizens in the state of destination without renouncing their citizenship status of their state of origin, thus ending up with dual or multiple citizenships.⁶⁸

Another important factor in this context is the number of displaced persons among cross-border migrants. Based on the 2022 U.N. migration report, approximately one-third of all cross-border migrants are displaced migrants. Of the displaced migrants, approximately 40% are refugees and asylum seekers and the other 60% are displaced persons most of whom are displaced due to conflict, violence, and disasters.⁶⁹

Equally important are the demographic changes between high-GDP countries (developed countries) and low-GDP countries (developing countries). While the population in developed countries is generally decreasing and aging, the situation in developing countries is completely different:

[a] stark demographic divergence separates high-income countries from developing countries. By 2030, for every young person (those 15–24 years old), there will be three seniors (65+) in Germany, Italy, and Japan (table 2.1). Even in China, the number of young persons is expected to be no greater than that of seniors by 2030. “By comparison, the ratio of old to young will be 1:9 in Uganda, 1:7 in Nigeria, and 1:2 in India and Mexico.” The inevitable consequence of the current trajectories will be large labor-market imbalances and mounting fiscal pressures in high-income countries as tax bases narrow and the costs of caring for the elderly rise. In contrast, developing nations with growing pools of young people will need to generate sufficient jobs to reach their targets for poverty reduction and growth.⁷⁰

These demographic changes lead to migration pressures that are likely to increase the working-age population (15–64 years). While the working-age population in developing countries is expected to grow by

67. World Bank Grp. [WBG], *Leveraging Economic Migration for Development: A Briefing for the World Bank Board*, at 4 (July 1, 2019), https://documents1.worldbank.org/curated/en/167041564497155991/pdf/Leveraging-Economic-Migration-for-Development-A-Briefing-for-the-World-Bank-Board.pdf?_gl=1*7bxjnz*_gcl_au*NzU3ODcwNzEyLjE3MjQ4MjI0MjU [https://perma.cc/2B84-US2B].

68. Cf. WORLD MIGRATION REPORT 2022, *supra* note 63, at 47 (examining naturalization of refugees).

69. *Id.* at 4.

70. World Bank Grp. [WBG], *supra* note 67, at 8.

552 million between 2018 and 2030, the demand for foreign/migrant workers in developed countries is expected to grow because their domestic supply will not meet the demand. This gap suggests a shortfall of millions of workers and would force developed countries to further relax their migration policies.⁷¹

B. *Economic Impacts of Cross-Border Migration*

As previously stated, even though the percentage of cross-border migrants is only estimated at less than 4% of the world's population, their economic impact is far greater than their representation in the global population for various reasons. Many of these cross-border migrants are either well-off individuals or more educated or skilled individuals who can cross countries and are admired for their education, skills, experience, or initiatives.

According to an economic report prepared by the World Bank in 2019, one of the main drivers for cross-border migration is the income gap between the average income in high-GDP countries and low-GDP countries. According to the report's findings, during 2013–2017, the average income in the high-income OECD member states was \$43,083, whereas the average income in low-income countries was \$795. This is a ratio of 54:1, and closing such an income gap is estimated to take 135 years.⁷²

A rough estimation of the economic significance of the cross-border migration phenomenon suggests that the 180 million labor migrants (approximately 60% of all cross-border migrants) earn roughly \$7.8 trillion. These cross-border migrants also have a significant role not only in the country of destination but also in their country of origin. For example, based on U.N. statistics, they remitted approximately \$700 billion to their friends and families who were left behind in 2020.⁷³ Notably, this amount was even greater before COVID-19 spread in 2020.

Cross-border migrants also economically contribute to their countries of origin in other ways, including by purchasing real estate there or by financially investing in these countries. Many of the cross-border migrants circulate and return to their countries of origin after spending several years overseas, bringing home knowledge, skills, experience, and economic networks that boost the local economies. An additional contribution such cross-border migration may have is creating diaspora communities that support other cross-border migrants from these countries of origin once they cross-border migrate.⁷⁴

71. *Id.* at 8.

72. *Id.* at 7.

73. WORLD MIGRATION REPORT 2022, *supra* note 63, at 39.

74. For detailed analysis of the advantages and disadvantages that arise from cross-border migration *see* Brauner, *supra* note 18; Shanan & Narotzki, *supra* note 18.

C. *Economic Aspects of Investor Citizenship Plans*

As we indicated previously, many states introduced CIPs/RIPs to incentivize wealthy, educated, or entrepreneurial individuals to relocate and become full members of that state. However, some states are willing to offer such status on the condition that the aliens would invest in real estate, invest in interest-free government bonds, employ local employees, and make other similar investments; some states simply require them to pay a fixed annual payment.⁷⁵

Many of these states introduced favorable tax regimes to incentivize the desired aliens to pick their state. These favorable tax regimes offer different tax breaks. For example, Portugal was among the first states to offer such a preferential regime following the stock market collapse of 2008. Portugal offered newcomers a preferential tax regime of up to 10 years, including exemptions and reduced rates for foreign source income.⁷⁶ Similarly, Cyprus offers newcomers exemptions on interest, dividend distribution, and capital gains; these tax breaks are not limited to foreign source income.⁷⁷ Whereas Bulgaria, for example, offers a 10% flat tax rate for all types of income.⁷⁸ Other states introduced non-domiciliary regimes that offer exemptions on foreign source income for a period of 10 or 15 years with some differences. For example, Israel offers newcomers and taxpayers who return after a 10-year period full exemption on foreign source income.⁷⁹ The United Kingdom offers exemptions on foreign source income during a 15-year period; however, it does tax income that is repatriated to the United Kingdom during the preferential period (remittance basis).⁸⁰ Whereas Italy offers an exemption on foreign source income but requires payment of an annual fixed sum of 100,000 Euros during the 10-year preferential period.⁸¹ Other states are willing to offer generous deductions including cost of living deductions, deductible rent, and more that are otherwise not

75. *How Citizenship by Investment Works – Programs, Benefits, Planning, and Application Process*, HIGH NET WORTH IMMIGR., <https://www.high-net-worth-immigration.com/citizenship-by-investment> [<https://perma.cc/73AP-N4Z2>].

76. Christians, *supra* note 39, at 58.

77. *Id.* at 58 n.24.

78. Daniel J. Mitchell, *Bulgaria Announces 10 Percent Flat Tax*, CATO INST.: CATO AT LIBERTY (July 30, 2007, 11:04 AM), <https://www.cato.org/blog/bulgaria-announces-10-percent-flat-tax> [<https://perma.cc/5TTQ-2375>].

79. *E.g.*, Income Tax Ordinance (New Version), 5721-1961, 6 DMI 120, as amended by amendment 168 (2008) (Isr.) (offering generous tax breaks to newcomers and to returning residents).

80. The United Kingdom offers a generous non-domiciliary regime that offers foreign nationals who establish their home in the U.K. a favorable tax break during their first 15 years. Christians, *supra* note 39, at 55–56 n.16. This regime was introduced in 1799 while William Pitt the Younger served as the Prime Minister.

81. For a presentation of the Italian new non-domiciliary regime *see id.* at 51–52, 58.

deductible for local taxpayers. Some states were even willing to offer tax breaks to local employees to make sure that they would not relocate overseas.⁸²

To summarize, over the last two decades more and more states realized the economic benefits that arise in introducing selective migration policies and in relaxing their naturalization requirements. These states boosted their economies and increased their tax revenues (both income and consumption taxes), to a certain extent at the expense of the countries of origin, as the international tax regime is generally a zero-sum game. Essentially, one could say that one state's "gain" is the other's loss in a race to the bottom, which may be considered abusive. In an attempt to eliminate tax evasion, the international tax regime attempted to limit the tax benefits to situations in which the taxpayer physically changed his or her fiscal residency; however, these attempts were unsuccessful to a certain degree. The following part will analyze the origin of the existing international tax regime and the changes made over the years to eliminate double non-taxation and to fairly allocate tax revenues among the relevant countries in cross-border settings.

D. *The Nomadism Phenomenon*

Another recent phenomenon that challenges international tax rules to a certain extent is the digital nomadism phenomenon. This phenomenon refers to individuals who choose to move from one state to another having no fixed anchor or permanent home or address while continuing to work either as service providers or as employees remotely. Technological and communicational advancements have changed the ways labor can be performed in more professions than ever before, simply by logging into one's personal computer and working virtually from any place that can offer an internet connection. Even though it is not entirely clear how representative the recent surveys on digital nomadism are, the general estimation is that in 2022, there were approximately 35 million digital nomads globally, approximately 15 million originate from the United States, 27% of which originate from Europe, and 17% of which originate from the rest of the world.⁸³

82. See Stjepan Gadžo, *Using Tax Policy to Address the Brain Drain and Depopulation: The Case of Croatia*, 67 BELGRADE L. REV. 116, 132–33 (2019); Kostić, *supra* note 45, at 353 (“[I]n 2019 Poland and Croatia introduced tax measures which provide a more beneficial treatment to those under the age of 26 in the case of Poland and the age of 30 in the case of Croatia. Croatia offers those under the age of 25 a full exemption from employment income taxation, and a 50% one for those between the ages of 25 and 30. Poland exempts those under the age of 26 from income tax provided their income is below a statutory threshold which is set some 50% above the average income level.”).

83. Matthew Metcalfe, *Digital Nomad Statistics: How Big Is the Nomad Movement?*, TWO TICKETS ANYWHERE (Oct. 20, 2023), <https://www.twoticketsanywhere.com/digital-nomad-statistics/> [<https://perma.cc/DPN2-NS3H>].

