

Uninvited Guests: Dissecting Treaty Shopping in Commercial Diplomacy

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Abstract

Commercial diplomacy plays a critical role in safeguarding a country's national interest in the face of competing interests of other nations. In an interplay between the home State and the host State of commercial activities, the former need maximum protection for their investors, while the latter prefers to accord less protection to the foreign investors that could not lead them to cumbersome obligations. International investment agreements (IIAs) in general and bilateral investment treaties (BITs) in particular are the primary ways via which both home and host countries need to fairly position their competing interests in commercial diplomacy. It may, however, sometimes happen that foreign investors resort to treaty shopping, by which they require host countries to perform unintended obligations. Treaty shopping allows foreign investors to find some connecting factors with the third country BIT concluded with the host country, by disregarding the BIT their home country concluded with that specific host country to find more protection for their investments. is a very serious problem for the host countries. Against this backdrop, this article critically analyzes the approaches of dissecting treaty shopping in commercial diplomacy. Investment agreements are used as primary source of data while literatures and reports are relied upon as secondary source of data. The article identifies the magnitude of challenges faced especially by host countries in concluding and implementing investment agreements. It recommends States to be curious and properly utilize the art of negotiation in their commercial diplomacy.

Keywords: bilateral investment treaties, commercial diplomacy, international investment agreements, treaty shopping
DOI: 10.7176/IAGS/103-03
Publication date: January 31st 2026

Acronyms

BIT	Bilateral Investment Treaties
ECHR	European Commission of Human Rights
FDI	Foreign Direct Investment
FTA	Free Trade Agreements
ICSID	International Centre for Settlement of Investment Dispute
IIA	International Investment Agreement
ISDS	Investor State Dispute Settlement
MFN	Most Favoured Nations
MNC	Multinational Corporations
NAFTA	North America Free Trade Agreement
NT	National Treatment
ROO	Rules of Origin
TPP	Trans-pacific Partnership
TTIP	Transatlantic Trade and Investment Partnership
UNCTRAL	United Nations Commission on International Trade

1. Introduction

Commercial diplomacy is one of the controversial areas of foreign diplomacy characterized by stiff competing interests. This is especially the case in international investment dealings which are regulated bilaterally. The current international investment regime is not governed by a set of multilateral rules unlike, for instance, the World Trade Organization (WTO) laws in international trade. Instead, it consists of thousands of IIAs[1], whose application is restricted to contracting states and investors with the nationality of the contracting states. Since the first BIT was signed in 1959 between Pakistan and Germany, the number of concluded IIAs has been rapidly increasing, surpassing three thousand.[2] Such an increase can be explained by competition between developing countries, which are mainly capital-importing countries, to attract foreign investment by committing to protecting investors' rights, despite bearing reduced policy tools.

Treaty shopping refers to the conduct of foreign investors who deliberately shop at their convenience for home countries that have favorable IIAs with the host countries where their investments are to be made.[3] The typical practice of treaty shopping in international investment arbitration is witnessed when claims are brought by an investor whose capital originates from corporations or natural persons of different nationality, who cannot directly resort to international arbitration due to the absence of IIA between their home country and host country. The practice of treaty shopping is controversial because of its undesirability and still-disputed legality. Recently, many host countries had not realized that broad languages in their IIAs could subject themselves to the practice of treaty shopping, which would result in the reduced scope of their regulatory policy tools even to unintended nationals.

In recent years, the development of the international law of foreign investment has been criticized for giving too much power to foreign investors,[4] while many have criticized international arbitration for not being able to develop a jurisprudence constant.[5] Despite these critiques, the current regime seems to work well and provide adequate protection to most foreign investors. In this respect, a new practice is emerging with "treaty shopping," which is a new test for the current regime and the ongoing negotiations in the context of the Transatlantic Trade and Investment Partnership (TTIP) or the trans-pacific partnership (TPP).[6]

One among the benefits foreign investor require from the host countries is finding of the more favorable conditions by bringing another third party, the home of parent company of the investor which has other treaty with the home country, which is known as treaty shopping. As in forum shopping one party need the more convenient forum, it's the need of the more comfortable treaty in treaty shopping. Treaty shopping also violates the principle of reciprocity on which IIAs are based and therefore, undermines the legitimacy of the ISDS mechanism. Recognizing such consequences, the European Parliament, in 2011, called for the assessment of the causal relationship between a broad definition of 'foreign investors' and the abusive practices of some enterprises to file against their own countries via BITs signed by third countries as well as a clearer definition of investment and investors[7], so that speculative forms of investment would not be protected.

