# Dealing with Treaty Shopping Across the Tax, Trade, and Investment Regimes

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## 1 Introduction

Treaty shopping is a strategy whereby companies or individuals restructure a cross-border transaction through a third jurisdiction in order to gain advantage of a more favourable bilateral treaty signed by this third jurisdiction. The phenomenon has received a lot of attention in the tax area, yet there is no agreement on how to address this problem satisfactorily. Hence, it is interesting to investigate how other economic regimes have approached the problem and whether there is potential for transferring policy ideas.

In theory, the issue can arise in any bilateralized international regime. A "bilateralized" regime is an international regime in which countries apply different treatments to different countries, for example because treaties with differing content are negotiated with individual (or groups of) countries or domestic law prescribes differentiated treatment to different geographical areas (Ruggie 1992).

There is increasing attention on treaty shopping in the international investment regime, which, like the international tax regime, is fundamentally built on bilateral treaties. Therefore, this presents an obvious area for comparison. Trade has historically been governed in a more multilateral way due to the most-favoured nation principle embedded in the General Agreement on Tariffs and Trade (GATT), which strives to equalize the treatment that a country applies to different countries. However, bilateralism or preferential treatment among regional groupings has become a prominent feature of the trade regime (Inama 2022). Moreover, as I will show below, there are other features of the trade regime that incentivize treaty shopping practices.

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The similarity of the issues in different policy areas has been noted by different authors. In the investment regime, the term "treaty shopping" appears to have been imported from the tax regime (Baumgartner 2016). In a 2001 article, Avi-Yonah and Slemrod drew a parallel between the anti-treaty shopping rules of tax treaties and the rules of origin of trade agreements (Slemrod and Avi-Yonah 2001, 544). However, a more systematic comparison of policy approaches to treaty shopping has not yet been undertaken.

Governments face several choices when adopting rules to tackle this issue. First, there is always a grey area between genuine situations and illegal behaviour. Governments need to calibrate their anti-treaty shopping rules to achieve an adequate equilibrium. They also face several choices in what kind of rules are used with different implications for effectiveness, compliance burden, and administrability. For instance, rules can be vague, allowing for case-by-case decisions, or mechanical. They can be uniform or differentiated across sectors, types of transactions, or economic actors. They can require routine compliance, or they can enable application in cases of suspected treaty shopping only.

At a global level, there are two relevant issues. First, international harmonization of approaches to treaty shopping is desirable to increase the predictability of rules for genuine economic actors operating across different countries. Second, by fostering multilateralism, international institutions can prevent the problem "at its root", since greater harmonization of fundamental policies means that there are fewer incentives for economic actors to devise treaty shopping strategies in the first place.

In Sect. 2, I describe how the phenomenon of treaty shopping appears in different regimes, what its motivations are, and how prevalent it is. In Sect. 3, I analyse the responses developed in each of the three regimes based on the features described above. In Sect. 4, I discuss which insights can be derived from comparing the three regimes and highlight some interactions of the responses adopted.

## 2 How Treaty Shopping Works in Each Regime and How Prevalent It Is

In the following sub-sections, I will describe the phenomenon of treaty shopping in each of the three regimes, among them what is "shopped" for, what features of countries' domestic laws or treaties enable treaty shopping, and how prevalent the phenomenon is thought to be. I show that the issue is prevalent in the tax and investment areas, but less so in the trade area. The main difference between the tax and investment areas is how frequent benefits occur as well as the likelihood of being investigated by relevant authorities.

## 2.1 Tax

In the field of tax, treaty shopping can be defined as a practice whereby a taxpayer routes an international payment through a conduit subsidiary resident in a state C, other than the state B from which the payment originates and the state A of the final recipient of the payment, to benefit from a (more advantageous) tax treaty. "More favourable" in the context of tax usually means that the treaty foresees lower withholding tax rates on different income flows (such as interest, royalty, dividends, technical services) to be levied by the source country or an exclusive allocation of taxing rights on capital gains to the residence state.[1] In addition, the domestic law of conduit jurisdictions is also relevant to this structure. For example, the tax system of the conduit jurisdiction should provide for an exemption from foreign-earned dividends and capital gains and not apply withholding taxes on outbound flows.

One should also mention that the identity of countries "A" and "B" in Fig. 1 could be the same. In that case, one would speak of "round-tripping".