Even though it seems that digital nomadism is not tax-driven, many of the digital nomads observe that their reason for moving was their difficulty in paying the cost of living in their country of origin, their desire to travel and experience different places and people or to change their lifestyle. Such phenomenon presumably results in untaxed revenues as the country in which the income originated does not tax them, and they are claiming to have no fiscal residency for tax purposes, which is in our view unjustified. It is thus our view that these nomads should be taxed by the states of their citizenships/permanent residence.⁸⁴

III. CROSS-BORDER TAX ASPECTS

A. Introduction

The 1923 League of Nation's economic committee proposed a compromise between the country in which the income originated and the country in which the taxpayer consumes the income proceeds. As Professor Michael Graetz described the 1923 committee recommendations, in proposing how to allocate the taxing rights of cross-border income among the different states, they adopted a trade-off between income and consumption, as these are the the two most common bases to tax income.⁸⁵

The justification for allocating taxing rights to the country in which the income originates is to compensate it for the resources it invested, including infrastructure (e.g., cost of roads, electricity, security, economic stability), the costs of police, military, the system for enforcement of laws, education, and more. Furthermore, the 1923 committee proposed a compromise between the source country (the country in which the income originated) and the country of residence (the country whose taxpayer generates the income). The 1923 committee recommended allocating the first right to tax cross-border income to the source country but to also allocate the residence country an inferior right to tax foreign source income (also referred to as "a second bite of the apple") as it was expected to offer a credit for any foreign source income paid. As Professor Graetz explains, in determining the residence country,

84. MBO PARTNERS, STATE OF INDEPENDENCE IN AMERICA 2022: HAPPIER, HEALTHIER & WEALTHIER 24 (2022), https://info.mbopartners.com/rs/mbo/images/MBO_2022_State_of_Independence_Research_Report.pdf [<https://perma.cc/P4X6-FSFC>] (finding that 16.9 million American workers currently describe themselves as digital nomads, increasing 8% from 2021 and a staggering 131% from the pre-pandemic year 2019). See also Doron Narotzki & Vered Kuperberg, *The Potential Federal Income Tax Liability of Foreign Digital Nomads*, 179 TAX NOTES FED. 65, 65 n.1 (2023).

85. Michael J. Graetz, *Taxing International Income - Inadequate Principles, Outdated Concepts, and Unsatisfactory Policy*, 54 TAX L. REV. 261, 294 (2000).

which focuses on the state in which the income is consumed, such determination would be based on a destination basis.⁸⁶

In the consumption tax context, the widely accepted general practice is to impose such taxes on a destination basis. In other words, to allocate the tax to the nation where the consumption occurs. Although credit-method value-added taxes are the common form of such consumption taxes, consumption taxes may be imposed in a manner quite similar to income taxes.⁸⁷

We wish to offer a different rationale for taxation by the residence country. In our view, the allocation of taxing rights to the residence country should be viewed as compensation for the resources that the state invested in educating the taxpayer and providing him or her with a welfare/healthcare network. We naturally refer to the costs and other resources it invested in public education, in protecting her and in providing health and medical services as well as in providing financial aid to individuals or families in need.⁸⁸ This rationale justifies defining residency by the country of origin, which is partially or fully responsible for his or her earning potential (at least initially after relocation and before the know-how and skills become outdated or even obsolete).

The 1923 Report was accepted by the League of Nations, and it was incorporated in the first bilateral tax treaty model that was used as the basis for the first tax treaty negotiations. This recommendation is still in effect today and clearly reflects the customary international tax regime. Based on the 1923 Report, bilateral tax treaties were negotiated and signed, and after the Second World War, the United States, the OEEC and its successor, the OECD, and the U.N. each prepared a model tax treaty to be used for treaty negotiation purposes and intended, among other things, to eliminate double taxation and prevent tax evasion. Each of the three tax treaty models included a preference for the source countries based on the Benefit approach that was endorsed by the 1923 Report. Also, each of the three tax treaty models determined that for tax treaty purposes, an individual is considered a resident of the relevant country if, under the laws of that country, he is liable to be taxed by reason of his domicile or residence.⁸⁹

B. The Dominant Personal Connecting Factors in Determining Fiscal Residency Among the OECD Member States

A comparative examination of all OECD member states reveals a great disparity in the way each member state defined fiscal residency. In

86. *Id.* at 289.

87. *Id.* at 298–99.

88. Shanani & Narotzki, *supra* note 18.

89. See Doron Narotzki, *Tax Treaty Models—Past, Present, and a Suggested Future*, 50 AKRON L. REV. 383 (2017).

determining fiscal residency for tax purposes, the following criteria are relevant: physical presence in the state, permanent residence, domicile, habitual abode, center of vital interest, and nationality. Most member states defined fiscal residency based on several factors, the most common test adopted by the vast majority of OECD member states being the physical presence test, whereas nationality was only adopted by only three member states—the United States, Hungary, and Lithuania. We will review the three most common tests and explain why the physical presence test may have been relatively meaningful and useful in determining tax residency throughout most of the 20th century. However, it may be less meaningful in the 21st century when human capital has become more mobile than ever, and citizenship and permanent nationality status can possibly improve the physical presence test.

+ **Physical Presence Test** (adopted by 27 OECD member states)⁹⁰

As indicated previously, most OECD member states incorporated some form of a physical presence test in their residency definition. The typical physical presence test these OECD member states rely on is the six months (183 days) within a calendar year test. The idea behind the physical presence test is that using a connecting personal factor for allocating taxing rights does not need explanation. Moreover, since individual taxpayers can only be in a single place at any given time, this factor can be easily measured and is less manipulatable. However, this connecting factor can be easily orchestrated in advance by the taxpayer if desired. Furthermore, the technological and communicational breakthroughs of the past decade and following the global pandemic make it clear that territorial relationship is of less importance than before. Consequently, physical presence is not *sine qua non* for taxation.

Furthermore, the physical presence test as a personal connecting factor in determining fiscal residency can change from year to year and does not recognize the history of the taxpayer. One can reside for 25 years in a certain country and then move the following year to a different country. The physical presence test disregards the 25 previous years instantaneously. Also, since the 1923 Report already put an emphasis on the territorial connection to the country that hosts the economically profitable activity, it is unclear what this connecting factor adds. In any event, active income is taxed at the source, and except for remote work, the source rules in any way that gives preference to the host country.⁹¹

90. The states that adopted the permanent physical presence factor in determining fiscal residency are Austria, Denmark, Greece, Iceland, Ireland, Italy, Portugal, Türkiye, Germany, Spain, the United States, Canada, Finland, Australia, New Zealand, Czech Republic, Poland, South Korea, Slovakia, Slovenia, Chile, Israel, Estonia, Latvia, Lithuania, Colombia, and Costa-Rica.

91. Brauner, *supra* note 18.

+ **Permanent Home/Residence** (adopted by 12 OECD member states)⁹²

The “permanent home” criterion may sound formal or technical as one may purchase or even rent a home to meet this standard, but the rationale behind this factor is clearly that the home should be more than just a place to sleep and keep some belongings on a temporary basis. The permanent home should be of a quality that reflects an allegiance between the individual and the state in which the home is located and possibly may strengthen one’s vital interest with that state.

Therefore, to meet the permanent home criterion, it is unimportant whether the home is rented or owned, but the focus would be on the permanent nature (as opposed to the temporary nature) of the home and on the permanency of its use by the individual. Even though it may sound challenging to administrate this factor, attesting to use of the home can be relatively easy and can be simply established by weighing the intensity of the individual’s use by counting the number of days one stayed within that state and the utility bills that could possibly show the use of the home.

+ **Domiciliary** (adopted by 12 OECD member states)⁹³

The domicile factor, which is used by twelve OECD member states in determining fiscal residency, unfortunately has different meanings in English and Continental language-speaking countries. In common-law countries, domicile is linked to the intention of an individual to establish a permanent home there, and under this definition, an individual must have one domicile at any given time, and he or she cannot have more than one domicile. Therefore, this concept reflects the strongest affiliation one has with a certain state where he or she is domiciled.

In continental-law countries, “domicile” mainly means that a person is registered in a particular state and has a home (i.e., an address) there. Many of these states mandate such registration in an official registrar when the individual’s stay there exceeds several months. Therefore, this factor in continental-law countries is more formal and does not necessarily attest to a strong affiliation or allegiance with that state but merely that he or she intends to stay there for a period that exceeds several months.

92. The states that adopted the permanent home/residence factor in determining fiscal residency are Denmark, Greece, Norway, Sweden, Switzerland, Germany, Mexico, Hungary, Slovakia, Latvia, Lithuania, and Costa-Rica.

93. The states that adopted domicile in determining fiscal residency are Austria, Belgium, France, Ireland, Italy, Luxembourg, the United Kingdom, Germany, Japan, Australia, South Korea, and Chile.

+ **Habitual Abode** (adopted by 7 OECD member states)⁹⁴

The term “habitual abode” refers to the “frequency, duration and regularity of stays that are part of the settled routine of an individual’s life and are therefore more than transient.”⁹⁵ This means that in determining one’s habitual abode, one follows where he or she normally, regularly, and customarily lives. These considerations are supposed to reflect a certain connection or allegiance with that state.

Clearly, the habitual abode factor can be categorized as a sub-test of the physical presence test, as it requires a sufficient length of time in a particular state but also requires that such a stay would be a minimal qualitative stay. Therefore, the time factor under this test is very important in deciding one’s habitual abode.

+ **Center of Vital Interests or its equivalent** (adopted by 4 OECD member states)⁹⁶

The “center of vital interests” criterion or its equivalents probably requires the most complex factual analysis as it requires the determination of which of the states has the strongest affiliation (social, familial, economic, and more) to the individual. However, unlike physical presence or citizenship status, which are relatively easily determined, the determination of which state has the closest affiliation may be more complicated.

Assume a single individual who moves from one place to another having no fixed permanent home whose mother resides in state A whereas his father resides in state B; assume an individual who is divorced twice with one divorcee and one child who live in state A and his other divorcee also with one child who lives in state B. These examples may sound like an interesting TV series or a good reality show. However, life offers much more complicated situations, and familial connections are only one factor that is weighed under the center of vital interest factor.

Assume a person has two jobs or two companies that he or she manages, and so forth.⁹⁷ Accordingly, this factor requires significant

94. The states that adopted habitual abode factor in determining fiscal residency are Austria, Greece, Luxembourg, Germany, Finland, New Zealand, and Hungary.

95. KLAUS VOGEL ON DOUBLE TAXATION CONVENTIONS 307–09 (Ekkehart Reimer & Alexander Rust eds., 5th ed. 2022) [hereinafter VOGEL].

96. The states that adopted the “center of vital interests” factor or similar equivalents in determining fiscal residency are Belgium, Greece, Mexico, and Hungary.