BIT is an investment agreement between two countries, home and host countries concerning the regulation of the investment. In the course of the conclusion the agreement, the home countries require the maximum protection for their investment, while the host countries need less protection as much as possible in order to achieve their economic and development goal. However, host countries may not succeed in keeping their interests in the negotiation of the agreement because of their bargaining power because their very low level of economy and high need to attract the FDI. This shows that, there is also an element of pressure or indirect coercion in signing

[1] Dolzer R. and Schreuer C., Principles of International Investment Law (Oxford University Press), (2008), p7.
[2] UNCTAD. (2013). World Investment Report 2013 (Global Value Chains: Investment and Trade for Development). New York and Geneva: United Nations.
[3] Van Harten, G., Five Justifications for Investment Treaties: A Critical Discussion. Trade, Law and Development, 2(1), (2010) p13.
[4] Stephan W. Schill, (2011) Enhancing International Investment Laws Legitimaci*:* Conceptual and Methodological Foundations of a New Public Law Approach*,* 52 VA. J. INT'L L. 57, p63
[5] Charles N. Brower & Stephan W. Schill, (2009); Is Arbitration a Threat or a Boon to the Legitimaci of International Investment La ii?, 9 CHI. J. INT'L L. *P*471.
[6] Julien Chaisse, (2015); The Treaty Shopping Practice: Corporate Structuring and Restructuring to Gain Access to Investment Treaties and Arbitration, 11 Hastings Bus. L.J. 225. p 227. Available at: https://repository.uchastings.edu/hastings_business_law_journal/vol11/iss2/1 retrieved at 19/12/2023.
[7] European Parliament. (2011). European Parliament resolution of 6 April 2011 on the future European international investment policy (2010/2203(INI)). Available on http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011

of BITs by many developing counties since the existence of such treaty was often a prerequisite for funding or investment insurance.[1]

Thus, their very less bargaining power expose the host, almost all from developing countries to agree to be bound by a very harsh obligation against their economic development and even their sovereign power regulatory power. Moreover, treaty shopping on its part add another unintended serious obligation on the host countries, by allowing foreign investors require a more favorable treatment for their investments from another BIT that specific host country concluded with another third country. This directly expose the host countries to perform or give preferential treatments for foreign investors that they haven't agree to be obliged by, which in its part is against reciprocity principle.

The main aim of this article is to examine magnitude of treaty shopping in foreign investment regime and how it can be dealt with in commercial diplomacy. It employs the doctrinal research method to analyze the actual problems treaty shopping causes to host countries. It further relies on different sources including international investment treaties, case laws and relevant literature.

2. The Concept of Treaty Shopping

There is no common definition given for treaty shopping under international law. But, we can define 'treaty shopping' as the conduct of foreign investors who deliberately shop at their convenience for home countries that have favorable IIAs with the host countries where their investments are to be made so that their investment can qualify for protection conferred by the treaties.[2] Treaty shopping should be distinguished from 'forum shopping,' although sometimes used interchangeably, as the latter means choosing the most favorable forum out of already-available multiple fora, such as choosing between ICSID and arbitration under UNCTRAL arbitration rules or between domestic courts and international arbitration.

Since the issue of treaty shopping is controversial through which foreign investors need to require maximum preferential treatments for their investment from host countries on the one hand, and the host countries oppose it not to be bound by an obligation they haven't assumed on the other hand, many scholars representing their respective groups argued vastly on the issue. Jonathan Bonnitcha,[3] in his article titled Assessing the Impacts of Investment Treaties: Overview of the Evidence, explained that the impact of the legal complexity on national level investment governance within developing countries has not been subject to empirical research to date. However, he concluded that the legal consequences are clear in which foreign investors' ability to structure virtually any investment in a way that brings it within the coverage of a least one of the host state's investment treaties significantly increases the exposure of that state to investment treaty claims. So, this may result in; first, it is difficult—sometimes even impossible—for a host state's authorities to determine which investors are entitled to the protection of which investment treaties in advance. Second, a single investor can bring multiple investment treaty arbitrations under different treaties in relation to a single dispute.

Treaty shopping takes place in two dimensions; one is nationality planning of natural persons, when a natural person acquires another or additional nationality; the other is nationality planning of legal persons, or corporations, when an investment is structured through a corporate entity in a third country.[4] There are typically two situations which can motivate investors to engage in treaty shopping: (i) when an investor's home country X does not have IIA with a host country Y but a third country Z has IIA with country Y; (ii) when country X has IIA with country Y but country Z has more advantageous IIA with country Y.

