Indirect investments channeled through intermediaries
A discussion on indirect shareholder protection under international investment agreements

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# Table of Contents

List of Abbreviations ......................................................................................... 3

1. Introduction ................................................................................................. 5
   1.1. Purpose of the Topic .......................................................................... 7
   1.2. Methodology and Sources ................................................................. 7
   1.3. Key Terminology and Delimitations .................................................... 8

2. Developments in Shareholder Protection .................................................. 10
   2.1. Indirect Shareholding ....................................................................... 12
       2.1.1. Indirect Shareholding by way of an Intermediary with the Nationality of the home State .................................................. 13
       2.1.2. Indirect Shareholding by way of an Intermediary with the Nationality of the host State .................................................. 15
       2.1.3. Indirect Shareholding by way of an Intermediary with the Nationality of a third State .................................................. 17
   2.2. Departure Standard Chartered Bank: Active Contribution? .......... 20
   2.3. Example for Future Tribunals? ......................................................... 23

3. Legal Complexities ....................................................................................... 27
   3.1. Multiplication of Claims .................................................................. 27
   3.2. Remoteness of Claims .................................................................... 31

4. Towards a More Active Role of the State .................................................. 35
   4.1. Cut-Off Point? ................................................................................ 35
   4.2. Denial of Benefits Clause ................................................................. 37

5. Concluding Remarks .................................................................................. 42

List of Cited Works ......................................................................................... 44

Appendix A: Articles 31 and 32 of the Vienna Convention on the Law of the Treaties .................................................. 50
List of Abbreviations

Arbitral Practice  Practice of Tribunals in recognising the right of indirect shareholders to institute arbitration claims for damages suffered by local corporations in the host State

ASEAN  Association of Southeast Asian Nations

BIT  Bilateral investment treaty

CIESA  Compañía de Inversiones de Energía S.A.

Contract  Contract on migration control and personal identification

EACH  Enron Argentina Ciesa Holdings S.A

ECIL  EPCA CIESA Inversiones Ltd.

ECT  Energy Charter Treaty

EDIDESCA  Enron de Inversiones de Energía S.C.A.

EPCA  Enron Pipeline Company Argentina S.A

Host State  State in which a foreign investor, invests

ICJ  International Court of Justice

ICSID  The International Centre for Settlement of Investment Disputes

IIA  International investment agreement

Indirect shareholder  Investor that owns shares *indirectly* through an intermediary that has an interest in a local corporation in the host State

ISDS  Investor–State dispute settlement

IPTL  Independent Power Tanzania Limited

MIT  Multilateral investment treaty

NAFTA  North American Free Trade Agreement

OECD  Organisation for Economic Co-operation and Development

PPA  Power Purchase Agreement

SCB  Standard Chartered Bank
SCB HK  Standard Chartered Bank (Hong Kong) Limited
SITS  Siemens IT Services S.A.
SNI  Siemens Nixdorf Informationssysteme A.G.
SPV  Special purpose vehicle
TANESCO  Tanzanian Electric Supply Company
TGS  Transportadora de Gas del Sur
Tribunal  An arbitral tribunal adjudicating an investment dispute
UNCITRAL  United Nations Commission on International Trade Law
UNCTAD  United Nations Conference on Trade and Development
VCLT  Vienna Convention on the Law of Treaties
1. Introduction

International investment law is one of the fastest-growing and developing areas of international law. One area that has in particular, witnessed rapid evolution over the past decades, is that of the *locus standi* under investment protection treaties of shareholders of corporations investing in foreign States.¹ Present-day, the legal protection for shareholders of foreign investors is growing with the conclusion of international investment agreements (“IIAs”); the universe of bilateral investment treaties (“BITs”) and multilateral investment treaties (“MITs”) such as the Energy Charter Treaty (“ECT”) and the North America Free Trade Agreement (“NAFTA”), continues to expand.² Not only do these investment protection treaties provide foreign investors with a level of substantive legal protection, they also give procedural benefits, of which most notably and meaningful, the investor–State dispute settlement (ISDS) mechanism: a way of instituting arbitrations *directly* against the host State in which they invest.³

Needless to say, there are multiple ways in which foreign investors may choose to invest in foreign States. The most straightforward scenario that one may envisage in this respect, is perhaps that of a *direct* investment by a foreign entity in the territory of another State: the host State. Another, not uncommon investment scenario, particularly when it concerns multinational corporations having business activity spread across the world, is where a foreign investor does *not* itself directly make an investment in the territory of the host State, but rather channels it through *another* intermediary (or a chain of intermediaries), which has an interest in a local corporation. Often, these intermediaries are so called “special purpose vehicles” (“SPV”) and do not necessarily have any significant assets or operations in the host State.⁴ As Treaties provide strong protections towards businesses,

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investors wishing to expand their business overseas may structure their transactions or business activities in this way, either because the foreign investor’s home State may simply not have entered into any IIA with the host State or alternatively, because the third State in which the SPV is set up, would offer more favourable protection.\(^5\)

In cases brought by indirect shareholders, the Claimant-investor is not the immediate, direct shareholder of the affected corporation by the host State’s alleged wrongful measures. This begs the questions, whether – and in the affirmative, to what extent - an investor can claim damages suffered by a local corporation of which it owns shares only \textit{indirectly} through an intermediary? To put it in Professor Schreuer’s words:

\[(\ldots) \text{if investor A owns shares in company B and company B owns shares in company C, is it possible for investor A to pursue a claim for damage inflicted by a host State upon company C?}\]\(^6\)

The legal standing of these indirect shareholders ultimately derives from the specific wording of the relevant legal instrument under which the Tribunal in question is constituted. Today, many BITs and MITs provide broad and wide-ranging definitions of investments and investors. It would appear from the interpretation of these broad formulations, that each holding company in a long chain of ownership, could file its own separate arbitration claim against the same host State in consequence of the same breach of rights.\(^7\) As a result, there is a higher chance that capital importing- and exporting countries that have entered into numerous IIAs, would need to act as Respondent in multiple (and possibly simultaneous) arbitrations instituted by different shareholders, due to the convoluted corporate structures of foreign investors.\(^8\) By bringing different cases

\(^5\) ibid 386-387.
\(^8\) Valasek and Dumberry supra (n 1), at 71.
that are virtually the same, the likelihood of conflicting and inconsistent arbitral decisions due to multiplication of claims would also increase. 9

1.1. Purpose of the Topic

The purpose of the Thesis is to present arbitral practice in recognising the right of indirect shareholders to institute arbitration claims for damages suffered by local corporations in the host State (“Arbitral Practice”). The Thesis will then proceed to identify the legal complexities that come with the evolving increased shareholder protection. Lastly, it will evaluate the need for a “cut-off point” i.e. whether a sufficiently direct relationship is necessary between the indirect investor and the investor, for it to enjoy Treaty benefits and protection.

The Thesis will address the following research questions:

I. To what extent have Tribunals recognised the right of indirect shareholders to submit arbitration claims for damages suffered by a local corporation in the host State?

II. Should a cut-off point, beyond which claims would not be permissible as they would have only a remote connection to the affected company, be established?

1.2. Methodology and Sources

This Thesis will be divided into four main parts. The first part (Chapter 2) intends to set the overall context and present Arbitral Practice. The second part (Chapter 3) will address and identify the legal complexities that arise in consequence of expanded protection to indirect shareholdings. The third part (Chapter 4) will propose how States can tackle these complications and evaluate in that light, whether a cut-off point is desired and can be realised. Lastly, (Chapter 5) will offer concluding remarks.

9 Valasek and Dumberry supra (n 1), at 70-71.
When the *presentation* is made of the Arbitral Practice, the aim has been to use the sources that provide best insight to establish a pattern. It is recognised by the author, that there is no binding precedent in international arbitration. Each and every case is therefore to be interpreted in light of its own facts and circumstances. However, the various case-law under discussion will illustrate that there seems to be a trend by Arbitral Tribunals in more readily admitting claims by indirect shareholders based on broad notions of investment and investor in the underlying IIAs. In order to provide a basis for further analysis, this Arbitral Practice, has been sorted into three distinct categories: where the indirect investor channelled its investment through an intermediary corporation with an interest in the local corporation with i) the Nationality of the home State, ii) the Nationality of the host State, and iii) the Nationality of a third State. This Arbitral Practice will be presented by means of a case-by-case analysis. Legal opinions and analyses of commentators and experts will be relied upon, where they add additional explanatory value.

Following the *presentation* of Arbitral Practice, the legal complexities that arise with the expansive protection towards indirect shareholders will be *identified*. Thereafter an *evaluation* of whether there is a need to establish a cut-off point will be made. Inspiration will be drawn from criticisms against, and defences in favour, of the Arbitral Practice. The materials will be found in case-law as well as scholarly commentaries and opinions.

