Gaining Access to International Investment Agreements' Protections through the Structuring or Restructuring of Investments: The Colombian Case

How can Investors Protect their Investments in Colombia through the Practice of Treaty Shopping?

Written by

Pedro Quintero González

Advised by

Daniel Mateo Puyo Velásquez

EAFIT University

Law School

Law Department

Thesis

02/10/2023

Abstract

This thesis explores the realm of international investment agreements and their potential to safeguard investments through the strategic corporate structuring or restructuring of investments, harnessing the benefits contained in international investment agreements.

The initial focus is on the fundamental role of these international instruments in ensuring the security of foreign investments. As the global investment landscape undergoes transformations, the thesis underscores the adaptive strategies investors employ to navigate the evolving legal framework.

The concept of *treaty shopping* is explored as a strategic tool embraced by investors to optimize protective measures. The motivations and perceptions across stakeholders, including governments, investors, and judicial bodies, is analyzed in the first sections of the thesis.

The study then examines the different limitations within the treaty shopping practice. Jurisdictional constraints, encompassing *ratione personae*, *ratione materiae*, and *ratione temporis*, are studied. The thesis further analyzes normative bounds, encompassing elements like denial of benefits clauses, and, lastly, it discusses the concept of the abuse of rights doctrine as an additional limit to the treaty shopping practice.

Shifting attention to Colombia, the thesis examines the nation's array of international investment agreements, evaluating their approach to the concept of treaty shopping. Real-world disputes involving these strategies, where Colombia has been implicated, are also analyzed.

Concluding, actionable recommendations are proposed for investors navigating Colombia's evolving investment landscape and recent political uncertainty. Bridging theory and practical scenarios, the thesis offers insights for investors and legal practitioners engaging with international investment protections within Colombia.

In essence, this thesis constructs a strategic guide, customized to Colombia's dynamic political landscape, aiding investors in effectively utilizing international investment agreements for investment security. The Colombian context serves as a distinct backdrop, illustrating the interplay between treaty provisions and adaptive investment protection strategies amid the global economic landscape.

Keywords: international investment law, treaty shopping, investment, investor, investment protection standards, Colombia.

Table of Contents

Introduction

International investment law ("IIL") deals with the investments made by natural or legal persons in states different from those from which they are nationals[1], usually referred to as *host countries*. This area of international law comprises all sets of rules that individually or jointly regulate foreign investments. The main sources of IIL are (i) international investment agreements[2] ("IIAs"); (ii) customary international law; (iii) general principles of law; (iv) unilateral statements made by states; (v) The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention"); and (vi) case law. Furthermore, although not a source of IIL from a narrow perspective, the domestic law of the host country also plays an important role. For example, domestic rules on nationality are central to any application of IIL, and in many cases may determine jurisdiction (Dolzer, Kriebaum, & Schreuer, 2022).

In general terms, the main reason for the existence of IIL is the promotion and protection of foreign investments. This way, IIL offers investors increased security and certainty, while helping states attract more resources in the form of foreign investment (Chaisse, 2015). This, in principle, corresponds to a favorable situation for the states receiving the investments insofar as they experience a multiplicity of benefits. According to Bonnitcha, Skovgaard, and Waibel (2021), these benefits include (i) the reallocation of resources in the market to the most productive and competitive companies and (ii) the diffusion of knowledge and technology. However, the same authors warn that, even though foreign direct investment in principle

[1] Even though, in principle, international investment law regulates the relations between foreign investors and host countries, it exceptionally can end up regulating relations between nationals and their own home countries whenever the practice of round-tripping (which will be explained further in this thesis) takes place.

[2] For the purposes of this thesis, the term IIA will be used indistinctly to refer to both bilateral investment treaties, multilateral investment treaties, as well as to free trade agreements or other international instruments containing investment chapters or provisions.

contributes to the economic development of host states, the magnitude of such contribution depends on the specific conditions of the host state and of the investment.

In pursuit of these goals, host states offer investors a series of benefits through IIAs known as standards of protection. These constitute substantive obligations entered into by states that stipulate how they must treat foreign investors and their investments. There are many different standards of protection in IIL, and they usually vary from treaty to treaty. However, eight standards are common to most IIAs, namely: (i) the most favored nation treatment ("MFN") standard; (ii) the guarantee of no expropriation without compensation; (iii) the fair and equitable treatment ("FET") standard; (iv) the free transfer of funds; (v) the full protection and security ("FPS") standard; (vi) the national treatment ("NT") standard; (vii) the prohibition of arbitrary or discriminatory measures; and (viii) the umbrella clause. According to an analysis of 1.602 treaties made by Bonnitcha, Poulsen, and Waibel (2021), these eight standards are present in most treaties, being the MFN standard the one found more often (in 95% of analyzed treaties) and the umbrella clause the most infrequent one (45% of analyzed treaties).

These standards of protection are commonly divided into two categories, contingent or relative standards, and non-contingent or absolute standards. The first of these two categories relates to those standards of protection whose application requires a comparison between how a state treats a foreign investment with the way it treats other investments. Examples of relative standards are the MFN and the NT standards. On the other hand, absolute standards of protection are those which require a host state to guarantee foreign investors certain conditions for their investments, without it being important how it treats other investments (Bonnitcha, Poulsen, & Waibel, 2021).

All these standards of protection, however, would be to a certain extent worthless if IIAs did not contain provisions related to dispute settlement. After all, the obligation to act in a certain way can be meaningless if there is no effective mechanism to enforce said obligation or demand compensation for the damages suffered because of its breach. For this reason, most IIAs provide multiple dispute-resolution mechanisms. Based on these provisions, disputes between an investor and a host state can be settled by an international and unbiased arbitral tribunal rather than by domestic courts which sometimes can lack impartiality (Chaisse, 2015).

There are generally two types of dispute settlement mechanisms contained in IIAs: state-to-state arbitration and investor-state arbitration ("ISDS"). The former of these, traditionally present in international law is highly infrequent in practice, while the latter, being both an innovative and highly beneficial way for investors of resolving conflicts, takes place much more frequently. Given its nature, ISDS is sometimes regarded as the most important and crucial element of IIAs (Gas Natural SDG, S.A. v. Argentine Republic, Decision on Jurisdiction, 2003). After all, this possibility alone is what differentiates IIAs from other types of international agreements (Chaisse, 2015).

ISDS enables investors who plead a state's infringement of a standard of protection to directly seek the enforcement of the protection or the financial compensation for the violation against the state through binding arbitration. The main advantages of this type of dispute settlement procedure are that, first, it allows investors to avoid the undesired uncertainties of host states' domestic laws, regulations, and courts; and second, it makes it possible for investors to initiate a claim on their own without having to resort to their home countries' willingness to launch such claim (Chaisse, 2015).

Despite its many advantages for investors, and even though it can be argued that ISDS can also bring benefits to states[3], the truth is that, to a certain extent, ISDS can have some unwanted results for host countries. For example, the relative easiness with which investors can launch claims against states without having to recur to their home states can result in multiple proceedings being initiated against a same country, which in turn amplifies the consequences that will be described below (Chaisse, 2015).

Furthermore, the fact that, through those claims, investors pursue exclusively their own commercial interests and do not care about the reasons behind the alleged infringement of a standard makes the act of initiating an arbitral proceeding even more frequent. After all, in instances of state-to-state dispute settlement, states usually apply restraint with respect to pursuing claims out of concern for the deterioration of their diplomatic relation with the country against which the claim is brought or because they have similar policies or measures implemented in their own country to those that allegedly constitute an infringement of IIL and which they would not want to be disputed (Chaisse, 2015).

Additionally, the high costs of participating in ISDS constitute a clear disadvantage for states facing multiple proceedings at once. Moreover, a phenomenon usually referred to as "regulatory chill", which will be explained in following sections, can also be pointed out as a disadvantage that states face because of ISDS and, particularly, its relative availability to investors. And finally, the fact that the dispute settlement system is structured in a way in which

[3] Julien Chaisse (2015), for instance, argues that investor-state arbitration can have the following advantages for host states: (i) it can send a positive signal to investors that the state is committed to protecting foreign investors; (ii) it can create an incentive to develop domestic policies that are favorable to foreign investment and thus attract new investors while helping maintain existing investors; and (iii) it locks in pro-investment policies making it difficult to change domestic laws regarding foreign investment.

only states can be made accountable for their actions and not investors is also a big shortcoming for states' willingness to participate in such proceedings (Chaisse, 2015).

As mentioned, one of the consequences of this high availability of ISDS is that it has led to a significant number of cases being brought up against states. For instance, as of December 31st, 2022, there have been a total of 1,257 known investment treaty cases. Just in 2022 alone, claimants brought 46 publicly known ISDS cases against host states (UNCTAD, 2023).

One of the reasons that has contributed to this multiplicity of investment claims brought up against states and, correspondingly, states' growing discontent against ISDS and IIL, is a practice known as *treaty shopping* ("TS"). In general terms, this practice consists in the establishment of a company in a state that has an IIA with favorable provisions in force with the host state that is the target of a certain investment, and which accepts incorporation as a basis for corporate nationality. That newly incorporated company is then used by the investor to funnel the investment and, by doing so, gain access to the protections offered by the IIA (Dolzer, Kriebaum, & Schreuer, 2022). Through it, investors "(…) deliberately shop at their convenience for home countries that have favourable IIAs with the host countries where their investments are to be made" (Lee E. , 2015, p. 1).

Because of this practice, the number of covered investments and investors is significantly enlarged, which in turn increases the probability of claims being presented by investors against host states. Despite its— to a certain extent— undesirability for host states (Lee E. , 2015), TS is not illegal nor unethical in itself (Baumgartner, Treaty Shopping in International Investment Law, 2016). On the contrary, as suggested by Dolzer, Kriebaum, and Schreuer (2022), "(…) a prudent investor may organize its investment in a way that affords maximum protection under existing treaties" (p. 71).

This is the case because, as seen above, IIAs offer investors multiple benefits and protections. For this reason, it is not uncommon for certain investors to proactively try to gain coverage from specific IIAs and it is even expected from them to explore all the possibilities outlined in front and benefit to the highest degree possible.

The present thesis explores this phenomenon with the objective of identifying what constitutes TS, what its limits are, and, therefore, when it is allowed, and how can prudent investors benefit from it without incurring in abuses of the practice. Particularly, this thesis focuses on the Colombian case because, although relevant in general, the TS practice can be of special significance for investors willing to invest in Colombia considering its current political and economic context.

For instance, the recent election of a left-leaning president —Gustavo Petro— has weighed on investors' willingness to invest in the country. According to a recent survey, only 27.5% of businessmen affiliated with the Asociación Nacional de Empresarios de Colombia (Andi) said they would maintain their investments in the country (Portafolio, 2023). The reasons for that decision adduced by the businessmen surveyed were mainly high interest rates (47.9%), **political uncertainty (31.3%)**, market opportunities (12.5%), and commitment to customers (9.6%).

Many renowned institutions, such as Standard & Poor's[4], Bank of America[5], and Moody's[6], have warned about the potentially negative impacts that Gustavo Petro's proposed reforms could have on investments in Colombia. For this reason, it is important for investors to be aware of Colombia's multiple IIAs that are currently in force and to learn how they can benefit from said agreements through TS. Furthermore, those investors willing to undergo the actions needed to effectively gain access to the protections provided by Colombian IIAs must know what limits there are to this practice.

The present thesis serves that role. By studying the practice of TS, outlining its limits, and analyzing Colombia's IIAs in order to identify those that provide the highest number of protections by simultaneously highlighting the ones that set the least strict requirements for gaining coverage, the readers of this thesis will be able to better understand Colombia's international investment regime, and by doing so, actively and effectively make informed decisions related to the structuring or restructuring of their investments. This way, corporate investors will be able to protect their investments from Colombia's current political uncertainty in a way that will potentially allow them to claim compensation for eventual damages through investment arbitration.

For this purpose, this thesis is divided into three parts: Part I, which defines the practice of TS and analyzes the main limits that exist in its practice as found in the existing bibliography

[4] Mercado, L. M. (2023, April 3). *W Radio*. Retrieved June 19, 2023, from Hay incertidumbre en inversionistas por reformas salud y pensional de Petro: S&P: https://www.wradio.com.co/2023/04/03/hay-incertidumbre-en-inversionistas-por-reformas-salud-y-pensional-de-petro-sp/.

[5] Revista Semana. (2023, April 29). *El segundo banco más grande de EE. UU. dice que el presidente Petro "ha creado incertidumbre política" con su remezón ministerial*. Retrieved June 19, 2023, from https://www.semana.com/economia/empresas/articulo/el-segundo-banco-mas-grande-de-ee-uu-dice-que-el-presidente-petro-ha-creado-incertidumbre-politica-con-su-remezon-ministerial/202356/.

[6] El Heraldo. (2023, May 9). *Agenda de reformas de Petro intensifica riesgos de inversionistas: Moody's*. Retrieved June 19, 2023, from https://www.elheraldo.co/economia/moodys-alerta-sobre-consecuencias-de-reformas-de-petro-en-el-mundo-empresarial-999367.

and arbitral decisions on the subject, namely: jurisdictional limits, normative limits, and the principle of good faith or the doctrine of abuse of right; Part II, which undergoes an analysis of Colombia's IIAs in force, as well as the arbitral proceedings in which Colombia has been a respondent and this issue has been raised; and, lastly, Part III, which takes on the preliminary conclusions of the first two parts and highlights investors' alternatives for the protection of their investments in Colombia with respect to TS.

Part 1 – The Concept of Treaty Shopping and its Limits

As mentioned in the introduction, IIAs provide different benefits and protections to those investors that are covered under their provisions. To that extent, it is expected for investors to want to access said benefits. However, it is a general rule that IIAs exclusively grant their protections to those investors that are nationals, or considered as nationals, of either of the states that are parties to the treaty, according to the definitions set forth in the IIA. For that reason, if a certain investor does not qualify as a national from one of the parties to the agreement, it cannot benefit from it.

Hence, the practice of TS or nationality planning exists. In other words, the main goal pursued by investors when implementing this practice is to gain coverage from a specific IIA. If it was not for this goal, the practice of TS would not exist (Ebert, 2018). If an investor wants to access a certain IIA, but lacks the nationality required to be covered by said treaty, then TS becomes a useful tool for the protection of its investment. But what exactly is TS?

The following sections will discuss this question. Particularly, the following paragraphs will analyze the meaning of this concept, as well as the reasons for its occurrence, the main perceptions towards it, and the limits for its proper implementation.

The Concept of Treaty Shopping

What is Treaty Shopping?

The concept of TS does not have an official and universally accepted definition, nor is it defined by any international instrument. This concept has been more of an academic construction, as well as an arbitral one. The term TS itself is not even the only term used to describe the practice of purposedly structuring or restructuring an investment with the aim of gaining access to an IIA's protection. Sometimes, other terms like *nationality planning, corporate restructuring* or *corporate maneuvering* are also used to describe this concept[7]. However, for the purposes of this thesis the term TS will be used to describe in a broad sense and with all its different variations, and without the intend to assign any negative or derogatory meaning or connotation to the practice of TS.

Despite these many different terms and the lack of an official and absolute definition, there is a consensus on what TS consists of. For Baumgartner (2016), one of the subject's most prominent authors, "[t]reaty shopping should thus be understood to include all legal operations aimed at invoking or creating a qualifying nationality and/or a qualifying investment, for example by structuring or restructuring an investment or by otherwise comparing an entitlement or property right to an investment, with a view to benefiting from a particular international investment agreement granting an investor direct standing (*ius standi*)" (p. 12).

The Organization for Economic Cooperation and Development (OECD) (2012), in turn, defines TS as those instances "(...) when an investor structures an investment (through

[7] Some minor differences between these various terms can be pointed out, e.g., the timing of the structuring/restructuring. While nationality planning is commonly used to describe the structuring in advance of an investment, TS can either refer to all the different moments in which such structuring can take place or exclusively the restructuring of the investment once the dispute has already emerged or is at least foreseeable. Furthermore, there are also different value judgements associated with each of these terms. For example, while nationality planning denotes a somehow acceptable practice, TS, in turn, involves a much more negative connotation (Baumgartner, Treaty Shopping in International Investment Law, 2016).

incorporation and possibly by restructuring certain business operations) in order to seek to qualify for protections conferred by particular investment treaties" (p. 55). Similarly, Eujung Lee (2015) defines TS as "(...) the conduct of foreign investors who deliberately shop at their convenience for home countries that have favourable IIAs with the host countries where their investments are to be made so that their investment can qualify for protection conferred by the treaties" (p. 1).

Additionally, Rudolf Dolzer, Ursula Kriebaum, and Christopher Schreuer (2022), who are also renown authorities on IIL describe TS as a practice by which "(...) a prudent investor may organize its investment in a way that affords maximum protection under existing treaties" (p. 71). Nelson Goh (2018), similarly, defines the practice of TS as taking placing when "(…) a company holding the investment adopts or alters its place of incorporation to bring itself within the purview of one or more investment treaties" (p. 23).

On the other hand, Javier García Olmedo (2020) assigns a negative connotation to his definition of nationality planning, defining it as "(…) the practice whereby investors use a passport or a corporation of convenience to benefit either from an IIA providing for ISDS when none would otherwise be available or from an IIA that offers higher levels of protection in procedural and/or substantive terms" (p. 307).

Regarding the different variations of the TS practice, authors usually identify two ways in which investors can implement this practice: one that occurs before any dispute arises and another one that takes place after a dispute has already arisen or becomes foreseeable. John Lee (2015), for example, refers to these two types of TS as front-end TS and back-end TS, respectively. This author describes these two types of TS as follows:

> Back-end Treaty Shopping is where a corporation restructures an investment after a dispute has arisen or becomes foreseeable, to gain access to favorable investor-state arbitration for that particular dispute. Front-end Treaty Shopping, in contrast, occurs when an investment structure is planned in advance so that the investment may benefit from a favorable regulatory environment (p. 358).

Furthermore, there is a third form of TS, namely: the transfer of claims, which occurs when an uncovered investor transfers or assigns already existing claims arising out of alleged violations of investment obligations by a host State to another investor who does have protection under an IIA entered into by the host State. This alternative, however, is almost unanimously understood to be unlawful and therefore is not usually included in the definition of TS (Goh, 2019) and will not be analyzed in the present thesis.

In conclusion, all the above definitions make it possible to establish that the concept of TS consists in the deliberate decision of an investor to either preemptively structure or restructure its investment through the incorporation of a company in a specific country in order to (i) gain coverage from an IIA in cases in which there was no access to such an international instrument or (ii) gain coverage from a more beneficial IIA in terms of substantive or procedural provisions. Additionally, another conclusion that can be drawn from the previous paragraphs is that this practice is not expressly prohibited by any international treaty and should therefore not be, in abstract, perceived as undesirable, since it has been admitted as valid by both scholars as well as arbitral tribunals.

Even though TS might be performed, in some cases, by both natural as well as legal persons, it is much more frequent for legal entities to undertake this practice. For this reason, and for the purposes of this thesis, the term TS will be exclusively used throughout this work to refer

to the practice as performed by juridical persons; its use by natural persons will not be analyzed further below.

Why Does Treaty Shopping Take Place?

According to Baumgartner (2016), there are essentially four reasons for the occurrence of TS: (i) the proliferation of IIAs; (ii) the change from diplomatic protection to ISDS; (iii) the ease of incorporation of legal entities; and (iv) the absence of a doctrine of precedent. Other authors like García Olmedo (2020) highlight (v) openly worded definitions of corporate investor in IIAs as an additional reason why TS takes place.

Most authors consider the existence of a multiplicity of bilateral IIAs as the main cause of the existence of TS. For instance, Baumgartner (2016) regards "(…) the proliferation of investment treaties and the failure to negotiate one overarching multilateral investment agreement (…)" as arguably being "(…) one of the main reasons for the increase in treaty shopping" (p. 20). For Liu (2019), the decentralization of the international investment system represents the sole reason for the occurrence of TS. According to this author, the fact that boundaries of IIL are set in a "myriad" of IIAs "(…) provides investors with the incentive to 'pick and choose' the most favourable system for their purpose" (p. 46).

By the end of 2022, the total number of IIAs was 3,265, of which 2,584 were in force (UNCTAD, 2023). Precisely, this multiplicity of IIAs is what most authors pinpoint as TS' main cause. The practical effect of this situation is that, although many of those IIAs are similar in general, their provisions usually vary, offering sometimes different levels of protection to investors or defining key terms through the use of different wordings (Baumgartner, The Significance of the Notion of Dispute and Its Foreseeability in an Investment Claim Involving a

Corporate Restructuring, 2017). This, in turn, incentivizes investors to compare, analyze and select the most advantageous IIA for them (Chaisse, 2015). As said by Baumgartner (2016):

> (…) it is the multiplicity of agreements granting direct standing to investors that is a 'key ingredient to the practice of treaty shopping. In other words, the more legal instruments for the protection of investments and the less coordinated or harmonized they are, the easier it is to try and come under the protection of one or several agreements thought most favourable for investors purpose (p. 26).

This situation is further worsened by the fact that, unlike other areas of international law —such as international trade—, there is no comprehensive multilateral agreement on investment. This absence of a centralized system contributes, therefore, to the existence and increase of TS (Chaisse, 2015). Some efforts have been made to achieve a centralized system; however, those efforts have proved to be unsuccessful (Baumgartner, The Significance of the Notion of Dispute and Its Foreseeability in an Investment Claim Involving a Corporate Restructuring, 2017).

The second most important reason pointed out by authors as contributing to the occurrence of TS is the paradigm change that IIL has undergone because of the inclusion of ISDS as an alternative for investors to settle their disputes directly with host countries. Before ISDS, diplomatic protection was the norm. Investors needed their home countries to bring claims against a certain host country. In this context, the home country, although it had the right to espouse the claim, was under no obligation to do so. The willingness of the home state to pursue a certain claim would depend mostly on political and diplomatic reasons, rather than the actual interests of the investor (Baumgartner, The Significance of the Notion of Dispute and Its Foreseeability in an Investment Claim Involving a Corporate Restructuring, 2017).

