บทความวิจัย (Research Article)

พัฒนาการของข้อบทการปฏิเสธสิทธิประโยชน์ในความตกลงการลงทุนระหว่างประเทศ

Evolution of a Denial of Benefits Clause in International Investment Agreements

โชติกา วิทยาวรากุล[*]
ผู้ช่วยศาสตราจารย์ คณะนิติศาสตร์ จุฬาลงกรณ์มหาวิทยาลัย
ถนนพญาไท เขตปทุมวัน กรุงเทพฯ 10330
chotika.w@chula.ac.th

Chotika Wittayawarakul
Assistant Professor of Law
Faculty of Law, Chulalongkorn University
Phayathai Road, Pathumwan, Bangkok 10330
chotika.w@chula.ac.th

วันที่รับบทความ 17 กุมภาพันธ์ 2569; วันที่แก้ไขบทความ 17 เมษายน 2569;
วันที่ตอบรับบทความ 17 เมษายน 2569

[*] นิติศาสตรบัณฑิต เกียรตินิยมอันดับ 2 (ธรรมศาสตร์); เนติบัณฑิตไทย; MJur (Oxon); PhD (Manchester).

บทคัดย่อ

ข้อบทการปฏิเสธสิทธิประโยชน์เป็นเครื่องมือในการจำกัดสิทธิประโยชน์ตามความตกลงการลงทุนระหว่างประเทศ ใช้เพื่อป้องกันไม่ให้นักลงทุนที่มีลักษณะตามเงื่อนไขที่กำหนดไว้ได้รับประโยชน์จากความตกลงการลงทุนระหว่างประเทศ แม้ว่านักลงทุนรายดังกล่าวจะเป็นนักลงทุนในความหมายของความตกลงฯ ก็ตาม ในอดีตข้อบทการปฏิเสธสิทธิประโยชน์ไม่ได้เป็นข้อบทพบได้ทั่วไปในความตกลงการลงทุนระหว่างประเทศ แต่ในระยะเวลาไม่นานมานี้ข้อบทดังกล่าวได้รับความสนใจมากขึ้นเนื่องจากเป็นข้อบทที่มีบทบาทสำคัญในการจัดการกับปัญหาการที่นักลงทุนวางแผนสัญชาติเพื่อให้ได้รับประโยชน์จากความตกลงการลงทุนระหว่างประเทศ บทความวิจัยนี้มีวัตถุประสงค์ที่จะศึกษาพัฒนาการของข้อบทการปฏิเสธสิทธิประโยชน์ตั้งแต่อดีตจนถึงปัจจุบัน จากการศึกษาว่าข้อบทการปฏิเสธสิทธิประโยชน์ในความตกลงการลงทุนระหว่างประเทศได้เปลี่ยนแปลงไปในทางที่กำหนดเงื่อนไขในการปฏิเสธสิทธิประโยชน์อย่างชัดเจนมากขึ้น และกำหนดเหตุที่รัฐสามารถปฏิเสธสิทธิประโยชน์ได้กว้างขวางขึ้น ข้อบทการปฏิเสธสิทธิประโยชน์มีความซับซ้อนมากขึ้นเนื่องจากถูกนำมาใช้เพื่อบรรลุวัตถุประสงค์หลากหลายไม่ได้จำกัดเพียงการป้องกันไม่ให้มีการแสวงหาประโยชน์จากสนธิสัญญาโดยไม่ชอบเท่านั้น

คำสำคัญ: ข้อบทการปฏิเสธสิทธิประโยชน์; การอนุญาโตตุลาการตามสนธิสัญญาลงทุน; การแสวงหาประโยชน์จากสนธิสัญญา; การวางแผนสัญชาตินิติบุคคล

Abstract

A denial of benefits clause is a mechanism used to limit the benefits of International Investment Agreements (IIAs) by excluding certain categories of investors who do not meet specified requirements, even if they fulfill the definition of an investor. Although this clause is an uncommon feature in investment treaties, it has attracted increasing attention due to its key role in addressing nationality planning aimed at obtaining investment treaty protection. To date, host states have invoked such clause in investment treaty arbitration with limited success, highlighting the need to refine the clause to make it more effective and responsive to states' concerns regarding the implications of investment treaty protection. This study examines the evolution of the denial of benefits clause and observes that recent international investment agreements generally expand the criteria for denying benefits while providing greater clarity on certain procedural and substantive aspects of the clause's application. It is argued that the denial of benefits clause has developed and become more sophisticated to fulfill a range of objectives beyond what was initially anticipated.

Keywords: denial of benefits clause, investment treaty arbitration, treaty-shopping, corporate nationality

1. Introduction

1.1 Background of the Study[1]

As many international investment agreements (IIAs) define nationality of corporate investors by relying on the place of incorporation, without denial of benefits clause, investment treaty arbitral tribunals setting disputes under those agreements have been reluctant to consider whether there is sufficient economic connection between the investors and the State Party under whose law they are incorporated or organized. Therefore, corporate investors owned or controlled by investors of a third Party or by investors of the denying Party have been considered as protected investors under the applicable treaties. Such problems of corporate nationality planning to obtain the benefits of the investment treaties can be partly dealt with by the rejection of an arbitral tribunal's jurisdiction *ratione temporis*[2] or by the application of abuse of rights doctrine.[3] However, these options are only available in cases of corporate structuring or restructuring occurred after the facts giving rise to a dispute has taken place or when a specific dispute is foreseeable.[4] Further, their application is not devoid

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[1] This research article summarizes the key points from the author's complete research study of the same title, funded by the Faculty of Law, Chulalongkorn University.

[2] *Phoenix Action Ltd v The Czech Republic*, ICSID Case No ARB/06/5, Award, 15 April 2009 (hereinafter '*Phoenix Action Ltd v Czech Republic*'), paras 67-71; *ST-AD GmbH v Bulgaria*, UNCITRAL, PCA Case No 2011-06, Award on Jurisdiction 18 July 2013, para 317.

[3] *Renée Rose Levy and Gremcitel SA Republic of Peru*, ICSID Case No ARB/11/17, Award 9 January 2015 (hereinafter '*Renée Rose Levy and Gremcitel SA v Peru*'), paras 185-191; *Philip Morris Asia Limited v The Commonwealth of Australia,* UNCITRAL, PCA Case No 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015 (hereinafter '*Philip Morris v Australia*'), para 536; *Transglobal Green Energy, LLC and Transglobal Green Energy de Panama, SA v The Republic of Panama*, ICSID Case No ARB/13/28, Award, 2 June 2016, paras 102-103.

[4] *Pac Rim Cayman LLC v Republic of El Salvador,* ICSID Case No ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, para 2.99; *Venezuela Holdings, BV, et al (case formerly known as Mobil Corporation, Venezuela Holdings, BV, et al) v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/27, Decision on Jurisdiction, 10 June 2010 (hereinafter '*Mobil v Argentina*'), paras 204-205; *ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/30, Decision on Jurisdiction and Merits, 3 September 2013, paras 279-280; *Tidewater Inc, Tidewater Investment SRL, Tidewater Caribe, CA, et al v The Bolivarian*

of problems and is susceptible to unpredictability. Mechanisms which are grounded in the treaty are therefore preferred.

The first one is to limit the scope of protected investors by using a cautious definition of investors requiring substantial or real economic connection between an investor and a putative home State. The second is to include a denial of benefits clause in a treaty. The function this clause is to prevent corporate nationality planning by allowing a Contracting Party to exclude the putative investors having insufficient economic connection with another Party despite having met the definition of investors of another Party. In practice, States have invoked the denial of benefit clauses as part of their objection to arbitral tribunal's jurisdiction, but they were not successful in most cases which necessitate careful treaty drafting.

UNCTAD's International Investment Agreements Navigator records 411 out of 2808 IIAs that contain the denial of benefit clause; over half of them were concluded after 2010.[5] This suggests that although the denial of benefits clause is not yet a typical element of international investment agreements, it is becoming a common feature in newly concluded IIAs. The evidence of the increasing popularity of the denial of benefits clause could also be found in recent model bilateral investment treaties (BITs) of many States, such as Italy Model BIT (2024), Canada Model BIT (2021), Bulgaria Model BIT (2023), European Union Model Clauses for BITs (2023), Belgium-Luxembourg Economic Union Model BIT (2019), Colombia Model BIT 2017, and India Model BIT 2015. Moreover, the denial of benefits clause is one of the reform elements in United Nations Commission on International Trade Law (UNCITRAL) Working Group III's investor-State dispute settlement reform, as part of 'Procedural Rules Reform and Cross-cutting Issues.'[6]

Republic of Venezuela, ICSID Case No. ARB/10/5, Decision on Jurisdiction, 8 February 2013, paras 195-198; *Lao Holdings NV v Lao People's Democratic Republic,* ICSID Case No ARB(AF)/12/6, Decision on Jurisdiction (hereinafter '*Lao Holdings NV v Laos*'), paras 76-78.

[5] International Investment Agreements Navigator <https://investmentpolicy.unctad.org/international-investment-agreements/> (accessed 11 February 2026).

[6] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, 'Possible Reform of Investor-State Dispute Settlement (ISDS), Draft Provisions on Procedural and Cross-Cutting Issues, Note by the Secretariat', A/CN9/WGIII/WP253, 30 June 2025.

1.2 Research Objective

The objective of this research paper is to trace the evolution of the denial of benefit clause in international investment agreements, including bilateral investment treaties (BITs) and other treaties which contain investment protection provisions in order to examine how they have evolved and factors that contribute to its evolution as well as analyse problems that arise in the application of the clause. This study will provide guidance to treaty negotiators about current treaty practice on the denial of benefit clauses which could be useful in treaty negotiations or the amendment of existing treaties.

1.3 Research Methodology

The research is doctrinal legal research which examines the texts of denial of benefit clauses in international investment agreements and relevant arbitral decisions which interpret and apply the denial of benefits clauses.

1.4 Structure

This research paper has five parts. Following the introduction in Part 1, Part 2 is to set the scene by exploring problems of corporate nationality planning and discussing available legal responses. Part 3 is to introduce the denial of benefits clause, examining its origin, typical function and important elements of the clause followed by Part 4 will explore recent treaty practice on the denial of benefit clause. Part 5 concludes this work analyzing key trends and future direction of the clause.

2. Corporate Nationality Planning Problems and their Legal Responses

International investment agreements provide substantive and procedural protection for investors of Contracting States. There are various criteria to determine investors which are juridical persons or legal entities who are entitled to the benefits provided by the agreements including place of incorporation, seat, and control or the combination of these tests.[7] When

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[7] Katia Yannaca-Small, 'Who is Entitled to Claim? The Definition of Nationality in Investment Arbitration' in Katia Yannaca-Small (ed) *Arbitration under International Investment Agreements: A Guide to the Key Issue* (2nd ed, Oxford University Press 2018) 234-237; UNCTAD, *Scope and Definition* (United Nations 2011) 81-84.

a treaty specifies incorporation as a test of corporate nationality, an arbitral tribunal tends to consider the origin of capital or control as irrelevant factors. As a result, investors from a third State or even from the host State can channel their investment though intermediate companies establish under the law of a State that has an IIA with the host State causing the treaty shopping problems.