### 1.3. Key terminology and Delimitations

It is acknowledged by the author that there are different types of shareholders that may wish to institute arbitral proceedings against the States in which they invest for interferences with their investments. Claims may for instance be submitted by majority-, minority-, controlling- or non-controlling shareholders. To discuss all possible avenues for these types of shareholders to qualify for Treaty protection, would be much excessive at best and therefore falls outside the scope of this Thesis.
Instead central to this Thesis is one type of claims by shareholders which are not the immediate and direct shareholders in an affected corporation: the indirect shareholder. Throughout the course of this Thesis the term indirect shareholder is therefore taken to mean an investor that owns shares indirectly through an intermediary that has an interest in a local corporation in the host State. Questions of control and percentage of shares may be discussed, but are only relevant in relation to the indirect shareholder, and will not be analysed separately.

The focus of this Thesis is in regard to the expansion of Treaty protection towards this particular group of shareholders, because investment Treaties offer investors powerful protection, including the right to resolve disputes with host States by way of arbitrations. This has resulted in critique by States who are concerned that expanding protection to indirect shareholders may give rise to an infinite number of claims. It is questionable whether it is reasonable and sustainable in the system of investment treaty arbitration, if just any shareholder can be deemed to fall within the scope of coverage or whether at a certain point, the protection should be ‘cut’ for being too remotely connected to the investment.

Given the scope of the Thesis, it will limit itself to the issue of multiplication- and remoteness of claims with thereby the potential of abuse through favourable treaty shopping. It will therefore not explore the issues in respect of computation of damages for these indirect claims and thereby the possible risk of double recovery.
2. Developments in Shareholder Protection

To set the base for the discussion and provide some overall context, this Chapter will briefly address the key evolutions in shareholder protection under international law.

The development in shareholder protection is particularly noteworthy if one takes the Barcelona Traction\(^{10}\) case, judged by the International Court of Justice (“ICJ”) in 1970, as a starting point. In that case the ICJ was faced with the question of whether Belgium, by virtue of its Belgian shareholders in Barcelona Traction, a Canadian incorporated company, would have the right to exercise diplomatic protection and have \textit{locus standi} before the ICJ.\(^{11}\) The facts of the case provide that Belgium wanted to exercise this right in consequence of acts and omissions by Spain directly taken against the Canadian company, and thus \textit{not} against the Belgian shareholders themselves, who merely had an \textit{indirect} interest.

The ICJ, in balancing the rights and responsibilities that States have regarding sovereignty and diplomatic protection, acknowledged the constant evolution of international law. To that end, it observed the increase of international economic relations and the significant transformations in the economic life of nations.\(^{12}\) It stated that international law has now recognised the concept of a “corporate entity.”\(^{13}\) Notwithstanding the acknowledgement of these developments, the ICJ drew attention to corporate entities having rights and obligations \textit{peculiar} to themselves.\(^{14}\) It was of the view that the concept and structure of a corporation is based on a legal distinction between the separate entity of the company and that of the shareholder.\(^{15}\)

\(^{10}\) \textit{Barcelona Traction, Light and Power Co., Ltd.} (Belgium v. Spain), ICJ Judgment 5 February 1970 (“Barcelona Traction”).
\(^{11}\) ibid paras. 32-33.
\(^{12}\) ibid para. 37.
\(^{13}\) ibid para. 38.
\(^{14}\) ibid para. 39.
\(^{15}\) ibid paras. 41-43.
In its reasoning, the ICJ brought attention to the distinction between interests and rights and reasoned as follows:

Notwithstanding the separate corporate personality, a wrong done to the company frequently causes a prejudice to its shareholders. But the mere fact that damage is sustained by both company and shareholder does not imply that both are entitled to claim compensation… In such cases, no doubt, the *interests* of the aggrieved are affected, but not their *rights*. (emphasis added) Thus whenever a shareholder’s interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action; for although two separate entities, may have suffered from the same wrong, it is only one entity whose rights have been infringed.\(^{16}\)

This holding may create the initial impression that under international law, foreign shareholders do not enjoy protection *independent* from the company that suffered damages in consequence of acts and omissions committed by the host State. It need however be stressed, that the ICJ made its ruling, in the context of diplomatic protection and not in the light of an international investment protection Treaty. Would the case have involved such a Treaty, the ICJ reasoned that in that situation, the Belgian Government would have been entitled to bring a claim:

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\text{\textit{\ldots} if it could show that one of its rights had been infringed and that the acts complained of involved the breach of an international obligation arising out of a treaty or a general rule of law.}\]^{17}\]

Roughly two decades later, in 1989, this open statement in *Barcelona Traction* was put to the test, when the ICJ had to decide the case of *ELSI*\(^{18}\), which was in fact based on an investment protection Treaty: the Treaty of Friendship, Commerce and Navigation between the United States and Italy. Although the ICJ in its judgment did not directly address the earlier *Barcelona Traction* case or the question of shareholders’ right to submit claims, it found no difficulty in granting the United States, the right to file an arbitration claim against Italy on behalf of its shareholders in an Italian incorporated company.

\(^{16}\) ibid para. 44.
\(^{17}\) ibid para. 86.
\(^{18}\) *Elettronica Sicula S.p.A.* (United States of America v. Italy), ICJ Judgment 20 July 1989 ("ELSI").
Given the rapid growth of international investment protection treaties and related emerging jurisprudence following the *ELSI* case, it is reasonable to say now that the *Barcelona Traction* case no longer reflects international law as it stands today. This is not surprising, given that the ICJ in that case itself recognised the continuous evolutions in this field.

2.1. **Indirect Shareholding**

For investors to institute arbitrations against the States in which they are investing successfully, and to be heard on the substantive matters, they will need to comply with certain jurisdiction hurdles, including those on nationality. Treaties have different tests and thresholds for determining whether someone qualifies as an investor and whether an investing activity qualifies as an investment.

The following section will proceed to highlight the Arbitral Practice where Tribunals have assumed jurisdiction over cases where shareholders claiming against the host State, had merely an *indirect* interest in the locally incorporated company. It should be stressed that although the cases discussed below reflect the *locus standi* of indirect shareholdings, they do not exhaust any possibilities for standing of indirect shareholders that may very well appear in the future.

For the purposes of this Thesis, the three scenarios in which Tribunals have so far done so, are summed up into three distinct categories: intermediary with the nationality of the home State (Section 2.1.1.), the nationality of the host State (Section 2.1.2.), and the nationality of the third State (Section 2.1.3.). Each of these scenarios will be examined and discussed below.

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2.1.1. Indirect Shareholding by way of an Intermediary with the Nationality of the home State

The first case example, *Siemens v. Argentina*\(^{20}\), will demonstrate the situation in which an intermediary company has the same nationality as the Claimant investor, i.e. that of the home State.

The facts of the case are as follows: Siemens, a German company, through its wholly-owned affiliate, Siemens Nixdorf Informationssysteme A.G. (“SNI”) set up a company in Argentina, Siemens IT Services S.A. (“SITS”).\(^{21}\) SNI was wholly integrated into Siemens and was furthermore under the control and management of Siemens.\(^{22}\) SITS was established with the purpose of taking part in the bidding system by the Respondent State, Argentina, for a contract on migration control and personal identification (“Contract”). The terms of this Contract namely required a local company to be established by the bidders. SITS’s bid won the Contract in 1998, which had a term of six years including the possibility of extension. Siemens then went on to make the required investments by way of capital contribution to SITS. It also provided SITS with the necessary funds to make sure that it was able to perform the obligations under the Contract. The actions that led to the dispute were following a change in Government in Argentina in 1999. The new Government suspended the Contract in 2000 and terminated it the year after, in 2001.

In July 2001, Siemens, as the indirect shareholder, filed a claim for arbitration against Argentina based on breaches of the Argentina-Germany BIT.\(^{23}\) Argentina, objected to the jurisdiction of the Tribunal on eight different accounts. Among these objections, was that the Claimant, in Argentina’s view, lacked the legal standing to file the arbitration claim. According to Argentina there was a need for

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\(^{20}\) Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004 (“Siemens”).

\(^{21}\) ibid para. 23.

\(^{22}\) ibid para. 24.

a *direct* relationship between the investor and the investment.\(^{24}\) Seeing that SNI, and not Siemens, was the holder of the shares in SITS, Argentina was of the view that no such direct relationship existed.