Because of these reasons, ISDS was developed as a more efficient and suitable mechanism to protect investors. Through ISDS, investors are not obliged to resort to their home countries in order to present an investment claim against a host country. On this basis, investors can easily bring a claim against the host state if they consider their rights have been wronged, a decision that will usually only follow their own interests and will not be conditioned by political or diplomatic reasons. As a matter of fact, it is submitted by some authors that without this paradigm change, TS would highly be inconsequential, unlikely, or even impossible altogether (Baumgartner, Treaty Shopping in International Investment Law, 2016).

As a third cause for TS, authors usually indicate today's easiness to incorporate legal entities in most countries. Both García Olmedo (2020) and Baumgartner (2016) argue that the relative absence of limits to the incorporation of legal entities, combined with the highly simplified procedures that many domestic jurisdictions require for said incorporations are relevant reasons for the occurrence of TS. In many cases, only a postbox business address is required for the incorporation of a legal entity, for instance. However, this easiness to incorporate alone would not be enough, but it is also the fact that in most countries "(…) incorporation is sufficient for a legal entity to acquire legal personality and corporate nationality (…)", which —as mentioned before— is central to the obtention of protection through IIAs (Baumgartner, Treaty Shopping in International Investment Law, 2016, p. 32).

Finally, Baumgartner (2016) also suggests in her work that the absence of a doctrine of precedent in IIL may potentially be a fourth and last reason for the occurrence of TS. The fact that tribunals are not legally obliged to follow previous tribunals' decisions, may motivate investors planning to bring up a claim against a host country to do so with the aim of obtaining divergent decisions that can potentially be favorable to them. However, it must be asserted that,

although referencing it as a probable cause of TS, Baumgartner (2016) also claims that this is likely not, strictly speaking, a situation that enables or furthers TS for it does not constitute a situation specific to this practice, but rather concerns IIL in general.

Perceptions Towards Treaty Shopping

As mentioned above, TS is not *per se* illegal and should therefore not be qualified as absolutely negative. Nonetheless, this has not kept the parties involved in this practice to develop their own perceptions towards TS. The present section will briefly discuss how the parties affected by the practice of TS generally perceive it, these parties being: the states, the investors, and the arbitral tribunals.

States. States tend to perceive TS in a mostly negative way. As respondents in arbitral proceedings where any form of TS has taken place, states usually contest the claims arguing TS contradicts IIL's nature and principles. For this reason, TS is regarded as an "unintended consequence" and "undesirable" for host countries (Lee E. , 2015).

Usually, there are three main reasons that states present in cases where TS has taken place in order to contest the claim: (i) lack of reciprocity; (ii) lack of informed consent; and (iii) policy concerns (Lee J. , 2015). In relation to the first of these arguments, states tend to assert that TS violates the principle of reciprocity that is supposed to be a base for IIAs. According to this argument, TS enables investors of a third country (or even from the host country itself) to benefit from an IIA's protections without their home countries undertaking any correlative obligation created by the IIA. As such, investors who incur in this practice are usually referred to by states as "free riders", "corporations of convenience" or "mailbox companies"; terms that perfectly describe states' discontent with TS (Lee E. , 2015).

In relation to the second of the arguments listed (lack of consent), states also tend to claim that TS constitutes a clear violation to their consent since the increased adoption of this practice represents an unexpected situation for them, which was completely unforeseen. In sum, what states argue in relation to this aspect is that, when negotiating and signing the IIAs, they never intended to consent to arbitrate the myriad of claims that are brought as a consequence of TS (Lee E. , 2015). Furthermore, it can also be said that the consent given by states when signing IIAs did not include the possibility for *any* investor to bring a claim against them, but rather for a specific group of qualified investors: those holding the required nationality (Baumgartner, The Significance of the Notion of Dispute and Its Foreseeability in an Investment Claim Involving a Corporate Restructuring, 2017).

Finally, policy considerations have also been brought up by states denouncing the TS practice. According to this argument —one that is more related to the desirability and morality of TS, rather than its legality—, one of IIAs' main goals is to increase the sustainable development of the host country. Therefore, it is submitted that TS can hinder said development on the basis that investors get to choose "(…) treaties with the most lenient human rights and sustainable development provisions" (Lee E. , 2015, p. 361).

Furthermore, it is sometimes claimed by states that TS undermines their ability to enact certain public policies. One such case, for example, is the Philip Morris v. Australia[8] case in which a dispute arose out of a health public policy promoted by the Australian government related to the packaging of cigarettes. This policy, known as the "plain packaging legislation" was regarded by Philip Morris International Group as prejudicial to its investment in the country. However, by the time the government announced its intention to introduce the plain packaging

[8] Philip Morris Asia Limited v. The Commonwealth of Australia (UNCITRAL, PCA Case No. 2012-12).

measures, the shares of Philip Morris Australia were held by the group's Swiss branch and, because at that time there was no IIA in place between Switzerland and Australia, Philip Morris decided to undergo a corporate restructuring through which the Australian company's shares were acquired by Philip Morris Asia Ltd.: a Hong Kong-based legal person. Thanks to this maneuver, Philip Morris was able to gain protection under the Australia-Hong Kong IIA.

Apart from the tribunal's considerations (which will be later analyzed in depth), the reason why this case is brought up in this section, is because it constitutes proof of the negative effect TS can have on a certain state's ability to enact public health policies in benefit of its citizens. Through Philip Morris' restructuring, the company was able to contend Australia's measure, which —had the claim been successful— could have potentially frustrated the country's intention to enact it. This phenomenon (usually referred to as "regulatory chill") can be, therefore, regarded as a consequence of TS because this practice makes it easier for investors to contest public policy decisions and, through that, has the potential of keeping states from enacting them (Baumgartner, The Significance of the Notion of Dispute and Its Foreseeability in an Investment Claim Involving a Corporate Restructuring, 2017).

Investors. In general terms, TS is perceived by investors in an almost exclusively positive way. As has been suggested throughout this thesis, TS enables prudent investors to gain access to a certain IIA's protections that would otherwise not be at their disposal. For this reason, TS represents an ideal mechanism for investors to better protect their investments. Nevertheless, one argument against TS can be drawn from the investors' perspective. This argument consists in the fact that TS:

> (…) 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 (Lee E. , 2015, p. 6).

Tribunals. Lastly, it is of utmost importance to understand how arbitral tribunals have perceived TS through their decisions on cases relating to this practice. For this purpose, Eunjung Lee's (2015) work titled "Treaty Shopping in International Investment Arbitration: How often has it occurred and how has it been perceived by tribunals?" constitutes an excellent source of information. In this paper, Lee develops a complete analysis of how tribunals have historically reacted to the practice of TS.

Lee's conclusions are that tribunals "(…) have failed to set a uniform criterion for dealing with the practice of treaty shopping" (p. 24). On the one hand, some tribunals have taken a permissive stance towards TS, refusing to consider additional elements when deciding whether an investor meets the requirement of nationality under a certain IIA absent any treaty's provisions demanding additional requirements different than the incorporation or the constitution test. On the other hand, some other tribunals have taken a prohibitive position towards TS, clearly rejecting the legitimacy of restructurings once the alleged dispute has arisen (Lee E. , 2015).

This conclusion, however, can be partly explained by the known and accepted fact that arbitral precedents do not constitute binding jurisprudence or *stare decisis* in international investment arbitration (Bentolila, n.d.).Nonetheless, despite Lee's conclusion being that there is no uniform criterion for dealing with TS, Lee's analysis does allow to identify a clear trend in tribunals' decisions: while TS, when undergone in advance without any dispute in existence will most times be allowed by arbitral tribunals, other instances of TS in which the restructuring takes

place after a dispute already exists or is, at least, foreseeable, will most likely be rejected by arbitral tribunals.

In many cases, arbitral tribunals, when analyzing instances of TS, have chosen to limit their considerations to the specific text of the IIA invoked in the dispute. In fact, the truth is that investment tribunals in general tend to guide their decisions on this basis. For this reason, the general consensus of arbitral tribunals has been that, absent a clear violation to either the domestic laws of the host country or the principle of good faith (which will be analyzed in depth in further sections), there are no reasons to consider TS as forbidden by IIAs or IIL (especially old generation IIAs, which do not usually contain provisions limiting investors' ability to perform TS).

An example of this position is the Saluka Investments B.V. v. The Czech Republic (2006) tribunal, which argued that, while sharing "(…) sympathy for the argument that a company which has no real connection with a State party to a BIT, and which is in reality a mere shell company controlled by another company which is not constituted under the laws of that State, should not be entitled to invoke the provisions of that treaty (…)" (para. 240), there was no treaty provision that would enable it to narrow the definition of investor further than what the applicable IIA required, which was the necessity of the investor to be constituted under the laws of the Netherlands.

Similarly, the tribunal in Yukos Universal Limited v. The Russian Federation (2009) was of the opinion that "(…) a treaty must be interpreted first on the basis of its plain language (para. 411)." On this basis, the tribunal upheld that "(…) companies incorporated in Contracting Parties are embraced by the definition, regardless of the nationality of shareholders, the origin of investment capital or the nationality of directors or management (…) (para. 222)", because the

applicable IIA's definition of investor did not require anything further than the claimant being "duly organized in accordance with the law applicable in a Contracting Part (para. 411)."

Furthermore, TS has even been accepted by arbitral tribunals. For instance, the tribunal in Aguas del Tunari, S.A. v. Republic of Bolivia (2005), in relation to this practice, said:

> (…) it is not uncommon in practice, and -- absent a particular limitation -- not illegal to locate one's operations in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for examples, of taxation or the substantive law of the jurisdiction, including the availability of a BIT (para. 330).

On the contrary, TS has also been sometimes perceived negatively or prohibitively by some arbitral tribunals. However, these more restrictive approaches to TS have mostly followed investors' attempts to either perform this practice at a time in which a dispute had already arisen (or was at least foreseeable) or directly by violating domestic rules of the host countries (cases of straight-out fraud).

For example, the tribunal in the Phoenix Action, Ltd. v. The Czech Republic (2009) argued that the purpose of the ICSID Convention is "(…) not to protect nationals of a Contracting State against their own State (…)" but to "(…) facilitate the settlement of disputes between States and foreign investors (…) (para. 88)." According to this purpose, the tribunal required that for the claimant to benefit from ICSID's protections, its investment had to be *bona fide* (Phoenix Action, Ltd. v. The Czech Republic, Award, 2009).

For this reason, the tribunal pointed out that, for a certain investment to be considered *bona fide*, the following elements would have to be considered: (i) timing of the investment; (ii) timing of the claim; (iii) substance of transaction; and (iv) true nature of the operation. Taking these elements into consideration, the tribunal then decided that the claimants attempt to gain the

requested protection through arbitration was an abuse of the system of IIL because "(…) a corporation cannot modify the structure of its investment for the sole purpose of gaining access to ICSID jurisdiction, after damages have occurred (…) (para. 92)." According to the tribunal, the claimant had made the investment not for the purpose of engaging with the host country's economy but for the sole purpose of turning a domestic dispute into an international arbitration (Dolzer, Kriebaum, & Schreuer, 2022). However, it also lined up with other tribunals' decisions regarding the preemptive structuring of an investment by concluding that investors are not prohibited from freely structuring their investments (Phoenix Action, Ltd. v. The Czech Republic, Award, 2009).

In Cementownia "Nowa Huta" S.A. v. Republic of Turkey (2009) (one of the cases in which an actual fraud took place instead of legitimate TS), the Tribunal found that the restructuring —which had taken place only twelve days before the event that started the dispute happened— had been completely fabricated by the claimant. Nonetheless, the tribunal went one step further and said that:

> Even if they did occur, the share transfers would not have been bona fide transactions, but rather attempts (in the face of government measures dating back some years about to culminate in the concessions' termination) to fabricate international jurisdiction where none should exist (para. 117).

In this same line, the tribunal in Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela (2010), asserted that TS is to be considered as legitimate as long as the dispute arises after the restructuring takes place. Conversely, if the restructuring is performed after the dispute has already arisen with the objective of gaining jurisdiction under a certain IIA, then TS would

constitute "(…) an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs (para. 205)."

Finally, under similar circumstances as those present in the cases described above, the tribunal in Philip Morris Asia Limited v. The Commonwealth of Australia (2015) held that "(…) the initiation of a treaty-based investor-State arbitration constitutes an abuse of rights (or an abuse of process, the rights abused being procedural in nature) when an investor has changed its corporate structure to gain the protection of an investment treaty at a point in time when a specific dispute was foreseeable" (para. 554).

In conclusion, it is to a certain extent clear that the prospective planning and structuring of an investment has been generally accepted by arbitral tribunals. This means that TS is acceptable when the corporate arrangements that lead to it are in place before the facts that lead to the dispute take place or the dispute arises. On the contrary, arbitral tribunals have consistently rejected the practice of TS when it occurs after an existing or at least foreseeable dispute already exists. In these cases, tribunals will usually decline their jurisdiction over the claim or will dismiss the claim on the basis of it being inadmissible (Dolzer, Kriebaum, & Schreuer, 2022).

Limits to Treaty Shopping

The previous section described, in general terms, when TS has usually been considered legitimate and when it has consistently been considered illegitimate by investment tribunals. However, that conclusion is highly abstract and does not effectively define when TS is permitted and when it is not. For instance, that conclusion still leaves many questions unanswered: when is a dispute foreseeable and when does it arise? How substantive or material must an investment be? Must the investment be made in pursuit of certain goals?

For an investor to truly benefit from the practice of TS, these and other questions must be resolved. For this reason, the present part of this thesis will analyze in detail what the limits of TS are and, through that analysis, determine what an investor must take into account in order to fully benefit from TS.

Jurisdictional Limits

Traditionally, for an investment tribunal to have jurisdiction over a particular claim, three criteria must be met: one related to the claimant, one related to the investment, and a last one related to the timing of the investment. These three concomitant levels of jurisdiction are generally referred to as jurisdiction *ratione personae*, jurisdiction *ratione materiae*, and jurisdiction *ratione temporis*[9]. They are the base of the ISDS mechanism. Only when they are present an investment tribunal is entitled to judge a particular dispute between a covered investor and a state.

As a result, in order for any investor to gain coverage of a particular IIA and, thus, present a claim against its host country, it must meet these three requirements. Of course, if that is the general case, an investor willing to benefit from the TS practice must also abide by the same rule and, therefore, must carefully analyze how these requirements are to be met under the specific IIA it is willing to gain access to.

---

[9] Some arbitral tribunals highlight the consent to arbitration as a fourth element of a tribunal's jurisdiction, referring to it as jurisdiction *ratione voluntatis.* Although it is certainly the cornerstone of jurisdiction, this element will not be analyzed in depth throughout this thesis since it does not play a relevant role in TS. The readers of this work only need to know that the way and the time at which parties' consent to arbitration depend on whether this consent is analyzed from the perspective of the respondent (the host state) or the claimant (the investor) (Chaeva, 2023).

Host states generally consent to arbitration by offering investors the possibility to bring disputes to an arbitral tribunal either by way of its national legislation or other unilateral acts, through IIAs, or through clauses contained in contracts entered into between investors and the respondent state. This consent is normally considered as "self-sufficient" and constituting a "standing offer", meaning that it is not necessary for the host State to consent again at a later point. The way investors, in turn, consent to arbitration is by submitting investment claims or other similar procedural actions like filing a notice of dispute when applicable (Chaeva, 2023).

To this end, the following paragraphs will analyze what is typically contained in IIAs in relation to tribunals' jurisdiction, as well as the different interpretations that investment tribunals have made of those provisions. All this with the aim of highlighting the main aspects to be considered when pursuing a correct implementation of the TS practice to gain coverage from a specific IIA.

Jurisdiction *ratione personae*. Determining who should qualify as an investor is extremely important. As said in previous sections, the main goal of IIL is to protect foreign investment. Thereby, the nationality of a particular investor is one of the elements that determines the foreignness of a certain investment and, by doing so, the applicability of a specific IIA. Precisely, it is the investor's nationality what defines from which IIAs it may benefit; a particular investor will not be able to rely on an IIA if it fails to prove that it holds the nationality of one of the parties to the treaty. In other words, an investment tribunal will only have jurisdiction over a claim brought by a given investor, if it is a national of one of the parties to the IIA that is being invoked (Dolzer, Kriebaum, & Schreuer, 2022). For this reason, being able to qualify as an investor under a particular IIA constitutes one of the most important elements that need to be considered when analyzing the possibility of implementing the TS practice. Consequently, it is also important for interested investors to be aware and understand the different discussions that have been raised in relation to the jurisdiction *ratione personae*.

In pursue of this purpose, the following paragraphs will discuss some of the controversial aspects that have surrounded the subject of nationality and that are central to the practice of TS and its successful implementation[10]. Naturally, these controversies have appeared most

[10] Not all controversial or debated issues will be discussed in this thesis, however. Particularly, debates around double nationality or the requirement of legal personality to access ISDS will not be covered, since this thesis's main focus corresponds to the structuring or restructuring of investments with the aim of gaining coverage from IIAs through TS, which ultimately is performed in most times through the incorporation of legal persons.

frequently in relation to legal entities because the nationality of natural persons corresponds to a much more settled discussion in international law.

However, in the case of legal entities the question of who is a national of a certain country and, therefore, who is to be regarded as a protected investor under a particular IIA does not have a simple answer. In fact, the different legal systems, domestic jurisdictions, and IIAs use a variety of different criteria to define whether a certain legal person is indeed a national or an investor of a particular country (Dolzer, Kriebaum, & Schreuer, 2022).

Regularly, there are two main criteria that are used to determine corporate nationality: *the incorporation test* and *the main seat of business test* ("*siège social*"), being the former the one found more often (Dolzer, Kriebaum, & Schreuer, 2022). According to the first of these tests, a legal entity can be regarded as a national of a certain country if it has been incorporated in said country in compliance with the country's laws. On the other hand, the main seat of business test states that the nationality of a certain legal person will be determined by the economic bond the legal person has with a specific country, namely: the fact that the legal entity's effective management is based in said country (Lee E. , 2015). Approximately 40 per cent of IIAs use the incorporation test as the sole criterion for determining nationality (García Olmedo, 2020).

Some examples of treaties that implement the incorporation test into their definition of investor are the Energy Charter Treaty, which defines a corporate investor as "a company or other organization orrganised in accordance with the law applicable in that Contracting Party", and the IIA between Armenia and Japan, which describes a corporate investor as being an *enterprise* of a contracting party, subsequently defining *enterprise* as "any legal person or any other entity duly constituted or orrganised under the applicable laws and regulations, whether or not for profit, and whether private or government owned or controlled, including any

corporation, trust, partnership, sole proprietorship, joint venture, association, organisation or company."

On the other hand, an example of an IIA that implements the main seat of business test into its definition of investor is the IIA between Argentina and Germany, which stipulates that the term investor of a contracting party means, in the case of corporations, all legal persons, as well as all commercial companies and other companies or associations with or without legal personality having their headquarters in the territory of one of the Contracting Parties, whether or not their activity is for profit.

As mentioned before, these two criteria constitute the most frequent way of determining corporate nationality in IIAs. However, their frequency is not the only characteristic that accompanies them. The incorporation and the main seat of business constitute the most permissive and easily met requirements when determining a legal entity's nationality. In general terms, both ways of determining nationality correspond with strictly formal requirements that can be easily met by so-called mailbox companies (Chaisse, 2015).

After all, on the one hand, incorporating a legal entity nowadays is extremely easy in most jurisdictions and, on the other hand, having the seat of business in a particular country with no other requirements to be met can also be relatively easy to attain; establishing a small operation charged with making the management decisions is not hard to achieve.

For these reasons, there are some IIAs that seek to go beyond the formalistic approach of the incorporation and the main seat of business tests by setting higher standards for an investor to be considered as a national of a specific country. These other criteria correspond to the *substantial business activities theory* and the *control theory* (Chaisse, 2015). The former of these requires a bond of economic substance between the investor and the country whose nationality it

claims in the form of genuine and substantive economic activity (Dolzer, Kriebaum, & Schreuer, 2022). In words of the Aris Mining Corporation (formerly known as GCM Mining Corp. and Gran Colombia Gold Corp.) v. Republic of Colombia arbitral tribunal, in order for a set of business activities to be of substance, they "(…) may not be mere cursory, fleeting or incidental, but must be of sufficient extent and meaning as to constitute a genuine connection by the company to its home State" (Gran Colombia Gold Corp. v Republic of Colombia, 2020, Decision on the Bifurcated Jurisdictional Issue, para. 137).

"Substantial", however, does not mean material. In this regard, the Limited Liability Company Amto v. Ukraine arbitral tribunal concluded in its award that: "(…) '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" (Limited Liability Company Amto v. Ukraine, Award, 2008, para. 69).

In other words, what the qualifying adjective of "substantial" seeks is to exclude from a particular IIA's scope of protection so-called mailbox or shell companies: legal persons that exclusively exist to satisfy formal requirements in order to obtain legal personality in a particular legal system.

The latter, in turn, the control theory, stipulates that the nationality of an investor stems from the country from which it is controlled, i.e., for a legal entity to be considered as national of a certain country, it must be controlled by nationals of said country (Ziadé & Melchionda, 2015). In other words, the control theory requires that the beneficial owners of a given legal person be nationals of the home state party (Chaisse, 2015).

Despite its relative advantages compared to the other traditional criteria, very few IIAs refer to the control theory (García Olmedo, 2020). Furthermore, according to some authors, the

efforts by states of implementing additional criteria such as the control theory have not significantly restricted the practice of TS, especially in cases where the applicable IIA provides for the establishment of jurisdiction through other means (Lee J. , 2015).

An example of an IIA that uses a form of the substantial business activities theory is the Singapore-Myanmar IIA, which defines enterprises as being "(…) any legal entity constituted or organised under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, and **engaged in substantive business operations** in the territory of that Party (…)." Alternatively, an example of an IIA that uses the control theory for its definition of investor is the Germany-Antigua and Barbuda IIA, which requires the legal entity to be controlled directly or indirectly by citizens of either Germany or Antigua and Barbuda, depending on the case.