In tax, the evidence of treaty shopping is well established. Even though there is no water-tight methodology to quantify revenue losses, estimates range among several billions (Lejour et al. 2021). This is further confirmed by the important role adopted by jurisdictions with favourable attributes for treaty shopping in global foreign direct investment flows and the number of special-purpose entities registered in these jurisdictions.

However, whether treaty shopping is likely to occur strongly depends on a country's treaty network and its domestic law. For example, if a country only imposes

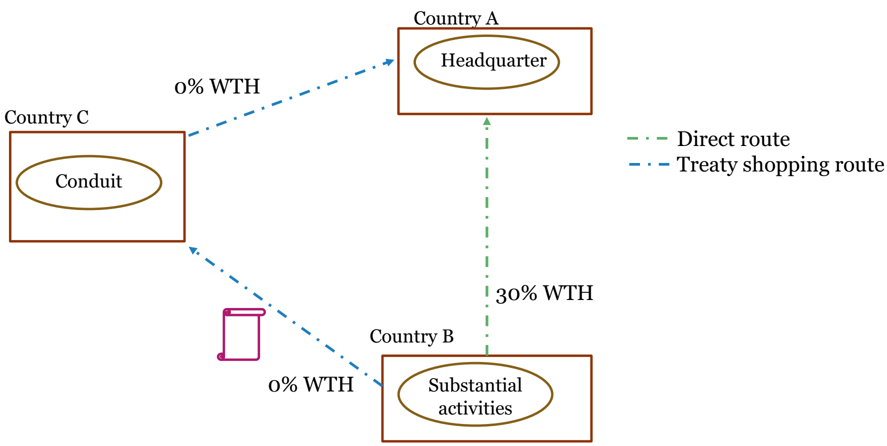


**Fig. 1** Treaty shopping scheme in tax. Source: the author

[1] Treaty shopping could be undertaken with the purpose of obtaining favourable treatment in the home state, for example the benefit of an exemption of foreign income, where otherwise only deduction or credit would be granted. But this should not occur often since most main residence countries have similar tax rules applicable to income earned abroad.

low withholding rates on outbound payments or if it has signed similarly worded treaties with all relevant trade partners, treaty shopping is unlikely to be of any advantage for taxpayers. Accordingly, there is considerable variation with respect to individual countries' exposure to the phenomenon (Lejour and van't Riet 2023).

## 2.2 *Investment*

In the investment regime, the main benefit of treaties is their dispute resolution provision, which typically allows an investor to initiate an investor-state arbitration proceeding (see Fig. 2). Because treaties' substantive provisions mainly restate what is generally accepted as customary international law and thus also applicable in the absence of a treaty, treaty shopping is mainly attractive to investors because of the dispute resolution provisions contained in BITs (Baumgartner 2016, 2; Gray 2019); thus, shopping should mainly occur from countries without any treaty to countries with a treaty. However, there is some variation in the degree of benefit offered by treaties, for example the existence of "umbrella" or tax carve-out provisions, which determine what kind of topics can be submitted to a dispute (see also the chapters by Garcia Cordoba and Garcia Olmedo in this volume). This variation could incentivize treaty shopping by investors from countries that even have a treaty in place (Skinner et al. 2010, 267).

Nevertheless, a difference from the tax regime is that benefits from investment treaty shopping tend to be more "one-off" for an investor (when a dispute occurs), whereas benefits from tax treaties occur repeatedly (at any time that there are taxable transactions affected by a treaty). The number of jurisdictions that can facilitate