The Tribunal rejected this argument and reasoned that the Argentina-Germany BIT did not exclude claims filed by indirect investors. It noted that the BIT did not put forward any express reference to direct or indirect investments.\(^{25}\) In its reasoning the Tribunal observed that the definition of “investment” under the BIT\(^{26}\) was very broad. It paid attention to the fact that the drafters used the wording “not exclusively” before listing the categories of “particularly” included investments, thereby broadening the definition. It also highlighted that the applicable BIT included “shares, rights of participation in companies and other types of participation in companies” as one of the illustrative categories qualifying as investment. The Tribunal was therefore of the view that:

> The Treaty does not require that there be no interposed companies between the investment and the ultimate owner of the companies. (emphasis added). Therefore, a literal reading of the Treaty does not support the allegation that the definition of investment excludes indirect investments.\(^{27}\)

The Tribunal found that Siemens, as an indirect shareholder, had legal standing in the arbitration proceedings as an investor in SITS through SNI.\(^{28}\) Consequently Argentina’s jurisdictional objection was dismissed.

\(^{24}\) *Siemens*, para. 123.

\(^{25}\) ibid para. 137.

\(^{26}\) See Art. 1(1) Argentina-Germany BIT (1991) which defines “investment” as:

> The term “investments” shall apply to assets of any category defined in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made and admitted in accordance with this Treaty and particularly, but not exclusively, to:

> (b) Shares, stocks in companies and other forms of participation in companies.

\(^{27}\) *Siemens*, para. 137. See also, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003, (“*Azurix Corp*”), paras 63-66, where the local subsidiary was in part held by an intermediary from the parent’s home State.

\(^{28}\) *Siemens*, para. 144.
2.1.2. Indirect Shareholding by way of an Intermediary with the Nationality of the host State

The next case example, Enron v. Argentina\(^{29}\) demonstrates a second situation in which an indirect shareholder was granted *locus standing* where the intermediary company was incorporated in the host State.

This arbitration was based on the Argentina-United States BIT.\(^{30}\) The Claimants investments were made in the gas industry of Argentina and its participation concerned the privatisation of Transportadora de Gas del Sur (“TGS”). Enron’s participation was explained as follows: it owned half of the shares of a company incorporated in Argentina, Compañía de Inversiones de Energía S.A. (“CIESA”). CIESA was the controlling shareholder of TGS by holding 55.30% of the total shares. Enron’s participation in CIESA was in turn held by two wholly-owned companies, Enron Pipeline Company Argentina S.A (“EPCA”) and Enron Argentina Ciesa Holdings S.A (“EACH”). Through EPCA, EACH and another company controlled by Enron, EPCA CIESA Inversiones Ltd. (“ECIL”), the Claimants held 75.93% of the shares in Enron de Inversiones de Energía S.C.A. (“EDIDESCA”), an Argentinian incorporated company that in turn held 10% of the shares of TGS. They obtained an additional 0.02% of TGS via EPCA. In total, the investment was said to amount to 35.263% of TGS.\(^{31}\)

The above description of the Claimants’ participation in TGS, demonstrates that not only was Enron’s shareholding *indirect* but it also involved numerous locally incorporated companies with various layers of ownership.

Argentina put forward the argument that Enron was merely *indirectly* affected as a minority shareholder in TGS. Argentina did not deny that shares would qualify as investments covered under the Argentina-US BIT, however, in its view, this


\(^{31}\) *ibid* para. 21.
would only be in relation to claims affecting their rights “qua shareholders”. According to Argentina therefore, the claims raised by Enron with respect to measures affecting the corporation as an independent legal entity, could not be admissible under the applicable BIT.

In approaching this issue, the Tribunal noted at the outset, that it is in line with international law and the ICSID Convention, to support the concept that shareholders may claim independently from the company concerned, irrespective of whether they are in majority or in control. The Tribunal subsequently went on to examine and interpret the definition of investment as set forth in the BIT in line with the rules governing the interpretation of Treaties under the Vienna Convention on the Law of Treaties (“VCLT”). It observed that the definition set out in the BIT was broad and did not exclude minority or non-controlling shareholders from bringing their claims. The Tribunal was further of the view that the fact that the BIT was silent on the question of indirect claims, whereas other Treaties may provide such rights expressly, was not to be interpreted as meaning that such rights were excluded.

Notwithstanding those observations, the Tribunal brought attention to the concern raised by Argentina that the Claimants made their investment in a chain of several locally incorporated companies which in turn made the investment in TGS. The Claimants participation in TGS was therefore only marginally. Argentina reasoned that if such shareholders can claim independently from the affected

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32 Enron, para. 35.
35 Enron, para. 43, 47, 58.
36 See Art. 1 (1) Argentina-United States BIT (1991) which provides;
“(a) ‘investment’ means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes without limitation:
(...)
(ii) a company or shares of stock or other interests in a company or interests in the assets thereof...”
37 Enron, paras. 44-49.
38 ibid para. 46.
39 ibid para. 50.

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corporation, it could give rise to a limitless number of claims.\(^\text{40}\) However, the Tribunal treated this issue\(^\text{41}\) in the context of admissibility of claims, and reasoned that in this case, this concern did not prove to be a problem as Argentina had expressly requested Enron to make the investment and Enron had several decision-making powers in the management of TGS.\(^\text{42}\)

For these reasons, the Tribunal held that the claim was admissible and accordingly that the Claimants, as indirect shareholders, had legal standing.\(^\text{43}\)

**2.1.3. Indirect Shareholding by way of an Intermediary with the Nationality of a third State**

The last scenario in which the right of a foreign indirect investor to claim against the host State, has been recognised, is where the intermediary company has the same nationality as that of a third State, i.e. a State other than the Claimant’s home State or the host State.

*Waste Management v. Mexico*\(^\text{44}\), which involved such a situation, is where the Tribunal was constituted under the NAFTA. The case dealt with a concession agreement between the city of Acapulco, Mexico and a Mexican incorporated company, Acaverde. The Claimant, Waste Management Inc., was a company incorporated in the United States which wholly owned Acaverde via a holding company, AcaVerde Holdings Ltd, by Sun Investment Co., of which both were Cayman Island companies.\(^\text{45}\) AcaVerde Holdings Ltd was bought by Sanifill Inc., a company incorporated in the United States which later merged with USA Waste Services Inc. which then adopted the current name of the Claimant, Waste Management Inc.

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\(^{40}\) ibid paras 50-52.

\(^{41}\) See Chapter 3.2 for more on this point.

\(^{42}\) Enron ibid para. 52.

\(^{43}\) ibid paras 52-57

\(^{44}\) Waste Management, Inc. v. United Mexican States ("Number 2"), ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 ("Waste Management").

\(^{45}\) ibid para. 77.
The Respondent challenged the Tribunal’s jurisdiction on the ground that Waste Management would not constitute a qualified investor under NAFTA because it carried out its investment through companies incorporated in a third State.\(^46\) In addressing this objection, the Tribunal firstly noted that Chapter 11 of the NAFTA stipulates the criteria for initiating arbitrations. The Tribunal carefully examined the provisions and reasoned that the NAFTA provisions separate claims brought by foreign investors in their own right or claims brought on behalf of a local company. The NAFTA provisions therefore address situations where the investor is merely an intermediary for interests substantially foreign and allows NAFTA protections to be withdrawn in such instances.\(^47\) However, it found that in the case in front of it, the beneficial ownership at all relevant times was with an investor of a NAFTA State. There was therefore in the Tribunal’s view, no hint of concern that investments were held through companies or enterprises of non-NAFTA States.\(^48\)

The Tribunal noted that NAFTA in Article 1139 gives a definition of the term “investment” which included “(e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise.” It found that there was no requirement that the investment itself has the nationality of a NAFTA party.\(^49\)

The Tribunal again brought attention to the fact that NAFTA with much attention and detail stipulates the criteria for maintaining a claim and that there is therefore no discretion to read into the Treaty any additional requirements that are not expressly contained in NAFTA itself.\(^50\) The Tribunal explained that had the NAFTA parties wanted to restrict their obligations of conduct solely to companies or investments with the same nationality as one of the other Parties, they could have made such a requirement in the Treaty. By the same token, if this was the Parties’ intention, in drafting they could have limited claims of loss or damage in connection to the nationality of the entity which itself suffered direct harm from

\(^{46}\) ibid para. 85.
\(^{47}\) ibid para. 80.
\(^{48}\) ibid.
\(^{49}\) ibid para. 83.
\(^{50}\) ibid para. 85.
the State’s measures.\textsuperscript{51} Given that NAFTA does not contain any such restrictions in its criteria, the Tribunal ruled that the nationality of the intermediary holding companies was irrelevant to the present claim.\textsuperscript{52}

Similar to the situation just described in \textit{Waste Management}, in the case of \textit{Kardassopoulos v. Georgia}\textsuperscript{53}, the Claimant also had an indirect shareholding in a host State corporation through an intermediary company incorporated in a third State. The Claimant, Mr. Ioannis Kardassopoulos filed a case against Georgia under the ECT as well as the Georgia-Greece BIT.\textsuperscript{54}

Georgia raised a jurisdictional objection regarding the Tribunal’s jurisdiction \textit{ratione materiae}. It argued for its part that Mr. Kardassopoulos did not have an interest in an investment that is covered under neither the ECT nor the BIT.

