'DENIAL OF BENEFITS' CLAUSE

Authors: Loukas Mistelis; Crina Baltag

Article last updated: December 2018

‘Denial of Benefits’ Clause in Investment Treaty Arbitration

Professor Loukas Mistelis and Dr Crina Baltag

A. Introduction

1 ‘Denial of benefits’ clauses, while having gained substantial popularity in the past ten prolific years of Investor-State Dispute Settlement (‘ISDS’), are not a common or typical presence in most traditional International Investment Agreements (‘IIAs’), be it in the form of Bilateral Investment Treaties (‘BITs’) or in the form of Free Trade Agreements (‘FTAs’). UNCTAD’s Investment Policy Hub lists 215 IIAs containing a ‘denial of benefits’ clause out of a total number of 2,572 mapped IIAs. (United Nations Conference on Trade and Development, Investment Policy Hub)

2 This paper analyses the framework of the ‘denial of benefits’ clause and its application by tribunals with respect to the procedural requirements of the clause (jurisdiction, time and effect). It appears that there are two distinct lines of jurisprudence on the procedural requirements of ’denial of benefits’ clauses: tribunals constituted under the Energy Charter Treaty (‘ECT’) and tribunals constituted under US BITs and the Dominican Republic-Central America FTA (CAFTA-DR).

3 The purpose of the ‘denial of benefits’ clause is to exclude from the protection afforded by applicable IIA investors and their investments who, although formally satisfying the definition of investor, do not have a real (economic) connection with the home State (→ International investment arbitration; → Nationality of claim: Investment arbitration). In *Caratube v. Kazakhstan*, the arbitral tribunal explained that

> This [denial of benefits] provision allows each of the parties to deny the benefits of the BIT’s protection to a company that is controlled by nationals of a third State and does not have any substantial activities in the other State-party to the BIT (*Caratube v. Kazakhstan*, 2012 para 354).

4 Dolzer and Schreuer consider the ‘denial of benefits’ clause as a ‘method to counteract strategies that seek the protection of particular treaties by acquiring a favourable nationality’ (Dolzer and Schreuer, 55). On the other hand, Salacuse explains that allowing the benefits of the IIA to nationals of third countries or to those ’primarily associated’ with those countries and with which the denying country has no relationship, would be to abandon the ’right to negotiate corresponding privileges and obligations from those countries’ (Salacuse, 655). As such, the ‘denial of benefits’ clause is not only a guarantee against the abuse of rights, but also a ’safety measure

for safeguarding the principle of reciprocity embodied in investment treaties' (Mistelis and Baltag, 2009, 1303; Sinclair, 1994, 3).

5 The arbitral tribunal in *Amto v. Ukraine* referred to the scope of the 'denial of benefits' clause in the context of Article 17 of the Energy Charter Treaty ('ECT'):

> Article 17 can be read together with the definition of 'Investor' in Article 1(7) as establishing two classes of Investors of a Contracting Party for the purposes of the ECT. The first class comprises Investors with an indefeasible right to investment protection under the ECT. This class includes nationals of another Contracting Party – whether natural persons or juridical entities – except for those nationals falling within the second class. The second class comprises Investors that have a defeasible right to investment protection under the ECT, because the host State of the investment has the power to divest the Investor of this right. In this second class are legal entities that satisfy the nationality requirement by reason of incorporation but are owned or controlled by nationals of a third state in a manner potentially unacceptable to the host State. Such foreign ownership or control is potentially unacceptable where it involves a State with which the Host State does not maintain normal diplomatic or economic relationships, or where it is not accompanied by substantial business activity in the state of incorporation. As the purpose of the ECT is to establish a legal framework 'in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits...' then the potential exclusion of foreign owned entities from ECT investment protection under Article 17 is readily comprehensible. 'Long term economic cooperation', 'complementarities' or 'mutual benefits' are unlikely to materialise for the host State with a State that serves as a nationality of convenience devoid of economic substance for an investment vehicle, or a State with which it does not enjoy normal diplomatic or economic relations (*Amto v. Ukraine*, 2008 para 61).

6 Some authors consider the mechanism of the 'denial of benefits' clause to operate in a similar manner as to the limitations placed on the definition of the notion of 'investor' (Lee, 2015, 366). However, the effects of the 'denial of benefits' clause can differ significantly. For example, while the limitations placed on the definition of the notion of 'investor' will affect the jurisdiction *ratione personae* of arbitral tribunals, the effects of the application of the 'denial of benefits' clause will depend on the wording of the clause and of the *locus* of the provision in the structure of the relevant IIA, thus affecting the jurisdiction of the tribunal or the merits (admissibility) of the claim, as will be discussed below.

7 As a practical issue, the invocation of the 'denial of benefits' clause is a matter for the host State, the respondent in the arbitration proceedings, to raise as will be further detailed below. From the perspective of the State, authors argue that the 'denial of benefits' clause is to be preferred to the doctrine of abuse of right, although, in

essence, both converge to the same result, grounded in similar motives (→ *Abuse of process in international arbitration*). As explained,

> When available, a denial of benefits provision, rather than the principle of abuse of right, should be a respondent's first choice when facing a claim brought by a company that appears to lack any genuine connection to its purported home State. There are several reasons to prefer a defence based on a denial of benefits provision. First, the abuse of right principle is not grounded in treaty text … Third, denial of benefits provisions reflect the express and shared views of the parties to the treaty regarding the circumstances in which treaty benefits can be denied … (Feldman, 2012, 283).

8 In the absence of a 'denial of benefits' clause relied on by respondent, arbitral tribunals are generally reluctant to investigate the corporate structure of investors and their economic activities in the alleged home State. To the contrary, arbitral tribunals prefer to give full effect to the wording of the applicable IIA, and, in particular, to the definition of the notion of 'investor' put forward therein. As pointed out by the tribunal in *Charanne v. Spain*,

> On a more general level, the Arbitral Tribunal shares the position taken under the ECT by the tribunal in the Yukos case, according to which 'the Tribunal knows of no general principles of international law that would require investigating the structure of a company or another organization when the applicable treaty simply requires it to be organized in accordance with the laws of a Contracting Party' (*Charanne v. Spain*, 2016, para 417).

9 A similar position was adopted by other arbitral tribunals. For example, in *Garanti Koza v. Turkmenistan*, the tribunal clarified that

> … the BIT requires only that Garanti Koza be incorporated somewhere in the United Kingdom in order to bring its investments within the protection of the treaty. The BIT contains no denial-of-benefits clause that would require that a U.K. investor have actual operations in the U.K. And the weight of the evidence shows that Turkmenistan knew and accepted that it was dealing with an English company (*Garanti Koza v. Turkmenistan*, 2016, para 222).

10 In *Tokios Tokelés v. Ukraine*, the arbitral tribunal also took the view that, in the absence of a 'denial of benefits' clause, the tribunal cannot impose any limitation on the notion of 'investor' outside the definition of this term in the applicable IIA. As explained by the tribunal,

> The Ukraine-Lithuania BIT [applicable in the case], by contrast, includes no such 'denial of benefits' provision with respect to entities controlled by third-country nationals or by nationals of the denying party. We regard the absence of such a provision as a deliberate choice of the Contracting Parties. In our view, it is not for

> tribunals to impose limits on the scope of BITs not found in the text, much less limits nowhere evident from the negotiating history. An international tribunal of defined jurisdiction should not reach out to exercise a jurisdiction beyond the borders of the definition. But equally an international tribunal should exercise, and indeed is bound to exercise, the measure of jurisdiction with which it is endowed (*Tokios Tokelés v. Ukraine*, 2004 para 36).

11 'Denial of benefits' clauses have received more attention in the last decade as a means of countering aggressive or merely tactical (IIA) treaty shopping by way of incorporation of convenience (→ *Forum shopping: Investment arbitration*). Consequently, they are part of the broader policy debate for reform of ISDS and IIAs (UNCTAD/WIR/2016,123). The discussions in the sessions of the UNCITRAL Working Group III, addressing the ISDS reform, alluded to the issue of treaty shopping, although not retaining it as a concern *per se*, with suggestions that treaties should include proper mechanisms for addressing it. (UNCITRAL, A/CN.9/964)

B The Framework of the 'Denial of Benefits' Clause in International Investment Agreements

12 As mentioned above, it is not common that IIAs include a 'denial of benefits' clause in their provisions. Originally used to deny diplomatic protection, the 'denial of benefits' clause was later imported into the treaties concerning protection of foreign investments. Traditionally, the US, Canada, China and Australia, in their BITs or FTAs have inserted, even from the early generations of IIAs, provisions denying the benefits of the treaty to investors and their investments, under specific conditions, with or without prior consultation. The origin of the 'denial of benefits' clause can be traced back to the Treaties of Friendship, Commerce and Navigation ('FCNs'), in which the contracting States reserve 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 (United States-China FCN).

13 Walker Jr. described the 'denial of benefits' clause as 'a latent protective clause which a party may utilize if it wishes to take the initiative of so doing.'(Walker Jr., 388). Interestingly, the same author suggests that the 'denial of benefits' clause in FCNs were 'directed primarily at the exercise by a company of its 'functional' rather than its 'civil' capacity.' (Walker Jr., 388) As such, the denial of the benefits of the treaty would

not trigger the denial of nationality or of the existence of the respective entity, nor, as mentioned in some FCNs, the denial of the access of these entities to the local courts.

14 Later on, the 'denial of benefits' clause was included in the modern IIAs. For example, Article I(b) of US-Democratic Republic of the Congo BIT, entered into force 1989, referred, in broad terms, to the following 'denial of benefits' provision:

> Each Party reserves the right to deny to 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 status and access to courts, if nationals of any third country 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 promptly consult with the other Party to seek a mutually satisfactory resolution to this matter.

15 The substantive requirement under this provision, thus considered only the control of the investor legal entity by nationals of a third country. The US-Democratic Republic of the Congo BIT also required the prompt consultation between the parties to the BIT for 'a mutually satisfactory resolution to this matter.'

16 Similarly, Article 2(2) of Australia-Czech Republic BIT, entered into force on 29 June 1994, provides that,

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

17 Article 1113 of the North American Free Trade Agreement ('NAFTA'), entered into force on 1 January 1994, refers to the following 'denial of benefits' clause:

> 1. A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such Party and to investments of such investor if investors of a non-Party own or control the enterprise and the denying Party:
>
> (a) does not maintain diplomatic relations with the non-Party; or
>
> (b) 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.
>
> 2. Subject to prior notification and consultation in accordance with Articles 1803 (Notification and Provision of Information) and 2006 (Consultations), a Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such Party and to investments of such investors if investors of a non-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.