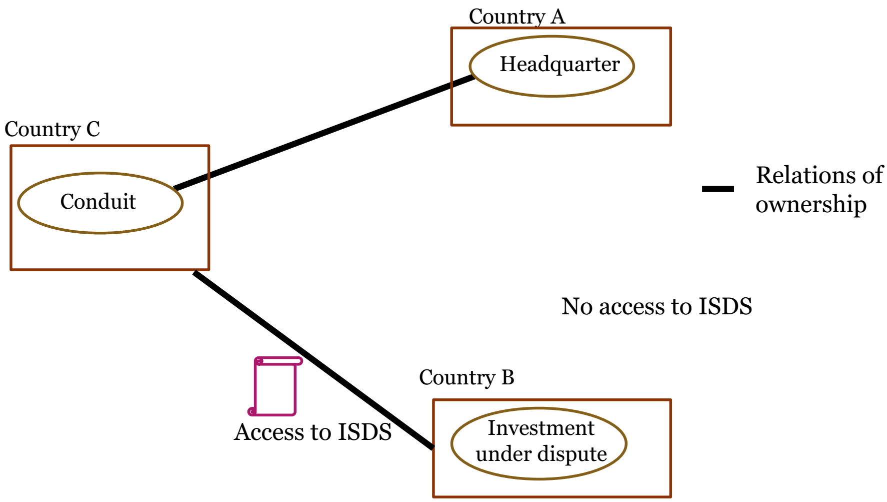


**Fig. 2** Treaty shopping in investment. Source: the author

investment treaty shopping is potentially greater than in the tax case, as well, since the domestic law of the jurisdiction used for treaty shopping is not immediately relevant—only the fact that a BIT exists.[2] Nevertheless, some jurisdictions appear to be used more often than others. For instance, the Netherlands is often cited as jurisdiction that can be used by investors for setting up shell companies because it has signed many BITs with comparatively favourable wording (Gray 2019), and possibly because it can simultaneously procure tax treaty shopping benefits (Gray 2019; Thrall 2021).

Although there are no concrete figures, the practice is regarded as prevalent, which is illustrated by the number of arbitration cases in which the Netherlands is involved (despite the comparatively small size of its economy) and the number of arbitration cases in which the matter of nationality is discussed (Chaisse 2015; Böhme 2021).

## 2.3 Trade

In the trade regime, it is useful to distinguish between trade in goods and trade in services since regulation of both issues fundamentally differs.

**Trade in Goods**

While in the tax and the investment regimes the true "residence" or "nationality" of an investor or taxpayer is the crucial question, in the regime on trade in goods, the true origin of a product is relevant. A parallel can be drawn between the shell company (or conduit company) in tax and investment law with companies that simply "re-package" or do minimal assembly works on imported goods in the trade regime.

Under the multilateral General Agreement on Tariffs and Trade (GATT), which applies to trade in goods, treaty shopping is prima facie not an issue because of the most-favoured nation (MFN) principle. However, GATT allows countries to conclude preferential agreements. In such cases, treaty shopping concerns could arise because a company could first import into the country with the most beneficial tariffs, and then further to the ultimate destination. Note, however, that in a customs union such as the European Union, this issue does not arise because there is a tariff common to all member countries vis-à-vis third countries (Felbermayr et al. 2018).

Treaty shopping could also arise when a country (or a block of countries) implements different tariffs, such as those implemented by the European Union's Generalized Scheme of Preferences, which provides for lower tariffs for least developed countries, and which is allowed under the GATT.

[2] Even though the tax regime may be relevant a company may prefer to use a country with a low tax rate so that potential arbitral awards are taxed at a low rate, as tribunals most of the time do not accept to "gross-up" an arbitral award by the tax applicable in a home jurisdiction (Leikin and Keller 2020).

In addition, even under the GATT the imposition of anti-dumping and countervailing measures on products from a specific country could incentivize economic actors to alter the origin of their products to obtain a more favourable treatment. While the term "treaty" shopping may not be fully accurate in this case (since no different treaty applies), this type of "duty evasion" shares the same characteristics of the treaty shopping issue, namely a circumvention of a disadvantageous treatment based (among others) on geography (Bjorklund and Marcoux 2022).

Chaisse argues that "treaty shopping is relatively less serious in the field of trade (in goods)" than in investment because defensive measures (the rules of origin) have already been established for a long time (Chaisse 2015, 244). Felbermayr and colleagues show that tariff levels towards third countries are often similar among countries that have preferential agreements among each other, which makes treaty shopping unprofitable in many cases even if no rules of origin applied (Felbermayr et al. 2018). Hence, strategies such as the one shown in Fig. 3 are unlikely to be adopted in many cases by economic actors, especially when considering additional transportation costs stemming from routing goods through an intermediary jurisdiction.

**Trade in Services**

With respect to trade in services, countries usually do not apply tariffs; therefore, international agreements such as the General Agreement on Trade in Services (GATS) relate to other measures, such as market access regulations, and aim to ensure that foreign service providers are treated like comparable national providers. As in the area of trade in goods, the GATS allows countries to conclude preferential economic integration agreements, and many countries have done so. Therefore, determining the proper origin of a service can also be an issue.

