

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 Dünhaupt & 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. Funaiole, *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.