Knocking on Arbitrators' Doors: Legal standing of controlled entities in investment treaty arbitration

Kloppen op de deuren van arbiters: de juridische status van gecontroleerde entiteiten in de context van investeringsarbitrage

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Anran Zhang

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Promotoren:	Prof. dr. M. G. Faure LL.M Prof. dr. Y. Li
Overige leden:	Prof. dr. M. W. Scheltema Prof. dr. G. J. Meijer Prof. dr. F. Baetens

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TABLE OF CONTENTS

LIST OF ABBREVIATIONS

AI	Artificial Intelligence
BIT	Bilateral Investment Treaty
BUCG	Beijing Urban Construction Group Co., LTD
CAFTA	The US-Dominican Republic-Central America Free Trade Agreement
CBQ	China Heilongjiang International Economic & Technical Cooperative Corp., Beijing Shougang Mining Investment Company Ltd., and Qinhuangdaoshi Qinlong International Industrial Co. Ltd.
CETA	The Comprehensive Economic and Trade Agreement between the EU and Canada
CFA	Corporate Framework Agreement
CIETAC	China International Economic and Trade Arbitration Commission
CL	Company Law
CNC	The National Commission of Telecommunications of the Argentine Republic
CPTPP	The Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CSOB	Ceskoslovenska Obchodini Banka A.S
CUP	Cambridge University Press
DA	The Draft Articles on the Responsibility of States for Internationally Wrongful Acts
DoB	Denial of Benefits
EC	European Commission
ECT	Energy Charter Treaty
EPA	Economic Partnership Agreement
EU	European Union
EUSFTA	The EU-Singapore Trade and Investment Agreements
EUSIPA	EU-Singapore Investment Protection Agreement
FCJV	The Sino-Foreign Contractual Joint Ventures Law
FEJV	The Sino-Foreign Equity Joint Ventures Law
FDI	Foreign Direct Investment
FIL	Foreign Investment Law
FOE	The Wholly Foreign-Owned Enterprises Law
FTA	Free Trade Agreement
GSB	Guangzhou Salvage Bureau

GATT	The General Agreement on Tariffs and Trade
ICJ	International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Dispute between States and Nationals of other States
ILC	International Law Commission
IIA	International Investment Arbitration
IIT	International Investment Treaty
IMF	International Monetary Fund
ITA	Investment Treaty Arbitration
IPO	Initial Public Offering
ISDS	Investor-State Dispute Settlement
MIT	Multilateral Investment Treaty
MOE	Ministry of Education
MOFCOM	Ministry of Commerce
NAFTA	The North American Free Trade Agreement
NDRC	The National Development and Reform Commission
OECD	Organization for Economic Co-operation and Development
OUP	Oxford University Press
PCA	Permanent Court of Arbitration
PITAD	The PluriCourts Investment Treaty Arbitration Database
PMA	Philip Morris Asia
PML	Philip Morris Limited
PRC	People's Republic of China
SCE	State-Controlled Enterprise
SOE	State-Owned Enterprise
SCC	Stockholm Chamber of Commerce
SRL	Shareholder Reflective Loss
TIP	Treaty with Investment Provisions
TPP	The Trans-Pacific Partnership
TTIP	The Transatlantic Trade and Investment Partnership
UK	The United Kingdom
UN	The United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
US	The United States
USMCA	The US-Mexico-Canada Agreement
VCLT	The Vienna Convention on the Law of Treaties
VIE	Variable Interests Entity
WFE	Wholly Foreign Controlled/Owned Enterprise
WFCE	Wholly Foreign Controlled Enterprise
WFOE	Wholly Foreign Owned Enterprise
WWI	World War One
WWII	World War Two

FIGURES AND TABLES

Figures

Table

CHAPTER 1 INTRODUCTION

1. Research Background

Foreign investment is a significant catalyst for international economic and global development. It is broadly defined as "a transfer of funds or materials from one country to another country in return for direct or indirect participation in the earnings of that enterprise."[1] Foreign investment usually displays in two senses: firstly, the process or transaction and secondly, an asset acquired as a result of investing.[2] Foreign investment can take many different forms, and this diversity is continually developing to meet new economic situations.[3]

Based on international investment treaties (IITs), investment treaty arbitration (ITA) provides an international remedy regime for foreign investment in the territory of a host State. To gain access to this regime, one key concern is the question of whose investments are under protection. Jurisdiction *ratione personae* is therefore essential in ITA. The definition of investors in IITs sets the scope for applying *rationae personae*.[4] The definition issue is critical to deciding the scope of application of rights and obligations of IITs. It is also important for arbitral tribunals to establish their jurisdiction in ITA.[5] The term "investor" is typically defined by reference to the nationality of the investor.[6] The investor's nationality is critical in two aspects. Firstly, a treaty will only guarantee substantive protection to the respective nationals that fall into the scope of the treaty protection. Secondly, the claimant's nationality determines the jurisdiction of international arbitral tribunals.[7]