Dinh notes that the issue has received significantly less attention from academics and policymakers, but nevertheless cites a few WTO cases in which the origin of a

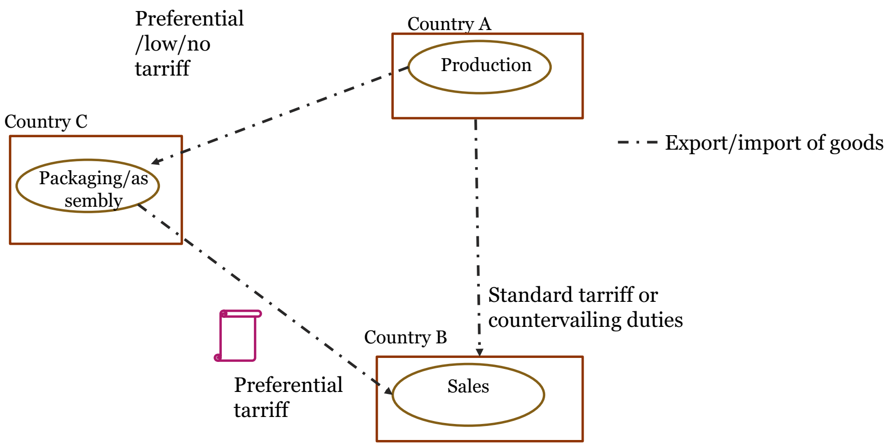


**Fig. 3** Duty evasion in trade. Source: the author

service was subject to dispute (Dinh 2020). He further argues that as cross-border services are gaining importance as inputs in the production of goods, determining the origin of services becomes indirectly relevant for determining the origin of goods.

# 3 Responses Adopted in Each Regime

In all three regimes, governments responded to treaty shopping. Terminology varies across regimes. For example, one can find "principal purpose test provisions" and "limitation of benefits" provisions in tax treaties, "denial of benefit" provisions in investment treaties, and "rules of origin" in domestic trade laws as well as preferential trade agreements. Their purposes are generally similar. However, their approaches can vary. For example, one can distinguish between formulaic approaches (more prevalent in the trade regime) and case-by-case approaches that consider facts and circumstances (more prevalent in the tax and investment regime). One can also distinguish between rules that apply routinely and anti-avoidance approaches that apply only in cases of suspected treaty shopping. At the regime level, there is variation with respect to the extent of harmonization, both within and across countries.

## *3.1 Tax*

The issue of tax treaty shopping has received increased attention from the 1970s onwards, coinciding with the expansion of international investment. The first device, already included in the 1977 OECD Model Convention, was a "beneficial ownership" provision added to the different articles concerning passive income, which can be used to deny benefits if a company does not have the formal right to dispose of the income received. However, these provisions used to be narrowly interpreted and were not judged as effective (OECD 1986).[3] However, in addition to beneficial ownership clauses, countries began relying on domestic anti-avoidance provisions and more stringent provisions included in treaties, or altogether terminated vulnerable treaties such as the United States-Netherlands Antilles, in the 1980s (Avi-Yonah and Panayi 2010). For instance, the OECD released a report in 1987, which described the phenomenon as well as four different responses adopted by countries (OECD 1987). Most relied on formal tests, such as the degree to which a foreign company that claimed treaty benefits was owned by shareholders in third states or the share of income received that was passed on to companies in third states. Until recently, most treaties had not included specific provisions.

[3] This has changed recently with the so-called Danish cases in which the European Court of Justice confirmed a wider interpretation of the concept (Bærentzen 2020).

The Base Erosion and Profit Shifting (BEPS) Project, launched by the OECD and G20 countries in 2013, has spurred harmonization by declaring the introduction of one of the two model anti-avoidance rules in countries' tax treaties as international minimum standards. The most prevalent approach is the one of a General Anti Avoidance Rule, the so-called principal purpose test (PPT), which allows to a state to deny a taxpayer the benefit of the treaty where availing oneself of the benefits of the treaty was one of the principal purposes of the transaction (OECD 2015). The alternative approach endorsed by the BEPS Project is a Limitation-on-benefits (LOB) rule, which is a simplified version of a clause developed by the United States. The LOB rule contains a series of tests based on the type of taxpayer and whether an active business is conducted in the state of the taxpayer's residence. While the LOB test is more formulaic, both PPT and LOB largely require a tax authority to do a case-by-case analysis in case they suspect a taxpayer of treaty shopping.

