Beyond The Name And Nationality: Who Are The Claimants in Investment Arbitration?

Vera Korzun[*]

Current efforts to reform international investment law focus in large part on the impact of investor-State dispute settlement (ISDS) on the regulatory power of the sovereign State. At the core of the reform debate is the ability of foreign investors, as claimants in investment treaty arbitrations, to challenge the laws and regulations of the host State as part of dispute resolution. Modern investment treaties seek to safeguard the State's right to regulate, but also impose obligations on foreign investors and promote responsible business conduct.

Yet, beyond the name and nationality as alleged in arbitration filings, very little is known about the claimants themselves. Who are the primary beneficiaries and users of international investment law and dispute resolution? Are they predominantly large multinational corporations as it is commonly perceived? Are there any individuals able to bring claims in ISDS? Do they relate to one another? These and many other questions remain largely open. Answering these questions will inform and guide sovereign States and international organizations as the debate about the possible reform of ISDS continues.

This Article seeks to fill the existing void by providing empirical data on claimants—companies and individuals—that have brought investment treaty

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* Associate Professor of Law, Faculty Research and Development Director, University of Akron School of Law. For questions and comments on earlier versions of this Article, I would like to thank Andrea K. Bjorklund, Susan Franck, Stuart Ford, Ibironke Odumosu-Ayanu, Sungjoon Cho, James T. Gathii, Cary Martin Shelby, Carliss Chatman, Guillermo J. Garcia Sanchez, Jacqueline Nolan-Haley, Sean J. Griffith, Richard Squire, Thomas H. Lee, Susan Block-Lieb, and participants of the National Business Law Scholars Conference held at the University of Georgia Law School on June 21–22, 2018; Chicagoland Junior Scholars Works-in-Progress Conference held at the Loyola University Chicago School of Law on Oct. 5, 2018; Research Forum of the American Society of International Law (ASIL) held at the UCLA School of Law on Nov. 8–10, 2018; ASIL-Midwest Virtual Works-in-Progress Conference hosted by the UIC School of Law on Nov. 13, 2020; a workshop hosted by the Marquette University Law School on Apr. 30, 2021, as part of the virtual speaker series "Discovering New Voices in Dispute Resolution," co-sponsored by the Dispute Resolution Works-in-Progress Consortium in Spring 2021; and the Fordham Business Law Seminar hosted by the Fordham University School of Law on Jan. 30, 2023.

arbitration claims in International Centre for Settlement of Investment Disputes (ICSID) arbitrations from January 1, 2010, to December 31, 2019. It further analyzes the data on claimants and investment arbitrations to better understand how investor protection treaties affect the flows and structure of foreign investments and decisions by companies and individuals to bring claims in ISDS. In doing so, it seeks to contribute to our understanding of the functioning of the international investment regime and whether it achieves its goal of increasing the flow of foreign investments into the host State's economy. The Article concludes by reconciling the goals of investor protection with the collected empirical data on claimants in ISDS and offers normative prescriptions for investment treaty-making.

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INTRODUCTION

Modern international investment law encompasses nearly 3,300 international investment agreements (IIAs) united largely by the same goal—to increase the flow of foreign investments into a host country by providing protections to foreign investors and/or investments.[1] In addition to serving their formal goal, such agreements perform a signaling function by indicating to the rest of the world that a country is safe for foreigners to invest in and will treat them fairly.[2] Although

1. As of January 2024, the database of IIAs of the United Nations Conference on Trade and Development (UNCTAD)—the IIA Navigator—contains 3,278 IIAs concluded worldwide to date, including 2,589 agreements currently in force. *See* UNCTAD, International Investment Agreements Navigator, https://investmentpolicy.unctad.org/international-investment-agreements. (According to the IIA Navigator, the majority of these agreements (2,828 IIAs) are bilateral investment treaties (BITs), with 2,219 BITs currently in force.)

2. *See, e.g.*, Zachary Elkins et al., *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000*, 2008 U. ILL. L. REV. 265, 283–84 (arguing that signing an investment treaty

the scope and protections offered in IIAs vary substantially, the conclusion of bilateral investment treaties (BITs) and other IIAs has long become a *de-facto* standard for investor-friendly nations.[3] Unsurprisingly, countries that sought foreign investments rushed to complete IIAs in bulk, often conceding to the demands of their treaty partners and not thinking through the economic implications of such treaties.[4]

A cursory look into BITs shows that they are treaties for the benefit of third parties. Concluded by sovereign States on a bilateral basis, they provide protections to nationals of State parties, both companies and individuals, who choose to invest in a foreign country that has signed a respective BIT.[5] The enforcement of BITs is left to their beneficiaries, foreign investors, who in case of a dispute can invoke an investor-State dispute settlement (ISDS) mechanism provided for in the treaty.[6] This right of foreign companies and individuals to

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"send[s] a proinvestment signal to international markets." (footnote omitted)). *See also* Lauge N. Skovgaard Poulsen, *The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2009–2010 539, 539–74 (Karl P. Sauvant ed., 2010); Andrew Guzman, *Explaining the Popularity of Bilateral Investment Treaties*, *in* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS 73, 73–98 (Karl P. Sauvant & Lisa E. Sachs eds., 2009).

3. *See* Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67, 102 (2005) (noting that "signaling power [of BITs] may have eroded during the 1990s as investors increasingly saw them as a 'normal feature of the institutional structure'." (footnote omitted)). *See also* UNCTAD's International Investment Agreements Navigator, *supra* note 1 (showing that almost all economies have signed BITs or other IIAs, including 180 countries that have signed at least one BIT to date).

4. *See, e.g.*, Deborah L. Swenson, *Why Do Developing Countries Sign BITs?*, 12 U.C. DAVIS J. INT'L L. & POL'Y 131, 143 (2005) (arguing that developing countries that signed BITs in the 1990s "may have agreed to sign these treaties since foreign investors located in their borders were lobbying for the investor protections they could gain from BITs").

5. *See, e.g.*, Anthea Roberts, *Triangular Treaties: The Extent and Limits of Investment Treaty Rights*, 56 HARV. INT'L L. J. 353, 353–54 (2015) ("Investment treaties should be reconceptualized as triangular treaties, i.e., agreements between sovereign States that create enforceable rights for investors as non-sovereign, third-party beneficiaries."). *See also* Vera Korzun, *The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs*, 50 VAND. J. TRANSNAT'L L. 355, 368 (2017) ("In this sense, IIAs operate like contracts for the benefit of third parties. Although they are concluded by sovereign States, IIAs provide third-party beneficiaries–the foreign investors–with the rights that are directly enforceable in international arbitration against State parties.")

6. The term "investor-State dispute settlement" (or "ISDS") refers to the mechanisms of resolving investment disputes between foreign investors and the host State, most commonly, investor-State arbitration. *See* Andrea Bjorklund, Lecture, *Will an International Investment Court Restore Legitimacy to Investor State Dispute Settlement?*, UN Audiovisual Library of International Law (2020). According to UNCTAD, most BITs contain ISDS provisions, notably, providing for binding arbitration that can be initiated by the foreign investor in case of a treaty breach by the host State. *See* UNCTAD, DISPUTE SETTLEMENT: INVESTOR-STATE. UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS 5 (2003). Depending on an investment treaty, foreign investors have several options to choose from, most commonly, the arbitration pursuant to the 1965 Convention for the Settlement of Investment Disputes Between States and Nationals of Other States (the ICSID Convention), the ICSID Additional Facility Rules, or the UNCITRAL Arbitration Rules. *See* Mapping of IIA Content, UNITED NATIONS CONF. ON TRADE AND DEV.,

bring a claim in ISDS has attracted the attention of scholars and policymakers and has generated an ongoing debate about the costs and benefits of foreign investor protection.[7] Moreover, once foreign investors began to bring their first claims in ISDS, it became clear that international investment law had empowered "foreigners" to challenge the government measures of the host State.[8] In response, governments and public interest groups voiced their concern that the current system of ISDS enabled foreign investors—often, multinational corporations—to encroach on State sovereignty and the right to regulate, that is the right of the host State to adopt and implement laws and regulations for the benefit of the public at large.[9] Providing for the right to regulate in investment treaties is an effort to safeguard rights for the sovereign State and, therefore, minimize challenges of domestic regulations and potential liability of the host State where domestic law

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https://investmentpolicy.unctad.org/internationalinvestment-agreements/iia-mapping [hereinafter UNCTAD IIA Mapping Project] (last visited Jan. 1, 2024) (mapping the content of 2,583 IIAs, including 2,448 treaties that provide for the ISDS mechanisms, such as the ICSID arbitration (2,191 treaties), the UNCITRAL arbitration (1,643 treaties), or litigation in domestic courts (1,623 treaties).

7. *See generally* Jonathan Bonnitcha et al., *A Future Without (Treaty-Based) ISDS: Costs and Benefits*, *in* INTERNATIONAL ECONOMIC DISPUTE SETTLEMENT: DEMISE OF TRANSFORMATION? 191, 191–219 (Manfred Elsig et al. eds., 2021) (exploring whether the abandonment of treaty-based ISDS would negatively impact the main benefits it allegedly provides, such as the increase of foreign investment flows, depoliticization of investment disputes, and the institutionalization of the rule of law in host States); Columbia Center on Sustainable Investment, *Costs and Benefits of Investment Treaties: Practical Considerations for States.* Policy Paper (March 2018) (providing an overview of the costs and benefits of investment treaties and offering suggestions to the sovereign States on managing their existing treaty obligations and developing future treaties); Joachim Pohl, *Societal Benefits and Costs of International Investment Agreements* (OECD, Working Papers on International Investment 2018/01), https://doi.org/10.1787/e5f85c3d-en (last visited Jan. 1, 2024) (reviewing societal benefits and costs of ISDS from the academic, government, business, and civil society viewpoints).

8. A classic example is the challenge by multinational tobacco company Philip Morris International, Inc. a tobacco-packaging legislation in Australia in domestic and international courts and ISDS. *See Philip Morris Asia Ltd. v. Austl., PCA Case No. 2012-12*, Award on Jurisdiction and Admissibility (UNCITRAL 2015). (Four years after the notice of arbitration was served, Australia won in the investment treaty arbitration but the reputation of ISDS has since suffered a heavy blow. In large part, because this dispute has shown how legitimate government measures can be challenged in ISDS through creative treaty- and forum-shopping.)

9. *See, e.g.*, OECD, *"Indirect Expropriation" and the "Right to Regulate" in International Investment Law* 2 (OECD, Working Papers on International Investment 2004/04), http://dx.doi.org/10.1787/780155872321 (last visited Jan. 1, 2024) (noting that "there is increasing concern that concepts such as indirect expropriation may be applicable to regulatory measures aimed at protecting the environment, health and other welfare interests of society."). On the right to regulate in international investment law and arbitration, *see generally* AIKATERINI TITI, THE RIGHT TO REGULATE IN INTERNATIONAL INVESTMENT LAW (2014) (offering the in-depth analysis of the right to regulate in trade and investment agreements, including pre-modern agreements and modern IIAs); Korzun, *The Right to Regulate, supra* note 5 (examining the right to regulate in international investment law, with a focus on regulatory disputes in ISDS and the ways to protect the right to regulate in investment treaties through exceptions, exclusions, and other safeguard provisions); YULIA LEVASHOVA, THE RIGHT OF STATES TO REGULATE IN INTERNATIONAL INVESTMENT LAW: THE SEARCH FOR BALANCE BETWEEN PUBLIC INTEREST AND FAIR AND EQUITABLE TREATMENT (2019) (providing a comprehensive analysis of the right to regulate in the context of the fair and equitable treatment (FET) standard as embodied in investment treaties and tribunal decisions).

impacts foreign investors. By definition, the scope of the right to regulate, as protected by investment treaties, impacts the scope of the benefits provided to foreign investors as well as the key concepts of the investment regime, such as "investor" and "investment."[10]

Developments in the world economy in the last two decades have contributed to the debate about the benefits of IIAs and the alleged legitimacy crisis in investment treaty arbitration.[11] Noticeably, there has been a change in the direction of cross-border investments. In the past, cross-border investments were made by companies and individuals from developed countries who frequently invested in less developed regions.[12] Thus, the flow of foreign investments remained largely unidirectional—from developed to developing countries—and the roles of these countries as capital exporters and capital importers rarely

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10. *See* UNCTAD, INTERNATIONAL INVESTMENT AGREEMENTS REFORM ACCELERATOR 5 (2020) (explaining that "[t]he extent to which a State's right to regulate in the public interest is restricted may be directly affected by treaty provisions relating to the scope of the IIA or definitions of concepts such as 'investment' and 'investor'").

11. The term "legitimacy crisis" with reference to ISDS was first used by Susan Franck in her 2005 law review article, where she argued that contradictory awards undermine "the legitimacy of investment arbitration, particularly where public international law rights are at stake and the legitimate expectations of investors and Sovereigns are mismanaged." Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1568 (2005). Since then, scholars have used the term "legitimacy crisis" to refer to a broad range of weaknesses of ISDS, including its inherent "pro-investor bias." *See, e.g.*, Malcolm Langford et al., *Special Issue: UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions, An Introduction*, 21 J. WORLD INV. & TRADE 167, 168 (2020) (observing that "[f]or at least a decade, the ISDS regime has suffered a public legitimacy crisis.") (footnote omitted) The authors further explain that "[c]ritics charge that the system is afflicted by pro-investor bias, undue secrecy, conflicting jurisprudence and high levels of compensation, which is compounded by concerns that developing countries are burdened with excessive legal costs and frequently lose cases against foreign investors." *Id.* (footnote omitted).

12. *See, e.g.*, UNCTAD, WORLD INVESTMENT REPORT 1998. TRENDS AND DETERMINANTS 9, Table I.8. Regional Distribution of FDI Inflows and Outflows, 1994–1997 (United Nations, New York, and Geneva, 1998) (providing data on outflows and inflows of FDI for 1994–1997, where the developed countries accounted for 84.8–86.9 percent of total FDI outflows and 57.9–63.9 percent of total FDI inflows while developing countries accounted for 12.9–15 percent of total FDI outflows and 31.9–39.3 percent of total FDI inflows). The report further states that in 1997 developing countries:

> accounted for close to two-fifths or $149 billion of world FDI inflows, twice the level they received in 1993 and tenfold the level in 1985. (Both in 1996 and 1997, FDI flows into developing countries were larger than those into Western Europe, by about $30 billion.)

Id. at 16. The reference in this Article to the "developing" and "developed" countries follows the practice of UNCTAD that prior to December 2021 reported statistical data for the developing and developed economies. UNCTAD has since abolished this practice, although to assist the users that "expressed the need to maintain the distinction of developed and developing regions," UNCTAD has made available a file with "an updated classification of developed and developing regions as of May 2022." UNCTAD, Methodology: Standard Country or Area Code for Statistical Use (M49), accessible https://unstats.un.org/unsd/methodology/m49/. The file can be accessed at https://unstats.un.org/unsd/methodology/m49/historical-classification-of-developed-and-developing-regions.xlsx.

changed.[13] Such asymmetry of roles and interests made it easier for signatory States to negotiate a BIT, because a home State would largely seek protections for its nationals investing abroad, while a host State would be willing to grant investor protections in hopes of attracting foreign investments.[14]

Today, investment flows are increasingly bi-directional.[15] Noticeably, countries that previously played a capital-importing role, such as China,[16] are actively investing abroad in Africa and Latin America,[17] and in traditionally capital-exporting countries of the European Union, the United Kingdom, the United States, and Canada.[18] In cases of investing in developed countries in

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13. *See, e.g.*, SUSAN D. FRANCK, ARBITRATION COSTS. MYTHS AND REALITIES IN INVESTMENT TREATY ARBITRATIOn 6–7 (2019) ("Historically, the developed world dominated capital exports. . . . [as] rates of capital outflows from developing [S]tates and transitioning economies was proportionately low when compared to their developed world counterparts, with annual investment outflows regularly around 10% and never more than a quarter of worldwide outbound investment until 2009" (footnote omitted)).

14. In international investment law, the term "home State" refers to the country of origin of foreign investments, while the term "host State" refers to the country where the investment is made.

15. *See, e.g.*, UNCTAD, WORLD INVESTMENT REPORT 2019: SPECIAL ECONOMIC ZONES 2 (United Nations, 2019) ("FDI flows to developed economies reached their lowest point since 2004, declining by 27 per cent.") Further, according to the 2019 Reports, FDI flows to developing economies remained stable, rising by 2 percent to $706 billion. As a result of the increase and the anomalous fall in developed countries, the share of developing economies in global FDI increased to 54 percent, a record. *Id. See also* Markus Wagner, *Regulatory Space in International Trade Law and International Investment Law*, 36 U. PA. J. INT'L L. 1, 23–24 (2014) ("Capital flows are no longer uni-directional, leaving [S]tates that had previously considered themselves immune from such suits open to investment arbitration." (footnote omitted)); FRANCK, ARBITRATION COSTS, *supra* note 13, at 6–7 ("More recently, yearly investment flows have ebbed and flowed but are no longer unidirectional." (footnote omitted)).