Investors are usually either natural persons or juridical persons/legal entities.[8] "Legal

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[1] *Encyclopedia of Public International* Law (Vol.8), 246.
[2] Jeswald W. Salacuse, *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital* (OUP 2013) 3.
[3] *Ibid*, 4.
[4] Katia Yannaca-Small, 'Who is Entitled to Claim? Definition of Nationality in Investment Arbitration' in Katia Yannaca-Small (ed) *Arbitration under International Investment Agreements* (2nd edn, OUP 2018) 223.
[5] OECD, 'Definition of Investor and Investment in International Investment Agreements' in *International Investment Law: Understanding Concepts and Tracking Innovations* (OECD 2008) 1.
[6] Anthony C. Sinclair, 'The Substance of Nationality Requirements in Investment Treaty Arbitration' (2005) 20 ICSID Review-Foreign Investment Law Journal 357, 358.
[7] Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 45.
[8] *Ibid*, 44. According to the juridical classification, persons consist of natural persons and judicial persons. A natural person refers to a human being who is capable of assuming obligations and holding

entities" refer to all the "non-human" entities which are created by law in contradistinction to "natural persons". This thesis covers all these legal entities, both companies and ventures. The law of the home state in which the nationality is issued is the primary meas of determining the nationality of an individual.[9] However, when it comes to juridical persons/legal entities, the law of the home state is not the only criterion to determine the nationality. The nationality of legal entities has several supplementary criteria, stemming from both the law of the home state and international treaties; thus, determining nationality is considerably more complicated than it is for individuals.[10] To qualify as a claimant in ITA, a legal entity must have the nationality of one contracting state in accordance with the nationality test prescribed in the applicable investment protection treaty.[11] In certain circumstances, domestic rules on nationality also regulate the nationality issue.[12] Although international investment law does not provide pertinent rules, it widely accepts that the nationality of a legal entity is governed by the place of its incorporation or registration on the basis of relevant domestic law.[13]

Companies as one main type of legal entity had no nationality at the beginning of the last century.[14] With the development of global trade and investment, the structures of companies have become increasingly comprehensive. Consequently, using specific criteria to identify the nationality of companies has become necessary. Nowadays, companies consist of layers of shareholders. Some companies consist of or operate with many international companies to enhance their business, and some complicate their company structures for tax, economic, and occasionally political purposes. International companies establish links between different economic entities in the form of "control" relations, which allow one entity to exercise control power over another entity. A series of control relations formulate complicated structures of legal entities. Added to this, joint ventures also play a role in international investment. A joint venture is created to be an association of two or more natural or legal entities to carry on as co-owners of an enterprise, venture, or operation for the duration of a particular transaction

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rights; a juridical person means the entity endowed with juridical personality and is known as a collective person, social person, or legal entity. Accordingly, the term "entity" is used when referring to the juridical person. See at Elvia Arcelia Quintana Adriano, 'The Natural Person, Legal Entity or Juridical Person and Juridical Personality' (2015) 4 Penn State Journal of Law & International Affairs 363, 366.

[9] In this research, "juridical person" and "legal entity" have the same meaning.

[10] Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 47. Katia Yannaca-Small, 'Who is Entitled to Claim?: Definition of Nationality in Investment Arbitration' in Katia Yannaca-Small (ed) *Arbitration under International Investment Agreements* (2nd edn, OUP 2018) 223, 223.

[11] Zachary Douglas, *The International Law of Investment Claims* (CUP 2009) 285.

[12] Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 12.

[13] Rainer Hofmann, 'The Protection of Individuals under Public International Law' in Marc Bungenberg, Jorn Giebel, Stephan Hobe, and August Reinisch (eds) *International Investment Law: A Handbook* (Hart Publishing 2015) 46, 61.

[14] 'Protection of Shareholder Interests in Foreign Corporations-Barcelona Traction Revisited' (1972) 41 Fordham Law Review 394, 402.

or series of transactions.[15] It is a complicated issue to determine the nationality of these entities, when they emerge in ITA.