97. In defining the center of vital interest for treaty purposes, Vogel listed the factors that have been used by the courts to evaluate these criteria. The following represents some of the factors that have been reviewed including: house; family home; furnishings; rented apartment; owned apartment; passport; sharing a room; no rent; no lease; place where that taxpayer was born and raised; children; country of birth of the children’s spouse; country of divorce; where spouse seeks employment; family visits; other family members; membership; language skills; work;

work to analyze the private and economic spheres of the individual, which creates a lot of uncertainty, and any such determination might lead to significant litigation, which would be costly and may lead to arbitrary outcomes.

+ **Citizenship/Nationality** (adopted by 3 OECD member states)⁹⁸

Over the past century, the only developed state that based taxation on nationality was the United States. However, over the past decade, Hungary and Lithuania adopted this test to determine fiscal residency. The nationality/citizenship factor allegedly reflects a strong affiliation between the state and its nation as it often is not easily acquired, and it offers civil rights and protections.

However, as we explain next, unlike a century ago, there are many nationals who hold dual or even multiple citizenships, and states relaxed their migration policies to award aliens nationality more easily conditioned on investment in their economy. Accordingly, a national of a state may have never set foot in that state, and therefore, this factor does not necessarily attest to a strong affiliation between the state and its national and may even be used to evade taxation. That is, this factor has been criticized and not adopted by many OECD member states.⁹⁹

This short summary of the dominant factors used by OECD member states in determining fiscal residency attests to the importance state attributes to the physical presence of a taxpayer during the relevant calendar year. It seems that except for nationality and possibly domicile (under the common-law states' interpretation), all other factors are based on the physical presence of the individual in the state. Most OECD member states define residency based on several alternative factors. However, most of them rely heavily on the physical presence of the individual in the country. These factors were developed many years ago when human capital mobility was not as high as it is today. However, as cross-border transportation becomes faster, more reliable, and less costly, and more and more services can be rendered remotely, we call to reexamine the way fiscal residency should be determined in our new economic reality in an era of globalization.

employer; adaption of professional qualifications (professional licenses); bank accounts; brokerage accounts; credit card; money transfers; health insurance and entitlement to Medicare; retirement plans and future retirement accounts; driver's licenses; personal belongings; registration to electoral roll and more. VOGEL, *supra* note 95, at 303–04.

98. The states that adopted nationality in determining fiscal residency are the United States, Hungary, and Lithuania.

99. For example, Hungary and Lithuania adopted the citizenship's taxpayer as an alternative criterion for establishing fiscal residency for tax purposes. *See* Act CXVII of 1995 on Personal Income Tax (Hung.); 2002 Lietuvos Respublikos Gyventojų Pajamų Mokesčio Įstatymas [Law on Personal Income Tax] art. 4 (Lith.).

C. *Fiscal Residency Determination Under the Model Tax Conventions*

The determination of tax residency under each of the U.N., U.S., or the OECD model tax conventions is conditioned on individuals being classified as a tax resident in both contracting states, and only then the treaty rules would come into play. This expresses the treaty drafters' thought that each state has sovereign authority to determine fiscal residency for tax purposes differently and that many states define residency for tax purposes based on several factors.

Furthermore, each of the three treaty models adopts a binary approach, which means that if an individual is deemed to be a resident under the domestic law of both contracting states, he or she will be classified as a tax resident of only one contracting state under the operation of Article 4 of the treaty. Accordingly, the binary approach, where one is either a resident of one contracting state or a resident of the other, may result in unfair and arbitrary consequences. However, replacing the binary approach with a comprehensive approach would require the development of novel mechanisms that would eliminate double taxation on a personal basis.

Arguably, the tax treaty models do not have a preference for personal attachment to the particular state if such attachment is based on physical presence, domiciliary, or nationality. However, when one analyzes more carefully the tiebreaker rules that were incorporated in Article 4 on the tax treaty models to determine which of the two contracting states has the right to tax the individuals, it seems that the physical presence test supersedes. The tiebreaker rules propose several connecting factors in a specific order, and if the first connecting factor is only satisfied in one country, then the other country "loses" its status as the "residence" country for purposes of the application of the treaty, and so forth. The four tiebreaker rules, in the exact order they appear in the treaty model, are: (1) permanent home that is available to him; (2) personal and economic relations (aka center of vital interests); (3) habitual abode; and (4) nationality.¹⁰⁰ However, and as we indicated previously, the reliance on "physical presence" in determining fiscal residency in general and the minimal presence period of six months (or 183 days) in determining such residency may be easily manipulated in our present economic reality and therefore, the time has come to reexamine how residency should be determined and whether more than a single state should be entitled to treat the individual as its resident.¹⁰¹ We also believe that the period in which an individual residency is examined should be extended (from a calendar year to a five-year period), and such extension will assist in

100. VOGEL, *supra* note 95, at 277–80.

101. *Id.* at 257–58.

recognizing the contribution of the taxpayer's country of origin (home country) and to reflect it in the international tax practices and rules.¹⁰²

Lastly, and not less importantly, after CIPs became popular and it was clear that states would offer significant tax holidays in attracting aliens to become their residents, all three of the treaty models included an anti-avoidance mechanism that would condition the application of the treaty models only on if the taxpayer is not "liable to tax in that state in respect only of income from sources in that state or capital situated therein" and this term was interpreted to mean liable to comprehensive tax. We also propose to amend this condition in Article 4(1), which would also deprive the application of the treaty when the individual is liable to comprehensive taxation. However, he or she is subject to a reduced rate in comparison to other residents in that state.¹⁰³

IV. CITIZENSHIP/DENIZENSHIP BASED TAX SYSTEMS

The United States was the first state that chose to tax its citizens living overseas and, by doing so, adopted a citizenship-based tax regime. The idea to tax citizens living overseas began during the American Civil War as a symbolic gesture when Americans were expected to serve in the military and serve their country, and the minimal solidarity that was expected from Americans living abroad who managed to avoid the draft was to participate in the national crisis and pay taxes (at higher rates) to support the war effort.¹⁰⁴ As stated by a senator who served as a manager in the conference committee:

We do not desire that our citizens who have incomes in this country . . . should go out of the country, reside in Paris or elsewhere, avoiding the risk of being drafted or contributing anything personally to the requirements of the country at this time, and get off with as low a tax as everybody else If a man draws his income from our public debt or from property here and resides in Paris, skulking away from contributing his personal support to the Government in this day of its extremity, he ought to pay a higher income tax.¹⁰⁵

Surprisingly, even after the war ended, the idea to tax United States citizens living abroad was incorporated in the early draft of the Revenue

102. David Elkins, *A Scalar Conception of Tax Residence for Individuals*, 41 VA. TAX REV. 149, 157–59 (2020).

103. Tamir Shanan, *The Impact of Tax Treaties on International Mobility of Work*, in MOBILITY OF WORK (forthcoming 2024).

104. Reuven S. Avi-Yonah, *Taxing Nomads: Reviving Citizenship-Based Taxation for the 21st Century* (Univ. Mich. L. & Econ., Working Paper No. 22-035, 2022), https://repository.law.umich.edu/law_econ_current/237 [<https://perma.cc/C29J-FQ2H>].

105. CONG. GLOBE, 38th Cong., 1st Sess. 2661 (1864) (statement of Sen. Collamer) (reflecting on 1862 legislation).

Code of 1894, and then it was incorporated into the Revenue Code of 1913. In fact, the United States was the only state that adopted a citizenship-based tax system. That is why a decade after, in 1924, these rules were challenged in the Supreme Court in *Cook v. Tait*, and the court upheld the taxation of nonresidents and ruled that the United States has jurisdiction to tax a native United States citizen who lived permanently in Mexico and derived his income from real and personal income located in Mexico.¹⁰⁶ The Supreme Court ruled that the United States has jurisdiction to tax its citizens living abroad because:

[T]he foundation of [plaintiff's argument] is the fact that the citizen receiving the income and the property of which it is the product are outside of the territorial limits of the United States. These two facts, the contention is, exclude the existence of the power to tax. Or, to put the contention another way, to the existence of the power and its exercise, the person receiving the income and the property from which he receives it must both be within the territorial limits of the United States to be within the taxing power of the United States. The contention is not justified, and that it is not justified is the necessary deduction of recent cases. In *United States v. Bennett*, 232 U.S. 299, the power of the United States to tax a foreign-built yacht owned and used during the taxing period outside of the United States by a citizen domiciled in the United States by a citizen domiciles in the United States was sustained.¹⁰⁷

However, even though the United States adopted a citizenship-based tax system according to which it taxes its citizens living abroad on a worldwide basis, it should be noted that de facto, it exempts most of its citizens living abroad as it offers them an exclusion of their foreign earnings up to an amount that is currently set at \$120,000 (for 2023).¹⁰⁸ This exclusion means that the vast majority of the United States citizens living abroad are not taxed on their foreign source income by the United States, and as the United States also offers foreign tax credit, many of its citizens who earn more than the exclusion amount are still untaxed in the United States, as they can credit foreign taxes paid by them against their foreign source income (over the exclusion).

However, the United States did not base its fiscal residency definition solely on citizenship status or physical presence but also incorporated a denizenship factor, according to which any lawful permanent resident

106. *Cook v. Tait*, 265 U.S. 47, 56 (1924).

107. *Id.* at 54–55 (citing *United States v. Bennett*, 232 U.S. 299 (1914)).

108. 26 U.S.C. § 911.

residing abroad has not formally notified United States Citizenship and Immigration Services in order to abandon that status.¹⁰⁹

Over the past century, there were other attempts to adopt citizenship-based taxation on citizens living abroad in Eritrea and the Philippines, but they did not include a reference to its denizens. However, it is unclear to what extent these states successfully taxed their citizens living overseas; in fact, the Philippines admitted that as it did not manage to enforce taxation over this population, so it decided to abandon its program in 1972.¹¹⁰

Over the past decade, Hungary and Lithuania amended their tax laws and added citizenship (but not denizenship) as an additional criterion for being classified as tax resident. However, it is unclear if they enforce these new rules.