16. *See, e.g.*, UNCTAD WORLD INVESTMENT REPORT 1998, *supra* note 12, at xx ("A new record level of $45 billion in FDI flows received by China contributed to the 9 per cent increase in total FDI flows to Asia and the pacific in 1997"). The 1998 Report also notes that in 1997 China and Indonesia experienced large increases in outflows, with big projects in natural resource-seeking investments, while firms from Singapore and Taiwan were actively involved in acquisitions of firms in crisis-afflicted countries. *Id*. at xxi.

17. On Chinese FDI in Africa, see, e.g., Won Kidane & Weidong Zhu, *China-Africa Investment Treaties: Old Rules, New Challenges*, 37 FORDHAM INT'L L.J. 1035, 1036 (2014) ("The extraordinary rise in the last decade of Chinese investment in Africa continues to be a subject of profound curiosity. . . . largely because it defies the centuries-old norm on who invests where."). On Chinese FDI in Latin America, *see, e.g.*, Ding Ding et al., *Chinese Investment in Latin America: Sectoral Complementarity and the Impact of China's Rebalancing*, IMF Working Paper WP/21/160 (2021).

18. *See, e.g.*, [UNCTAD], WORLD INVESTMENT REPORT 2021: INVESTING IN SUSTAINABLE RECOVERY 82 (United Nations, 2021) ("Despite the COVID-19 pandemic, aggregate FDI flows to the least developed countries (LDCs) remained practically unchanged in 2020, largely due to the developments in Angola. . . . Investors from developing countries, especially from China and, to a lesser degree, Mauritius, South Africa and Thailand, continued to play a growing role in investment in LDCs.") The 2021 Report further notes that "China is the largest and one of the fastest growing sources of FDI to LDCs." *Id*. at 83. *See also* Max J. Zenglein & Gregor Sebastian, *Chinese Foreign Direct Investment in Europe: The Downward Trend Continues*, UNIDO INDUS. ANALYTICS PLATFORM (IAP) (Dec. 2022) (observing the downwards trends in Chinese FDI in Europe following the COVID-19 pandemic but also reporting that

particular, once a dispute arises, the old generation of Chinese BITs, which provided limited protections to foreign investors and focused on protecting the host State, may prove to be less adept at satisfying the interests of Chinese companies making investments abroad.[19] Although China remains a net capital importer, there is a growing awareness in China and other countries whose roles in cross-border movement of capital are changing that investor protection treaties should both safeguard the rights of the host State and protect its investors abroad.[20] Similarly, as the pattern of investment flows is changing globally, developed countries are no longer immune from claims in ISDS by foreign investors coming from developing countries that were predominantly capital importers in the past.[21]

Another development that has affected international investment law is the evolution of the European Union (EU) and its foreign investment competence regime.[22] Today, Foreign Direct Investments (FDIs), as part of the common commercial policy, fall under the exclusive competence of the EU.[23] This gives the EU the exclusive power to legislate in the area of FDIs but not in the area of

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> Chinese investments in Europe (the European Union (EU) and the United Kingdom (UK)) . . . which had been steadily declining since 2017, bounced back in 2021, increasing by 33 percent year-on-year, and reaching EUR 10.6 billion. Despite this recovery, Chinese FDI in Europe has dropped by 77 percent compared to the peak in 2016 of EUR 46 billion, and remains on a downward trajectory due to increased scrutiny—including stronger investment screening in Europe as well as ongoing capital controls in China—and an economic slowdown at home.).

19. *See, e.g.*, Juan Du, *Restrictive ISDS Clauses under Chinese BITs: Interpretations and Implications for China*, 30 ASIA PACIFIC L. REV. 382, 382 (2022) (in view of the restrictive ISDS clauses in Chinese BITs, arguing that

> As China's dual role in two-way investment, China needs to consider the protection of both the host [S]tate and its investors. To deal with the challenges from the predominance of the restrictive ISDS clauses in Chinese BITs, China seems to be updating its restrictive BITs from a multilateral level.

See also Uche Ewelukwa Ofodile, *Africa-China Bilateral Investment Treaties: A Critique*, 35 MICH. J. INT'L L. 131, 155 (2013) (observing that "[e]arly Chinese BITs 'provided investors with little protection in practice' and accorded host governments considerable policy space") (footnote omitted).

20. *See, e.g.*, Uche Ewelukwa Ofodile, *supra* note 19, at 156–57 (exploring China's motivations for concluding BITs with countries in Africa). *See also* Cai Congyan, *Outward Foreign Direct Investment Protection and the Effectiveness of Chinese BIT Practice*, 7 J. WORLD INV. & TRADE 639 (2006); Stephan W. Schill, *Tearing Down the Great Wall—the New Generation Investment Treaties of the People's Republic of China*, 15 CARDOZO J. INT'L & COMP. L. 73 (2007).

21. *See* Markus Wagner, *Regulatory Space in International Trade Law and International Investment Law*, 36 U. PA. J. INT'L L. 1, 23–24 (2014).

22. *See generally* ANGELOS DIMOPOULOS, EU FOREIGN INVESTMENT LAW (2011) (providing a comprehensive analysis of the European Union's involvement in the regulation of foreign investments, including the scope of the EU competencies and the influence of the EU on international investment law globally).

23. *See* Issam Hallak, *EU International Investment Policy: Looking Ahead, Briefing,* E.P.R.S. Doc. PE 729.276 (Feb. 2022).

portfolio investments or ISDS, which are frequently covered by the IIAs.[24] As a result, in concluding EU investor protection treaties with third countries, the EU shares its competence with EU Member States whose approval of such treaties is required.[25] In addition to its role in investment treaty-making, the European Commission has long been adamant in its criticism of ISDS and has proposed to replace it with the two-tier permanent international investment court system.[26] The EU and its Member States now lead the discussions on possible reform of ISDS under the guidance of the United Nations Commission on International Trade Law (UNCITRAL).[27]

Current scholarly debate reflects these trends in the world economy, and treaty drafting has focused on the issues of rebalancing international investment

24. *Id*. at 1 ("Early on, concerns were raised as to the specific EU competence. Opinions requested from the Court of Justice of the EU (CJEU) established that the EU had neither exclusive competence in portfolio international investments (which, unlike direct investments, provide limited control over a firm) nor in the investor-State dispute settlement (ISDS) mechanism – two domains covered by EU protection IIAs. EU Member State approval on these provisions was therefore needed.")

25. Since 2009 when the Lisbon Treaty entered into force and provided the EU with exclusive competence over FDI, the EU and its Members States have concluded such protection IIAs as the 2016 Canada-EU Comprehensive Trade and Economic Agreement (CETA), the 2018 EU-Singapore Investment Protection Agreement, and the 2019 EU-Vietnam Investment Protection Agreement. *Id*.

26. *See, e.g.*, Cecilia Malmström, *A Multilateral Investment Court: A Contribution to the Conversation About Reform of Investment Dispute Settlement*, EUR. COMM'N DOC. 157512 (Nov. 22, 2018), https://trade.ec.europa.eu/doclib/docs/2018/november/tradoc_157512.pdf [https://perma.cc/LAJ2-535Q] (archived Dec. 2, 2022) (discussing the EU position expressing dissatisfaction with modern ISDS and suggesting to replace it with an investment court system). *See also* Issam Hallak, *Multilateral Investment Court: Overview of the Reform Proposals and Prospects*, E.P.R.S. Doc. PE 646.147 (Jan. 2020), https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/646147/EPRS_BRI(2020)646147_EN.pdf; European Commission Press Release IP/15/6059, The Commission, EU Finalises Proposal for Investment Protection and Court System for TTIP (Nov. 12, 2015), https://ec.europa.eu/commission/presscorner/detail/en/ip_15_6059; European Commission Press Release IP/15/5651, Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations (Sept. 16, 2015), http://europa.eu/rapid/press-release_IP-15-5651_en.htm.

27. *See* U.N. COMM'N ON INT'L TRADE L. [UNCITRAL], Working Group III, *Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the European Union*, A/CN.9/WG.III/WP.145 (Dec. 12, 2017).

law[28] and reforming the existing system of ISDS.[29] Looking into the first of these issues (rebalancing international investment law), scholars and sovereign States have explored ways to protect the State's regulatory power while also ensuring that foreign investors can continue to rely on investor protection treaties.[30] They have also addressed the ability of multinational corporations to interfere with the State's right to regulate by challenging the government's measures in investment treaty arbitration.[31] Other scholars have focused on ISDS's structural weaknesses:

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28. *See generally* Anthea Roberts & Taylor St John, *Complex Designers and Emergent Design: Reforming the Investment Treaty System*, 116 AM. J. INT'L L. 96 (2022) (exploring the "balanced content" as one of the "emergent design principles" underlying the work of the participants of the ISDS reform efforts at the UNCITRAL); Luke Nottage, *Rebalancing Investment Treaties and Investor-State Arbitration: Two Approaches*, 17(6) J. WORLD INV. & TRADE 1015 (2016) (reviewing two then recent books exploring how international investment law can be changed to better balance the interests of foreign investors and host States); Andrea K. Bjorklund, *The Role of Counterclaims in Rebalancing Investment Law*, 17(2) LEWIS & CLARK L. REV. 461 (2013) (exploring counterclaims in investment law and arguing that permitting closely related counterclaims against an investor in investment treaties would contribute to rebalancing international investment law). *See also* Marc Jacob & Stephan W. Schill, *Going Soft: Towards a New Age of Soft Law in International Law?*, 8(1) WORLD ARB. & MEDIATION REV. 1, 43–44 (2014) (studying the role of soft law instruments in international investment law and observing that "soft law instruments are . . . becoming increasingly wide-spread also as regards the balancing, or re-balancing, of rights of investors and competing rights of States and their populations").

29. On the proposed reform of ISDS, *see, e.g.*, José Alvarez, *ISDS Reform: The Long View*, 36 ICSID REV.–FILJ 253 (2021); Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AM. J. INT'L L. 361 (2018); Anthea Roberts, *Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration*, 112 AM. J. INT'L L. 410 (2018); RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM (Jean E. Kalicki & Anna Joubin-Bret eds., 2015). *See also* WOLFGANG ALSCHNER, INVESTMENT ARBITRATION AND STATE-DRIVEN REFORM: NEW TREATIES, OLD OUTCOMES (2022).

30. *See, e.g.,* Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims*, 45 VA. J. INT'L L. 809 (2005); AIKATERINI TITI, THE RIGHT TO REGULATE IN INTERNATIONAL INVESTMENT LAW (2014); PEDRO J. MARTINEZ-FRAGA & C. RYAN REETZ, PUBLIC PURPOSE IN INTERNATIONAL LAW: RETHINKING REGULATORY SOVEREIGNTY IN THE GLOBAL ERA (2015); Korzun, *The Right to Regulate*, *supra* note 5; Klara Polackova Van der Ploeg, *Protection of Regulatory Autonomy and Investor Obligations: Latest Trends in Investment Treaty Design*, 51 INT'L LAW 109 (2018). *See also* UNCTAD, IIA ISSUES NOTE. INTERNATIONAL INVESTMENT AGREEMENTS, RECENT DEVELOPMENT IN THE IIA REGIME: ACCELERATING IIA REFORM 5 (Issue 3, August 2021) (observing that the right to regulate has been selected among topics for the modernization in the Energy Charter Treaty (ECT); noting that the "States' right to regulate in areas such as health, safety and the environment" is recognized in the United States-Mexico-Canada Agreement (USMCA, in force as from July 1, 2020)); further noting that provisions on the protection of the right to regulate are included in the Regionally Accepted Standards for Negotiating International Investment Agreements, which were endorsed on Nov. 10, 2020 and will serve as a "baseline" for the negotiation of future investment agreements involving Albania, Bosnia and Herzegovina, Kosovo, Montenegro, North Macedonia, and Serbia).

31. *See, e.g.*, *TPP "Worst Trade Deal Ever," Says Nobel-Winning Economist Joseph Stiglitz*, CBC NEWS (Mar. 31, 2016), http://www.cbc.ca/news/business/joseph-stiglitztpp-1.3515452 ("Stiglitz takes issue with the TPP's investment-protection provisions, which he says could interfere with the ability of governments to regulate business or to move toward a low-carbon economy."). *See also* Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121, 124 (2006) ("This growth [of investment treaty arbitration] suggests that multinational enterprises are increasingly prepared to use investment arbitration to resolve disputes

it does not prevent multiple proceedings or double recovery and may allow investment tribunals to render inconsistent and conflicting awards, thereby increasing the social costs of litigation.[32] Scholars have acknowledged that the ISDS system is in crisis and looked into ways to reform ISDS or replace it with an international investment court.[33] Other studies have explored the scope of investor protection treaties and the impact of such treaties on incoming FDIs.[34] Several studies have sought to provide empirical insights into ISDS.[35] Yet very little is known about the *users* of ISDS—companies and individuals that bring

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with [S]tates, indicating that investment arbitration has become an important method for foreign investors to resist [S]tate regulation and seek compensation for the costs that flow from the exercise of public authority.").

32. A classic example of multiplicity and inconsistency of arbitral awards are tribunal decisions in *CME v. Czech Republic* and *Lauder v. Czech Republic*, where different tribunals rendered different decisions based on the same facts. *See* CME Czech Republic B.V. (The Netherlands) v. Czech Republic, UNCITRAL, Partial Award, ¶ 620 (Sept. 13, 2001) and Lauder v. Czech Republic, UNCITRAL, Final Award, ¶¶ 176–80 (Sept. 3, 2001). *See also* Julien Chaisse & Lisa Zhuoyue Li, *Shareholder Protection Reloaded: Redesigning the Matrix of Shareholder Claims for Reflective Loss*, 52 STAN. J. INT'L L. 51, 82 (2016) (discussing the rationale for avoiding double recovery in the context of shareholder claims for reflective loss). Together with the counterclaims, multiple proceedings are now on the agenda of the UNCITRAL Working Group III looking into the possible reform of ISDS. *See* UNCITRAL, Working Group III (Investor-State Dispute Settlement Reform), Thirty-Ninth Session. *Possible Reform of Investor-State Dispute Settlement (ISDS). Multiple Proceedings and Counterclaims.* Note by the Secretariat. A/CN.9/WG.III/WP.193 (Jan. 22, 2020).

33. *See generally* José Alvarez, *ISDS Reform: The Long View*, 36 ICSID REV. – FOREIGN INV. L.J. 253 (2021) (reviewing IIAs and ISDS reform efforts at the UNCTAD, ICSID, and UNCITRAL levels and arguing that available and proposed alternative dispute resolution methods will not fully displace ISDS); Andrea Bjorklund, Lecture, *Will an International Investment Court Restore Legitimacy to Investor State Dispute Settlement?*, UN Audiovisual Library of International Law (2020) (exploring arguments for and against establishing the international investment court system and its potential to restore legitimacy of ISDS); Wolfgang Alschner, *The OECD Multilateral Tax Instrument: A Model for Reforming the International Investment Regime?*, 45 BROOK. J. INT'L L. 1 (2019) (studying the extent to which the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Tax Base Erosion and Profit Shifting, known as the Multilateral Instrument (MLI), can serve as a model for reforming bilateral IIAs).

34. *See, e.g.*, Jason Yackee, *Do BITs Really Work? Revisiting the Empirical Link Between Investment Treaties and Foreign Direct Investment, in* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES AND INVESTMENT FLOWS 379 (Karl P. Sauvant & Lisa E. Sachs eds., 2009); Jason Yackee, *Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties*, 22 BROOK. J. INT'L L. 405 (2008); Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?,* 33 WORLD DEV. 1567 (2005).

35. *See, e.g.*, FRANCK, ARBITRATION COSTS, *supra* note 13, at 67–68 (providing empirical data on the cost of investment treaty arbitration); David Chriki, *Is the Washington Consensus Really Dead? An Empirical Analysis of FET Claims in Investment Arbitration*, 41 SUFFOLK TRANSNAT'L. L. REV. 291 (2018); Rachel L. Wellhausen, *Recent Trends in Investor-State Settlement*, 7 J. INT'L DISP. SETTLEMENT 117 (2016); Kathleen S. McArthur & Pablo A. Ormachea, *International Investor-State Arbitration: An Empirical Analysis of ICSID Decisions on Jurisdiction*, 28 REV. LIT. 559 (2009); Gus Van Harten, *Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration*, 50 OSGOODE HALL L.J. 211 (2012); Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators*, 96 CORNELL L. REV. 47 (2010).

claims in investment treaty arbitration—and the relationships among them.[36] This Article seeks to fill that void.

In the context of the ISDS debate, multinational corporations have long found themselves at the epicenter of criticism. They are believed to be the primary users—and, by some accounts, abusers—of ISDS.[37] In particular, they are suspected of treaty- and forum-shopping through corporate restructuring and incorporating in countries with more beneficial investor protection regimes.[38] They are blamed for contributing to excessive litigation by bringing frivolous and multiple claims.[39] They are accused of encroaching on State sovereignty by challenging government measures adopted for the benefit of the public at large.[40] Meanwhile, multinational corporations have proved capable of depleting natural resources without considering the economic, social, cultural, and environmental needs of the local communities.[41]

36. *See, e.g.*, FRANCK, ARBITRATION COSTS, *supra* note 13, at 67–68 (noting that investors are "one of the most under-explored actors of [investment treaty arbitration]").