18 Under the second limb of Article 1113 of NAFTA, a party may deny the benefits of the treaty if investors of a non-NAFTA party control the investor-enterprise and the enterprise has no substantial business activities in the territory of the Party under whose law it is constituted or organized. Such provision is subject to prior notification and consultation requirements under NAFTA.

19 Article 14.14 of the United States-Mexico-Canada Agreement, set to replace NAFTA in the near future, also includes provisions concerning the denial of benefits, as follows:

> 1. A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of that other Party and to investments of that investor if the enterprise:
>
> (a) is owned or controlled by a person of a non-Party or of the denying Party; and
>
> (b) has no substantial business activities in the territory of any Party other than the denying Party.
>
> 2. A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of that 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.

20 It appears that there is no substantive departure from the wording of Article 1113 of NAFTA in the new United States-Mexico-Canada Agreement. However, unlike NAFTA, the new Agreement extends the 'denial of benefits' clause to instances where the putative investor is owned or controlled not only by persons of a non-Party, but also by persons of the denying Party. Similar provisions may be found in other new generation IIAs. See, for example, Art. 17(2) of the US-Uruguay BIT, entered into force on 31 October 2006:

> A Party may deny the benefits of this Treaty 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.

21 Article I(2) of Ukraine-US BIT, entered into force on 16 November 1996, contains a provision similar to the one included in NAFTA, albeit placed in the context of the definitions of the notions employed by the BIT:

> 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.

22 Article 17, 'Non-Application of Part III in Certain Circumstances' of the Energy Charter Treaty, in force in April 1998, has been subject to extensive analysis by arbitral tribunals and it refers to the following:

> Each Contracting Party reserves the right to deny the advantages of this Part to:
> (1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized; or
> (2) an Investment, if the denying Contracting Party establishes that such Investment is an Investment of an Investor of a third state with or as to which the denying Contracting Party:
> (a) does not maintain a diplomatic relationship; or
> (b) adopts or maintains measures that:
> (i) prohibit transactions with Investors of that state; or
> (ii) would be violated or circumvented if the benefits of this Part were accorded to Investors of that state or to their Investments.

23 The United States-Panama Trade Promotion Agreement, in force on 31 October 2012, refers to the 'denial of benefits' clause in Article 10.12:

> 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:
> (a) does not maintain diplomatic relations with the non-Party; or
> (b) 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. 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 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.

24 The US-Bolivia BIT, entered into force on 6 June 2001 and terminated on 10 June 2012, is interesting to mention in this context as it includes the Letter of Submittal from the US, in which Article XII of the BIT referring to the 'denial of benefits' clause is explained. The 'denial of benefits' provision refers to the following:

Each Party reserves the right to deny to a company of the other Party the benefits of this Treaty if nationals of a third country own or control the company and:

(a) the denying Party does not maintain normal economic relations with the third country; or

(b) the company has no substantial business activities in the territory of the Party under whose laws it is constituted or organized.

25 As explained,

Article XII(a) preserves the right of each Party to deny the benefits of the Treaty to a company owned or controlled by nationals of a non-Party country with which the denying Party does not have normal economic relations, e.g., a country to which it is applying economic sanctions. For example, at this time the United States does not maintain normal economic relations with, among other countries, Cuba and Libya. Article XII(b) permits each Party to deny the benefits of the Treaty to a company of the other Party if the company is owned or controlled by non-Party nationals and if the company has no substantial business activities in the Party where it is established. Thus, the United States could deny benefits to a company that is a subsidiary of a shell company organized under the laws of Bolivia if controlled by nationals of a third country. However, this provision would not generally permit the United States to deny benefits to a company of Bolivia that maintains its central administration or principal place of business in the territory of, or has a real and continuous link with, Bolivia (Letter of Submittal, XI from US).

26 The new generation of IIAs, although not departing from the established wording of the 'denial of benefits' clause, attempts to address controversial issues raised by the interpretation of this provision by arbitral tribunals. For example, Article 8 of the Iran-Slovakia BIT, entered into force on 30 August 2017, spells out the requirements for the application of the 'denial of benefits' provision, as follows:

1. The benefits of this Agreement shall be denied to an investor of the Home State that is an enterprise of the Home State and to investments of that investor if natural persons or enterprises of a non-Contracting Party own or control such enterprise or any part of it and the Host State:

a) does not maintain diplomatic relations with the non-Contracting Party; or

b) adopts or maintains measures with respect to the non-Contracting Party or a natural person or enterprise of the non-Contracting Party that prohibit transactions with such natural person or enterprise or that would be violated or circumvented if the benefits of this Agreement were accorded to such investor or to its investments.

2. The benefits of this Agreement shall be denied to an investor of the Home State that is an enterprise of the Home State and to investments of that investor if natural

persons or enterprises of the Host State own or control the enterprise or any part of it.
3. For avoidance of any doubt the benefits of this Agreement shall be denied if the preconditions set down in paragraph 1 are fulfilled at time when the claim is submitted pursuant to Article 17.

27 The Hong Kong, China SAR – ASEAN Investment Agreement (2017) is relevant too in this regard. In particular, Article 19.5 provides:

> A Party's right to deny the benefits of this Agreement as provided for in this Article may be exercised at any time, including after the institution of arbitration proceedings on accordance with Article 20 (Settlement of Investment Disputes between a Party and an Investor.

28 A similar wording can be seen in the China-Hong Kong CEPA Investment Agreement where Article 21 provides:

> One side may, at any time including after the institution of any proceedings in accordance with Chapter 3 (Investment Facilitation and Settlement of Disputes), deny the benefits of this Agreement to an investor of the other side that is an enterprise of that other side and to covered investments of that investor if:
> (i) investors of any other party own or control the enterprise;
> and
> (ii) the denying side adopts or maintains measures with respect to that other party:
> 1. that prohibit transactions with the enterprise; or
> 2. that would be violated or circumvented if the benefits of this Agreement were accorded to the enterprise or to its covered investments.

29 Article 8.16 of the Canada-EU Comprehensive Trade and Economic Agreement ('CETA'), not yet in force, refers to the 'denial of benefits' clause in the following terms:

> 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.

30 Further, Article 13 of the Model Agreement Between The Belgium-Luxembourg Economic Union, adopted on 28 March 2019 provides that the conditions for the application of the 'denial of benefits' clause must be met at the time of the submissions of the claims to arbitration:

> 1. A Contracting Party may deny the benefits of this Agreement to an investor of the other Contracting Party that is an enterprise of that Contracting Party and to investments of that investor if:
> (a) the investors of a non- Contracting Party own or controls the enterprise; and
> (b) the denying Contracting Party adopts or maintains a measure with respect to the non- Contracting Party, or a natural person, or an enterprise of the non-Contracting Party that:
>
> a. are related to the maintenance of international peace and security;
>
> b. prohibit transactions with such natural person or enterprise or would be violated or circumvented if the benefits of this Chapter were accorded to the investor or to its investments.
>
> 2. For avoidance of any doubt, the benefits of this Agreement shall be denied if the preconditions set down in paragraph 1 are fulfilled at time when the claim is submitted pursuant to Article 19 (D).

31 Article 16(3) of Brazil-Angola Cooperation and Investment Facilitation Agreement, entered into force on 11 October 2017, includes the following 'denial of benefits' clause:

> Subject to prior notification and consultation, any Party may deny the benefits of this Agreement to an investor of the other Party or to investments of this investor, if:
>
> i. the investor natural person is not a national or permanent resident of the other Party, in accordance with its laws;
> ii. the investor legal person:
> a. is not constituted in accordance with the laws of one of the Parties, does not have the seat in the territory of one of the Parties and there does not have substantial business or activities; or
> b. it is not the property of or effectively controlled, directly or indirectly, by nationals or permanent residents of the Parties, in accordance with the applicable laws. (unofficial English translation)

32 Article 14.17 of Japan-Australia FTA, entered into force on 15 January 2015, refers to the following elements of the 'denial of benefits' clause, also including definitions of certain terms employed by this provision:

> 1. A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of the other Party and to its investments, where the denying

Party establishes that the enterprise is owned or controlled by an investor of a non-Party and the denying Party:

(a) does not maintain diplomatic relations with the non-Party; or

(b) 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.

2. A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of the other Party and to its investments, where the denying Party establishes that the enterprise is owned or controlled by an investor of a non-Party or of the denying Party and the enterprise has no substantial business activities in the Area of the other Party.

Note: For the purposes of this Article, an enterprise is:

(a) 'owned' by an investor if more than 50 per cent of the equity interest in it is beneficially owned by the investor; and

(b) 'controlled' by an investor if the investor has the power to name a majority of its directors or otherwise to legally direct its actions.

33 Article 21 of Benin-Canada BIT, entered into force on 12 May 2014, includes the following 'denial of benefits' clause:

A Contracting Party may deny the benefits of this Chapter to an investor of the other Contracting Party that is an enterprise of that Contracting Party and to investments of that investor if investors of a non-Party or of the denying Contracting Party own or control the enterprise and:

(a) the denying Contracting 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; or

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

34 Whilet is evident that 'denial of benefits' clauses have evolved over time and started to be incorporated more frequently by States in their treaties, they are still to become a typical presence in IIAs.

C. Application of the 'Denial of Benefits' Clause

35 The 'denial of benefits' clause, as explained, performs the essential function of preventing the misuse of the protection accorded by IIAs, in particular when the investor is a legal person has minimal connection to its alleged home State. In the

words of the arbitral tribunal in *Waste Management v. Mexico*, explaining the provisions of NAFTA in this context,

> Chapter 11 of NAFTA spells out in detail and with evident care the conditions for commencing arbitrations under its provisions. ... The relevant provisions cover the full range of possibilities, including direct and indirect control and ownership. They deal with possible 'protection shopping', i.e. with situations where the substantial control or ownership of an enterprise of a Party lies with an investor of a non-party and the enterprise 'has no substantial business activities in the territory of the Party under whose law it is constituted or organized'. In other words NAFTA addresses situations where the investor is simply an intermediary for interests substantially foreign, and it allows NAFTA protections to be withdrawn in such cases (subject to prior notification and consultation) (*Waste Management v. Mexico*, 2004 para 80).