Through the BEPS Multilateral Instrument, a mechanism to update bilateral treaties, many treaties now contain the same PPT or LOB clause. However, there is no sufficient evidence yet to judge whether this initiative has brought any harmonization in practice (Jiménez 2022). Because applying the PPT rule can be challenging for tax administrations with limited capacity, some countries have undertaken renegotiations of substantial provisions. For example, in 2017, India simultaneously renegotiated the advantages it conferred in treaties with Mauritius, Singapore, and Cyprus, as these treaties had been used by many investors (Bose 2017; Kotha 2017). When they perceive high revenue losses from treaty shopping, other countries have even terminated treaties.[4] However, while these approaches may effectively combat treaty shopping in a low-capacity context, they are politically difficult to enact, since terminating or renegotiating a treaty involves a diplomatic procedure with many potential veto players (Hearson 2021).

### *3.2 Investment*

In the investment regime, treaty shopping has been addressed through anti-abuse doctrines, through definitions of the concept of "investor" or of the concept of the "home state" of the investor, or through specific denial of benefit clauses.

The Model bilateral investment agreement developed by the International Institute for Sustainable Development (IISD), which has significantly influenced recently negotiated BITs (Alschner et al. 2022, 602), contains a clause according to which benefits of the agreement can be denied if the investing enterprise does not meet a "substantial business activities" test in the contracting jurisdictions or if the investing enterprise has activities but is owned by a resident with which the recipient has no diplomatic relations or with respect to which it has specific regulations prohibiting exchanges (Mann et al. 2006, 12). In addition, the definition of the

[4] The termination of the Senegal–Mauritius treaty in 2019 is a notable example.

"home state" in the agreement seeks to exclude shell companies, by stating that an investor's home state is the "principal place of business or a major centre of effective and sustained links with the home state economy and from where effective control over the investment is exercised" (Mann et al. 2006, 5). However, a substantial activity test alone may be less effective in the investment regime than in tax and trade because the treaty shopping benefit is large and concentrated in time; hence, it is profitable for an MNE to start substantial activities in an otherwise empty conduit company when there is a prospect for an investment dispute (Böhme 2021, 516). Therefore, some states include additional purpose-based limitation of benefits clauses in the dispute resolution clause of BITs. The Dutch Model BIT, for example, denies access to investor-state arbitration "if an investor within the meaning of Article 1(b) of this Agreement […] has changed its corporate structure with a main purpose to gain the protection of this Agreement at a point in time where a dispute had arisen or was foreseeable".

As pointed out by several authors, the timing at which planning occurs is often an important factor in arbitral decisions dividing different forms of treaty shopping into acceptable and unacceptable behaviour (Baumgartner 2016, 10; Böhme 2021). In many cases, benefits were denied only if a company structure was changed when an investment dispute was already in prospect, but not if the investment had already been structured through an intermediary company beforehand. In contrast, the moment in time at which a structure is established is usually not part of the consideration in tax matters.

There are debates around the modalities of applying the respective clauses. In some cases, for example, arbitral tribunals judged that a government had to notify an investor beforehand when an investment was made if it intended to apply a denial of benefits clause (Böhme 2021; Azaino 2012).

Termination owing to treaty shopping is rare. Azaino cites the case of the Venezuela–Netherlands treaty, where Venezuela had mentioned treaty shopping as reason for the termination (Azaino 2012, 13). However, this is an exception. In sum, the standard response to treaty shopping in the investment regime appears to be comparatively weaker than that in the tax regime. Nevertheless, Böhme shows how state practice has evolved towards the inclusion of stricter limitation of benefits clauses in newer treaties. However, she concludes that they cannot combat treaty shopping effectively, since it is sufficient that a country has only one treaty without effective clause to be exposed to treaty shopping (Böhme 2021, 529).

### *3.3 Trade*

Rules of origin are the main response to the treaty shopping problem in the trade in goods regime. These rules determine when a good originates from a specific country. Their purpose is not only to prevent treaty shopping but also to compile correct trade statistics (Inama 2022).

When it was concluded in 1947, the General Agreement on Tariffs and Trade (GATT) did not include any rules or guidance on rules of origin. Instead, countries have developed differing approaches in domestic law (Inama 2022). The common basis of most countries' approaches is that a good needs to have undergone "substantial transformation" in the last country of export to be considered as originating from that country. This test has been objectified by different types of formulaic tests such as an "ad valorem percentage criterion", "change in tariff heading" (which would indicate the transformation of a good) or a specified list of manufacturing operations that would qualify for a substantial transformation.[5] For the same type of test, countries can then differ in the strictness. For example, country X requires that 50% of value is added in country Y in order to consider the good as originating from country Y, whereas country Z only requires 30% of value added.