2.1 Corporate Nationality Planning Problems

One of the most seminal cases which highlight the problematic situation when an investor of a host country made an investment in that country through an intermediate company established in the other Contracting State is *Tokios Tokelés v Ukraine*.[8] In this case, the majority of the arbitral tribunal held that the claimant, a company incorporated in Lithuania could bring a claim against Ukraine under Lithuania-Ukraine BIT even though the company was 99 percent owned and controlled by Ukraine nationals. The main reason for such holding is that the BIT itself only stipulates the incorporation test. If the parties would like to exclude the entities owned or controlled by host State's nationals, they could have included a denial of benefits clause for that purpose.[9]

Likewise, arbitral tribunals have refused to decline jurisdiction when the claimant is a company incorporated in a Contracting State but owned or controlled by nationals of a third State which is not a party to the IIA. For example, in *Saluka v Czech Republic*, the Tribunal rejected the respondent State's argument that Saluka, a company established under the law of the Netherlands, was not a real investor but a shell company of an English registered company.[10] In *Gold Reserve v Venezuela*, the respondent State argued that the Claimant, despite having incorporated in Canada, had its headquarter in the United States (US) and was

[8] *Tokios Tokelés v Ukraine*, ICSID Case No ARB/02/18, Decision on Jurisdiction, 29 April 2004 (hereinafter '*Tokios Tokelés v Ukraine'*)

[9] ibid, paras 36-40; *The Rompetrol Group NV v Romania,* ICSID Case No ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008, para 82. (a Dutch company controlled by a Romanian national was entitled to bring a claim against Romania under the Netherlands-Romania BIT).

[10] *Saluka Investments BV v The Czech Republic*, UNCITRAL, Partial Award 17 March 2006, paras 239-241.

a shell company of the US based Gold Reserve Corp. Therefore, it was not entitled to the protection under Canada-Venezuela BIT.[11] The Tribunal disagreed; it held that had the Parties wish to require the investor has 'genuine link' with the State which was the place of incorporation, they should have included such criteria in the BIT. As the Claimant was a company incorporated in Canada, it satisfied the definition of investor.[12]

The three cases mentioned above highlight the disadvantage of using country of incorporation test to determine nationality of a corporate investor. Under this test, a company may claim the nationality of a particular State even though no nationals of that State participate in the ownership or management of the company and even though the company engages in no activity in that country. In effect, the company could claim the benefits of the treaties concluded by that State, despite the fact that it conferred no economic benefit of any kind on that State. This causes concern for both the investor's home State and the host State. The home State might find itself protecting an investor that brings it no economic benefit while the host State may have to extend protection to investment ultimately owned by persons from a State that extends no reciprocal benefits to the host country's own investors.[13] If the treaties simply stipulate the place of incorporation as a corporate nationality test without further requiring real economic connection with the State of incorporation, the arbitral tribunals would refuse to consider beyond the treaty text unless there is abuse.[14]

2.2 Legal Response to Corporate Nationality Planning

Although arbitral tribunals did not totally exclude the possibility of applying a doctrine of corporate veil piercing, such doctrine is unlikely to be successfully invoked since it could only be applied in exceptional cases. As suggested by the ICJ in Barcelona Traction Case and endorsed by the Tribunal in *Tokios Tokelés v Ukraine*, the corporate veil may be lifted 'for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of

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[11] *Gold Reserve Inc v Bolivarian Republic of Venezuela* (I), ICSID Case No ARB(AF)/09/1, Award, 22 September 2014 (hereinafter '*Gold Reserve v Venezuela*'), para 251.

[12] ibid, para 255.

[13] UNCTAD (n 7) 82-83.

[14] *Tokios Tokelés v Ukraine*, paras 53-56; *Gold Reserve v Venezuela*, para 270.

fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations.'[15] Nationality planning to gain protection under IIAs is accepted by arbitral tribunal as legitimate.[16]

However, jurisprudence of arbitral tribunals suggests there is some limit on corporate structuring and restructuring to obtain IIA protection. In the absence of embedded filtering mechanisms in the investment treaty, the investor's claim may be rejected due to the tribunal's lack of Jurisdiction *ratione temporis*. In addition, some arbitral tribunals have applied the principle of abuse of rights or abuse of process to limit corporate nationality planning.

2.2.1 Jurisdiction *Ratione Temporis*

Corporate nationality planning is acceptable If it is done before the facts which lead to the dispute occurs; otherwise the investor's claim would fall outside a temporal scope of a treaty.[17] This principle of non-retroactivity of a treaty has been applied by many arbitral tribunals to limit investment treaty protection and their arbitral jurisdiction only to investors that acquire corporate nationality before the facts giving rise to the dispute occurred.[18] In *Phoenix Action Ltd v Czech Republic*, the facts giving rise to the dispute occurred before the original investors – the two Czech companies – were acquired by the Claimant, an Israeli Company, established for the purpose of gaining protection under the BIT between Israel and Czech Republic. The Tribunal held that it had no jurisdiction *ratione temporis* in respect of the events which took place prior to the Claimant's acquisition of the Czech companies.[19]

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[15] *Barcelona Traction, Light and Power Co, Ltd (Belgium v Spain)*, Judgment of 5 February 1970, para 56; *Tokios Tokelés v Ukraine*, para 54.

[16] *Aguas del Tunari, SA v Republic of Bolivia*, ICSID Case No ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, para 330.

[17] Article 28 of the 1969 Vienna Convention on the Law of Treaties.

[18] *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, SA v The Dominican Republic*, UNCITRAL, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, para 105; *ST-AD GmbH v Bulgaria*, paras 300-314

[19] *Phoenix Action, Ltd v The Czech Republic*, ICSID Case No ARB/06/5, Award, 15 April 2009 (hereinafter '*Phoenix Action Ltd v Czech Republic*') paras 67-71.

2.2.2 Abuse of Rights or Abuse of Process

The doctrine of abuse of rights is derived from the principle of good faith and has been widely recognized by scholars and international courts and tribunals.[20] The procedural aspect of the abuse of rights doctrine is referred to as abuse of process.[21] It prevents the use of procedural instruments or rights for purposes that are not consistent with those for which the procedural rights were established. Arbitral tribunals have applied abuse of rights or abuse of process doctrine in the context of corporate structuring and restructuring to examine whether the purpose of such transaction was to create international jurisdiction for a claim where none would otherwise exist, in which case the investor does not deserve investment treaty protection. In *Mobil v Venezuela*, the Tribunal considered a corporate restructuring was 'a perfectly legitimate goal as far as it concerned future disputes'.[22] In contrast, a restructuring to obtain BIT protection for pending disputes would be 'an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs'.[23]

In addition, where the corporate restructuring took place before the dispute occurred which means a tribunal has jurisdiction *ratione temporis* over the dispute, the Tribunal may consider the claimant's claim as abuse of rights or abuse of process if the investor can foresee a specific future dispute. As suggested by the *Pac Rim Cayman LLC v El Salvador* Tribunal, a corporate restructuring could amount to an abuse of process if 'the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy.'[24] The Tribunal endorsed the Respondent's argument that 'it is clearly an abuse for an investor to manipulate the

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[20] Jorun Baumgartner, *Treaty Shopping in International Investment Law* (Oxford University Press 2016) 202; Duncan Watson and Tom Brebner, 'Nationality Planning and Abuse of Process: A Coherent Framework' (2018) 33 ICSID Review 302, 303.

[21] Baumgartner, ibid 204; John D Branson, 'The Abuse of Process Doctrine Extended: A Tool for Right Thinking People in International Arbitration' (2021) 38 Journal of International Arbitration 187.

[22] *Mobil v Argentina*, para 204.

[23] ibid, para 205.

[24] *Pac Rim Cayman LLC v El Salvador*, para 2.99; also see *Lao Holdings NV v Laos*, paras 76-78.

nationality of a shell company subsidiary to gain jurisdiction under an international treaty at a time when the investor is aware that events have occurred that negatively affect its investment and may lead to arbitration.'[25] In a widely publicized *Philip Morris v Australia* case which concerns Australia's tobacco 'plain packaging legislation', the Claimant was company registered in Hong Kong and was part of Philip Morris corporate group. As a result of the group's restructuring decision, the Claimant became the sole owner of the group's Australian subsidiaries since February 2011 before the plain packing legislation was passed by Australian Parliament in November 2011. However, the Tribunal held that from at least April 2010 when there was joint announcement of the Prime Minister and the Health Minister on proposed tobacco control measures including plain packing legislation, the Government's intention to introduce the law was certain and there was a reasonable prospect that the legislation equivalent to the Plain Packaging Measures would eventually be enacted. [26] The Claimant was not able to show that the restructuring was done for reasons independently of bringing a claim. According to the Tribunal, '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.'[27] Therefore, the initiation of the arbitration constituted constitutes an abuse of rights.[28]

Although the abuse of rights doctrine is well-established in arbitral decisions, there are some unsettled issues with regards to its requirements which could render them ineffective. As Watson and Brebner point out, it is unclear what specific risk must be foreseeable and when it has to be foreseeable.[29] In addition, it is unsettled whether the restructuring must pursue the sole purpose of investment treaty protection as suggested by

[25] *Pac Rim Cayman LLC v El Salvador*, para 2.100, Also *Renée Rose Levy and Gremcitel SA v Peru*, paras 188-193.

[26] *Philip Morris v Australia*, para 567.

[27] Ibid, para 584.

[28] Ibid, para 588.

[29] Duncan Watson and Tom Brebner (n 20) 318-319.

the *Phoenix* Tribunal,[30] or simply be 'the main determinative, if not sole' reason as adopted by the *Philip Morris* Tribunal.[31]

Instead of relying on the non-retroactivity principle and the abuse of rights or abuse of process, it is arguable that the better way to deal with corporate nationality planning is to rely on a treaty text. First, the definition of an investor covered by the treaty can be designed to require more substance to the nationality. It might require a company must not only be incorporated or organized under the law of a Contracting Party, but must also have seat as well as actual business in that Contracting Party. For example, the Philippines-UK BIT (1981) Article 1(4) requires that a company be incorporated and 'actually doing business' under the law of a Contracting Party wherein a place of effective management is situated.[32]

Apart from a more cautious investor's definition, another treaty-embedded mechanism is a denial of benefit clause. The denial of benefit clause could produce effect differing from that of the definition clause. While the definition clause automatically excludes the investors that fail to meet the stipulated requirements under the definition, denial of benefits clause could have varying effect depending on the treaty text. Therefore, it could be designed and structured to be more flexible and serve different objectives.[33] Moreover, it is argued that the denial of benefits clause should be preferred as it has several advantages compared to the abuse of rights doctrine. First, the doctrine is not grounded in the treaty text and its application is not predictable. As mentioned above, there are still some issues not yet settled. Second, there is a risk that expansive application of the doctrine can be developed

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[30] *Phoenix Action Ltd v Czech Republic*, para 93.

[31] *Philip Morris v Australia*, para 584; *Mobil Corporation v Venezuela*, para 190; *Pac Rim Cayman LLC v El Salvador*, para 2.41.