The Tribunal subsequently looked at the definition of “investment” as set forth in Article 1(6) ECT.\textsuperscript{55} This provision broadly defines investment as “every kind of asset, owned or controlled \textit{directly or indirectly} by an Investor (…)”. It observed that although the Georgia-Greece BIT in Article 1 lists “shares, stock and any other form of participation in a company” as an example of a covered investment, it does not offer any specification as to whether it needs to be direct.\textsuperscript{56} The Tribunal referred to the case of \textit{Siemens} where the Tribunal was also faced with a broad definition of investment which was silent on whether an investment qualifying for protection needed to be direct. As clarified above in Section 2.1.1, the \textit{Siemens} Tribunal reasoned that indirect investments were covered as the framing of the Argentina-Germany BIT ‘does not require that there be no interposed companies between the investment and the ultimate owner of the company.’\textsuperscript{57} The \textit{Kardassopoulos} Tribunal upheld this reasoning\textsuperscript{58} and in its view,

\textsuperscript{51} ibid.  
\textsuperscript{52} ibid paras. 84-85.  
\textsuperscript{53} Ioannis Kardassopoulos v. The Republic of Georgia, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007 (“Kardassopoulos”).  
\textsuperscript{54} Georgia-Greece BIT (1994).  
\textsuperscript{55} ibid para. 121.  
\textsuperscript{56} ibid para. 123.  
\textsuperscript{57} Siemens A.G. v. Argentina, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, para. 137.  
\textsuperscript{58} Kardassopoulos, para. 124.
therefore, the indirect ownership of the shares by Mr. Kardassopoulos amounted to a qualified investment under both the ECT and the BIT.\textsuperscript{59}

Georgia contended that the Claimant had no interest, neither direct nor indirect, in the investment. The Tribunal concluded however that there was ample evidence establishing that Mr. Kardassapoulos had an interest in Tramex Panama. The Tribunal therefore rejected Georgia’s jurisdictional objection \textit{ratione materiae} and found that Mr. Kardassopoulos was at all relevant times the beneficial owner of the 50\% shares in Tramex Panama and indirectly owned a 25\% interest in GTI, which made an investment in the territory of Georgia.\textsuperscript{60}

Other Tribunals have reached similar outcomes as the two cases discussed above, as concerns indirect shareholdings via intermediate companies having the nationality of a third States.\textsuperscript{61}

\textbf{2.2. Departure Standard Chartered Bank: Active Contribution?}

The above discussion on Arbitral Practice has demonstrated that in many investment Treaties, a reference is made to shares as one of the illustrative categories that qualify as a covered investment. Often, these definitions do not contain any express carve-out for specific types of shares, be it in the form of a percentage or minimum size requirement. The case-law discussion has illustrated that failing any express exclusion, indirect investments are generally considered within the scope of coverage under the Treaty. This finding is, irrespective of the actual nationality of the intermediary, be it the home State, host State or even a third State, through which the investment is channelled.

\textsuperscript{59} ibid.
\textsuperscript{60} ibid para. 141.
The following case example, that of Standard Chartered Bank v. Tanzania⁶², brought new perspective into the increased shareholder protection for indirect investors. The fairly recent ICSID case against Tanzania was initiated by Standard Chartered Bank (“SCB”), a company incorporated in the United Kingdom of Great Britain and Northern Ireland. The dispute arose out of a Power Purchase Agreement (“PPA”) entered into between the Tanzanian Electric Supply Company (“TANESCO”) and Independent Power Tanzania Limited (“IPTL”).⁶³

Under the PPA, IPTL agreed to design, construct, own, operate and maintain the plant, of which it was to deliver the electricity generated to TANESCO for a term of twenty years.⁶⁴ In exchange for the services offered, TANESCO had to make certain capacity, energy, and test energy- payments to IPTL.⁶⁵ The relevant credit for the power plant in Tanzania was at first provided by a consortium of Malaysian banks in the form of loans but these were later on, taken over by Standard Chartered Bank (Hong Kong) Limited (“SCB HK”). The Claimant’s investment, on which basis it wished to enjoy Treaty protection under the BIT as investor, was due to its equity ownership in SCB HK.⁶⁶ SCB namely owned and controlled SCB HK through a minority ownership with a shareholding of 38.8%, as well as indirectly by way of its ownership of the entire shareholding in SC Sherwood, a company incorporated in Hong Kong, which in turn had a majority shareholding of 61.2% in SCB HK.⁶⁷

The starting point of the Tribunal to solve the issue before it and thereby to decide whether SCB was eligible for Treaty protection, was in line with the approaches of the Tribunals discussed before, and was hence to conduct an interpretation exercise of the applicable Tanzania-United Kingdom BIT.⁶⁸ The Tribunal reasoned that based on the jurisdictional clause in Article 8(1) of the BIT⁶⁹, its

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⁶² Standard Chartered Bank v. The United Republic of Tanzania, ICSID Case No. ARB/10/12, Award, 2 November 2012 (“Standard Chartered Bank”).
⁶³ ibid para. 23.
⁶⁴ ibid.
⁶⁵ ibid para. 24.
⁶⁶ ibid para. 196.
⁶⁷ ibid para. 252.
⁶⁸ Tanzania-United Kingdom BIT (1994).
⁶⁹ Article 8(1) of Tanzania-United Kingdom BIT (1994) provides: “Each Contracting Party hereby consents to submit […] any legal dispute arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former.”
jurisdiction relied upon a finding that the loans were investments of SCB in the territory of Tanzania. It found that for SCB to be considered an investor under the Treaty so that the loans to fund the power plant in Tanzania, would be considered investments of SCB, would require the Claimant to somehow actively contribute throughout the course of the investment, either directly or by way of an agent or entity under the investor’s command.

The Tribunal admits that there are SPVs and confirms that investments may be made indirectly. It was however of the view that such indirect investments, would involve investing activity by the Claimant, even if the investment is performed under the investor’s direction or through an entity controlled by the investor. Article 1(a) of the Tanzania-United Kingdom BIT gives the definition of “investment” for purposes of the Treaty as “every kind of asset admitted in accordance with the legislation and regulations in force in the territory of the Contracting Party in which the investment is made (…).” The Tribunal was of the view that the wording made implies action and therefore, that for the Claimant to avail itself to the benefits under Article 8(1) of the BIT he must:

(...) demonstrate that the investment was made at the Claimant’s direction, that the Claimant funded the investment or that the Claimant controlled the investment in an active and direct manner. Passive ownership of shares in a company not controlled by the Claimant where that company in turn owns the investment is not sufficient.

Given that the facts of the case did not show any action by SCB contributing to the loans or the power plant, nor was there any evidence that showed that the investment was made at the direction of the SCB as investor, the Tribunal was of the view that SCB had not established an investment in the territory of Tanzania which would justify a finding of jurisdiction. Important to note is that in its reasoning, the Tribunal also paid attention to the preamble of the BIT, which

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70 Standard Chartered Bank, para. 197.
71 ibid para. 188.
72 ibid para. 199.
73 ibid para. 230.
74 ibid para. 265.
reflected the aim of “reciprocal protection”. It held to that end that it would be unreasonable to read the BIT:

(…) to permit a UK national with subsidiaries all around the world to claim entitlement to the UK-Tanzania BIT protection for each and every one of the investments around the world held by these daughter or granddaughter entities.\(^75\)

In the Tribunal’s view the word reciprocal had to be interpreted as having some meaning. For all those reasons, it found that it lacked jurisdiction to try the case.\(^76\)

### 2.3. Example for Future Tribunals?

The holding in *Standard Chartered Bank* marks a deviation in outcome from the Arbitral Practice discussed in Section 2.1. Notwithstanding the fact that “shares” were listed in the definition of investment under the UK-Tanzania BIT, the Tribunal reasoned that the consent expressed by the host State to arbitrate was only in relation to investors who somehow “actively” participated or contributed to the making of the investment. Consequently, it found that the BIT only covered investments *made* and not those that were merely *held* by the investor.