37. *See, e.g.*, *The International Center for Settlement of Investment Disputes (ICSID)*, BRETTON WOODS PROJECT (July 10, 2009), https://www.brettonwoodsproject.org/2009/07/art-564868 ("Twenty per cent of ICSID cases are brought by companies that rank within the top 500 globally, seven of these companies have revenues that exceed the GDP of the country they are bringing a case against."). *See also* GUS VAN HARTEN, THE TROUBLE WITH SOVEREIGN INVESTOR PROTECTION 99–132 (2020) (arguing that through "ISDS as a source of litigation risk" foreign investors are intimidating sovereign States, which leads to regulatory chill and makes governments otherwise change their minds).

38. Vera Korzun, *Shareholder Claims for Reflective Loss: How International Investment Law Changes Corporate Law and Governance*, 40 U. PA. J. INT'L L. 189, 234–38 (2018) (providing examples of investment disputes and related instances of treaty- and forum-shopping in the context of ISDS).

39. *See, e.g.*, Henrik Horn, *Investor-State v. State-State Dispute Settlement*, IFN Working Paper, No. 1248, Research Institute of Industrial Economics (IFN) (Stockholm, 2018) (observing that ISDS has been criticized for allegedly "caus[ing] 'excessive' litigation, relative to some (normally unspecified) benchmark."). The author further explains that "[e]xcessive litigation could be very costly to host countries in terms of legal costs, compensation payments, and reduced regulatory 'policy space'." (footnotes omitted). *Id.*

40. The topic of frivolous claims is currently on the agenda of the UNCITRAL Working Group III looking into the possible reform of ISDS. *See* UNCITRAL, Working Group III (Investor-State Dispute Settlement Reform), Thirty-Ninth Session. *Possible Reform of Investor-State Dispute Settlement (ISDS). Security for Cost and Frivolous Claims.* Note by the Secretariat. A/CN.9/WG.III/WP.192 (Jan. 16, 2020).

41. *See, e.g.*, George K. Foster, *Investor-Community Conflicts in Investor-State Dispute Settlement: Rethinking 'Reasonable Expectations' and Expecting More from Investors*, 69 AM. U. L. REV. 105, 108 (2019) (analyzing "Community Conflict Cases," that is

> investment cases in which the investor seeks damages from the host [S]tate for having canceled a development project following an outcry by local communities who feared that the project would contaminate their water supplies, destroy their sacred sites, threaten endangered plants or wildlife, or wreak other serious harm.)

Forster provides detailed summaries of several Community Conflict Cases in Section II.B of the article. *Id.* at 146–51.

Yet, corporations are themselves affected by the international investment regime.[42] It is increasingly evident that international investment law impacts the inner structure of the corporations that act as claimants in investment treaty arbitration.[43] Remarkably, international investment law allows shareholders to bring claims for damages in ISDS for so-called "reflective loss," that is, loss incurred by shareholders indirectly as a result of injury to "their" company.[44] Shareholders can bring these claims without consulting with the management of the company, regardless of any claims brought by the corporation.[45] Thus, inherent in investment arbitration is the ability of individual shareholders to alter the corporate law and governance choices adopted by the corporation. Furthermore, as empirical evidence suggests, investment treaties incentivize corporate claimants to restructure in order to benefit from a stronger investor protection regime in anticipation of investment treaty arbitration.[46]

Against this background, this Article seeks to provide empirical data on claimants—companies and individuals—that have brought investment claims in ISDS. It further seeks to examine the nature and structure of relations between claimants in known investment treaty arbitrations to better understand how investor protection treaties affect the structure of foreign investments and decisions by companies and individuals to bring ISDS claims. The Article starts with a hypothesis that corporations and their shareholders are the most common ISDS claimants. The empirical data collected in this study confirm this hypothesis, although a further study is needed to explore the prevalence in ISDS of reflective loss claims that may lead to double recovery and inconsistent awards. The Article also advances a hypothesis that corporations often bring multiple claims in ISDS, simultaneously or over time, acting directly or through related corporate entities or shareholders. The data do not support this hypothesis, although a further study on reflective loss may impact this conclusion if claims

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42. *See* Korzun, *Shareholder Claims, supra* note 38, at 193 (arguing that international investment law distorts domestic corporate law and governance by "allow[ing] foreign shareholders to bring claims for 'reflective loss'—that is, loss incurred by shareholders as a result of injury to the company").

43. *See, e.g.*, Julian Arato, *The Elastic Corporate Form in International Law*, 62 VA. J. INT'L L. 383, 385 (2022) ("International law is warping the corporate form.").

44. On the shareholder claims for reflective loss, see David Gaukrodger, *Investment Treaties and Shareholder Claims: Insights from Advanced Systems of Corporate Law* (OECD, Working Papers on International Investment 2014/02), https://doi.org/10.1787/5jz0xvgngmr3-en (last visited Jan. 1, 2024); Korzun, *Shareholder Claims*, *supra* note 38; Julian Arato, Kathleen Claussen, Jaemin Lee, & Giovanni Zarra, *Reforming Shareholder Claims in ISDS* (Acad. F. on ISDS Concept Paper 2019/9); LUKAS VANHONNAEKER, SHAREHOLDERS' CLAIMS FOR REFLECTIVE LOSS IN INTERNATIONAL INVESTMENT LAW (2020).

45. *See* Korzun, *Shareholder Claims*, supra note 38, at 189.

46. *See, e.g.*, Ed Poulton et al., *Empirical Study: Corporate Restructuring and Investment Treaty Protection*, BIICL/BakerMcKenzie (London, 2020) (identifying "at least [sixty-one] publicly available decisions [that] concern a respondent [S]tate's objection to corporate restructuring" and concluding that in these cases "[a] majority of tribunals find they have jurisdiction despite the respondents' objections to restructuring").

by shareholders are counted as claims by the corporation itself. If ultimately confirmed, this hypothesis would suggest that host States might be allowed to tailor their investor protection regimes to their needs. For instance, instead of providing a blanket consent to arbitration in investment treaties, host States could resort to consenting to arbitration on a case-by-case basis in investment contracts, thereby limiting their exposure to liability for breach of investment treaties.

Following this Introduction, Part I provides background information on international investment law and dispute resolution by focusing on shareholding as investment and the role of companies and their shareholders as claimants in ISDS. Part II provides empirical data on companies and individuals that, from January 1, 2010, to December 31, 2019, initiated investment treaty arbitrations pursuant to the 1965 Convention for the Settlement of Investment Disputes Between States and Nationals of Other States (the ICSID Convention)[47] and the ICSID Additional Facility Rules. Data on claimants in ICSID arbitrations were collected using the ICSID database and available submissions by the parties.[48] Further data on the legal form, place of incorporation, ownership structure, and corporate relationship for claimants were collected using company websites, Bloomberg, and online business information. Part III seeks to reconcile the goals of the investor protection regime with collected empirical data on claimants in investment arbitrations. In view of the empirical findings, this Article makes a normative argument that sovereign States should not seek to revisit their universal consent to arbitration provided in investment treaties. Empirical data show that the system operates as anticipated, providing a route for a variety of claimants to enforce their rights in ISDS. If the host States revoke their universal consent to arbitration granted in IIAs, it would only benefit the most powerful users of ISDS—multinational corporations. These corporations would still be able to bargain for arbitration on a case-by-case basis in investment contracts. Other users of ISDS—individuals, small-, and medium-sized companies which commonly bring FDIs as opposed to short-term portfolio investments—would be deprived of the ability to enforce their rights in ISDS and would therefore be less likely to invest.

I. International Investment Law and Dispute Resolution

Before discussing the process of collecting, coding, and interpreting the empirical data on claimants in investment treaty arbitration, this Part briefly explains how the modern system of international investment law and dispute

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47. *See* Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Washington Convention), Mar. 18, 1965, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

48. ICSID explains that its database "covers all cases registered at ICSID. . . [and allows searching] for cases and case-related materials by claimant, respondent, case number, applicable rules and other terms." *See* ICSID Cases Database (2024), INT'L CTR. FOR SETTLEMENT OF INV. DISPS., https://icsid.worldbank.org/cases.

resolution operates. In doing so, it is critical to acknowledge that there are multiple sources and instruments of international investment law and dispute resolution that can be relevant for a foreign investor in an investment dispute.[49] Furthermore, in bringing its claims and invoking an investment treaty in ISDS, a foreign investor generally has a choice between different treaties and arbitration rules and may bring a claim to arbitration through its subsidiary, parent company, and/or other affiliated entities. Finally, such subsidiaries and/or shareholders can bring their own claims in arbitration, together with the foreign investor or on their own, concurrently or separately, and may invoke the same or different investor protection treaties and/or arbitration rules. Such a dispute resolution system leads to the multiplicity of claims and claimants at different levels of the corporate ownership chain, including claims that relate to the same investment but invoke different investor protection treaties and/or arbitration rules. As a result, in the absence of a single method of dispute resolution and a centralized system of registration for investment arbitrations, coupled with the confidentiality and privacy of the process, any empirical study in the field of ISDS has its limitations, and choices regarding the scope of the study and coding of data need to be made.

A. Investor Protection: From Foreign Direct Investments to Reflective Loss

Dating back to the first known BIT of 1959 between Germany and Pakistan,[50] international investment law today encompasses nearly 3,300 IIAs concluded to date.[51] The majority of these treaties are BITs, which provide foreign investors with investor protections, such as national treatment (NT), most-favored-nation treatment (MFN), fair and equitable treatment (FET), and full protection and security (FPS).[52] In addition to providing foreign investors with substantive protections, investment treaties may also contain the State's consent

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49. Depending on the nature of the dispute and investor protections granted by the host State, sources and instruments of international investment law and dispute resolution include investor protection treaties, domestic law of the host State and arbitration rules that can be invoked in a case, such as the ICSID Convention and ICSID Additional Facility Rules, the SCC Arbitration Rules, and the UNCITRAL Arbitration Rules.

50. For the text of the first known BIT, *see* Treaty for the Promotion and Protection of Investments, Ger.-Pak., Nov. 25, 1959, 457 U.N.T.S. 24. *See also* Tom Ginsburg, *International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance*, 25 INT'L REV. L. & ECON. 107 (2005) (referring to the 1959 BIT between Germany and Pakistan as "the first such agreement").

51. This number of IIAs is based on the information provided by UNCTAD. As of January 2024, UNCTAD reports 3,278 IIAs concluded worldwide to date. Of these, there are 2,828 BITs, including 2,219 BITs currently in force. *See* UNCTAD's International Investment Agreements Navigator, *supra* note 1.

52. UNCTAD provides comprehensive data on the content of IIAs as part of its IIA Mapping Project, which as of January 2024 includes 2,583 IIAs. *See* UNCTAD IIA Mapping Project, *supra* note 6. Of these 2,583 IIAs, 2,029 treaties provide for NT and 2,347 for MFN treatment in the post-establishment stage of the investment, 1,985 for unqualified FET, and 1,982 for FPS. *Id*.

to ISDS, which could include investment treaty arbitration or other methods of resolving investment disputes, such as conciliation or mediation.[53]

The first generation of BITs were largely focused on attracting foreign direct investments (FDIs),[54] which, in contrast with two other categories of investments, portfolio and indirect investments,[55] entail a lasting relationship with a certain degree of control or influence over investments.[56] More recent BITs have expanded the concept of investments by defining them broadly to include not only FDIs, but also portfolio investments (such as investments in the equity or debt securities) and indirect investments (such as agreements on technical assistance or intellectual property transfers).[57] As a result, modern BITs generally cover shares, stock, and other forms of equity participation in the company.[58]

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53. Out of 2,583 investment treaties included in the UNCTAD's IIA Mapping Project by January 2024, 1,840 treaties provide for a general consent to ISDS covering any dispute relating to investment. *See* UNCTAD IIA Mapping Project, *supra* note 6. Further, 2,448 treaties include ISDS, of which 2,191 treaties provide for ICSID arbitration, 1,643 for UNCITRAL arbitration, and 1,623 for litigation in domestic courts. *Id*. As an alternative to arbitration, 627 IIAs provide for voluntary alternative dispute resolution (ADR), such as conciliation or mediation. *Id*.

54. For a definition of foreign direct investment (FDI), *see, e.g.*, Padma Mallampally & Karl P. Sauvant, *Foreign Direct Investment in Developing Countries*, 36 FIN. & DEV. 34, 34 (1999) (defining FDI as "investment by transnational corporations or multinational enterprises in foreign countries in order to control assets and manage production activities in those countries."). *See also* IMF BALANCE OF PAYMENTS AND INTERNATIONAL INVESTMENT POSITION MANUAL 99 (6th ed. 2009) ("Direct investment is related to control or a significant degree of influence, and tends to be associated with a lasting relationship. As well as funds, direct investors may supply additional contributions such as know-how, technology, management, and marketing. Furthermore, enterprises in a direct investment relationship are more likely to trade with and finance each other.").

55. *See, e.g*., CHRISTOPHER F. DUGAN ET AL., INVESTOR-STATE ARBITRATION 1-2 (2008) (defining three broad categories of cross-border investments in international investment law: (i) foreign direct investments (FDIs), (ii) portfolio investments, and (iii) indirect investments). *See also* Mallampally & Sauvant, *supra* note 54, at 34 (distinguishing FDI from "other major types of external private capital flows in that [FDI] is motivated largely by the investors' long-term prospects for making profits in production activities that they directly control"). The authors further explain that "[f]oreign bank lending and portfolio investment, in contrast, are not invested in activities controlled by banks or portfolio investors, which are often motivated by short-term profit considerations that can be influenced by a variety of factors (interest rates, for example) and are prone to herd behavior." *Id.*

56. *See* Korzun, *Shareholder Claims, supra* note 38, at 211.

57. *Id*. at 213.

58. *See, e.g.*, Agreement Between the State of Israel and Japan for the Liberalization, Promotion and Protection of Investment, Israel-Japan, art. 1, Feb. 1, 2017 (defining "investment" as "every kind of asset made in accordance with the applicable law and regulations, owned or controlled, directly or indirectly, by an investor, including (i) an enterprise and a branch of an enterprise; (ii) shares, stocks or other forms of equity participation in an enterprise"); Agreement Between the Government of the Republic of Korea and the Government of the Republic of Uzbekistan for the Reciprocal Promotion and Protection of Investments, Republic of Korea-Uzbekistan, art. 1, Apr. 19, 2019 (defining "investment" as "every kind of asset in the territory of one Contracting Party, owned or controlled directly or indirectly by an investor of the other Contracting Party, provided that the investment has been made in accordance with the laws and regulations of the former Contracting Party, and that has the characteristics of an investment, including, though not exclusively . . . (ii) shares, stock, and other forms of equity participation in an enterprise"). *See* UNCTAD IIA Mapping Project, *supra* note 6.

Naturally, with the expansion of the concept of covered "investments" under BITs came the expansion of the potential pool of claimants in ISDS, that is, foreign investors engaged in investment disputes with the host States that decide to commence an investment arbitration. Today, in addition to foreign individuals, claimants in ISDS include foreign corporations with branches and subsidiaries in a host State, as well as foreign shareholders in existing or newly created companies in a host State.[59] This latter group of claimants, who can be short-term equity investors with no interest in the control or management of the foreign enterprise, differs drastically from the FDI providers protected by the first generation of BITs in that their investments are relatively short and bring no lasting economic effect on the host State's economy.[60]

Foreign shareholders, both individuals and companies, are able to bring ISDS claims for direct and indirect (or reflective) loss.[61] The availability of reflective loss claims in international investment law allows shareholders to bring ISDS claims for damages for loss incurred indirectly because of injury to the company.[62] For instance, in view of the regulatory expropriation or breach of the FET standard by the host State, a company investing abroad may sustain an injury that affects its value or profitability. Such injury may reflect on the shareholders by decreasing the value of their shares.[63] Under many modern IIAs, shareholders are able to bring claims in ISDS for such reflective loss without consulting with the company's management and regardless of any claims by the company itself.[64]

Allowing shareholder claims for reflective loss has put international investment law and dispute resolution at odds with domestic corporate law, which generally prohibits reflective loss claims for policy reasons, such as to avoid double recovery and achieve greater consistency, predictability, and judicial economy in dispute resolution.[65] In recognizing reflective loss claims,

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(According to UNCTAD's Mapping Project, out of 2,583 IIAs included in the project by January 1, 2024, only thirty-one treaties specifically exclude portfolio investments from their coverage.)

59. *See, e.g.*, empirical data on claimants in ISDS, *infra*, Part II. B.

60. It is assumed that by contrast to FDIs, portfolio and indirect investments bring no lasting economic effect on the host State's economy as they are largely motivated by short-term profit considerations. *See supra* notes 54, 55 and accompanying text (discussing the difference between FDIs and other forms of investments).

61. *See* Korzun, *Shareholder Claims*, *supra* note 38.

62. It is not always easy in practice to distinguish between direct and reflective loss or to establish whether an exception to the "no reflective loss" principle recognized under domestic law can be applied. In the Netherlands and the United Kingdom, these issues have led to extensive case law and literature on the subject. *See* Bas J. de Jong, *Shareholders' Claims for Reflective Loss: A Comparative Analysis*, 14 EUR. J. BUS. ORG. 97, 99 (2013).