[32] Article 1(4): The term "company" of a Contracting Party shall mean a corporation, partnership or other association, incorporated or constituted and actually doing business under the laws in force in any part of the territory of that Contracting Party wherein a place of effective management is situated. See also Iran-Switzerland BIT (1998 Article 1(b); Thailand-UAE BIT (2015) Article 1(2); EU - Singapore Investment Protection Agreement (2018) Article 1.2

[33] Mark Feldman, 'Setting Limits on Corporate Nationality Planning in Investment Treaty Arbitration' (2012) 27 ICSID Review 281, 283.

by investors to claim the abuse of rights by States. Third, the denial of benefit clause represents a common and express position of the Parties regarding the circumstances in which the investor should be denied benefits.[34]

3. Denial of Benefit Clause: Origin, Early Practice and Its Application

3.1 Origin and Early Practice of Denial of Benefits Clauses

Although a denial of benefit clause is a provision that is not commonly found in international investment agreements, the clause has gained considerable interest in recent years as a tool to limit the scope of investment treaty protection. The origin of the clause could be traced back to the Treaties of Friendship, Commerce, and Navigation or FCN treaties, especially the United States (US)'s FCN treaties, for example US-China FCN (1946).[35] After defining term 'corporations and associations' as corporations, companies, partnerships and other associations, created or organized under the laws of the Contracting Parties, Article XXVI (5) states:

> [....] each High Contracting Party reserves the right to deny any of the rights and privileges accorded by this Treaty to any corporation or association created or organized under the laws and regulations of the other High Contracting Party which is directly or indirectly owned or controlled, through majority-stock ownership or otherwise, by nationals, corporations or associations of any third country or countries.

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[34] ibid 282-283.

[35] Loukas Mistelis and Crina Baltag, 'Denial of Benefits Clause' in *Max Plack Encyclopedias of International Law* (July 2019), para 12; Intan Murnira Ramli, 'Denial of Benefits in Investment Arbitration: Genesis, Trends, and Application' in J Chaisse et al (eds), *Handbook of International Investment Law and Policy* (Springer 2021) 1013.

The denial of benefit clause has been incorporated into most BITs and free trade agreements (FTAs) concluded by the United States.[36] The function of the clause is to deny the benefit to investors and their investment if the conditions provided in the treaties are met even though the investors might satisfy the definition of investors under the relevant treaties. Therefore, the denial of benefits clause is a 'method to counteract strategies that seek protection of particular treaties by acquiring a favourable nationality'.[37] It is also described as 'safety measure[s] for safeguarding the principle of reciprocity embodies in investment treaties'.[38]

The examination of US investment treaty practice reveals evolution of the denial of benefit clause in the US treaty practice. The first generation of the denial of benefits clause appears in the US BITs concluded in 1980s.[39] It is different from the clause which is provided in later treaties in several aspects. First, the clause allows a Contracting Party to deny benefits of the treaty to its own companies or to company of the other Party. Second, only one substantive requirement for denying benefits is imposed – nationals of any third country own or control such company. Third, the denying Party is required to consult with the other Party

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[36] Anne K Hoffmann, 'Denial of Benefits' in Marc Bungenberg, Jörn Griebel, August Reinisch and Stephan Hobe (eds) *International Investment Law: A Handbook* (Nomos 2015) 599.

[37] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 55.

[38] L Mistelis and C Baltag, 'Denial of Benefits and Article 17 of the Energy Charter Treaty' (2009) 113 Penn State Law Review 1301, 1303.

[39] For example, US Panama 1982 Article 1 states:

Each Party reserves the right to deny any of its own companies or to a company of the other Party the advantages of this Treaty, except with respect to recognition of juridical access to courts, if nationals of any third country own or control such company; provided that whenever one Party concludes that the benefits of this Treaty should not be extended to a company of the other Party for this reason, it shall consult with the other Party to seek a mutually satisfactory resolution to this matter;

See also US-Panama BIT (1982) Article 1; US-Senegal BIT (1983) Article 1, US-Congo BIT (1984) Article 1, US-Morrocco BIT (1985) Article 1; US-Turkey BIT (1985) Article 1, US-Cameroon BIT (1986) Article 1, US-Bangladesh BIT (1986).

to seek a mutually satisfactory resolution to this matter[40] which is more stringent procedural requirement imposed in most treaties concluded later.

The denial of benefits clause in later treaties limits the right to deny the benefits to a company of the other contracting Party and impose an additional requirement that such company 'has no substantial business activities in the territory of the other Party.' However, it extends the ground for denying benefits to the case when a company of the other Party is owned or controlled by nationals of a third country with which the denying Party does not maintain normal economic relations.[41] This ground permits the US government to deny the benefits to the investor which is owned or controlled by investors from a country to which it is applying economic sanctions such as Cuba and Libya.[42] Later, the denial of benefit clause includes the case when the investor is owned or controlled by nationals of a third country with which the denying Party does not maintain diplomatic relations with the non-Party.[43] Some IIAs also cover the case that a company is owned or controlled by investors of the denying Party and such company has no substantial business activities in the territory of the Party under whose law it is constituted or organized.[44]

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[40] US-Panama BIT (1982) Article 1; US-Senegal BIT (1983) Article 1, US-Congo BIT (1984) Article 1, US-Morrocco BIT (1985) Article 1; US-Turkey BIT (1985) Article 1, US-Cameroon BIT (1986) Article 1, US-Bangladesh BIT (1986).

[41] Ex US-Grenada 1986 Article 1; US Congo BIT (1990) Article 1; US -Sri-Lanka BIT (1991) Article 1; US Slovakia BIT (1991); Romania-US BIT (1992) Article 1; Ecuador-US BIT (1993) Article 1; US-Georgia BIT (1994) Article XII; Albania-US BIT (1995) Article XII; Honduras-US BIT (1995) Article XII; Croatia-US BIT (1996) Article XII; Jordan-US BIT (1997) Article XII; US-Viet Nam Trade Relations Agreement (2000) Article 15.

[42] Letter of Submittal dated June 22, 1995 transmitting the US-Georgia BIT (1994) for US Senate's consent for ratification; available at <https://www.state.gov/investment-affairs/bilateral-investment-treaties-and-related-agreements/united-states-bilateral-investment-treaties/> (accessed 16 April 2026).

[43] Ex NAFTA (1992) Article 1113; Singapore-US FTA (2003) Article 15.11; US-Uruguay BIT (2005) Article 17.

[44] Ex Singapore-US FTA (2003) Article 15.11; CAFTA (2004) Article 10.12; Bahrain-US FTA (2004); Panama-US FTA (2007) Article 10.12; Chile-US FTA (2003) Article 10.11; Morocco-US FTA (2004).

Apart from the US IIAs, the denial of benefit clause has been incorporated in IIAs concluded by other States such as Canada, China, and Australia[45] and also been used in plurilateral agreements such as the North American Free Trade Agreement (1992)[46], the Energy Charter Treaty (1994), and ASEAN Comprehensive Investment Agreement (ACIA) (2009), Regional Comprehensive Economic Partnership Agreement (RCEP) (2020). The ways that the denial of benefits clauses are incorporated in the investment treaties vary. While the US-China FCN included the denial of benefits clause as part of a provision which contains exception and exemption,[47] many US BITs in 1980s and 1990s included the denial of benefits clause in the provision on definitions.[48] In some treaties, the denial of benefits clause also appears in the provision on the scope of application. For instance, Australia-Philippines BIT (1995) Article 2 entitled 'Application of Agreement' states:

3. Where a company of a Party is owned or controlled by a citizen or a company of any third country, the Parties may decide jointly in consultation not to extend the rights and benefits of this Agreement to such company.[49]

To date, the denial of benefits clause appears more often in a separate treaty provision.[50]

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[45] Hoffmann (n 38).

[46] Since 1 July 2020, NAFTA was replaced by the United States-Mexico-Canada Agreement (USMCA) (2018)

[47] US-China FCN Article XXVI; See also 1966 Treaty of Amity and Economic Relations between the United States and Thailand Article XXII

[48] Ex US-Panama (1982) Article 1(c); US-Haiti BIT (1983) Article 1(b); US-Ecuador (1993) Article 1(2); US-Argentina (1991) Article 1(2).

[49] See also Australia-Turkey-BIT (2005) Article 2.

[50] Ex United States - Uruguay BIT (2005); NAFTA Article 1113.

3.2 Structure of the Denial of Benefits Clause

The effect of the denial of benefits clause could vary depending on the structural design, the scope as well as the requirements that need to be met before the benefits would be denied.

3.2.1 Automatic or Discretionary Denial of Benefit Clause

Most of the denial of benefits clauses found in IIAs are discretionary clauses, requiring a contracting Party to exercise the right to deny. They provide that a Party 'reserves the right to deny,'[51] 'may deny,'[52] 'preserves the right to deny'.[53] Thus, the investors are not excluded from the benefits of the treaties even though the conditions for denying the benefits are met unless a Contracting Party exercises the right to deny.[54] The reason why States tend to adopt a discretionary denial of benefit clause rather than a mandatory clause might be because the discretionary clause is more flexible and offers the opportunity for the States to decide if they want to extend the benefits of the treaties to certain groups of investors even if they might fall with the situations where the benefits can be denied.

In *Plama v Bulgaria*, the Tribunal distinguished the text of Article 17(1) of the ECT from the one appearing in Article VI of the ASEAN Framework Agreement on Trade in Services (AFAS). The ECT Article 17 (1) provides '[e]ach Contracting Party reserves the right to deny …' while AFAS Article VI uses the terms '[t]he benefits of this Framework Agreement shall be denied …' whereas the ECT Article 17 (1) provides '[e]ach Contracting Party reserves the right to deny …'. The Tribunal considered the latter formulation automatically excluded the investor from the treaty benefits without requiring a Contracting Party to exercise the right to deny such benefits.[55] To exercise the right under Article 17 of the ECT, the State must

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[51] Ex Protocol to the US-Egypt BIT (1986), Energy Charter Treaty Article 17; Argentina-US BIT (1991) Article 1(2) US-Bolivia BIT (1998); Japan-Vietnam BIT (2003).

[52] Ex NAFTA (1994) Article 1113; CAFTA (2004) Article 10.12; US-Uruguay (2005) Article 17.

[53] Ex US-Uzbekistan BIT (1994) Article XII.

[54] *Khan Resources Inc, Khan Resources BV, and Cauc Holding Company Ltd v The Government of Mongolia*, Decision on Jurisdiction, 25 July 2012 (hereinafter '*Khan Resources v Mongolia'*) para 419.

[55] *Plama Consortium Limited v Republic of Bulgaria,* ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005 (hereinafter '*Plama v Bulgaria'*), para 156.

inform the investor about the exercise of the such right which could be done through publicity or other notice which are reasonable to the investor.[56] This case therefore highlights the problem that is caused by the discretionary denial of benefits clause and prompt the reconsideration of the structural design of the denial of benefit clause in later treaties.

[56] Ibid, para 157.