Different countries apply different rules of origin, and often have different rules depending on the type of good. One country may also agree to "preferential" rules in a free trade agreement distinct from "non-preferential" rules applying to other countries. For example, the EU accepts "aluminous cement" as originating from Indonesia based on either the "change in tariff heading" test or a 30% of value-added test. However, imports of the same good from Algeria can qualify for a preferential tariff under the Algeria-EU Free trade agreement, but in that case, only the change in tariff heading is accepted as a criterion.[6]

International harmonization efforts have been started in the 1990s with the drafting of the Agreement on Rules of Origin, which, however, has not been ratified as of 2023, which is why in 2022 Inama still describes them as "no man's land in international trade law" (Inama 2022, xxxv).

In addition to rules of origin, more generally worded anti-abuse rules may apply to protect rules of origin from circumvention (Bjorklund and Marcoux 2022, 228). For example, a company can circumvent a substantial transformation test based on value added by artificially lowering the prices of intermediary goods imported into the country of assembly, which then leads to higher value added in the latter country (Jha 2010). The North American Free Trade Agreement therefore included a generally worded circumvention clause in the chapter on rules of origin.[7]

Anti-circumvention rules for anti-dumping provisions are also more akin to anti-abuse rules in tax and an investigation of the purpose.[8]

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[5] https://www.wto.org/english/tratop_e/roi_e/roi_info_e.htm

[6] For an overview of different rules applied, see: https://findrulesoforigin.org/

[7] "A good shall not be considered to be an originating good merely by reason of […] any production or pricing practice in respect of which it may be demonstrated, on the basis of a preponderance of evidence, that the object was to circumvent this Chapter" North American Free Trade Agreement, art. 412.

[8] For example, the anti-circumvention provision of the EU Regulation on the matter of circumvention is defined as "change in the pattern of trade between third countries and the Union or between individual companies in the country subject to measures and the Union, which stems from a practice, process or work for which there is insufficient due cause or economic justification other than the imposition of the duty" (Council of the European Union 2016, art. 13).

Rules of origin in trade services have been subject to far less attention by academics and policymakers (Dinh 2020). However, rules with similar functions exist, and their application has occasionally become subject to dispute (Dinh 2020). However, rather than to rules of origin in trade of goods they are more similar to those used in the investment and tax areas, as they rely on tests of "substantial business activities" in a member state (Zampetti and Sauvé 2006, 135). In the US–Mexico–Canada Agreement (the successor of the North American Free Trade Agreement), for example, virtually the same denial of benefits clause is used in both investment and cross-border service chapters.[9]

Dinh criticizes that rules of origin for services concern only the "origin" (or better residence) of the supplier of the service, but not the economic origin of the service, which could be different if the service is outsourced to subcontractors residing in third countries (Dinh 2020).

## 4 Comparison Across Areas

In all three areas, the need for rules capable of combatting treaty shopping arises from the potential of circumvention of preferential rules based on geographical origin, even though this potential may be more or less serious depending on the benefits of bilateral treatment. However, the landscape has evolved differently across the regimes. In the following section, I compare the approaches adopted in different policy areas and review academic discussions around them.

### *4.1 Routinely Applied Rules or an Anti-Avoidance Approach*

In the trade regime, rules are routinely applied, are very detailed, and not even primarily considered as anti-avoidance devices. Zampetti and Sauvé, for example note that, "Rules of Origin are (or should be) merely definitional in character" (Zampetti and Sauvé 2006, 114). In fact, they could be compared to transfer pricing rules in the tax arena, which are very detailed and routinely applied, even in transactions without tax-saving potential for a company. The investment regime represents the opposite end of the spectrum, as the application of anti-treaty shopping rules is clearly associated with an anti-avoidance motive. In the tax regime, different rules have been used in the past but since the BEPS Project, the dominant approach has also been an anti-avoidance approach.

One reason for this divergence may lie in the frequency of their application: Whereas in the investment regime the need to check whether an investor has the right to benefit from a preferential treatment granted by a treatment really only

[9] Articles 14.14 and 15.11 of United States–Mexico–Canada Agreement.

arises in the situation of a possible dispute, the need to apply the correct customs treatment arises in most countries several hundreds or thousands of times every day.[10] However, as referenced above, Felbermayr, Teti, and Yalcin argue that the potential for treaty shopping (or trade deflection, as they call it) is unprofitable for the majority of country-pairs. Therefore, it is questionable whether routine application, which involves a burden of documentation for the relevant economic actor, is justified (Felbermayr et al. 2018). In the investment regime the anti-avoidance regime makes sense since treaty shopping is unlikely to go undetected. When there is a dispute, high stakes are usually involved, and a host government will likely invest resources to explore whether treaty shopping can be used as argument to fend off the dispute.