63. *See* Korzun, *Shareholder Claims*, *supra* note 38, at 199.

64. *Id*.

65. *See* David Gaukrodger, *Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency* 11 (OECD, Working Papers on International Investment 2013/03), http://dx.doi.org/10.1787/5k3w9t44mt0v-en (last visited Jan. 1, 2024). For court decisions, *see, e.g.*, Gaubert v. United States, 885 F.2d 1284, 1291 (5th Cir. 1989) ("One rationale behind this prohibition [of shareholder claims for reflective loss] rests on principles of judicial economy.")

international investment tribunals appear to ignore these public policy concerns. Therefore, in cases where investment treaties provide protections to foreign investments in equity securities, shareholders in international investment law have independent standing under IIAs to bring individual claims for losses suffered by the company.[66]

B. Companies and Individuals as Claimants in Investment Arbitration

For a company or an individual seeking to bring a claim in investment treaty arbitration, two broad questions become determinative. First, what constitutes an *investment* under a treaty? Specifically for reflective loss claims, does protected investment include stocks or other equity interest in the company? Second, *who* can bring a claim under an investor protection treaty? Determining whether a treaty covers a particular economic activity or a claimant is crucial for establishing jurisdiction of the investment tribunal.

Answering these questions requires investment tribunals to engage in treaty interpretation. The Vienna Convention on the Law of Treaties (VCLT) calls on arbitral tribunals to interpret BITs and other IIAs by giving the terms of the treaty their ordinary meaning in view of the object and purpose of the treaty.[67] Yet most investment treaties are inherently vague and provide little or no clarification as to what constitutes an investment under the treaty.[68] As a result, interpretations by arbitral tribunals vary substantially across treaties and investment disputes. Furthermore, without *stare decisis* or binding precedents in international investment law, tribunals may also interpret identical treaty provisions differently in subsequent arbitrations.[69]

66. *See, e.g.*, Enron v. Argentina, ICSID Case No. ARB/01/3, Decision on Jurisdiction, ¶ 39 (Jan. 14, 2014) (noting that "there is nothing contrary to international law or the ICSID Convention in upholding the concept that shareholders may claim independently from the corporation concerned, even if those shareholders are not in the majority or in control of the company.").

67. *See* Vienna Convention on the Law of Treaties Art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.

68. For instance, arbitral tribunals have allowed claims by both direct and indirect shareholders because BITs generally do not distinguish between direct and indirect investments. *See* Martin J. Valasek & Patrick Dumberry, *Developments in the Legal Standing of Shareholders and Holding Corporations in Investor-State Dispute*s, 26 ICSID REV.–FILJ 34, 51 (2011) (providing an example of *Siemens v. Argentina*, where the investment tribunal in allowing claims by the indirect shareholder, Siemens A.G., concluded that "[the Argentina-Germany BIT] does not require that there be no interposed companies between the investment and the ultimate owner of the company.").

69. *See* Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 ARB. INT'L 357, 369 (2007) (observing that in investment arbitration, "[w]hile tribunals seem to agree that there is no doctrine of precedent per se, they also concur on the need to take earlier cases into account."). *See also* Richard C. Chen, *Precedent and Dialogue in Investment Treaty Arbitration*, 60 HARV. INT'L L.J. 47, 47 (2019) (arguing that "[t]he use of precedent in investment treaty arbitration ("ITA") presents a puzzle" as "[t]he treaties themselves do not provide for a doctrine of stare decisis.") (footnote omitted). Chen further questioned "whether precedent can play a useful role in the process," considering that "the substantive law that the tribunals are shaping through precedent is fragmented,

Claims in ISDS can generally be brought by the foreign investors and/or, depending on the language of the treaty, by the investments. Most treaties focus on the nationality of claimants in ISDS and require a claimant to be a national of the State party to the treaty (the "home State") but not a national of the "host State" where the investments are made.[70] However, companies that are incorporated in the host State (and, therefore, have the nationality of the host State based on the place of incorporation) will often count as foreign investors and will be able to bring their claims in ISDS, provided they are under foreign control.[71]

More recent treaties, such as the United States-Mexico-Canada Agreement (USMCA),[72] distinguish between investors and investments in their ability to bring a claim in ISDS.[73] Pursuant to Annex 14-D of the USMCA,[74] a foreign

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coming not from a single multilateral treaty but instead from thousands of investment treaties that are similar in content but nonetheless formally distinct." *Id.* at 47–48 (footnote omitted).

70. *See* Christoph Schreuer, *Shareholder Protection in International Investment Law*, 2(3) TRANSNAT'L DISP. MGMT. 1, 2 (2005) ("The claimants in investment arbitration must meet certain requirements with respect to their nationality. Most importantly, they must not be nationals of the host State.") (footnote omitted).

71. *See, e.g.*, Article 25(21)(b) of the ICSID Convention, which permits the host State and the foreign investor to agree that a locally incorporated company should be treated as a foreign company because of its foreign control. *See* ICSID Convention, *supra* note 47, at 18 (providing in relevant part that "'[n]ational of another Contracting State means: . . . any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention."). *See also* Energy Charter Treaty, art. 26(7), *opened for signature* Dec. 17, 1994, 2080 U.N.T.S. 95, http://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf (last visited Jan. 1, 2024). Thus, if the parties agree on this issue, the foreign control requirement allows departure from the principles of incorporation or seat of the company, which are commonly applied under international investment law to determine the nationality of the corporation. *Cf.* Schreuer, *supra* note 70, at 17 ("Under the ICSID Convention, departure from the principle of incorporation or siège social in favor of foreign control to determine corporate nationality is permissible only under the narrowly circumscribed conditions of Article 25(2)(b)."). Some tribunals may also apply the equitable doctrine of "veil piercing" to identify the true nationality of the party. *See, e.g.*, Stanimir A. Alexandrov, *The "Baby Boom" of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as "Investors" Under Investment Treaties*, 6 J. WORLD INV. & TRADE 387, 402 (2005) (citing Tokios Tokelės v. Ukraine, ICSID Case No. Arb/02/18, Decision on Jurisdiction, ¶ 56 (Apr. 29, 2004), where the tribunal opined that the doctrine could only be used by a tribunal where the company's conduct "constitutes an abuse of legal personality" and there is evidence that the company "used its formal legal nationality for [an] improper purpose.")

72. United States-Mexico-Canada Agreement, Can.-Mex.-U.S., Nov. 30, 2018, Pub. L. No. 116–113 [hereinafter USMCA].

73. For the definitions of "investor" and "investment," *see* Article 14.1 of the USMCA. USMCA, art. 14.1. Generally, the article defines the investor as "a national or an enterprise of the [S]tate party." *Id.* It further defines the investment as "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk". *Id. See also* USMCA, art. 1.5 (defining an enterprise as "an entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned or controlled, including a corporation, trust, partnership, sole proprietorship, joint venture, association or similar organization."). *Id.*

74. Annex 14-D of the USMCA applies only to investment disputes relevant to two State parties—Mexico and the United States—and investors from these two countries. *See* USMCA, *supra*

investor can submit a claim to arbitration on its own behalf or on behalf of an enterprise of the responding State, which is a juridical person established in the host State that the claimant owns or controls.[75] Similar provisions were available in the former North American Free Trade Agreement (NAFTA),[76] which also called for the consolidation of arbitrations if claims were made both on behalf of an *investor* and an *enterprise* and arose from the same events.[77]

Other IIAs are less consistent with regard to claimants and allow an *investment* to initiate an arbitration directly.[78] In these instances, an "investment" is not a share or stock but a company that was incorporated in the host State to carry out investment activity because the law or the business considerations so required.[79] Allowing an "investment" (i.e., an enterprise) to be a claimant in ISDS is a call back to the prior generation of BITs, which sought to protect investments in the form of FDIs, such as opening a subsidiary or creating a new company in the host State.[80] As legal persons of their own, such "investments" in the host State received protection under IIAs and could bring their own claims in ISDS.

Looking at shareholders as claimants in ISDS, one should note that IIAs usually do not talk about shareholders or their rights beyond listing shares as a

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note 72, Annex 14-D (titled Mexico-United States Investment Disputes). Chapter 14 of the USMCA does not provide for ISDS of the Canada-United States investment disputes or Canada-Mexico investment disputes. *See* USMCA, *supra* note 72, Ch. 14.

75. USMCA, *supra* note 72, art. 14.D.3.1(a)–(b).

76. North American Free Trade Agreement, arts. 1116–17, Dec. 17, 1992, 32 I.L.M. 289 (1992) [hereinafter NAFTA].

77. NAFTA, *supra* note 76, art. 1117(3). Consolidation seeks to achieve greater consistency of arbitral awards, reduce the risk of double recovery, and increase judicial economy in ISDS. Under USMCA, a disputing party can seek consolidation pursuant to Article 14.D.12. *See* USMCA, *supra* note 72, art. 14.D.12.

78. UNCTAD, *Investor-State Disputes Arising from Investment Treaties: A Review*, 15, U.N. Doc. UNCTAD/ITE/IIT/2005/4 (2005) (defining "investor" and "investment"). *But see* NAFTA, *supra* note 76, art. 1117(4) ("An investment may not make a claim under this Section [B. Settlement of Disputes between a Party and an Investor of Another Party].").

79. *See* Schreuer, *supra* note 70, at 20 ("[Where] the company has the nationality of the host State and does not qualify as a foreign investor. . . . the company in question is not treated as the investor but as the investment."). *Id.* at 4 (observing that "many States require the establishment of a local company as a precondition for foreign investment."). For an arbitral decision touching on this issue, *see, e.g.*, Compañía de Aguas del Aconquija, S.A. & Compagnie Générale des Eaux v. Arg. (the Vivendi case), ICSID Case No. ARB/97/3, Decision on Annulment, ¶ 50 (July 3, 2002) ("In common with other BITs, Article 1 [of the France-Argentina BIT] clearly distinguishes between foreign shareholders in local companies and those companies themselves. While the foreign shareholding is by definition an "investment" and its holder an "investor," the local company only falls within the scope of Article 1 if it is "effectively controlled, directly or indirectly, by nationals of one Contracting Party" or by corporations established under its laws."). Sometimes, establishment of the local company is motivated purely by business considerations. *See, e.g.*, Eskosol S.p.A. in Liquidazione v. It., ICSID Case No. ARB/15/50, Decision on Respondent's Application under Rule 41(5), ¶ 49 (Mar. 20, 2017) (where there was no requirement under the Italian law to establish a local company, but a foreign investor chose to do so for business reasons).

80. Contrast this understanding with the modern, more expansive definition of investment, which includes portfolio investments and would require permitting a share, a stock, or other equity participation in the company to bring a claim in ISDS.

type of investment or providing a broad definition of investments that can be interpreted to include shares.[81] Moreover, IIAs generally do not restrict shareholders—be they controlling, majority, or minority shareholders—in their ability to bring a claim in ISDS.[82] It should come as no surprise then that investment tribunals supported by legal scholars have consistently interpreted IIAs to allow reflective loss claims by shareholders—many of whom are companies themselves.[83] In 2013, the Organisation for Economic Co-Operation and Development (OECD) had already estimated that "[c]laims by company shareholders seeking damages from government for so-called 'reflective loss' now make up a substantial part of the ISDS caseload" and would continue to grow.[84]

Furthermore, investment tribunals have allowed both *direct* and *indirect* shareholders to bring claims for reflective loss in ISDS.[85] In doing so, tribunals rely on investment treaty provisions, which are usually broad and do not distinguish between direct and indirect investments.[86] Without an express exclusion of indirect shareholders, arbitral tribunals have demonstrated a certain reluctance to deny jurisdiction to indirect investments.[87]

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81. Korzun, *Shareholder Claims*, *supra* note 38, at 215. *See also* Gaukrodger, *Investment Treaties as Corporate Law*, *supra* note 65, at 8 ("Typically, the only reference to shares in BITs is a clause that clarifies that shares are assets that qualify as an investment under the treaty definition of investment."); Julian Arato, *The Elastic Corporate Form in International Law*, 62 VA. J. INT'L L. 383, 398 (2022) ("[Investment treaties] generally extend substantive and procedural rights to corporations and shareholders, by including natural and legal persons in the definition of 'investor'; and by including enterprises, stocks, shares, and various interests in corporations within the definition of 'investment'.").

82. Gaukrodger, *Investment Treaties as Corporate Law*, *supra* note 65, at 8 (noting that most treaties do not "expressly address the issue of the scope of shareholder claims.").

83. For an example of legal scholarship supporting investment tribunals in their treatment of shareholder claims for reflective loss, see, for instance, CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES §§ 6.77, 6.79 (2007) ("Given the wide definition of investment contained in most bilateral investment treaties, if an 'investment' can include shares in a company there is no conceptual reason to prevent an investor recovering for damage caused to those shares which has resulted in a diminution in their value. . . The simplest approach to justify claims [for reflective loss] is. . . based upon the wording of the treaty.").

84. Gaukrodger, *Investment Treaties as Corporate Law*, *supra* note 65, at 7. Gaukrodger estimated at the time that "there are easily more than [forty] decisions involving shareholder claims and numerous pending cases, many of which involve claims for reflective loss." *Id.*

85. *See* Valasek & Dumberry, *supra* note 68 (analyzing claims in ISDS by shareholders, including majority, minority, and indirect shareholders).

86. *See* Korzun, *Shareholder Claims*, *supra* note 38, at 195 (providing example of Venezuela Holdings (Exxon) v. Venezuela, ICSID Case No. ARB/07/27, where the tribunal allowed an indirect shareholder to assert claims under the Netherlands-Venezuela BIT relying on the literal reading of the treaty, which granted protection to investments without distinguishing between direct and indirect investments).

87. *See, e.g.*, Siemens A.G. v. Arg., ICSID Case No. ARB/02/8, Decision on Jurisdiction, ¶ 137 (Aug. 3, 2004) (where Argentina objected to tribunal's jurisdiction because Siemens A.G., the claimant, was an indirect shareholder in the Argentine investment, but the tribunal found jurisdiction noting that "there is no explicit reference to direct or indirect investment as such in the Treaty. The

The openness of ISDS to claims by indirect shareholders increases the multiplicity of claims in ISDS because the pool of potential claimants expands beyond a local company (an "investment") and its direct shareholders.[88] There are multiple ways of structuring foreign (direct and portfolio) investments and then choosing the best claimant(s) among related companies and individuals. They can involve shareholders of one or more intermediaries in the investor's home State, the host State or third countries, at several levels of corporate ownership structure.[89] Arbitral tribunals have acknowledged this multiplicity of claims problem, which leads to excessive litigation and potential double recovery, but continue to grant jurisdiction as long as a treaty allows shareholder protection without reservations.[90]

Whether a company can submit a claim of its own is largely irrelevant for shareholder standing.[91] The tribunals view the claims by shareholders as separate

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definition of "investment" is very broad. . . . Therefore, a literal reading of the Treaty does not support the allegation that the definition of investment excludes indirect investments.").

88. Schreuer, *supra* note 70, at 11 (observing that "[i]f there are two or more layers of minority shareholding the economic consequence of the adverse action by the host State may still be traceable. But the pursuit of legal remedies becomes increasingly complex especially if competing sets of shareholders at different levels pursue parallel or conflicting remedies.").

89. Schreuer points to a complex structure of investment in *Enron v. Arg*., where the claimants indirectly owned 35.263 percent of the investments in Argentina. *Id.* at 12. The shareholding was described as follows:

> Claimants' participation concerns the privatization of Transportadora de Gas del Sur ("TGS"), one of the major networks for the transportation and distribution of gas produced in the provinces of the South of Argentina. The Claimants own 50 percent of the shares of CIESA, an Argentine incorporated company that controls TGS by owning 55.30 percent of its shares; the Claimants' participation in CIESA is held by two wholly-owned companies, EPCA and EACH. The Claimants, through EPCA, EACH and ECIL, another corporation controlled by the Claimants, also own 75.93 percent of EDIDESCA, another Argentine corporation that owns 10 percent of the shares of TGS; and they also have acquired an additional 0.02 percent of TGS through EPCA. The investment as a whole, it is explained, amounts to 35.263 percent of TGS.

Enron v. Arg., ICSID Case No. ARB/01/3, Decision on Jurisdiction, ¶ 21 (Jan. 14, 2014).

90. *See, e.g.*, Enron v. Arg., ICSID Case No. ARB/01/3, Decision on Jurisdiction, ¶ 50 (Jan. 14, 2014) ("The Argentine Republic has rightly raised a concern about the fact that if minority shareholders can claim independently from the affected corporation, this could trigger an endless chain of claims, as any shareholder making an investment in a company that makes an investment in another company, and so on, could invoke a direct right of action for measures affecting a corporation at the end of the chain."). *Id.* at ¶ 52 ("The Tribunal notes that while investors can claim in their own right under the provisions of the treaty, there is indeed a need to establish a cut-off point beyond which claims would not be permissible as they would have only a remote connection to the affected company. As this is in essence a question of admissibility of claims, the answer lies in establishing the extent of the consent to arbitration of the host State."). *But see* Schreuer, *supra* note 70, at 14 (criticizing the tribunal's suggestion to find a cut-off, stating that "[t]he Tribunal's demand for a cut-off point for indirect shareholding lacks a legal foundation. Any difficulties arising from a multiplicity of claimants can be taken care of by a number of devices but do not require that the investor be deprived of its standing.")