Eunjung Lee[5], examined the practice of treaty shopping in international investment arbitration and concluded that, treaty shopping undermines the principle of reciprocity which bilateral treaties are based on and subjects host countries of FDI to more investor-state disputes, which otherwise could not be brought before international

[1] Agata Ferreira, How and why does Sustainable Development influence International Investment Law in the Current Globalization Era? Compatibility or Irreconcilability? (Doctoral Theses at ESADE Law School – Ramon Llull University, p78. Available at http://hdl.handle.net/10803/456675 .

[2] Eunjung, Supra note at 10, p 5.

[3] Jonathan Bonnitcha, Assessing the Impacts of Investment Treaties, Overview of the Evidence, International Institute for Sustainable Development Report, (September, 2017).

[4] Gaukrodger, D. & Gordon, K. (2012). Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community. (OECD Working Papers on International Investment, 2012/03). Paris: OECD Publishing, p120.

[5] Eunjung Lee, Treaty Shopping in International Investment Arbitration: How often has it occurred and how has it been perceived by tribunals?, Department of International Development, London School of Economics and Political Science, London, (2015), Available at www.lse.ac.uk/depts/ID .

arbitration. He has also found that developing countries are much more likely to be victimized by investors engaging in the treaty shopping practice, implying that they should be more careful in examining the effects of IIAs.

Although some scholars argue that treaty shopping is not illegal as long as investors meet the nationality requirement stipulated in the applicable IIA, there certainly are aspects which make treaty shopping undesirable. Firstly, treaty shopping is an unintended consequence of host countries. Most host countries seem not to have anticipated that broad languages in IIAs would give ground for treaty shopping. Secondly, treaty shopping violates the principle of reciprocity that IIAs are based on by establishing reciprocal rights and obligations between contracting parties. Under the practice of treaty shopping, investors of a third country can benefit from an investment treaty without its home government undertaking any obligation created by the treaty. Thirdly, from a host country's welfare perspective, treaty shopping results in a reduced scope of regulatory tools of the host country, since it exposes the host country to claims by investors who would otherwise not be eligible to invoke a treaty when regulatory action is taken. Fourthly, treaty shopping creates a situation where the playing field among domestic investors is not level because the host country nationals seeking to have access to international investment arbitration by establishing a corporate entity in a third country are privileged compared to their local competitors who are short of resources and access to legal expertise to practice treaty shopping.

There are typically two situations which can motivate investors to engage in treaty shopping:[1] (i) when an investor's home country X does not have IIA with a host country Y but a third country Z has IIA with country Y; (ii) when country X has IIA with country Y but country Z has more advantageous IIA with country Y. From an investor's perspective, an IIA can be more advantageous than another in terms of substance (i.e. stronger protection of investor's rights) or procedure (i.e. inclusion of ISDS clauses and ease of invoking such clauses).

Blyschak[2], on his article titled, Access and advantage expanded: Mobil Corporation v. Venezuela and other recent arbitration awards on treaty shopping, found that treaty shopping further damages the current international investment regime functioning upon the ISDS mechanism of ad-hoc nature, which has already been going through the so-called 'legitimate crisis,' characterized by an inconsistency of rulings and opacity of arbitral procedures. None of the abovementioned authors have exhaustively examined the actual problems treaty shopping cause to host countries, which is the business of this study.

3. Countries involved in potential treaty shopping

Treat shopping come into being when the third country not intended to be part of the treaty brought into the investment contract mostly by foreign investors to get better benefits from the treaty. Therefore, in treaty shopping three parties or countries exist.

3.1. Host Country

Host country refers to the respondent state which has hosted investment from claimants. In the contemporary investment world, host countries are mostly developing countries from Africa and Asian and Latin American continents. Some research shows that, developing countries have been respondents in 53 out of 66 cases, which accounts for 80.3% of the potential treaty shopping cases.[3]

3.2. Home Country of Claimant

Home country mean the nationality of the investor, place of incorporation and other for companies or legal person, of place of birth or other for natural person according to the laws of the potential home country of treaty shopping cases. They are all from developed and rapidly developing countries like India, South Korea and others. Home countries in treaty shopping is the country of investors and they are two and more in treaty shopping cases, in which the investor from one home country claim more benefits from the host country by claiming the other nationality from another home country.