Despite the positive objectives they pursue, these two efforts by states of setting harder to achieve requirements in order for a particular legal entity to be able to claim a nationality have not come without difficulties to implement them and, on the contrary, have in many cases resulted in controversy. In regard to the substantive business activities theory, the main challenge that arises when interpreting said provisions is determining what constitutes a *business activity* and at what point should it be considered *substantive*.

For some authors, the term *substantial business activities* requires a company to be "(…) engaged in buying, selling and contracting in that territory beyond the normal activities or functions of its mere corporate existence (…)" (Jagusch & Sinclair, 2008, p. 19). Additionally, a company would also be expected:

"(…) (1) to have employees in the territory of the Contracting Party in which it is organized carrying out assignments in furtherance of the business; (2) to have resident managers

involved in a hands-on manner in the actual decision-making of the business; (3) to be party to substantial transactions in the Area of the Contracting Party associated with the furtherance of the business; (4) to pay taxes to the treasury of that Contracting Party in relation to profits earned from these transactions; and (5) to engage in procurement locally of inputs for the business (Jagusch & Sinclair, 2008, p. 19).

Arbitral tribunals' interpretation of this term has also been in these same lines. For instance, the tribunal in Pac Rim Cayman LLC v. Republic of El Salvador asserted that the requirement of substantial business activities, in the case of holding companies, required the holding company to have a board of directors, board minutes, a continuous physical presence, a bank account and an active holding of the shares in subsidiaries as opposed to nominal, passive, limited and insubstantial activities (Pac Rim Cayman LLC v. Republic of El Salvador, Decision on the Respondent's Jurisdictional Objections, 2012).

In the same way, the definition and scope of the term "control" represents a highly discussed and unresolved subject as well. The main controversy regarding this term relates to whether "control" requires just a mere legal or formal control or if, on the contrary, an effective control is needed. In most cases, responding states have argued that the control theory requires for an effective control to be present. Nonetheless, claimants have usually defended the opposite argument (Banifatemi, 2018).

Regarding the question of what represents *control* over an investment, arbitral tribunals have generally concluded that the most frequent forms of control constitute "shareholding, voting rights, decision-making structures, nationality of the management or board of directors, technical know-how provided by a foreign national, etc." However, tribunals' decisions towards resolving the question of whether control over an investment must correspond to mere legal

control or rather an effective one have been much more inconsistent and have left the discussion unresolved (Baumgartner, Treaty Shopping in International Investment Law, 2016).

In relation to this discussion, the following observations must be made. First, tribunals have been consistent in concluding that owning a majority shareholding is evidence of control in itself, while minority shareholdings are never to be considered alone as a source of control. To this extent, tribunals have chosen a more formalistic approach, rather than an effective one. Nevertheless, some arbitral cases have shown tribunals' willingness to analyze additional criteria and, therefore, going beyond the analysis of formal or legal control (Banifatemi, 2018).

For instance, the tribunal in Liberian Eastern Timber Corporation v. Republic of Liberia took its analysis beyond the mere finding of the investment being one hundred per cent owned by a French national and went on to examine other elements such as the decision-making structure of the legal entity and its management. According to the tribunal, it found that control over the investment did not only stem from the one hundred per cent French shareholding, but also:

> (…) effective control in the sense that, apart from French shareholdings. French nationals dominated the company decision-making structure. It appears from the evidence presented that a majority, if not all, of Letco's directors, as well as the General Manager, were at all times French nationals (Liberian Eastern Timber Corporation v. Republic of Liberia, Award, 1986, para. 16.5).

The need for additional elements of control has also been required by arbitral tribunals in which there was already a foreign majority shareholding. For example, in the case of Caratube International Oil Company LLP v. The Republic of Kazakhstan, the arbitral tribunal required proof of effective control despite the existence of majority shareholding. In this regard, the tribunal stated that although majority shareholding "(…) implies a presumption of control (…), it

found that legal control does not in itself and in all cases constitute sufficient proof of control (Caratube International Oil Company LLP v. The Republic of Kazakhstan, Award, 2012, para. 382).

The same applies for opposite cases in which control cannot be concluded from shareholding alone, so tribunals have agreed to examine other elements to determine whether there is control or not. One such case, for example, was Vacuum Salt Products Ltd. v. Republic of Ghana.

In this case, the tribunal concluded that foreign control "(…) does not require, or imply, any particular percentage of share ownership (para. 43)." For this reason, it asserted that, while "(…) 100 percent foreign ownership almost certainly would result in foreign control, by whatever standard, and that a total absence of foreign shareholding would virtually preclude the existence of such control (…) (para. 43)", each case must be analyzed in its own context. Finally, according to this conclusion, the tribunal established that the smaller "(…) the percentage of voting shares held by the asserted source of foreign control, the more one must look to other elements bearing on that issue (…) (para. 44)", noting that an arbitral tribunal "(…) may regard any criterion based on management, voting rights, shareholding or any other reasonable theory as being reasonable for the purpose (…) (para. 44)" of establishing control over an investment. (Vacuum Salt Products Ltd. v. Republic of Ghana, Award, 1994).

Another frequent discussion that takes place when analyzing IIAs' provisions requiring control of certain nationals in order to assign corporate nationality to a specific corporate vehicle is the question of up to which level of control must be analyzed. Does the analysis stop once the requisite nationality has been found or are tribunals obligated to continue their analysis up to the last tier of control? According to Baumgartner (2016), arbitral jurisprudence has been thoroughly

inconsistent when treating these questions: while some tribunals have stopped at the first tier of control[11], others have decided to go beyond that first tier[12].

Of particular importance for this discussion is the award in National Gas S.A.E. v. Arab Republic of Egypt. In this case, the claimant was a locally incorporated legal person controlled by two tiers of mailbox companies incorporated in the United Arab Emirates and ultimately controlled by an Egyptian national. In its award, the tribunal concluded that granting protection to a national of the host state "(…) would permit the use of the ICSID Convention for a purpose for which it was clearly not intended and it would breach its outer limits" (National Gas S.A.E. v. Arab Republic of Egypt, Award, 2014, para. 136). On this basis, the tribunal opted for analyzing beyond the first level of control and ultimately determining the beneficial owner of the corporate vehicle in order to deny jurisdiction.

In sum, arbitral tribunals have (i) generally regarded majority shareholding as a presumption of control that in many cases can be sufficient in itself, (ii) while also pointing out that majority shareholding can sometimes be insufficient in order to unequivocally determine control; (iii) asserting, therefore, that other forms of control such as voting rights and decision-making structures can also be used for the purposes of determining control both in cases where there are doubts over the effective control a majority shareholder really exercises and in cases in which a minority shareholder, despite its small shareholding, exercises some level of control over the investment. Additionally, it can also be concluded that (iv) arbitral tribunals have generally been inconsistent when it comes to deciding whether the search for control must end at the first tier or whether it should continue up to the beneficial owner of the investment. However,

[11] One example is Amco Asia Corporation and others v. Republic of Indonesia (ICSID Case No. ARB/81/1).
[12] For example, the tribunals in Société Ouest Africaine des Bétons Industriels v. Senegal (ICSID Case No. ARB/82/1) and Compagnie d'Exploitation du Chemin de Fer Transgabonais v. Gabonese Republic (ICSID Case No. ARB/04/5).

(v) there appears to be a somehow consistent set of arbitral precedents according to which the search for the beneficial owner of an investment is justified when the beneficial owner is a national of the host country.

In addition to the four different theories of criteria explained above, some states can also include combinations or alternatives of the theories in their IIAs. A common combination of criteria is the combination of the incorporation theory with the main seat of business theory (García Olmedo, 2020). For example, the now terminated ASEAN Investment Agreement had a combination of the incorporation and the seat of business theories, defining a company of a contracting party as being "(…) a corporation, partnership or other business association, incorporated or constituted under the laws in force in the territory of any Contracting Party wherein the place of effective management is situated." Likewise, most French IIAs require legal persons to be incorporated and have their main seat of business in the host country in order to qualify as a protected investor (García Olmedo, 2020).

Furthermore, other IIAs like the one entered into by Japan and the United Kingdom provide a combination of the incorporation test and the substantive business activities theory. This IIA defines a juridical person of a party as being a "(…) juridical person constituted or organised under the laws and regulations of a Party and engaged in substantive business operations in the territory of that Party."

In conclusion, it can be asserted that the jurisdictional limit known as jurisdiction *ratione personae* is defined by the IIA's choice of one of the four available criteria to determine the nationality of an investor or a combination of them. When one or more of these criteria is present in an IIA, arbitral tribunals will mostly refrain from deviating from the treaty's text and will instead stick to the applicable IIA's wording. For this reason, arbitral tribunals will not demand

other criteria that are not present in the IIA's text to be met in order to consider a particular legal person as a covered investor under the IIA (Liu, 2019). This was the case, for example, in Tokios Tokelés v. Ukraine, Saluka Investments B.V. v. The Czech Republic, and ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary.

According to this, an investor willing to comply with the first of many requirements: jurisdiction *ratione personae*, in order to successfully implement the TS practice, will have to analyze the target IIA's definition of investor and determine which of the four criteria (if not a combination of them) is present in the treaty's text. By establishing this and taking into account the different observations made throughout this section, the investor will be able to know in what way they will need to incorporate their investment as to being able to obtain the desired nationality.

The most beneficial of all criteria for the practice of TS will be, of course, the pure incorporation test for it simply requires the investor to be incorporated under the law of the contracting party. This, in turn, facilitates enormously the successful implementation of TS. Conversely, investors willing to structure or restructure their investments in order to gain coverage from an IIA will probably avoid IIAs providing for other *ratione personae* requirements such as the ones analyzed above because of their lack of flexibility (Ziadé & Melchionda, 2015).

Jurisdiction *ratione materiae.* Equally as important as determining who qualifies as an investor is the question regarding *what* qualifies as an investment under a specific IIA. After all, it is not only protected investors who can benefit from the provisions of an IIA, but investors who have made an investment in the terms of said treaty. For this reason, arbitral tribunals' jurisdiction is also determined by a second level of analysis or criteria known as the jurisdiction *ratione materiae*.

For Baumgartner (2016):

> (…) the question of which investor qualifies for protection is inseparable from the question of which investment qualifies for protection under a given investment treaty, a putative investor-claimant not only having to prove that he holds the requisite nationality, but also that he has made an investment protected under the invoked investment treaty (p. 140).

In general terms, an investment is usually described as being "(…) a collection of resources for a given period used for future profits" (Chaisse, 2015, p. 291). However, the formal definitions found in IIAs have different variations and scopes, as will be seen below.

Contrary to the case of jurisdiction *ratione personae*, the definitions of investment do not tend to vary considerably from IIA to IIA. In fact, most IIAs have included the *asset-based* definition approach for determining what qualifies as a protected investment (Baumgartner, Treaty Shopping in International Investment Law, 2016). According to this approach, an investment is usually any asset owned or controlled, directly or indirectly, by a protected investor. This broad definition is usually followed in most IIAs by a non-exhaustive list of what can be considered an investment.

For example, the Austria-Kyrgyzstan IIA provides for one such definition of investment. According to this treaty, an investment by an investor of a contracting party:

> (…) means every kind of asset in the territory of one Contracting Party, owned or controlled, directly or indirectly, by an investor of the other Contracting Party. Investments are understood to have specific characteristics such as the commitment of capital or other resources, or the expectation of gain or profit, or the assumption of risk, and include: (…) (non-exhaustive list of possible forms of investments).

Other IIAs that use this asset-based definition have, conversely, chosen to follow the general definition of investment with a closed-list of examples of what forms an investment can take.

Alternatively, there is a second approach to the definition of investment known as the *enterprise-based* definition. This type of definition is much less frequent in IIAs and provides that investments consist in "(…) the establishment or acquisition of an enterprise in the host state. By contrast, the asset-based definition is broader, covering more than just capital or resources that have crossed the borders with a view of creating an enterprise" (International Institue for Sustainable Development, n.d., section 5.2.1.).

Lastly, other requirements can be added to any of the above-described approaches to the definition of investment. For example, a particular IIA can stipulate that the investment, in order to be covered by the treaty, must be made, constituted or operated in compliance with the law of the host state. Likewise, other provisions can add to the definition of investment the requirement for it to contribute to the economic development of the host state in a specific way (International Institue for Sustainable Development, n.d.). For example, the Colombia-Turkey IIA requires that an investment must have the minimum following characteristics: "(…) (a) the commitment of

capital or other resources; (b) the expectation of gain or profit; and (c) the assumption of risk for the investor."

As mentioned above, the definition of investment can hardly be stated in abstract. On the contrary, what qualifies as a protected investment under a particular IIA will have to be determined on a case-by-case basis. To this end, IIAs that contain non-exhaustive (or in some cases exhaustive) lists of examples of what qualifies as an investment are essentially very useful for determining whether a particular asset qualifies as an investment or not. As an example, the Colombia-Turkey IIA provides the following non-exhaustive list of examples of what qualifies as a protected investment under the treaty:

> (a) movable and immovable property, as well as any tangible or intangible property rights, such as mortgages, liens, pledges and any other similar rights as defined in conformity with the laws and regulations of the Contracting Party in whose territory the property is situated; (b) reinvested returns, claims to money or any other rights having financial value related to an investment; (c) shares, stocks or any other form of participation in companies; (d) bonds, debentures and other debt instruments of a company, but does not include a debt instrument of a state or state company; (e) a loan to a company, but does not include a loan to a state or to a state company; (f) interests arising from the commitment of capital or other resources in the territory of a Contracting Party to an economic activity in such territory, such as under contracts involving the presence of an investor's property in the territory of the other Contracting Party, including turnkey or construction contracts, or business concessions conferred by law or by contract, including concessions related to natural resources; (g) intellectual property rights, including, among others, copyrights and related rights, and industrial property

> rights such as patents, manufacturers brands and trademarks, trade names, industrial designs, technical processes and intangible assets such as know-how and goodwill.

As can be seen from the above-cited list of examples of investments, determining what is to be considered as a protected investment under the Colombia-Turkey IIA constitutes a somehow easy task. Even more so, considering the fact that the definition contained in the treaty also provides a list of exclusions, as follows:

> (a) investments which are in the nature of acquisition of shares or voting power amounting to, or representing of less than ten (10) percent of a company through stock exchanges; (b) public debt operations; (c) claims to money arising solely from: (i) commercial contracts for the sale of goods and services by a national or legal entity in the territory of a Contracting Party to a national or a legal entity in the territory of the other Contracting Party; or (ii) credits granted in relation with a commercial transaction.

All these examples of protected forms of investments, as well as the exclusions, provide for a high certainty regarding what is to be considered as a protected investment under the Colombia-Turkey IIA. This is the case for many other treaties.

For some authors, the broader the definition of investment, the stronger the incentive there is to invest; conversely, the narrower the definition, the weaker the incentive because of the high risk that the lack of protection involves. Evidently, the asset-based approach to the definition of investment, together with the non-exhaustive list of examples, as opposed to the closed-list variant constitutes the broadest definition that can be found in IIAs (Chaisse, 2015).

Despite this level of jurisdiction being much more straight-forward than the jurisdiction *ratione personae*, there are nonetheless some issues that have generally been discussed and have sparked controversy in some arbitral proceedings. Probably the most prominent discussion that

has arisen in relation to the jurisdiction *ratione materiae* is whether an indirect investment and a passive investment should be considered as qualifying investments.

A particular case of passive investments is shareholding. For many years, arbitral tribunals have discussed whether the mere ownership of shares constitutes an investment under the provisions of IIAs. In general, the tribunals' decisions have leaned towards accepting shareholding as protected investments in most cases. This reasoning has even been applied to the so-called portfolio investments, which are those investments made in companies that do not involve direct control i.e., minority shareholdings. In regard to this, however, it must be noted that some IIAs explicitly exclude portfolio investments from protection (Ho, 2020). In relation to indirect investments, tribunals have almost unanimously found them to be covered by IIAs, enabling that way the structuring of investments through several corporate layers (Batifort & Larkin, 2022).

Despite this consensus surrounding the protection of both passive as well as indirect investments, there have been some cases in which exceptions have been made by arbitral tribunals. One such case was HICEE B.V. v. The Slovak Republic, in which a dispute arose over a set of measures allegedly affecting the claimant's indirect investment, through a Slovakia-incorporated holding company, in two local companies in the health insurance business. In relation to the possibility of that indirect investment being protected by the Netherlands-Slovak Republic IIA, the arbitral tribunal concluded the following:

> It is not enough for the Claimant to say that HICEE suffered a loss via the effect of national law on that business, unless the loss followed in some direct sense from a treaty breach. When the Claimant says that "investment treaty jurisprudence" gives a shareholder standing to pursue claims for damage to the assets of a company in which it

> holds shares, that is not a proposition that can be upheld by the Tribunal in so sweeping a form, given the default position in international law that the corporate form is recognized as legally distinct from the shareholders, and confers on the corporate entity the capacity to assert claims for damage suffered to it or its property.192 The true position, as the Tribunal understands it, is that the admissibility of shareholder claims depends upon the provisions of the investment protection treaty in question, and that investment protection treaties very frequently make provision to allow for shareholder claims, either explicitly or by necessary implication.193 The position, in other words, is controlled by the treaty,194 and the Tribunal can see no justification for calling into play a supposed proposition of general law in order to change or override what the treaty itself provides (para. 147)" (HICEE B.V. v. The Slovak Republic, Partial Award, 2011).

The tribunal, therefore, decided to not grant protection to the indirect investment on the basis of the IIA's text.

Another example of arbitral tribunals taking a different stance in relation to the need of the investment being an active investment is the Standard Chartered Bank v. The United Republic of Tanzania tribunal. This tribunal, based on the wording of the Tanzania-United Kingdom IIA, concluded that an active relationship between the investor and the investment was needed. According to the tribunal, the existence of such an active relationship could be proved through evidence showing that "(…) the claimant funded the investment or that the claimant controlled the investment in an active and direct manner (…) (para. 230)", later arguing that "[p]assive ownership of shares in a company not controlled by the claimant where that company in turn owns the investment is not sufficient" (Standard Chartered Bank v. The United Republic of Tanzania, 2012, para. 230).

In addition to the discussion surrounding the need for investments of either being active or direct, the substance of the investment is also a usual point of discussion regarding jurisdiction *ratione materiae*. As explained above, some IIAs stipulate specific substantive requirements that investments must meet in order to gain coverage from the treaty. However, absent said provisions, arbitral tribunals have sometimes been faced with the question whether investments that do not involve substantive economic expenditures can really be regarded as investments under a specific IIA. Particularly controversial, have been the cases involving shareholdings bought at nominal prices (or even for free).

In these cases, respondent states have tried to argue against the protection of said investments on the basis that the investment lacks economic motivation. However, arbitral tribunals have been wary of disregarding investments on the basis of their lack of economic impact or motivation. In Saluka Investments B.V. v. The Czech Republic, for instance, the tribunal concluded that an investment could not be disqualified only because the claimant had purchased the shares at low prices. This position was then restated by the Caratube International Oil Company LLP v. The Republic of Kazakhstan tribunal.

Likewise, other tribunals have asserted that nominal price payments of shares are not prohibited and should therefore not be taken as reasons for the disqualification of a particular investment. In Société Générale in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic, the tribunal concluded, in relation to the acquisition at nominal price of some shares, that:

> The parties have extensively discussed whether a US$ 2 purchase price can be considered an investment. If this were the only element involved in such a transaction doubts could legitimately arise about its meaning, but in fact the transaction includes many other

> elements, such as the potential market value of the shares purchased, contract rights related to the concession and other claims and rights to benefits having an economic value. All such elements are specifically listed in the definition of investment under Article 1 of the Treaty. The purchase of property for a nominal price is a normal kind of transaction the world over when there are other interests and risks entailed in the business. To the extent that the purchase price might include a discounted value and hence entail a form of compensation for the distressed state of a company (Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic, Award on Preliminary Objections to Jurisdiction, 2008, para. 36).

From this case, as well as the Caratube International Oil Company LLP v. The Republic of Kazakhstan, it can be concluded that, in principle, the payment of a nominal price does not in itself automatically disqualify a certain investment if there are other elements that allow the tribunal to conclude that the investor had the real intention of making an investment instead of just the objective of undergoing a restructuring for the purpose of gaining coverage from an IIA.

This, in fact, was the conclusion at which the Phoenix Action, Ltd. v. The Czech Republic tribunal arrived after analyzing the facts of the case:

> The Tribunal considers that the existence of a nominal price for the acquisition of an investment raises necessarily some doubts about the existence of an "investment" and requires an in depth inquiry into the circumstances of the transaction at stake. If there is indeed a real intent to develop economic activities on that basis, the existence of a nominal price is not a bar to a finding that there exists an investment (Phoenix Action, Ltd. v. The Czech Republic, Award, 2009, para. 119).

Lastly, another question that usually arises regarding jurisdiction *ratione materiae* is whether investments must be made in good faith or not. However, it must be noted that the role of the principle of good faith in general will be analyzed in depth in following sections. Therefore, the present section will stop at just pointing out the existence of the discussion, which will be later resumed.

In conclusion, there are two main approaches at defining what qualifies as an investment in IIAs: the asset-based approach and the enterprise-based approach, being the former the most frequent form found in IIAs. Additionally, these definitions can be complemented by adding additional requirements such as the need of contribution to the host state's economy, the economic motivation of the investment, the presence of good faith while making the investment, etc. Finally, most IIAs also tend to contain either non-exhaustive lists of potential forms of investments or closed lists that establish what is to be considered as an investment.

Furthermore, the discussions regarding the viability of investments being either passive or indirect have mostly come to the conclusion that neither of these characteristics can by itself completely disqualify a certain investment from being protected under a given IIA. On the contrary, the general rule is that both types of investments are to be considered in most cases as protected.

However, it is a tribunal's task to analyze on a case-by-case basis whether a specific passive or indirect investment does indeed qualify as a protected investment. Even more so when taking into account a third usually discussed characteristic of some investments which is their motive i.e., the good faith (or lack thereof) behind the reasons of the decision to invest. This way, a certain arbitral tribunal, when analyzing whether a specific investment should qualify for protection under an IIA, must also take into consideration the reasons behind said investment.