The rationale behind requiring this “active contribution” requirement is evident, if one considers that in situations of multi-layer corporate structures, where, because of the protection of indirect investments, the parent company or any of its subsidiaries down the corporate chain, would be able to claim protection under different IIAs. This could result in an infinite number of claims regarding a virtually identical dispute. This reflects an important consequence of expanding investment protection rights to indirect shareholders, as a Tribunal would be granting extremely powerful rights under a Treaty, to entities in a very long chain of property ownership. Requiring an element of active contribution, would be a means to combat “handing out” Treaty protection to just any remotely affected entity in a corporation with a complex corporate structure with its departments.

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\(^75\) ibid para. 270.

\(^76\) ibid para. 277.
spread world-wide. Even though the reasoning of any rendered award is by its own nature confined to the underlying provisions of the relevant Treaty and the facts and circumstances of the case, the reasoning in Standard Chartered Bank may serve as an example in the arbitration community on how to tackle the problems that indirect investments channelled through layers of intermediaries bring with it. That said, the author realises that a Tribunal derives its mandate from the consent of both Parties, as stems from the relevant legal instrument under which it is constituted. In cases where there is uncertainty or disagreement as to a provision and an interpretation is warranted, the starting point is therefore always to interpret the provisions of the said instrument in accordance with the Articles 31 and 32 of the VCLT. Tribunals would be exceeding their mandate if they were to include - or exclude - rights or obligations that the Parties did not envisage when drafting the Treaty. Based on the different kinds of formulations found in IIAs, it would be problematic for a Tribunal on its own motion to read into a broad definition of “investment” a need for active participation or contribution in the operation of the investment, if the given Treaty definition does not provide any such specification. The author is however of the opinion that certain Treaty formulations may be more easily interpreted as having an inherent “active contribution” element than others. This comes to show, how important it is for States to pay careful attention to the provisions defining “investment” and “investment”, when drafting their respective Treaties. In many cases, the finest nuance in wording may be the reason behind a Tribunal’s finding upon having conducted an interpretative exercise.77

It is self-explanatory that different States depending on their interests and ambitions, may have different policies, incentives or preferences when it comes to the regulation of foreign investments.78 For that reason alone, it is not possible to find the “perfect” standardised definition of investment, that could be included in each and every IIA. Notwithstanding, there are several observations that can be made despite there being no typical definition. It is common in the IIA universe,

for Treaties to contain broad, asset-based definitions of “investment”. The use of “any kind of asset, owned or controlled, directly or indirectly by an investor” can be found in numerous international legal instruments.79 Given the use of a passive-voice formulation, it would be problematic for a Tribunal to read an active relationship requirement in this definition. The words “owned or controlled by” seem to suggest that when the State Parties were drafting the Treaty, they intended to cover purely passive ownerships or control by an investor irrespective of whether there are various layers of corporate structures. This would particularly be the case, if the Treaty definition does not require any form of “effective” control.80 In the drafting of some IIAs, formulations such as “every kind of asset that an investor owns or controls directly or indirectly”, are used.81 With the use of an active voice formulation as opposed to passive language, a more convincing argument may be made, that for an investor to enjoy Treaty protection, some form of investing activity is required. However, it would be difficult to draw a line between protected active ownership and unprotected passive ownership. Other formulations such as “any kind of asset invested by investors” can also be found.82 Some formulations of this kind also make express reference to indirect investments by stating “invested directly or indirectly by investors”, among which the recently concluded BIT between China and Germany.83 The author is of the view that formulations of this kind are most suited to contain an ‘inherent’ active contribution element, as the wording indicates a relationship between the investor and investment. The use of the wording “invested” suggests that for the investor to benefit from protection under the Treaty, it must have made some form of contribution, which necessarily requires an input by the investor. The Tribunal in Standard Chartered Bank was faced with a definition of investment where the investment “is made” for which there is arguably also more reason to require a form of active contribution. The author is however of the view that the Tribunal’s finding would require further clarification particularly in regards to the question how one can draw a line between an “active” (indirect) investment versus a

80 Baumgartner (n 70) 266.
81 See for example Art. 1 United States Model BIT (2012), Art. 1 (2) China-Japan-Korea trilateral investment agreement (2013).
“passive” (indirect) investment. This is an issue that the Tribunal itself also noted, but left unanswered. It held in that respect that: ‘[a]dmittedly, no bright line exists to determine how remote or near a corporate relationship should be in order to be considered relevant. The Tribunal attempts no such line drawing […]’.

It reasonably follows that indirect shareholders further down the chain with investments channelled through multiple layers of intermediaries, will have a more remote relationship to the investment in the local company that was adversely affected by the host State’s acts or omissions. It would depend on the circumstances and facts of a given face, where the causal link between the indirect investor’s claim for damage sustained to the affected corporation and the adverse measures will disappear.

With respect to future BITs and MITs, States may therefore consider including wording that expressly requires a relationship of some form between the investor and the investor, with a view to limiting the endless possibility of claims by shareholders that are only remotely connected to the invest. Evidently there remain uncertainties with regards to where the line between a passive and an active investment needs to be drawn. Consequently, it will not be a full guarantee if States include requirement of this kind in the relevant legal instrument, that a Tribunal will decide in the same manner as Standard Chartered Bank would. The author is however of the opinion that it would increase the likelihood that a deciding Tribunal would do so and it would be a way of eliminating of unfounded claims by investors that have merely a remote connection with the affected corporation.

84 ibid para. 253.
3. Legal Complexities

The preceding Chapter has highlighted the legal developments in the arena of international law towards greater shareholder protection ever since Barcelona Traction.

Shareholder protection is an essential aspect of a favourable BIT or MIT to give investors the opportunity to institute arbitrations against the host State. It is however said, that so called ‘treaty and forum shopping’ would be facilitated, because of broad notions of investment and investors with thereby the extended protection of indirect investments.\(^\text{86}\) This ‘shopping’ entails that a foreign investor re-organises its corporate structure with the aim of gaining access to a (more) favourable BIT or MIT with the host State.\(^\text{87}\) Multinational corporations with their corporate structures spread across the globe, could significantly increase their potential Treaty protection, with multiple entities down the chain, having their own *locus standi* to submit claims against the host State.

This Chapter will now proceed to discuss the legal complexities that may arise from this extended Treaty protection. It will start with the problem of multiplication of claims and will then move on to discuss the issue of remoteness of claims.

3.1. Multiplication of Claims

In the majority of jurisdictions, municipal company laws preclude a shareholder (save for limited exceptions) to submit a claim on behalf of the corporation in which it owns the shares. This rule stems from the principle of separating the legal identity of shareholders from that of the corporation.\(^\text{88}\) This is also the traditional


\(^{87}\) McIlwrath and Savage supra (n 4) 386-387.

\(^{88}\) Hobér supra (n 3) 347.
rule under customary international law in the context of diplomatic protection as evidenced with *Barcelona Traction*.\(^{89}\)

That notwithstanding, many of the IIAs, as has been demonstrated with the case-law discussion, do not only extend legal standing to direct shareholders in the locally incorporated company, but also to those that own or control the investment *indirectly* by way of a chain of intermediaries. This gives rise to a risk of potential abuses by investors. In the clear majority of investment treaty arbitration cases, the investor is a juridical person in the form of a corporation.\(^{90}\) These corporations are owned by shareholders, who may or may not be juridical persons themselves, with differing nationalities. All of them constitute separate investors and may thus, in principle, initiate independent investment claims in consequence of the same acts and omissions taken by the host State.\(^{91}\) Moreover, in regulating foreign investment, it is not uncommon for States and investors to draw up investment contracts. These contracts may include their own dispute settlement provisions that would offer the possibility of arbitration. In such cases, there is nothing that would bar an investor from instituting an arbitration, both under the arbitration clause provided for in the contract, and in accordance with the standing offer to arbitrate by the State as contained in the relevant IIA.\(^{92}\) The effect of which is, that if an investor holds shares in a local corporation through a chain of intermediaries incorporated in various jurisdictions, - assuming that all of these jurisdictions have entered into Treaties with the host State that protect/do not exclude indirect shareholdings - each and every one of these entities would, generally, be entitled to institute separate arbitration proceedings against the host State under their respective legal instrument, claiming on the basis of the same acts or omissions.

The expansion of Treaty protection to indirect shareholding combined with the lack of coordination between the different bilateral and multilateral instruments – therefore allows different entities within the same corporate structure to bring

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\(^{89}\) *Barcelona Traction* para. 44

\(^{90}\) See to that end for example: the ICSID Caseload – Statistics Special Focus – European Union (April 2016) of the 93 ICSID cases involving an EU member State, 80% were instituted by juridical persons.

\(^{91}\) Schreuer supra (n 2) 1.