3.3. Home country of parent company of the claimant

This is the other third country brought into investment treaty even though it is not party to the treaty by the reason of being home country of parent company of the investor. Investors in the course of finding more benefits from the home country raises another treaty the host country concluded by the other third country, which is the home parent company of the investor by disregarding the treaty the two parties (the home country and investor) concluded, which lastly brings the concept of treaty shopping into existence.

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[1] Ibid.

[2] Blyschak, P. M. (2011a). Access and advantage expanded: Mobil Corporation v. Venezuela and other recent arbitration awards on treaty shopping. Journal of World Energy Law & Business, 4(1), 32-39.

[3] Schill, Supra at 4, P 12.

4. Dissecting Treaty Shopping: Concepts, Causes and Consequences

4.1. Treaty Shopping *vis-à-vis* Forum Shopping

In international investment law, forum shopping and treaty shopping are separate, but related practices undertaken by investors. In general terms, forum shopping involves efforts by disputing parties to have the dispute resolved by what they believe is the most favorable forum for their interests. Parties compare possible fora with respect to a wide range of variables such as the likely decision-makers; the integrity of the adjudication process; the applicable law for considering the merits of the case; the degree of transparency of proceedings; and the impact of the choice of forum on execution and enforcement.[1] Domestic legal systems appear to generally try to limit or discourage forum shopping. Legal rules on jurisdiction and competence often seek to try to identify neutral criteria to determine the appropriate fora. For claims against the State in particular, whether in the nature of judicial review or claims for damages, competence rules may be precisely defined.

In the broadest terms, it appears that forum shopping in investment law can arise in three ways. First, at the level of international arbitration, investment treaties frequently explicitly give investors a choice of more than one arbitral fora and/or rules. Thus, many investment treaties offer investors a choice of either ICSID or UNCITRAL arbitration, and some offer additional choices. Second, as in international law more generally, an investor may be able to file a claim under a treaty such as the ECHR, which protects property rights, rather than or in addition to a claim under an investment treaty. Third, investors can also frequently choose whether to litigate their case in domestic courts in the host State or in international arbitration (or other international fora). Many investment treaties contain provisions on how recourse to international and domestic fora are to be coordinated. While recognizing the importance of all three types of forum shopping, this section addresses only the first type of forum shopping – investor choice from among multiple international arbitration fora.

However, treaty shopping under international investment law occurs when an investor structures an investment (through incorporation and possibly by restructuring certain business operations) in order to seek to qualify for protections conferred by particular investment treaties. The practice typically involves establishing an entity in a State that is party to a targeted treaty.

Investors may seek to engage in treaty shopping for several reasons including: (i) to seek to ensure treaty protection where none would otherwise be available; (ii) to seek to benefit from specific substantive protections in particular treaties; or (iii) to seek to benefit from certain procedural or other aspects of the dispute settlement provisions of a particular treaty. Treaty shopping thus raises issue for ISDS as well as with regard to substantive investment law.

4.2. How Treaty Shopping Really Happens?

Treaty obligations apply only to the "investments" of "investors" as defined in the treaty. The key legal question is thus, who is an investor and what is an investment'?

In order to address the issue, treaty shopping countries always consider the following two main legal issues. First, what kind of investments will benefit from the treaty obligation'? Generally, capital-exporting states would like to have a broad definition to ensure that their investors are protected regardless of the form of their investment. Host states may be concerned that a broad definition of investment creates a substantial risk of investor-state claims. Second, what type of investment would a state like to attract'? Does a host state want to attract FDI or portfolio or both'?

Each of the existing IIAs reflects a careful analysis of these elements. Section A first reviews the main issues raised by treaty shopping before looking at three disputes which shed light on the practices of treaty shopping. Section B will focus on a case of upstream change. Section C analyzes the hypothesis of a downstream reorganization upon an already existing dispute. Finally, Section D reviews the hypothesis of a bad faith abuse of arbitration.

Treaty shopping will be facilitated to the extent that the rules enabling an investor to claim BIT protection are interpreted as being permissive. Mapping the scope for investment treaty shopping is a difficult task, in part because many of the relevant concepts have yet to be clarified in treaties and in case law. Issues that affect the scope for treaty shopping notably include the following, which include some of the most frequently disputed issues in ISDS cases:

[1] Christopher Whytock, (2011); The Evolving Forum Shopping System, 96 Cornell Law Review 481, p485.