For all these reasons, an investor willing to benefit from the practice of TS would have to analyze the definition contained in the IIA whose protection is desired and determine what type of definition of investment it contains, as well as checking whether additional requirements are added to the definition. Of course, IIAs with asset-based definitions, non-exhaustive list of examples, and no additional requirements will be the most attractive alternatives for investors willing to implement the TS practice.

As a concluding remark in relation to the jurisdiction *ratione personae* and jurisdiction *ratione materiae*, it should be noted that these two levels of jurisdiction are sometimes referred as being the "weaker gatekeepers of eligibility for treaty protection" (Ho, 2020, p. 525). Because, even though the third jurisdictional limit that will be analyzed in the following section (jurisdiction *ratione temporis*) is well defined in both IIAs and customary international law, the truth is that "(…) the definitional limits of a protected investment and a protected investor tend to follow the text of the investment treaty" (p. 525), which makes it much more easy for investors willing to benefit from TS to take advantage of certain treaty provisions (Ho, 2020). Taking this into account, it can be concluded that these two levels of jurisdiction should be the first to be analyzed by investors when deciding to perform the TS practice.

Double-barreled / Two-fold test. Before continuing with the analysis of the third and last element of an arbitral tribunal's jurisdiction, a brief mention of the so-called "double-barreled", "double keyhole", or "twofold" test must be made. According to this test, an arbitral tribunal must verify both its general as well as special jurisdiction *ratione personae* and *ratione materiae*. These two levels of jurisdiction must be present for an arbitral tribunal to have jurisdiction and be constituted under the ICSID Convention. For this reason and given that the ICSID is the most frequent forum in which investment arbitrations usually take place, it is important to undertake the analysis of this concept. This becomes even more important if it is considered that some non-ICSID tribunals have to a certain extent applied the "objective" criteria of the double-barreled test when determining their jurisdiction (Fahrner, 2023).

As mentioned above, for an arbitral tribunal to have jurisdiction over a specific claim under the ICSID Convention, it must establish its jurisdiction under both article 25[13] of said convention (the objective test) and the relevant provision in the IIA that contains the host state's consent to arbitration (the subjective test). Thus, in addition to all the conclusions set out in the previous two sections of this thesis, it is also important to consider that for TS to be successfully

[13] The relevant provisions of article 25 of the ICSID Convention are the following:

"(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) "National of another Contracting State" means:

(…) and (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

(…)"

implemented, investors must correspondingly pay close attention to the aforementioned objective test (Fahrner, 2023).

For this part of the test to be passed, arbitral tribunals must, therefore, establish that the dispute that gave rise to the claim arose "directly out of an investment". However, the term "investment" is not defined in the ICSID Convention. Because of this, it has been the task of arbitral tribunals to give this term a definition. On this basis, the so-called "Salini test" was developed by the arbitral tribunal in the previously mentioned Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco case (Fahrner, 2023). According to the Salini test, an investment must cumulatively[14] satisfy four criteria: it must have represented a (i) contribution (ii) of a certain duration, (iii) a risk, and lastly (iv) a contribution to the economic development of the host state[15] Moreover, arbitral tribunals must also ascertain their jurisdiction on the basis of article 25(2)(b), as cited in footnote 15 (Fahrner, 2023).

Despite some arbitral tribunals having refused to apply the double-barreled test, the truth is that this test constitutes a generally accepted requirement that must be met for a given tribunal to have jurisdiction over a specific claim. For this reason, it is important for investors willing to benefit from the TS practice to make sure that the structuring or restructuring of their investment not only meets the jurisdiction *ratione personae* and *ratione materiae* requirements outlined in the applicable IIA, but also that it can pass the first prong of the two-fold test as described in the previous paragraphs.

[14] This corresponds to the general consensus of most arbitral tribunals that apply the Salini test. However, some other tribunals have opted to analyze the criteria in a non-cumulative way.
[15] This last criterion is not completely undisputed.

Jurisdiction *ratione temporis.* The third and last one of the elements that must be present for an arbitral tribunal to have jurisdiction over a certain dispute relates to the timing of the investment and is generally referred to as jurisdiction *ratione temporis*. This third level of a tribunal's jurisdiction corresponds to the least controversial one when it comes to the practice of TS for its boundaries have been very well determined both by arbitral tribunals as well as IIAs. In principle, in order for an arbitral tribunal to have jurisdiction *ratione temporis* the putative investor-claimant must have been a national of the contracting party and be the owner of a qualifying investment by the time the investment obligation of the host country was allegedly breached (Baumgartner, Treaty Shopping in International Investment Law, 2016). This requirement corresponds, therefore, to an application of the principle of non-retroactivity under customary international law (Liu, 2019).

One thing must be clarified relating to this and it is the meaning of the entry into force of the agreement, which must not be understood to be, in all cases, the date in which the treaty entered into force for the host country, but rather, in some cases, as the date in which —so to say— it entered into force for those investors that only existed after the treaty's entry into force.

Additionally, it has also been generally concluded by arbitral jurisprudence that the investor must maintain the nationality of the host country up until the moment it presents the claim. This means that there is a requirement of continuous nationality between the time at which the dispute arises and when the affected investor presents the claim against the host state. Beyond that point, there is no generally accepted requirement for investors to maintain the host state's nationality throughout the arbitral process and up until the arbitral award[16] (Baumgartner,

[16] In Loewen Group, Inc. and Raymond L. Loewen v. United States of America (a standalone case), however, the arbitral tribunal considered that "(…) there must be continuous national identity from the date of the events giving rise to the claim, which date is known as the dies a quo, through the date of the resolution of the claim, which date is known as the dies ad quem."

Treaty Shopping in International Investment Law, 2016). In fact, this discussion is, according to Baumgartner (2016), settled to the point that "(…) commentators and arbitral tribunals seem to be unanimous in their rejection of a continuous nationality requirement as postulated by the Loewen decision" (p. 172).

The exclusion of pre-existing disputes from the protection of IIAs comes, as mentioned above, from the non-retroactivity principle of customary international law. However, there are also numerous IIAs that expressly exclude their coverage for pre-existing disputes. These exclusions can come in the form of two different types of clauses. On the one hand, there are the so-called *single exclusion clauses*, which state that the temporal scope of a given treaty excludes disputes that have arisen before its entry into force. Meanwhile, on the other hand, the so-called *double exclusion clauses* provide for the exclusion both disputes that have arisen before the treaty in question entered into force, as well as those facts or acts that took place before the treaty entered into force but that give rise to a later dispute (Baumgartner, Treaty Shopping in International Investment Law, 2016).

Absent this type of clauses in a particular IIA, investment tribunals have nonetheless decided (particularly in TS cases) that they lack jurisdiction over pre-existing disputes. For instance, that was the conclusion reached by the tribunals in Generation Ukraine, Inc. v. Ukraine and Lao Holdings N.V. v. Lao People's Democratic Republic.

The tribunal in Phoenix Action, Ltd. v. The Czech Republic, for example, stated that it was "(…) limited *ratione temporis* to judging only those acts and omissions occurring after the date of the investor's purported investment" (para. 68) and had "(…) no jurisdiction *ratione temporis* over any alleged claims" (p. 71) that predated the claimant's restructuring despite the

fact the Czech Republic-Israel AII lacked an exclusion clause (Phoenix Action, Ltd. v. The Czech Republic, Award, 2009).

In this way, arbitral tribunals have somehow deviated from the general accepted rule according to which tribunals shall exclusively base their decisions on the IIA's text. However, this deviance from the general rule that guides investment tribunals' judgements has two plausible explanations. First, the one that has already been mentioned at the beginning of this section, which consists in the fact that the exclusion of pre-existing disputes has already reached the level of customary international law. Nevertheless, this argument is hardly defendable, according to some authors like Baumgartner (2016), given the high heterogeneity found in IIL concerning this subject.

For Baumgartner, the fact that there are so many IIAs that do not include express exclusion clauses is much rather an argument in favor of the contrary position: that absent an exclusion clause, an arbitral tribunal should indeed have jurisdiction over pre-existing disputes. The second reason adduced by some authors is the already mentioned non-retroactivity principle of customary international law, which is also codified in article 28 of the Vienna Convention on the Law of Treaties. This reason has frequently been invoked by various arbitral tribunals in cases involving TS (Ziadé & Melchionda, 2015).

On the basis of the aforementioned information, the analysis that arbitral tribunals are faced with when determining whether a particular investor and its investment are covered by a given IIA consists in determining at which point the investor obtained the nationality of the claimed host state. After determining that, the tribunal then needs to establish when the investment was acquired by the investor and, lastly, when the dispute between the investor and the host state arose. The latter of these moments must have happened after the moment in which

the investor obtained the host state's nationality for the investor to qualify for protection under the applicable IIA (Liu, 2019).

Naturally, determining when the investor obtained the host state's nationality and when it acquired its investment is a much easier process because the moments in time at which each of those things take place are easily determinable[17]. However, establishing when a dispute has arisen is a much more complicated subject and corresponds to jurisdiction *ratione temporis'* most controversial facet.

In customary law, the concept of "dispute" has been defined as the opposition between two parties' positions that subsequently gives basis to a claim (Liu, 2019). According to the jurisprudence of the Permanent Court of International Justice and the International Court of Justice —which has consistently been adopted by investment tribunals—, the concept of dispute has generally been understood as "(…) disagreement on a point of law or fact, a conflict of legal views or interests between two persons (…)" (Mavrommatis Palestine Concessions, 1924), in which "(…) two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations" (Advisory Opinion Concerning the Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, 1988).

Additionally, for Schreuer (2009) disputes:

> (…) must relate to clearly identified issues between the parties and must not be merely academic. This is not to say that a specific action must have been taken by one side or that the dispute must have escalated to a certain level of confrontation, but merely that it

[17] See previous sections for an explanation on when an investor obtains a particular nationality and when an investment becomes one.

> must be of immediate interest to the parties. The dispute must go beyond general grievances and must be susceptible of being stated in terms of a concrete claim (p. 94).

In the case of IIL, some arbitral tribunals have equated the rise of the dispute to the date on which the notification of the claim or the request of arbitration was made by the investor[18]. Despite the high degree of certainty that comes with this approach, given the easiness of identifying the rise of the dispute with a formal and clear date, some authors criticize this method because, in most cases, the events that actually cause the harm or injury to the investor tend to pre-date the formal presentation of the claim. For this reason, investors can benefit from the time-lag between the acts or facts causing the harm and the formal initiation of the dispute in the form of the notice or request for arbitration (Voon, Mitchell, & Munro, 2013).

Because of these flaws, other arbitral tribunals have rather focused on determining the time at which a dispute arises by analyzing the date of the harm or injury suffered by the investor[19]. This date usually refers to the moment at which, for example, an asset is expropriated, or a permit is revoked. This approach, however, is not without its own flaws. Primarily, the biggest shortcoming of trying to identify the rise of a dispute by determining when the harm or prejudice was done corresponds to the difficulty of said task. For instance, given the fact that harm can arise in many ways, it is difficult to establish a uniform criterion for determining when disputes have arisen.

In relation to this, the tribunal in Pac Rim Cayman LLC v. Republic of El Salvador concluded that the acts that cause harm to an investor can either be “one-time acts”, “continuous acts”, and “composite acts”. As described by the tribunal, one-time acts are those that take place

---

[18] See for instance Azurix Corp. v. The Argentine Republic, The Rompetrol Group N.V. v. Romania, and Ronald S. Lauder v. The Czech Republic.

[19] See for instance Europe Cement Investment & Trade S.A. v. Republic of Turkey, Cementownia "Nowa Huta" S.A. v. Republic of Turkey, and Pac Rim Cayman LLC v. Republic of El Salvador.

at precise moments in time and can have continuous effects, whereas continuous acts consist in one individual act "(…) extending throughout a period of time", and composite acts consist in "(…) a series of different acts that extend over (…)" a certain period of time (Pac Rim Cayman LLC v. Republic of El Salvador, Decision on the Respondent's Jurisdictional Objections, 2012). These different categories therefore difficult the process of determining the precise moment at which harm has been made to a particular investor (Voon, Mitchell, & Munro, 2013).

Of course, the determination of the time of the harm becomes much more difficult in cases involving continuous or composite acts. The non-issuance of a mining license, for example, over a prolonged period of time is difficult to interpret. When can it be concluded that the harm caused by the non-issuance was caused? On the contrary, one-time acts are essentially easier to analyze. For instance, the decision to expropriate a certain investment can naturally be equated to the moment at which the harm was caused. However, even in these cases one may argue that the dispute can even pre-date the actual decision that produces the harm. For example, the announcement of the potential decision of expropriation could be pointed out as being the moment in which the dispute arose.

According to the tribunal in Pac Rim Cayman LLC v. Republic of El Salvador, these difficulties have resulted in the need of incorporating more subjective criteria to what has traditionally been treated as a predominantly objective test: the identification of the start of the dispute. For instance, the tribunals in some restructuring cases "(…) have shown a tendency to place (possibly too) much emphasis on the investor's horizon on whether a dispute existed, with the consequence of equating the existence of a dispute with the timing of the alleged breach" (Baumgartner, Treaty Shopping in International Investment Law, 2016, p. 190).

This shift towards a more subjective analysis of the start of a dispute, rather than an objective and autonomous one[20] had, therefore, for a period of time, resulted in arbitral tribunals' preference towards equating the timing of the (alleged) breach to the timing of the dispute. This, in turn, gives the opportunity to well-advised investors to restructure their investments strategically and successfully in order to be able to pass the hurdle of jurisdiction *ratione temporis* (Watson & Brebner, 2018) .

Because of these complexities, it can also be said that equating the moment of the harm or injury with the time at which the dispute arises is also problematic because not in all cases the timing of the dispute is identical with the timing of the harm, injury, or —more technically— the breach of the investment obligation. Nonetheless, it is also true that in cases involving TS —especially those dealing with restructurings— "(…) arbitral tribunals have shown a tendency to equate the starting point of the dispute with the occurrence of the (alleged) breach (Baumgartner, Treaty Shopping in International Investment Law, 2016, p. 184).

In addition to all that has been said up to this point in relation to the rise of the actual dispute, there is another point of discussion involving jurisdiction *ratione temporis*, namely: the point in time at which the dispute was foreseeable. In contrast to the rise of a dispute (which was already sufficiently explained in previous paragraphs), the question of when a dispute was foreseeable also relates —to a certain extent— to the temporal scope of an IIA.

However, the foreseeability of a given dispute has lately been analyzed by arbitral tribunals in pivotal cases[21] as an admissibility element rather than a jurisdiction one. On this basis, arbitral tribunals have generally linked the foreseeability of a dispute to the doctrine of the

[20] See for instance Pac Rim Cayman LLC v. Republic of El Salvador and Lao Holdings N.V. v. Lao People's Democratic Republic.
[21] For example, the Philip Morris Asia Limited v. The Commonwealth of Australia case.

abuse of rights. For this reason, the question on whether an investment tribunal has jurisdiction (or whether a certain claim is admissible) when the dispute that gave basis to the claim was already foreseeable at the time of the obtention of the nationality will be discussed in the following sections (Pauker, 2018).

In conclusion, when it comes to the question of the temporal scope of IIAs (jurisdiction *ratione temporis*) three main observations must be made. First, it is to a great extent settled by arbitral jurisprudence that IIL in general and IIAs in particular are only intended to protect investors and investments that have obtained the qualifying nationality and been made, respectively, before the entry into force of the IIA. This both in cases where the applicable IIA contains an exclusion clause, as well as cases in which there is no such clause.

Second, it can be concluded that there are many different approaches to determining when a dispute has arisen. However, the most recently used approach consists in equating the timing of the dispute to the timing of the (alleged) breach. This, in turn, has resulted in a higher focus being put on the parties' perceptions on when the dispute has arisen, rather than focusing on factual criteria that allow for a more objective conclusion being made.

Lastly, it can also be highlighted that, despite its close relation with the subject of jurisdiction *ratione temporis*, the foreseeability of a certain dispute cannot be analyzed together with these other issues because arbitral tribunals[22] have recently pointed to the conclusion of this subject rather being connected to the admissibility of the claim and the possibility of declining protection of ILL on grounds of the abuse of rights doctrine.

[22] In particular, the tribunal in Philip Morris Asia Limited v. The Commonwealth of Australia.

For these reasons, an investor willing to benefit from the practice of TS (particularly those that perform back-end TS[23]) will need to restructure its investment before the rise of the dispute. This rise, according to the most recent and predominant arbitral jurisprudence, will correspond to the timing of the (alleged) breach as claimed by the investor, which arbitral tribunals will tend to analyze from the claimant's subjective perceptions rather than from objective facts. In any case, the uncertainty surrounding this subjective analysis will always find a more objective limit in the form of the timing of the actual act or measure that causes the harm to the investor.

However, as will be seen below, this relative time gap that recent arbitral jurisprudence apparently opened for investors to conveniently restructure in a timely manner before an actual dispute arises must be handled with care. The fact that arbitral tribunals have tended to be to a certain extent lenient as to determining when a dispute has arisen must not be abused by investors in a way that, although not failing to meet the jurisdiction *ratione temporis* requirement, does end up violating the abuse of rights doctrine, which will, in turn, lead to tribunals' decisions of denying claims on the basis of them being inadmissible.

Normative Limits

Closely related to the jurisdictional limits of TS to an extent that almost does not merit an independent category are the normative limits of this practice. In fact, most authors do not analyze these limits independently, but rather study them together with the jurisdictional limits. The reason for this is because arbitral tribunals mainly base their analysis of jurisdictional limits on the text of the applicable IIA. Because of this, it is hard to differentiate these two categories since one depends on the other and vice versa.

[23] Investors performing front-end TS Will always pass this third level of the jurisdiction test because of the nature of this alternative of TS.

However, for the purposes of the present work these limits will be analyzed independently, of course, in a much shorter way than the jurisdictional limits analyzed in the previous section. After all, most of what was said in that section can be directly applied to the present section.

In total, there are four ways host states can fine tune their IIAs to restrict the practice of TS. This can be done through the definition of investor, the definition of investment, the inclusion of a denial of benefits clause, or the inclusion of an exclusion clause. As can be deduced from the above, each one of these limits is directly related to one of the previously explained levels of jurisdiction. First, the definition of investor has to do with jurisdiction *ratione personae*. Second, the definition of investment relates to jurisdiction *ratione materiae.* Third, the exclusion clause, as mentioned before, is related with jurisdiction *ratione temporis*. And lastly, although less obvious, the so-called denial of benefits clause relates to the jurisdiction *ratione personae.*

The following paragraphs will briefly explain each one of these normative limits that can be present in an IIA's text and can be consciously implemented by host states in their treaty drafting procedures in order to contain to a higher degree the practice of TS.

Definition of investor. As mentioned in the section dedicated to jurisdiction *ratione personae,* the definition of investor can vary from IIA to IIA. This way, states can either choose to include narrow definitions of investors or they can implement broader definitions that will cover most if not virtually all possible types of investors. As explained before, states can choose to define a protected investor with recourse to either the incorporation theory (which is the least restrictive approach), the main seat of business theory (which lies somehow in the middle of the spectrum), the substantial business activities theory (which is the most restrictive approach, the control theory, or a combination of all these theories.

Definitions that contain less requirements, for example, those only requiring the investor to be incorporated in the host state, will prove much more lenient than other definitions that incorporate many different requirements, such as those that require for an investor to both be incorporated and have substantial business activities in the host state.

For this reason, as noted before, prudent investors willing to benefit from the practice of TS will need to pay close attention to the scope of the definition of investor contained in the IIA they are willing to gain protection from.

Denial of benefits clause. The denial of benefits clause ("DOBC") allows states to deny the benefits of an IIA to a legal person incorporated in a state party to the treaty that is owned or controlled by nationals of a third country not party to the IIA and does not have an economic connection to that state. This economic connection would be measured in terms of how substantial the business activities of the legal person are in the host state or whether it is owned or controlled by a national of a state party to the IIA (Dolzer, Kriebaum, & Schreuer, 2022).

In general terms, the DOBC constitutes an alternative for states to keep mailbox or shell companies from gaining coverage of their IIAs. By doing so, DOBCs constitute a good

alternative for states wanting to avoid arbitral tribunals' rather permissive stance towards mailbox or shell companies. They also represent treaty-based limitations to those cases of TS that can to a certain extent be pointed out as abusive, particularly those in which investors incorporate mailbox companies with the exclusive goal of gaining protection under a specific IIA, while frustrating IIL's goals and purposes[24] (Mistelis & Baltag, 2018).

DOBCs objectives can be regarded as being two. First, by limiting the advantages of the treaty to investors of the states that accepted the reciprocal treaty responsibilities, DOBCs contribute to the preservation of reciprocity. Second, DOBCs aid in preventing those instances of abusive TS, where investors arrange their investment solely to receive treaty protections without having actual operations in the host state (Bashir, 2023).

On this basis, DOBCs operate as a condition of the host state's consent to arbitration. The way this condition works is that, if the requirements contained in the wording of the DOBC are met, then certain or all benefits from the invoked IIA can be denied to the investor, particularly the right to access arbitration. The fulfillment of these requirements, depending on the specific DOBC, can be either alternative or cumulative, being the latter the most frequent case (Bashir, 2023).

In this regard, the most common requirements found in most DOBCs in order for them to be successfully applied by a respondent are the following. First, the legal person invoking the protection of the IIA must be owned or controlled by nationals of a third non-contracting party. Secondly, the legal person must usually not have substantial business activities in the host state. Thirdly, some DOBCs also require the legal entity to not have diplomatic relations with the host

[24] See previous section on "Perceptions towards Treaty Shopping".

state. And lastly, some DOBCs also provide for the denial of benefits when the legal person invoking the treaty is owned by nationals of the host state (Bashir, 2023).

Despite how straight forward DOBCs' application may appear, their analysis and application to particular cases have not been undisputed. For instance, one of the first questions that arose regarding the application of DOBCs was whether they could be applied retrospectively by states or if their application could only be prospective. In other words, it was questioned whether or not it was required for host states to actively and preemptively deny the benefits to specific investors before the claim was brought against them in order for the DOBC to be able to produce effects or whether states were allowed to invoke it after the commencement of the arbitration.