3.2.2 Scope of Denial of Benefits Clauses

A denial of benefit clause could produce different effect due to the scope of the clause – the coverage of benefits that will not be granted to the investor. The clause mostly allows a denying Party to deny the benefits of the whole treaty including the offer to arbitrate. For instance, the US-Bolivia BIT (1998) Article XII states each Party 'reserves the right to deny benefits of the Treaty'. Similarly, Article 10.12 of the Dominican Republic-Central America-United States Free Trade Agreement (2004) or CAFTA provides that '[a] Party may deny the benefits of this [investment] Chapter'. In contrast, denial of benefits clauses in some treaties only cover the benefits under certain parts of the treaties. For example, Article 17 of the Energy Charter Treaty (ECT) contains the denial of benefits clause locating in Part III entitled 'Investment Promotion and Protection' and provides that '[e]ach Contracting Party reserves the right to deny the advantages of this Part to…'. This clause was interpreted as allowing the denying Party to exclude the benefits provided in Part III which contains substantive investment protection only but not the State's offer to arbitrate.[57]

In practice, the scope of the denial of benefits clause has an implication on the effect of a State's exercise of the right to deny – whether such denial should have prospective or retrospective effect. According to arbitral decisions, the right to deny benefits under the ECT operates prospectively requiring the denying State to notify the investor of such intention in advance.[58] While arbitral tribunals considering the denial of benefits under other treaties such as CAFTA and US-Bolivia BIT (1998) to operate retrospectively.[59] The

[57] ibid, paras 148-149.

[58] ibid, para 162; *Yukos Universal Limited (Isle of Man) v Russian Federation*, PCA Case No 227, Interim Award on Jurisdiction and Admissibility, 30 November 2009 (hereinafter '*Yukos v Russia*') para 458; *Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award, 22 June 2010, para 225; *Masdar Solar & Wind Cooperatief UA v Kingdom of Spain*, ICSID Case No ARB/14/1, Award of 16 May 2018, para 239.

[59] *Guaracachi America, Inc and Rurelec PLC v The Plurinational State of Bolivia,* UNCITRAL, PCA Case No 2011-17, Award, 31 January 2014, para 376; *Pac Rim Cayman LLC v El Salvador*, paras 483-490; *Ulysseas Inc v Ecuador*, PCA Case No 2009-19, Interim Award, 28 September 2010 (hereinafter '*Ulysseas v Ecuador*'), para 173.

difference in the scope of denial of benefit clause under the ECT and other treaties could be one of the reasons that support the holding that the right to denial benefit under the ECT could not operate retrospectively whereas denial of benefits of the kind which appear in other treaties such as US-Bolivia BIT were able to operate retrospectively.[60]

3.2.3 Requirements for Invoking Denial of Benefit Clauses

Requirements for invoking the denial of benefit clauses can be categorized into substantive and procedural requirements.

1) Substantive Requirements

The denial of benefits clause has been used to exclude the investor from the benefits of the treaty on various grounds which constitute different substantive conditions that have to be met. The denial of benefits clause was originally aimed at excluding the benefits to an investor which is a juridical person, such as a company, of a Contracting Party but is owned or controlled by nationals or companies of a non-Party.[61] Later, the ground for denying benefits was more elaborated. For example: NAFTA Article 1113 provides that a Party may deny the benefits of NAFTA Chapter 11 to an investor of another Party that is an enterprise of such Party and to investments of such investor if investors of a non-Party own or control the enterprise and the existence of one of these situations:

> (a) the denying Party 'does not maintain diplomatic relations with the non-Party'; or
>
> (b) the denying Party 'adopts or maintains measures with respect to the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments';[62] or

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[60] Mistelis and Baltag (n 37) para 80.

[61] Ex US-Panama BIT (1982) Article 1(c); US-Haiti BIT (1983) Article 1(b); US-Egypt BIT(1986); Australia-Philippines BIT (1995) Article 2.3.

[62] Early US BITs, such as US-Bolivia (1998) BIT Article XII, refers to 'the denying Party does not maintain normal economic relations with the third country'.

(c) the enterprise has no substantial business activities in the territory of the Party under whose law it is constituted or organized.'

It is notable that the early denial of benefits clauses focus on the exclusion of the investor which is owned or controlled by the investors of a non-Party as most of them do not include the situation when the investor is owned or controlled by the investors of a denying State. Not many IIAs include the right to deny of benefits on such ground.[63] Such ground is included in the 2004 US Model BIT which is the year that *Tokios Tokelés v Ukraine* decision on jurisdiction was issued. Since then, IIAs often allow a Contracting Party to deny benefits if (1) the investor of another Party is owned or controlled by the persons of a non-Party or of the denying Party and (2) such investor does not have substantive business activities in territory of another Party.[64] However, some IIAs stipulate such requirements as alternative rather than accumulative thus broadening the ground for denying the benefits.[65]

2) Procedural Requirements

To invoke a denial of benefit clause, IIAs may impose the procedural requirement to notify and/or consult with other Contracting Parties. The procedural requirement for invoking the denial of benefits clause is diverse. While some IIAs do not impose any procedural requirements,[66] there are agreements which subject the right to deny benefits to the notification and consultation requirements.[67] Some IIAs impose a more demanding consultation requirement. For instance, paragraph 1 of the Protocol to US-Egypt BIT (1986) requires consultation to 'seek a mutually satisfactory solution'. It states:

1. Each Party reserves the right to deny the benefits of this Treaty to any company of either Party, or its affiliates or subsidiaries, if nationals of any third country control

[63] Ex US-Argentina BIT (1994) Article I(2).

[64] Ex US-Panama Trade Promotion Agreement (2007) Article 10.12; USMCA Article 14.14.

[65] Pakistan-Malaysia CEPA (2007) Article 101(2); Singapore-India CECA (2005) Article 6.9.

[66] US-China FCN (1946); US-Bolivia BIT (1998) Article XII; US-Argentina BIT (1994) Article I(2).

[67] CAFTA Article 10.12(2); US-Panama Trade Promotion Agreement (2007) Article 10.12.

such company, affiliate or subsidiary; provided that, whenever one Party concludes that the benefits of this Treaty should not be extended for this reason, it shall promptly consult with the other Party to seek a mutually satisfactory resolution of this matter.[68]

In addition, some IIAs require all Parties to make a joint decision not to extent the treaties' benefits to the investor if the substantive requirements for denying such benefits are met. For example, Australia-Philippines BIT (1995) provides that 'the Parties may decide jointly in consultation not to extend the benefits …' Protocol to Korea-Switzerland BIT (1971) states '[b]oth Parties shall come to an understanding in each case with regard to whether the interest held by nationals of either Party is a controlling interest permitting to exercise decisive influence on the company'.

3.3 The Application of the Denial of Benefits Clause

States invoked the denial of benefits clause as part of their objection to the arbitral tribunal's jurisdiction in various cases. Most of them are concerned with the application of the denial of benefits clause in the ECT; other cases involve the application of such clause in CAFTA and in US's BITs. Those invocations were successful in very few cases. Arbitral decisions on the application of the denial of benefits clause highlight several problems caused by lack of clarity and loopholes in the treaty text.

3.3.1 Substantive Requirements

The denial of benefits clause can be invoked to exclude investors from benefits under the treaties if they fall within the situations set out in the denial of benefits clauses. In practice, the ground for denial of benefits that is mostly invoked by a Contracting State in investment treaty arbitration is the case when an investor which is a juridical person is owned or control by investors of a third Party and such investor has no substantive business operations in the Contracting Party under whose law it was incorporated or organized or in the State Party in which it has its seat. In such case, two accumulative requirements must be met: the investor is owned or controlled by nationals or enterprise of a non-Party and that

[68] See also US-Haiti BIT (1983) Article 1(b); US-Panama BIT (1982) Article 1(c)

the investor does not have substantial business activities in the State whose law it is incorporated or in whose territories it has its seat.[69]

1) The investor is owned or controlled by investors of a third Party

To invoke the denial of benefits clauses, it must be established that the investor is owned or controlled by investors of a third Party. The problem regarding this requirement is how to establish ownership or control. The determination of control normally involves the examination of factual circumstances. Some IIAs may include definitions of ownership and control. Some treaties further provide for factors to be considered as evidence of control.[70] For instance, the Protocol of 23 August to the Australia-Argentina BIT (1997) states that the establishment of control depends on factual circumstances and provides for factual circumstances that are evidence of control:

> 3. The following facts, inter alia, shall be accepted as evidence of control:
>
> (a) a level of direct or indirect participation in the capital of a legal person or of a company which allows for control, such as a direct or indirect participation higher than 50% of the capital or a majority shareholding; or
>
> (b) a direct or indirect control of the voting rights allowing for:
>
> (i) the exercise of decisive power over management and operations; or
>
> (ii) the exercise of a decisive power over the composition of the Board of Directors or any other managing body.

In investment treaty arbitration, several issues were raised regarding the determination of 'control': whether 'control' covers both direct and indirect control and at what level of control that would be examined. According to the Tribunal in *Ulysseas v Ecuador*, the parties agreed that 'control' in the denial of benefits clause of US-Ecudador BIT

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[69] *Plama v Bulgaria*, para 143.

[70] For example, Article 14.17 Japan-Australia EPA (2014); Understanding No 3 to Article 1(6) ECT; Protocol of 23 August 1995 to the Australia-Argentina BIT (1997).

(1993) means 'legal capacity to control'.[71] However, they disagreed on the issue whether 'control' must be exercised directly only or can be exercised indirectly. Having considered the text of Article I(2) which states 'if nationals of any third country control such company' and the definition of 'nationals' in the Treaty being referred to natural persons, the tribunal concluded the notion of control in this Treaty's denial of benefit clause must cover indirect control. Therefore, it examined who had the ultimate control over the Claimant 'at the upper end of the chain of control of a company'.[72] In addition, the Tribunal in *Big Sky Energy Corporation v Kazakhstan* interpreting the denial of benefits clause in US-Kazakhstan BIT (1992) suggests that control may be control in law or control in fact.[73] However, the fact that there is a national of a third State funds arbitration does not necessarily mean that person has control over the claimant. In addition, arbitral funding arrangements which appoint a third State national as a claim manager do not necessarily transfer control-in-fact of the claimant to the claim manager.[74]

In *Pac Rim Cayman LLC v El Salvador*, El Salvador alleged that Pac Rim was owned by and controlled by PRMC, a Canadian corporation. Canada is not a Party to CAFTA. In contrast, Pac Rim argued that its ultimate owners and controllers were US persons who

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[71] *Ulysseas v Ecuador*, para 168. Denial of benefits clause stated in Article 1(2) states:

Each Party reserves the right to deny to any company the advantages of this Treaty if nationals of any third country control such company and, in the case of a company of the other Party, that company has no substantial business activities in the territory of the other Party or is controlled by nationals of a third country with which the denying Party does not maintain normal economic relations.

[72] ibid, paras 169-170.

[73] *Big Sky Energy Corporation v Republic of Kazakhstan*, ICSID Case No ARB/17/22, Award, 24 November 2021 (hereinafter '*Big Sky v Kazakhstan*'), paras 251 and 253. Article 1(2) of US-Kazakhstan BIT (1992) provides that:

[e]ach Party reserves the right to deny to any company the advantages of this Treaty if nationals of any third country control such company and, in the case of a company of the other Party, that company has no substantial business activities in the territory of the other Party or is controlled by nationals of a third country with which the denying Party does not maintain normal economic relations.