In ITA, a claimant should meet the conditions on nationality in the instrument of IITs, as well as the objective requirements of the Convention on the Settlement of Investment Dispute between States and Nationals of Other States (the ICSID Convention) where applicable. [16] IITs including Bilateral Investment Treaties (BITs), Multilateral Investment Treaties (MITs), and Treaties with Investment Provisions (TIPs) apply no single criterion or test to define the link required between legal entities which seek protection under the treaty and the Contracting States from which the investor asks for protection.[17] Moreover, the ICSID Convention is a multilateral treaty which establishes the framework for investor-State dispute settlement (ISDS), including ITA. However, the ICSID Convention does not give a specific definition of the nationality, either. [18]

Since the law does not give a straightforward and coherent direction, the legal issues concerning the examination of the nationality have been highly debated in ITA. The issue concerning the nationality of the investor and the investor's accessibility appeared in the first BIT arbitration, *AAPL v. Sri Lanka*.[19] Since then, more than 600 known treaty-based investor-State arbitrations have been concluded, and in the majority of investor-State arbitration awards or decisions, arbitral tribunals discussed issues concerning the nationality of foreign investors.[20] In addition, the issue of the access of

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[15] Joseph Taubman, 'What Constitutes a Joint Venture' (1956) 41 Cornell Law Review 640, 641.

[16] Anthony C. Sinclair, 'The Substance of Nationality Requirements in ITA' (2005) 20 *ICSID Review - Foreign Investment Law Journal* 357, 360. The ICSID Convention is short for the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. The International Centre for Settlement of Investment Disputes (ICSID or the Centre) was established by the Convention.

[17] Katia Yannaca-Small, 'Who is Entitled to Claim? : Definition of Nationality in Investment Arbitration' in Katia Yannaca-Small (ed) *Arbitration under International Investment Agreements* (OUP 2018) 223, 234.

[18] Aron Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (1972) 136 *Recueil des Cours de l'Académie de Droit International* 331-361.

[19] Campbell McLachlan QC, Laurence Shore and Matthew Weiniger, *International Investment Arbitration, Substantive Principles* (OUP 2008) 185. *Asian Agricultural Products Ltd v. Republic of Sri Lanka*, ICSID Case No. 87/3, Award (27 June 1990) [hereinafter "AAPL case"]. In this case, a dispute was about whether the claimant (AAPL), a Hong Kong company, holding 48% of shares in a Sri Lankan company could bring its claim for the loss. The BIT arbitration means an investment arbitration based on a BIT.

[20] According to the Investment Dispute Settlement Navigator subject to the UNCTAD database, the total number of the known treaty-based investor-State arbitrations is 1023, and 674 of them were concluded. Available at here UNCTAD, 'International Investment Agreement Navigator' < https://investmentpolicy.unctad.org/investment-dispute-settlement.> (also known as "UNCTAD Mapping Project"). According to the Investor-State Law Guide (ISLG), the guide searched for all instances where the searched term or phrase matches the names of decisions and awards found under the jurisprudence citator and found 450 awards/decisions by using the keyword "nationality". The ISLG is a "contextual and intuitive research tool in all available documentation on the website linking to specific passages of decisions/documents discussion concerning a particular issue, prior decisions or specific legal instrument." Read at Julien Fouret, 'A Practical Guide: Research Tools in International Investment Law' in Katia Yannaca-Small (ed) *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (2nd edn, OUP 2018) 823, 825. **All the data and websites cited in this research are as of the date of submission (July 2020).**

foreign investors to ITA has also emerged as one of the essential points discussed by arbitrators in recent years.[21] Nevertheless, arbitral tribunals usually resolve issues using distinctive approaches.[22]

In this regard, this thesis contributes by providing a comprehensive study of the standing of legal entities when they gain access to ITA. This thesis identifies four different types of entities, the status of which lies behind the majority of legal challenges to ITA.

2. Research Scope

2.1 Four Groups of Legal Entities Studied in this Research

This research covers, as extensively as possible, the jurisdictional issues raised when legal entities gain access to ITA. The entities studied include (1) the entities under the control of other entities in a company chain, (2) shareholders in the companies, and (3) state-owned enterprises or state-controlled enterprises (SOEs/SCEs). These three types of legal entity present critical aspects concerning the access of company investors to ITA. In addition to these three legal entities, this research will also discover the standing of a new type of entity: variable interest entity (VIE).[23] The VIE structure is a consolidation model as opposed to the voting interest entity model.[24] The VIE structure is created by entities to gain access to the market of the host State without violating its prohibition and restriction towards the foreign capital. However, this model is not legalised in some jurisdictions. When these entities bring claims to ITA, they are required to be legally established in accordance with the law of the home states. Consequently, the requirement raises challenges that the legitimacy of these entities will influence their access to ITA. Although there is no case in ITA to address the standing of some entities, disputes may still arise as a result of their complicated and particular corporate structures.