This question was promptly given a preliminary answer by arbitral tribunals. One of the first cases that dealt with this question was Plama Consortium Limited v. Republic of Bulgaria. In this case, the tribunal concluded that the DOBC contained in the Energy Charter Treaty could only produce prospective and not retrospective effects. This same position was later followed by multiple arbitral tribunals in cases like Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan, Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. Kazakhstan, and Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic.

However, some recent investment tribunals have implicitly or explicitly accepted a retrospective effect of DOBCs[25]. One renowned case involving the retrospective application of DOBCs was Pac Rim Cayman LLC v. Republic of El Salvador in which the tribunal found that, absent a specific provision in the DOBC requiring the exercise of the right to take place at a

[25] See for instance Empresa Eléctrica del Ecuador, Inc. v. Republic of Ecuador and Ulysseas, Inc. v. The Republic of Ecuador.

specific point in time, the DOBC could be invoked even after the commencement of an arbitration and it could be applied to investments made years before (Pac Rim Cayman LLC v. Republic of El Salvador, Decision on the Respondent's Jurisdictional Objections, 2012).

In fact, some authors have criticized the Plama Consortium Limited v. Republic of Bulgaria tribunal's position on grounds that it virtually renders DOBCs *de facto* useless or meaningless, because it is argued that host states will normally not be aware of a legal person fulfilling the requirements of a given DOBC before the rise of a dispute. This, in turn, would require host states to undergo excessively difficult processes of screening of all investors entering their country (Baumgartner, Treaty Shopping in International Investment Law, 2016).

For this reason, it has been suggested that the retrospective application of DOBCs constitutes a more reasonable analysis of the parties' intentions of incorporating one such clause into an IIA. Some commentators have even gone as far as saying that the mere presence of the DOBC in the IIA constitutes a sufficient and general notice for the investor to the effect of warning about the possibility of the eventual denial of benefits (Baumgartner, Treaty Shopping in International Investment Law, 2016).

The tribunal in Ulysseas, Inc. v. The Republic of Ecuador reached this exact conclusion by saying there were:

> (…) no valid reasons to exclude retrospective effects. In reply to Claimant's argument that this would cause uncertainties as to the legal relations under the BIT, it may be noted that since the possibility for the host State to exercise the right in question is known to the investor from the time when it made its investment, it may be concluded that the protection afforded by the BIT is subject during the life of the investment to the possibility of a denial of the BIT's advantages by the host State (p. 173).

Another complex discussion relating the application of DOBCs consists in the question of how the term substantial should be interpreted by arbitral tribunals. Especially, this situation is aggravated by the fact that not all, in fact, very few IIAs provide for a definition of the concept of "substantial business activities" (Mistelis & Baltag, 2018). To this effect, the tribunal in Limited Liability Company Amto v. Ukraine concluded that:

> (…) '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 (Limited Liability Company Amto v. Ukraine, Final Award, 2008, para. 69).

On the basis of this analysis, for example, the tribunal in the recent Aris Mining Corporation (formerly known as GCM Mining Corp. and Gran Colombia Gold Corp.) v. Republic of Colombia concluded that some business activities like renting office space, corporate functions like fundraising, accounting, and legal, as well as having eight full-time employees and several bank accounts containing more than 25 million US dollars represented clear evidence of substantial business activities being developed by an alleged mailbox company, according to Colombia's position in the case.

Nonetheless, these characteristics of Aris Mining Corporation's investment must not be interpreted by the readers of this thesis as proof that the substantiality of an investment is to be measured in terms of its intensity (as the fact of having bank accounts with millions of dollars would suggest), but they must rather understand the underlying rationale that was explained in

previous sections: substantiality is not equal to materiality or intensity, but it is much rather connected with the nature of the investment being much more than a mere formal legal person.

According to the previous paragraphs, it can be concluded that the concept of *substantial business activities* "(…) should imply that the investor is not a 'mailbox company' or a 'shell company', a legal entity which has not life of its own" (Mistelis & Baltag, 2018, p. 35). On the contrary, in order for a legal person to meet the substantial business requirement it is expected, at the minimum, to participate in transactions in the host state, to have employees involved in such transactions, to have resident managers, etc. (Mistelis & Baltag, 2018).

Another discussion arbitral tribunals have been faced with when analyzing the application of DOBCs is who has the burden of proof in cases in which one of these clauses is invoked. This question, however, has found a unanimous answer that the burden of proof rests on the denying states (Mistelis & Baltag, 2018). For instance, the tribunal in Generation Ukraine, Inc. v. Ukraine concluded that: "(…) the burden of proof to establish the factual basis of the 'third country control', together with the other conditions, falls upon the State as the party invoking the 'right to deny' (…)" (Generation Ukraine, Inc. v. Ukraine, Award, 2003, para. 15.7).

In conclusion, it is clear that DOBCs are a crucial tool that states can use to implement a policy of barring specified investor types from enjoying the advantages of IIAs in certain situations and under certain conditions (Banifatemi, 2018). For this reason, it is important for investors willing to benefit from the TS practice to first check whether the desired IIA contains a DOBC and subsequently analyze the scope and requirements provided in the clause. This because DOBCs tend to vary in their wordings from IIA to IIA.

However, it can be concluded, in general, given that the requirements contained in DOBCs are usually cumulative, that by avoiding the fulfillment of at least one of the requirements, investors can escape the risk of being denied the benefits of an IIA. Taking this into account, it is suggested that investors willing to undergo TS in relation to an IIA that contains a DOBC must carefully structure their investment in a way that guarantees the fulfillment of the substantial business activities since this requirement can easily be met. On the other hand, the control requirement constitutes a much harder to meet requirement because it constitutes the very nature of TS that the controllers of a particular legal person are nationals of a state not party to the invoked IIA.

Definition of investment. As mentioned in previous sections, states can also implement either restrictive or lenient definitions of investment which will have an impact on the number of different investments that will qualify as protected under a specific IIA. The more restrictive definitions will contain exhaustive lists of examples of what is to be considered as a protected investment and will provide lists of exclusions. On the other hand, less restrictive definitions will only contain non-exhaustive lists of qualifying assets.

Moreover, certain definitions of investment can contain additional requirements that must be carefully analyzed by investors willing to benefit from the TS practice, as mentioned before.

Exclusion clause. As explained, states can actively choose to exclude pre-existing disputes from the scope of a certain IIA. This way, the so-called exclusion clauses constitute an additional tool for states willing to better delineate IIAs' scope. However, as was described in the section dedicated to the jurisdiction *ratione temporis*, these clauses —although frequent in most IIAs— appear to not be necessary on the basis that most arbitral tribunals consider that IIAs' provisions are only applicable in a prospective manner.

In either case, investors willing to benefit from the TS practice will need to carefully analyze how the jurisdiction *ratione temporis* is regulated in the wanted IIA in order to make sure they fulfill the requirements contained in the treaty in regard to this subject.

The Principle of Good Faith as a Limit to Treaty Shopping

The last limit that exists on TS relates to the application of the abuse of rights or abuse of process doctrine (terms that will be used interchangeably in this section). This limit corresponds almost exclusively to a jurisprudential creation since there are virtually no treaties that have provisions relating this matter[26] (Pika, 2023).

The abuse of rights doctrine is a concretization of the general principle of law known as the principle of good faith. This principle is unanimously accepted as being part of customary international law. Additionally, it is also present in the Vienna Convention on the Law of Treaties, according to which treaties shall be interpreted with reference to the principle of good faith[27] (Liu, 2019) and has been recognized in multiple occasions by international courts, such as the International Court of Justice (Gaillard, 2017).

In general terms, the abuse of rights doctrine requires that rights shall not be used in an *abusive* way. It seeks to avoid situations in which the exercise of one person's or state's rights

[26] The most prominent exception is Article 294(1) of the United Nations Convention on the Law of the Sea.
[27] Arts. 26 and 31(1).

either impedes the enjoyment of another person's or state's own rights or is done for a purpose different from the one for which the right was created (Fukunaga, 2018).

This doctrine, therefore, finds its basis on the understanding that a person or state may have a valid right "(…) and yet exercise it in an abnormal, excessive or abusive way, with the sole purpose of causing injury to another or for the purpose of evading a rule of law, so as to forfeit its entitlement to rely upon it" (Gaillard, 2017, p. 32).

Given its nature of a general principle of law, its content is highly vague and abstract and must, therefore, be concretized in each particular case in which it is applied (Schill, 2017). Because of this vagueness and the potential risks associated with it, the application of the abuse of rights doctrine to IIL has garnered some critics (Söderlund & Burova, 2018).

Despite not being present in the text of most IIAs, arbitral tribunals have considered (in particular, recently) the use of this doctrine in IIL arbitral cases because of its "important social ordering function", as described by Baumgartner (2016). The application of the abuse of rights doctrine is justified on two main reasons. First, no right is *a priori* absolute and, therefore, limiting a right cannot be absolutely proscribed. Second, when a given right is used in an antisocial way, law —as a means of resolving social conflicts— helps in rebalancing the opposite interests that may arise from said abuse of a given right. In sum, limiting a certain right because it is being abused by the person that benefits from it is not only justified, but also to a certain extent wanted (Watson & Brebner, 2018).

In relation to this, it is commonly argued that as rights are conferred by society, their anti-social exercise cannot be allowed by society and can therefore be limited (Fukunaga, 2018). The function of the abuse of rights doctrine is consequently the rebalancing of "(…) countervailing interests as soon as policy decides that it is socially more advantageous to restrict a right in

favour of an interest which henceforth becomes a legal right" (Baumgartner, Treaty Shopping in International Investment Law, 2016, p. 203).

However, most scholars agree on the fact that, despite its importance as a way to avoid the unlawful exercise of rights and to keep social order, the abuse of rights doctrine must be understood as a "legal tool of last resort" because of the potential risks associated with its indiscriminate application. In fact, the vagueness and abstractness of the doctrine could certainly lead to arbitral tribunals having too much power if allowed to apply this doctrine in a discretionary manner. For these reasons, scholars have agreed on "(…) the subsidiary character of the abuse of rights doctrine, which should only be called upon once treaty interpretation has been unsuccessful in finding the required balance of countervailing interests" (Baumgartner, Treaty Shopping in International Investment Law, 2016, p. 203).

For some scholars, the abuse of rights doctrine "(…) has become the main limitation to the practice of treaty-shopping and nationality planning" (Liu, 2019, p. 58). In the specific case of TS, arbitral tribunals have found room for the application of the abuse of rights doctrine in two different scenarios. First, in cases in which the dispute was foreseeable for the investor and, second, in cases in which gaining coverage from a particular IIA constituted the predominant purpose of a legal person's restructuring.

But before explaining these two instances in which today's arbitral jurisprudence agrees the doctrine of abuse of rights can be applied to, it must also be noted that there is also a third scenario in which the abuse of rights doctrine has been applied in investment arbitration cases, namely: the need for investments to be made in good faith.

This was precisely the case in Phoenix Action, Ltd. v. The Czech Republic. In this case, the claimant was a newly incorporated Israeli legal person which had acquired the shares of two

Czech Republic-incorporated companies just a few months before presenting the claim. The beneficial owner of the Israeli company was a Czech national who had recently been charged with criminal charges of tax evasion and had fled the country on that account (Phoenix Action, Ltd. v. The Czech Republic, Award, 2009).

Under these circumstances, the arbitral tribunal found that for an investment to be protected by IIL it had to be made in accordance with host state laws and in good faith. On this basis, the tribunal concluded that the claimant's "(…) whole operation was not an economic investment, based on the actual or future value of the companies, but indeed, simply a rearrangement of assets within a family, to gain access to ICSID jurisdiction to which the initial investor was not entitled" (Phoenix Action, Ltd. v. The Czech Republic, Award, 2009, para. 140). For this reason, the tribunal found the investment to be an abuse of rights, which led to the tribunal dismissing the claim because it lacked jurisdiction *ratione materiae*.

Despite this precedent, most subsequent tribunals have not adopted the approach of the Phoenix tribunal. Some tribunals have even gone as far as directly rejecting said approach, a position that has also been held by scholars . For example, the tribunal in Saba Fakes v. Republic of Turkey adduced in its award that "(…) the principles of good faith and legality cannot be incorporated into the definition of Article 25(1) of the ICSID Convention without doing violence to the language of the ICSID Convention: an investment might be „legal" or „illegal," made in "good faith" or not, it nonetheless remains an investment" (Saba Fakes v. Republic of Turkey, Award, 2010, para. 112).

For this reason, as it was mentioned above, there are only two scenarios in which the abuse of rights doctrine has (somehow) constantly been applied to: cases in which the rise of dispute was already foreseeable, and cases in which the restructuring took place predominantly

on the purpose of gaining protection of a particular IIA. Hereinafter, these two instances will be explained.

The foreseeability of a dispute and the application of the abuse of rights doctrine in cases in which the dispute was already foreseeable by the time of the corporate restructuring have been subject of analysis on numerous occasions[28]. In these cases, arbitral tribunals have studied whether from the investor's point of view the dispute was already foreseeable in order to determine whether the restructuring constituted an abuse of rights.

However, the task of determining the foreseeability of a particular dispute from the investor's point of view is a highly subjective task that pertains the investor's personal motives. Therefore, arbitral jurisprudence's approach to this question has not been uniform and has, on the contrary, faced multiple challenges. After all, this high level of subjectivity has made it difficult for arbitral tribunals to reach straightforward conclusions and to easily prove the existence of an abuse of rights; hence the need for this doctrine to be a last resort tool as mentioned before (Liu, 2019).

Given this high level of subjectivity, arbitral tribunals have faced the need of objectifying the foreseeability of a dispute to subtract this variable from the investor's personal sphere. Nevertheless, these attempts on basing the analysis of a dispute's foreseeability on more objective facts have also not been very consistent (Baumgartner, Treaty Shopping in International Investment Law, 2016).

[28] Some cases in which this issue has been discussed are the following: Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic; Cementownia "Nowa Huta" S.A. v. Republic of Turkey; Aguas del Tunari, S.A. v. Republic of Bolivia; Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela; and Pac Rim Cayman LLC v. Republic of El Salvador.

Four slightly differing foreseeability tests have been proposed by four different arbitral tribunals. On the one hand, the Pac Rim Cayman LLC v. Republic of El Salvador tribunal argued that a foreseeable dispute corresponded to "a very high probability and not merely a possibility" of a dispute taking place. Conversely, the Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela tribunal settled for a standard that established that, a future dispute, to be considered as foreseeable, had to be "reasonably" foreseeable. The Lao Holdings N.V. v. Lao People's Democratic Republic tribunal, in turn, diverted to a certain extent from the concept of foreseeability and determined that an abuse of rights could take place in cases in which the dispute was "highly probable". Lastly, the tribunal in Alapli Elektrik B.V. v. Republic of Turkey asserted that a foreseeable dispute was when the investor can anticipate a specific future dispute as "a high probability and not merely as a general future controversy" (Baumgartner, Treaty Shopping in International Investment Law, 2016).

Out of these four slightly different tests, it can be adduced that the reasoning or tests of the Pac Rim, Lao Holdings, and Alapli Elektrik cases, are the most similar to each other and, hence, the most frequently used by arbitral tribunals. However, it can also be argued that the Tidewater tribunal's test is much more objective than the others. This has to do with the fact that the other three approaches place a higher emphasis on the investor's personal sphere and lack therefore a true objective analysis of whether the dispute was in abstract foreseeable.

For this reason, recurring to the alternative of determining whether a dispute was foreseeable on the basis of how *reasonably* foreseeable it was i.e., assessing whether a reasonable investor would have been able to foresee said dispute constitutes a much more objective test. Despite this higher objectivity, nonetheless, it must also be admitted that the

application of the reasonably foreseeable test does not eliminate entirely the unpredictability that may come with this analysis (Watson & Brebner, 2018).

Perhaps the most iconic abuse of rights case to this date, the Philip Morris Asia Limited v. The Commonwealth of Australia, constitutes both a consolidation, as well as a development of the application of this doctrine on cases of TS. The tribunal in this case developed a comprehensive analysis of all past jurisprudence on the abuse of rights doctrine, reaching very important and conclusive thoughts towards the end of its decision on jurisdiction and admissibility[29]. In this summary of past arbitral jurisprudence, the Philip Morris tribunal recognized and sided with many of the observations that have been made in regard to the subject of the abuse of rights doctrine in previous paragraphs.

For instance, the tribunal asserted that "it is clear, and recognised by all earlier decisions that the threshold for finding an abusive initiation of an investment claim is high" (para. 539), confirming, therefore, the nature of a "last resort tool" this doctrine has. Likewise, the tribunal argued that "(…) it is first and foremost uncontroversial that the mere fact of restructuring an investment to obtain BIT benefits is not per se illegitimate" (para. 540). Citing multiple other arbitral tribunals[30], the Philip Morris confirmed from the very start of its analysis that the practice of restructuring an investment is not illegal in itself (something that has been argued from the beginning of this thesis) (Philip Morris Asia Limited v. The Commonwealth of Australia, Award on Jurisdiction and Admissibility, 2015).

[29] Decision on jurisdiction and admissibility, paras. 538-554 (Philip Morris Asia Limited v. The Commonwealth of Australia, Award on Jurisdiction and Admissibility, 2015).
[30] In regard to this affirmation the Philip Morris tribunal cited the Tidewater, Mobil Corporation, Gremcitel, and Aguas del Tunari tribunals.

Finally, relating the question of the foreseeability test that must be applied in order to determine whether a certain restructuring constitutes an abuse of rights, the Philip Morris concluded that:

> (…) foreseeability rests between the two extremes posited by the tribunal in Pac Rim v. El Salvador—"a very high probability and not merely a possible controversy". On this basis, the initiation of a treaty-based investor-State arbitration constitutes an abuse of rights (or an abuse of process, the rights abused being procedural in nature) when an investor has changed its corporate structure to gain the protection of an investment treaty at a point in time when a specific dispute was foreseeable. The Tribunal is of the opinion that a dispute is foreseeable when there is a reasonable prospect, as stated by the Tidewater tribunal, that a measure which may give rise to a treaty claim will materialize (para. 554).

This way, the Philip Morris case represents a consolidation of the Tidewater approach at establishing when a dispute is foreseeable and, therefore, allows for conclusions to be drawn in relation to this subject.

The second of the scenarios in which arbitral tribunals have found an abuse of rights to be present is when a corporate restructuring performed by an investor has been made predominantly for the obtention of coverage under a particular IIA. For instance, the tribunal in Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela, after analyzing the facts of the case, decided that "(…) the main, if not the sole purpose of the restructuring was to protect Mobil investments from adverse Venezuelan measures in getting access to ICSID arbitration through the Dutch-Venezuela BIT" (Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation,

Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela, Decision on Jurisdiction, 2010, para. 190).

With this conclusion in mind, the tribunal —citing the Phoenix Action case— concluded that "(…) to restructure investments only in order to gain jurisdiction under a BIT for such disputes would constitute, to take the words of the Phoenix Tribunal, "an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs" (Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela, Decision on Jurisdiction, 2010, para. 205).

This position was later followed by two additional cases involving the same two Turkish companies: Europe Cement Investment & Trade S.A. v. Republic of Turkey and Cementownia "Nowa Huta" S.A. v. Republic of Turkey. The arbitral tribunal in the Cementownia case —citing the Phoenix tribunal again—, for instance, held that an investor:

> (…) that makes an investment, not for the purpose of engaging in commercial activity, but for the sole purpose of gaining access to international jurisdiction, does not engage in a bona fide transaction. Such a transaction is deemed not to be a protected investment and a party's creation of a legal fiction so as to gain access to an international arbitration procedure to which it was not entitled is an abuse which could be "détournement de rocedure" (para. 154).

The aforementioned shows that arbitral tribunals have constantly dismissed investment claims on the basis of the underlying corporate restructurings having been made with the sole (or at least predominant) purpose of gaining access to a specific IIA. Conversely, other arbitral tribunals, like the one in the National Gas S.A.E. v. Arab Republic of Egypt case, have argued

that where the restructuring is done in good faith and for legitimate reasons (like fiscal reasons), then an abuse of rights cannot be said to exist.

Another example of this position can be found in the Philip Morris case, where the tribunal argued that "(…) the main and determinative, if not sole, reason for the restructuring was the intention to bring a claim under the Treaty, using an entity from Hong Kong" and noted that it was "(…) not persuaded that tax or other business reasons were determinative factors for the Claimant's restructuring" (para. 584), suggesting that the presence of additional justifications for the restructuring could have potentially led it to a different conclusion (Philip Morris Asia Limited v. The Commonwealth of Australia, Award on Jurisdiction and Admissibility, 2015).

The obtention of coverage under a specific IIA cannot, therefore, be the sole reason for a corporate restructuring taking place. Instead, it must be one of different independent reasons motivating the decision. Gaining access to an IIA must be, as mentioned by the Philip Morris tribunal, an "ancillary" consequence of the restructuring and not its main and only purpose. Moreover, the Philip Morris tribunal's decision allows for the following conclusion to be drawn: a corporate restructuring with different independent justifications can be saved from being deemed as an abuse of rights (Watson & Brebner, 2018).

The relationship between the two scenarios explained above (the foreseeability of the dispute and the sole purpose theory) is not entirely clear. For some authors and in some arbitral cases, the two scenarios have been highlighted as not being cumulative and, therefore, the presence of only one of them has been considered to be sufficient for the application of the abuse of rights doctrine.

Furthermore, some authors like Baumgartner (2016) believe that the second of these elements, the sole purpose doctrine, should be laid to rest. In the opinion of this author, this

doctrine does not constitute an ideal tool for determining the presence of an abuse of rights because of the high subjectivity attached to it. For her, the difficulty with focusing too much on the purpose of the restructuring consists in the fact that corporate motives of a restructuring "(…) pertain inherently to the investor's horizon and are thus difficult to establish in the absence of objective criteria permitting the affirmation of bad faith" (p. 227).

For this reason, the application of the sole purpose doctrine can lead to it being enough for claimants to invoke additional reasons to debunk any potential doubts regarding the validity of their restructuring. On this basis, Baumgartner (2016) comments that the foreseeability criterion corresponds to a much more adequate standard to analyze in alleged cases of abuse of rights for it "(…) has the advantage of circumventing the highly subjective question of motivations (…)" (p. 227). Consequently, her opinion towards implementing the sole purpose doctrine is that the benefit of relying on it remains "questionable".