36 As summarized by the tribunal in *Guaracachi v. Bolivia,* certain conditions within the relevant framework of the applicable 'denial of benefits' clause must be observed:

> Considering the requirements of Article XII [of the US-Bolivia BIT, 'denial of benefits' clause], the Tribunal must determine whether the denial is valid *rationae* [sic] *materiae*, which requires that the Tribunal be convinced that GAI is owned or controlled by a national of a third country (other than the US) and that GAI has no substantial business activities in the US. Further, the Tribunal must also determine whether the denial of benefits is valid *rationae* [sic] *temporis*, which requires that the Tribunal be convinced as to the timeliness of the denial of benefits (*Guaracachi v. Bolivia*, 2014, para 367).

37 We will take a brief look below at the issues raised by the application of the 'denial of benefits' clause, by first reviewing the procedural aspects of the submission of such provision before arbitral tribunals, and, subsequently, by examining the substantive requirements (or *ratione materiae*, as referred to by the *Waste Management* arbitral tribunal) of such provision. As will be shown, grasping the application of the 'denial of benefits' clause is not a straightforward task and, although a rather uniform language across IIAs can be detected with respect to such provision, arbitral tribunals often come to divergent conclusions.

1. Procedural Aspects

a. Exercising the Right to Deny the Benefits of an International Investment Agreement

38 Probably the natural question triggered by the presence of a 'denial of benefits' clause in an IIA is whether the denying State can benefit from the automatic application of the provision when the conditions spelled out in it are met or, to the contrary, if the State must exercise this 'denial of benefits' right before the putative investor files its

claim. Generally, the language of the IIAs includes reference to '[e]ach Contracting Party reserves the right to deny', as it is the case of Article 17 of the ECT, or to '[a] Party may deny', as in Article 14.17 of Japan-Australia FTA. Such language implies that this 'denial of benefits' right must be exercised by the host State. Few IIAs would contain a wording which could suggest the automatic application of the 'denial of benefits' clause, as it is the case of Article 8 of Iran-Slovakia BIT referring to '[t]he benefits of this Agreement shall be denied' (*Plama v. Bulgaria,* 2005 para 156).

39 In *Plama v. Bulgaria*, the arbitral tribunal analysed the 'denial of benefits' clause under Article 17 of the ECT and held that Bulgaria must exercise this right:

> In the Tribunal's view, the existence of a 'right' is distinct from the exercise of that right. For example, a party may have a contractual right to refer a claim to arbitration; but there can be no arbitration unless and until that right is exercised. In the same way, a Contracting Party has a right under Article 17(1) ECT to deny a covered investor the advantages under Part III; but it is not required to exercise that right; and it may never do so. The language of Article 17(1) is unambiguous; and that meaning is consistent with the different state practices of the ECT's Contracting States under different bilateral investment treaties … (*Plama v. Bulgaria*, 2005 para 155).

40 A similar conclusion was reached by the tribunal in *Liman Oil v. Kazakhstan*:

> Taking into account the above contentions of the Parties, the Tribunal notes that there is no disagreement between the Parties on the point that Article 17 contains a notification requirement to the effect that a state must expressly invoke Article 17(1) of the ECT to rely on the rights under that provision. The Tribunal agrees that this is the only interpretation that can be drawn from the wording that the host state 'reserves the right to deny the advantages of this Part'. To reserve a right, it has to be exercised in an explicit way (*Liman Oil v. Kazakhstan*, 2010 para 224).

41 In *Ascom v. Kazakhstan,* the arbitral tribunal expressed the same position, noting that 'Art. 17 ECT would only apply if a state invoked that provision to deny benefits to an investor before a dispute arose and Respondent did not exercise this right' (*Ascom v. Kazakhstan*, 2013, para 745).

42 The arbitral tribunal in *Khan Resources v. Mongolia*, in holding that the 'denial of benefits' right must be exercised by the denying State, put forward a more incisive approach to this matter:

> Article 17(1) of the ECT provides that the Contracting Party 'reserves the right' to deny the benefits of Part III of the ECT. The ordinary meaning of the verb 'to reserve' suggests that the right to deny the benefits of the Treaty is being *kept* by the

Contracting Party, to be exercised in the future. Had Article 17 been intended to deny benefits automatically, it could easily have been phrased to do so. A formulation such as: 'The advantages of Part III of the ECT shall be denied to' would have made such meaning plain. This leads the Tribunal to conclude that the Contracting Party's right to deny the benefits of Part III of the ECT must be exercised actively.

The interpretation that Article 17 requires an active exercise of the Contracting Party's right to deny the benefits of Part III of the ECT is in line with the Treaty's object and purpose (*Khan Resources v. Mongolia*, 2012 paras 419 and 421).

43 After establishing that the 'denial of benefits' right must be actively exercised by the respondent State, arbitral tribunals embarked on assessing the proper manner in which such exercise should be effected. In *Plama v. Bulgaria*, the tribunal considered that

> The exercise would necessarily be associated with publicity or other notice so as to become reasonably available to investors and their advisers. To this end, a general declaration in a Contracting State's official gazette could suffice; or a statutory provision in a Contracting State's investment or other laws; or even an exchange of letters with a particular investor or class of investors. Given that in practice an investor must distinguish between Contracting States with different state practices, it is not unreasonable or impractical to interpret Article 17(1) as requiring that a Contracting State must exercise its right before applying it to an investor and be seen to have done so (*Plama v. Bulgaria*, 2005 para 157).

44 As further explained by the *Plama* tribunal, '[b]y itself, Article 17(1) ECT is at best only half a notice; without further reasonable notice of its exercise by the host state, its terms tell the investor little; and for all practical purposes, something more is needed' (*Plama v. Bulgaria*, 2005 para 157). The arbitral tribunal in *Khan Resources v. Mongolia* concurred with this approach: '[c]oncerning the manner in which the host state's right may be exercised, the Tribunal concurs with the *Plama* tribunal' (para 423).

45 Some IIAs require a prior notification and/or consultation procedure between the parties to the applicable IIA, before effectively denying the benefits of that treaty to the putative investors. For example, Article 1113 of NAFTA provides that 'a Party may deny the benefits of this Chapter' only '[s]ubject to prior notification and consultation in accordance with Articles 1803 (Notification and Provision of Information) and 2006 (Consultations)' of NAFTA. Other IIAs, such as Article 2(2) of the Australia-Czech Republic BIT, refer to a joint consultation between the Contracting Parties upon which they 'may decide … not to extend the rights and benefits of this Agreement'. It is understood that such obligation of prior consultations between the parties to the IIAs

is satisfied if such consultations are carried out and, arguably, in good faith, rather than if and when an agreement is reached between the parties.

46 In *Ampal v. Egypt*, the arbitral tribunal considered the following wording of paragraph 1 of the Protocol of 11 March 1986 to the US-Egypt BIT, entered into force on 27 June 1992:

> 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 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.
> 2. 'Control' means to have a substantial share of ownership rights and the ability to exercise decisive influence. Differences as to the existence of control shall be resolved according to the provisions of Article VIII [Settlement of Disputes Between the Parties Concerning Interpretation or Application of this Treaty].

47 Under this provision, the arbitral tribunal concluded that the conditions set forth in the 'denial of benefits' clause in respect of the consultation requirement were not fulfilled:

> The Party wishing to invoke the denial-of-benefits provision of the Treaty has the obligation to consult with the other Patty in order to search for a mutually satisfactory resolution of the matter and such consultations must be held promptly (*Ampal v. Egypt*, 2016 para 147).

48 As summarized by the tribunal in *Ampal v. Egypt,* Egypt conveyed its decision to the United States on 23 January 2013, as a '"fait accompli"' rather than invited to engage in a process of consultation in order to seek a mutually satisfactory resolution of the issue raised by Egypt', although there has been correspondence between Egypt and the US, but nothing which would indicate that there were 'consultations such as clearly envisaged in the Protocol.' (*Ampal v. Egypt*, 2016 para. 150) As such, the tribunal concluded, Egypt's 'denial of benefits to Ampal was thus ineffective' (*Ampal v. Egypt*, 2016 paras 150-151). The *Ampal* tribunal distinguished this particular case from the *Pac-Rim Cayman LLC v. Republic of El Salvador*, where the arbitral tribunal had to assess the provision of Article 10.12 of CAFTA-DR, entered into force on 1 January 2009. With a similar wording to Article 1113 of NAFTA, the 'denial of benefits' provision under CAFTA-DR provides that '[s]ubject to Articles 18.3 (Notification and Provision of Information) and 20.4 (Consultations), a Party may deny the benefits of this Chapter'. The *Ampal* tribunal considered that in contrast to the discretionary consultations under Article 10-12 of CAFTA-DR, the consultations pursuant to

paragraph 1 of the Protocol to the US-Egypt BIT are mandatory (*Ampal v. Egypt*, 2016, para 156.

49 The manner in which the host State should exercise the 'denial of benefits' right and any prior notification or consultations requirements are intertwined. While the first concerns the relation between the host State and the putative investor, and the second concerns the relation between the parties to the applicable IIA containing the 'denial of benefits' clause, both are meant to ensure that the clause produces the desired effects. Both aspects ensure the correct application of the 'denial of benefits' clause, in the sense that, on one hand, the interests of the parties to the relevant IIA are preserved and benefits of the treaty are granted to proper investors, and, on the other, investors investing in the host State and committing significant resources in this respect, are protected from any abusive invocation of the 'denial of benefits' clause.

50 With respect to the notification or consultation requirement, this must be spelled out in the 'denial of benefits' clause and appropriate steps must be taken by the parties to the IIA. Arguably, when notification or consultation steps are not included in the 'denial of benefits' clause, the State parties to the IIA intended to increase the prerogatives of the denying State in respect to these putative investors and their investments (Mistelis and Baltag, 2009, 1320). As suggested by the tribunal in *Ampal v. Egypt*, such negotiations or consultation may be mandatory or not. If mandatory, the failure to proceed with them would trigger the inapplicability of the 'denial of benefits' clause. Possible difficulties would arise in practice related to the manner in which such notifications or consultations would take place, in particular when the IIA does not contain separate provisions dealing with these mechanisms of notification and consultation, such as it is the case of NAFTA.

51 The manner in which the host State exercises the 'denial of benefits' clause with respect to the putative investor tends to be more controversial. This aspect is closely connected to the timing of the 'denial of benefits' clause discussed below, which is when the host State can exercise the 'denial of benefits' right against the investor.