[74] Ibid, paras 258-262.

owned a majority shares of PRMC, its Canadian parent company.[75] However, the Tribunal did not agree that Pac Rim was owned or controlled by the US nationals. According to the Tribunal, US nationality cannot be merely adduced from the fact that the persons have postal addresses in the US; rather, this issue has to be determined by relevant law.[76] The *Pac Rim* Tribunal does not resolve the issue if the majority shareholders of the Canadian Company are actually US nationals, would Pac Rim be considered as being owned or controlled by the US nationals? It is arguable that Pac Rim might be considered as being controlled by US nationals since 'control' is likely to encompass both direct and indirect control.[77]

2) The investors do not have substantive business activities in the State Party

This requirement is quite controversial, and the treaty text rarely provides for clear guidance especially on the issue of which moment in time that is relevant to assess whether there are substantial business activities and the issue of whether business activities of the claimant are 'substantial'.

(a) The moment in time that is relevant to assess whether the Claimant has substantial business activities

The arbitral decisions on this issue are inconsistent. In *GCM v Columbia*, the Tribunal identified three possible dates that are relevant to the analysis of substantial business activities[78]:

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[75] *Pac Rim Cayman LLC v El Salvador*, para 4.35.

[76] Ibid, para 4.81.

[77] Cf Jordan Behlman, 'Out of a Rim: Pacific Rim's Venture into CAFTA's Denial of Benefits Clause (2014) 45 Inter-American Law Review 397, 408 (arguing that even if the shareholders were US nationals, Pac Rim is owned and controlled by PRMC, a Canadian Company that wholly owns Pac Rim. The Tribunal does not have to consider the structure of PRMC since CAFTA's denial of benefits clause focuses on the 'enterprise'.

[78] The case concerns the denial of benefits clause in Canada-Columbia FTA (2008) Article 814(2) which states:

- the date at which the request for arbitration was issued;
- the date at which the denial of benefits clause was invoked;
- the date at which ICSID registered the claim.[79]

Other tribunals' decisions are divided as to the relevant date for the assessment of substantive business activities. In *Ulysseas v Ecuador*, the Tribunal considered the date of the Notice of Arbitration as the relevant date, since it is 'the date on which the Claimant has claimed the BIT's advantages that Respondent intends to deny'.[80] However, In *Pac Rim Cayman LLC v El Salvador*, the Tribunal considered whether the claimant has substantive business activities in the US from the date that it was incorporated in the US.[81] Similarly, the *Littop v Ukraine* Tribunal considered the relevant date is the date at which the investment was made and/or the period immediately following.[82] The Tribunal in *Big Sky v Kazakhstan* rejected the Respondent's argument that the date for determining the existence of substantive business activities should be the date of a request for arbitration, but it was not decisive on the exact point of time the substantive business activities should be assessed. Instead, it held that it should analyse business activities 'more broadly with respect to the relevant date.'[83] The *Durres Kurum v Albania* Tribunal considered the date immediately prior to alleged measures of the host State as the relevant date'.[84]

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 non Party 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.

[79] *Aris Mining Corporation (formerly known as GCM Mining Corp. and Gran Colombia Gold Corp) v Republic of Colombia* (hereinafter '*GCM v Columbia*') ICSID Case No ARB/18/23, Decision on the Bifurcated Jurisdictional Issue, 23 November 2020, para 139.

[80] *Ulysseas v Ecuador*, para 174.

[81] *Pac Rim v El Salvador*, para 4.67.

[82] *Littop Enterprises Limited, Bridgemont Ventures Limited and Bordo Management Limited v Ukraine*, SCC Case No V 2015/092) Final Award, 4 February 2021 (hereinafter '*Littop v Ukraine*') para 634.

[83] *Big Sky Energy Corporation v Republic of Kazakhstan* para 276.

[84] *Durres Kurum Shipping SH PK and others v Republic of Albani*a), ICSID Case No ARB/20/37, Award, 26 July 2024, para 339.

(b) whether business activities of the claimant are 'substantial'.

The Tribunal in *AMTO v Ukraine* viewed that the requirement that the business activities be 'substantial' in Article 17 of the ECT refers to the 'substance' rather than 'form'.[85] Moreover, substantial' does not mean 'large' as it is the 'materiality' not the 'magnitude' of the business activities that matters.[86] However, the Tribunal concluded without much explanation that '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.'[87]

In *Pac Rim Cayman LLC v El Salvador*, the Tribunal refused to consider collective activities of a corporate group, affirming that the business activities for the purpose of the denial of benefit clause must be the activities of the Claimant itself, not the activities of other companies in the corporate group.[88] The Tribunal agreed with the Respondent's contention that Pac Rim was simply a shell company, solely owned by a Canadian parent company. It was established to hold shares of its parent with no office space, no employees, no board of directors, and no US bank account. Furthermore, it did not conduct exploration activities and did not pay any taxes in the US.[89] The Tribunal made it clear that it does not exclude the possibility that a holding company cannot meet the substantiality requirement.[90]

In *Bridgestone v Panama*, the Respondent State, Panama, invoked the denial of benefits clause in Article 10.12.2 of the US-Panama Trade Promotion Agreement (TPA) (2007) arguing that one of the Claimants, Bridgestone Licensing Services, Inc (BSLS), despite being incorporated in the US, was wholly owned by Bridgestone Corporation (BSJ), a

[85] *Limited Liability Company Amto v Ukraine*, SCC Case No 080/2005, Final Award, 26 March 2008, para 69.

[86] ibid.

[87] Ibid.

[88] *Pac Rim Cayman LLC v El Salvador*, para 4.66.

[89] Ibid, paras 4.8 and 4.69-4.70.

[90] Ibid, para 4.72.

Japanese corporation, and did not have substantial business activities in the US.[91] The Tribunal did not agreed with Panama's contention that 'substantial' means 'sizeable' and that 'business' must involve 'offering goods or services to unrelated parties'.[92] Instead, it considered whether BSLS had 'a real and continuous link' with the US, the place where it was established.[93] The Tribunal found that BSLS carried out substantial activities in the US before it was taken over by BSJ and continued to be after the takeover.[94] BSLS's business activities concerned the FIRESTONE trademarks. The company derived its income from royalties, which were deposited into its US bank account, and taxes on this income were paid in the US.[95] The income generated from the business activities does not need to be substantial.[96] The fact that many of its activities were performed by its sister company, and outsourced to other entities, or that its activities were supervised by its foreign parent company with major decisions made in the parent's home country, does not prevent the Tribunal from concluding that BSLS conducted substantial business activities in the US.[97]

(c) The geographical location of the substantive business activities

With regards to the geographical location of the business activities, the Tribunal in *Pac Rim Cayman LLC v El Salvador* clarified that the Claimant must have substantive business activities in the territory of the US, which is the State under whose law it was incorporated, not El Salvador.[98] The fact that the Claimant has business activities holding the shares of its subsidiaries in El Salvador cannot be considered as business activities in the

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[91] *Bridgestone Licensing Services, Inc and Bridgestone Americas, Inc v Republic of Panama, ICSID Case No ARB/16/34*, Decision on Expedited Objections, 13 December 2017 (hereinafter '*Bridgestone v Panama*'), paras 249-256.

[92] ibid, para 253.

[93] ibid, para 302.

[94] ibid.

[95] ibid, para 296.

[96] ibid, para 300.

[97] Ibid, para 302.

[98] *Pac Rim Cayman LLC v El Salvador*, para 4.74.

meaning of CAFTA's denial of benefits clause.[99] Likewise, in *Bridgestone v Panama*, the Tribunal considered whether the 'a real and continuous link' with the US, the place where it was established.[100]

3.3.2 Procedural Requirements

As most denial of benefits clauses are discretionary clauses, a State must exercise the right to deny the benefits.[101] However, the issue of when such right can be exercised against the investor is controversial, especially when denial of benefit clauses do not expressly deal with such problem.

1) Timeliness for invoking the denial of benefit clause

The timeliness for invoking denial of benefit clauses raises an issue of how to strike appropriate balance between the investor protection and the State's interest in preventing of abusive corporate nationality planning. The arbitral decisions are inconsistent on this issue and can be categorized into two groups.

The first group involves the application of the denial of benefits clause of the ECT. Most arbitral tribunals applying the denial of benefits clause of this Treaty viewed that a State could not deny benefits after the commence of investment treaty arbitration. They support this position by referring to the treaty objective. However, the arbitral decisions vary on the moment of time that the State should exercise the right to deny. Some tribunals held that the right should be exercised before the investor made the investment,[102] while others decided the benefits should be denied to an investor before a dispute arose.[103] These tribunals often relied on the object and purpose of the ECT to create a predictable legal framework for investments to support their interpretations[104]. However, these interpretations

[99] ibid.

[100] *Bridgestone v Panama*, para, 302.

[101] *Khan Resources v Mongolia*, para 419.

[102] *Plama v Bulgaria*, para 161; *Khan Resources v Mongolia*, paras 426-427.

[103] *Ascom Group SA and Terra Raf Trans Traiding Ltd v Kazakhstan,* SCC Case No V 116/2010, Award, 19 December 2013 (hereinafter *'Ascom v Kazakhstan'),* para 745, *Yukos v Russia*, para 458.

[104] *Plama v Bulgaria*, para 161; *Khan Resources v Mongolia*, para 426.

cause concerns regarding the practicality for a State to invoke the denial of benefits clause since a host State would normally be aware of the investors and their situation when they make request for arbitration.[105]

The second group of arbitral decisions applying treaties other than the ECT. Many arbitral tribunals held that without an express time-limit for denying the benefits, a denying State could exercise such right any time even after the dispute had arisen but must invoke such right when objecting to the arbitral tribunal's jurisdiction at the latest.[106] The Tribunal in *Durres Kurum v Albania* case relied on the absence of a time limit for the invocation of the denial of benefit clause and on the objective of the clause to support the conclusion that the State should be granted a practical opportunity to assess whether or not the requirements for denying benefits were met and decide whether or not to exercise such right.[107] However, the arbitral decisions on the timeliness for invoking denial of benefits are by no means consistent. In *Ampal v Egypt* case, the Tribunal held that the denying Party must deny the benefits before a Request for Arbitration was filed and registered with ICSID Secretariate.[108]

2) Notification and/or consultation requirements

Apart from the issue of when the right to deny benefits can be exercised, there is also an issue of whether there are other procedural requirements to be met before denying benefits. Some IIAs include the requirement that the denying Party must notify and/or consult with the other Party before denying benefits. In *Ampal v Egypt*, the Tribunal applied the

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[105] Cf *RSE Holdings AG v Republic of Latvia (II)*, PCA Case No 2022-41, Award 28 May 2025 deciding that the Respondent State could invoke the denial of benefits clause with retroactive effect to the date of investment. However, at the time of writing, the award is not yet available to public.