Four different groups of legal entity will be analysed due to the following reasons. In general, there are two main categories of legal entity that join international investment:

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[21] Gus Van Harten, 'Leaders in the Expansive and Restrictive Interpretation of Investment Treaties: A Descriptive Study of ISDS Awards to 2010' (2018) 29 European Journal of International Law 507, 514.

[22] *Ibid*.

[23] Deloitte, 'Road Map Series' (10 December 2015) <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/audit/ASC/Roadmaps/us-aers-roadmap-consolidation-12102015.pdf > 5 -7. The concept of the "Variable Interest Entities" ("VIEs") comes originally from the US, by using which companies operate this structure to list on the New York Stock Exchange (NYSE), NASDAQ, or the American Stock Exchange (ASE). The US Accounting Standards Codification (ASC) 810-10 indicates that a legal entity is considered to be a VIE if it has any one of the following characteristics, "

1. The legal entity does not have sufficient equity investment at risk;
2. The equity investors at risk, as a group, lack the characteristics of controlling financial interest;
3. The entity is structured with disproportionate voting rights, and substantially all of the activities are conducted on behalf of an investor with disproportionately few voting rights."

[24] *Ibid*.

private legal entities, and legal entities of a sovereign nature.[25] Therefore, this thesis will firstly address the legal status of private legal entities in ITA, and secondly, turn to examine the legal entities of a sovereign nature, namely SOEs.

Private legal entities might establish links with each other by holding equity or signing contracts. Equity-based corporate groups and contract-based corporate groups are the leading groups in international investment.[26] In addition, equity-based companies usually consist of two different groups of entity. The first group is the controlling entity which exercises control by holding controlling power over other entities and those entities under the control of other entities. The second group is the non-controlling entity, which usually comprises shareholders with non-controlling power over other entities. Added to these, contract-based corporate groups also play their respective roles in international investment. In contract-based corporate groups, entities establish links with each other in the ways of contracts or methods other than equity. VIEs are the representative groups.

In sum, this thesis classes different legal entities in relation to the term "control" in order to conduct analyses. Consequently, the next section will define control as used in this thesis.

2.2 Defining "Control" to Establish Chapter Links

These classes of entity have close relations with each other. Business entities expand their business and establish links with other entities in the form of a "control" relation, which allows one entity to exercise power over another entity. A series of control relations formulate complicated structures of legal entities. The "control" relationship between different entities constitutes one of the forms of foreign investment. To be specific, foreign investment usually attributes two basic forms: the property and contractual rights resulting from the investment and the control attributes of the

[25] Peter T. Muchlinski, *Multinational Enterprises & The Law* (2nd edn, OUP 2007) 52. The author made these classification by referring to, RE Tindall, *Multinational Enterprises* (Dobbs Ferry: Oceana, 1975) ch 4; CM Schmitthoff 'The Multinational Enterprise in the United Kingdom' in HR Hahlo, J Graham Smith and RW Wright (eds) *Nationalism and Multinational Enterprise* (Sijthoff/Oceana, 1977) 22-38; Leo D'Arcy, Carole Murray & Barbara Cleave, *Schmitthoff's Export Trade* (London: Sweet & Maxwell, 10th edn, 2000) part 8; Cynthia Day Wallace, *Legal Control of the Multinational Enterprise* (Martinus Nijhoff 1983) 13-16. International organisations also have international legal personalities and always appear in the fields of international investment in relation to banking and finance. Supranational banks, including the World Bank, the Asian Development Bank, the Asian Infrastructure Investment Bank, and International Finance Corporation take active parts in international investment through loans and equity participation. These banks and organisations provide loans, credits, and grants to developing countries to reduce poverty and support development. As these international organisations do not act either as the investors or the controller of other companies or are under the control of other entities, this research does not focus on these organisations.