Up until recently, most scholars criticized citizenship-based taxation and could not find any meaningful rationale to justify it as the citizenship status by itself does not necessarily reflect proximity and meaningful economic relations between the state and the individual taxpayer (especially for people who acquired citizenship by being born there or by descent and have been living almost all of their lives overseas and sometimes don't even know they are eligible to be citizens in that country).¹¹¹

However, over the last decade, several prominent legal scholars, including Professors Zelinski, Kirsch, and Avi-Yonah, all advocated in favor of a citizenship-based regime for the following reasons.

Professor Zelinsky argues that an individual's citizenship can be referred to as a proxy of one's domicile as it is generally linked to where his or her permanent home is. Accordingly, citizenship should not be viewed merely as a "formal" status but as a representation of an individual's allegiance to the state of citizenship. Accordingly, Professor Zelinsky argues that citizenship-based taxation should be adopted not only because it is easily administered (unlike residency determination that requires factual-complex inquiries) but also because of the benefits that citizenship status awards. He believes there is allegiance between the

109. 26 U.S.C. § 7701(a)(30)(A).

110. Allison Christians, *A Global Perspective on Citizenship-Based Taxation*, 38 MICH. J. INT'L L. 193, 207 (2017) (discussing problems the IRS faces when taxing non-resident citizens); Richard D. Pomp, *The Experience of the Philippines in Taxing Its Nonresident Citizens*, in INCOME TAXATION AND INTERNATIONAL PERSONAL MOBILITY 43, 52 (Jagdish Bhagwati ed., 1989) (discussing problems that the BIR faced when taxing non-resident citizens and their abandonment of the prior tax program).

111. Cynthia Blum & Paula N. Singer, *A Coherent Policy Proposal for US Residence Based Taxation of Individuals*, 41 VAND. J. TRANSNAT'L L. 705, 705 (2008); Reuven S. Avi-Yonah, *The Case Against Taxing Citizens*, 58 TAX NOTES INT'L 389, 389 (2010); Bernard Schneider, *The End of Taxation Without End: A New Tax Regime for U.S. Expatriates*, 32 VA. TAX REV. 1, 17–39 (2012); Ruth Mason, *Citizen Taxation*, 89 S. CAL. L. REV. 169, 173 (2016).

state and its citizens and, therefore, finds the adoption of citizenship as a connecting factor to award the right to tax foreign-source income as a proxy for his or her domicile. As such, this regime does not deviate from the existing common rules.¹¹²

Professor Kirsch advocated for a citizenship-based taxation regime and explained that while decades ago such regimes were mainly symbolic as taxing foreign citizens was hardly enforceable, recent globalization changes (including lowered barriers to cross-border trade and the increased mobility of employees), as well as the weakening of bank secrecy and the recent exchange of information practices, make citizenship-based taxation more relevant than ever. That is why, unlike before, states can tax citizens living overseas in the same manner as citizens residing within their state of citizenship.¹¹³

Lastly, Professor Avi-Yonah initially argued a decade ago that a citizenship-based tax regime cannot be justified, even though it is easily administered and even though citizenship status may award the individual certain benefits. He also asserted that this regime cannot even be justified by the ability to pay rationale and that, in fact, the United States is the only developed country to adopt this regime and that de-facto, the state is unable to fully tax its foreign citizens because if offered the foreign exclusion, this regime becomes ineffective. However, in a recent article, Professor Avi-Yonah explained that as human capital mobility continues to rise and as the physical presence of individuals becomes less meaningful (especially for individuals who move from one state to another and have no permanent fixed home, also referred to as nomads) citizenship status can serve better as a connecting factor in the international regime.¹¹⁴

Considering the above, it seems that citizenship can serve as a connecting factor in the international tax regime. However, a citizenship-based regime should take into account the fact that citizenship status acquired by birth or descent may, in many cases, be economically meaningless and unjustified.

This tax regime should also take into account that tens of millions, if not hundreds of millions, of individuals have dual or multiple citizenships. As such, the regime should include mechanisms that would eliminate double taxation and possibly mechanisms that would bifurcate/allocate the taxing rights among different states of citizenships.

112. See Edward A. Zelinsky, *Citizenship and Worldwide Taxation: Citizenship as an Administrable Proxy for Domicile*, 96 IOWA L. REV. 1289, 1289 (2011).

113. See, e.g., Michael S. Kirsch, *Taxing Citizens in a Global Economy*, 82 N.Y.U. L. REV. 443, 443 (2007); Michael S. Kirsch, *Revisiting the Tax Treatment of Citizens Abroad: Reconciling Principle and Practice*, 16 FLA. TAX REV. 117, 117 (2014). See also Young Ran Kim, *Considering "Citizenship Taxation": In Defense of FATCA*, 20 FLA. TAX REV. 335, 335 (2017).

114. Avi-Yonah, *supra* note 104, at 3–6.

Lastly, in light of recent citizenship investment programs that offer citizenship to foreign individuals to boost their economies and in an attempt to attract these skilled, educated, and wealthy individuals, offer them tax holidays that reduce their overall effective tax liability, anti-evasion measures should be introduced.

In our view, even though citizenship-based tax systems can easily be administered at present and could significantly reduce litigation since 97% of the world population acquired their citizenship by birth or descent, since such status does not necessarily attest to the existence of a meaningful allegiance between the individual and the state(s) in which he or she is a citizen, most states did not factor citizenship status in their fiscal residency definition. However, unlike citizenship, denizenship status is different for the following two reasons: first, a person is not admitted or awarded denizenship status automatically and is required to “naturalize” in some form or manner; second, denizenship is not a mere formal status and is economically meaningful. Additionally, denizenship status is generally conditioned on a meaningful physical residence and, unlike citizenship, expires when such allegiance between the state and its denizen becomes lax.

CONCLUSION

Over the past century, migration has become more meaningful and relevant than ever, and studies on this subject expect this phenomenon to continue in the next several decades. More than a billion people leave their homes, families, and friends to become integral parts of new communities, three-quarters of which migrate locally within their home countries, while the others leave their home countries and build new homes overseas. The rules for allocating taxing rights were determined a century ago when this phenomenon was peripheral, and the economic reality was very different, and the time has come to reexamine them.

A century ago, it was very difficult for “home countries” to keep in touch with their citizens who moved abroad or to be informed of the income and gains their former residents generated overseas. This may be one of the reasons why the rules put a lot of emphasis on the territorial connections with the country that hosted the activity that generated the profit/income and with the country that hosted the taxpayer and served as her home. Unfortunately, the country of origin of the migrant did not receive its appropriate recognition and was unable to participate and collect taxes.

Our proposal calls for a change in the way fiscal residency is determined. We wish to strengthen the social contract between the country and its national/permanent residents. Fifty years ago, a change in this direction (regarding developing countries) was raised by Professor Bhagwati and several of his colleagues; however, their efforts were futile.

Professor Bhagwati's basic idea was to compensate the home country by imposing on the host country a foreign migrant surtax. This proposal did not pick up momentum for various reasons, and absent the cooperation of the countries of destination, it was clear that it could be declaratory and unenforceable by the home countries.

However, the technological and communication breakthroughs, as well as the resistance of countries from exchanging information, have been dramatically diminished during the past decade after the creation of Common Reporting Standards and the Foreign Tax Compliance Act (FATCA), and the adoption of FACTA by over a hundred countries. Moreover, the recognition that double non-taxation is undesirable can set the grounds for a desired change, especially in light of the increasing cross-border mobility of human capital which is not expected to stop but to increase.

Our recommendation does not intend to rock the foundations of the international tax regime and its compromises by leaving the source country with the primary right to tax cross-border income and awarding the resident country with an inferior right. However, we do recommend that the taxpayers' fiscal residency should be determined based on their national domiciliary. Since domiciliary is determined based on one's intent to establish a permanent home, and one's intention is difficult to prove, we recommend that denizenship status be used as a proxy for domiciliary. In our view, because mere citizenship status can be acquired without any meaningful proximity or allegiance with a state (economic, territorial or otherwise), it is recommended that fiscal residency be determined based on denizenship status, as long as that status is conditioned on a meaningful physical presence that is also easily established and difficult to manipulate as "individuals can only be in one place at any given time."¹¹⁵ However, we also believe the current rules that require a minimal period of 183 days (six months) to establish denizenship status should be relaxed.

Second, we recommend adopting anti-avoidance mechanisms that would make sure denizenship would not be acquired principally to evade taxes. Accordingly, fiscal residency should only be respected if the individual is taxed on a comprehensive basis and only if the individual is taxed in the same manner and at the same rates as other domestic taxpayers in that state. Also, we recommend that no exclusion or exemption be available. As we previously indicated, over the past several years, states have come to understand the economic contributions that skilled migrants can bring; and in relaxing their migration policies, they offer favorable tax treatment in a race to the bottom, which is undesirable

115. Reuven S. Avi-Yonah, *The Structure of International Taxation: A Proposal for Simplification*, 74 TEX. L. REV. 1301, 1311 (1996).

in our view. We, therefore, recommend that resident countries tax their nationals on a worldwide basis while also allowing deductions that would mitigate the cost of their minimal living standard overseas. We also recommend declaring that an individual cannot be “fiscally stateless” for tax purposes and that no one can be exempt from being taxed on a worldwide basis, including those who adopt a nomadic way of living.

Third, we believe that relying on denizenship status is fairer as it strengthens the social contract between the state and its denizens, and it also recognizes that abandonment of domiciliary/nationality is a process that takes time (several years), as does the acquisition of citizenship status. We, therefore, recommend considering some restrictions regarding the acquisition of denizenship under immigration investment programs that do not require a significant physical residence and where the state has very little social and economic proximity with the taxpayer. This proposal thus suggests adopting a period of several years in which the “home countries” would be able to participate and tax the foreign income of their citizens living overseas, but it would not be perpetual and would be limited to a certain period between five to ten years. During this period, the ties between the migrant and her home country are stronger and tighter. Also, the legitimacy of imposing such taxes during the first couple of years following immigration is, in our view, self-explanatory as a compensatory mechanism for the state’s investment in the taxpayer and her family. However, as time goes by, such legitimacy lessens, and the contribution of the home country to the economic welfare of the taxpayer becomes more and more distant. As such, the taxes imposed on the migrants by the home country should be adjusted and reduced during this period. Furthermore, we would like to note that this proposal does not automatically apply to refugees, asylum seekers, and displaced persons. To the extent that the taxpayers were persecuted in their home countries and, as such, had to leave (to escape for their lives), the home country should be entitled to no tax revenues.