52 The *Plama* tribunal considered that the exercise of the 'denial of benefits' clause must be associated 'with publicity or other notice so as to become reasonably available to investors and their advisers.' At the same time, in order to preserve the object and purpose of the applicable IIA, such notice, as explained by the tribunal in *Khan Resources v. Mongolia*, relying on the decision of *Plama* tribunal, must be given to the investor in a transparent manner, and, in any case, before the investor chooses to rely on the provisions of the denied benefits under the IIA in the arbitration proceedings. The approach makes sense if one considers the interests of the putative investor. To this extent, a proper – or public – notice, given before the investor decides to rely on the dispute settlement mechanism under the IIA, should be retained. However, this method appears to ignore the interpretation of the 'denial of benefits' clause in

accordance with the principles of treaty interpretation, as well as the fact that the interests of host States should be equally upheld in this context. On the first limb, arbitral tribunals are called upon to apply the relevant 'denial of benefits' clause. If the wording of the clause does not lead to the conclusion that the notification of investor is required and, furthermore, no time limits are associated with the exercise of the 'denial of benefits' right, arbitral tribunals should be cautious in reading such prerequisites into this clause. While relying on the object and purpose of the applicable IIA is appropriate in the context of treaty interpretation, this cannot contradict the textual interpretation of the applicable provision. If the parties to the treaty intended to add certain prerequisites or limitations in the application of the 'denial of benefits' clause, they would have provided for those in the same manner as for prior notification or consultation between the States parties to the relevant IIA. Furthermore, under certain treaties, a general notice extended to investors might be considered to breach the provisions of the respective treaties prohibiting any reservations, as is the case of Article 46 of the ECT providing that '[n]o reservations may be made to this Treaty'. One would also assess the opportunity of such a prior notice. In reality, host States become aware of investors and their particularities, and, more specifically, whether they fit into the 'denial of benefits' situation, at the time they are served with the request for arbitration.

53 As such, it is difficult to imagine a situation in which a host State diligently serves the putative investors with the notice for the application of the 'denial of benefits' clause, before disputes with them arise. In addition, one would wonder whether a general notice, as suggested by *Plama* tribunal, if allowed under the text of the applicable IIA, is an effective one, considering that such general notice is the 'denial of benefits' clause itself. Any application of a 'denial of benefits' clause must offer a balanced approach, in accordance with the text of the provision interpreted under the rules of interpretation as codified under Articles 31-33 of the Vienna Convention on the Law of Treaties.

b. Denial of Benefits: Issue of Jurisdiction or Merits?

54 Distinguishing between jurisdiction and merits has relevant practical consequences (→ *Jurisdiction;* → *Admissibility*). When an arbitral tribunal considers a matter to pertain to its jurisdiction, that decision may be challenged under the appropriate available mechanism. As such, erroneously considering an issue pertaining to jurisdiction, could 'result in an unjustified extension of the scope for challenging the awards' (Paulsson, 2005, 601). Consequently, whether or not the invocation of the 'denial of benefits' clause relates to the jurisdiction of the arbitral tribunal or it is related to the merits of the dispute, should not be regarded as an academic exercise, but as a vigorous approach with palpable – and one could add, critical – consequences (Paulsson, 2005, 617).

55 The position of arbitral tribunals should not be considered in a vacuum, but with specific insight into the relevant 'denial of benefits' clause, in the light of the customary rules of treaty interpretation as codified by the Vienna Convention on the Law of Treaties. From this perspective several aspects would likely influence the decision of an arbitral tribunal. Among them, the position of the 'denial of benefits' clause in the structure of the relevant IIA, as well as the wording of the clause are of utmost significance. The Decision on Jurisdiction in *Plama v. Bulgaria* is representative in this context. As explained by the tribunal,

> … the Respondent's jurisdictional case here turns on the effect of Articles 17(1) and 26 ECT, interpreted under Article 31(1) of the Vienna Convention. The express terms of Article 17 refer to a denial of the advantages 'of this Part', thereby referring to the substantive advantages conferred upon an investor by Part III of the ECT. The language is unambiguous; but it is confirmed by the title to Article 17: 'Non-Application of Part III in Certain Circumstances'. … From these terms, interpreted in good faith in accordance with their ordinary contextual meaning, the denial applies only to advantages under Part III. It would therefore require a gross manipulation of the language to make it refer to Article 26 in Part V of the ECT.
> Article 26 provides a procedural remedy for a covered investor's claims; and it is not physically or juridically part of the ECT's substantive advantages enjoyed by that investor under Part III. As a matter of language, it would have been simple to exclude a class of investors completely from the scope of the ECT as a whole, as do certain other bilateral investment treaties; but that is self-evidently not the approach taken in the ECT. This limited exclusion from Part III for a covered investor, dependent on certain specific criteria, requires a procedure to resolve a dispute as to whether that exclusion applies in any particular case; and the object and purpose of the ECT, in the Tribunal's view, clearly requires Article 26 to be unaffected by the operation of Article 17(1) (*Plama v. Bulgaria*, 2005 paras 147-8).

56 The arbitral tribunal in *Plama v. Bulgaria* reinforced its conclusion by considering the purpose of the ECT and concluded that allowing an interpretation of the 'denial of benefits' clause as denying the benefits of Article 26 of the ECT – the procedural remedies made available to investors – would make the respondent contracting party the judge of its own cause, as investors would be left without any recourse to assess the valid application of Article 17:

> In the absence of Article 26 as a remedy available to the covered investor (as the Respondent contends), how are such disputes to be determined between the host state and the covered investor, given that such determination is crucial to both? According to the Respondent, there is no remedy available to a covered investor under the ECT at all: it has no advantages under the ECT at all; it has no rights under Article 26 to amicable negotiations or international arbitration; and any attempt to

initiate arbitration before ICSID will be met with a demand by the host state that the request for arbitration should not be registered under Article 36(3) of the ICSID Convention. … Towards the covered investor, under the Respondent's case, the Contracting State invoking the application of Article 17(1) is the judge in its own cause. That is a license for injustice; and it treats a covered investor as if it were not covered under the ECT at all (*Plama v. Bulgaria*, 2005 para 149).

57 Subsequent tribunals adopted the conclusion of the arbitral tribunal in *Plama v. Bulgaria.* For example, the tribunal in the *Yukos cases* referred to this issue as follows:

> However, insofar as those arguments are deemed to address the question of whether the Tribunal has jurisdiction to pass upon the merits of the claims of Claimant, they are not on point. That is because Article 17 specifies—as does the title of that Article—that it concerns denial of the advantages of 'this Part,' i.e., Part III of the ECT. Provision for dispute settlement under the ECT is not found in 'this Part' but in Part V of the Treaty. Whether or not Claimant is entitled to the advantages of Part III is a question not of jurisdiction but of the merits. Since Article 17 relates not to the ECT as a whole, or to Part V, but exclusively to Part III, its interpretation for that reason cannot determine whether the Tribunal has jurisdiction to entertain the claims of Claimant. … This Tribunal finds the reasoning of the *Plama* tribunal on this point convincing and adopts it (*Yukos v. Russian Federation*, 2009 paras 441-3; *Veteran Petroleum Limited v. Russian Federation*, 2009, paras 497-9; *Hulley Enterpises Limited v. Russian Federation*, 2009, para 440-2).

58 The tribunal in *Ascom v. Kazakhstan* was of the same opinion:

> Article 17 ECT, as clearly indicated by its introductory words 'of this part', only applies to Part III of the ECT, leaving unaffected the dispute resolution provision in Part V with Art. 26 ECT (*Ascom v. Kazakhstan*, 2013, para 745).

59 The same position that the 'denial of benefits' clause pertains to the merits of the dispute, rather than to jurisdiction, was retained by the arbitral tribunals constituted under Article 26 of the ECT, in *Isolux v. Spain* (para 712) and in *Khan Resources v. Mongolia* (para 411), as well as by the tribunals in *Bridgestone v. Panama*, under Article 10.12 of the US-Panama Free Trade Agreement, entered into force on 31 October 2012 (*Bridgestone v. Panama*, para 288).

60 The tribunal in *Ulysseas v. Ecuador* considered the exercise of the 'denial of benefits' right under Article I.2 of the US-Ecuador BIT, as pertaining to jurisdiction, rather than to the merits of the dispute:

> In the Tribunal's view, since such advantages include BIT arbitration, a valid exercise of the right would have the effect of depriving the Tribunal of jurisdiction under the BIT (*Ulysseas v. Ecuador*, 2010 para 172).

61 Similarly, in *Guaracachi v. Bolivia*, the tribunal held that

> The consequence of the denial of benefits is that the Tribunal (which forms part of the package of benefits afforded under the BIT) will be deprived of jurisdiction over the present dispute (*Guaracachi v. Bolivia*, 2014 para 381).

62 Arguably, irrespective of whether one considers that a state cannot deny the benefits of the substantive protection of a treaty without, implicitly, denying the procedural remedies thereof, or formally approaches this denial as confined to the substantive protection strictly, investors would still have access to the dispute resolution mechanism against the denying state. In this sense, the arbitral tribunal, remains competent to decide whether the 'denial of benefits' clause has been validly relied on or not, and as such, whether the tribunal has jurisdiction to hear the merits of the case. (Shore, 2007, 57).

c. When Should a State Deny the Benefits of an International Investment Agreement?

63 A majority of the decisions of arbitral tribunals addressing the application of 'denial of benefits' clauses surveyed reveal the fact that States rely on such provisions and effectively deny the benefits of the applicable IIA when a dispute is well underway, and more specifically, after it becomes aware of the request for arbitration submitted under the investor-state dispute settlement provisions. From a practical point of view, unless foreign investments have to be authorized by the host State, few denying States will become aware of a case where the 'denial of benefits' right should be vigorously exercised before receiving the notice of the dispute (→ *Arbitration without privity*). As explained by the tribunal in *Guaracachi v. Bolivia*,

> As a matter of fact, it would be odd for a State to examine whether the requirements of Article XII ['denial of benefits' clause] had been fulfilled in relation to an investor with whom it had no dispute whatsoever. In that case, the notification of the denial of benefits would—per se—be seen as an unfriendly and groundless act, contrary to the promotion of foreign investments. On the other side, the fulfilment of the aforementioned requirements is not static and can change from one day to the next, which means that it is only when a dispute arises that the respondent State will be able to assess whether such requirements are met and decide whether it will deny the benefits of the treaty in respect of that particular dispute (*Guaracachi v. Bolivia*, 2014, para 379).

64 As such, it is for the arbitral tribunal, under the relevant provisions of the applicable IIA and of the arbitration rules, to determine whether the respondent State had exercised the 'denial of benefits' right in a timely manner. The practice of arbitral tribunals under this point varies, although some arbitral tribunals advise for a strict application of the 'denial of benefits' clause, given the exceptional character of this provision. For example, in *Ascom v. Kazakhstan*, the tribunal held that 'Art. 17 ECT would only apply if a state invoked that provision to deny benefits to an investor before a dispute arose' (*Ascom v. Kazakhstan*, 2013, para 745). Similarly, the tribunal in *Khan Resources v. Mongolia* concluded that investor must be given prior notice with respect to the exercise of the 'denial of benefits' right, in a transparent manner, and, in any case, before the investor chooses to rely on the provisions of the denied benefits under the IIA in the arbitration proceedings.