Nevertheless, there are other authors like Watson and Brebner (2018) who claim that there are sufficient reasons to argue that both of these two elements must be present for the abuse of rights to be correctly implemented and not constitute an overly discretional application of this "last resort tool". First, because a mere coincidence in the timing of a certain investment and the foreseeability of a given dispute cannot be regarded as sufficient prove of an abuse of rights. This is because, although —as recognized by the Philip Morris tribunal— it is "(…) accepted that the notion of abuse does not imply a showing of bad faith" (para. 539), some level of abusiveness is still needed in order to qualify a certain investment as an abuse of rights (Watson & Brebner, 2018).

This finds its support in the fact that the whole rationale behind the abuse of rights doctrine is that it is the duty of the IIL system through its investment arbitral tribunals to protect

the system from abusive manipulations in the form of protecting investments that the system was not designed for to protect (Phoenix Action, Ltd. v. The Czech Republic, Award, 2009).

For this reason, perhaps not directly necessary for evidence of bad faith to be present, but it is nonetheless generally accepted that at least some level of abusiveness must take place. This abusiveness, in turn, can only be deduced from the sole purpose test since the foreseeability of the dispute can only represent a presumption that a certain investment was made for reasons different than the act of investing in itself and cannot therefore be regarded as enough proof of the presence of an abuse of rights (Watson & Brebner, 2018).

This way, the analysis of the presence of an abuse of rights constitutes a two-level test comprised of a first, more objective analysis relating to the timing of the investment and its relation to the timing of the dispute and a second, more subjective analysis of the purpose of said investment. This means that in any given case the arbitral tribunal must be able to conclude that: (i) the restructuring took place at a time when, objectively, a particular dispute was already foreseeable; and (ii) the investor, subjectively, underwent the restructuring predominantly to obtain protection from a specific IIA (Watson & Brebner, 2018).

Second, and closely related to the first argument, it is also highlighted by some scholars that a purely objective test (as in only requiring the first of the elements to be proved) would probably lead to the tribunals' "(…) extraordinary power to dismiss valid claims as an abuse being wielded against claimants guilty of nothing more than unfortunate timing" (Watson & Brebner, 2018, p. 319).

Watson and Brebner (2018) propose, based on the above mentioned, what they call a "coherent framework" for the correct application of the abuse of rights doctrine. In order for arbitral tribunals to adequately make use of this doctrine, they would have to first determine

whether the restructuring occurred at a time when a dispute was foreseeable. Afterwards, if it established that the dispute was indeed foreseeable, a rebuttable presumption would arise "(…) that the restructuring was intended to secure treaty protection for that dispute" (p. 320). On this basis, the onus would be placed on the claimant who would then be forced to displace said presumption. Reversing the burden of proof in this manner would, therefore, help avoid the difficulties brought by the high subjectivity that is inherent to the sole purpose doctrine (Watson & Brebner, 2018).

In conclusion, investors willing to benefit from the TS practice will have to take into account two different variables in relation to the abuse of rights doctrine. First and foremost, investors performing TS —particularly those performing back-end TS— will have to carefully pay attention to the foreseeability of the dispute. In particular, investors will have to make sure that, by the time they undergo the corporate restructuring, the dispute is not *reasonably* foreseeable.

Of course, the definition of what can be highlighted as reasonably foreseeable will vary from case to case, but in abstract what this means is that no reasonable investor should be able to anticipate the rise of a particular dispute. For this reason, investors should try to initiate the activities necessary for the restructuring as soon as, for example, the business environment or relationship with the host states begin to deteriorate. The longer they let certain acts or facts to take place, the higher the probability of classifying the restructuring as an abuse of rights by an arbitral tribunal.

Furthermore, investors willing to benefit from TS while avoiding the limit of the abuse of rights doctrine will also need to look out for different reasons that will help them justify their corporate restructuring. This, given the fact that in some cases having the obtention of coverage

from a specific IIA as the sole or main purpose for the restructuring can lead to the restructuring being classified as an abuse of rights by arbitral tribunals.

Adducing other reasons like business or fiscal reasons as additional justifications for the restructuring of a certain investment can help avoid the risk of having arbitral tribunals classify certain cases of corporate restructurings as abuses of rights. However, it must also be noted that —as has sufficiently been said throughout this thesis— TS is not in itself illegal or objectionable. On the contrary, this practice has been admitted multiple times by different arbitral tribunals.

Therefore, it is also true that the need for additional reasons that justify the restructuring is mostly only present in cases in which the dispute is to a certain extent foreseeable or, in other words, in cases of back-end TS. On the other hand, investors performing front-end TS will rarely face the challenge of having to adduce additional reasons for their decision of structuring their investment in a specific way because of the fact that that decision is perfectly legitimate.

Preliminary Conclusions

As has been explained throughout this first part of this thesis, TS is not *per se* wrongful or illegitimate. On the contrary, various arbitral tribunals have regarded it as a perfectly legitimate practice. Some very well recognized scholars on the subject of IIL, such as Christoph Screuer and Rudolf Dolzer (2022) and Duncan Watson and Tom Brebner (2018), have even gone as far as commenting that any prudent investor should structure its investment in a way that enables the maximization of the protection of the investment. For these reasons, it can be safely argued that TS is not only allowed but is also in most instances expected.

However, not all forms of TS are permitted. On the contrary, there are many occasions in which this practice can lead to the dismissal of investment claims on the basis of lack of jurisdiction or admissibility. Given this context, it is important for investors to know which are

the limits that have been imposed on this practice by states through the drafting of their IIAs or by investment tribunals through their jurisprudence.

In general, there are three main classes or categories of limits to the practice of TS: jurisdictional limits, normative limits, and the abuse of rights doctrine. Regarding the first of these categories (the jurisdictional limits) it was explained in previous sections that there are traditionally three levels of jurisdiction that must all be met in order for a particular arbitral tribunal to have jurisdiction over a specific claim.

The first of these levels, jurisdiction *ratione personae*, concerns who is to be regarded as an investor and, particularly, as a protected investor under a specific IIA. The second level, jurisdiction *ratione materiae*, relates to the definition of what is to be considered as a protected investment. Lastly, jurisdiction *ratione temporis*, the last of the three jurisdictional levels, has to do with the temporal scope of application of a particular IIA.

Each of the previous sections dedicated to these three levels of jurisdiction showed what limits have been placed by states through the drafting of the IIAs and subsequently applied by arbitral tribunals in their decisions. Investors willing to benefit from the practice of TS must pay close attention to the definitions of each of these levels contained in the particular IIAs they are willing to gain coverage from, as well as the jurisprudential precedents set by arbitral tribunals in cases relating to TS.

Furthermore, in close relation to the jurisdictional limits to TS stand the normative limits. These limits are contained in the IIAs and consist in specific clauses that states can introduce in their treaties in order to restrict the scope of applicability and protection of said international instruments. For this reason, investors willing to benefit from the TS practice must also pay

special attention to the presence or absence of these clauses in the particular IIAs they are willing to benefit from.

Lastly, there is a third hurdle that investors must surpass if they are planning on benefitting from TS. This last limit, called the abuse of rights doctrine, constitutes a much more recent development of the arbitral jurisprudence according to which the benefits offered by IIL in general and IIAs in particular are not meant to be used in an abusive way or, in other words, the IIL system is not meant to protect investments done in abusive matters.

On the basis of this last and less predictable limit to TS, investors willing to benefit from this practice will have to consider the timing and justifications of their investment in order to avoid that, even in cases in which the other jurisdictional and normative requirements have been successfully met, arbitral tribunals dismiss investors' investment claims based on their inadmissibility because of alleged abuses of rights.

Part 2 – Colombia and the Treaty Shopping Practice

The previous part of this thesis explained the concept of TS and its main limitations. The purpose of that analysis was to give the readers of this work an idea of what constitutes TS, why it occurs, how it is perceived, and when it becomes unlawful.

With these conclusions in mind, the present part will analyze Colombia's IIAs in force and the way they regulate the practice of TS in order to establish to what extent Colombia's international investment regime allows this practice to take place. Additionally, this analysis will seek to highlight the country's general approach towards TS, explained through its treaty drafting decisions embodied in the different IIAs that are currently in force.

Lastly, it will briefly discuss some arbitral cases in which Colombia has acted as a respondent and in which either the subject of TS or one of the elements of jurisdiction have been

discussed by the arbitral tribunal. Through this examination, the readers will get an idea of how Colombia has reacted to potential TS cases and what its arguments have been in relation to this practice and the potential dismissal of claims on that basis.

Colombia's International Investment Agreements and Their Approach to Treaty Shopping: An Analysis

Background

Ever since the economic opening that started with the promulgation of the 1991 political constitution, Colombia has had a pro-foreign investment approach. This shift from a protectionist and closed market logic to one that encouraged foreign investment and the inclusion of the national economy in world trade and financial channels resulted in the signing of multiple international treaties, such as IIAs. For this reason, during the past three decades, Colombia has seen in IIAs a favorable way of promoting foreign investment. In fact, this approach even led to a constitutional reform back in 1999[31] that eliminated the possibility of expropriation without compensation that was contained in article 58 of Colombia's political constitution (García Matamoros, 2019). In this context, the country's first IIA, the Colombia – United Kingdom BIT, was signed in March 1994 and since then Colombia has signed well over 30 IIAs, 18 of which are currently in force (Ministerio de Comercio, Industria y Turismo, 2023).

Colombia's internal foreign investment regime stems from articles 150, 371, and 372 of the country's political constitution, which define the powers to regulate the aspects of the international exchange regime, investments, tariffs, and others. Based on these provisions, Colombia's congress issued law 9 of 1991 and law 31 of 1992, which establish the country's general investment regime. Lastly, these laws have been regulated by the Colombian government

[31] Acto Legislativo 1 de 1999.

through the issuance of multiple decrees, such as the General Regime for Foreign Capital Investment in Colombia and Colombian Capital Abroad, Decree 2080 of 2000, partially modified by Decrees 1844 of 2003, 4210 of 2004 and 1866 of 2005, issued by the national government; Decree 2466 of 2007, which modifies the General Regime for Foreign Capital Investments in Colombia and Colombian Capital Abroad; and Decree 1888 of 2008, which modifies the General Regime for Foreign Capital Investments in Colombia and Colombian Capital Abroad (García Matamoros, 2019).

Under Álvaro Uribe's presidency, the Colombian state maintained a clear pro-foreign investment policy that was reflected in the national development plans of his two tenures as the country's main leader. A total of 10 IIAs entered into force during Uribe's presidency. Undoubtedly, "investor trust" was one of Álvaro Uribe's main objectives (García Matamoros, 2019). Subsequently, both Juan Manuel Santos' and Iván Duque's presidencies also had an important focus on foreign investment and the development of the country's promotion of foreign investment which led to the signing of even more IIAs.

However, this pro-foreign investment approach is being currently reviewed by Colombia's Gustavo Petro-led government. For instance, Colombia's minister of commerce, Industry and Tourism, Germán Umaña Mendoza, has expressed the government's intention to revise the country's IIAs in order to achieve a fair balance between the role of the state and that of multinational corporations. To that extent, the minister has mentioned that the government will seek to renegotiate and modernize those IIAs that are currently in force (Ministerio de Comercio, Industria y Turismo, 2023). This latest intention of the Colombian government must be closely monitored by investors, especially those willing to benefit from practices like TS, for

it is precisely these types of practices that are usually sought to be avoided or restricted in these processes of revision of IIAs.

Analysis of Colombian IIAs in Regard to the Treaty Shopping Practice

Methodology. For the purposes of this thesis, a total of 18 IIAs[32] that are in force were analyzed, as well as Colombia's model IIA. From these 18 treaties, 10 are pure bilateral investment agreements and the other 8 correspond to free trade agreements with investment chapters. In addition to these 18 IIAs, it must also be warned that some international treaties like the free trade agreement with the European Union were not considered in the analysis for they lack substantial investment-related provisions.

Finally, it should also be noted that the analysis that was made for the purpose of the present work did not include those IIAs that have already been signed but have not entered into force. For instance, of special relevance is the newly signed Colombia-Spain bilateral investment agreement which, once in force, will replace the IIA that is currently in place (which was the one analyzed in this thesis). These IIAs, however, were not taken into account for the analysis because they lacked the relevance needed to be part of it: either because their provisions are not of the substance needed to consider them proper IIAs or because at the time of the writing of this thesis they were not in force.

Investors willing to benefit from TS must nonetheless take this situation into account, especially that of the signed IIAs that will eventually enter into force (like the already mentioned Colombia-Spain bilateral investment agreement or the Colombia-Venezuela and Colombia-

[32] The reviewed IIAs were those signed with the following countries or country alliances: the Pacific Alliance, Canada, Chile, China, South Korea, Costa Rica, the EFTA countries, Spain, the United States of America, France, India, Israel, Japan, Mexico, Perú, the United Kingdom, Switzerland, and the North Triangle (El Salvador, Guatemala, and Honduras).

United Arab Emirates agreements), so they can determine at the time in which the potential implementation of TS will take place what the most favorable alternative at the moment is.

The methodology that was followed for this analysis consisted in a qualitative review of the different IIAs. This review was done through the personal analysis of the IIAs as well as supported with the United Nations Conference on Trade and Development International Investment Agreements Navigator tool (UNCTAD, 2023). The different variables related with the three levels of jurisdiction analyzed in the previous part of this thesis were looked at.

In relation to the jurisdiction *ratione personae*, the definition of investor and enterprise (when applicable), the theory of nationality used by each IIA in relation to juridical persons, and the presence of DOBCs were all jointly analyzed. Secondly, in relation to the jurisdiction *ratione materiae*, the definition of investment (and covered investment when applicable) and the type of definition were analyzed as well as the exclusion of certain asset categories. Regarding the jurisdiction *ratione temporis*, the scope of application and the presence of an exclusion clause were examined. And lastly, the different standards of protection present in the reviewed IIAs were also studied. The results of this analysis can be seen in Annex 1 of this thesis, which consists in a comparative table of all the variables mentioned for each of the IIAs studied. Annex 1 contains, therefore a summarized and comparative analysis of all IIAs that were studied. In addition to this succinct analysis, further Annexes (2-7) were drawn up to include all the IIAs' provisions, divided by topic.

After identifying these different variables in each of the IIAs and outlining them in the comparative table, some of the cells were colored using a color scale consisting in three levels: green —which denotes the most favorable provisions—, yellow —which denotes neutral

favorability—, and red —which signals the least favorable of the provisions—. This color scale was developed based on the conclusions that were reached in Part I of this thesis.

Finally, with help of the color-coded cells of the table a shortlist of three IIAs was established to determine, based on the number of favorable conditions of each IIA, which of all IIAs analyzed were the most favorable ones for the practice of TS. This shortlist can be seen in Annex 8 of this thesis. In general, all provisions were given the same importance while establishing the shortlist. However, there was one specific condition that was given a higher relevance, namely: the absence of a DOBC. Because, although all the requirements that have been explained throughout this thesis are equally important and must all be cumulatively met in order to succeed at the implementation of TS, it is also true that the presence of a DOBC in a given IIA makes it much more difficult to perform this practice.

For this reason, as will be seen on Annexes 1 and 8, the three shortlisted IIAs all lack a DOBC in their texts, a characteristic that could limit Colombia's possibility of having claims directly dismissed on the basis of the performance of an abusive TS. This is not to say that, absent a DOBC, any TS becomes plausible, but it is nonetheless clear that the absence of said clauses makes it easier to implement TS.

General Results. In general terms, it can be concluded that Colombia's IIAs have a restrictive approach on TS. Particularly, Colombia's current model IIA is proof of how restrictive Colombia is regarding this practice. For instance, this model IIA, which was created in 2017, contains a highly restrictive definition of investor that mixes three of the previously explained theories, namely: the incorporation, the *siege social*, and the substantial business activities theories.

In terms of jurisdiction, the 2017 model IIA provides carefully crafted jurisdictional concepts that seek to limit expansive notions of key concepts like "investment" and "investor", effectively restraining the possibility of implementing TS. For example, the inclusion of the requirement for an investment to have "the intention to maintain a long-term presence in the Host Party" certainly has the effect of avoiding controversial discussions that have taken place in arbitral jurisprudence such as the determination of whether a particular investment contributed towards the development of the host country (Duggal, García Clavijo, Trujillo, & Rincón, 2019).

Additionally, the fact that the definition of investment contains a closed list of assets also represents a restrictive approach towards jurisdiction in general. That is to say, Colombia's model IIA seeks to limit the general jurisdiction of arbitral tribunals over possible investments and investors.

Another particular characteristic of this model IIA is the definition it contains of what can constitutes "substantial business activities". This provision has the effect of eliminating the uncertainty there is around the determination of what constitutes or what does not constitute substantial business activities. An uncertainty that leaves too much discretion on the arbitral tribunals power to decide over a certain dispute. These elements contain, for example, objective

features such as the number of sales and clients or the continuous physical presence in the territory of the host country (Duggal, García Clavijo, Trujillo, & Rincón, 2019).

These and other characteristics of the 2017 Colombian model IIA make it clear that the country's current approach towards jurisdiction in general and practices such as TS in particular is to a certain extent restrictive. However, it must also be noted that because of the nature of the model IIA being precisely that: a model, all its provisions are subject to negotiation in each case. For that reason, the fact that this model portrays a restrictive approach to TS cannot be taken as an absolute indicator of Colombia's future IIAs, for this model will always suffer modifications as a product of Colombia's negotiations with other countries.

The analysis of the other real IIAs also allows for a similar conclusion to be made. Particularly, the high number of DOBCs contained in the IIAs reviewed shows Colombia's particular interest in restricting the practice of TS. Out of the 18 IIAs reviewed, 11 contain a DOBC. Furthermore, 8 of those 18 IIAs explicitly require investors to have substantial business activities in the host country, while an additional 8 require some form of qualified business activities to be had[33]. This situation shows a clear tendency to avoid so-called mailbox companies to benefit from the protections provided in IIAs.

In terms of the jurisdiction *ratione materiae*, Colombian IIAs also tend to have a somehow restrictive approach. All the IIAs analyzed contain exclusions in their definitions of investment. Furthermore, 14 of the 18 IIAs reviewed require additional characteristics that the investments must have to be considered as investments. Some of these characteristics are the

[33] This mention to "business activities" is sometimes made alone like in the case of the Canada or Chile free trade agreements but in other cases it is accompanied by other adjectives like "real" or "effective", like it is the case with the France and Switzerland bilateral investment treaties.

commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk[34].

However, it must also be noted that the situations described before do not actually have the potential to effectively limit the practice of treaty shopping and could even be described as standard in IIL. The most restrictive of the situations outlined corresponds to the requirement of additional features that the investments must have. Nevertheless, it must also be pointed out that those features have been generally highlighted by arbitral tribunals as being inherent to the definition of investment even in the absence of express mention to them. For this reason, although this situation must be considered by investors willing to benefit from TS, they must also take into account the fact that it does not absolutely limit the possibility of implementing TS.

In relation to the temporal scope of the IIAs reviewed (jurisdiction *ratione temporis*), it can be concluded that most of them do exclude acts or facts that predate the entry into force of the agreement (the so-called exclusion clauses). In this context, there are express mentions to the already discussed non-retroactivity principle of international customary law that prevent previous acts or facts to support a given investment claim. This, in turn, has the effect of avoiding back-end TS from taking placing once the measures that constitute an IIA's breach have already been undergone by the host country.

Lastly, regarding the different standards of protection it can be concluded that, although some variations between IIAs can be identified in the way they provide for these standards, the truth is that virtually all Colombian IIAs contain the most frequent standards of protection discussed in the introduction of this thesis. This characteristic, of course, should not be regarded

[34] Colombia-Japan IIA.

as exceptional because the inclusion of these standards of protection in IIAs is to a great extent standard in IIL.

Perhaps the biggest differences in terms of standards of protection correspond to the temporal scope of application of standards like MFN and FET, which in some IIAs are guaranteed pre- and post-establishment of the investment, and the exclusions to the MFN standard, which in some cases refers only to ISDS and in others to both ISDS and to other subjects like provisions contained in economic integration agreements or taxation treaties. In sum, the mentioned variations do not actually merit the conclusion that one IIA is more beneficial than the other because in general terms all the IIAs reviewed contain very similar provisions in terms of standards of protection.

Shortlisted IIAs. Despite the general conclusions described in the previous section that relate to how restrictive of the TS practice Colombia's treaty drafting technique appears to be, the present section will show that, nonetheless, investors willing to benefit from the practice of TS can still do so by carefully keeping in mind all the conclusions and recommendations from the first part and by choosing to incorporate their corporate vehicle for the funneling of their investment in one of the three states that will be shown below.

The three Colombian IIAs that, according to the analysis performed, represent the most favorable alternatives for an investor planning on performing TS are, in order: the Colombia – Switzerland bilateral investment treaty, the Colombia – France bilateral investment treat, and the Colombia – Israel free trade agreement.

The feature that these three IIAs have in common is that they all lack a DOBC, which for the purposes of the analysis performed was given a special relevance. This way, Colombia as a host state to an investor will not be able to deny the benefits of any of these three IIAs based on

the occurrence of one of the typical application cases of a DOBC. On this basis, cases of round-tripping, for example, will not *prima facie* be excluded from the scope of application of these three IIAs.

For this reason alone, these three IIAs constitute very favorable alternatives for the performance of TS. However, there are also other features of these treaties that allow the conclusion to be made that they constitute favorable IIAs for TS practitioners. These particular features of each of these international agreements will be detailed below.

Colombia – Switzerland bilateral investment treaty. This IIA, which was signed in 2006 and entered into force in 2009, corresponds to the most beneficial Colombian IIA out of the 18 IIAs analyzed because of different reasons. The first reason, as it has already been mentioned, is the absence of a DOBC in its text. Additionally, it can also be highlighted from this IIA the fact that its definition of investor alternatively establishes the possibility of legal persons being considered as nationals of one of the parties, on the one hand, on grounds of the incorporation theory, combined with the *siege social* and a variation of the substantial business activities and, on the other hand, on grounds of the control theory.