[106] *Elemec v Ecuador*, para 7; *Pac Rim Cayman LLC v El Salvador'*para 4.85; *Ulysseas v Ecuador*, para 172; *Guaracachi v Bolivia*, para 382; *GCM v Columbia*, para 127 (the tribunal viewed that if the State Parties want to set out the time limit for invoking the right to deny benefits, they should have specified the deadline in the treaty text.)

[107] *Durres Kurum v Albania,* para 349.

[108] *Ampal-American Israel Corporation and others v Arab Republic of Egypt* (hereinafter '*Ampal v Egypt*'), ICSID Case No ARB/12/11, para 170.

Protocol to the US-Egypt BIT which requires that the denying Party, if it considers the benefits of the BIT should not be extended to the investor by the reason that it is controlled by nationals of third countries, 'shall promptly consult with the other Party to seek a mutually satisfactory resolution of this matter'.[109] The Tribunal considered such consultation condition as mandatory,[110] and that Egypt had not yet fulfilled such condition. Although there had been correspondence between Egypt and the US, there were no consultations between the two States to seek mutually satisfactory resolution.[111] Importantly, the consultation must be done before the decision to deny benefits was made.[112] Therefore, the denial of benefits to Ampal was ineffective.[113] The Tribunal pointed out the 'significant difference' in treaty language of the denial of benefits clause in US-Egypt BIT and in CAFTA. According to CAFTA Article 10.12(2), the right to deny benefits is subjected to consultation requirement according to CAFTA Article 20.4.[114] The consultation between the two Parties in CAFTA is discretionary rather than mandatory as in the case of US-Egypt BIT.[115] The *Ampal v Egypt* case thus emphasizes the important implication of a procedural requirement imposed by the denial of benefits case which can impede the exercise of the right to deny the benefits.

4. Recent Practice on the Denial of Benefits Clause

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[109] Protocol of 11 March 1986 para 1.

[110] *Ampal v Egypt*, para. 148.

[111] Ibid, paras 149-150.

[112] ibid paras 152-154.

[113] ibid para 151.

[114] CAFTA Article 10.12 (2) states:

Subject to Articles 18.3 (Notification and Provision of Information) and 20.4 (Consultations), a Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of any Party, other than the denying Party, and persons of a non-Party, or of the denying Party, own or control the enterprise.

[115] Ibid, para 156.

Although the denial of benefits clause has not been widely incorporated in early investment treaty practice, it appears more often in treaties concluded since 2010. Arguably, it has increasingly become a prevalent feature of newly negotiated IIAs. More States including Asian States especially Japan, Korea, China, India, and United Arab Emirates have included the denial of benefits clause in their IIAs. Moreover, the denial of benefits clause has received considerable attention in the IIA reform effort since it could play an important role in seeking a proper balance between the State's right to regulate and the protection of investors' interest. This Part will examine recently concluded IIAs focusing on those adopted after 2010 and analyse how denial of benefits clause has evolved in response to problems in the application of the previous generation of the clause. It will also highlight the expansion of the situations giving rise to the right to deny the benefits in recent IIAs.

4.1 Structural Design of the Denial of Benefits Clause

4.1.1 Discretionary or Mandatory clause

As pointed out in Part 3, the denial of benefits clause can be formulated to be a discretionary clause or a mandatory clause. The former requires the right to deny be exercised by a Contracting State whereas the latter will automatically exclude the investor from the benefits of a treaty if the conditions are met.[116] Most denial of benefits clauses are discretionary providing 'a Party may deny'[117] or 'the benefits of this Agreement may be denied'.[118] However, there are many IIAs concluded after 2010 contain terms such as 'benefits of this Agreement shall not be available to …', [119] 'the benefit under this Treaty shall not be

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[116] *Plama v Bulgaria* paras 155-158.

[117] Ex Kenya-Singapore BIT (2018) Article 23; CETA (2018) Article 8.16; Angola-China BIT (2023) Article 17; EFTA-Malaysia (2025) Article 8.14; Japan-Uruguay BIT (2015) Article 28.

[118] Ex China-Venezuela BIT (2024) Article 13.

[119] Ex Columbia-UAE BIT (2017) Article 25; Mauritius-UAE BIT (2015) Article 15; Rwanda-UAE BIT Article 24; Thailand-UAE BIT (2015) Article 13; Kyrgyzstan-UAE BIT (2014) Article 15; Türkiye-UAE BIT (2023) Article 14(2); Article 36.1 India-UAE BIT (2024) Article 36.1; Jersey-UAE BIT (2021) Article 13.2; Armenia-UAE BIT (2016) Article 15(1)

extended to…'[120] or 'the benefits of this Agreement shall be denied to …'.[121] They seem to suggest a trend towards a mandatory denial of benefits clause. These terms suggest that the investors will not be granted the benefits of the treaties if the requirements stipulated in those clauses are met. They convey a strong message to the investors that they will not be given treaty benefits if they fall within the stipulated situation. In addition, some denial of benefit clauses are formulated in a mandatory language using the terms 'a Contracting Party shall deny' rather than 'may deny'.[122] This formulation appears to oblige a Contracting Party to deny the benefits if the specified conditions are met.

However, those mandatory treaty languages must be considered in their context. Some IIAs impose procedural requirements to be met before excluding the investors from the benefits of the treaties which might compromise the effectiveness of the clause. For example, Thailand-The United Arab Emirates (UAE) BIT (2015) Article 13 entitled 'Limitation of Benefits' provides in its first paragraph that '[b]enefits of this Agreement shall not be available to …', but the second paragraph requires the denying Party to have consultation with the other Contracting Party to seek mutual agreement of the Contracting Parties before the benefits can be denied. [123] By contrast, other agreements which contain the 'limitation of benefits' clauses provide for less stringent procedural requirements including notification and consultation with the other Contracting Party,[124] notification the other Contracting Party

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[120] Ex India-UAE BIT (2024) Article 36.2.

[121] Ex Slovakia-UAE BIT (2016) Article 9(1).

[122] Ex UAE-Zimbabwe BIT (2018) Article 17.

[123] Article 13 Limitation of Benefits

1. Benefits of this Agreement shall not be available to an investor of a Contracting Party, if the main purpose of the acquisition of the nationality of that Contracting Party was to obtain benefits under this Agreement that would not otherwise be available to the investor.

2. Prior to denying the benefits of this Agreement, the denying Contracting Party shall consult the other Contracting Party, and upon mutual agreement of the Contracting Parties may deny the benefits of this Agreement and shall inform such investor accordingly.

[124] Ex Mauritius-UAE BIT (2015) Article 15(2).

without undue delay.[125] Therefore, the effect of the clause will have to be evaluated together with other requirements of the clause.

In recent treaty practice of UAE, the title 'limitation of benefits' is often used instead of 'denial of benefits.' It is questionable whether they produce different effect. Since the procedural requirements provided in the 'limitation of benefits clauses' of UAE's BITs vary and appear to be similar to those found in 'denial of benefit clauses'. Some clauses require prior notification,[126] while others require prior consultation to achieve mutual agreement of the Contracting Parties to deny the benefits.[127] The latter condition could even be more stringent than the procedural requirements of many denial of benefits clauses. Moreover, there are some provisions entitled 'denial of benefits' clauses contain similar wording found in the 'limitation of benefits' clause, such as 'the benefits of this Agreement shall not be available to…',[128] or 'the benefit under this Treaty shall not be extended to…'[129] or 'the benefits of this Agreement shall be denied to …'.[130] Therefore, there seems to be no significant difference between 'denial of benefits' and 'limitation of benefits' clauses. What matters is not the title but the content of the clauses.

Another point of interest regarding the structural design of the denial of benefit clause is that the clause might contain different language formulations for each ground of denial. For instance, Jersey-UAE BIT (2021) Article 13 states that:

1. A Contracting Party may deny the benefits of this Agreement to an investor of a Contracting Party and to investments of such an investor if the investor is owned or controlled by legal entities or natural persons of a third Party with respect to whom the

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[125] Ex Hungary-UAE BIT (2021) Article 23(3).

[126] Ex Rwanda-UAE BIT (2017) Article 24; Serbia-UAE BIT (2013) Article 14.

[127] Ex Thailand-UAE BIT (2015) Article 13(2).

[128] Ex Türkiye-UAE BIT (2023) Article 14(2); India-UAE BIT (2024) Article 36.1; Article 13.2 Jersey-UAE BIT (2021) Article 13.2; Armenia-UAE BIT (2016) Article 15(1).

[129] Ex India-UAE BIT (2024) Article 36.2.

[130] Ex Slovakia-UAE BIT (2016) Article 9(1).

denying Contracting Party adopts or maintains prohibitive measures or measures that would be violated or circumvented if the benefits of this Agreement were accorded to the investor or its investments.

2. Notwithstanding any other provision of this Agreement, the benefits of this Agreement shall not be available to an investor of a Contracting Party and investments of such an investor if the investor is owned or controlled by a legal or natural person or persons of a non-Contracting Party and that investor has no substantial business activities in the territory of a Contracting Party under whose law it is constituted or organized.

This clause seems to suggest that the denial of benefits on the ground of the existence of prohibitive measures is discretionary whereas the denial of benefits on the ground of the absence of no substantial business activities is more mandatory.[131] It might be argued that the State Parties intentionally use different formulations so that they would produce different effect.

4.1.2 The Scope of the Clause

Unlike the ECT, most denial of benefits clauses exclude the benefits provided by IIAs including substantive benefits as well as investor-State dispute settlement. However, some treaties explicitly state that the benefits of the treaty including the investor-State dispute settlement will be denied. For example, India-UAE BIT (2024) Article 36 provides that '[t]he benefits of this Treaty, including after the institution of arbitration proceedings in accordance with Chapter IV of this Treaty, shall not be available to: …'.

4.2 Substantive requirements

Some observations can be made regarding the substantive requirements of the denial of benefits clauses

***First*, most IIAs still follow previous treaty practice offering the ground to exclude the investor and its investments from the benefits of the treaties if the investor is owned or controlled by investors of a non-Party and does not have substantial business**

[131] See also New Zealand-UAE BIT (2025) Article 10; Georgia-Hungary BIT (2024) Article 20.

operations in its putative home State. These are cumulative requirements which must be met.[132] However, some variations can be found.

In some IIAs, these two requirements are imposed as alternative, thus broadening the circumstances in which the benefits can be denied.[133] Some IIAs impose either one of those two requirements without mentioning the other. For example, Korea-Uzbekistan BIT (2019) Article 14(2) stipulates that a Contracting Party can deny the benefits if the investor has no substantial business activities in the territory of the other Contracting Party,[134] even though the investor may be owned or controlled by persons of the other Contracting Party. This kind of denial of benefits clause therefore requires the investor to ensure that it has substantial economic activities in its home State. On the contrary, some IIAs allow a Contracting Party to deny benefits to the investors if the investment is being made by a juridical person that is owned or controlled by persons of non-Party or of the denying party.[135] Accordingly, a Contracting State can exercise the right to deny benefits although such investor has substantive business operations in the Contracting State under whose law it is incorporated.