> The Treaty seeks to create a predictable legal framework for investments in the energy field. This predictability materializes only if investors can know in advance whether they are entitled to the protections of the Treaty. If an investor such as Khan Netherlands, who falls within the definition of 'Investor' at Article 1(7) of the Treaty and is therefore entitled to the Treaty's protections in principle, could be denied the benefit of the Treaty at any moment after it has invested in the host country, it would find itself in a highly unpredictable situation. This lack of certainty would impede the investor's ability to evaluate whether or not to make an investment in any particular state. This would be contrary to the Treaty's object and purpose.
>
> In contrast, an obligation for contracting parties to exercise their Article 17 right in time to give adequate notice to investors would be consistent with the obligation of host states under Article 10(1) of the Treaty to create 'transparent conditions' for investments.
>
> … A good faith interpretation does not permit the Tribunal to choose a construction of Article 17 that would allow host states to lure investors by ostensibly extending to them the protections of the ECT, to then deny these protections when the investor attempts to invoke them in international arbitration (*Khan Resources v. Mongolia*, 2012 paras 426-7, and 429).

65 In this sense, the tribunal in *Khan Resources* followed the position adopted by the tribunal in *Plama v. Bulgaria*, and more recently adopted by the arbitral tribunal in *Masdar v. Spain* (*Masdar v. Spain*, 2018 paras 234-6):

> The covered investor enjoys the advantages of Part III unless the host state exercises its right under Article 17(1) ECT; and a putative covered investor has legitimate expectations of such advantages until that right's exercise. A putative investor therefore requires reasonable notice before making any investment in the host state whether or not that host state has exercised its right under Article 17(1) ECT. At that stage, the putative investor can so plan its business affairs to come

within or without the criteria there specified, as it chooses. It can also plan not to make any investment at all or to make it elsewhere. After an investment is made in the host state, the 'hostage-factor' is introduced; the covered investor's choices are accordingly more limited; and the investor is correspondingly more vulnerable to the host state's exercise of its right under Article 17(1) ECT. At this time, therefore, the covered investor needs at least the same protection as it enjoyed as a putative investor able to plan its investment. The ECT's express 'purpose' under Article 2 ECT is the establishment of '... a legal framework in order to promote long-term co-operation in the energy field ... in accordance with the objectives and principles of the Charter' … (*Plama v. Bulgaria*, 2005 para 161).

66 The question, of course, remains, as to the practicality of such conclusion, given that, as mentioned before, host States become aware of the circumstances triggering the reliance on the 'denial of benefits' clause only when the investor notifies the claim to the host State. As mentioned by the US in its submission in *Pac Rim v. El Salvador*, assuming otherwise would imply an expectation of the host State 'to monitor the ever-changing business activities of all enterprises in the territories of each of the other six CAFTA-DR Parties that attempt to make, are making, or have made investments in the territory of the respondent', which 'would place an untenable burden on a CAFTA Party'. (*Pacific Rim v. El Salvador*, 2012 para. 4.56)

67 Other arbitral tribunals, under the ICSID Arbitration Rules, as well as under the UNCITRAL Arbitration Rules, have considered that the respondent State can validly exercise the 'denial of benefits' right at the latest when raising objections to jurisdiction. In *EMELEC v. Ecuador*, the tribunal concluded that 'Ecuador announced the denial of benefits to EMELEC at the proper stage of the proceedings, i.e. upon raising its objections on jurisdiction' (*EMELEC v. Ecuador*, 2009, para 71). In *Pac Rim v. El Salvador*, the arbitral tribunal, after making a note of the fact that Article 10.12 of CAFTA-DR does not include an express time limit for exercise of the 'denial of benefits' right, held that under the provisions of the ICSID Convention and of the ICSID Arbitration Rules, the respondent State relied on this 'denial of benefits' clause in a timely manner:

… this is an arbitration subject to the ICSID Convention and the ICSID Arbitration Rules, as chosen by the Claimant under CAFTA Article 10.16(3)(a). Under ICSID Arbitration Rule 41, any objection by a respondent that the dispute is not within the jurisdiction of the Centre, or, for other reasons, is not within the competence of the tribunal 'shall be made as early as possible' and 'no later than the expiration of the time limit fixed for the filing of the counter-memorial'. In the Tribunal's view, that is the time-limit in this case here incorporated by reference into CAFTA Article 10.12.2. Any earlier time-limit could not be justified on the wording of CAFTA Article 10.12.2; and further, it would create considerable practical difficulties for CAFTA Parties inconsistent with this provision's object and purpose, as observed

by Costa Rica and the USA from their different perspectives as host and home States (as also by the Amicus Curiae more generally). In the Tribunal's view, the Respondent has respected the time-limit imposed by ICSID Arbitration Rule 41 (In *Pac Rim v. El Salvador*, 2012, para 4.85).

68 The tribunal in *Ulysseas v. Ecuador* reached a similar conclusion under the UNCITRAL Arbitration Rules:

> The first question concerns whether there is a time-limit for the exercise by the State of the right to deny the BIT's advantages. … According to the UNCITRAL Rules, a jurisdictional objection must be raised not later than in the statement of defence (Article 21(3)). By exercising the right to deny Claimant the BIT's advantages in the Answer, Respondent has complied with the time limit prescribed by the UNCITRAL Rules. Nothing in Article I(2) of the BIT excludes that the right to deny the BIT's advantages be exercised by the State at the time when such advantages are sought by the investor through a request for arbitration (*Ulysseas v. Ecuador*, 2010 para 172).

69 Also, under the UNCITRAL Arbitration Rules, the arbitral tribunal in *Guaracachi v. Bolivia* agreed with the position of the tribunal in *Ulysseas v. Ecuador* and concluded that 'the objection to jurisdiction was made in good time, taking into account Article 23(2) of the UNCITRAL Rules' (*Guaracachi v. Bolivia*, 2014, para 382).

70 Nevertheless, the tribunal in *Ampal v. Egypt,* deviating from the decisions of the tribunals in *Pac Rim v. El Salvador* and *Guaracachi v. Bolivia* and following the conclusion of the arbitral tribunal in *Plama v. Bulgaria*, reasoned that, in the light of Article 25(1) of the ICSID Convention, for the denial of benefits to be effective, it 'must be made prior to the filing and registration of the Request for Arbitration' (*Ampal v. Egypt*, para. 170).

d. The Effects of the Exercise of the 'Denial of Benefits' Clause

71 The effects of the 'denial of benefits' clause are of high relevance to investors. If the respondent State successfully invokes this provision, the question is whether the effects will be applied retroactively or prospectively. The practical relevance of this matter is evident. If retaining the prospective effect, investors will benefit from the relevant IIA up to the date when the respondent State exercised the 'denial of benefits' right, and consequently, the arbitral tribunal can effectively address any breach of the protection afforded by the IIA up to that moment.

72 As with other issues concerning the 'denial of benefits' clause, this matter is also highly debated in the practice of arbitral tribunals. There is no clear-cut position on this issue.

73 In *Plama v. Bulgaria*, the arbitral tribunal explained the prospective effect of the 'denial of benefits' clause under Article 17 of the ECT with reference to the purpose of the ECT, as follows:

> In the Tribunal's view, therefore, the object and purpose of the ECT suggest that the right's exercise should not have retrospective effect. A putative investor, properly informed and advised of the potential effect of Article 17(1), could adjust its plans accordingly prior to making its investment. If, however, the right's exercise had retrospective effect, the consequences for the investor would be serious. The investor could not plan in the 'long term' for such an effect (if at all); and indeed such an unexercised right could lure putative investors with legitimate expectations only to have those expectations made retrospectively false at a much later date (*Plama v. Bulgaria*, 2005, para 162).

74 The *Yukos* arbitral tribunal also decided in favour of the prospective application of the 'denial of benefits' clause, with reference to the purpose of the ECT, as follows

> In any event, if the passage in Respondent's First Memorial quoted above in paragraph 447 is construed as an exercise of the reserved right of denial, it can only be prospective in effect from the date of that Memorial. To treat denial as retrospective would, in the light of the ECT's 'Purpose,' as set out in Article 2 of the Treaty ('The Treaty establishes a legal framework in order to promote long-term cooperation in the energy field ...') be incompatible 'with the objectives and principles of the Charter.' Paramount among those objectives and principles is 'Promotion, Protection and Treatment of Investments' as specified by the terms of Article 10 of the Treaty. Retrospective application of a denial of rights would be inconsistent with such promotion and protection and constitute treatment at odds with those terms (*Yukos v. Russian Federation*, 2009 para 458).

75 The tribunal in *Liman Caspian Oil v. Kazakhstan* retained the prospective effect of the 'denial of benefits' clause and further explained that

> Accepting the option of a retroactive notification would not be compatible with the object and purpose of the ECT, which the Tribunal has to take into account according to Article 31(1) of the VCLT, and which the ECT, in its Article 2, expressly identifies as 'to promote long-term co-operation in the energy field'. Such long-term co-operation requires, and it also follows from the principle of legal certainty, that an investor must be able to rely on the advantages under the ECT, as long as the host state has not explicitly invoked the right to deny such advantages. Therefore, the

Tribunal finds that Article 17(1) of the ECT does not have retroactive effect (*Liman Caspian Oil v. Kazakhstan*, 2010, para 225).

76 More recently, in the context of the ECT, the tribunal in *Masdar v. Spain* confirmed the finding of previous arbitral tribunals on the prospective effect of the 'denial of benefits' provision under Article 17 of the ECT:

> A majority of the Tribunal accepts that submission. It considers that it would contradict the text and the purposes of the ECT to say that a Contracting State may deny benefits retrospectively, after an investment has been made and a dispute has arisen. That would be contrary to the transparency, co-operation and stability objectives of the ECT and it would lead to anomalous results. The majority notes that a majority of tribunals, which has considered this issue, has concluded that before disputes arise, a Contracting State must act, whether by adopting legislation denying benefits generally (or to a specific sector or sectors) or by promulgating measures directed at specific investors. That is both practical and consistent with the object and purpose of the ECT –co-operation, transparency and predictability (*Masdar v. Spain*, 2018 para 239).