Lastly, we are aware that there are tens of millions of people who have dual/multiple citizenships, and possibly denizenships, and that all three model tax treaties adopt a binary approach, according to which an individual cannot be treated as being a dual resident for treaty purposes. We believe that under our proposal dual/multiple citizenship or permanent residency should not lead to double tax liability as we recommend that residency should not be changed during a five to ten year period, and therefore an individual should be classified during that period as a resident of her country of origin. Only if he or she acquires new denizenship does the new denizenship become effective following the transition period.

PUBLIC TRUST AND RESPECT FOR LAW ENFORCEMENT:
UNITED STATES VS. JAPAN

*Hannah Stevenson**

Abstract

American police have broadly failed to gain public trust, which is essential to their success in protecting communities. By contrast, Japanese police excel at maintaining public trust and cooperation. Drawing on the success of the Japanese, this Note examines the shortcomings of American policing and recommends reforms for the future.

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INTRODUCTION

“Police misconduct and corruption have the potential to erode public trust and confidence in . . . policing.”¹ Law enforcement misconduct is present in every country, but a country’s ability to manage and reduce this misconduct instills confidence, trust, and respect in its citizens. According to the *Pew Research Center*, in a November 2020 study asking American adults how much confidence they have in police to act in the public’s best interests, only thirteen percent of Democrats reported having confidence in America’s current policing system.² This is compared to four-in-ten members of the Republican party who reported having a “great deal of confidence in the police.”³ This statistic will provide guidance when discerning America’s attitude toward law enforcement discussed throughout this Note.

By comparing the growing public trust and respect for Japanese policing with the current distrust and lack of respect for American policing, this Note examines contributing factors and potential reform proposals based on the Japanese policing scheme to restore public confidence, trust, and respect in American law enforcement.

Three factors will be compared throughout this Note, each section will address how: (1) a community policing structure can affect police brutality and systemic racism; (2) accountability procedures contribute to

1. Frank V. Ferdik, et al., *Citizen Oversight in the United States and Canada: An Overview*, 14 POLICE PRAC. & RES. 104, 104 (2013).

2. *Trust In America: Do Americans Trust The Police?*, PEW RSCH. CTR. (Jan. 5, 2022), <https://www.pewresearch.org/2022/01/05/trust-in-america-do-americans-trust-the-police/> [<https://perma.cc/SFS8-2DWY>].

3. *Id.*

community respect; and (3) the level and quality of police training can create a foundation of trust in law enforcement.

Part I will discuss how these factors have contributed to and exacerbated widespread distrust and disrespect for law enforcement in America. Using the same factors, Part II of this Note will discuss the public's deep respect and admiration of Japanese police forces.

Finally, Part III of this Note describes a proposed model of policing reform that will restore the American public's trust and respect in law enforcement. This part will highlight how the United States could benefit from adopting a similar policing scheme that has proven to be successful in a country of developmentally equal status. Like the United States, Japan is highly sophisticated, industrialized, and rooted in democracy. Because of Japan's comparable position as a nation, a proposed model based on the Japanese law enforcement design is particularly realistic.

I. THE UNITED STATES

A. *History*

This section begins with a brief overview of the history of policing in America that led to distrust and the promotion of police brutality. Policing in America began in the Carolina colonies in 1704 with the creation of slave patrols.⁴ Slave patrols were "responsible for capturing runaway slaves and returning them to their masters."⁵ Given the egregious nature of slavery, slave patrols were brutal in their punishment of runaway slaves. Slave patrols were the first unofficial policing in America, entrenching America's policing in discriminatory, unfair, and inhumane practices.⁶

After the Civil War, slave patrols slowly took the form of policing units; however, the military played a substantial role in law enforcement at this time.⁷ Around this time, policing in America also "consisted of voluntary watch groups formed by citizens;" however, the groups were considered unorganized and ineffective.⁸ The Reconstruction Era followed the Civil War, during which time cruelty was America's go-to policing style. During the Reconstruction Era, police units focused on

4. Jonathan Andrew Perez, *Rioting by A Different Name: The Voice of the Unheard in the Age of George Floyd, and the History of the Laws, Policies, and Legislation of Systemic Racism*, 24 J. GENDER RACE & JUST. 87, 116 (2021).

5. Kala Bhattar, *The History of Policing in the US and Its Impact on Americans Today*, UAB INST. HUM. RTS. BLOG (Dec. 8, 2021), <https://sites.uab.edu/humanrights/2021/12/08/the-history-of-policing-in-the-us-and-its-impact-on-americans-today/> [<https://perma.cc/W54F-9TZP>].

6. *Id.*

7. Olivia Waxman, *How the U.S. Got Its Police Force*, TIME MAG. (May 18, 2017), <https://time.com/4779112/police-history-origins/> [<https://perma.cc/Z2TX-ZKCD>].

8. CAROL A. ARCHBOLD, POLICING 2–11 (2013).

segregation.⁹ Police were expected to protect white communities by over-policing black communities resulting in increased violence and police brutality within black communities.¹⁰ Modern policing began in the mid-1800s, starting with the New York Police Department, St. Louis Metropolitan Police Department, and the Chicago Police Department.¹¹ These new modern policing units employed three distinct characteristics that are still included in today's police practices: (1) limited police authority; (2) local control; and (3) fragmented law enforcement authority.¹² This history of police creation has led to an increased distrust in law enforcement and public disrespect in modern communities.

B. Lack of Efficient Community Policing Combined with a History of Police Brutality and Systemic Racism has Prompted a Long-Standing Negative Attitude Toward Law Enforcement

“Police brutality is a widespread problem that causes significant physical and psychological trauma, undermines faith in the law, and disproportionately impacts communities of color.”¹³ “[W]hen it comes to public safety, Black, Latino, and Asian communities want what every community wants: a safe and secure environment where their families can live and thrive, free from the fear of violence and crime.”¹⁴ The consistent and unpunished behavior by law enforcement strengthens the publics’ lack of respect for the police force in America.

One of the first and most infamous cases of police brutality was the beating of an African American man, Rodney King, by four Los Angeles Police Officers in 1991. This incident was caught on camera, broadcast on local television, and eventually on national news.¹⁵ A year after the beating, the officers were acquitted of the charges of assault with a deadly weapon and excessive use of force.¹⁶ The city commenced “several days of civil unrest, protests, and violence that resulted in thousands of people injured and more than 50 people dead.”¹⁷ Acquittals like this have

9. *Id.* at 2.

10. *Id.*

11. *Id.* at 3.

12. *Id.* at 4.

13. Mark D. Duda, *Remedying Police Brutality Through Sentence Reduction*, 107 VA. L. REV. ONLINE 99 (2021).

14. Sudria Twyman, *What Communities of Color Want from Police Reform*, THIRD WAY (Mar. 31, 2022), <https://www.thirdway.org/memo/what-communities-of-color-want-from-police-reform> [<https://perma.cc/U2VL-AX9L>].

15. Jenesse Miller, ‘Like a stick of dynamite’: USC scholars reflect on legacy of 1992 L.A. uprising and police beating of Rodney King, USC NEWS (Apr. 28, 2022), <https://today.usc.edu/like-a-stick-of-dynamite-usc-scholars-reflect-on-legacy-of-1992-l-a-uprising-and-police-beating-of-rodney-king/> [<https://perma.cc/S7TR-P8TC>].

16. *Id.*

17. *Id.*

contributed to the public's distrust of law enforcement because it demonstrates that officers can escape punishment for actions that would have gotten a conviction had they been committed by anyone outside of law enforcement. Situations like these demonstrate to the public that officers are above the law, which alone generates a negative bias towards officers. Numerous police brutality cases followed the Rodney King case.

A more recent police brutality case that evoked riots, protests, and the proposition of defunding the police was the killing of Eric Garner in New York. Garner was the victim of an illegal chokehold committed by Officer Daniel Pantaleo. Despite Garner pleading that he could not breathe, Pantaleo did not undo his chokehold, which eventually led to the death of Garner.¹⁸ After Garner's death, "NYPD officials and officers . . . attempted to cover up the killing, first claiming that Garner died of a heart attack, illegally leaking sealed records to criminalize Mr. Garner, and lying on official reports."¹⁹ These are the events that foster distrust in the American public. Police officers are expected to be a community safeguard. Still, even in the light of a tragic event committed by one of their own, they continue to push mistrust on the public by engaging in dishonest acts. "In a survey of over 30,000 Black Americans, 73% agreed that holding police officers responsible for misconduct would improve police-community relations."²⁰ This statistic sheds light on how minority communities view law enforcement.

Minority communities are disproportionately targeted for acts of police brutality. This erodes the trust and respect for law enforcement in these communities by driving diverse individuals to fear police officers. Creating fearful encounters undermines any form of respect that police expect because minority communities anticipate being harassed by law enforcement due to the history of police brutality that has submerged our police force. Many communities envision officers as role models. Therefore, allowing officers to act dishonestly, violently target minority groups, among committing many other forms of misconduct without consequences creates a mistrust in American officers.

C. Lack of Social Accountability Leaves Victimized Communities Suspicious of Dishonest Practices Engaged by Law Enforcement

"Police abuse and lack of accountability . . . can easily erode people's respect for, and allegiance to, legal institutions."²¹ Two significant barriers to this issue of social accountability are: (1) secrecy laws; and (2) a steep qualified immunity standard.

18. *Justice For Eric Garner*, COMMUNITIES UNITED FOR POLICE REFORM (2020), <https://www.changethenypd.org/EricGarner> [<https://perma.cc/6U7A-3EQJ>].