91. *See* ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 456 (2009) (citing arbitrations where companies had recourse to claims in ISDS, yet their shareholders were also allowed to proceed in arbitration, including *Lauder v. Czech* (Final Award) (2001); *CME Czech*

from the claims by the company and generally allow both types of claims to proceed.[92] Unless the interests of a shareholder and a company are identical, tribunals do not find it abusive to allow both arbitrations to continue.[93]

Overall, domestic courts and investment tribunals approach shareholder claims differently. Domestic courts focus on the type of loss suffered by shareholders, such as drops in the share price or dividend payout, and prohibit claims by shareholders if their loss is merely the reflection of the injury to the company.[94] In contrast, investment tribunals in ISDS focus on the availability of a cause of action for shareholders.[95] Once they are satisfied that a shareholder is protected under a treaty, tribunals allow a case to proceed without regard to the type of loss suffered by a shareholder.[96] Having established liability, tribunals award damages to shareholders directly, usually on a pro rata basis to the company's loss.[97]

Arbitral tribunals have acknowledged that reflective loss claims in ISDS raise concerns of the increased cost of litigation, conflicting decisions, and double recovery that motivated domestic courts to adopt the "no reflective loss" principle.[98] Tribunals have also expressed sympathy to the host States' circumstances that allow multiple claims arising from the same dispute and that make it harder for the State to predict who will initiate an investment arbitration

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Republic BV (The Netherlands) v. Czech, Partial Award (2001) & Final Award (2003); *Sempra Energy Int'l v. Arg*., Preliminary Objections (2005), § 42).

92. *See, e.g.*, Eskosol S.p.A. in Liquidazione v. It., ICSID Case No. ARB/15/50, Decision on Respondent's Application under Rule 41(5), ¶ 166 (Mar. 20, 2017) (where the tribunal allowed the company's claim to proceed after an arbitration lost by the company's shareholder, holding that "[a] shareholder's claims for its reflective loss through an entity in which it holds shares cannot be equated automatically to that entity's claims for its direct loss").

93. *Id.* at ¶ 167 (noting that the interests of the shareholders and the company can be identical so that it would be abusive to "permit arbitration of a given dispute by one after the other already has concluded an arbitration over the same dispute.") For instance, the interest of a shareholder and a company could be viewed as identical where a foreign shareholder owns 100 percent of equity in a local company. *Id.*

94. Korzun, *Shareholder Claims*, *supra* note 38, at 199, 215.

95. Chaisse and Li argued in this respect that "policy considerations underlining the non-reflective loss principle that are developed by the domestic courts should not be blindly adopted by international arbitration tribunals adjudicating investment treaty disputes." Chaisse & Li, *supra* note 32, at 84. They further suggested that "the tribunals should first analyze the policy considerations in the context of international investment and economic development." *Id.*

96. Korzun, *Shareholder Claims*, *supra* note 38, at 210.

97. Gaukrodger, *supra* note 65, at 8 (explaining that, in contrast to domestic law, in international investment law shareholders are not only able to claim for reflective loss, but also to collect recovery directly, irrespective of the company claims that may co-exist).

98. Korzun, *Shareholder Claims*, *supra* note 38, at 219. *See also* Gaukrodger, *supra* note 65, at 9 (observing that "[s]hareholder claims are likely to be less predictable for governments than claims by the injured company because company nationality is both known and hard to change; in contrast, the identity of shareholders is both more likely to change and frequently hard to monitor").

and when.[99] Yet investment tribunals continue to enforce IIAs by permitting reflective loss claims by shareholders independently of the claims by local companies.[100]

Investment tribunals have been less sensitive to corporate needs in ISDS, although they are aware of the distortions reflective loss claims create on corporate governance.[101] If the language of the treaty permits, arbitral tribunals continue to accept shareholder claims for reflective loss, even where it harms the corporation by destroying the management's efforts to settle.[102] Only a few tribunals have acknowledged the tension between the interests of shareholders and the company in the context of the reflective loss claims in international investment law, but suggested that disputes between them can be addressed under domestic law.[103] Investment tribunals have largely not acknowledged or dismissed any

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99. *See, e.g.*, Eskosol S.p.A. in Liquidazione v. It., ICSID Case No. ARB/15/50, Decision on Respondent's Application under Rule 41(5), ¶ 170 (Mar. 20, 2017) ("The Tribunal is not unsympathetic to Italy's circumstances, having to face claims now that are closely related to those it already successfully vanquished in a prior proceeding. . . . Absent such a system [for joinder of all stakeholders] . . . it would not be appropriate for tribunals to preclude arbitration by qualified investors, simply because *other* qualified investors may have proceeded before them without their participation." (footnote omitted)).

100. *See, e.g.*, CHRISTOPHER F. DUGAN ET AL., INVESTOR-STATE ARBITRATION 249 (2008) (citing American Mfg. & Trading v. Zaire, ICSID Case No. ARB/93/1, Award (Feb 21, 1997) ("investment" was shares (94% ownership) in a Zairian company); Genin v. Est., ICSID Case No. ARB/99/2, Award, ¶ 324 (June 25, 2001) (U.S. citizen's equity in Estonian company qualified as "investment"); CME Czech Republic B.V. (The Netherlands) v. Czech, UNCITRAL, Partial Award (Sept. 13, 2001) (CME's claim was based on a 99% equity interest in the Czech company). *See also* Antoineé Goetz et consorts v. Burundi, ICSID Case No. ARB/95/3, Decision (Sept. 2, 1998); Maffezzini v. Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction (Jan. 25, 2000); Compañía de Aguas del Aconquija, S.A. v. Arg. (the Vivendi case), ICSID Case No. ARB/97/3, Decision on Annulment (July 3, 2002); Azurix v. Arg., ICSID Case No. ARB/01/12, Decision on Jurisdiction (Dec. 8, 2003); LG&E Energy v. Arg., ICSID Case No. ARB/02/1, Decision of the Arbitral Tribunal on Objections to Jurisdiction (Apr. 30, 2004); Plama Consortium v. Bulg., ICSID Case No. ARB/03/24, Decision on Jurisdiction (Feb. 8, 2005).

101. Korzun, *Shareholder Claims*, *supra* note 38, at 220. For evidence that tribunals are aware of the impact of reflective loss claims, *see, e.g.*, *Total S.A. v. Arg.*, ICSID Case No. ARB/04/01, Decision on Objections to Jurisdiction, ¶ 80 (Aug. 25, 2006), where the tribunal stated:

> Having found, however, that the assets and rights that Total claims have been injured in breach of the BIT fall under the definition of investments under the BIT, it is immaterial that they belong to Argentine companies in accordance with the law of Argentina. Total asserts its own treaty rights for their protection, regardless of any right, contractual or non-contractual that the various companies [in which it owns shares] might assert in respect of such assets and rights under local law before the courts of other authorities of Argentina, in order to seek redress or indemnification for damages suffered as a consequence of actions taken by those authorities.

102. *See* DOUGLAS, *supra* note 91, at 456 (describing instances where tribunals "hearing claims by shareholders have proclaimed as irrelevant the fact that the company is actively negotiating with the host state to achieve a settlement").

103. Korzun, *Shareholder Claims*, *supra* note 38, at 220. *See also* Eskosol S.p.A. in Liquidazione v. It., ICSID Case No. ARB/15/50, Decision on Respondent's Application under Rule 41(5), ¶ 170 (Mar. 20, 2017) (where the tribunal held it was not "sufficient basis for precluding qualified investors from exercising their fundamental right to access the ICSID system," even where domestic law affords

concerns over competing interests between the company and its treaty-protected shareholders, presumably leaving the resolution of such disputes to the parties.[104]

In summary, international investment law allows individuals and companies and/or shareholders of such companies to bring claims in ISDS. In turn, shareholders can be individuals and/or companies that are owned by individuals and/or companies entitled to bring their own claims in ISDS, as long as there is an investment treaty granting protection to a shareholder. In other words, international investment law allows direct and indirect shareholders to bring claims for direct loss, as well as reflective loss sustained due to the loss to the company.[105] Because of the shareholder standing and the ability of shareholders and companies to bring multiple claims deriving from the same investment and breach, claimants in ISDS can be connected at different levels of the corporate ownership structure. Ultimately, it may be that all claims in ISDS are brought by the limited number of multinational corporations who act as repeat users of ISDS directly or through their subsidiaries or other affiliated entities.

II. EMPIRICAL DATA ON CLAIMANTS IN ISDS

Empirical data and scholarship on ISDS remain relatively scarce, even though empirical studies on investment arbitration have noticeably expanded.[106] One can identify several distinct groups of empirical studies in this field, none of which focus specifically on claimants in ISDS. First, multiple empirical studies have sought to analyze BITs and, in particular, to establish a relationship between

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"potential remedies—for example, claims by minority shareholders or bankruptcy receivers against majority shareholders who take unauthorized actions in contravention of domestic law.")

104. Korzun, *Shareholder Claims*, *supra* note 38, at 220.

105. In contrast to reflective loss, shareholders incur direct loss when they are deprived of or restricted in their rights as shareholders (e.g., the right to vote, the right to share proceeds upon dissolution of the company) or when their shares are canceled or expropriated. *See* Korzun, *Shareholder Claims*, *supra* note 38, at 198.

106. *See* Susan D. Franck, *The Promise and Peril of Empiricism and International Investment Law Disputes*, *in* CAMBRIDGE COMPENDIUM OF INTERNATIONAL COMMERCIAL AND INVESTMENT ARBITRATION 61, 61 (Andrea Bjorklund et al. eds., 2023) ("A little more than a decade ago, virtually no empirical scholarship explored investment treaty dispute settlement."). For an overview of the existing empirical studies and publications on international commercial and international investment arbitration, see Christopher R. Drahozal, *Empirical Findings on International Arbitration: An Overview*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ARBITRATION 643 (Thomas Schultz & Federico Ortino eds., 2020). *See also* Daniel Behn et al., *Evidence-Guided Reform: Surveying the Empirical Research on Arbitrator Bias and Diversity in Investor-State Arbitration*, *in* INTERNATIONAL ECONOMIC DISPUTE SETTLEMENT: DEMISE OR TRANSFORMATION? 264 (Manfred Elsig et al. eds., 2021); Daniel F. Behn, *Bibliography*: *Empirical Studies on Legitimacy in International Investment Law* (PluriCourts Investment, Internal Working Paper 1/2014) (containing a bibliography of empirical studies on international investment law, including studies on investment arbitration, investment treaties & FDI, procedural issues and outcomes relating to investment arbitration); Daniel Behn et al., *Empirical Perspectives on Investment Arbitration: What Do We Know? Does It Matter?*, 21 J. WORLD INV. & TRADE 188 (2020) ("provid[ing] a state-of-the-art summary and assessment of empirical studies on the six identified concerns of [S]tates: legal cost, duration of proceedings, consistency, correctness, diversity and independence").

the conclusion of BITs and the growth of inward FDIs, although the causal link between the two remains unclear.[107] Second, with a focus on investment dispute resolution, separate studies have touched on claimants and respondents in ISDS, looked at the nationality of claimants,[108] and provided data on responding States; the data include the frequency of being sued in ISDS and the breakdown data on the region and development status.[109] Third, a number of studies have looked into arbitrators who served on international investment tribunals.[110] Here, empirical studies have made data available on arbitrators' background, nationality, diversity, behavior, independence, impartiality, personal and professional relations, frequency of serving together, ownership of financial stakes in the outcome of a dispute, appointment by an investor and/or a host State, and decision for a foreign claimant and/or responding State.[111] Fourth, prior studies have provided empirical data on outcomes in investment treaty arbitration, including arbitration cases by sector,[112] winners and losers in ISDS,[113] and the effect on the outcome of the investment arbitration on the development status of the respondent State and the presiding arbitrator.[114] In addition, scholars have presented

107. *See, e.g.*, Arjan Lejour & Maria Salfi, *The Regional Impact of Bilateral Investment Treaties on Foreign Direct Investment* (CPB Netherlands Bureau for Economic Policy Analysis, CPB Discussion Paper 298, Jan. 16, 2015), https://ideas.repec.org/p/cpb/discus/298.html#download (concluding that "[u]pper middle income countries seem to benefit the most from BITs. . . . [but] BITs do not support significantly foreign investment in high income countries."); Yackee, *Do BITs Really Work?, supra* note 34; Yackee, *Conceptual Difficulties*, *supra* note 34; Neumayer & Spess, *supra* note 34. *See also* Behn, *Bibliography: Empirical Studies, supra* note 106 (containing an extensive list of empirical studies on investment treaties and FDI).

108. *See, e.g.*, Susan D. Franck, *Empirically Evaluating Claims about Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 26–31 (2007) (presenting information on investor nationality for 82 separate cases that resulted in 102 arbitral awards publicly available before June 1, 2006).

109. *See, e.g.*, Daniel Behn et al., *Poor States or Poor Governance? Explaining Outcomes in Investment Treaty Arbitration*, 38 NW J. INT'L L. & BUS. 333 (2018); Franck, *supra* note 108, at 31–33.

110. *See, e.g.*, Drahozal, *Evidence-Guided Reform, supra* note 106; Van Harten, *supra* note 35; Franck, *Empirically Evaluating Claims*, *supra* note 108, at 75–83 (presenting empirical data on arbitrators' nationality and gender).

111. *See, e.g.*, Behn et al., *Evidence-Guided Reform, supra* note 106; PIA EBERHARDT ET AL., PROFITING FROM INJUSTICE: HOW LAW FIRMS, ARBITRATORS AND FINANCIERS ARE FUELLING AN INVESTMENT ARBITRATION BOOM (Helen Burley ed., 2012); Daphna Kapeliuk, *Collegial Games: Analyzing the Effect of Panel Composition on Outcome in Investment Arbitration*, 31 REV. LITIG. 267 (2012).

112. *See, e.g.,* Behn et al., *Evidence-Guided Reform*, *supra* note 106, at 269–70.

113. *See, e.g.,* Behn et al., *Evidence-Guided Reform*, *supra* note 106, at 267–69; Tim R. Samples, *Winning and Losing in Investor-State Dispute Settlement*, 56 AM. BUS. L.J. 115, 115–75 (2019); Franck, *Empirically Evaluating Claims, supra* note 108, at 49–55 (empirically exploring the winners and losers in investment treaty arbitration).

114. Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L L.J. 435, 435–89 (2009).

empirical data on provisional measures,[115] as well as the costs, damages, and duration in investor-State arbitrations.[116]

With respect to claimants, the aforementioned empirical studies do not present data beyond the named nationality of a claimant.[117] A notable exception is the empirical work by Susan Franck, who most recently published a comprehensive empirical study on arbitration costs and provided data on claimants based on investment treaty arbitration awards made public by January 1, 2012.[118] Prior to that, the OECD provided empirical data on claimants based on a survey of fifty ICSID cases and forty-five UNCITRAL arbitrations concluded between April 2006 and April 2010.[119]

The comprehensive arbitration cost study by Susan Franck on the arbitration costs provides unique empirical insights into claimants in investment treaty arbitration. Professor Franck analyzed 202 different investment arbitration cases that generated 272 arbitration awards made public by 2012.[120] Based on the first award in the case, the author provided empirical data on claimants: (i) the total number of claimants (irrespective of whether they were foreign or locally incorporated), (ii) investors' nationality and the development status of their claimed home State (i.e., claimed origin of the investment), and (iii) background information on whether investors included individuals, corporations, or a combination thereof; privately held or publicly listed entities; or involved at least one commercial entity classified as a leading multinational enterprise according to the *Financial Times 500*.[121]

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115. DAVID GOLDBERG ET AL., PROVISIONAL MEASURES IN INVESTOR-STATE ARBITRATION, BIICL/White & Case (London, 2023).

116. Tim Hart & Rebecca Vélez, *Study of Damages Awards in Investor-State Cases*, 18 TRANSNAT'L DISP. MGMT. (2021); GOLDBERG ET AL., *supra* note 115; MATTHEW HODGSON ET AL., 2021 EMPIRICAL STUDY: COSTS, DAMAGES AND DURATION IN INVESTOR-STATE ARBITRATION, BIICL/Allen & Overy (2021); Franck, *Empirically Evaluating Claims*, *supra* note 108, at 55–66.

117. Today, the nationality of claimants can be extracted from the databases of investment arbitrations run by ICSID and UNCTAD. On its website, ICSID allows the user to do a search of cases by "Claimant(s) Nationality(ies)" for all cases registered at ICSID. *See* ICSID Cases Database, *supra* note 48. Otherwise, as Susan Franck points out, "[u]nfortunately, ICSID does not provide information on investor nationality or distinguishing characteristics, such as firm size or type." (footnote omitted). FRANCK, ARBITRATION COSTS, *supra* note 13, at 72–73 (2019). Similarly, the UNCTAD Investment Dispute Settlement Navigator—the ISDS Navigator—allows the users to search arbitration cases by "Claimant's Nationality." According to UNCTAD, the ISDS Navigator includes publicly known international arbitration cases commenced by foreign investors against the host State pursuant to IIAs. *See* UNCTAD, Investment Dispute Settlement Navigator, https://investmentpolicy.unctad.org/investment-dispute-settlement.