77 In *Ulysseas v. Ecuador*, the arbitral tribunal preferred to give effect to the retrospective application of the 'denial of benefits' clause. In reaching this decision, the arbitrators held that

> In reply to Claimant's argument that this would cause uncertainties as to the legal relations under the BIT, it may be noted that since the possibility for the host State to exercise the right in question is known to the investor from the time when it made its the [sic] investment, it may be concluded that the protection afforded by the BIT is subject during the life of the investment to the possibility of a denial of the BIT's advantages by the host State (*Ulysseas v. Ecuador*, 2010, para 173).

78 Similarly, in *Guaracachi v. Bolivia*, the arbitral tribunal upheld the retroactive effect, concluding that the very purpose of the 'denial of benefits' clause is to withdraw the benefits claimed by the putative investor:

> The same must be said in relation to the supposedly retroactive application of the clause. The Tribunal cannot agree with the Claimants when they argue that the Respondent is precluded from applying the denial of benefits clause retroactively. The very purpose of the denial of benefits is to give the Respondent the possibility of withdrawing the benefits granted under the BIT to investors who invoke those benefits. As such, it is proper that the denial is 'activated' when the benefits are being claimed (*Guaracachi v. Bolivia*, 2014, para 376).

79 It appears that arbitral tribunals constituted under the ECT give full effect to the prospective application of the 'denial of benefits' clause under Article 17, while tribunals under other IIAs, in particular under US BITs and CAFTA-DR favour a retrospective effect (Gastrell and Le Cannu, 2015, 84-5).

80 As suggested, one explanation for this divergent approach could rest on the specific language of the relevant 'denial of benefits' clause. For instance, Article 17 of the ECT states that '[e]ach Contracting Party reserves the right to deny the advantages of this Part', while Article 10.12 of CAFTA-DR states that '[a] Party may deny the benefits of this Chapter'. Arguably, it is considered that the effect of the 'denial of benefits' under CAFTA can only be upheld if a retrospective effect is attached to this provision (Behlman, 2014, 417). The retroactive or prospective application of a 'denial of benefits' clause, should indeed rest on the specific language of the provision. However, it is not evident that the two examples above would, indeed, justify a divergent approach. In both cases, host States have a discretionary right in deciding to deny the benefits of the applicable treaty. Nevertheless, it appears that majority of arbitral tribunals justify a prospective or retrospective effect of a 'denial of benefits' clause by relying on the object and purpose of applicable IIA. For example, Article 2 of the ECT refers to the purpose of the ECT as 'establishing a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits' or the Preamble of CAFTA-DR referring to 'a predictable commercial framework for business planning and investment'. In this respect, one could argue how both prospective and retrospective effects could be upheld by parties. At the same time investors should be provided with a predictable framework for their investments, the host State should be under the obligation to protect only investors and their investments that comply with the prerequisites set forth in the applicable IIA (Mistelis and Baltag, 2009, 1321).

81 Arbitral tribunals should first give preference to the 'ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose', as directed by Article 31 of the Vienna Convention on the Law of Treaties. One could also give full effect to the reciprocal nature of IIAs, as well as to the principle of legal certainty, as explained by the tribunal in *Liman Caspian Oil v. Kazakhstan*, which would imply that 'an investor must be able to rely on the advantages under the ECT, as long as the host state has not explicitly invoked the right to deny such advantages' (*Liman Caspian Oil v. Kazakhstan*, 2010, para 225). Furthermore, such approach would be backed by the legitimate expectations investors have to be protected as long as host States do not decide to rely on the 'denial of benefits' right, especially when such prerogative is a possibility, as evidence by the use of the terms 'may' or 'reserves', rather than a certainty.

e. Burden of Proof

82 Arbitral tribunals are unanimous in concluding that the burden to prove the fulfilment of the requirements for the application of the 'denial of benefits' clause rests on the denying State.

83 In *AMTO v. Ukraine*, the tribunal explained that

> The burden of proof of an allegation in international arbitration rests on the party advancing the allegation, in accordance with the maxim *onus probandi actori incumbit*. In application of this principle, a claimant has the burden to prove that it satisfies the definition of an Investor so as to be entitled to the Part III protections and the right to arbitrate disputes in Article 26. On the same basis, the claimant would be expected to have the burden of proof that it controls, directly or indirectly, an Investment for which protection is sought, and this is a fact explicitly stated in Understanding 3 to the Final Act. However, when a respondent alleges that the claimant is of the class of Investors only entitled to defeasible protection, so that the respondent can exercise its power to deny, then the burden passes to the respondent to prove the factual prerequisites of Article 17 on which it relies. Article 17(2) adopts exactly this approach but, as already mentioned, Article 17(1) is neutral on the question of burden of proof (*AMTO v. Ukraine*, 2008 para 64).

84 Similarly, in *Generation Ukraine v. Ukraine*, the arbitral tribunal concluded that

> the burden of proof to establish the factual basis of the 'third country control', together with the other conditions, falls upon the State as the party invoking the 'right to deny' conferred by Article 1(2) (*Generation Ukraine v. Ukraine*, 2003, para 15.7).

85 In *Pac Rim v. El Salvador*, the conclusion of the tribunal also indicates that respondent has the burden to establish the fulfilment of the conditions for the 'denial of benefits' clause:

> The Tribunal approaches this issue as to denial of benefits on the basis that it is primarily for the Respondent to establish, both as to law and fact, its positive assertion that the Respondent has effectively denied all relevant benefits under CAFTA to the Claimant pursuant to CAFTA Article 10.12.2 and that, conversely, it is not primarily for the Claimant here to establish the opposite as a negative (*Pac Rim v. El Salvador*, 2012 para 4.60).

86 The same approach was followed by the tribunal in *Ulysseas v. Ecuador*, under the UNCITRAL Arbitration Rules:

> The Tribunal agrees with Claimant that the burden of proving that the conditions for the exercise of the right to deny the BIT advantages is to be borne by Respondent as the party advancing this specific defence to the Tribunal's jurisdiction. This is the rule dictated by the UNCITRAL Rules governing these proceedings (*Ulysseas v. Ecuador*, 2010, para 166).

87 Hence, the burden of proof appears to be uncontroversial: it rests with the denying party, the respondent.

2. Substantive Requirements

88 While the language of the 'denial of benefits' clause is not identical in the IIAs, they do refer to at least two cumulative conditions for such clause to be called in effect: (1) ownership or control of the legal entity by nationals of a third State or by the denying State (see, Georgia-Switzerland BIT (2014), Article 8), and (2) the legal entity has no substantial business activities at the place of incorporation. We are thus in the scenario in which the legal entity formally satisfies the requirements of the definition of 'investor' under the applicable IIA, usually with reference only to the place of incorporation or seat being in one of the contracting parties to the IIA.

89 The cumulative application of the two substantive conditions mentioned above is not controversial in practice. For example, in *Plama v. Bulgaria*, the arbitral tribunal was clear in concluding that the wording of Article 17 of the ECT poses no difficulties in this respect:

> Article 17 is entitled 'Non-Application of Part III in Certain Circumstances'; and taken from the ECT's English version, Article 17(1) provides: 'Each Contracting Party reserves the right to deny the advantages of this Part [i.e., Part III] to: (1) a legal entity [Limb i] if citizens or nationals of a third state own or control such entity and [Limb ii] if that entity has no substantial business activities in the Area of the Contracting Party in which it is organised; ...'. The Tribunal attaches significance to the word 'and' linking both limbs of Article 17(1), thereby requiring both to be satisfied (*Plama v. Bulgaria*, 2005 para 143).

90 Likewise, in the *Yukos cases*, the tribunal held that

> It is apparent from the wording of Article 17(1) that two additional cumulative substantive conditions must be met before the 'denial-of-benefits' clause can be exercised in respect of any particular legal entity. First, such legal entity must be owned or controlled by citizens or nationals of a third State; second, the legal entity must have no substantial business activities in the place in which it is organized (*Yukos v. Russian Federation*, 2009, para 460).

91 In *Ulysseas v. Ecuador*, the tribunal applied the rules of treaty interpretation and held that

> … two cumulative conditions must be met for Respondent to deny Claimant the [US-Ecuador] BIT advantages:
> a) Claimant must be controlled by third party nationals, and
> b) either Claimant does not conduct substantial business activities in the United States or Claimant is controlled by nationals of a third country with which Respondent does not maintain normal economic relations.
> The Parties agree that these are the relevant conditions under Article I(2) of the [US-Ecuador] BIT and that they must be met cumulatively (*Ulysseas v. Ecuador*, 2010, para 167).

92 With respect to the substantive requirements for the application of the 'denial of benefits' clause, arbitral tribunals have signalled the scarce guidance when it comes to the meaning of the notions of 'substantive activities', 'control' and 'third State / party'. Few IIAs include a definition of these notion. Some treaties attempt to define some of these terms. For example, Article 14.17 of the Japan-Australia BIT defines the notions of 'ownership' and 'control' in the context of the 'denial of benefits' clause. The notion of 'control' is also mentioned in Understandings no. 3 to Article 1(6) of the ECT, in the context of the definition of the notion of 'investment' (→ *Protected investment*). As explained there,

> … control of an Investment means control in fact, determined after an examination of the actual circumstances in each situation. In any such examination, all relevant factors should be considered, including the Investor's
> (a) financial interest, including equity interest, in the Investment;
> (b) ability to exercise substantial influence over the management and operation of the Investment; and
> (c) ability to exercise substantial influence over the selection of members of the board of directors or any other managing body.
> Where there is doubt as to whether an Investor controls, directly or indirectly, an Investment, an Investor claiming such control has the burden of proof that such control exists.

93 The Protocol of 23 August 1995 to the Australia-Argentina BIT, entered into force on 11 January 1997, refers to the following elements of 'control':

> 1. The Contracting Parties acknowledge that the question of control with respect to an investor will depend on the factual circumstances of the particular case.
> 2. The Contracting Party in whose territory the investments are undertaken may require proof of the control invoked by the investors of the other Contracting Party.

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 a 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.
4. Where there is doubt as to whether an investor exercises effective control, the investor shall be responsible for demonstrating that such control exists.

94 Supporting provisions are also found in the North American Free Trade Agreement Implementation Act Statement of Administrative Action of November 1993, submitted to the US Congress and containing the actions proposed to implement NAFTA, as follows:

> Thus shell companies could be denied benefits but not, for example, firms that maintain their central administration or principal place of business in the territory of, or have a real and continuous link with, the country where they are established. This provision requires the denying government to give prior notification, and to consult, in accordance with Articles 1803 and 2006.