19. *Id.*

20. Twyman, *supra* note 14.

21. Avidan Y. Cover, *Revisionist Municipal Liability*, 52 GA. L. REV. 375, 411 (2018).

1. Secrecy Laws

Many states continue to pass laws that hide police misconduct from the public view “[d]espite the centrality of police misconduct information [and] the responsibility the state holds for people killed by police.”²² Secrecy laws were enacted to protect police officers and became popular following the Civil Rights Movement. The Civil Rights Movement was the first time “police officers’ conduct was under scrutiny from official actors outside of the police department,” because of the increased interest in the constitutional rights of people accused of crimes.²³

Suppressing police misconduct information contributes to the public’s distrust in law enforcement in more ways than one. First, secrecy laws deprive grieving families of information regarding a loved one’s death. This strips families of the opportunity to “achieve accountability beyond individual officers.”²⁴ Second, hiding evidence of police violence allows officers to partake in racial biases while wearing badges.²⁵ A few states have taken steps to remedy their secrecy laws to allow state citizens access to police disciplinary records. This is a major modernization for these states. However, several states are still reluctant to dispose of secrecy laws, claiming these laws protect their officers. These unwilling states seriously threaten police reform in the United States because becoming transparent vitally contributes to building Americans’ respect, trust, and value toward law enforcement. If the American public were to have access to the disciplinary records of police officers, citizens would likely feel that officers are being held accountable for their actions. Thus, public respect for the law will be greatly enhanced because accountability will deter police misconduct.

A recent example of security law reform in the United States was the repeal of New York Civil Rights Law section 50-a. Section 50-a kept disciplinary records secret from the public. At its inception, legislatures had ample warning that this law could restrict police accountability.²⁶ The repeal of section 50-a in New York was primarily prompted by the tragic death of George Floyd in Minnesota.²⁷ Derek Chauvin, a Minneapolis Police Officer, killed Floyd. Following Floyd’s death, records containing

22. Rebecca Brown & Cynthia Conti-Cook, *Crime Without Punishment*, 46 HUM. RTS. 14 (Jan. 11, 2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/crime-without-punishment/ [https://perma.cc/JVC7-YATT].

23. Cynthia Conti-Cook, *Digging Out from Under Section 50-a: The Initial Impact of Public Access to Police Misconduct Records in New York State*, 18 U. ST. THOMAS L.J. 43, 52 (2022).

24. *Id.* at 51.

25. *Id.*

26. *Id.* at 53.

27. *Id.* at 44.

information regarding twenty-two prior complaints against Chauvin were released to the public.²⁸ Floyd's death had a significant impact on secrecy laws across the country. The state of New York recognized that "[u]nlike the community that watched Derek Chauvin kill George Floyd, New Yorkers "[were] unable to look at patterns of officers who are continuously beating people up in the community."²⁹ The repeal of section 50-a prompted trust and respect throughout communities in New York because the public now feels more aware of police misconduct in their area. "The communities where these incidents occur will also no longer be fearful of not knowing, for example, the names of police who shot a man in broad daylight and how the department responded."³⁰ Reforming secrecy laws can substantially impact the relationship between law enforcement and the community. This example highlighting the effects of repealing section 50-a should guide those states who refuse to reform their secrecy laws. While reforming secrecy laws will not eliminate police violence and public distrust, it will significantly change the dynamic relationship between law enforcement and the communities they regulate.

Some laws are not secrecy laws on their face but can be twisted and used to hide the identity of police officers, one of those laws is Marsy's Law. In its original capacity, "Marsy's Law seeks to give crime victims meaningful and enforceable constitutional rights equal to the rights of the accused."³¹ "[A]s police across the nation face cries for accountability amid mounting evidence of brutality and systemic racism, law enforcement agencies in Florida are using Marsy's Law to shield officers after they use force, sometimes under questionable circumstances."³² The Florida Supreme Court heard arguments on whether Marsy's Law can be used to promote police anonymity in December 2022 and is expected to make a ruling in spring 2023.³³

28. *Id.* at 58.

29. *Id.* at 59.

30. *Id.* at 61–62.

31. *What is Marsy's Law*, MARSY'S LAW, https://www.marsyslaw.us/what_is_marsys_law [<https://perma.cc/9JLG-PKWC>].

32. Kenny Jacoby & Ryan Gabrielson, *Marsy's Law was meant to protect crime victims. It now hides the identities of cops who use force*, USA TODAY & PROPUBLICA (Oct. 20, 2022), <https://www.usatoday.com/in-depth/news/investigations/2020/10/29/police-hide-their-identities-using-victims-rights-bill-marsys-law/3734042001/> [<https://perma.cc/XN83-G64D>].

33. Carissa Allen, *The Florida Supreme Court considers whether Tallahassee police identities can be kept secret under Marsy's Law*, WUSF PUBLIC MEDIA (Dec. 8, 2022), <https://news.wfsu.org/wfsu-local-news/2022-12-08/the-florida-supreme-court-considers-whether-tallahassee-police-identities-can-be-kept-secret-under-marsys-law> [<https://perma.cc/Y9CG-TMBR>].

2. Qualified Immunity

Often, community distrust arises when police officers are protected from accountability using qualified immunity. Qualified immunity can erode public trust because it establishes the notion that police officers are above the law and can circumvent consequences. Qualified immunity can be used in civil suits, not criminal suits, to shield police officers from monetary damages. Without qualified immunity, victims and their families could use § 1983 to obtain money damages as a remedy for police misconduct. Qualified immunity was developed as a defense to U.S.C. § 1983. “The doctrine of qualified immunity protects state and local officials, including law enforcement officers, from individual liability unless the official violated a clearly established constitutional right.”³⁴ Many lawsuits filed against law enforcement are filed as § 1983 claims, however, the qualified immunity defense often bars victim recovery because of the near impossible standard of proof required to overcome this defense.

3. The Relationship Between § 1983 and Qualified Immunity

Section 1983 “makes government employees and state officials personally liable for money damages if they violate a person’s federal constitutional rights.”³⁵ Qualified immunity is a defense, used by law enforcement to protect them from individual liability. “Qualified immunity is generally available if the law a government official violated isn’t ‘clearly established.’” However, what courts have considered “clearly established” has varied since the initiation of qualified immunity. Generally, “clearly established means that, at the time of the official’s conduct, the law was sufficiently clear that every reasonable official would understand that what he or she is doing is unconstitutional.”³⁶

The case of *Baxter v. Bracey*³⁷ better illustrates the relationship between a § 1983 claim and the qualified immunity defense. In this case, Officer Brad Bracey arrested Alexander Baxter after he committed an aggravated burglary and fled the scene.³⁸ A neighbor saw Baxter breaking into a home and called the police. Once Baxter heard the sirens, he hid in the basement of the house he had broken into.³⁹ When the officer arrived on the scene, he announced that he “would release the canine if Baxter did

34. *Qualified Immunity*, NAT’L CONF. STATE LEGISLATURES (Jan. 12, 2021), <https://www.ncsl.org/civil-and-criminal-justice/qualified-immunity> [https://perma.cc/AFK8-4B62].

35. *Id.*

36. *Id.*

37. *Baxter v. Bracey*, 751 F. App’x 869 (6th Cir. 2018).

38. *Id.* at 2.

39. *Id.*

not surrender.”⁴⁰ With no response, the officer released the canine, who found Baxter in the basement.⁴¹ Baxter contended that when the officers came down the stairs, he raised his arms as to surrender, but did not communicate his surrender vocally.⁴² Baxter got bit on the arm before the officer arrested him. Further, Baxter was only bitten once, which was consistent with the canine’s police training. Baxter filed a § 1983 claim against Bracey for violating his constitutional right to be free from excessive force. The court discussed the elements that needed to be satisfied when claiming under § 1983, the plaintiff needs to prove: “[f]irst, that the officer violated his constitutional rights[,] [a]nd second, that the violation was “clearly established at the time.”⁴³ To satisfy the first element a plaintiff needs to assert a violation of his constitutional right, here plaintiff argues a violation of his Fourth Amendment protection against excessive force while being arrested. For the second element, the court explained a law is “clearly established,” when “every reasonable official would understand that what he is doing is unlawful.”⁴⁴ Further, “it is not enough that the rule is suggested by then-existing precedent, - it must be beyond debate and settled law.”⁴⁵ In the court’s analysis, it compares the facts at issue to cases with similar facts to determine if it was “clearly established” law that an officer cannot release a properly trained canine to apprehend a suspect who remained quiet after a warning from the officer.

In its comparison, the court looked to *Campbell v. City of Springboro* and *Robinette v. Barnes*. *Campbell* held that “officers cannot use an inadequately trained canine, without warning, to apprehend two suspects who were not fleeing.”⁴⁶ *Robinette* upheld “the use of a well-trained canine to apprehend a fleeing suspect in a dark and unfamiliar location.”⁴⁷ The court reasoned that the current case was more like *Robinette* and was not like *Campbell* on its facts. Because it was not similar to *Campbell* which made it clearly established that “officers cannot use an inadequately trained canine, without warning, to apprehend two suspects who were not fleeing,” then not every reasonable officer would understand what he was doing was unlawful. The court held that the officer was entitled to qualified immunity because there was no clearly established law making it a violation of an individual’s constitutional

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

rights for an officer to release a properly trained canine to apprehend a suspect who remained quiet after a warning from the officer.

The Supreme Court held in *Ashcroft v. al-Kidd*, that to be “clearly established” law “[w]e do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate. This creates a substantially high burden of proof for plaintiffs asserting a § 1983 claim because police misconduct varies in types and degrees. Because of the high standard of proof required, qualified immunity promotes public distrust and contributes to a lack of law enforcement accountability. Qualified immunity illustrates that police officers are above the law and fosters an us-vs-them relationship between police officers and the general public.

D. Inadequate Police Training Contributes to Public Distrust Because of the Inability of Law Enforcement to Engage with Culturally Distinct Communities

“A 2018 Justice Department study of state and local law enforcement training academies found that the average length of core basic police training in the U.S. is 833 hours, or less than 22 weeks.”⁴⁸ Inadequate police training significantly contributes to public distrust in law enforcement because it does not equip police officers with the skills necessary to efficiently keep the public safe. On average, police officers in the United States spend more than three times the training hours on firearms than training on de-escalating a situation.⁴⁹ This structure of training contributes to the wide-spread disrespect for law enforcement because it encourages police officers to rapidly escalate a situation using firearms or other forces rather than use communication to dilute a high emotion situation. Common training in police academies include police strategy, weapons training, community collaboration, and various physical tests. What is not included is training on mental health and diversity awareness. These two factors specifically contribute to the distrust in American policing because police officers do not know how to handle certain situations, whether cultural or mental health related.