118. FRANCK, ARBITRATION COSTS, *supra* note 13, at 68.

119. David Gaukrodger & Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community* (OECD, Working Papers on International Investment 2012/03) https://doi.org/10.1787/5k46b1r85j6f-en (last visited Jan. 1, 2024).

120. FRANCK, ARBITRATION COSTS, *supra* note 13, at 68.

121. *Id.* at 73.

For 202 cases included in the survey, Professor Franck identified 180,893 named claimants, including claimants in the mass claims arbitration *Abaclat v. Argentina*.[122] These investors came from twenty-three different countries, with the United States leading in the number of cases initiated by its investors.[123] The survey also identified that "[t]he vast majority of investors bringing ITA claims were corporate entities," with only twenty three cases (11.4 percent) commenced solely by individuals.[124] For thirty cases (14.9 percent), the survey identified no data on investor identity in terms of whether the companies were privately owned or publicly traded.[125] Out of the remaining 172 cases, only fifty-one cases (29.7 percent) were initiated by claimants where at least one investor was "publicly traded or otherwise listed on any worldwide stock exchange."[126] Professor Franck used the public listing of the company as a proxy, albeit "imperfect," for the size of the investor and its economic strength.[127]

The OECD survey showed that 48 percent of claimants in the sample were medium and large multinational enterprises, varying in size from several hundred employees to tens of thousands of employees.[128] Only 8 percent of claimants in the OECD sample were extremely large multinationals, companies appearing in the UNCTAD's list of top one hundred multinational enterprises.[129] Twenty-two percent of the claimants in the OECD sample were either individuals or very small corporations with limited foreign operations (one or two foreign projects).[130] This goes against the common view that ISDS is only available and used by global multinational corporations. Finally, in 30 percent of arbitrations in the OECD sample, information on claimants was not publicly available or was very limited.[131] The authors of the OECD survey explained the lack of publicly available information as a possible result of the small size of some companies, which were not publicly listed and/or not subject to disclosure requirements, and of the fact that in some instances, claimants were "holding companies formed for the specific asset or activity that [was] the subject of the arbitral dispute."[132] I observed similar difficulties in obtaining information on the nationality of a

122. *Id.* For the *Abaclat* arbitration, see Abaclat v. Arg., ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 10 (Aug 4, 2011).

123. FRANCK, *supra* note 13, at 74.

124. *Id.* at 76.

125. *Id.* at 77.

126. *Id.*

127. *Id*. at 79. As Professor Franck explains, "[g]iven the administrative complexity and scrutiny of public listing, smaller businesses may prefer to remain privately held, whereas larger businesses may be willing to incur the costs associated with public listing." *Id*. at 77.

128. Gaukrodger & Gordon, *supra* note 119, at 18.

129. *Id*.

130. *Id*. at 17.

131. *Id*.

132. *Id*. at 78.

claimant, its governance structure, and financial and operating data in collecting the data for this Article.

A. Methodology for the Survey

Empirical data for the present survey were collected using publicly available information about companies and individuals who have filed and/or acted as claimants in investment treaty arbitration (ITA) cases pursuant to the ICSID Convention and the ICSID Additional Facility Rules.[133] Data on claimants were collected without regard to whether the case was discontinued, settled, decided by the tribunal, and/or decided by the ad hoc committee as a result of annulment proceedings. As long as the case was initiated, assigned a number, and included in the ICSID database,[134] it was counted as an ICSID case, analyzed, and coded as to its claimants.

I have limited my study to ICSID arbitrations (both ICSID Convention and ICSID Additional Facility arbitrations) because information on these cases is publicly available through the ICSID website and regularly updated. It can also be checked against known investment arbitrations included in the UNCTAD's Investment Dispute Settlement Navigator.[135] In the future, I might be able to expand my study to other investor-State arbitrations, such as those conducted under the UNCITRAL arbitration rules and investment arbitrations invoking investment law and/or contracts.

Data for the survey were collected by reading and coding requests for arbitration, arbitral awards, and other filings made in ICSID arbitrations initiated from January 1, 2010, to December 31, 2019. I limited my survey to this time period of ten years as it covers the most recent investment arbitration cases, which have not yet been studied empirically. As such, this survey provides the most recent data on claimants in known investment treaty arbitrations. This includes arbitrations invoking IIAs, irrespective of whether such arbitration also invoked domestic investment law of the host State and/or a contract. This survey did not include cases where the claimants invoked a contract and/or investment law without also invoking a BIT or other treaty with investment protections.

To collect arbitration cases, I first used the ICSID website to conduct a search for all cases invoking the "ICSID Convention – Arbitration Rules" and the "ICSID Additional Facility – Arbitration Rules," as well as "Bilateral Investment Treaties" and "Other Treaties" as instruments invoked by the claimant. I did not use any other limitations except for the "proceeding registration date," where I limited my search to the time period of January 1, 2010, to December 31, 2019. I then conducted a similar search on the UNCTAD's website for the Investment

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133. INT'L CTR. FOR SETTLEMENT OF INV. DISPS., ADDITIONAL FACILITY RULES (effective April 10, 2006).

134. ICSID Cases Database, *supra* note 48.

135. UNCTAD's Investment Dispute Settlement Navigator, *supra* note 117.

Dispute Settlement Navigator. Finally, I compared the two pools of investment treaty arbitration cases and identified the reasons for discrepancies and missing cases. For instance, there was a case "missing" on the UNCTAD's list because UNCTAD listed two consolidated cases, ARB/12/40 and ARB/12/14, as a single arbitration, while the ICSID listed them separately as two cases, albeit with a note that they were consolidated. Ultimately, this process has generated a list of 375 investment treaty arbitrations for reading and coding (see Table 1).

Table 1. Number of ITA Cases Pursuant to the ICSID Convention and ICSID Additional Facility Rules initiated from January 1, 2010, to December 31, 2019

Year	ICSID Convention	ICSID AF	Total
2010	18	1	19
2011	29	4	33
2012	31	7	38
2013	30	2	32
2014	30	3	33
2015	46	2	48
2016	39	5	44
2017	42	4	46
2018	41	6	47
2019	32	3	35
Total	***338***	***37***	***375***

Source: Composed by the author based on the data collected and coded by the author using the methodology as described in Part II.A of the Article.

The goal of the survey was to go beyond the name of the claimant and its alleged nationality as presented at the time of filing. Having collected information on claimants from the ICSID database, UNCTAD's Investment Dispute Settlement Navigator and accompanying filings, I proceeded to collect data from other resources, such as *Investment Arbitration Reporter*, a subscription-based news and analysis service on international arbitrations.[136]

For cases with more than one claimant, I collected data on each claimant named on the case separately. This avoided the weakness of the OECD survey, which counted the largest investor as being the claimant on the case, thereby increasing the proportion of large investors in the finding.[137] I categorized claimants as individuals or companies. For individuals, I sought to collect data on their names, nationality, number, relations between themselves and other claimants, and any other background information publicly reported as part of the case. For companies, I sought to collect data on their name, legal form, named nationality, number, relations with other claimants, and publicly available information on their subsidiaries/parent companies, affiliates, prior experience in

136. Investment Arbitration Reporter, otherwise known as IAReporter, is accessible at https://www.iareporter.com/.

137. Gaukrodger & Gordon, *supra* note 119, at 78.

investment arbitrations, and status as a multinational corporation. Where possible, I noted whether the company was publicly or privately held. Finally, I noted the size of the companies and the size of their alleged investments and claims.

To collect these data, I used several sources of information: UNCTAD's Investment Dispute Settlement Navigator; Investment Arbitration Reporter; a company's profile on Bloomberg; the website of the claimant, if available; and business information appearing on the internet.

B. Claimants in ICSID Arbitrations

Using the above methodology, the following data were collected on claimants and ITA cases as they relate to claimants for publicly known ICSID arbitrations initiated from January 1, 2010, to December 31, 2019, pursuant to BITs and other investment treaties.

Except for the year 2016,[138] there were ITA cases initiated solely by individuals each year, in addition to arbitration cases commenced solely by companies or jointly by individuals and companies (*see* Table 2). For the years with ITA cases initiated solely by individuals, such cases constituted from the total cases initiated that year from 6.06 percent (number (n)=2) in 2014 to 25.71 percent (n=9) in 2019. Companies as sole claimants commenced the majority of ITA cases for each year. The share of ITA cases initiated by companies as sole claimants on a case ranged from 56.25 percent (n=18) in 2013 to 89.13 percent (n=41) in 2015 (if we exclude from consideration the two outlier cases for 2015),[139] or to 88.64% (n=39) in 2016 (if we add for consideration the two outlier cases for 2015). ITA cases initiated by both individuals and companies acting as claimants on a case ranged from 4.35 percent (n=2) in 2015 (without the outlier cases for 2015) or 7.89 percent (n=3) in 2012 (with the outlier cases for 2015) to 21.88 percent (n=7) in 2013.

Table 2. Number of ITA Cases, Per Category of Claimants, Pursuant to the ICSID Convention and ICSID Additional Facility Rules initiated from January 1, 2010, to December 31, 2019

Year	Cases with individuals as sole claimants on the case (% of total cases)	Cases with companies as sole claimants on the case (% of total cases)	Cases with both individuals and companies as claimants on the case (% of total cases)	Total number of cases
2010	4 (21.05%)	13 (68.42%)	2 (10.53%)	19
2011	4 (12.12%)	26 (78.79%)	3 (9.09%)	33
2012	3 (7.89%)	32 (84.21%)	3 (7.89%)	38

138. In 2016, there were no ITA cases initiated by individuals on their own, although they brought five cases (out of forty-four for the year) jointly with companies as claimants.

139. The two outlier cases for 2015 were Adamakopoulos and Others v. Cyprus, ICSID Case No. ARB/15/49, and Kruck v. Spain, ICSID Case No. ARB/15/23. For further discussion of these two cases as outliers, see the text of the Article immediately following Table 2.

2013	7 (21.88%)	18 (56.25%)	7 (21.88%)	32
2014	2 (6.06%)	27 (81.82%)	4 (12.12%)	33
2015[i]	3 (6.52%) 3 (6.25%)	41 (89.13%) 41 (85.42%)	2 (4.35%) 2(+2) (8.33%)	46 46(+2)
2016	0 (0%)	39 (88.64%)	5 (11.36%)	44
2017	5 (10.87%)	37 (80.43%)	4 (8.70%)	46
2018	7 (14.89%)	34 (72.34%)	6 (12.77%)	47
2019	9 (25.71%)	23 (65.72%)	3 (8.57%)	35
Total[ii]	44 (11.80%) 44 (11.73%)	290 (77.75%) 290 (77.33%)	39 (10.45%) 39(+2) (10.94%)	373 373(+2)

Source: Composed by the author based on the data collected and coded by the author using the methodology as described in Part II.A of the Article.

The year 2015 covered two outlier cases, including a mass claims arbitration of *Adamakopoulos and Others v. Cyprus*, an ICSID Convention case that, by the date of the hearing on the jurisdiction included as claimants 951 (ultimately 949) natural persons and seven companies.[140] As the decision on jurisdiction further explains, the number and identity of claimants in this ITA case have changed since the date of filing a request for arbitration: Twelve claimants passed away and were succeeded by their estates, four claimants were added after being omitted by error, duplicates were corrected for three claimants listed twice and one claimant listed twice under two separate names, and one more claimant (originally listed but latter excluded by mistake) was added to the list of claimants.[141] At the hearing, the claimants stated their number as 969, although their rejoinder on jurisdiction (Annex A) listed the number of claimants as 958.[142] Two claimants later withdrew, bringing their number down to 956, including 949 natural persons and seven companies, covered by the tribunal's decision on jurisdiction.[143]

i. For the year 2015, the top line represents the data for the year without including the two outlier cases (Adamakopoulos v. Cyprus, ICSID Case No. ARB/15/49, and Kruck v. Spain, ICSID Case No. ARB/15/23), and the bottom line represents the data including the two outlier cases.

ii. For the Total for the period of 2010-2019, the top line represents the data without including the two outlier cases (Adamakopoulos v. Cyprus, ICSID Case No. ARB/15/49, and Kruck v. Spain, ICSID Case No. ARB/15/23), and the bottom line represents the data including the two outlier cases.

140. *See* Adamakopoulos v. Cyprus, ICSID Case No. ARB/15/49, Decision on Jurisdiction, ¶ 2 (Feb. 7, 2020). For further reading on this arbitration, see, for instance, Ridhi Kabra, *Theodoros Adamakopoulos and others v Cyprus: Multiparty Arbitration Takes One Step Forward, Two Steps Back*, 36 ICSID REV.–FILJ 286 (2021).

141. Adamakopoulos v. Cyprus, ICSID Case No. ARB/15/49, Decision on Jurisdiction, ¶ 2, n. 3 (Feb. 7, 2020).

142. *Id.*

143. *Id.* The full list of claimants is included in the Decision on Jurisdiction, Annex I.

The second outlier case for 2015 was *Kruck and Other v. Spain*, an ICSID Convention case which involved 116 German claimants, including largely limited liability partnerships, private companies, and eight German nationals.[144]

For the ten years under review, there were 957 named claimants who initiated ICSID arbitrations (including outliers—2,029 named claimants), ranging for the year from forty-eight (in 2011) to 205 (in 2016) (including outliers—to 1,160 named claimants (in 2015))[145] (*see* Table 3). If we exclude the two outlier cases for 2015, for each year (except 2013), more companies than individuals initiated ICSID arbitrations. The share of companies as claimants in ITA cases under review ranged from 60.69 percent in 2018 to 90.41 percent in 2012. By exception, in 2013, there were more individuals than companies who initiated ICSID arbitrations: Fifty-seven individuals (57.58 percent of total claimants) brought claims in ICSID that year as compared to only forty-two companies (42.42 percent). If we add the number of claimants for the outlier cases of 2015 and consider the year 2013, the data are different: Now, for two years (2013 and 2015) out of the ten-year period under review individuals constituted larger shares of claimants in ICSID arbitrations, representing 57.58 percent of all claimants in 2013 and 83.36 percent in 2015.

Table 3. Number of Claimants in ITA Cases Pursuant to the ICSID Convention and ICSID Additional Facility Rules initiated from January 1, 2010, to December 31, 2019

Year	Individuals as claimants (% of total claimants)	Companies as claimants (% of total claimants)	Total number of claimants
2010	18 (36.73%)	31 (63.27%)	49
2011	7 (14.58%)	41 (85.42%)	48
2012	7 (9.59%)	66 (90.41%)	73
2013	57 (57.58%)	42 (42.42%)	99
2014	8 (11.94%)	59 (88.06%)	67
2015[iii]	10 (11.36%) 10 (+949+8) (83.36%)	78 (88.64%) 78 (+7+108) (16.64%)	88 88 (+956+116)
2016	33 (16.10%)	172 (83.90%)	205
2017	32 (29.63%)	76 (70.37%)	108
2018	57 (39.31%)	88 (60.69%)	145
2019	29 (38.67%)	46 (61.33%)	75

144. *See* Kruck v. Spain, ICSID Case No. ARB/15/23, Decision on Jurisdiction and Admissibility, ¶ 2 (April 19, 2021).

145. *See* Adamakopoulos v. Cyprus, ICSID Case No. ARB/15/49, Decision on Jurisdiction, ¶ 2 (Feb. 7, 2020), and Kruck v. Spain, ICSID Case No. ARB/15/23, Decision on Jurisdiction and Admissibility, ¶ 2 (April 19, 2021), respectively.

iii. For the year 2015, the top line represents the data for the year without including the two outlier cases (Adamakopoulos v. Cyprus, ICSID Case No. ARB/15/49, and Kruck v. Spain, ICSID Case No. ARB/15/23), and the bottom line represents the data including the two outlier cases.

Total[iv]	258 (26.96%) / 258 (+957) (59.88%)	699 (73.04%) / 699 (+115) (40.12%)	957 957 (+1,072)

Source: Composed by the author based on the data collected and coded by the author using the methodology as described in Part II.A of the Article.