On this dimension, the tax regime is more similar to the trade regime, since the need to apply a tax treaty arises frequently as well, usually at least once a year for every taxpayer with relevant cross-border transactions. Hence, it is somewhat surprising that the standard approach in tax is now an anti-avoidance approach.

## *4.2 Mechanical Rules vs. Tests Based on Facts and Circumstances*

One can also observe a divergence between mechanically applied rules and those that rely on facts and circumstances. Here again, trade in goods is different from the rest. While in investment much attention is paid to the circumstances in each individual case, trade in goods relies on objective tests, which, however, can be very detailed and differentiated across different situations. Both approaches are used in tax, but the facts and circumstances test is more prevalent.

Usually, the facts and circumstances tests have spurred criticism: Authors have raised concerns that the general anti-avoidance approach in tax could justify non-respect of the treaty in too many circumstances and hence erode the tax treaty's core function of alleviating double taxation (De Broe and Luts 2015). Developing country governments, on the other hand, are concerned that they cannot effectively apply the rule, due to a lack of administrative resources that can be dedicated to carrying out fact-intensive, case-by-case analyses approach (Heitmüller 2024).

However, Dinh argues that the "experiences in the area of trade in goods also reveal that lengthy and detailed origin rules are not always synonymous with complexity. Indeed, the restrictiveness of the rules does not depend solely on the complexity, but indeed the thresholds used in the rules themselves are also one of the factors" (Dinh 2020, 143). Whether detailed rules are burdensome rather depends on whether the information necessary to apply them is readily available or not. Dinh suggests that in the future it could be possible to make trade in services rules of

[10] Of course, most countries only verify a fraction of imports and exports.

origin more similar to rules in trade of goods as more sophisticated statistics on trade in value added become available.

In the case of investment, arguments against attributing nationality based on the ultimate shareholders of an investment are that this is frequently difficult to verify, especially in cases of widely held companies with changing ownership (and with several intermediaries, such as investment funds) (Böhme 2021). However, a similar argument such as the one Dinh makes in the context of services could apply here, as more countries and more countries are introducing ownership registers (see chapter by Ates et al.).

Nevertheless, objective tests can be circumvented, as illustrated by the fact that countries have introduced additional anti-avoidance rules in rule of origins provisions of trade agreements. If, however, the alternative is a complete lack of application of an anti-avoidance rule as the experience in tax suggests, more objective tests appear preferable.

### *4.3 Should Treaty Shopping Be a Concern at All?*

Finally, it is interesting to note that in all three areas, there are debates among academics and policymakers regarding whether treaty shopping should be combatted at all. The arguments that are advanced are similar. With respect to investment, Chaisse, for example, argues that "treaty shopping is not, in principle, prohibited under international investment law, as the precise purpose of IIAs is to encourage investment" (Chaisse 2015, 228). With respect to trade, many authors consider rules of origin simply to be distortionary because of the administrative burden required for compliance and the potential for discriminatory treatment (Mavroidis 2018; Felbermayr et al. 2018; Geraets et al. 2015). For instance, Zampetti and Sauvé argue that consumers are disadvantaged by strict rules of origin for services trade since they may not have access to the most competitive service provider (Zampetti and Sauvé 2006). In the tax area, such arguments even have had legal consequences, for instance in the Azadi Bachao Andolan case, where the preamble of the India–Mauritius tax treaty, which like many treaties refers to broad objectives such as enhancing trade and investment between the countries, was used to justify tolerance of treaty shopping (Union Of India (Uoi) And Anr. vs Azadi Bachao Andolan And Anr. 2003; Baistrocchi 2008).

These arguments all come from a similar perspective that considers treaty shopping within the context of the overall liberalizing (or at least multilateralizing) goal of the respective regime. If one considers bilateralism as a second-best world or just an intermediary step towards the end goal of a fully liberalized regime, one would not consider treaty shopping as undesirable.