- investment treaty definitions of the concept of investor and in particular treaties‘ treatment of nationality of legal persons, and interpretations thereof by arbitral tribunals;[1]
- the interpretation of the ICSID Convention provisions on investor nationality;[2]
- investment treaty definitions of covered investments together with the interpretation of the reference to investment in article 25 of the ICSID Convention;
- in particular, the degree to which shareholders, including indirect shareholders, are able to bring claims based on injury to the company of which they are a direct or indirect shareholder;
- denial of benefits or similar clauses in investment treaties which may seek, for example, to exclude shell companies from the protection of the treaties;
- the rules on incorporation of companies in possible host State jurisdictions.

4.3. Issues Raised by Treaty Shopping

Given the number of agreements involved, the problem of treaty shopping becomes serious in the case of intersected agreements. Whereas the problem of nested agreements is limited to the choice between a limited number of agreements that include the same parties (a trilateral A-B-C agreement versus a bilateral B-C agreement), there are many options in the case of intersected agreements if treaty shopping becomes an issue.

However, treaty shopping is relatively less serious in the field of trade (in goods). This is mainly because there is an established concept of rules of origin ("ROO") for goods trade. It is natural that an export from Country B to Country A uses an A-B agreement to secure preferential access. There is still a possibility that an A-C agreement could be used for export from Country B to Country A, depending on the ROO stipulated in the A-C agreement. However, this certainly leads to more options for traders: a trader in Country B can use both an A-B agreement and an A-C agreement. Some may argue that the unexpected use of an agreement (the use of an A-C agreement by a trader in Country B exporting to Country A) could be problematic. Such an unexpected use of an agreement by traders leads to uncertainty from a policy perspective, but this essentially increases business opportunities. Moreover, an agreement's "leaky" ROO that leads to an unexpected way of using the agreement simply reduces the discriminatory effects of FTAs and is thus welfare enhancing.

In the case of investment, treaty shopping problems seem to be more serious than in the case of goods because the origin of investor and investment is more ambiguous. IIAs usually employ a very broad definition of investment and the qualification for an investor is usually not demanding. Moreover, one should note that investors are mobile. This is especially true for multinational corporations ("MNCs"). Thus, MNCs have a temptation to partially relocate their bases, so that their investment assets are best protected by selecting the economy that has a favorable IIA with the hosting country of its investment. In short, treaty shopping leads to more legal options for investors.

This is a problem because IAs usually involve ISD mechanisms under which a state could be sued by an investor. The uncertainty with regard to the origin determination of firms and the mobility of firms may lead to an unexpected ISD dispute, which is not favorable for governments. Interestingly, even a firm in a third country, which has no IIA with the concerned country, may file a claim against it.

4.4. Cause of Treaty Shopping: Is It Actually a Problem?

The terms of commitments entered into in respect of the foreign investment are to be observed.
If there is a taking by the state of the foreign investment, by means direct or indirect, the state is treaty bound to pay prompt, adequate, and effective compensation.[3]

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[1] A 2008 OECD Working Paper documents variations in treaty writing practice with respect to a key determinant of the scope for treaty shopping – the criteria for determining the nationality of legal persons. The paper states: ―Bilateral investment treaties have essentially relied on the following tests for determining the nationality of legal persons: i) the place of constitution in accordance with the law in force in the country; ii) the place of incorporation or where the registered office is; iii) the country of the seat; i.e. where the place of administration is; and iv) less frequently, the country of control.

[2] Article 25 of the ICSID Convention limits the jurisdiction of the Centre to legal disputes arising out of an investment between a contracting state and a ‗national ‘of the other contracting state. The Article defers to the Contracting State parties in setting out criteria for nationality (Article 25.2. (a)). The Article also deals with the issue of foreign owned controlled legal persons and provides that they should be treated a foreign companies only where the State parties so agree (Article 25.2(b)).

[3] See Judge Stephen M. Schwebel, (2009); The Overwhelming Benefits of Bilateral Investment Treaties, Remarks at Suffolk University Law School (Oct. 31, 2008), in 32 SUFFOLK TRANSNAT'L L. REv. 263, P265.