For 2010–2019, the number of ITA cases where individuals acted as claimants on the case, on their own or jointly with companies, ranged from five (in 2015 (without the outlier cases) and in 2016) to fourteen (in 2013) (see Table 4). The weight of these ITA cases in the total number of cases for the year ranged from 10.87 percent for 2015 (if we exclude from consideration the two outlier cases for 2015),[146] or from 11.36 percent for 2016 (if we add for consideration the two outlier cases for 2015) to 43.75 percent for 2013, with an average for the period of ten years of 22.25 percent (83 ITA cases out of 373 total), or 22.67 percent (85 ITA cases out of 375 total, if including the two outlier cases). In some ITA cases, individuals acted as the only claimants on the case. The largest number of cases in this category were initiated in 2019 (n=9), which constituted 25.71 percent of all ITA cases for that year (n=35). The largest number of individuals as claimants in a case was 949 in the outlier case of *Adamakopoulos and Others v. Cyprus*, initiated in 2015.[147] Without this mass claims arbitration, the largest number of individuals as claimants in a case was thirty-four in 2018.[148]

Table 4. Individuals as Claimants in ITA Cases Pursuant to the ICSID Convention and ICSID Additional Facility Rules initiated from January 1, 2010, to December 31, 2019

Year	**Number of cases with individuals as claimants on the case (% of total cases)**	**Number of cases with individuals as the only claimants on the case (% of total cases)**	**The largest number of individuals as claimants on the case**
2010	6 (31.58%)	4 (21.05%)	9
2011	7 (21.21%)	4 (12.12%)	1
2012	6 (15.79%)	3 (7.89%)	2
2013	14 (43.75%)	7 (21.88%)	13
2014	6 (18.18%)	2 (6.06%)	2
2015[v]	5 (10.87%)	3 (6.52%)	4

iv. For the *Total* for the period of 2010-2019, the top line represents the data without including the two outlier cases (Adamakopoulos v. Cyprus, ICSID Case No. ARB/15/49, and Kruck v. Spain, ICSID Case No. ARB/15/23), and the bottom line represents the data including the two outlier cases.

146. The two outlier cases for 2015 were Adamakopoulos and Others v. Cyprus, ICSID Case No. ARB/15/49, and Kruck v. Spain, ICSID Case No. ARB/15/23. For further discussion of these two cases as outliers, see the text of the Article immediately following Table 2.

147. Adamakopoulos v. Cyprus, ICSID Case No. ARB/15/49, Decision on Jurisdiction, ¶ 2 (Feb. 7, 2020).

148. The case at hand is GBM Global v. Spain, ICSID Case No. ARB/18/33.

v. For the year 2015, the top line represents the data for the year without including the two outlier cases (Adamakopoulos v. Cyprus, ICSID Case No. ARB/15/49, and Kruck v. Spain, ICSID Case No. ARB/15/23), and the bottom line represents the data including the two outlier cases. Without

	7 (14.58%)	3 (6.25%)	949
2016	5 (11.36%)	0 (0%)	19
2017	9 (19.57%)	5 (10.87%)	17
2018	13 (27.66%)	7 (14.89%)	35
2019	12 (34.29%)	9 (25.71%)	7
Total[vi]	83 (22.25%) 85 (22.67%)	44 (11.80%) 44 (11.73%)	***N/A***

Source: Composed by the author based on the data collected and coded by the author using the methodology as described in Part II.A of the Article.

The collected empirical data on claimants also revealed information on ITA cases where the host State companies acted as claimants in arbitration (Table 5). The weight of such cases in the overall number of arbitrations ranged from 9.38 percent (n=3) in 2013 to 26.09 percent (n=12) in 2017. Further study of the data is needed to explore whether these host companies as named claimants are true investors in the case or whether they are companies incorporated in the host State to satisfy the conditions of doing business in the country.

Table 5. ITA Cases Pursuant to the ICSID Convention and ICSID Additional Facility Rules initiated from January 1, 2010, to December 31, 2019, with the Host State Companies as Claimants on the Case

Year	Cases with Host State Companies as Claimants (% total)	Total Number of Cases
2010	4 (21.05%)	19
2011	5 (15.15%)	33
2012	7 (18.42%)	38
2013	3 (9.38%)	32
2014	8 (24.24%)	33
2015	5 (10.42%)	48
2016	11 (25.00%)	44
2017	12 (26.09%)	46
2018	5 (10.64%)	47
2019	6 (17.14%)	35
Total	***66 (17.60%)***	***375***

Source: Composed by the author based on the data collected and coded by the author using the methodology as described in Part II.A of the Article.

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the two outlier cases for 2015, the total number of ITA cases with individuals as claimants on the case was five (out of forty-six cases total for 2015), including three cases where individuals acted as sole claimants on the case. With the outlier cases, the total number of cases with individuals as claimants on the case was seven (out of forty-eight cases total for 2015), including three cases where individuals acted as sole claimants on the case (*see* Table 2 above).

vi. For the *Total* for the period of 2010-2019, the top line represents the data without including the two outlier cases (Adamakopoulos v. Cyprus, ICSID Case No. ARB/15/49, and Kruck v. Spain, ICSID Case No. ARB/15/23), and the bottom line represents the data including the two outlier cases.

III. DATA ANALYSIS AND NORMATIVE PRESCRIPTIONS FOR INVESTMENT TREATY-MAKING

According to UNCTAD, as of January 2024, US claimants (on their own or jointly with claimants from other countries) have commenced 132 arbitrations under the ICSID Convention and ICSID Additional Facility Rules invoking BITs and other treaties with investment provisions.[149] This constitutes 17.7 percent of all ICSID cases invoking BITs and other treaties with investment provisions (n=746). Of these arbitrations, twenty-nine arbitrations are still pending. Therefore, on its face, US claimants are by far the most active users of the ISDS system, followed by Dutch claimants (ninety-five arbitrations to date, twenty-eight currently pending), UK claimants (fifty-eight arbitrations, eighteen pending), German claimants (fifty-two arbitrations, twenty pending), French claimants (forty arbitrations, eleven pending), and Canadian claimants (thirty-three arbitrations, fifteen pending).

For the period of January 1, 2010, to December 31, 2019, under review in this survey, US claimants initiated thirty-nine ICSID arbitrations invoking BITs and other IIAs. This constitutes 10.4 percent of all cases for the period (n=375) covered by the survey. During this period, Dutch claimants were more active than US ones, having initiated fifty-three arbitrations (14.1 percent of all arbitrations initiated for the period). These two groups of claimants were followed by the United Kingdom (thirty-two arbitrations initiated; 8.5 percent), Germany (twenty-nine; 7.7 percent), France (twenty-one; 5.6 percent), and Canada (seventeen; 4.5 percent). This includes both individuals and companies with their nationality counted as identified in the arbitration filings, irrespective of whether the arbitral tribunal later accepted such claimants as foreign investors and recognized their nationality for the purposes of the investment dispute.

What does the survey data tell us about claimants in ISDS? First, a relatively small number of investment treaty arbitrations involve individuals acting as claimants on their own or together with companies (Table 2, Table 4). Most claims in investment treaty arbitrations are brought by companies, frequently acting together with their subsidiaries, such as those incorporated in the host State as part of the investment projects (Table 3, Table 5).

Second, corporations, as distinct from other legal forms of companies, frequently bring claims in investment arbitrations, but generally do so only once over their lifetimes (Table 3). Judging by the number of cases corporations submit to ISDS, they are certainly the users but hardly the abusers of the ISDS system. Large multinational corporations are indeed the frequent users of ISDS, bringing claims to ICSID arbitration directly or indirectly through their subsidiaries (Table 2, Table 4). Yet, they are not the only users of the ISDS system. Individuals and small and medium-size companies also bring claims in investment treaty arbitrations (Tables 2–4). This finding is consistent with the OECD survey, which

149. *See* UNCTAD's Investment Dispute Settlement Navigator, *supra* note 117.

found that global multinational corporations brought only 8 percent of investment arbitration cases.[150]

Third, based on the collected data, it appears that when individuals invest abroad professionally, they tend to shield themselves from liability by investing indirectly through companies incorporated in third jurisdictions, which may also reduce their tax liability.[151] This then impacts the nature of claimants in ISDS, which may be companies created for the sole purpose of making investments overseas and/or incorporated in the "tax haven" jurisdictions. The indirect structure of such investments makes it harder to identify the national origin of the investments as they may come through several entities and countries before entering the host State. For instance, the *Lao Holdings v. Laos (I)* arbitration, on its face, involved a Dutch investor invoking the 2003 BIT between the Netherlands and Laos (in addition to the ICSID Additional Facility Rules).[152] Yet, as the arbitration materials demonstrate, the case involved an investment by two US individuals made through two companies incorporated in Aruba, the Netherlands Antilles, and a subsidiary in Macau.[153] The arbitration was ultimately decided in favor of the host State, dismissing all claims at the merits stage.[154]

Still, other investment cases involve individuals who directly invested in the host State, without seeking protection of the limited liability. For instance, the *Gavrilovic v. Croatia* arbitration focused on the ownership and operation of the meat processing plant and the alleged statutory expropriation of the land and commercial properties of the company.[155] The claimant in this case invested in Croatia directly. The case was decided in favor of the foreign investor.[156]

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150. Gaukrodger & Gordon, *supra* note 119, at 18.

151. An example comes from *Lao Holdings v. Laos (I)*, where two US entrepreneurs with business experience in gambling facilities sought to make investments in casinos and slot machines in Laos. To this effect, they began investing in Laos in 2007 through their company incorporated in Macau in 2005. *See* Lao Holdings N.V. v. Laos, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction, ¶ 2, ¶ 15 (Feb. 12, 2014). In 2012, to take advantage of the Laos-Netherlands BIT, the US investors incorporated a company (Lao Holdings N.V.) in Aruba, the Netherlands Antilles, and then transferred to it the ownership of their company in Macau. *Id.*, ¶¶ 49–52. Through these Dutch and Macau entities, US nationals partnered with a conglomerate in Laos in two casino projects and three slot machine clubs. *See* Lao Holdings N.V. v. Laos, ICSID Case No. ARB(AF)/12/6, Award, ¶ 1 (Aug. 6, 2019). One of the casinos was built and operated successfully, while the second one was never built. *Id*. When a dispute arose, it led to two separate arbitration cases, with Dutch and Macau entities (but not their US owners) serving as claimants in a case: (i) *Lao Holdings v. Laos (I)*, an arbitration case invoking the Laos-Netherlands BIT pursuant to the ICSID Additional Facility Arbitration Rules, and (ii) *Sanum Investments v. Laos (I)*, an UNCITRAL arbitration case invoking the China-Laos BIT.

152. *See Lao Holdings N.V. v. Laos*, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction, ¶ 2 (Feb. 12, 2014) ("The Claimant, Lao Holdings N.V., is a company incorporated under the laws of Aruba, The Netherlands Antilles, and is hereinafter referred to as 'Lao Holdings' or the 'Claimant'.")

153. *See supra* note vi and accompanying text.

154. *See* Lao Holdings N.V. v. Laos, ICSID Case No. ARB(AF)/12/6, Award, ¶ 293 (Aug. 6, 2019).

155. Gavrilovic v. Croat., ICSID Case No. ARB/12/39, Award (July 26, 2018).

156. *Id.*, ¶ 1324.

If individuals are named as claimants together with companies in investment arbitrations, they are frequently the owners/shareholders of the legal entities listed as named claimants.[157] For instance, in *Blusun v. Italy*, the two shareholders of the public limited company (S.A.) acting as claimants in the case, Jean-Pierre Lecorcier (a French national) and Michael Stein (a German national), owned and exclusively controlled Blusun company (with 66 percent and 34 percent shares of equity, respectively), which was also listed as claimant in the case.[158] Although the case involved shareholder claims for reflective loss, the issue was avoided as the arbitral tribunal dismissed all the claims at the merits stage.[159]

Blusun, in turn, owned 80 percent of the Italian company, Eskosol S.p.A., which commenced a separate investment arbitration against Italy after being declared insolvent and placed in liquidation proceedings.[160] That case was also decided in favor of Italy on the merits,[161] so there were no damages awarded to the company in the *Eskosol* arbitration or its shareholders in the separate *Blusun* arbitration. Thus, the potential double recovery and inconsistent awards were avoided. But the *Blusun/Eskosol* case drew attention to the issue of shareholder claims for reflective loss as it involved an insolvent Italian subsidiary of the Belgian company desperately seeking but ultimately unable to join the *Blusun* arbitration (initiated by its parent company) in hopes to collect part of the arbitration award.[162] Considering its dire financial situation, Eskosol's inability to join the *Blusun* arbitration (ultimately lost by Blusun), followed by the need to fight back Italy's *res judicata* objection in the subsequent *Eskosol* arbitration, only highlighted the difficulty of reconciling the conflicting interests of the company and its shareholders in the context of reflective loss claims.

Fourth, the named nationality of claimants in investment arbitration may be misleading, with the "true" nationality of claimants not apparent from the arbitration materials. A good example is the *Rusoro Mining v. Venezuela* arbitration, where the named claimant was a Canadian corporation controlled by Russian businessmen, which becomes apparent after searching additional

157. *See, e.g.*, RSM Prod. Corp. v. Gren., ICSID Case No. ARB/10/6, Award (Dec. 10, 2010) (where three US individuals acting as claimants—Rachel S. Grynberg, Stephen M. Grynberg and Miriam Z. Grynberg—collectively, in equal shares, owned 100 precent of RSM Production Corporation, the fourth claimant on the case); Awdi v. Rom., ICSID Case No. ARB/10/13, Award (Mar. 2, 2015) (where Hassan Awdi, the individual acting as claimant on the case, wholly owned two U.S. companies—Enterprise Business Consultants, Inc. and Alfa El Corporation—as the sole shareholder of both companies).

158. Blusun v. It., ICSID Case No. ARB/14/3, Award, ¶¶ 2–4 (Dec. 27, 2016).

159. *Id.* ¶ 423. The tribunal's award was upheld in the ICSID annulment proceedings. *See* Blusun v. It., ICSID Case No. ARB/14/3, Decision on Annulment, ¶ 339 (Apr. 13, 2020).

160. Eskosol S.p.A. v. It., ICSID Case No. ARB/15/50, Award (Sept. 4, 2020).

161. *Id.* ¶ 499.

162. Blusun v. It., ICSID Case No. ARB/14/3, Award, ¶¶ 2–4 (Dec. 27, 2016). In the Blusun arbitration, Eskosol argued that "this Tribunal lacks jurisdiction and/or the Blusun claim is inadmissible because the Claimants are seeking damages to which only Eskosol is entitled, which will cause prejudice to Eskosol, its creditors and the Non-Party Shareholders." *Id.* ¶42.

information on the internet and the company's website.[163] Yet, the arbitration was decided on the premise that the claimant was a Canadian company and therefore could benefit from the Canada-Venezuela BIT.[164] Similarly, in the *NextEra v. Spain* arbitration, the dispute on its face involved two Dutch private limited liability companies—NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V.[165] However, both companies are the Dutch subsidiaries of the US-based energy company NextEra Energy, Inc.[166] So, the case could instead be counted as initiated by the US claimant.

A similar example of the "hidden" nationality is provided by *Cortec Mining v. Kenya*, where the three claimants were a Kenyan company (Cortec Mining Kenya Limited ("CMK")) and two companies incorporated in England and Wales (Cortec (Pty) Ltd ("Cortec UK") and Stirling Capital Limited ("Stirling")).[167] CMK was majority (70 percent) owned by Cortec UK and Stirling, who were "eventually wholly owned by Pacific Wildcat ("PAW"), a Canadian company listed on the Venture Exchange Market of the Toronto Stock Exchange."[168] From a formal perspective, the case involved UK investments in Kenya and, indeed, the claimants invoked the Kenya-United Kingdom BIT (1999).[169] However, one could also describe it as a dispute involving Canadian investments in Kenya and seek to invoke an investment treaty with Canada (except that Kenya did not have a BIT with Canada, which might explain why the claim was ultimately brought by UK claimants).[170] In fact, the absence of a BIT can explain the named claimants and the invoked alternative BIT in many investment arbitrations where, on its face, the claimant has made its investments indirectly.[171]

Overall, these observations show how random the nationality of a claimant is in investment arbitration. One should therefore be wary of studies of the

163. Rusoro Mining v. Venez., ICSID Case No. ARB(AF)/12/5, Award (Aug. 22, 2016).

164. According to Reuters, Rusoro Mining Ltd. is a Canada-based company, which is engaged in the operation, acquisition, exploration, and development of gold mining and mineral properties. *See* the company's profile at https://www.reuters.com/markets/companies/RML.V (last visited Jan. 1, 2024).

165. NextEra Energy Global Holdings B.V. v. Spain, ICSID Case No. ARB/14/11.

166. Caroline Simson, *Spain Can't Get €291M Award to NextEra Units Nixed*, LAW360 (Mar. 29, 2022).

167. Cortec Mining Kenya v. Kenya, ICSID Case No. ARB/15/29, Award, ¶ 14 (Oct. 22, 2018).

168. *Id*.

169. *Id.* (Identifying claimants as two companies incorporated in England and Wales that together owned 70 percent of the third claimant, a Kenyan company).

170. This conclusion is drawn from the arbitration materials of the case, which identify a Canadian public company as the ultimate owner of the investments in Kenya. *Id.* One could therefore explore whether there is an alternative BIT to invoke, which could have been a treaty between Kenya and Canada, but such a treaty has never been concluded.