\(^{92}\) Tribunals have generally tended to treat the claims or causes of action under the BIT and the Investment Contract as different. See for example *Azurix Corp.*, para. 78.
multiple or parallel claims concerning the same investment and in respect of the same alleged wrongful acts or omissions of the host State. Shareholders and corporations at different levels may as a result, pursue conflicting or competing litigation strategies, which may be difficult to reconcile and coordinate.

An argument may be made that the multiplication of claims increases, or at least, spreads out the investor’s potential of attaining a judgment with a positive outcome: if the investor fails in one forum, the investor may simply try again in another. By the same token, the reverse can be said from the perspective of the State i.e. that the multiplication of claims may spread out the chances of potential loss.

These arguments in the author’s view are however not convincing enough when balanced against the number of drawbacks that uncoordinated and parallel proceedings give rise to. Firstly, multiplication of claims creates increased costs and thereby a waste of dispute settlement resources. Evidently this is true for the host State, parallel or multiple proceedings would impose additional burdens and effects on the State by having to act as Respondent and thereby to defend a virtually identical claim, in multiple proceedings. This would naturally impact the State’s public budget. However, the same holds true from the Claimant’s side, even if the case is instituted by different entities, they would still belong to the same corporate structure. It is therefore not cost-effective from the perspective of either side, to take part in multiple proceedings.

Moreover, parallel or multiple proceedings carry a risk that Tribunals render conflicting or inconsistent awards. That Tribunals reach contradictory and

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93 ibid 346-347.
94 Dolzer and Schreuer supra (n 3), 60.
95 Hobér supra (n 3) 319, 345.
98 Hobér supra (n 3) 345.
99 Kaufmann-Kohler supra (n 88) 6.
100 Hobér supra (n 3) 345-347.
inconsistent awards on virtually identical legal issues and facts, impacts and undermines the credibility and perceived legitimacy of investment treaty arbitration as a system of adjudication.101

This is not mere theoretical speculation: on the issue of multiplication of claims by different shareholders of the same corporate chain, for actions against the same host State, two notable cases come to mind: *Lauder v. Czech Republic*102 and *CME v. Czech Republic*.103 In the former case, Mr. Lauder instituted arbitral proceedings under the United States-Czech Republic BIT104 as he was the controlling shareholder in CME which owned a majority share in a broadcaster incorporated in the Czech Republic. In the latter case, CME, a Dutch incorporated company, brought the case under the Netherlands-Czech Republic BIT.105

Both cases have been often-cited and heavily discussed, and because of the scope of this Thesis, do not require an in-depth discussion of the facts. What is noteworthy to mention is that in these two cases, based on claims arising out of an identical set of facts, the *CME* Tribunal held the Czech Republic liable and awarded damages to the Claimant, whereas the *Lauder* Tribunal held it was not liable to make any compensation payments. Two Tribunals hence reached contradictory findings on matters of fact and law as concerns the same events affecting the investment.

The crux of the problem here is not that both Tribunals rendered conflicting awards. It is not extraordinary under the circumstances for the Tribunals to reach inconsistent decisions from a procedural point of view, particularly given that there is no system of precedent in international arbitration. Rather what these cases illustrate is that the protection of indirect shareholdings hides a risk of investor-treaty shopping, forum shopping and thereby the potential of abuse of

101 Hobér supra (n 3) 538.
102 *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, 3 September 2001 (“Lauder”).
103 *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Final Award, 14 March 2003 (“CME”).
process, which is not easy to remedy. This risk emanates from the broad inclusion of indirect shareholdings as investments covered for protection under the Treaties, without any restrictions. It is hence the inevitable consequence from States that have extended protection – and thereby the possibility to institute arbitral proceedings – not only to those entities that directly made an investment in their territory, but also to all shareholders in corporate structure. As can be witnessed from the Arbitral Practice, without any express restrictions, shareholders in the same corporate chain, enjoy protection.

3.2. Remoteness of Claims

The granting of standing to indirect shareholders has triggered the issue of remoteness between the shareholder and the “real” investment in the company that suffered from adverse measures. Particularly the Respondent States, when faced with an arbitration claim instituted by an indirect investor, call the investment quality of indirect investors into quality when challenging the jurisdiction of the Tribunal. As evidenced by the case-law discussion however, Tribunals have unequivocally rejected these objections and have permitted arbitration claims filed by indirect shareholders.

That notwithstanding, various Tribunals and most noteworthy the Enron Tribunal, have expressed sympathy for the objection by the Respondent States and addressed the “endless chain of claims” concern.

Argentina was concerned that when minority shareholders are allowed to make autonomous investment claims distinct 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

108 See case law discussed and cited in Chapter 2.
company, and so on, could invoke a direct right of action for measures affecting a corporation at the end of the chain.\textsuperscript{109}

In \textit{Enron} the Tribunal concluded that there was 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.’\textsuperscript{110} It reasoned that the formation of such a cut-off point essentially depends on the ‘extent of the consent to arbitration of the host State.’\textsuperscript{111} It found that:

If consent has been given in respect of an investor and an investment, it can be reasonably concluded that the claims brought by such investor are admissible under the treaty. If the consent cannot be considered as extending to another investor or investment, these other claims should then be considered inadmissible as being only remotely connected with the affected company and the scope of the legal system protecting that investment.\textsuperscript{112}

Recent cases show that the question of a “cut-off point” is very much prevalent. The issue of remoteness of claims is however contentious\textsuperscript{113} and for those reasons Tribunals express caution when addressing this topic, or simply refrain, from making any attempt to formulate where and when exactly this point should come into effect. This is not surprising as no universal consensus exists as to when in practice, something would be considered “too remote.”\textsuperscript{114}

In the case of \textit{Noble Energy v. Ecuador}\textsuperscript{115}, the Tribunal did not make any attempt to define the cut-off point, it was however of the view that two intermediate layers would not be sufficient for this point to come into effect. It held in that respect that:

The Tribunal does not disagree with the statement made by the Enron tribunal. There may well be a cut-off point somewhere, and future tribunals may be called upon to define it. In the present case, the need for

\textsuperscript{109} \textit{Enron}, para. 50.
\textsuperscript{110} \textit{Enron}, para. 52.
\textsuperscript{111} ibid para. 52.
\textsuperscript{112} ibid.
\textsuperscript{113} Valasek and Dumberry supra (n 1) 73
\textsuperscript{114} ibid.
\textsuperscript{115} \textit{Noble Energy, Inc. and Machalapower Cia. Ltda. v. The Republic of Ecuador and Consejo Nacional de Electricidad}, ICSID Case No. ARB/05/12, Decision on Jurisdiction, 5 March 2008 (“Noble Energy”).
such a definition does not arise. Indeed, the cut-off point, whatever it may be, is not reached with two intermediate layers. The relationship between the investment and the direct shareholder, on the one hand, and the indirect shareholder, on the other, is not too remote.\footnote{116}

In a later case, that of \textit{Société Générale v. the Dominican Republic},\footnote{117} the Tribunal, as in \textit{Enron}, considered whether there was a need for a “cut-off point”: 

\[
\text{(...) to the effect that a Respondent State cannot be bound by an arbitration agreement extending indefinitely to a chain of investors because one after the other might become claimants without the knowledge of the Respondent’s government.}\footnote{118}
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The Tribunal followed the \textit{Enron} Tribunal’s line of reasoning and noted that although in \textit{Société Générale} the investor’s participation was not specifically sought, the host State was familiar with the investor’s interest to invest and to that end meetings were organised between officials of both the Claimant and the Respondent to discuss the potential investment and prospects of the regulatory framework in the host State.\footnote{119} It furthermore noted, that the broad definition of “investment” under the Treaty, which includes both minority and indirect forms of equity interest ‘necessarily implies that there may be one or several layers of intermediate companies or interests intervening between the [C]laimant and the investment.’\footnote{120} Accordingly, the Tribunal was of the view that there was no need to establish a cut-off point, as the framing of the Treaty provision envisioned scenarios where the connection between the Claimant and the investment flows through different layers of intermediaries. The investment was thus entitled to protection irrespective of the corporate structure.\footnote{121}

In \textit{Phoenix v. Czech Republic}\footnote{122} the Tribunal, in referring to and agreeing with, the same concern voiced by the Tribunal in \textit{Enron}, held that ‘not any minor

\footnotesize{\begin{itemize}
\item \footnote{116} ibid para. 82.
\item \footnote{117} \textit{Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic}, UNCTRAL, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2009 (“\textit{Société Générale}”).
\item \footnote{118} ibid para. 49.
\item \footnote{119} ibid para. 50.
\item \footnote{120} ibid para. 51.
\item \footnote{121} ibid para. 52.
\item \footnote{122} \textit{Phoenix Action, Ltd. v. The Czech Republic}, ICSID Case No. ARB/06/5, Award, 15 April 2009 (“\textit{Phoenix Action}”).
\end{itemize}}
portion of indirectly owned shares should necessarily be considered as an investment.\textsuperscript{123} 

The call for a cut-off point in the investment arbitration jurisprudence shows that Tribunals have identified the practical problem associated with granting powerful rights to indirect shareholders to claim against host States. The way it stands, could lead State Parties to BITs and MITs with broad definitions of investment and investor, to face a multitude of Claimants of which the identity cannot be anticipated. They may for example be fully or partially-owned parent companies, but it may just as well be an infinite number of intermediaries and shareholders, with minimal interests and a remote connection.\textsuperscript{124} The consequent risk for potential abuse of investor rights is evident.