Countries conclude IIAs primarily for the protection and, indirectly, the promotion of foreign investment, and increasingly also for the purpose of liberalization of such investment. IIAs offer companies and individuals from contracting parties increased security and certainty under international law when they invest or set up a business in other countries party to the agreement. The reduction of the investment risk flowing from an IIA is meant to encourage companies and individuals to invest in the country that concluded the IIA. Allowing foreign investors to settle disputes with the host country through international arbitration, rather than only the host country's domestic courts, is an important aspect in this context. In essence, there are two different types of standards of protection in IIAs: most-favored nation ("MFN") and national treatment ("NT")

4.4.1. Most-Favored Nation Status

MFN treatment does not require the host country to treat enterprises in different sectors or in different "situations" or "circumstances" in the same way; however, again there is a difficulty in determining what constitutes a "like circumstance."[1]

A first option consists of a drafting which gives the MFN a broad scope of application.[2] This first option is expected to be relatively more favorable to foreign investments. Conversely, restrictions are considered relatively less appealing to foreign investments. A second option limits the scope of the MEN clause through the inclusion of different possible restrictions. In order to identify these limitations, three issues can be raised: first, when there is a limited set of activities;[3] second, whether the MFN clause applies to third treaties providing for substantial liberalization of investment;[4] and, third, whether the MFN applies to the investment only (and not to the investor).[5]

The main issue with using a MFN provision in a treaty to import standards from other treaties is that it could threaten the stability and coherence of obligations. The inclusion of a MEN clause in a new treaty may lead to the importation of provisions from old treaties. Similarly, obligations agreed to in new treaties could be imported into old treaties with MFN clauses. although one way of avoiding the applicability of this standard is including exceptions and specific reservations in new treaties, the bargaining power of the host or developing countries do not allow them since their core motivation is attracting foreign investments to create job opportunities for the huge number of un employment force and need of foreign currency, in investment treaty developing countries compete by leaving such kind of benefits for the interest of foreign investors.

The standard of protection of the MFN is the main benefits raised under the issue of treaty shopping, that the need of better protection provision for the third country to be applicable for the investor in course of proceeding.

4.4.2. National Treatment

According to investment treaties, NT requires that foreign investors are accorded treatment that is no less favorable than that accorded to investors of the host state.[6] NT means the obligation of contracting parties to grant investors of the other contracting party treatment no less favorable than the treatment they grant to

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[1] Julie A. Maupin, (2011); MLEN-Based Jurisdiction in Investor-State Arbitration: Is There An Hope for a Consistent Approach?, 14 J. INT'L ECON. L. 157. (Examining the difficulties and controversies provoked by the extension of jurisdiction via MEN clauses).

[2] Emilio Agustin Maffezini, ICSID Case No. ARB/97/7, Award, 38 ("In all matters subject to this Agreement, this treatment shall be no less favourable than that extended by each Party to the investments made in its territory by investors of a third country.").

[3] See United Nations Conference on Trade and Development, New York, U.S. and Geneva, Switz., Nov. 2010, Most-Favoured Nation Treatment, UNCTAD Series on Issues in International Investment Agreements II at 55, UNCTAD/DIAEIA/2010I/1 ("Each Country shall accord to investors of the other Country and to their investments treatment no less favourable than that it accords in like circumstances to investors of a third State and to their investments, with respect to investment activities. Investment activities' being defined as 'establishment, acquisition, expansion, management, operation, maintenance, use, possession, liquidation, sale, or other disposition of investments.'").

[4] For example, the Japan-Switzerland EPA 2009 establishes that the MFN clause does not apply to third treaties providing for substantial liberalization of investment. If such liberalization does occur, it would be subject to consultation with a view of incorporating it into the base treaty.

[5] For example, the BITs between China on the one hand, and Cambodia, Qatar, and Brunei Darussalam, respectively, on the other hand. Some of China's earlier BITs are limited in scope and cover only investments in their MEN Clause, without direct reference to "investment-related activities." See Agreement on the Mutual Protection of Investments, China-Swed., and art. 1, Mar. 29, 1982. Some IhAs cover only investments.

[6] Champion Trading Co., ICSID Case No. ARB/(P/9, Award, 128 (stating that national treatment prohibits discrimination on the grounds of nationality).

investments of their own investors. Essentially, NT requires that countries do not discriminate against foreign investors in favor of domestic investors.

In terms of the benefit of NT to an investor, it offers the investor a level playing field and protects the investor against discrimination. However, for host states, it reduces the possibility of favoring domestic firms, unless exceptions or reservations are expressly introduced into agreements to allow discrimination as is commonly done in the case of government procurement, domestic subsidies to local business or taxation, etc.