171. Another example comes from the *Smurfit Holding B.V. v. Venez.* arbitration, where the Ireland-based multinational corporation commenced an investment arbitration through its Dutch subsidiary, invoking the Netherlands-Venezuela BIT, in part because there were no investment treaties concluded between Ireland and Venezuela. See Smurfit Holding B.V. v. Venez., ICSID Case No. ARB/18/49 (pending).

nationality of claimants in investment arbitrations based merely on the named nationality in arbitration filings and/or invoked BITs. Still, the nationality of the investment always impacts the tribunal's decision as to the jurisdiction and admissibility of a claim. For instance, in *Capital Financial v. Cameroon*,[172] the tribunal "dismissed jurisdiction over the claim, finding that Capital Financial was not a Luxembourg national for purposes of the BIT or the ICSID convention."[173] Furthermore, the "tribunal found that Capital Financial had committed an abuse of rights in bringing the claim, as the ultimate owner who had funded the investment was a Cameroonian national."[174]

Fifth, further studies are needed to explore the relationship among claimants in arbitrations where more than one claimant is listed on the case. There, the multiplicity of claimants may be explained by several factors, including jurisdictional concerns and requirements of local incorporation. Jurisdictional concerns could indeed contribute to (socially wasteful) treaty-shopping, while incorporating in the host State is often required as a condition of doing business in that country.

Sixth, due to the decentralized system of ISDS, data on related arbitrations are inherently incomplete, especially if such arbitrations are conducted under different arbitration rules by related parties. For instance, the *Lao Holdings* arbitration (referred above) was commenced by the Dutch company, on behalf of two US investors, pursuant to the Laos-Netherlands BIT and the ICSID Additional Facility Rules. This arbitration was subsequently followed by the UNCITRAL arbitration, pursuant to the China-Laos BIT, which was commenced by the wholly-owned subsidiary of *Lao Holdings*—Sanum Investments Limited, a company established under the laws of the Macau Special Administrative Region of the People's Republic of China.[175] Presently, there are no tools on the ICSID website or the UNCTAD Investment Dispute Settlement Navigator that would allow the user to identify related arbitration cases. Therefore, one has to know the facts of the dispute and learn about multiple arbitrations and/or court proceedings elsewhere to connect cases related to the same investment dispute. As a result, empirical studies in this respect are inherently limited in their ability to provide systematic data on investment arbitrations.

Seventh, the level of activism by US claimants in ISDS is not necessarily reflective of the foreign investments made by US companies and individuals abroad. Instead, a high number of US claimants could be an indicator of the attractiveness of the US treaty regime, especially in the areas of corporate law and

172. Capital Financial Holdings Luxembourg S.A. v. Republic of Cameroon, ICSID Case No. ARB/15/18, Award (June 22, 2017).

173. Zoe Williams, *Investor Seeks to Annul Jurisdictional Decision That Has Thwarted Its Claims Against Cameroon*, IA REPORTER (Nov. 2, 2017).

174. *Id*.

175. *See* Lao Holdings N.V. v. Laos, ICSID Case No. ARB(AF)/12/6, Award, ¶ 1 (Aug. 6, 2019), and Sanum Investments v. Laos, UNCITRAL, PCA Case No. 2013–13, respectively.

foreign investor protection. A comparable level of activism is seen with respect to the Dutch claimants, which are the second most common users of ICSID judging by the number of arbitrations commenced by them. Here, scholars have observed the so-called "going Dutch" phenomenon,[176] where companies engage in treaty-shopping by incorporating in the Netherlands to benefit from Dutch investor protection treaties (by January 1, 2024, the Netherlands has concluded 108 BITs and eighty-one other treaties with investment provisions).[177] Similarly, the US regime currently includes forty-seven BITs and seventy other treaties with investor protection provisions,[178] which at least partially explains why US claimants have commenced so many ICSID arbitrations.

Some claimants openly admit the use of treaty-shopping to bring a claim in investment arbitration (e.g., through a subsidiary in a third country where a direct claim by the parent company is not available because of the lack of BITs). For instance, in *Smurfit Holdings B.V. v. Venezuela*,[179] the "Irish cardboard packaging giant" Smurfit Kappa Group, Plc. first "publicly threatened to initiate arbitration proceedings against Venezuela over a temporary takeover of its local subsidiary Smurfit Kappa Carton de Venezuela (SKCV) by the Venezuelan government."[180] It then chose to submit its request for arbitration through a Dutch affiliate pursuant to the 1991 Netherlands-Venezuela BIT.[181] As some reports suggest, the choice of the investment treaty and a named claimant (a Dutch holding company) in this arbitration have been influenced by the absence of a BIT between Ireland and Venezuela.[182] Of course, for a multinational corporation, such as Smurfit Kappa, operating in several jurisdictions and able to use its subsidiaries, other related entities, or its owners, treaty-shopping becomes a rational choice. Ultimately, the structure of the claim will largely depend on the counsel representing the company in the investment arbitration.

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176. *See* Timothy G. Nelson, *Going Dutch—The Many Virtues of the Netherlands Model BIT,* 6 IBA DISP. RESOL. INT'L 161, 161–62 (2012) (arguing that Dutch investor protection and double taxation treaties made it extremely attractive for investors to "channel their investments through the Netherlands by incorporating there," in other words, "going Dutch"). *See also* Roeline Knottnerus & Roos Van Os, *The Netherlands: A Gateway to 'Treaty Shopping' for Investment Protection*, INVESTMENT TREATY NEWS (Jan. 12, 2012), https://www.iisd.org/itn/en/2012/01/12/the-netherlands-treaty-shopping/.

177. On the number of investment treaties concluded by the Netherlands, see UNCTAD's International Investment Agreements Navigator, *supra* note 1.

178. *See* UNCTAD's International Investment Agreements Navigator, *supra* note 1 (last visited Jan. 1, 2024).

179. Smurfit Holding B.V. v. Venez., ICSID Case No. ARB/18/49 (pending).

180. Lisa Bohmer, *Cardboard Packaging Manufacturer Smurfit Holdings Makes on Earlier Threats to Initiate ICSID Arbitration Against Venezuela*, IA REPORTER (Dec. 28, 2018).

181. Smurfit Holding B.V. v. Venez., ICSID Case No. ARB/18/49 (pending).

182. Lisa Bohmer, *Cardboard Packaging Manufacturer Smurfit Holdings Makes on Earlier Threats to Initiate ICSID Arbitration Against Venezuela*, IA REPORTER (Dec. 28, 2018) ("Ireland does not maintain a bilateral investment treaty with Venezuela. To make good on its earlier threats to initiate ICSID arbitration against Venezuela, Smurfit has opted to pursue the arbitration through its Dutch affiliate Smurfit Holdings B.V.".)

However, from a data accuracy perspective, such practice changes the named nationality of claimants and impacts information on the true origin of foreign investments. It also creates a distorted impression as to the litigious nature of some foreign investors. Take, for instance, the Dutch investors who are the second most common claimants in known investment arbitrations under the ICSID Convention and ICSID Additional Facility Arbitration Rules.[183] As *Smurfit Holdings* and other cases demonstrate,[184] Dutch investors may simply be named claimants in many cases because of the structure of investments,[185] the number of IIAs concluded by the Netherlands,[186] and the attractiveness of the Dutch investor protection regime under the Dutch BITs and other IIAs.[187]

For an outside observer not familiar with the intricacies of international investment law and dispute settlement, it may appear that Dutch companies are prone to disputes and would eagerly engage in investment arbitrations should a dispute arise. However, a professional in the area of international investment arbitration would understand that the process is at least partially driven by the

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183. According to the ICSID database of cases, by January 2024 Dutch claimants have brought one hundred investment arbitrations (10.48 percent of 954 cases worldwide) pursuant to both the ICSID Convention and the ICSID Additional Facility Arbitration Rules. *See* ICSID Cases Database, *supra* note 48. Dutch claimants follow the lead of US claimants, who have brought 176 (18.45 percent of cases worldwide) investment arbitration cases. *Id*. These numbers include disputes invoking BITs but also other treaties with investment protections, domestic investment law, and contracts. *Id.*

184. Smurfit Holding B.V. v. Venez., ICSID Case No. ARB/18/49 (pending). *See also* Lao Holdings N.V. v. Laos, ICSID Case No. ARB(AF)/12/6, Award, ¶ 1 (Aug. 6, 2019) (where US entrepreneurs, who made investments in Laos through a company in Macau, underwent corporate restructuring and incorporated in Aruba, the Netherlands Antilles, to receive the benefits of the Netherlands-Laos BIT).

185. *See, e.g.*, UNCTAD/DIAE, *Treaty-Based ISDS Cases Brought under Dutch IIAs: An Overview* 14–15 (2014) (partially explaining the significant number of cases brought by Dutch claimants in ISDS by "the frequent use of Dutch-incorporated entities as intermediaries in making transnational investments by non-Dutch companies.") The authors report that "in around three quarters of Dutch cases [brought by the end of 2013] the ultimate owners of the claimants are not Dutch themselves" and explain that "[i]ncorporation of a company in the Netherlands is sufficient to benefit from Dutch BITs; no substantive business operations in the country are required." *Id*. at 15.

186. According to UNCTAD, as of January 2024, the Netherlands has concluded 108 BITs, of which seventy-five are currently in force (five signed but not yet in force, and twenty-eight terminated). *See* UNCTAD's International Investment Agreements Navigator, *supra* note 1. In addition, the Netherlands has concluded seventy-seven (sixty-one currently in force) other treaties with investment protections, such as free trade agreements (FTAs) with investment chapters. *Id*. *See also* UNCTAD/DIAE, *Treaty-Based ISDS Cases Brought under Dutch IIAs: An Overview* 14 (2014) (concluding that the high activity of the Dutch investors as claimants in ISDS can be "explained by the significant number of BITs signed by the Netherlands," but further acknowledging that this explanation is only partial as a "few other EU Member States, including Germany, the United Kingdom and France have more extensive BIT networks" but have not experienced such a high number of claim in ISDS).

187. *See* Nelson, *supra* note 176, at 161–62 ("The extent of investment protections contained within the Netherlands Model BIT, and their 'broad geographic inclusivity and application', has made it extremely attractive to investors.") (footnote omitted).

volume and benefits of the Dutch investment treaties.[188] Yet, it is often impossible to separate "true" Dutch investors or investments from the named Dutch investments only. In view of the reputation that Dutch claimants receive in ISDS,[189] one should ask herself whether the Netherlands (and investment tribunals called upon to decide on their jurisdiction and the admissibility of a claim) are doing justice to the "true" Dutch investors. After all, some host States may be worried about engaging in investment projects with Dutch investors due to their reputation in the area of ISDS. Finally, such extensive reliance on Dutch investment treaties underlines the importance of the Dutch BITs as the trailblazers in investor protection and, more recently, responsible investment debate. Together with the United States and United Kingdom, whose investment treaties are most frequently invoked in investment arbitrations,[190] the Netherlands has a special role to play in setting the standards of investment protection worldwide.

This observation contributes to the long-running debate on the role of investment treaties in attracting and promoting foreign investments. It appears that regardless of the role of such treaties in the initiation of foreign investments (that is to say, irrespective of the weight a foreign investor gives to investment treaties when making its decision to invest), such treaties play a crucial role when actual disputes arise. It is at this stage that a foreign investor and their counsel would carefully consider their options and seek to frame their dispute to fit an investment treaty.

Whether they are able to frame their dispute successfully would depend on many factors, including the nature of the investment, the existence of related parties, and the availability of investment treaties that can be used for bringing a case in ISDS. Moreover, not all (creative) filings would persuade the arbitral tribunal. The case has to pass the objections to jurisdiction and admissibility, and the tribunal needs to establish that an investment treaty was breached, and, ultimately, award damages to the foreign investor. Nonetheless, once an

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188. *See* UNCTAD/DIAE, *Treaty-Based ISDS Cases Brought under Dutch IIAs: An Overview* 14 (2014). *See also* Nelson, *supra* note 176, at 178 (arguing that "[t]he relatively liberal entry criteria for the Netherlands Model BIT, which extend protection to companies incorporated in the Netherlands regardless of the nationality of their shareholders, reflect a deliberate policy of encouraging incorporation in that jurisdiction—a policy that ICSID and UNCITRAL tribunals have been reluctant to second-guess").

189. *See, e.g.*, UNCTAD/DIAE, *Treaty-Based ISDS Cases Brought under Dutch IIAs: An Overview* 14 (2014) ("Dutch investors (mostly companies and only rarely individuals) rank highest in the European Union, and second highest in the world (after the United States), as frequent claimants in ISDS proceedings.").

190. *See* UNCTAD, IIA ISSUES NOTE, INTERNATIONAL INVESTMENT AGREEMENTS, INVESTOR-STATE DISPUTE SETTLEMENT CASES: FACTS AND FIGURES 2020 2-3 and Annex 2 (Issue 4, September 2021) (reporting that the United States (with 194 cases), the Netherlands (118 cases) and the United Kingdom (ninety cases) "have been the three most frequent home States of claimants in known ISDS cases filed from 1987 to 2020.") UNCTAD explains that its "statistics do not cover investor–State cases that are based exclusively on investment contracts (State contracts) or national investment laws, or cases in which a party has signaled its intention to submit a claim to ISDS but has not commenced the arbitration." *Id*. at 1.

arbitration is commenced, the nationality of an investor as alleged in arbitration filings tends to stick and reflect on ISDS and foreign investors globally, even if the tribunal concludes that a claimant is *not* an investor for the purposes of the treaty, or the case is dismissed or settled along the way.

Generally, one should note that investment treaties play a two-fold role. At the investment stage, they may create a favorable environment and signal to foreign investors that a host State is welcoming of foreign capital. At the dispute stage, they may be invoked by a foreign investor in ISDS to fit a particular investment project after the fact, once a dispute has arisen or is about to be submitted for ISDS. In their investment treaty-making, sovereign States and international organizations should keep both of these stages in mind. Moreover, States should tailor their investment treaties to the two different audiences among foreign investors, as the pool of claimants who trigger the ISDS mechanism may not be the same as the pool of investors who bring the foreign capital to the host State. The treaty language should reflect which group(s) it aims to attract.

The current system of ISDS, based on the host State's open-ended consent to arbitration, does not account for this two-fold role of investment treaties or tailor the ISDS mechanism to different groups of investors. Instead, reform proposals include abolishing ISDS entirely,[191] which would have a tremendous effect on the nature of investment claims that could be submitted to arbitration. Large multinational corporations and other foreign investors, who because of the nature of their business deals might have direct contracts with the host State (e.g., concession contracts), would still be able to negotiate for investment arbitration individually, even in the absence of a blanket protection of an investment treaty. Other foreign investors who, as this empirical study suggests, currently benefit from the investment treaty protections without direct contracts with the host State, would be left out. This includes family members investing abroad in smaller/family businesses and individuals with deposits and bonds in foreign banks (see, e.g., *Adamakopoulos v. Cyprus*, a mass claims arbitration pending at ICSID).[192]

Ultimately, there is a policy choice to be made by sovereign States and other treaty-makers as to the desirability of one category of investments (investments brought by multinational corporations) over the other (investments brought by everyone but multinational corporations), if we accept that investment treaties have a role to play in the foreign investor's decision to invest. Yet, simply abolishing ISDS in investment treaties would not eliminate the existing concerns of the multinational corporations' interference with the State's right to regulate and alleged abuses of the current system of foreign investor protection. As the existing data on investment arbitrations invoking contracts demonstrate,[193] many

191. *See supra* note 26 and accompanying text (discussing proposals of the multilateral investment court system to replace ISDS).

192. Adamakopoulos v. Cyprus, ICSID Case No. ARB/15/49 (currently pending).

193. For a list of contract-based ISDS cases, see, ICSID Cases Database, *supra* note 48.

of these cases involve multinational corporations that would continue to benefit from their bargaining power if the investment treaty protections were to be eliminated.

To conclude, what do these data and observations mean for ISDS? First, ISDS provides a forum for dispute resolution for all types of investors—from individuals and small and medium-sized companies to multinational corporations. Judging by the number and nature of claimants in surveyed ICSID arbitrations, the ISDS regime appears to be functioning better than commonly perceived. Second, in view of these findings, revoking BITs and/or universal consent to arbitration in investment treaties would likely harm first and foremost individuals and other investors without investment contracts with the host State. Large multinational corporations—the alleged primary users and abusers of ISDS—would preserve their bargaining power and ability to negotiate for ISDS directly in investment contracts. Finally, the nationality of investors as named in arbitration filings is impacted by several factors, including the type and structure of investments, the existence of related parties and the global corporate ownership network, and the availability of investment treaties that can be used to bring a case in ISDS. Further research is needed to explore the relationships between claimants in known ISDS cases and instances of corporate restructuring undertaken to facilitate treaty- and forum-shopping.

CONCLUSION

Sovereign States grant investor protections to foreign companies and individuals to attract foreign investments and, most importantly, FDIs. To enforce their rights under international investment law, foreign investors can bring ISDS claims. It is commonly believed that large multinational corporations are the only users of ISDS, and that by submitting ISDS claims, multinational corporations have been able to interfere with State sovereignty by challenging government measures adopted for the benefit of the public at large. Empirical data on companies and individuals that have brought claims in investment arbitrations under the ICSID Convention and the ICSID Additional Facility Rules show that large multinational corporations are not the only users of ISDS. Small- and medium-sized corporations, as well as other companies and individuals, frequently rely on ISDS to enforce their investor protection rights. This proves that the ISDS system functions as it should—by providing the route (often the only viable one) for diverse foreign investors to enforce their investor protection rights under IIAs.