\textsuperscript{123} ibid para. 122.

4. Towards a More Active Role of the State

The preceding Chapter has highlighted some of the legal complexities that stem from the legal developments in extended Treaty protection to indirect shareholdings. This has in many instances led to jurisdictional challenges by Respondents, particularly Argentina\textsuperscript{125}, of the Tribunal’s jurisdiction. States deem it unreasonable to be bound by an arbitration clause, that due to the protection of indirect investments, may give rise to an “endless chain of claims” that have only a remote connection with the affected corporation.

This Chapter will now proceed to provide comments on the need of a cut-off point and propose, considering the proliferation of IIAs, strategies that States could follow with an eye to negotiating future BITs and MITs.

4.1. Cut-Off Point?

To tackle the situation of an ‘endless chain of claims’, most notoriously, the Enron Tribunal introduced the need for a cut-off point. Proponents of the cut-off points, among which Professors Wälde and Sabahi, are of the view that it is ‘essential’ to set a cut-off point.\textsuperscript{126} They draw inspiration from corporate law and deem a minimum shareholding of 10\% an appropriate threshold to be considered eligible for Treaty protection and cut-off ownership beyond that point.\textsuperscript{127}

Professor Schreuer is on the other end of the spectrum. He is of the view that the call for a “cut-off point” for indirect shareholdings is without any legal foundation.\textsuperscript{128} In his view, the issues stemming from multiplications of claims should be dealt with in others ways that do not take away the investor’s legal standing.

\textsuperscript{125} See for example Siemens paras. 136-144., CMS Gas, paras. 59, 66-69., Enron, paras. 43-49. Azurix Corp., paras. 69, 73.

\textsuperscript{126} Wälde and Sabahi supra n (122) 42.

\textsuperscript{127} ibid.

\textsuperscript{128} Schreuer supra (n 2) 13-14.
As pointed out earlier in Section 2.1.3., in ruling that consent was given by the host State to the indirect investors, the Tribunal in Enron noted that the Claimants’ participation in the management of TGS i.e. its decision-making powers. These powers show that the Claimants had certain control or influence over the investment. That the Tribunal factored the degree of control into its decision to grant standing to the indirect shareholder, illustrates a partial deviation from the principle that non-controlling shareholders enjoy protection under investment Treaties. What is more, is that the Tribunal in arriving to its decision, noted that the Claimants’ participation was specifically sought as they were invited by the host State to make the investment. The significance of this invitation by the host State in the context of consent to arbitration, is however conflicting with the idea of “arbitration without privity” as coined by Professor Jan Paulsson. This idea entails that consent to arbitration expressed by host States through Treaties or national laws and regulations, is not subject to any personal relations with the investor. Rather, the idea is that any investor who meets the requisites under the terms of the relevant legal instrument, holds the right to commence arbitral proceedings.

The author is of the view that there is no inherent problem as such, in granting separate legal standing to indirect shareholders, if the relevant IIA supports such a conclusion (i.e. by not explicitly excluding indirect shareholders). An investor derives its access to arbitration by satisfying the definitions of “investor” and “investment” under the relevant instrument. There is therefore no reason, an investor should be deprived of its standing, where the indirect investor falls within the scope of coverage that the State Parties themselves agreed upon. Accordingly, as the Tribunal in ADC v. Hungary eloquently put it: ‘[t]he Tribunal cannot read more into the BIT than one can discern from its plain text.’ Also, as convincingly stated by the Tribunal in Saluka Investments v. the Czech Republic: ‘it is not (emphasis added) open to the Tribunal to add other

129 ibid 13.
131 ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 October 2006.
132 ibid para. 359.
133 Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award, 17 March 2006.
requirements which the parties could themselves have added but which they omitted to add.\textsuperscript{134} In the author’s opinion therefore, those who are ultimately in the “driving seat” to put a stop to the possibility of endless chains through complex multinational corporate structures, are the States themselves.

It is apparent from the objections raised in arbitral case-law that there is a desire from States to limit the possibility of endless claims by investors within complex corporate structures. The author is also of the view that it is in the interest of a fair and efficient arbitral system to avoid remote and unfounded claims by an indefinite number of shareholders. It is therefore argued that with an eye to the future, States should refrain from being “passive bystanders” but instead are to take a pro-active role, to avoid and combat any of the issues. This requires an effort from States in the careful drafting of their IIAs. This would consequently also serve as better guidelines to Tribunals who are now often left to interpret broad and open-ended definitions of “investment” and “investor”. The Arbitral Practice has made it abundantly clear that Tribunals give full effect to these broad notions. Tribunals, bound by their mandate, are not likely to pierce the corporate veil \textit{ex officio} to verify whether the ultimate investor in fact holds the genuine nationality of the home State: as long as the indirect shareholder falls within the scope of coverage of the applicable Treaty, standing is granted. It is therefore in the author’s view necessary for States to pay closer scrutiny from the beginning to the definitions of protected investors and investments as set forth their respective BITs and MITs, with the aim of not indirectly allowing recourse to arbitration for unforeseen investors. Many BITs and MITs are silent on whether indirect investments are covered and leave it therefore up to the Tribunals’ interpretation, which has so far generally been in favour of their inclusion. States may therefore include language that excludes Treaty protection to indirect investments channelled through intermediary companies by requiring that an investment be made \textit{directly} in the territory of the host State. This would significantly narrow the scope of coverage, and for States wishing to attract foreign investment, this may not necessarily be the best solution. Instead they may consider using language requiring an element of active contribution in the definition of investment as in

\textsuperscript{134} ibid para. 341.
Standard Chartered Bank. States may also consider including specific carve-outs in their definition of shares, where shareholders with a share-value of under a certain percentage, may lose out on protection for being too remotely affected.

As far as Tribunals are concerned, the author is of the view that inspiration may be drawn from the Lauder case, in which the Tribunal held that the damage was ‘too remote to qualify as a relevant cause for the harm caused.’ Evaluating whether there exists a reasonable causal link between the wrongdoings complained of and the damages suffered, is an efficient tool to eliminate too remote and frivolous claims by indirect shareholders.

4.2. Denial of Benefits Clause

The author is of the view that another possible attractive solution for States is to consider negotiating a “denial of benefits” clause in their future IIAs. As the name gives away, this clause enables a State party to the relevant IIA, to deny the benefits thereunder, to a foreign investor that has no real economic connection to that State. This economic connection is expressed by substantial business activities in the territory of the State of incorporation or ownership or control by the investor. Several IIAs already contain such clauses, among which the ECT and NAFTA. It is important to note however, that this clause, as it is as present drafted in various IIAs does not create a systematic denial of benefits of Treaty protection to the specified investors. This goes to show already by the very fact that States may refuse or reserve the right to refuse to accord benefits to the investor or not. There is thus great discretion and flexibility on part of the States to exercise their right to deny or confer benefits under the relevant legal instrument. This has important legal implications and has led Tribunals to interpret the effectiveness of these clauses differently. The Tribunals in three relatively recent cases under the ECT, have ruled that the denial of Treaty

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135 Lauder, para. 235.
136 Dolzer and Schreuer supra (n 3), 55.
137 See ECT, Art. 17(1).
138 See NAFTA, Art. 1113.
protection does not have retrospective effect. Consequently, they rejected States’ attempt to exercise their right to deny benefits after an arbitration claim had been initiated. The Tribunal in Plama v. Bulgaria\textsuperscript{140} highlighted that it was important to safeguard legal certainty for investors as before an investment is made, the putative investor has the freedom to choose and plan its investment. Once the investment is made however, the investor falls “hostage” to the host State and accordingly, its choices are much more restricted as it would now be vulnerable to the State’s exercise of the right to deny benefits.\textsuperscript{141} The Tribunal was therefore of the view that it is not in line with the object and purpose of the ECT to give retrospective effect to the State’s exercise. It reasoned that a covered investor needs to enjoy at least the same protection as a putative investor who is able to plan its investment.\textsuperscript{142} The Tribunal found that the State’s exercise of the denial of benefits clause has prospective effect only.\textsuperscript{143} The Tribunals in Yukos v. Russia\textsuperscript{144} and Liman v. Kazakhstan\textsuperscript{145} closely followed the same line of reasoning in Plama and found that under Article 17 of the ECT, a State cannot deny benefits under the Treaty to investors that have already brought a claim.