Generally, treaty shopping raises a number of policy issues. As a general matter, businesses frequently seek to structure their affairs to benefit from law that is advantageous to their interests. It is clear that allowing broad scope for treaty shopping may create broad investor eligibility for States 'investment treaty protections. Countries that consider that these commitments enhance investor confidence and promote more orderly and effective investment policies might feel quite comfortable with the expansion of investor eligibility for these protections to their own nationals or to investors from third parties. Countries that do not share this view or that, for other reasons, wish to limit eligibility to foreigners may have a different perspective on treaty shopping. Ultimately, the decision as to what, if anything, States should seek to do about investment treaty shopping is closely linked to their underlying objectives in signing investment treaties, and to how they see treaty shopping as either hindering or facilitating the realization of these objectives.
In addition to the very broad policy issue, a number of more specific concerns for State parties in relation to treaty shopping have been identified:

- **Legal uncertainty:** Treaty shopping can make it difficult for States parties to investment treaties to ascertain the exact scope of their commitments under those treaties. This tends to increase the legal uncertainties countries face in relation to these treaties.
- **Impact on reciprocal benefits and burdens:** In some cases, States may want to restrict rights to investors from a bilateral treaty partner country and establish a reciprocal relationship. This reciprocity is called into question when investors from third countries can ‗shop into‖ treaties to which their countries are not party. The third country's investors can obtain the advantages of investment treaties without the government having to submit to the disciplines and potential liability created by investment treaties. Treaty shopping may therefore undermine countries 'incentives to negotiate investment treaties.
- **Impact on a level playing field between domestic and foreign investors:** As noted above, some ISDS cases have involved efforts by domestic investors to use treaty shopping to get access to investment treaty arbitration (rather than being limited to their domestic law and courts). These efforts raise the question of whether there is a level playing field between domestic and international investors.
- **Treaty competition:** Competition arising from treaty shopping may alter treaty negotiating dynamics. A ―competitive‖ investment treaty is one whose substantive and procedural provisions are attractive to investors and whose domestic legal context(s) make it is easy for third-country investors to qualify for treaty protections. Such a treaty becomes de facto a treaty with an undetermined number of other countries. Non-competitive treaties, on the other hand, are not used by investors as a source of investment protection. Whether this matters for parties to such treaties depends on what the parties hoped to get from the treaties in the first place and whether or not the treaties actually create the hoped for benefits. Treaty negotiators may wish to think about how ―competitive‖ their treaty package is (that is, treaty language plus other arrangements such as incorporation rules).

4.5. How to Avoid Treaty Shopping

Treaty shopping is used by foreign investors for a "home country of convenience" – that is, the seeking of home countries that have treaties with host countries where investments are to be made. The potential for such treaty shopping was recognized in the drafting of Chapter 11 of NAFTA, which includes a provision allowing a party to deny the benefits of the agreement to investors that have no "substantial business activities" in their putative home country.[1] Similar clauses can be found in BITs (e.g. in United States BITs and a number of ASEAN country BITs), reflecting the intent of the agreements to protect only bona fide transitional investments between the home country and the host country.[2] The absence of such a "denial of benefits" provision may allow virtually any type of home country linkage to be sufficient to allow a claim to proceed.

[1] Investor-State Disputes arising from Investment Treaties: A Review, United Nations Conference on Trade and Development, New York and Geneva, 2005, P21.
[2] Ibid.

In principle, therefore, a contracting party to a BIT, or other IIA, may expressly guard itself against "treaty shopping". Conversely, this party may permit the benefit of the IIA to pass, on the basis of a share transfer, from a holding company in a non-contracting party to one located in a contracting party by expressly accepting such a change. On the other hand, the party in question could, in view of the underlying economic reality of the case, insist that the nationality of the directors, or the effective location of ultimate control, determine whether the benefit of the IIA should extend to the investor and its investment. Defining who is an investor is a very interesting concept under investment treaties. Investor should be given to the one concluding the specific investment treaty, not the one out of the contract. Defining investor will decides the scope of an investment agreement, that make us know who is the beneficiary of the rights, and going to take the obligation under the certain investment treaty in conclusion.

4.5.1. Definition of "investor" and "investment"

One of the first issues relates to the definition of the investor entitled to use the investor-State dispute settlement procedures. In many instances, the investment may initiate the arbitration directly. This approach has been followed in BIT arbitrations to date as well, and it is quite reasonable if the objectives of protection of the investor are to be met. Accordingly, the issue of how to read the definition of who may qualify as an investor is complex.