95 With respect to the notion of 'control', the tribunal in *Ulysseas v. Ecuador* first highlighted that while '[t]he Parties agree also that the term "control" means the "legal capacity to control", they "disagree regarding whether control must be exercised "directly," as argued by Claimant, or may be exercised "indirectly," as asserted by Respondent' (*Ulysseas v. Ecuador*, 2010, para 168). As such, the tribunal had to 'determine whether the terms of Article I(2) of the [US-Ecuador] BIT, when read in their context and in the light of the object and purpose of the treaty, are meant to limit "control" to direct control or also embrace indirect control' (*Ulysseas v. Ecuador*, 2010, para 169). The tribunal was comfortable in deciding that it would look into the upper end of the chain of control of a company (*Ulysseas v. Ecuador*, 2010, paras 170-171). Establishing who in fact controls a legal entity is not a straightforward task. Frequent changes in the corporate structure, few or no restrictions on the transfer of shares, non-public shareholders' registers etc. are some of the difficulties created by the control-test established under the 'denial of benefits' clause. It has been suggested that 'effective control as opposed to legal control is a more probing test for the claimant and enables tribunals to look more easily for the 'true' controller of the investment'. (Baumgartner, 257)

96 As to the meaning of the terms 'substantial activity', the arbitral tribunal in *AMTO v. Ukraine*, concluded that, in the absence of a definition in the ECT,

… 'substantial' in this context means 'of substance, and not merely of form'. It does not mean 'large', and the materiality not the magnitude of the business activity is the decisive question. In the present case, the Tribunal is satisfied that the Claimant has substantial business activity in Latvia, on the basis of its investment related activities conducted from premises in Latvia, and involving the employment of a small but permanent staff (*AMTO v. Ukraine*, 2008, para 69).

97 Subsequent arbitral tribunal followed the approach of the tribunal in *AMTO v. Ukraine* on the issue of 'substantial business activity'. For example, in *Masdar v. Spain*, the tribunal concluded the following:

> There is no definition in the ECT itself of 'substantial business activities.' The Tribunal has had regard, however, to the decision of the tribunal in *AMTO* in which it concluded that: '[...]"substantial" in this context means "of substance and not merely of form". It does not mean "large", and the materiality, not the magnitude of the business activity is the decisive question.'
> The Tribunal adopts this analysis. It has taken note of all the reservations raised by the Respondent, but it concludes that the unchallenged evidence adduced by Claimant, notably as to its standing as a holding company with substantial international assets under its control … and the similarly unchallenged evidence of Mr. Al Ramahi, is persuasive of the true extent and materiality of the business conducted by Claimant in The Netherlands. Respondent has failed to demonstrate that Claimant has no substantial business activity in The Netherlands. Accordingly, there is no basis for a denial of benefits under Article 17(1) of the ECT (*Masdar v. Spain*, 2018, paras 253-4).

98 In *Pac Rim v. El Salvador*, while the tribunal acknowledged that the group of companies of which the putative investor formed a part had 'substantial business activities' in the territory of the US, it held that for the purpose of the 'denial of benefits' clause under CAFTA-DR, it was the claimant's individual activities which would qualify the substantial business in the territory of the home State:

> However, in the Tribunal's view, this first condition under CAFTA Article 10.12.2 relates not to the collective activities of a group of companies, but to activities attributable to the 'enterprise' itself, here the Claimant. If that enterprise's own activities do not reach the level stipulated by CAFTA Article 10.12.2, it cannot aggregate to itself the separate activities of other natural or legal persons to increase the level of its own activities: those would not be the enterprise's activities for the purpose of applying CAFTA Article 10.12.2 (*Pac Rim v. El Salvador*, 2012 para 4.66).

99 As explained, the terms 'substantial business' should imply that the investor is not a 'mailbox company' or a 'shell company', a legal entity which does not have life of its own (Mistelis and Baltag, 2009, 1315). As such, one would expect that the investor is

> engaged in buying, selling, and contracting in that territory beyond the normal activities or functions required merely by the fact of its corporate existence (such as corporate registration and administration, including holding requisite board or shareholders' meetings and the payment of associated taxes and corporate registration fees) (Jagusch and Sinclair, 2008, 20).

100 'Substantial business' would mean, as a minimum, that the investor is party to transactions in the home State, has employees involved in such transactions, has resident managers, etc. (Jagusch and Sinclair, 2008, 20). Usually, IIAs, and in particular, the older generation of IIAs, do not define what 'substantial activities' mean. One example of a treaty that attempts to explain the meaning of these terms is the 2018 Dutch Model BIT, which, in Article 1(c) provides that

> Indications of having 'substantive business activities' in a Contracting Party may include:
> (i) the undertaking's registered office and/or administration is established in that Contracting Party;
> (ii) the undertaking's headquarters and/or management is established in that Contracting Party;
> (iii) the number of employees and their qualifications based in that Contracting Party;
> (iv) the turnover generated in that Contracting Party; and
> (v) an office, production facility and/or research laboratory is established in that Contracting Party;
> These indications should be assessed in each specific case, taking into account the total number of employees and turnover of the undertaking concerned, and take account of the nature and maturity of the activities carried out by the undertaking in the Contracting Party in which it is established (Dutch Model BIT 2018).

101 Similarly, Articles 1.2.1. and 1.2.2 of the Indian Model BIT refer to the following:
> 1.2.1 For greater certainty, 'real and substantial business operations' for the purposes of this definition requires an Enterprise to have, without exception, all the following elements:
> (i) made a substantial and long-term commitment of capital in the Host State;
> (ii) engaged a substantial number of employees in the territory of the Host State;
> (iii) assumed entrepreneurial risk;
> (iv) made a substantial contribution to the development of the Host State through its operations along with transfer of technological knowhow, where applicable; and
> (v) carried out all its operations in accordance with the Law of the Host State.

1.2.2 'Real and substantial business operations' do not include:
(i) objectives/strategies/arrangements, the main purpose or one of the main purposes of which is to avoid tax liabilities;
(ii) the passive holding of stock, securities, land, or other property; or
(iii)the ownership or leasing of real or personal property used in a trade or business.

102 It is evident that factors, such as turnover, number of employees, facilities owned by the alleged investor etc. are indicative elements in establishing a substantial business activity. As such, an arbitral tribunal, based on the evidence presented to it, must engage in a factual inquiry in determining whether the investor has, indeed, substantial activity in its home State. The key element here is that such determination must be focused on 'substantial', rather than on 'any' business activity. Consequently, the threshold set by the 'denial of benefits' clause is high, but is balanced by the other prerequisites of the clause, such as the 'control or ownership by third States'. One could argue that the approach should be qualitative rather than quantitative as dictated by the provisions of the applicable IIA. In this sense, the object of assessment by an arbitral tribunal is not the magnitude of the business on the territory of the home State but the genuineness of the business. Consequently, in assessing the facts of the case, arbitral tribunals, arguably, should be guided by the elements that can detect whether the activities in the home State are real or legitimate. This approach would be justified by the purpose of the 'denial of benefits' clause, which is to preserve the reciprocity in the IIAs and prevent abuses to their benefits.

103 With reference to the meaning of 'third State / party', the tribunal in *AMTO v. Ukraine* held that

> … the investor must be owned or controlled by citizens or nationals of a 'third state'. 'Third state' is not defined in the ECT, but is used in Article 1(7) in contradistinction to 'Contracting Party', which suggests that a third state is any state that is not a Contracting Party to the ECT (para 72).

104 In *Libanaco v. Turkey*, the arbitral tribunal devoted considerable attention to the *travaux preparatoires* of the ECT in the context of the meaning of the notion of 'third state', which appears not only in Article 17 of the 'denial of benefits' clause but also in other provisions of the ECT including in the definition of the notion of 'investor' under Article 1(7). The tribunal highlighted that, for example, under Article 7 of the ECT, the notion of 'third state' refers to a Contracting Party to the ECT and concluded that in the context of Article 17, the notion of 'third state' is meant to point toward a non-Contracting Party to the ECT (*Libanaco v. Turkey*, 2011, paras 552-6). As such, the ECT, unlike other IIAs, (e.g. Australia-Republic of Korea FTA) does not appear to include cases where the legal entity is owned or controlled by nationals of the host Contracting Party (Jagusch and Sinclair, 2008, 19).

D. Outlook

105 There has been a marked progression in the increase of use of 'denial of benefits' clauses in recent IIAs and in the development of jurisprudence on such clauses. It appears that most new FTAs with an investment chapter contain a 'denial of benefits' clause and the clauses are used as a state defence to aggressive and speculative treaty shopping pursued by investors. As a result, the conditions for the application of the clause are both control from a third state party and lack of substantive business activity in the state of alleged nationality. The function of the clauses has also evolved from an attempt to merely deny tribunals jurisdiction to hear a particular matter to more consistently denying *prima facie* investors benefits of IIA claims where the conditions of the treaty clause are met. The burden of proof clearly rests with the party denying the benefits, i.e. the respondent state. It is also for the state to rely on the clause and not a matter for a tribunal to discuss *ex officio*.

106 Over the last decade various 'denial of benefits' clauses have been discussed and applied by tribunals with some matters being settled and uncontroversial (e.g. conditions to be met for the application of clause) and a small number of matters subject to divergent applications (in particular, the timing and the timeliness of the reliance on the clause).

107 'Denial of benefits' clauses have gained significance as states wish to moderate treaty shopping and aggressive establishment of jurisdiction. It is, thus, expected that tribunals will be addressing more such clauses in the not too distant future.

Cited Bibliography

J W Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact of Foreign Investment in Developing Countries' (1990) 24 Int'l Law, 655-675.

J Paulsson, 'Jurisdiction and Admissibility', in G Asken (ed.), *Global reflections on international law, commerce and dispute resolution: Liber Amicorum in honour of Robert Briner*, (ICC Publishing 2005) 601-617.

A Sinclair, 'Investment Protection for "Mailbox Companies" under the 1994 Energy Charter Treaty' (2005) 2 TDM 3.

H Essig, 'Balancing Investors: Interests and State Sovereignty: The ICSID-Decision on Jurisdiction Plama Consortium Ltd. v. Republic of Bulgaria', (2007) 5 OGEL Intelligence, 10.

L Shore, 'The jurisdiction problem in Energy Charter Treaty claims', (2007) 10(3) Int'l Arb. L. Rev 58.

S Jagusch and A Sinclair, 'Denial of Advantages under Article 17(1)', in Graham Coop and Clarisse Ribeiro (eds.), *Investment Protection and the Energy Charter Treaty*, (Juris Publishing 2008), 17-45.