In contrast, in the cases of Rurelec v. Bolivia\textsuperscript{146} and Pac Rim Cayman v El Salvador\textsuperscript{147}, the Tribunals found that States are not precluded from exercising their rights for the denial of benefits clause retroactively. The Rurelec Tribunal reasoned that it is the very purpose of the denial of benefits clause to give the State the possibility of withdrawing the benefits conferred to investors under the BIT.\textsuperscript{148} The Tribunal noted that the host State’s consent to arbitrate is conditional when a BIT contains a denial of benefits clause.\textsuperscript{149} The Tribunal was of the view

\textsuperscript{140} Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, (“Plama”).
\textsuperscript{141} ibid para. 161.
\textsuperscript{142} ibid para. 162.
\textsuperscript{143} ibid paras. 161-165, 179.
\textsuperscript{144} Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, 30 November 2009, para. 461.
\textsuperscript{145} Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan ICSID Case No. ARB/07/14, Award, 22 June 2010, paras. 224-225.
\textsuperscript{146} Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia, UNCITRAL, PCA Case No. 2011-17, Award (corrected) 31 January 2014, (“Rurelec”).
\textsuperscript{147} Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections, 1 June 2012, (“Pac Rim Cayman”).
\textsuperscript{148} Rurelec, paras. 375-379.
\textsuperscript{149} ibid para. 272.
that a State would usually exercise its right to deny benefits once Treaty benefits were invoked by an investor and held in that respect that it is proper for a State to do so.\textsuperscript{150} This approach was mirrored by the Tribunal in \textit{Pac Rim Cayman}, which allowed El Salvador to exercise its right under the denial of benefits clause \textit{after} the dispute had arisen.\textsuperscript{151}

Ultimately, it again boils down to an interpretation exercise of the Tribunal based on the different wording, effect and context of the provision. In \textit{Plama} the Tribunal looked at the wording of the denial of benefits clause in Article VI under the Association of Southeast Asian Nations (“ASEAN”) Framework Agreement on Services of December 1995. The wording of this provision reads: “the benefits (...) \textit{shall} be denied...” It compared this wording with that of Article 17 of the ECT which reads instead: “[e]ach Contracting Party \textit{reserves the right} to deny the advantages (...)” It held that the permissive language used in Article 17 of the ECT, as opposed to the mandatory and commanding language of “shall”, means that the provision does not automatically come into effect and requires action on part of the denying State.\textsuperscript{152} This conclusion is notwithstanding the Tribunal’s finding in favour of retrospective application in the cases of \textit{Rurelec} and \textit{Pac Rim Cayman}, where the clauses were drafted in (similar) permissible language. In \textit{Rurelec}. Article XII of the US-Bolivia BIT reads “[e]ach Party \textit{reserves the right} to deny (...)” and in \textit{Pac Rim Cayman}, Article 10.12 of the Central America Free Trade Agreement (“CAFTA”) stipulates “[a] Party \textit{may} deny benefits (...)”.

These differences in findings, accentuate the diverging jurisprudence and uncertainties in outcome, with respect to the application of the denial of benefits clause, especially on the question of whether the clause may be applied retrospectively and whether it has automatic effect.\textsuperscript{153} That notwithstanding, the author is of the view, that the inclusion of mandatory and commanding language such as “\textit{shall}” is likely to be interpreted in a manner that would resolve the temporal effect of a denial of benefits clause. This because, the clause would

\textsuperscript{150} ibid para. 378.
\textsuperscript{151} \textit{Pac Rim Cayman}. paras. 4.83-4.92.
\textsuperscript{152} \textit{Plama}, para. 156.
automatically come into effect, once the investment is made. The importance of safeguarding investors’ expectations as the Tribunal in *Plama* stressed, would therefore not be compromised, as the denial of benefits clause would make it clear, that once the conditions of its application are satisfied, the investor is not eligible for Treaty protection.

The downside of framing a provision in a manner that provides for this automatic effect is however, that a State would lose its discretion in deciding not to deny Treaty benefits, even where the conditions of application of the clause are otherwise satisfied. Arguably, this discretionary power is one of the main appeals in the decision of States to include a denial of benefits clause in an IIA. This could be a reason why these clauses are negotiated, as opposed to including narrower scope provisions or narrower definitions of “investment” and “investor”.154 States that wish to maintain their discretionary position, could instead make use of language that provides for a retrospective application of the denial of benefits clause. This formulation would then make explicit, that an arbitration claim filed *before* the denial of Treaty benefits, would be unsuccessful for lack of jurisdiction *ratione personae*.155

In determining whether to insert such a clarification to the denial of benefits clause with an eye to future IIAs, States would need to evaluate the trend and possibility of future Tribunals following the same interpretation approach as that of *Plama* and mirrored by Tribunals since, against the policy objective of combatting potential investor-treaty shopping by entities down the same corporate chain.

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155 ibid 245-256.
5. Concluding Remarks

What this Thesis has sought to demonstrate, is that shareholder protection under international law since *Barcelona Traction*, has significantly developed. In response to the continuous evolutions and the emergence of a new investment environment with the proliferation of IIAs, shareholder protection has significantly increased. This is to the benefit of both investors and host States: investors as they have an efficient mechanism to claim against a host State in case of any disturbances to their investment, and host States benefit by attracting and promoting investment in their territories.

Nevertheless, one cannot disregard that Tribunals have been granting shareholder protection expansively by awarding indirect shareholdings *locus standi* based on broad definitions found in BITs and MITs. Arbitral Practice has demonstrated that it does not matter whether the indirect shareholder holds shares in an intermediate, has the nationality of the home State, host State or even that of a third State. Tribunals have repeatedly endorsed the view that investments may be structured through several corporate layers. It has also been generally agreed among Tribunals that, unless explicitly excluded, indirect investments enjoy protection under IIAs, also in instances where the Treaty does not specify whether indirect investments qualify for protection. Tribunals have, to that end routinely found that the inclusion of broad asset-based definitions in the relevant legal instrument, is to be interpreted as meaning that indirect investments fall under the scope of coverage.

The growing number of IIAs and the broad interpretations of the notions “investment” and “investor” under these instruments, has made it possible for different entities along the same corporate chain, to have recourse to arbitration. This is well demonstrated with the *CME/Lauder*-saga where in both cases against the Czech Republic, the “different” Claimants were in fact linked: the direct investor *CME* and the indirect investor, *Lauder*, who then instituted arbitration proceedings for the same investment, under different BITs, regarding an identical set of facts.
By extending Treaty protection to all shareholders of different levels within the same corporate structure, the risk of potential abuse of the investment treaty arbitration system, exists. For these reasons, Tribunals have recognised the need for a point, where certain investors that have only a very remote connection to the affected company, should be ‘cut-off’.

It has not been argued in this Thesis that due to this possibility of a multitude of claims and the consequent risk of potential abuse, that legal protection should in its entirety be denied to indirect shareholders. Rather, the author is of the view that States who often raise the jurisdictional objection of an “endless chain of claims” possibility, should take action to prevent such phenomenon from occurring. By taking the upper hand, much of the undesired consequences may be controlled.

Facing the next rounds of BIT and MIT negotiations, States should consider the developments in shareholder protection, and consider including language to that effect. In doing so, they may include provisions excluding the protection of indirect investments, include specific carve-outs including minimum size and value requirements for shares, include language requiring active contribution following the Standard Chartered Bank award and lastly, it has been proposed that they may include a denial of benefits clause that would allow States to deny benefits to certain types of investors. These with the aim of combatting frivolous and too remote claims.

In conclusion, the way in which Treaty provisions are framed, is an essential determinant for a Tribunal’s findings. This highlights the importance of balanced and careful drafting of Treaties. The underlying message of this Thesis is therefore that serious attention is required by States, as the key actors at the IIA negotiation tables, when drafting future Treaties. Given the growing number of BITs and MITs. Such effort is necessary, in the interest of a fair and efficient system for the settlement of international investment disputes.
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Appendix A: Article 31 and 32 of the Vienna Convention on the Law of Treaties

Article 31
General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
   (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32
Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
   (a) leaves the meaning ambiguous or obscure; or
   (b) leads to a result which is manifestly absurd or unreasonable.