One example highlighting the need for police training focused on mental health, is the killing of Daniel Prude. Prude was a forty-one-year-old African American man who was visiting his brother in New York

48. Jack Date, *Why police training in the US falls short compared to the rest of the world: Report*, ABC NEWS (Feb. 15, 2023), <https://abcnews.go.com/US/police-training-us-falls-short-compared-rest-world/story?id=96729748#:~:text=A%202018%20Justice%20Department%20study,or%20less%20than%2022%20weeks> [https://perma.cc/Q4K6-C8R6].

49. Jack Horton, *How US police training compares with the rest of the world*, BBC NEWS (May 17, 2021), <https://www.bbc.com/news/world-us-canada-56834733> [https://perma.cc/7XWE-EJY4].

when he ran out of his brother's home with no shirt, no shoes, and in an "erratic state."⁵⁰ The police were called, and Prude was arrested.⁵¹ While handcuffed, Prude began spitting and the officers responded by "covering his head with a hood" and pinning him face down on the ground.⁵² Prude stopped breathing and died after about two minutes on the ground.⁵³ Prude had a very tragic life in which he dealt with many of his family members' death and used various drugs. Both of which influenced his mental health.⁵⁴ The police were not trained to handle such severe mental and substance abusive culprits. Police training in the United States has contributed to the widespread disrespect for law enforcement that Americans carry with them today. If we are to rely on law enforcement to keep our communities safe, it is imperative that police officers be trained to handle common situations which arise in low-income or culturally diverse communities.

II. JAPAN

Police misconduct is present in every country, but public distrust varies for many reasons. Japan is a country of interest in this Note because of its similarities to the United States. Japan is a "highly developed, industrialized, and urban society," as is the United States.⁵⁵ This makes the potential reform ideas and adopting a similar policing scheme more realistic for the United States.

A. History

Before the formal formation of policing in Japan, Japan had a rigid class system.⁵⁶ The class system consisted of the following groups: the Tenno-Heika, regarded as a "direct descendent of the Sun goddess," the Shotgun "who dominated imperial rule," and the Samurai, the warrior class who were accorded deep respect.⁵⁷ The lower class Samurai were responsible for protection and policing until the issuance of a formal policing system in the 1870s.⁵⁸ "In 1872, the Japanese government sent the first Superintendent General Toshiyoshi to Europe to study the police

50. Michael Gold, *What We Know About Daniel Prude's Case and Death*, N.Y. TIMES (Apr. 16, 2021), <https://www.nytimes.com/article/what-happened-daniel-prude.html> [<https://perma.cc/L8UZ-LKEV>].

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. Liqun Cao, et al., *Public Attitudes Toward the Police: A Comparative Study Between Japan and America*, 26 J. OF CRIM. JUST. 279, 280 (1998), <https://www.sciencedirect.com/science/article/abs/pii/S0047235298000154> [<https://perma.cc/RHL2-FSBW>].

56. *Id.*

57. *Id.*

58. *Id.*

system.”⁵⁹ After his return, Toshiyoshi created the Tokyo Metropolitan Police Department, which was a centralized police organization run by the national government.⁶⁰ After World War II, Japan was democratized and established the Police Act of 1948.⁶¹ At this point, the Japanese government established municipal police to ensure democratized management.⁶² This municipal police structure “caused several problems such as inefficiency of police force operations and low cost- effectiveness due to geographical segmentation of the police units and unclear distinction of responsibilities between the municipal police forces and the national government to maintain public peace and order.”⁶³ Therefore, in 1954, the Police Act was transformed into the National Police Agency, which improved the initial shortcomings.⁶⁴ The National Police Agency is still the heart of Japanese policing today.

B. *How is Japan Different from the United States?*

The Japanese policing system carries some similarities to the United States. However, respect for law enforcement is deeply rooted in the structure of Japanese culture and policing. Even before a formal police structure was established, the Samurai were regarded as honorable, with a good community reputation. Japan focus’ their policing on promoting the public trust. In Japan, respect is valued, and trust is earned and taken away. These are important aspects of the Japanese culture that the United States does not necessarily have. The United States use a militarized tactic in policing while the Japanese value personal relationships within the community.

This section will discuss police brutality, racism, and accountability by addressing the factors of Japanese policing contributing to community trust in law enforcement. These factors are: (1) community policing structures; and (2) organizations focused on police accountability.

1. Community Policing has Instilled a Deep Trust and Respect for Law Enforcement and Promote Unity Between Police and Minority Communities

“For the Japanese police, good ties with neighborhood residents and cooperation with the community are key elements of crime prevention.”⁶⁵

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Sharing the Community-Based Police Model: The Japanese Koban System and Residents’ Trust*, 2016 TOMODACHI 10, 10, https://www.japan.go.jp/_src/302365/spring16_10-11.pdf [<https://perma.cc/DT6C-56TN>].

The Japanese have a democratized form of policing that reenforces positive community relationships with law enforcement. The structure of the Japanese police comprises of one National Police Agency and forty-seven Prefectural Police Departments. Within these forty-seven Prefectural Police Departments are more than 6,000 neighborhood Kobans.⁶⁶

Kobans are small “police boxes” in every neighborhood in Japan.⁶⁷ Kobans help establish a foundation of public trust. While smaller, Kobans are like local police stations in the United States, except that the central idea of Kobans is to focus on promoting crime prevention through local volunteer groups. The term “Koban” means “taking turns to keep watch.”⁶⁸ This emphasizes the idea of community inclusion rather than the us-versus-them mentality that American police officers often carry. “The role of [the] Koban is for police officers to serve as a close presence in people’s lives on a regular basis—not just when an incident happens—and to offer total support so that people in the local area can live each day with safety and security.”⁶⁹ Kobans contribute to the trust and respect Japanese communities hold in their law enforcement because the officers can bond with the community, helping them better assess the community’s needs when an incident occurs. Kobans also contribute to the face-saving culture established in Japan. Japanese officers value a positive reputation. Kobans provide ample opportunity to build a reputation.⁷⁰ Because the face-saving culture is so valuable in Japan, it influences how “law enforcement officers resolve and respond to crime.”⁷¹ The face-saving culture also lessens the demand for accountability procedures because of the community relationships built through frequent association with law enforcement.

Furthermore, police brutality and racism are reduced by using Kobans for similar reasons. The officers are routinely in contact with the communities and can use a grassroots method of dealing with situations arising in minority communities. Racism is an ongoing concern worldwide, and Japan is no exception. However, operations like the Koban can also reduce racism because officers will interact with minority

66. *Id.*

67. *Id.*

68. *Japan’s Streets Are Safe and Secure Thanks to Koban*, WEB JAPAN, [https://web-japan.org/trends/11_tech-life/tec202011_police-box.html#:~:text=The%20word%20Koban%20literally%20means,%2024%2Dhours%20a%20day.&text=Koban%20have%20a%20long%20hi story \[https://perma.cc/MFD2-P8ZP\].](https://web-japan.org/trends/11_tech-life/tec202011_police-box.html#:~:text=The%20word%20Koban%20literally%20means,%2024%2Dhours%20a%20day.&text=Koban%20have%20a%20long%20hi story [https://perma.cc/MFD2-P8ZP].)

69. *Id.*

70. Katrina Tran, *How Japan’s Cultural Norms Affect Policing: A Side-By-Side Comparison with the United States*, 5 RES. J. JUST. STUD. FORENSIC SCI. 37, 48 (2017), [https://scholarworks.sjsu.edu/cgi/viewcontent.cgi?article=1051&context=themis \[https://perma.cc/W87Q-YK3Z\].](https://scholarworks.sjsu.edu/cgi/viewcontent.cgi?article=1051&context=themis [https://perma.cc/W87Q-YK3Z].)

71. *Id.*

groups for long periods. Over time, racial stereotypes will likely diminish. Finally, Kobans aid officers in their ability to help because they see first-hand how certain communities function. Japanese law enforcement “prefer[s] a moral norm as opposed to a legal one for conflict resolution.”⁷² Getting to know the community plays a major role in establishing trust and respect in law enforcement.⁷³

C. Policing Structure Focused on Accountability will Help to Strengthen Public Trust Because It Proves Police are not Above the Law

In Japan “[t]he national level police organizations are the National Police Safety Commission (NPSC) and the National Police Agency (NPA).”⁷⁴ “Since the NPSC makes basic policy and the NPA administers police affairs, the NPSC has control over the NPA.”⁷⁵ The NPSC is an independent governmental body, making the Japanese police an “apolitical” organization.⁷⁶ Being apolitical by its very nature aids in community respect and trust for law enforcement because it allows communities to feel that officers are acting in their best interest, not the best interest of their electors.⁷⁷ The Prime Minister of Japan does not even give orders to the NPSC.⁷⁸ Because of this independent structure, punishment and accountability are in the hands of the NPSC.

While there are few written sources on established Japanese law, a notable example of Japanese police punishment is when the NPSC punished Japan’s top law enforcement officer, Setsuo Tanaka, for police bungling “in the case of a woman who was abducted and held hostage for nine years.”⁷⁹ Tanaka, who was the NPA chief, received a five percent pay cut. If the requests for help were not ignored, the police would have been able to free the woman sooner than nine years after the kidnapping.⁸⁰ Tanaka oversaw supervising the Prefectural Police Departments and was punished because the Prefectural Police Department that the kidnapping occurred in, did not properly inspect the incident.⁸¹

72. *Id.* at 53.

73. *Id.*

74. John Pike & Steven Aftergood, *National Police Safety Commission (NPSC)*, FED’N AM. SCIENTISTS: INTEL. RES. PROGRAM, <https://irp.fas.org/world/japan/npsc.htm> [<https://perma.cc/NZ4R-WUAL>] (last updated Oct. 12, 2000).

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Kidnap Bungle: Police Head Gets Pay Cut*, INDEP. ONLINE (Mar. 2, 2000), <https://www.iol.co.za/news/world/kidnap-bungle-police-head-gets-pay-cut-29895> [<https://perma.cc/DFE2-X46J>].