As to the definition of an "investment", apart from the case where the investor establishes a presence in the host country through an affiliate, other kinds of activities have been considered to come within this term. For example, many BITs operate with a broad asset-based definition of investment that allows portfolio investments to be covered, although there are instances where treaty coverage is expressly limited to FDI only. In addition, an investment may be constituted by a mere sales presence. The establishment of a sales office and the commitment of marketing time were held to constitute a sufficient investment. In this case and others, market share through trade has been regarded as part of the assets of an investment, and this therefore supports the view that the operation of a sales office is sufficient to constitute an investment.

Generally, in investment treaties the definition given for foreign corporation as investor, foreign corporation as assets of investment and others have great effect on the future effectiveness and achievement of the intended benefits of investment treaty. Thus, countries, particularly developing countries in the course of concluding investment treaties or contracts with foreign investors should take care on giving definition to the term investor and investment in order to define the scope of their treaty and avoid treaty shopping.

4.5.2. Determining the Nationality of Investors

Different scholars believe that the definition given for the nationality of investor is critical issue in determining the scope of treaty shopping. In defining investor's nationality all IIA have their own criterion used.

First of all, IIAs tend to adopt the following four criteria to determine the nationality of legal persons: (i) place of incorporation, (ii) place of its seat, i.e. administrative seat or statutory seat of a company, (iii) place of constitution in accordance with the law in force in the country, (iv) the country of control, i.e. nationality of its majority of shareholders. The place of incorporation for the legal persons and citizenship or residence of investor for physical person are the most commonly used criterion to determine the nationality of both on different types of IIA or BITs concluded by various states across the world.

4.5.3. The Issue of Umbrella Clause

An umbrella clause can be defined as a clause through which the contracting parties assume – as a matter of treaty law – additional substantive and or procedural obligations with regard to undertakings contained in instruments extraneous to the treaty.[1] In other words, it extends the protection of the treaty to legally binding commitments external to the treaty.

It is generally a provision in an investment treaty that guarantees the observance of obligations assumed by the host state and the investor. Umbrella clauses thus may turn a host state's breach of contract or other commitment into a breach of the treaty. Umbrella clauses can be particularly useful to investor, since the host state often assumes obligations than investors in the form of concessions, leases, or licenses. In this case a better treatment is promised to non-nationals than to nationals either under inter-governmental or other agreements or by

[1] Tarcisio Gazzinia and Attila Tanzib, Handle with care: Umbrella clauses and MFN treatment in investment arbitration, The Journal of World Investment & Trade 14 (2013). P985.

administrative decrees of one of the High contracting Parties, including most-favored nation clauses, such promises shall prevail.

4.5.4. Denial of Benefits

The 'denial of benefits' clause in IIAs gives contracting states the right to "deny treaty protection to investors who do not have substantial business activities in their alleged home state and who are owned and/or controlled by nationals of the denying state or of a state not a party to the treaty." The objective of the denial of benefits clause is to exclude the so-called shell companies, which are established in the territory of a contracting state only to benefit from a certain IIA but do not have an economic connection to the state. Therefore, it is considered as a countermeasure for host states to deal with treaty shopping practices.

5. Conclusions and the Way Forward

Treaty shopping is the conduct of foreign investors who intentionally shop at their convenience for home countries that have favorable IIAs with the host countries where their investments are to be made. It come into being when the third country not intended to be part of the treaty brought into the investment contract mostly by foreign investors to get better benefits from the treaty. In international investment law, forum shopping and treaty shopping are separate, but related practices undertaken by investors.

Treat shopping come into being when the third country not intended to be part of the treaty brought into the investment contract mostly by foreign investors to get better benefits from the treaty. Therefore, in treaty shopping three parties or countries exist; home country, host country of claimant and home country of parent country of claimant.

In the case of investment, treaty shopping problems seem to be more serious than in the case of goods because the origin of investor and investment is more ambiguous. IIAs usually employ a very broad definition of investment and the qualification for an investor is usually not demanding.

Treaty shopping will resulted to different actual problems like legal uncertainty, impact on a level playing field between domestic and foreign investors and treaty competition.

Defining who is an investor is a very interesting concept under investment treaties. Investor should be given to the one concluding the specific investment treaty, not the one out of the contract. Defining investor will decides the scope of an investment agreement, that make us know who is the beneficiary of the rights, and going to take the obligation under the certain investment treaty in conclusion.

Therefore, host countries should be cautious and transparent at the time of conclusion of BIT by adopting the way their scholars help their country in giving them advice and the public at large participated in order to avoid the potential risks of treat shopping. In particular, developing, host countries of foreign investment must find another way of attracting foreign investors than negotiating to compromise their interests on BIT, since BIT is not the only way of attracting foreign investments.

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