Interestingly, some treaties do not contain the provision allowing the denial of benefits if the investor is owned or controlled by persons of non-Party or of the denying Party and/or does not have substantial business operations in the territory of the Contracting State under

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[132] Canada-Moldova BIT (2019) Article 18; Australia-Uruguay BIT (2019) Article 11; Japan-Bahrain BIT (2022) Article 25.

[133] Article 5(1)(e) of the Protocol to the Agreement Establishing the African Continental Free Trade Area on Investment (AfCFTA) (2023); India-Malaysia FTA (2012) Article 10.10(2); Pakistan-Malaysia CEPA (2007) Article 101(2); Singapore-India CECA (2005) Article 6.9.

[134] Korea-Uzbekistan BIT (2019) Article 14(2) stipulates that:

2. A Contracting Party may deny the benefits of this Agreement to an investor of the other Contracting Party that is an enterprise of that other Contracting Party and to investments of that investor if the enterprise has no substantial business activities in the territory of that other Contracting Party.

See also Korea-Armenia (2018) Article 14(2).

[135] Article 5(1)(e) of the Protocol to the Agreement Establishing the African Continental Free Trade Area on Investment (AfCFTA) (2023), signed but not yet in force; Belarus-India BIT (2018) Article 35(i); ACFTA (2009) Article 15(1)(b).

whose law it is established.[136] Their absence might be explained by referring to the definition of an investor in these treaties which does not only prescribe a corporate investor be constituted or organized under the law of the Contracting Party but also require further economic connection to that Contracting Party. For example, Burkina Faso-Canada BIT (2015) Article 1 explicitly exclude the investor which is owned or controlled by persons of a non-Party or a denying Party and does not have substantive business activities in the territory of the Party under whose law it is constituted or organised.[137] Therefore, there is no need for denying the benefits in such case.

***Second*, there are efforts to clarify certain elements of substantive requirements which seem to be less explained in previous IIAs.** Although the denial of benefits on the ground that the investor of the other Contracting State is owned or controlled by the investor of a non-Party or of a denying Party and/ or that investor has no substantive business activities in the other Contracting Party is commonly found in many agreements, there is not much clarification especially on the terms ‘control’ and ‘substantive business operations/activities’.[138]

Some recent IIAs expressly state that the term ‘control’ include both direct and indirect control.[139] This clarification appears to follow the interpretation of ‘control’ made by the arbitral tribunals studied in Part 3.

With regards to ‘substantial business activities’, some IIAs seek to clarify the factors that should be taken into consideration. For example India-UAE BIT (2024) provides:

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[136] Burkina Faso-Canada-BITT (2015) Article 19; CETA Article 8.16

[137] Burkina Faso-Canada BIT (2015) Article 1 states:

‘investor of a Party’ means a Party, or a national or an enterprise of a Party, that seeks to make, is making or has made an investment, but excludes an enterprise of a Party if investors of a non-Party or of the other Party own or control that enterprise and the enterprise does not have substantial business activity in the territory of the Party under whose domestic law it is constituted or organized at the time of the events giving rise to the claim;

[138] Australia-UAE BIT (2024) Article 11; India-UAE BIT (2024) Article 36.1(i).

[139] India-UAE BIT (2024) Article 36.1(i) an Investment or Investor owned or controlled, directly or indirectly, by juridical entities or natural persons of a non-Party or of the denying Party.’

Substantial Business Activity should be established by an overall examination, on a case-by-case basis, of the relevant circumstances. These circumstances may include whether the entity

(a) has a continuous physical presence, including through ownership or rental of premises, in the territory of that Party;

(b) has its central administration in the territory of that Party;

(c) employs staff in the territory of that Party; and

(d) generates turnover and pays taxes in the territory of that Party.[140]

Such clarification is consistent with previous arbitral tribunal jurisprudence on the meaning of 'substantial business activities' explored in Part 3. A more demanding requirement for 'substantive business activities' appears in AfCFTA Article 1 which stipulates factors to be examined including '(i) the nature, size, scope and sector of business, (ii) the amount of investment brought into the territory of a State Party, (iii) the effect of the investment on the local community and (iv) the length of time the investment has been in operation'.

However, the problem regarding the moment of time that substantive business activities should be assessed appears to be left unaddressed.

***Third*, recently concluded IIAs provide for the ground for excluding the investor from the treaty benefits which could broadly cover cases of abuse of nationality, by natural as well as juridical persons, in order to gain benefits from the treaties or from the investor-State dispute settlement mechanism under the treaties**. For example, Colombia-UAE BIT (2017) Article 25(1) provides:

Benefits of this Agreement shall not be available to an Investor of a Contracting Party, if the main purpose behind the acquisition of the nationality of that Contracting Party was to

[140] Footnote 3 to Article 1.5 on the definition of an investor which is a 'juridical person'.

obtain benefits under this Agreement that would not otherwise be available to such Investor.[141]

Unlike the denial of benefit clauses in older treaties which tend to focus on denying the benefits of the treaties to a corporate investor, this clause can be invoked to deny the benefits of the treaty to a natural person as well as a corporate investor.

Some treaties make specific reference to the case that the investor has been established or restructured to gain access to dispute settlement under the treaties. For example, Belarus-India BIT (2018) Article 35(ii) allows a Party to deny the benefits of the treaty to 'an investment or investor that has been established or restructured with the primary purpose of gaining access to the dispute resolution mechanisms provided in this Treaty.'[142]

These grounds for denying benefits may raise a practical problem about determining the motivation of nationality acquisition whether its 'main purpose' or 'primary purpose' is to obtain the benefits of the treaties or not. In fact, the inclusion of the terms 'main purpose' or 'primary purpose' in such clauses is arguably to address the problem that arose in the arbitral decisions on the abuse of rights – to be regarded as abuse of rights, must the acquisition of nationality be done for the sole purpose to obtain the benefits of the treaties?

Unlike the Belarus-India BIT, some IIAs such as Hong Kong-UAE BIT (2019) specifically referred to the case of restructuring or acquiring nationality to obtain the benefits of the BIT with regards to existing disputes.[143] This provision is to address a State's concern that the

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[141] New Zealand Arab Emirates BIT (2025) Article 10(2)(b).

[142] See also India-UAE (2024) BIT Article 36.1(ii); Thailand-UAE BIT (2015) Article 13(1)

[143] Hong Kong-UAE BIT (2019) Article 11 (1) states:

A Contracting Party may at any time deny the benefits of this Agreement to an investor of the other Contracting Party and to investments of that investor if:

(a) the main purpose of acquiring the status of investor of the latter Contracting Party, or of structuring or acquiring its investment, was to obtain benefits under this Agreement in respect of any dispute in existence at the time of such acquisition or structuring, which benefits would not otherwise be available to the investor;

investor may restructure its investment in order to have access to investor-State arbitration provided in a treaty. However, it is arguable that such problem can be dealt with by applying the principle of non-retroactivity of the treaty and the limitation of arbitral tribunal's jurisdiction *ratione temporis* as mentioned in Part 2 without the need for a denial of benefit clause dealing with such problem.

***Fourth*, the denial of benefits clause is used to exclude the investor not complying with domestic laws of a host State.** The right to deny benefits to the investor that does not comply with certain areas of domestic law is found in ACIA and the agreements between ASEAN and non-ASEAN Party as well as RCEP. In ACIA, Article 19(2) provides:

[...] a Member State may deny the benefits of this Agreement to investors of another Member State and to investments of that investor, where it establishes that such investor has made an investment in breach of the domestic laws of the denying Member State by misrepresenting its ownership in those areas of investment which are reserved for natural or juridical persons of the denying Member State.

Unlike the ACIA, the Agreements between ASEAN and non-ASEAN Parties contain denial of benefit clauses which are especially addressed to certain Parties, namely Thailand, and the Philippines. A specific clause for Thailand is found in all Agreement except the Agreement with India. Such clause allows Thailand to deny the benefits under the Agreement relating to admission, establish, acquisition and expansion of investments to a juridical person which is an investor of another Party if it is owned or controlled by natural persons or juridical persons of a non-Party or the denying Party.[144]

ASEAN Agreements with non-ASEAN Parties and RCEP contain a specific provision regarding the right to deny benefits of the Philippines, allowing it to denial the benefits of

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[144] ASEAN-Australia and New Zealand FTA (2009) Article 12.5; ASEAN-Korea Investment Agreement (2009) Article 17.3; ASEAN-China Investment Agreement (2009) Article 15.2; ASEAN-Hong Kong Investment Agreement (2009) Article 19.2.

these to an investor and the investment of such investor if the investor has made an investment in breach of An Act to Punish Acts of Evasion of Laws on the Nationalization of Certain Rights, Franchises or Privileges, or 'the Anti-Dummy Law.'[145]

Thus, the denial of benefits clauses in ASEAN and ASEAN plus non-ASEAN Party investment agreements aim at ensuring the investor's compliance with domestic law which imposes foreign ownership restrictions in some investment sectors. Moreover, RCEP Article 10.14(7) permit a Party the deny the benefits to the investor who has made an investment in breach of the denying Party's laws and regulations that implement the Financial Action Task Force Recommendations tackling financial crimes.[146]

As the definition of 'covered investment' in ACIA and ASEAN investment Agreements with non-ASEAN countries explicitly requires the investment to be made in accordance with domestic laws of the host State, it is questionable why the denial of benefits clauses in these agreements need to include the ground the investment has not been made in accordance with the host State laws. It might be argued that such clause sends a clear signal to prospective investors that the benefits of the agreements are granted conditionally subject to the investor's compliance with the domestic laws of the host country.

***Fifth*, the denial of benefit clause is used to deny the benefits of the treaty to an investor and its investment due to the investor's conduct.** For example, the denial of benefit clause, Article 5 of the Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area (AfCFTA) (2023) allow a State Party to deny benefits on the ground that 'an investor or investment is engaged in activities prejudicial to the essential and national interests of the Host State'. Moreover, such clause also covers the situation that

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[145] ASEAN-Australia and New Zealand FTA (2009) Article 12.7; ASEAN-China Investment Agreement (2009) Article 15.3; ASEAN-India Investment Agreement (2014) Article 13.4; ASEAN-Korea Investment Agreement (2009) Article 17.5; ASEAN-Hong Kong Investment Agreement (2009) Article 19.4.

[146] Article 10.14(7) RCEP (2020) states that '[a] Party may deny the benefits of this Chapter to an investor of another Party or of a non-Party and to investments of that investor where such an investor has made an investment in breach of the provisions of the denying Party's laws and regulations that implement the Financial Action Task Force Recommendations.'

an investor or investment has breached the obligation under Part V which concerns the investor obligations including the obligations to comply with domestic and international laws, obligations in relation to the protection of internationally recognised human rights and labour standards, obligations relating to environmental protection and anti-corruption.[147]

It is notable that AfCFTA's denial of benefit clause makes clear in Article 5(2) that the exercise of the right to deny benefits is subject to review under the dispute settlement mechanisms provided by the agreement. This seems to help guarding the investor against the State's unfettered right to deny the benefits on very broad grounds.