80. *Id.*

81. *Id.*

This is just one way in which the NPSC punishes the officers in the NPA. In 2022, the NPA stated that 276 officers were disciplined; and in 2021 that number was 204. “Of the total [in 2021], 57 were arrested and 27 dismissed from their jobs.”⁸² The crimes that warranted disciplinary action include “theft, sexual harassment, accepting bribes, fraud, gambling at police training academies, illicit sex, fraud and causing traffic accidents.”⁸³ Furthermore, while no statutory laws govern accountability of Japanese police officers, there is an entire apolitical branch of government with the power, resources, and authority to discipline as they see fit. The NPSC has made it their mission to restore the public’s trust after these disciplinary actions.⁸⁴

While the NPSC is the top-ranking disciplinary committee designated to reforming and advancing Japanese policing, the NPA also takes steps to remedy potential misconduct brought to their attention.⁸⁵ This is significant because it proves that at each level of the policing system in Japan, there is recognition of wrongdoings and the need for reform. Racial discrimination is present in every country, but response by law enforcement varies greatly. Law enforcement acknowledgement and reformation plans in Japan help to promote trust and respect for policing. Japan has recently faced scrutiny for alleged racial discrimination by police officers.

One recent case of racial discrimination by police was the stop and search of Alonzo Omotegawa, an African American man of Japanese descent in 2021.⁸⁶ Omotegawa states that this was the third time he had been searched in six months. Coincidentally, he grew dreadlocks in the six months before these searches began. When Omotegawa asked the officer why he was being stopped, the officer admitted that Omotegawa’s appearance “influenced his decision” and that in the officer’s experience, “people wearing stylish clothes and dreadlocks tend to carry drugs.”⁸⁷ Another African American artist named Terry Wright was also vocal about his frequent encounters with Japanese police.⁸⁸ Wright states that there is

82. *Disciplinary action taken against 276 police personnel in 2022*, JAPAN TODAY (Feb. 10, 2023), <https://japantoday.com/category/crime/disciplinary-action-taken-against-276-police-personnel-in-2022#:~:text=Disciplinary%20action%20was%20taken%20against,the%20report%20released%20on%20Thursday> [https://perma.cc/9ES4-D3N7].

83. *Id.*

84. *Id.*

85. *Id.*

86. See Liselotte Mas, *Video: Japanese Policeman Admits to Searching Black Man Because of his Dreadlocks*, FR. 24 OBSERVERS (Mar. 2, 2021, 6:20 PM), <https://observers.france24.com/en/asia-pacific/20210205-japanese-police-officer-admits-to-searching-black-man-because-of-his-dreadlocks> [https://perma.cc/VQ3N-W65M].

87. *Id.*

88. *Id.*

a real fear of being targeted based on his skin color.⁸⁹ However, he states that these encounters are not like the United States' problem of police brutality. While these encounters are generally not deadly, they are discriminatory, unnecessary, and stress inducing.

The U.S. Embassy in Tokyo tweeted in December 2021, that "it had received reports of suspected racial profiling incidents."⁹⁰ Prompted by Omotegawa, Wright, and other similar incidents, the NPA issued an advisory to all Japanese prefectural police forces.⁹¹ After this advisory was released, Lawrence Yoshitaka Shimoji, a sociology researcher emphasized that the advisory is "an important first step," but that the problem could be solved at the level of the Koban.

Furthermore, Japan does not have the protective layer of qualified immunity. This allows people to truly see that police are not above the law in Japan. Japanese police can be held accountable for their actions under the State Redress Act. The State Redress Act provides "When a public employee who exercises the public authority of the State or of a public entity has, in the course of their duties, unlawfully caused loss or damage to another person intentionally or negligently, the State or public entity assumes the responsibility to compensate therefor."⁹² This means that Japanese citizens who feel wronged or believe they have been the victim of police misconduct, will be allowed to bring suit and hold the public entity, the police officer, responsible for their actions.

D. Quality Police Training Helps Establish Community Trust Because Police Officers will be Trained to Deal with Cultural Differences and Community Variability that Leads to Trust and Respect for Law Enforcement

"The conundrum facing all of law enforcement is the need to uphold the highest standards of professionalism in an increasingly violent society while ensuring that the applicant pool is sufficient to meet the needs of the communities they serve."⁹³ "It is critically important to be aware of the linkages between public trust in police and police leadership, as the

89. *Id.*

90. *Japan Police Urge Officers to Avoid Impression of Racial Profiling*, KYODO NEWS (May 12, 2022, 4:34 PM), <https://english.kyodonews.net/news/2022/05/b3bd7f651613-japan-police-urge-officers-to-avoid-impression-of-racial-profiling.html> [<https://perma.cc/PB3S-BUR8>].

91. *Id.*

92. Kokka baishōhō [State Redress Act], Law No. 125 of 1947, art. 1(1), *translated in* (Japanese Law Translation [JLT DS]), <https://www.japaneselawtranslation.go.jp/en/laws/view/3785/en> [<https://perma.cc/2PLH-7EFK>].

93. Sid Smith, *A Crisis Facing Law Enforcement: Recruiting in the 21st Century*, THE POLICE CHIEF (June 2016), <https://www.policechiefmagazine.org/a-crisis-facing-law-enforcement-recruiting-in-the-21st-century/#1> [<https://perma.cc/X9QT-PD2S>].

factors influencing public perception of police services are much bigger than officers on patrol can control.”⁹⁴

In Japan, police officers are awarded great respect and are regarded as white-collar workers. Japanese police training focuses on building community trust and encouraging continuing police education.⁹⁵ To qualify to be a police officer in Japan, an individual must have a black belt in Judo.⁹⁶ This aspect of Japanese police training is enough to aid community trust because communities will not be fearful that they will be shot when encountered with police forces.⁹⁷ Training police officers in ways other than promoting militarized violence is a major part of the police training in Japan.⁹⁸ Japanese police also must continue their police education; after one year as a police officer, the police officer “must return to the police academy to improve his skills and self-defense courses.”⁹⁹ Further, Japanese police training includes courses focused on softening their police officers. Unlike in the United States where the main way of law enforcement control is by way of force, in Japan, police officers must take courses such as flower arranging or meditation, to lighten any violent instincts.¹⁰⁰ For all these reasons, Japanese police have gained deep respect from the community, which has contributed to less police violence and a decrease in the fear held in communities.

III. THE UNITED STATES COULD BENEFIT FROM ADOPTING A SIMILAR POLICING SCHEME

American policing can benefit from adopting a strong community policing structure and a National Police Safety Commission. Both additions to American policing would help advance community trust and respect for law enforcement. The United States could accept a more local community policing plan like the Koban that would push officers in direct contact with individuals they are policing. This will aid the relationships between officers and members of the community, which will reduce police brutality and racism because officers would better understand the culture of minority communities. Understanding the culture will provide officers with the skills to apply the proper context of policing in a

94. Chris Lewis, *The Impact of Police Leadership on Public Trust*, POLICE1 BY LEXIPOL (July 5, 2022), <https://www.police1.com/chiefs-sheriffs/articles/the-impact-of-police-leadership-on-public-trust-icNhytjot4el77b1/> [https://perma.cc/WL34-QZ2C].

95. See S. Charle, *Tokyo (Japan) Police Academy*, 2 POLICE MAG. 49 (1979).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

community they are less familiar with.¹⁰¹ In the United States, this concept is referred to as cultural competency. “A culturally competent law enforcement agency knows who lives in the areas in which the department polices, and it understands how to interact with various cultures in the regulatory radius.”¹⁰² The most effective way to do this would be to submerge the officers in the culture, not just for an emergency, but as a friendly face in the neighborhood who can offer help and file complaints that may arise, just like the officers in the Japanese Kobans. Kobans allow officers to learn the communities they serve. They allow for police to see first-hand what a community is sensitive to and how they interact with each other. This aids in showing officers what tactics will work best in certain communities. Some communities may be more sensitive to weapons than others and some communities may respond better to gentle guidance and prevention rather than abrupt hostility after the incident. But these things are learned from ongoing contact within a community, which Koban’s provide. The United States would greatly benefit from a system like this due to the American police reputation of being hostile to certain minority communities.

A. Accountability

Another notable adoption that could aid in establishing community trust and respect for American law enforcement is initiating a National Police Safety Commission. Like Japan’s structure, organizing a commission independent from government scrutiny would be beneficial. This commission, like the NPSC, would be apolitical and place the people’s interests at the forefront of their values. The American NPSC would be solely dedicated as the check on police behavior throughout the United States. This would minimize the police brutality, and racist encounters faced by minority communities. Overall, there are a lot of concepts rooted in the Japanese culture that make these two aspects of their policing culture successful, but the United States should use these reform strategies as a guide.

Furthermore, the United States would benefit from getting rid of qualified immunity. Qualified immunity allows officers to hide behind the law and circumvent all consequences. This promotes public distrust, of which Japan does not have to confront. The United States should allow victimized citizens to sue officers for their misconduct and reduce the standard of proof needed to succeed on a § 1983 claim. This will help to hold officers accountable and will create a sense of trust between

101. Damon J. Brown, *Community Policing in Multicultural Communities*, POLICE CHIEF ONLINE (Aug. 19, 2020), <https://www.policechiefmagazine.org/community-policing-in-multi-cultural-communities/?ref=427751ea7b20b192339f915ad4db3062> [https://perma.cc/XBQ7-M6DQ].

102. *Id.*

communities and law enforcement because communities will feel like they have some way of redressing harm, and officers have a deterrent to participating in misconduct.

B. Police Training

The United States should adopt a similar police training scheme used by Japan to promote confidence in American police officers. Given the long-standing history of militarized policing held by the United States, we should now focus most of America's police training on softening our officers and bringing them down to earth. Providing a grass roots level viewpoint for police officers will help them to better assist the communities they serve. The United States should require some sort of self-defense training that does not require weaponry. This will decrease the amount of fear in minority communities. Furthermore, America should train officers on mental health and substance abuse, to help them better understand and address the situation at hand.

CONCLUSION

Reform is achievable if the United States focuses on restoring public trust in the American public. Aspects such as community policing, accountability, and police training can make a substantial difference in the way our country views law enforcement. We should not be afraid of the people who are tasked with protecting us. Therefore, reform is not only needed but it is necessary to establish a more trustworthy police force. With trust comes easier and more organized policing. Communities will be more willing to help and work with police officers if they trust them. There are many other types of reform that the United States could benefit from, but the main ones include community policing, accountability, and police trainings. All of these aspects will help to re-instill trust in law enforcement in America.