These arguments are usually balanced by counterarguments that again are similar across areas. In tax, one argument is that treaties that make a country vulnerable to treaty shopping are often those concluded when negotiation teams had little experience and do not distribute taxing rights in a fair way (Hearson 2021). Since newer investment treaties are usually less liberal than older ones in terms of the rights granted to investors, a similar argument may apply (Alschner 2022). Geopolitics is also often considered (Finelli 2023). In the EU-Canada Comprehensive Economic and Trade Agreement (CETA), for example, anti-treaty shopping rules for investment and trade apply a stricter test to entities in an intermediary country that are connected to third countries to which the country in question applies sanctions (*EU-Canada Comprehensive Economic and Trade Agreement (CETA)* 2017, art. 8.16).

Inspiration can be taken from the tax regime to prevent interpretations that consider treaty shopping as permissive. Following the introduction of an anti-avoidance rule, the Base Erosion and Profit Shifting Project encouraged countries to change their tax treaties' preambles to clarify that encouraging treaty shopping is not the goal of a bilateral tax treaty (OECD 2015).

## 4.4 Interactions

Do the treaty shopping phenomenon and the countermeasures adopted by states in the different areas interact with each other? Five types of interactions can be mentioned:

First, one type of treaty shopping opportunity may induce investors to take them in other areas, as well. Thrall shows that, for instance, multinational enterprises first established special-purpose entities to gain tax benefits and later used the same entities for investment treaty shopping (Thrall 2021).

Second, countermeasures taken in one area can have consequences for behaviour in other areas. For instance, when countries adopt stricter rules of origin in trade, or stricter local substance requirements in tax, this may induce companies to invest more in an intermediary country and to increase the amount of local value added and local activities.

Third, recently, investment disputes have arisen with respect to the correct application of anti-treaty shopping measures in tax, such as in the *Lone Star* case (see the chapter by Garcia Olmedo in this volume).

Fourth, policy ideas appear to be influencing the development of policies across areas. For example, the term "treaty shopping", which is now commonly used in the investment policy community, was borrowed from the tax community, where the phenomenon had emerged earlier (Baumgartner 2016, 7). Nevertheless, the different policy discussions still mainly take place in isolation from each other as negotiators of tax, trade, or investment treaties are frequently coming from different ministries (Owens and Zhan 2018, 5).

A symptom of this may be a fifth type of interaction, which until now is of an entirely hypothetical nature, however: The PPT rule tackles tax treaty shopping by querying whether obtaining the benefit of the tax treaty is the principal purpose of a transaction. However, such a design may open the door for an argument by companies or individuals that a specific scheme was designed not principally to take advantage of the tax agreement, but also to take advantage of a preferential trade treatment or a bilateral investment treaty. From the point of view of the host state, this should not make the arrangement more desirable because it may be equally opposed to treaty shopping for trade benefits or investment protection. However, such an arrangement could escape the letter of the principal purpose test used in tax treaties. Therefore, it could be desirable for countries to adopt measures that protect them from treaty shopping more generally, without focusing on one particular area only.

## 5 Conclusion

Can anything be learned from one regime for the other? The characteristics of the treaty shopping phenomenon and responses adopted to it are different in each area but also show some similarities. The response to treaty shopping in trade in goods is clearly the odd-one out, which correlates with the differences in the nature of the issue. However, there is already a significant overlap in the issues and approaches to treaty shopping with respect to trade in services, investment, and tax purposes. Hence, there may be scope for harmonization across these issue areas. This could lead to a pooling of administrative resources and increased legal certainty for economic actors. For example, in each country, one agency could be responsible for auditing the geographic origin of a transaction under a common criterion and the outcome of the audit would be valid for the purposes of applying a tax treaty, an investment treaty, and a preferential services trade treaty. Moreover, international organizations working in the areas of tax, trade, and investment could collaborate to define a common standard for tackling treaty shopping.

Further, some innovations from one policy area may lend themselves for application in another. For instance, the idea “customs unions” from the trade regime could be transposed to tax. For example, treaty shopping would be a reduced concern for EU countries if the EU started agreeing tax treaties with third countries on behalf of all their member states and set common tax rules applicable to third countries in the absence of a treaty. In investment, a similar movement has already started as the EU has started negotiating common investment and trade agreements with third states (e.g. CETA).

In the tax regime, international harmonization of rules is most advanced. In the investment regime, there is already a discussion to use a multilateral mechanism to update treaties, similar to the Multilateral Instrument of the BEPS project to include anti-avoidance rules across the board (Böhme 2021, 530). This may also be fruitful for the trade regime.

More generally, the chapter has shown that being aware of academic debates and policy considerations from one policy area can be useful for those engaged in another, be it only for recognizing that different approaches exist and that similar arguments are being exchanged.

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