Loukas Mistelis and Crina Baltag, 'Denial of Benefits and Article 17 of the Energy Charter Treaty' (2009) 113 Penn St. L. Rev., 1301-1321.

R Dolzer and C Schreuer, *Principles of International Investment Law,* (OUP Oxford 2012).

J Behlman, 'Out of a Rim: Pacific Rim's Venture Into CAFTA's Denial of Benefits Clause', (2014) 45 U. Miami Inter-Am. L. Rev. 397-424.

L Gastrell and P Le Cannu, 'Procedural Requirements of 'Denial-of-Benefits' Clauses in Investment Treaties: A Review of Arbitral Decisions', (2015) 30 ICSID Review 30, 78-97.

J Lee, 'Resolving Concerns of Treaty Shopping in International Investment Arbitration' (2015) (JIDS) 6, 355-379.

Herman Walker Jr., 'Provisions on Companies in United States Commercial Treaties', 50 AM. J. INT'L L. 373-393, (1956)*

Jorun Baumgartner, Treaty Shopping in International Investment Law, Oxford University Press, 2016

Further Bibliography

V Heiskanen, 'Ménage à trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration', (2014) ICSID Rev. 29, 231-246

F G Santacroce, 'Navigating the troubled waters between jurisdiction and admissibility: an analysis of which law should govern characterization of preliminary issues in international arbitration', (2017) ArbInt'l, 2017 33, 539-570.

Cited Documents

*Agreement on Reciprocal Promotion and Protection of Investments between [...] and the Kingdom of the Netherlands ('Dutch Model BIT 2018').

*Bilateral Investment Treaty between the Government of the Republic of India and [...] (Indian Model BIT 2015).

* Agreement between Australia and the Czech Republic on the Reciprocal Promotion and Protection of Investments (signed 30 September 1993, entered into force 29 June 1994) IC-BT 541 ('Australia-Czech Republic BIT).*

* Agreement between Australia and Japan for an Economic Partnership (signed 8 July 2014, entered 15 January 2015) (Japan-Australia FTA).*

* Agreement Between the Government of Canada and the Government of the Republic of Benin for the Promotion and Reciprocal Protection of Investments (signed 9 January 2013, entered into force 12 May 2014) IC-BT 1715 ('Benin-Canada BIT').*

* Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments (signed 19 January 2016, entered into force 30 August 2017) IC-BT 1868 ('Iran-Slovakia BIT').*

Agreement between the United States of America, the United Mexican States, and Canada (signed 30 November 2018, entered into force).

Agreement on Investment among the Governments of the Hong Kong Special Administrative Region of The People's Republic of China and the Member States Of The Association Of Southeast Asian Nations (signed 12 November 2017) ('The Hong Kong, China SAR – ASEAN Investment Agreement').

Comprehensive Economic and Trade Agreement (signed 30 October 2016) IC-MT 025 (2017) ('CETA').

Energy Charter Treaty (signed 17 December 1994, entered into force 16 April 1998) 2080 UNTS 100, [1994] OJ L380/24.

* Free Trade Agreement between Central America, the Dominican Republic and the United States of America (signed 5 August 2004, entered into force 1 January 2009) 43 ILM 514 ('CAFTA').*

* Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea (signed 8 April 2014, entered into force 12 December 2014) 43 ATS (Australia-Republic of Korea FTA).

Mainland and Hong Kong Closer Economic Partnership Arrangement (signed 28 June 2017, entered into force 28 June 2017).

North America Free Trade Agreement (signed 17 December 1992, entered into force 1 January 1994) 32 ILM 289, 605.

Trade Promotion Agreement between the Government of the United States of America and the Government of the Republic of Panama (signed 28 June 2007, entered into force 31 October 2012) ('United States-Panama Trade Promotion Agreement').

* Treaty Between the Government of the United States of America and the Government of the Republic of Bolivia concerning the Encouragement and Reciprocal Protection of Investment

(signed 17 April 1998, entered into force 6 June 2018) S Treaty Doc No 106-26, IC-BT 389 ('US-Bolivia BIT').*

* Brazil-Angola Cooperation and Investment Facilitation Agreement, entered into force on 11 October 2017 *

* Model Agreement Between The Belgium-Luxembourg Economic Union, adopted on 28 March 2019*

Agreement between the Swiss Confederation and Georgia on the Promotion and Reciprocal Protection of Investments, entered into force on 17 April 2015 ('Georgia-Switzerland BIT')

* Treaty between the United States of America and Ukraine concerning the Encouragement and Reciprocal Protection of Investment (signed 4 March 1994, entered into force 16 November 1996, terminated 10 June 2012) S Treaty Doc No 103-37, IC-BT 636 ('Ukraine-US BIT').*

Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of China, (signed 4 November 1946, entered into force on 30 November 1948) 25 U.N.T.S. 69 ('United States-China FCN').

Treaty between the United States of America and the Republic of Zaire Concerning the Reciprocal Encouragement and Protection of Investment (signed 3 August 1984, entered into force 1989) S Treaty Doc No 99-17, IC-BT 394 ('United States-Congo BIT').

***** United Nations Conference on Trade and Development, *Series on Issues in International Investment Agreements II - Scope and Definition: A Sequel edited by United Nations Conference on Trade and Development* UN Doc UNCTAD/DIAE/IA/2010/2.

* United Nations Conference on Trade and Development, Investment Policy Hub http://investmentpolicyhub.unctad.org/IIA/mappedContent#iiaInnerMenu, last visited 22 October 2018.

*United Nations Conference on Trade and Development, World Investment Report 2016: Investor Nationality – Policy Changes, 2016, E.16.II.D.4.

* Vienna Convention on the law of treaties (signed 23 May 1969, entered into force 1980) U.N.T.S. 1155 331.*

* UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October–2 November 2018) of 6 November 2018, A/CN.9/964

Cited cases

Limited Liability Company Amto v. Ukraine, Final Award, 26 March 2008, SCC Case No. 080/2005, IIC 346 (2008) (AMTO v Ukraine).

* *Yukos Universal Limited v. Russian Federation*, Interim Award on Jurisdiction and Admissibility, 30 November 2009 PCA Case No AA 227, IIC 416 (2009).

* *Veteran Petroleum Limited v. Russian Federation*, Interim award on jurisdiction and admissibility, 30 November 2009, PCA Case No 2005-05/AA228, IIC 417 (2009).*

**Ulysseas Incorporated v. Ecuador*, Interim award, 28 September 2010, PCA Case No 2009-19.*

* *Khan Resources Incorporated and ors v. Mongolia and MonAtom LLC (Mongolia),* Decision on Jurisdiction, 25 July 2012 PCA Case No 2011-09, IIC 1397 (2012) (Khan Resources v Mongolia).*

* *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Traiding Ltd v. Republic of Kazakhstan*, Award, 19 December 2013 SCC Case No. V116/2010 (Ascom v Kazakhstan).*

**Guaracachi America, Inc. and Rurelec PLC v. Plurinational State of Bolivia,* Award, 31 January 2014 PCA Case No. 2011-17, IIC 628 (2014) (Guarachi v Bolivia).*

**Hulley Enterprises Limited v. Russian Federation*, Interim Award on Jurisdiction and Admissibility, 30 November 2009 PCA Case No 2005-03/AA 226, IIC 415 (2009).*

**Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain*, Award, 21 January 2016, SCC Case No. 062/2012, IIC 758 (2016) (Charanne v. Spain).*

ICSID Cases

***** *Generation Ukraine Incorporated v. Ukraine*, Award, 16 September 2003 ICSID Case No ARB/00/9, IIC 116 (2003), (2007) 10 ICSID Rep 240, (2005) 44 ILM 404.*

*****Waste Management, Inc. v. United Mexican States*, Award, 30 April 2004 ICSID Case No. ARB(AF)/00/3, IIC 270 (2004) (Waste Management v Mexico).*

*****Plama Consortium Limited v. Bulgaria*, Decision on jurisdiction, 8 February 2005 ICSID Case No ARB/03/24, (2005) 20 ICSID Rev-FILJ 262, IIC 189 (2005) ('Plama v Bulgaria).*

*****Tokios Tokelés v. Ukraine*, Decision on Jurisdiction, 29 April 2004 ICSID Case No. ARB/02/18, IIC 331 (2007) (Tokios Tokelés v Ukraine).*

***** *Empresa Eléctrica del Ecuador Incorporated v. Ecuador*, Award, 2 June 2009 ICSID Case No ARB/05/9, IIC 376 (2009) (EMELEC v Ecuador).

*****Caratube International Oil Company LLP v. Republic of Kazakhstan*, Award, 5 June 2012 ICSID Case No. ARB/08/12, IIC 562 (2012) (Caratube v Kazakhstan).*

***** *Liman Caspian Oil BV and NCL Dutch Investment BV v. Kazakhstan*, Award, 22 June 2010 ICSID Case No ARB/07/14, IIC 590 (2010) (Liman Oil v Kazakhstan).*

***** *Libananco Holdings Company Limited v. Turkey*, Award, 2 September 2011 ICSID Case No ARB/06/8, IIC 506 (2011).

***** *Isolux Infrastructure Netherlands BV v. Spain*, Award, 12 July 2016 SCC Case V 2013/153, IIC 979 (2016) ('Isolux v Spain').

***** *Ampal-American Israel Corporation and ors v Egypt*, Decision on jurisdiction, 1 February 2016, ICSID Case No ARB/12/11, IIC 970 (2016) (Ampal v Egypt).*

*****Pac Rim Cayman LLC v. El Salvador*, Decision on Jurisdictional Objections, 1 June 2012 ICSID Case No ARB/09/12, IIC 543 (2012) (Pac Rim v El Salvador).*

***** *Bridgestone Licensing Services Incorporated and Bridgestone Americas Incorporated v. Panama*, Decision on expedited objections, 13 December 2017 ICSID Case No ARB/16/34, IIC 1273 (2017) ('Bridgestone v Panama).*

* *Masdar Solar and Wind Cooperatief UA v. Spain*, Award, 16 May 2018, ICSID Case No ARB/14/1, IIC 1375 (2018).

* Garanti Koza LLP v. Turkmenistan, Award, 19 December 2016, ICSID Case No ARB/11/20, IIC 985 (2016)(Garanti Koza v. Turkmenistan).*

PIL Keywords

World Bank; International Centre for Settlement of Investment Disputes [ICSID]; # Ad Hoc Tribunal (UNCITRAL); ECT (Energy Charter Treaty); Denial of benefits clause; Nationality of investor, corporations; Control; Investment, territorial element; Burden of proof;