***Sixth*, in recent IIAs concluded by the European Union and by the European Free Trade Association (EFTA), the ground for denying benefits covers the case that an investor is owned and controlled by an investor of a non-Party and the denying Party adopts or maintains measures related to the maintenance of international peace and**

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[147] The Protocol on Investment to AfCFTA (2023) Article 5:

1. A State Party may at any time deny an investor of another State Party and the investment of such investor the benefits of this Protocol if:

a. an investment has no substantial business activity in the territory of the Home State;

b. an investment has been established or restructured with the primary purpose of gaining access to the dispute settlement mechanism under this Protocol;

c. an investor or investment is engaged in activities prejudicial to the essential and national interests of the Host State;

d. an investment is owned or controlled, directly or indirectly, by natural or juridical persons of a Third Party with which the denying Party does not maintain a diplomatic relationship or toward which it prohibits transactions;

e. an investment is owned or controlled, directly or indirectly, by natural or legal persons of the denying Host State;

f. an investment is owned or controlled, directly or indirectly, by natural or juridical persons of a non-State Party that has no substantial business in the territory of a State Party; or

g. an investor or investment has committed a breach of a specific binding obligation under Part V of this Protocol.

2. For the avoidance of doubt, the exercise by a Host State of its right to deny benefits to an investor of another State Party and investment of such investor may be subject of review in accordance with Part VII of this Protocol.

security.[148] This provision explicitly allows a Party to deny benefits to the investor of the other Party if the denying Party have measures which arguably could be adopted unilaterally, or within the framework of the United Nations Charter to maintain international peace and security. The maintenance of international peace and security, according to some IIAs such as EU-Japan Economic Partnership Agreement (2023), has been extended to include the protection of human rights.[149]

4.3 Procedural requirements

In light of the arbitral decisions on the interpretation and application of denial of benefits clauses, recent IIAs seek to avoid problems in the invocation of the denial of benefits clause by explicitly addressing certain issues that arose in the past.

4.3.1 Timeliness for Exercising the Right to Deny

According to arbitral decisions explored in Part 3, one of the important issues concerning the application of the denial of benefits clause is about the timeliness of the State's exercise of the right to deny since the relevant IIAs do not provide an explicit provision

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[148] Article 8.16 Denial of benefits

A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of that Party and to investments of that investor if:

(a) an investor of a third country owns or controls the enterprise; and

(b) the denying Party adopts or maintains a measure with respect to the third country that:

(i) relates to the maintenance of international peace and security; and

(ii) prohibits transactions with the enterprise or would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.

[149] EU-Japan Economic Partnership Agreement (2023) Article 8.13 states:

A Party may deny the benefits of this Section to an entrepreneur of the other Party that is a juridical person of the other Party and to its covered enterprise if that juridical person is owned or controlled by a natural or juridical person of a third country and the denying Party adopts or maintains measures with respect to the third country that:

(a) are related to the maintenance of international peace and security, including the protection of human rights; and

(b) prohibit transactions with that juridical person or its covered enterprise, or would be violated or circumvented if the benefits of this Section were accorded to them.

See also EFTA-Malaysia (2025) Article 8.14.

on the issue. In response, some IIAs explicitly state that the right to deny may be exercised at any time. For instance, Hong Kong-UAE BIT (2019) Article 11(1) provides that '[a] Contracting Party may at any time deny the benefits of this Agreement to an investor of the other Contracting Party and to investments of that investor …'. [150] Some IIAs make clear that the denial may be done even after the institution of arbitral proceedings. For example, Canada-Hong Kong BIT (2016) Article 18 provides that the benefits can be denied 'at any time including after the institution of arbitration proceedings'.[151]

4.3.2 Notification and/or consultation requirements

The procedural requirements for invoking the denial of benefit clause are diverse. While many IIAs impose procedural requirements, some do not.[152] Moreover, procedural requirements impose could be different depending on the ground of denial. The ground that the investor is owned or controlled by persons of a third party or the denying party and does not have substantial business activities in the other Contracting Party tends to be subjected to more stringent procedural conditions than other grounds. For example, Central America Republics-Republic of Korea FTA (2018) Article 9.12 requires prior notification if a Contracting State is to deny the benefits of the Agreement on the ground that the investor has no substantial business activities in the territory of the other Party and persons of a non-Party or of the denying Party, own or control the investor (Article 9.12(2)). However, it does not impose any procedure for denying the benefits on the ground that persons of a non-Party own or control the investor and the denying Party adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the investor (Article 9.12(1)).[153]

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[150] Hong Kong-UAE BIT (2019) Article 11; Australia-Uruguay BIT (2019) Article 11; RCEP (2020) footnote 32 to Article 10.14; Australia-UK FTA (2021) Article 13.16 and footnote 23 (providing that the right to deny the benefits can be exercised 'at any time before or after the investment is made').

[151] Also Belarus-India BIT (2018) Article 35; Argentina-UAE (2019) (not in force) Article 13; Angola-China BIT (2023) Article 17.

[152] Ex Canada-Republic of Korea FTA (2014) Article 8.14; Australia-China FTA (2015) Article 9.6; Japan-Angola BIT (2023) Article 22.

[153] Central America Republics-Republic of Korea FTA (2018) Article 9.12:

The procedural requirements vary from notification to mutual agreement or joint decision. The most burdensome requirement would be to require a joint decision or mutual agreement of the Contracting Parties to deny benefits.[154] The more lenient requirement is to require prior consultation with the other Contracting State,[155] or prior notification and the obligation to consult if requested by the other Party.[156] However, some IIAs simply require the denying Party to notify other Contracting Party; but the timing of

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1. A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of such other Party, and to investments of that investor if persons of a non-Party own or control the enterprise and the denying Party adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.

2. A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of the other Party and persons of a non-Party, or of the denying Party, own or control the enterprise. The denying Party shall, to the extent practicable, notify the other Party before denying the benefits under this paragraph. If the denying Party provides such notice, it shall consult with the other Party at the other Party's request.

See also Australia-UAE BIT (2024) Article 11.

[154] Singapore-UAE BIT (2011) Article 14; Thailand-UAE BIT (2015) Article 13; Mexico-UAE BIT (2016) Article 30.

[155] Australia-UAE BIT (2024) Article 11(2):

A Party may deny the benefits of this Agreement to an investor of the other Party that is an enterprise of the other Party, and to investments of that investor, if the enterprise is owned or controlled, directly or indirectly, by persons of a non-party or of the denying Party, provided that, prior to invoking its rights under this paragraph, the denying Party shall consult with the other Party.

[156] Central America-Korea, Republic of FTA (2018) Article 9.12(2) provides that:

The denying Party shall, to the extent practicable, notify the other Party before denying the benefits under this paragraph. If the denying Party provides such notice, it shall consult with the other Party at the other Party's request.

Also Korea-Türkiye Investment Agreement (2015) Article 1.15(2); Korea-Vietnam FTA (2015) Article 9.11 (2); Singapore-Sri-Lanka FTA (2018) 10.21(2).

notification could be different. Some IIAs require prior notification[157] or prior notification 'to the extent practicable'[158] whereas others simply require notification to the home State of the investor without an explicit requirement that the notification must be done before exercising the right to deny. For example, Hungary-UAE BIT (2021) Article 23(3) stipulates that 'the denial of benefits by a host State shall be notified to the home State of the investor without undue delay.' It is notable that most of these notification requirements refer to the notification to the other Contracting Party rather than to the investors.

5. Conclusion

This research paper has examined the origin of the denial of benefit clause, its early treaty practice as well as the problems arising from the application of the clause. It has pointed out some development in the denial of benefits clause which seeks to address practice problems in the application of the clause. Overall, there is tendency towards relaxing the procedural requirement and clarifying certain substantive requirements for invoking the clause. Moreover, it tends to broaden the circumstances in which the treaty benefits can be denied. For example, some recent IIAs allow a Party to deny the benefits if either the enterprise is owned or controlled by investors of a third Party, or the enterprise has no substantial business activities in the territory of the other Party under whose law it is constituted or organized. Some IIAs extend the ground for denying the benefits to cover broader cases of abusive nationality planning covering not only the case of a juridical person but also a natural person.

One might question whether the recent development of the denial of benefits clause will help improve the effectiveness of the clause in preventing treaty shopping which is its original function. The answer could vary depending on the text of the clause. The fact that the many recent IIAs seek to solve the procedural issue relating to the moment of time that the right to deny benefits can be exercised and the broader grounds for denying benefits

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[157] Mali-UAE BIT Article 16(4) provides that '[b]efore refusing the benefits of this agreement, the Contracting Party refusing the agreement shall inform the other Contracting Party.'

[158] Australia-Republic of Korea FTA (2014) Article 11.11(2); Pakistan-Turkey BIT (2012) Article 11(2); Australia-Republic of Korea FTA (2014) Article 11.11(2).

might help ensure the fulfillment of the objective of the denial of benefits clause. However, there are certain elements in the clause that might compromise its effectiveness, for example, a procedural hurdle such as the requirement that mutual agreement between the contracting Parties must be achieved or sought before the benefits can be denied. The clause that allows a contracting Party to deny benefits when the investor if the main purpose behind the acquisition of the nationality was to obtain benefits under the treaty could raise new interpretation problems. In addition, it is unclear how changes in the treaty text toward mandatory language, such as 'limitation of benefits' or 'the benefits of the treaty will not be available to,' would produce a different effect compared to discretionary language. These issues could result in legal uncertainty and the investment treaty protection could become less predictable for investors.

Recent development of the denial of benefits clause illustrates its evolving function. Initially, the denial of benefits clause is an instrument to guard against treaty shopping practice caused by excluding certain investors without sufficient economic connection with the their State of incorporation from the benefits of the treaties. However, in recent years, the clause has become more sophisticated to address various concerns and objectives. It has been used to address special concerns of some Parties to the treaties, as mentioned above in the investment treaty practice of ASEAN. It is also a tool to ensure compliance with domestic laws and investors' obligations and to sanction investors and investment that engage in activities that are 'prejudicial to the essential and national interests of the host country'. Currently, UNCITRAL's Working Group III mandated to consider possibility for reforming investor-State dispute settlement is exploring the role of the denial of benefits clause to complement the ISDS reform which might result in the denial of benefits clause covering the case when the investor received third party funding limited by the tribunal.[159] Therefore, the function of the denial of benefits clause is becoming more diverse.

One might raise the question whether the denial of benefits clause is suitable for performing those various functions. Moreover, it is arguable that some extended grounds for

[159] UNCITRAL (n 6), Draft Provision 17.

denying benefits are redundant or are not necessary as they are already dealt with or can be dealt with by other treaty provisions. For example, the definition of investment or 'covered investment' in the treaty might exclude investment which is not made in accordance with domestic laws or national policies of the host State from the scope of investment protected by the treaty. Indeed, when the treaty already contains explicit requirement that the investment has to be made in accordance with laws of the host country, the denial of benefit clause permitting the host country to exclude the investment which does not meet such requirement might cause more confusion. Finally, the extensive grounds for denying benefits raises a question about the appropriate balance between the host State's and the investors' interest. If excessive discretion is granted to the denying State, the denial of benefits clause could be prone to abuse, and the certainty and predictability of investment treaty protection could be undermined. To address such concern, procedural safeguards might be needed to protect the investor from a State's improper exercise of the right to deny investment treaty benefits.

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