This definition includes a variation of this last theory because it does not explicitly require substantial business activities to be performed but rather just "real" business activities. For this reason, it is submitted that this term does not establish the same level of requirement as the adjective "substantial". Nevertheless, it is not hereby submitted that pure shell companies are to be regarded as investors under this treaty. Alternatively, the fact that the IIA also allows for legal persons not incorporated in either of the parties but that are controlled by nationals of one contracting party enhances the number of possible scenarios in which a corporate vehicle could gain protection from this agreement.

Furthermore, another reason why this IIA is favorable for the performance of TS is because of its non-exhaustive definition of investment and the fact that no additional characteristics of an investment are required. According to this treaty's definition of investment, an investment is "every kind of asset", expression which is then followed by a non-exhaustive list of examples of assets. Additionally, it can also be highlighted the fact that there is only one asset class excluded from the definition of investment: the "claims to money that arise solely from commercial contracts for the sale of goods or services or from credits in connection with a commercial transaction, the maturity of which is less than three years."

In terms of standards of protection guaranteed by this IIA, it must be noted that, although only offering MFN and FET standards post-establishment of the investment, all major standards of protection are contained in the treaty with the only exception being the FPS standard. Furthermore, it is also important to highlight the fact that procedural aspects like ISDS are not excluded in this case from the application of the MFN standard of protection like is the case in most of the other Colombian IIAs.

Despite all these positive characteristics, there is one downside of the Colombia – Switzerland IIA that, in comparison with other Colombian IIAs puts it a certain disadvantage: the fact that, according to its scope of application, the provisions of the treaty do not apply to taxation matters. However, this is not to be seen as a complete disadvantage for this exclusion is not absolute and, in fact, has an exception: the application of articles 6 and 10 of the treaty, one of which consists in the obligation of no expropriation without compensation. This exception, therefore, allows for the conclusion to be drawn that the exclusion of taxation matters from the scope of application of the IIA is not entirely disadvantageous since those matters are indeed under the treaty's scope when it comes to taxation measures that result in expropriation.

Colombia – France bilateral investment treaty. In contrast to the Colombia – Switzerland bilateral investment treaty, the Colombia – France IIA, which was signed in 2014 and entered into force in 2020, does exclude taxation matters from its scope of application in an absolute manner. For this reason alone, this IIA ranks second in the shortlist done as a result of the analysis conducted. Other than that situation, this IIA's provisions are highly similar to those contained in the Colombia – Switzerland IIA and are, therefore, also highly favorable for the implementation of the TS practice.

Firstly, the definition of investor also contains a combination of the same theories present in the definition of investor of the Colombia – Switzerland IIA. However, in this case the adjective that accompanies the concept of business activities is not "real" but "effective". For this reason, although it is still submitted that the deliberate use of a different adjective must be regarded as a choice not to require the substantiality of the business activities in the terms explained in the first part of this thesis, the truth is that the word "effective" denotes a higher requirement. Alternatively, nationality under this IIA can also be achieved through the control theory in the same terms of the Switzerland – Colombia IIA.

Secondly, although not overly restrictive, the definition of investment under this IIA does require additional characteristics to be present in order to consider an asset an investment. According to this treaty's definition of investment, an investment must consist in the existence of a capital or any other resource contribution and the assumption of risk. Furthermore, the list of excluded assets is longer than the one contained in the Switzerland – Colombia IIA. In this case, this IIA excludes from its definition of investment public debt operations, commercial transactions related to the import and export of goods and services, and credits for the financing thereof or interests thereon.

Lastly, just like in the case of the Colombia – Switzerland IIA, this IIA offers all the common standards of protection with the same peculiarity that both the MFN as well as the FET standard are only offered post-establishment. It does, however, offer the FPS standard to investors in contrast to the Colombia – Switzerland IIA wich, as mentioned, does not.

Despite these few restrictive provisions, it is hereby restated that the fact that this IIA, as well as the other two, does not include a DOBC makes it a very favorable treaty for the implementation of the TS practice.

Colombia – Israel free trade agreement. The last IIA that was included in the shortlist of most favorable Colombian IIAs for the implementation of TS is the Israel – Colombia free trade agreement, which was signed in 2013 and entered into force in 2020. This IIA, as well as the other two, does not contain a DOBC, which is essential for performing TS in a much easier way. Furthermore, according to this IIA, a legal person is to be regarded as an investor if (i) it is incorporated in one of the contracting parties and has substantial business activities in that territory, or if (ii) it is incorporated in any other World Trade Organization member and it is owned or controlled by nationals of the contracting parties.

As can be seen from this definition, the requirements that need to be met to be classified as an investor under this IIA are very similar to those required in the two previously discussed IIAs. However, in contrast to the choice of words made by those two treaties (“real” and “effective”), this IIA does explicitly mention the need for the legal person to conduct substantial business activities in the host country.

Moreover, in a similar way than that of the Colombia – France IIA, this IIA excludes the same asset classes, a feature that is to a certain extent standard in many of Colombia’s IIAs. The definition of investment contained in this treaty also requires investments to have the same two

characteristics required by the Colombia – France IIA, namely: the contribution of capital or any other resource and the assumption of risk by the investor.

In terms of standards of protection, this IIA is very similar to the other two agreements: it contains most of the standards of protection that are generally present in IIAs and the MFN and FET standards are offered only post-establishment of the investment.

Lastly, despite this IIA being to a certain extent more restrictive than the other two, there is nonetheless one characteristic from this agreement that makes it more favorable than the other shortlisted IIAs. This characteristic has to do with its scope of application and consists in the fact that no exclusion of taxation matters is included in the article dealing with its scope of application.

Preliminary conclusions. The three shortlisted IIAs have all many things in common: (i) they lack a DOBC in their texts; (ii) they either directly or through analogous vocabulary require investors to conduct business activities (real, effective or substantial) in the host country; (iii) they favor a combination of theories for the definition of investor; (iv) they exclude from their scope of application the acts or facts that give rise to controversies before the entry into force of the relevant IIA; and (v) they offer more or less the same standards of protection with very small variations in the wordings of the relevant clauses.

On the other hand, some differences that set these IIAs apart are the list of assets classes excluded from the definition of investment and the (absolute or relative) exclusion of taxation measures from the scope of application of the treaty.

In sum, these three IIAs constitute favorable treaties for investors willing to benefit from the practice of TS mainly because they lack DOBCs in their texts, but also because their definitions of investor and investment are not overly restrictive, and the requirements contained

in them can be easily met if the corporate structuring or restructuring is undergone in a very careful and well-thought way. These characteristics will be explained further below, in Part 3, after some arbitral decisions in cases in which Colombia has acted as respondent are analyzed. The analysis of these cases together with this set of preliminary conclusions will allow for more definitive and useful conclusions and recommendations for investors willing to protect their investments in Colombia through TS.

Colombia's Experience in International Investment Arbitrations Regarding the Treaty Shopping Practice

In order to complement the analysis that has been done up until this point of this thesis, four different arbitral cases will be briefly analyzed in the following sections. Despite the fact that only in one of the four cases that will be reviewed below the discussion was centered around the application of one of the three shortlisted IIAs (specifically, the Switzerland – Colombia IIA), the revision of these arbitral cases will allow to enhance the understanding of how arbitral tribunals have dealt with questions regarding jurisdiction under Colombian IIAs as well as the country's defense in such cases. For this reason, the following cases will briefly summarize the facts of three different arbitral cases and will highlight those elements of the discussion that centered on jurisdictional issues that are relevant for the present work's purpose.

Nonetheless, it is important to note that there have been no clear TS cases involving Colombia and, therefore, there are no arbitral decisions regarding this subject in relation to the particular case of Colombian IIAs. For this reason, it will not be possible to determine how Colombia as a respondent has acted in cases of this type. Furthermore, it will not be possible to analyze specifically the limits of this practice in regard to Colombian IIAs. However, the cases

that will be analyzed in the following sections do in fact provide insightful information that helps complementing the analysis undergone in previous sections of this thesis.

Aris Mining Corporation (formerly known as GCM Mining Corp. and Gran Colombia Gold Corp.) v. Republic of Colombia

The Aris Mining Corporation (formerly known as GCM Mining Corp. and Gran Colombia Gold Corp.) v. Republic of Colombia (ICSID Case No. ARB/18/23) case ("GCM Mining v. Colombia") is a pending ICSID case in which the claimant, a Canadian legal person, is claiming Colombia's breaches of its obligations under the Canada – Colombia free trade agreement. Particularly, the claimant is arguing the breach of Colombia's "(…) obligations under *(i)* Article 811 of the Treaty by means of the indirect expropriation of its investments; *(ii)* Article 805 of the Treaty and customary international law concerning the standard of full protection and security; and *(iii)* Article 805 of the Treaty concerning the fair and equitable treatment standard" (Gran Colombia Gold Corp. v Republic of Colombia, Decision on the Bifurcated Jurisdictional Issue, 2020, para. 4).

According to the claimant, a series of measures and omissions by Colombia allegedly negatively impacted the claimant's investments in the Colombian gold and silver mining sectors. Specifically, the claimant alleges that the investments it has made in Colombia through four different Colombian corporations have been affected by the Colombian government's inability to avoid illegal mining to take place in the claimant's legally and exclusively acquired mining titles. Moreover, the claimant also alleges that Colombia's constitutional court's SU-133 decision of 2017, "(…) which effectively suspended mining activities in certain exclusive mining rights and titles of GCG and its Companies (…), was not based on any reasonable legal grounds and made the lifting of the suspension subject to a consultation process with the indigenous communities

even though no such requirement exists under the law for companies that have already acquired or been assigned mining rights (Dentons US LLP, Counsel for Gran Colombia Gold Corp., 2018, para. 22)."

On the basis of this facts, the claimant argues that:

> The State's failure to provide full protection and security and fair and equitable treatment to GCG's investments in accordance with national and international law has deprived GCG and its Companies of their exclusive rights under their mining titles, continues to destroy the value of GCG's investments in the Colombian mining sector, and exposes GCG and its Companies to liability for the acts of illegal miners in areas covered by those mining titles. The State's continued failures have directly caused GCG to lose hundreds of millions of dollars in damages including but not limited to: the loss of investments, losses derived from mineral resources illegally stripped from the Company's mines in Marmato and Segovia, lost profits arising from the plundering and destruction of newly proven gold exploration and exploitation opportunities, damage to GCG property caused by illegal miners, and losses caused by production stoppages (Dentons US LLP, Counsel for Gran Colombia Gold Corp., 2018, para. 23).

The reason why this arbitral case is relevant for this thesis is because the tribunal in its Decision on the Bifurcated Jurisdictional Issue (2020) was faced with the question of whether Colombia's objection based on DOBC contained in the applicable IIA could prosper. In particular, the arbitral tribunal in this case had to analyze whether Colombia had denied the benefits of the treaty in a timely manner according to the treaty's text; additionally, the tribunal had to determine whether the claimant could indeed qualify as an investor under the treaty.

In relation to these two subjects, the tribunal made some very important conclusions that both confirm the understanding set forth in previous sections and provide relevant criteria that are specific to the Colombian case to answer some of the most controversial discussions related to the application of DOBCs against alleged mailbox companies.

In relation to the timing in which Colombia was obliged to present its denial of benefits, which the claimant had argued had to be presented before consent for arbitration had been perfected (which took place at the time of the request for arbitration), the tribunal found that the DOBC contained in the treaty has no temporal restriction for its application. For this reason, the tribunal concluded that "(…) investors operating in Canada and Colombia must understand, *ex ante*, that any protections otherwise offered to them in Chapter Eight of the FTA (which includes both substantive protections and dispute resolution mechanisms) may be subject to their ability to demonstrate that they meet the ownership or control and substantial business activity requirements of that provision" (Gran Colombia Gold Corp. v Republic of Colombia, Decision on the Bifurcated Jurisdictional Issue, 2020, para. 130).

By doing so, the tribunal reaffirmed the tribunal in Pac Rim v. El Salvador's conclusion in relation to the fact that the presence of DOBCs in the text of the treaty necessarily means that the host state's consent to arbitration "(…) qualified from the outset by [the denial of benefits clause], and accordingly a denial of benefits invoked after an ICSID arbitration commences "cannot be treated as the unilateral withdrawal of that Party's consent to ICSID arbitration under ICSID Article 25(1)" (Gran Colombia Gold Corp. v Republic of Colombia, Decision on the Bifurcated Jurisdictional Issue, 2020, para. 130).

Because of these reasons, the tribunal decided that Colombia had communicated its decision to deny the benefits of the treaty in a timely manner (having done so just one day after

its receipt of the claimant's request for arbitration) and could therefore go on to study the grounds for said denial.

In relation to the justification of said denial, the tribunal had to analyze whether the two cumulative requirements provided in the DOBC were present in the case: (i) that the enterprise is not owned or controlled by nationals of its home state; and (ii) that it has no substantial business activities in its home state.

For this purpose, the tribunal decided to study the second of these requirements, highlighting that despite the question of ownership or control in the present case could be highly debatable, the fact that both requirements were cumulative and that the failure to meet at least one of them would result in a failure to apply the DOBC was enough to just analyze the second of the requirements, which it considered to not be present in this case.

In its analysis, the tribunal concluded that the wording of the DOBC allowed the parties to deny the benefits of the IIA if investors of a non-party or of the denying party owned or controlled an enterprise and if that enterprise had no substantial business activities in the territory of the Party under whose law it was constituted or organized. Therefore, according to the tribunal, the IIA only required the investor to have "any" substantial business activities in the home country and did not require, therefore, that the investor have the "most" substantial business activities in said country[35]. Hence, the DOBC did not require a comparative analysis to be undergone, "[i]t simply requires that a Canadian-registered company have *some* substantial business activity in Canada" (Gran Colombia Gold Corp. v Republic of Colombia, Decision on the Bifurcated Jurisdictional Issue, 2020, para. 136).

[35] The IIA's relevant wording is as follows: "(…) 2. A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of such Party and to investments of that investor if investors of a nonParty or of the denying Party 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.

Having settled this discussion, the arbitral tribunal then proceeded with the analysis of what "substantive" meant. For that purpose, it asserted that "[a] business activity may not be mere cursory, fleeting or incidental, but must be of sufficient extent and meaning as to constitute a genuine connection by the company to its home State" (Gran Colombia Gold Corp. v Republic of Colombia, Decision on the Bifurcated Jurisdictional Issue, 2020, para. 137). On that same vein, it reasoned that "(…) while the company must have some real, material business activities in its home State, the Treaty contains no limitations on the nature of that business" (para. 138) and, for that reason, there was no need for the activities of the investor in its home country to be of the same nature of those developed in the host country (Gran Colombia Gold Corp. v Republic of Colombia, Decision on the Bifurcated Jurisdictional Issue, 2020).

Finally, drawing from that conclusion, the arbitral tribunal established that it was perfectly allowed for a given company "(…) to locate coordinating or support functions in its home State, or to use its home State as a hub for investment and financing activities that make possible the operational activities in other places" (Gran Colombia Gold Corp. v Republic of Colombia, Decision on the Bifurcated Jurisdictional Issue, 2020, para. 138). By doing so, the tribunal gave legitimacy to holding companies like Gran Colombia Gold Corp. and concluded that the following activities amply satisfied the substantial business activities requirement:

- Core corporate functions in Toronto: corporate finance, fundraising, accounting, shareholder relations, legal, administration and IT support;
- Office space: spending over US$100,000 on rent, utilities and related expenses in 2018;
- Eight full-time employees in Toronto: In 2018, GCG spent over CAD$1.2 million in Canada on compensation and benefits.

- Several bank accounts in Canada: Six bank accounts through which GCG actively conducts its business; in or about May 2018, those six accounts contained more than US$25 million;
- Annual purchases of goods and services in Canada: GCG has spent hundreds of thousands of dollars related to accounting and advisory services, legal services, and shareholder and investor related activities, as well as miscellaneous services such as IT, liability policies and a listing fee for the Toronto Stock Exchange; and
- Financing activities: GCG has raised more than US$500 million over the last 10 years, in transactions on the Canadian debt and equity markets, in order to support its operations (para. 139).

For the tribunal, these activities were:

(…) clearly 'substantial', carried out over a period of years and having the depth and materiality to demonstrate a genuine and meaningful connection (and contribution) to Canada. They are undoubtedly "business" in nature, even if the business in question in Canada appears – as the Claimant contends – to be essentially investment management and financing, to support a different type of business (mining operations) conducted in Colombia by affiliated entities (para. 140).

Finally, it even went as far as pointing out the fact that those activities were "(…) well beyond that which would be necessary for a "mailbox" or "shell" company to maintain its corporate form" (141). For all these reasons, the tribunal decided to dismiss Colombia's DOBC objection in 2020 and the cases is therefore still pending an award.

The arguments presented by the arbitral tribunal in this case provide a very insightful understanding of two different subjects that are relevant to the TS practice. Firstly, the fact that it

is nowadays mostly uncontroversial that, absent any special wording in a DOBC, it is clear that respondent states can invoke the application of these clauses even after the request for arbitration has been submitted by the claimant. Secondly, the fact that holding companies are not entirely forbidden in IIL. On the contrary, they are completely legitimate and are perfectly capable of satisfying the substantial business activities requirement.

Astrida Benita Carrizosa v. Republic of Colombia

Although not a case that involved a discussion surrounding the concept of TS specifically (as was to a certain extent the Gran Colombia Gold Corp. case), this case provides for relevant criteria that help understand the temporal scope of IIAs in general and, in particular, one of Colombia's IIAs: the Colombia – United States Trade Promotion Agreement. In this case, a natural person, citizen of the United States, claimed that a series of measures enacted by the Colombian government which subsequently led to the Colombian government being the majority shareholder in Granahorrar, a Colombian financial institution in which the claimant had a direct interest, had negatively affected her investments in Colombia and constituted a breach of the country's obligations under the Colombia – USA free trade agreement which had entered into force in 2012.

Given these facts, one of the first matters that had to be analyzed by the arbitral tribunal was the temporal scope of the treaty because most of the acts that had led to the alleged breach of obligations had taken place well before the entry into force of the IIA. For instance, only the final judicial decision (2014) in a series of judicial procedures that had started as a result of the 1998 measures took place after the IIA's entry into force. For this reason, the arbitral tribunal was faced with the question of whether the IIA was applicable or not.

From the start of its analysis, the tribunal established that, unless provided otherwise in the IIA, the customary international law rule about non-retroactivity, codified in article 28 of the Vienna Convention on the Law of Treaties, stated that a treaty's "(…) provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party" (Astrida Benita Carrizosa v. Republic of Colombia, Award, 2021, para. 107).

According to this and given the fact that the relevant IIA did not provide for the contrary, the tribunal concluded from the outset that it would only have jurisdiction over acts or facts that had taken place after the entry into force of the IIA. Therefore, "(…) any claim of unlawfulness of the Respondent's pre-TPA conduct is outside the Tribunal's jurisdiction" (Astrida Benita Carrizosa v. Republic of Colombia, Award, 2021, para. 128).

Starting from that conclusion, the tribunal went on to analyze a less clear subject: whether the 2014 judicial decision, although being a consequence of the same dispute that had started back in 1998, could fall within its jurisdiction. To solve this question, the wording of the IIA was very relevant since what the scope of application of the treaty provided was for the exclusion of "acts" or "facts" that had taken place before the entry into force of the IIA. For that reason, the arbitral tribunal concluded that it was not the "disputes" that predated the treaty that were excluded but rather those acts or facts. Because of this, the tribunal concluded by citing arbitral decisions from other tribunals like the MCI v. Ecuador, Generation Ukraine v. Ukraine, and the Mondev v. USA tribunals that:

> (…) if post-treaty conduct is in itself an actionable breach of the treaty, the principle of non-retroactivity does not place such conduct outside the reach of the treaty even if the dispute to which the conduct pertains had arisen before the treaty entered into force. For

> this reason, the Tribunal need not determine whether the notion of dispute found in Chapter 10 of the TPA prevails over the broad notion found in customary international law. In either case, the Tribunal would be competent to entertain a claim which arises from a particular post-treaty conduct and which is capable of constituting a breach of the TPA (Astrida Benita Carrizosa v. Republic of Colombia, Award, 2021, para. 149).

However, after analyzing the 2014 decision in particular, the tribunal decided that that decision was not in itself an actionable breach of the treaty and, therefore, had no jurisdiction over the claim.

The arguments set forth by the arbitral tribunal in this case allow for two main conclusions to be drawn in regards to jurisdiction *ratione temporis* in general and in the particular case of Colombian IIAs: on the one hand, it reaffirms the mostly uncontested reality that IIAs' provisions do not apply retroactively on the basis of both the non-retroactivity principle of international customary law, as well as specific treaty provisions such as the exclusion clauses; on the other hand, it provides relevant insights on the possibility of certain acts or facts that take place after the entry into force of a certain IIA but that are part of one prolonged dispute that predates said treaty of falling under the jurisdiction of an arbitral tribunal.

Red Eagle Exploration Limited v. Republic of Colombia

The last case in which Colombia has acted as a respondent state and that provides additional information in relation to the analysis that has been done throughout this thesis is the Red Eagle Exploration Limited v. Republic of Colombia case. This ICSID case, which is still pending, was brought up against Colombia by a Canadian legal person on the basis of some administrative and judicial measures of Colombia having negatively affected the claimant's investment in Colombia. According to the claimant, the Colombian government and the

Colombian constitutional court, through a series of measures and decisions, breached Colombia's obligations contained in the IIA, particularly: the minimum standard of treatment and the prohibition of expropriation without compensation.

In response to the claimant's request for arbitration, Colombia submitted a series of objections to the claim. One of those objections (of particular relevance for this thesis) was, like in the Gran Colombia Gold Corp. Case, a DOBC objection. On the basis of these objections, the arbitral tribunal issued its Decision on Bifurcation on August 13th, 2020 (Red Eagle Exploration Limited v. Republic of Colombia, Decision on Bifurcation, 2020).

In this brief decision, the tribunal studied Colombia's objection and concluded that the respondent had "(…) not met the burden of proof even on a *prima facie* basis, particularly in light of the fact that in its Memorial, the Claimant submitted evidence purporting to demonstrate that it is a Canadian company owned and controlled by Canadian nationals (Red Eagle Exploration Limited v. Republic of Colombia, Decision on Bifurcation, 2020, para. 64). For this reason, the tribunal dismissed the objection, and the case is still pending a final decision by the tribunal.

The relevance of this brief mention to the Red Eagle Exploration Limited case lies on the fact that the burden of proof when a respondent is pursuing the application of a DOBC is for the host country to meet. Therefore, it will not be the claimant's task to prove that it satisfies the two requirements usually contained in DOBCs, but rather the respondent's obligation to do so.

Part 3 – Investors' Alternatives for the Protection of Their Investments in Colombia with Respect to Treaty Shopping

The previous parts of this thesis have provided the readers with the information required to correctly understand what investors willing to protect their investments through the practice of

TS must take into account. Part 1 of this thesis provided an in-depth analysis of the concept of TS and its limits. That Part of the present work established the different requirements that must be met in order to successfully implement the TS practice.

On the other hand, Part 2 of this thesis provided a detailed analysis of Colombia's IIAs currently in force and identified those that are more susceptible to allow the practice of TS. Additionally, Part 2 also offered a summary of some arbitral decisions in which Colombia has acted as a respondent state and that have to a certain extent involved the practice of TS or at least one of the elements of jurisdiction explained in Part 1.

With all this information in mind, the present Part of this thesis has the objective of summarizing the conclusions reached in Part 1 and in conjunction with the IIAs' recommendations of Part 2 and the specific analysis of TS-related elements in arbitral jurisprudence involving Colombia, will succinctly highlight a series of recommendations for investors willing to protect their investments in Colombia through the implementation of the TS practice.

For this purpose, the following section will offer those recommendations in relation to each one of the limits studied in Part 1 of this thesis. Additionally, it will seek to directly relate each one of those recommendations with the three shortlisted IIAs in order to specifically tailor those recommendations to the selected IIAs. This way, the readers of this thesis will know exactly what to consider when planning their TS efforts in advance.

Recommendations for Investors Willing to Protect Their Investments in Colombia.

Recommendations regarding jurisdiction ratione personae.

Investors that seek to benefit from the protections offered by the three shortlisted IIAs will first have to consider the double-barreled test described in Part 1 of this thesis. According to

this test, as explained before, investors will need to make sure their chose corporate vehicles for the implementation of the TS practice classify as investors under both article 25(2)(b) of the ICSID Convention as well as the desired IIA.

To this extent, investors will need to make sure the chosen corporate vehicle is either a "(…) juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration" or a "(…) juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention."

After satisfying this first prong of the test, the interested investor will preferably need to make sure that its corporate vehicle qualifies as an investor in the chosen IIA. This way and in relation to the three shortlisted treaties' definitions of investor, the investor interested in performing TS will need to (i) incorporate the legal person in either Switzerland, France, or Israel; and (ii) make sure the vehicle is not a mere shell company but it rather has some form of substantial/effective/real business activities in the home country; additionally, for the cases of Switzerland and France the investor (iii) will need to establish the vehicle's seat of business in one of those two countries.

As examples of what constitutes substantial business activities investors can use the list of activities highlighted by the arbitral tribunal in the Gran Colombia Gold Corp. v. Colombia case to determine at what point the business transactions and operations of holding companies become "substantial".

In any case, investors willing to benefit from the protections of the three shortlisted IIAs can rest assured that under no circumstances Colombia will be able to deny the benefits of these three IIAs directly and preliminarily because of the absence of DOBCs in them.

Recommendations regarding jurisdiction ratione materiae.

In relation to jurisdiction *ratione materiae*, there are three main aspects that must be taken into account by investors willing to benefit from TS and the protections of the three shortlisted IIAs: first, the double-barreled test; second, the list of excluded assets contained in the definitions of investment; and third, the additional requirements set out in the France and Israel IIAs.

Regarding the first of these aspects, investors must bear in mind the previously explained Salini Test (which, in some cases, is incorporated into the IIA's text) so that their investments effectively classify as such under article 25(1) of the ICSID Convention. Once that first prong of the test is satisfied, investors must pay close attention to the definitions of investment contained in the three shortlisted IIAs. However, as explained before, these asset-based non exhaustive definitions do not constitute much of a limit to the practice of TS. Investor must only take into consideration the fact that their investments do not fall into one of the excluded asset categories.

In relation to the second of the aforementioned aspects, investors must know that some commercial contracts are not considered as investments in all three IIAs and that, additionally, other assets like public debt operations or credits related to commercial contracts do not qualify as investments under the France and Israel IIAs. For this reason, investors must carefully analyze what types of assets they will transfer to the corporate vehicle in order to make sure that they are considered to be protected investments under the desired IIA.

Finally, investors willing to protect their investments through the practice of TS and gain coverage to either the France or the Israel IIAs will also need to pay close attention to the fact that their investment satisfies the two additional requirements contained in the definitions of investment of those two treaties: (i) the commitment of capital or other resources and (ii) the assumption of risk. Two characteristics that are basically a written expression of two of the four (or three) elements of the Salini Test.

Recommendations regarding jurisdiction ratione temporis.

In order for investors to guarantee the jurisdiction *ratione temporis* of arbitral tribunals over claims regarding their investments under any of the three shortlisted IIAs, the structuring or restructuring of the investment must take place before the occurrence of the facts, acts or controversies that give rise to an eventual investment claim. In other words, investors should undergo the structuring or restructuring before the potential measures that affect the investment are enacted by the Colombian government.

Recommendations regarding admissibility and the abuse of rights doctrine.

Lastly, although not an unsettled subject and still with many critics, investors willing to benefit from the TS practice must also think about the possibility of arbitral tribunals pointing out their TS efforts as abuses of rights and declaring their investment claims inadmissible on those grounds. In relation to this subject and although not directly related to the IIAs' texts, investors must make sure, especially in cases of back-end TS, that their investments are structured or restructured well in advance of any potential dispute's rise.

For this purpose, investor should undertake their TS efforts before a dispute becomes foreseeable, according to the terms explained in the section dedicated to the abuse of rights doctrine. Thus, in a scenario of political and economic uncertainty like today's situation in

Colombia in which different press releases and official statements take place in a frequent matter in relation to very sensitive economic and political issues, it is recommended for investors to undergo their TS efforts as soon as possible. That way, they will be able to avoid the foreseeability theory being brought up in a dispute by the Colombian government.

Additionally, should also seek to justify their decision of performing TS on various reasons and avoiding the situation in which gaining coverage from a specific IIA constitutes the sole purpose of their structuring or restructuring. This, particularly in cases in which there is proximity between the rise of the dispute (foreseeability) and the structuring or restructuring. However, in cases of prudent front-end TS, this precaution is not entirely necessary for, as mentioned in multiple occasions throughout this thesis, the practice of TS is not by any means forbidden and, on the contrary, many different arbitral tribunals have given it legitimacy in cases in which it is undergone in advance.

Conclusions

The primary objective of this thesis was the analysis of the limits to TS and the subsequent determination of how those limits are encapsulated within the various IIAs of Colombia. The aim was to establish which agreements offer a less restrictive approach towards the implementation of this practice for investors willing to protect their investments in today's economic and political uncertainties of Colombia and how those investors can successfully benefit from TS without incurring in an abuse of this practice.

Throughout this investigation, several significant findings have emerged. The practice of TS, while multifaceted, was revealed to be perceived differently by various stakeholders, including investors, governments, and arbitral tribunals. While some parties regard it as a legitimate means to maximize treaty protections, others scrutinize it for its potential misuse.

Central to the exploration undergone through this thesis was the delineation of the boundaries that restrict TS. A comprehensive examination of jurisdictional constraints was conducted, encompassing *ratione personae*, *ratione materiae*, and *ratione temporis*, highlighting their role as crucial safeguards against excessive or inappropriate TS. Additionally, the normative bounds of this practice were also explored, which included elements like DOBCs. Lastly, the concept of the abuse of rights doctrine was also introduced as an additional limit to TS.

Turning the focus of the analysis to Colombia, a meticulous examination of the nation's diverse array of IIAs revealed the depth of Colombia's commitment to protecting foreign investments. The analysis provided insights into the practical implications of these agreements by studying real-world disputes involving relevant jurisdictional matters, where Colombia has been implicated.

To bridge theory and practice, this thesis furnished actionable recommendations for investors navigating Colombia's evolving investment landscape. These recommendations are firmly rooted in the understanding that a dynamic political climate requires adaptive investment protection strategies. By identifying and harnessing the full potential of IIAs, investors can effectively mitigate risks and secure their investments.

In essence, this thesis has constructed a strategic guide tailored to Colombia's dynamic political landscape, offering practical guidance for investors seeking to utilize IIAs for investment security. In particular, it has outlined the three most favorable Colombian IIAs that are currently in force, which offer investors all the protections normally contained in these types of international instruments while maintaining relatively low requirements for accessing their coverage.

This research significantly contributes to the broader field of IIL, underscoring the strategic dimensions of TS. This contribution extends the ongoing dialogue on the legitimacy and effectiveness of this practice.

In conclusion, the primary objective of this thesis has been met by delineating the limits of TS and evaluating their presence within Colombia's IIAs in order to provide investors willing to benefit from this practice and to gain access to the protections offered in IIAs with insightful and useful recommendations to achieve said objective. This knowledge allows investors to navigate the complex and ever-changing landscape of investment protection. By recognizing the agreements that offer the greatest promise for implementing this practice while respecting their limits, investors willing to continue investing in Colombia will be able to better protect their investments in the country and mitigate the potential risks associated with the country’s current political and economic uncertainties.

References

Advisory Opinion Concerning the Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 (International Court of Justice 1988).

Aguas del Tunari, S.A. v. Republic of Bolivia, Decision on Respondent's Objections to Jurisdiction , ICSID Case No. ARB/02/3 (Arbitral Tribunal 2005).

Astrida Benita Carrizosa v. Republic of Colombia, Award, ICSID Case No. ARB/18/5 (Arbitral Tribunal April 19, 2021).

Banifatemi, Y. (2018). Taking Into Account Control Under Denial of Benefits Clauses. In E. Gaillard, & Y. Banifatemi, *Jurisdiction in Investment Treaty Arbitration - IAI Series No. 8* (pp. 223-267). Paris: Juris Arbitration Law.

Bashir, M. (2023, May 16). *Jus mundi*. Retrieved August 13, 2023, from Denial of Benefits: https://jusmundi.com/en/document/publication/en-denial-of-benefits#:~:text=Denial%20of%20Benefits%20clauses%20are,did%20not%20intend%20to%20protect.

Batifort, S., & Larkin, A. (2022). The Meaning of Silence in Investment Treaties. *ICSID Review - Foreign Investment Law Journal, 00*(00), 1-25.

Baumgartner, J. (2016). *Treaty Shopping in International Investment Law* (First ed.). Oxford, United Kingdom: Oxford Univeristy Press.

Baumgartner, J. (2017). The Significance of the Notion of Dispute and Its Foreseeability in an Investment Claim Involving a Corporate Restructuring. *Journal of World Investment & Trade, 18,* 201-231.

Bentolila, D. (n.d.). Towards a Doctrine of Jurisprudence in Treaty-Based Investment Arbitration .

Bonnitcha, J., Poulsen, L., & Waibel, M. (2021). *La economía política del régimen de los tratados de inversión* (First ed.). (M. M. Mürrle, Trans.) Bogotá, Colombia: Legis.

Caratube International Oil Company LLP v. The Republic of Kazakhstan, Award, ICSID Case No. ARB/08/12 (Arbitral Tribunal 2012).

Cementownia "Nowa Huta" S.A. v. Republic of Turkey, Award, ICSID Case No. ARB(AF)/06/2 (Arbitral Tribunal 2009).

Chaeva, N. (2023, August 21). *Jus Mundi*. Retrieved September 2, 2023, from Consent to Arbitration : https://jusmundi.com/en/document/publication/en-consent-to-arbitration

Chaisse, J. (2015). The Treaty Shopping Practice: Corporate Structuring and Restructuring to Gain Access to Investment Treaties and Arbitration. *Hastings Business Law Journal , 11*(2), 225-306.

Dentons US LLP, Counsel for Gran Colombia Gold Corp. (2018, May 25). Request for arbitration.

Dolzer, R., Kriebaum, U., & Schreuer, C. (2022). *Principles of International Investment Law* (Third ed.). Oxford, United Kingdom: Oxford University Press.

Duggal, K. A., García Clavijo, D. F., Trujillo, S., & Rincón, M. C. (2019). Colombia's 2017 Model IIA: Something Old, Something New, Something Borrowed. *ICSID Review - Foreign Investment Law Journal, 34*(1), 224-240.

Ebert, B. P. (2018). Forum Shopping, Treaty Shopping, Nationality Planning, and International Investment Law: Quo Vadis. . *ZDAR: Zeitschrift fur Deutsches und Amerikanisches Recht, 41*, 27-29.

Fahrner, A. (2023, May 17). *Jus Mundi*. Retrieved September 2, 2023, from Double barreled / Two-fold test: https://jusmundi.com/en/document/publication/en-double-barrelled-two-fold-test#:~:text=The%20%E2%80%9Cdouble%2Dbarreled%20test%E2%80%9D,in%20the%20instrument%20embodying%20its

Fukunaga, Y. (2018). Abuse of Process under International Law and Investment Arbitration. *ICSID Review - Foreign Investment Law Journal, 33*(1), 181-211.

Gaillard, E. (2017). Abuse of Process in International Arbitration. *ICSID Review - Foreign Investment Law Journal, 32*(1), 17-37.

García Matamoros, L. V. (2019). La relación entre las políticas de inversión extranjera en Colombia y los acuerdos internacionales de inversión. *Anuario Colombiano de Derecho Internacional, 12*, 85-120.

García Olmedo, J. (2020). Recalibrating the International Investment Regime Through Narrowed Jurisdiction. *International and Comparative Law Quarterly, 69*, 301-334.

Gas Natural SDG, S.A. v. Argentine Republic, Decision on Jurisdiction, ICSID Case No. ARB/03/10 (Arbitral Tribunal April 7, 2003).

Generation Ukraine, Inc. v. Ukraine, Award, ICSID Case No. ARB/00/9 (Arbitral Tribunal 2003).

Goh, N. (2019). The Assignment of Investment Treaty Claims: Mapping the Principles. *Journal of International Dispute Settlement, 10*, 23-41.

Gran Colombia Gold Corp. v Republic of Colombia, ICSID Case No. ARB/18/23 (November 23, 2020).

HICEE B.V. v. The Slovak Republic, Partial Award, UNCITRAL, PCA Case No. 2009-11 (Arbitral Tribunal 2011).

Ho, J. (2020). Passive Investments. *ICSID Review - Foreign Investment Law Journal, 35*(3), 523-539.

International Institue for Sustainable Development. (n.d.). *UN Environment Programme*. Retrieved August 7, 2023, from A Sustainability Toolkit for Trade Negotiators: Trade and investment as vehicles for achieving the 2030 Sustainable Development Agenda: https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/5-investment-provisions/5-2-definition-of-investment/

Jagusch, S., & Sinclair, A. (2008). Denial of advantages under Article 17(1). In C. Graham, & R. Clarisse, *Investment Protection and The Energy Charter Treaty.* Juris Publishing.

Lee, E. (2015, February). Treaty Shopping in International Investment Arbitration: How often has it occurred and how has it been perceived by tribunals? *Working paper Series 2015. No.15-167*. London, United Kingdom: Department of International Development, London School of Economics and Political Science.

Lee, J. (2015). Resolving Concerns of Treaty Shopping in International Investment Arbitration. *Journal of International Dispute Settlement, 6*, 355-379.

Liberian Eastern Timber Corporation v. Republic of Liberia, Award, ICSID Case No. ARB/83/2 (Arbitral Tribunal 1986).

Limited Liability Company Amto v. Ukraine, Award, SCC Case No. 080/2005 (Arbitral Tribunal March 26, 2008).

Limited Liability Company Amto v. Ukraine, Final Award, SCC Case No. 080/2005 (Arbitral Tribunal 2008).

Liu, S. (2019). An Examination of the Limits on Treaty Shopping and Nationality Planning through Arbitral Jurisprudence - How the Philip Morris v Australia Award Represents a Consolidation of the Approach of Previous Tribunals. *InternationalTrade andBusiness Law Review, 22*, 43-68.

Mavrommatis Palestine Concessions (Permanent Court of International Justice 1924).

Ministerio de Comercio, Industria y Turismo. (2023, May 24). *Ministerio de Comercio, Industria y Turismo*. Retrieved September 24, 2023, from Colombia revisa acuerdos de promoción de inversiones : https://www.mincit.gov.co/prensa/noticias/comercio/colombia-revisa-acuerdos-de-promocion-inversiones

Ministerio de Comercio, Industria y Turismo. (2023). *Acuerdos Internacionales de Inversión (AIIs)*. Retrieved August 31, 2023, from Acuerdos Internacionales de Inversión Vigentes: https://www.tlc.gov.co/acuerdos/a-internacional-de-inversion

Mistelis, L., & Baltag, C. (2018). 'Denial of Benefits' Clause in Investment Treaty Arbitration. *Legal Studies Research Paper No. 293/2018*. London, United Kingdom: Queen Mary University of London, School of Law.

National Gas S.A.E. v. Arab Republic of Egypt, Award, ICSID Case No. ARB/11/7 (Arbitral Tribunal 2014).

OECD. (2012). Investor-State Dispute Settlement Public Consultation: 16 May - 9 July 2012. 55.

Pac Rim Cayman LLC v. Republic of El Salvador, Decision on the Respondent's Jurisdictional Objections, ICSID Case No. ARB/09/12 (Arbitral Tribunal 2012).

Pauker, S. A. (2018). Admissibility of claims in investment treaty arbitration. *Arbitration International, 34*, 1-78.

Philip Morris Asia Limited v. The Commonwealth of Australia, Award on Jurisdiction and Admissibility, UNCITRAL, PCA Case No. 2012-12 (Arbitral Tribunal 2015).

Phoenix Action, Ltd. v. The Czech Republic, Award, ICSID Case No. ARB/06/5 (Arbitral Tribunal 2009).

Pika, M. (2023, July 31). *Jus Mundi*. Retrieved August 13, 2023, from Abuse of Process : https://jusmundi.com/en/document/publication/en-abuse-of-process#:~:text=I.-,Definition,deciding%20between%20jurisdiction%2Fadmissibility).

Portafolio. (2023, February 23). *Los factores que alejarían a los inversionistas de Colombia* . Retrieved June 19, 2023, from https://www.portafolio.co/economia/gustavo-petro-las-condiciones-sociopoliticas-aleja-a-los-inversionistas-de-colombia-578940

Red Eagle Exploration Limited v. Republic of Colombia, Decision on Bifurcation, ICSID Case No. ARB/18/12 (Arbitral Tribunal August 13, 2020).

Revista Semana. (2023, April 29). *El segundo banco más grande de EE. UU. dice que el presidente Petro "ha creado incertidumbre política" con su remezón ministerial* . Retrieved June 19, 2023, from https://www.semana.com/economia/empresas/articulo/el-segundo-banco-mas-grande-de-ee-uu-dice-que-el-presidente-petro-ha-creado-incertidumbre-politica-con-su-remezon-ministerial/202356/

Saba Fakes v. Republic of Turkey, Award, ICSID Case No. ARB/07/20 (Arbitral Tribunal 2010).

Saluka Investments B.V. v. The Czech Republic, Partial Award (Arbitral Tribunal 2006).

Schill, S. W. (2017). Good Faith Limitations on Protected Investments and Corporate Structuring. *Amsterdam Law School Legal Studies Research Paper No. 2017-16*. Amsterdam, The Netherlands: Amsterdam Center for International Law, University of Amsterdam.

Schreuer, C. H., Malintoppi, L., Reinisch, A., & Sinclair, A. (2009). *The ICSID Convention: a Commentary.* Cambridge: Cambridge University Press.

Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic, Award on Preliminary Objections to Jurisdiction, UNCITRAL, LCIA Case No. UN 7927 (Arbitral Tribunal 2008).

Söderlund, C., & Burova, E. (2018). Is There Such a Thing as Admissibility in Investment Arbitration? *ICSID Review - Foreign Investment Law Journal, 33*(2), 525-559.

Standard Chartered Bank v. The United Republic of Tanzania, ICSID Case No. ARB/10/12 (Arbitral Tribunal 2012).

Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States Award, ICSID Case No. ARB (AF)/00/2 (Arbitral Tribunal May 29, 2003).

UNCTAD. (2023, April 19). *Investment Policy Hub*. Retrieved July 16, 2023, from Total number of known investment treaty cases rises to 1,257: https://investmentpolicy.unctad.org/news/hub/1717/20230419-total-number-of-known-investment-treaty-cases-rises-to-1-257

UNCTAD. (2023). *International Investment Agreements Navigator*. Retrieved September 3, 2023, from Colombia: https://investmentpolicy.unctad.org/international-investment-agreements/countries/45/colombia

UNCTAD. (2023). *World Investment Report 2023.*

Vacuum Salt Products Ltd. v. Republic of Ghana, Award, ICSID Case No. ARB/92/1 (Arbitral Tribunal 1994).

Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela, Decision on Jurisdiction, ICSID Case No. ARB/07/27 (Arbitral Tribunal 2010).

Voon, T., Mitchell, A., & Munro, J. (2013). Legal Responses to Corporate Manoeuvring in International Investment Arbitration. *Journal of International Dispute Settlement, 5*, 41-68.

Watson, D., & Brebner, T. (2018). Nationality Planning and Abuse of Process: A Coherent Framework. *ICSID Review - Foreign Investment Law Journal, 33*(1), 302-329.

Yukos Universal Limited (Isle of Man) v. The Russian Federation, Partial Award, PCA Case No. 2005-04/AA227 (Arbitral Tribunal 2009).

Ziadé, R., & Melchionda, L. (2015). Structuring and Restructuring of Investment in Investment Treaty Arbitration. In A. W. Rovine, *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2014* (pp. 370-399). Brill.