[26] Peter T. Muchlinski, *Multinational Enterprises & The Law* (2nd edn, OUP 2007) 52.

investment.[27] Firstly, it is common to see that foreign investors make an investment by gaining equity or debt in domestic companies. In addition, a control relationship always applies. To be specific, such an investment relates to the extent of investors' legal rights to control the underlying enterprises or assets in which the investment was made.[28]

In the corporate system, the phenomenon of "control" refers to the capacity to choose directors, influence or dominate the board of directors. Control has been regarded as a function of the ownership of voting shares.[29] There are two discernible types of control: the first type is "absolute control" which is equity-based control and exists when a single owner or a few shareholders act together to hold a majority of voting stock.[30] Controlling shareholders are usually majority shareholders behind the company. However, this is not absolute. The distinction between being controlling shareholders and being majority shareholders depends on which kinds of shares are held in the company. If this company applies the rule, ownership of the voting stock equates with the ownership of shares in the company. In this sense, shareholders with relatively majority shares of the company are the controllers of the company.[31] As a bedrock principle of Anglo-Saxon corporate governance, the *one-share-one-vote* rule means that a shareholder in a company has one vote per share of the company equally with other shareholders.[32] In other words, shareholders who supply equal amounts of capital should have equal opportunities to influence decisions.[33]

However, companies may deviate from this principle, and the members of votes are not equal to the numbers of shares. In this so-called *dual-class share* system, the company separates the equity power and voting power, and such a separation allows insiders of the company to retain majority voting control while owning a minority of its shares.[34]

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[27] Jeswald W. Salacuse, *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital* (OUP 2013) 3. Salacuse catalogues the investment into three main forms, and compared with this research, Salacuse adds a third form, the enterprise forms. Salacuse states that the enterprise or asset may be owned directly by the separate legal entity in which the investor has an equity interest. This asset might be considered by this research as a branch of the investor. Alternatively, if "the asset or enterprise might be owned by a separate legal entity all of whose shares are in turn owned by the investor", the investment is in the form of a subsidiary of the investor. However, this research holds that, either way, control attitude always applies.

[28] *Ibid*, 5.

[29] Adolf A. Berle, Jr, ' "Control" in Corporate Law' (1958) 58 Columbia Law Review 1212, 1213.

[30] *Ibid*.

[31] *Ibid*. For instance, a single shareholder or a compact group become the apparent controller by holding more than 51% of the ownership of the voting stock. Alternatively, if this sole shareholder or this group holds somewhat fewer shares (less than 50 % of the ownership of the voting stock) and the rest of the shares are held among many small voting shareholders, this single shareholder or the compact group is still determined as the controller. In this situation, this sole shareholder or this group is still the relatively controlling shareholder in comparison with other shareholders.

[32] Harry G. Henn, *Handbook of the Law of Corporations and Other Business Enterprises* (West Publishing 1961) 291. Simon C.Y. Wong, 'Rethinking 'One Share, One Vote'" *Harvard Business Review* (29 January 2013) <https://hbr.org/2013/01/rethinking-one-share-one-vote >.

[33] Mike Burkart and Samuel Lee, 'One Share- One Vote: The Theory' (2008) 12 Review of Finance 1,1.

[34] Joel Seligman, 'Equal Protection in Shareholder Voting Rights: The One Common Share, One Vote Controversy.' (1985) 54 George Washington Law Review 687, 687; Kate Bentel and Gabriel Walter, 'Dual Class Shares' (2016) Comparative Corporate Governance and Financial Regulation 17.

The first class of shares still apply the *one-share-one-vote* principle, but the second class of shares issue voting stock with different voting power. With regard to the respective articles of association in different companies, shares issued by the companies give multiple votes or no vote per unit of par value.[35] In this sense, majority shareholders are not bound to be the controllers, and conversely, minority shareholders might act as the controllers by holding majority voting stock. As a result, to become a controller of a company, the controlling shareholder needs to hold enough voting shares to exercise control over the company.

Apart from the absolute control mentioned above, the second type of control is the "working control" which is not entirely equity-based and involves other factual elements.[36] This factual element refers to the capacity to mobilise other shareholders through methods other than holding majority voting equity. Working control commonly exists where a small group of shareholders, or single shareholder with a substantial minority interest, has a readily available method to make decisions on behalf of the company.[37] With this approach, the controller can have its control power such as the rights of voting and the rights of choosing the directors or other significant matters within the company. A contractual agreement may help to establish a control relationship between entities, and this agreement grants absolute power to the controller over another company without asking the controller to hold a majority voting power. Such a contractual control bypasses the rules in some jurisdictions, which prohibits foreign companies from holding majority equities over a domestic company in some industrial fields.

In summary; the concept of "control" in this thesis refers to (1) holding more than 50% share of the voting powers in the company, or (2) holding less than 50% share of the voting power but having an influential power over the company. In certain circumstances, this control power might be established based on contracts.

With this in mind, the first coded legal entity discussed in Chapter 3 is the entity under the control of its controllers; usually, those holding the majority voting power of that entity. Chapter 4 also focuses on the second coded legal entity which is the shareholders in the company. The third coded legal entity, discussed in Chapter 5 is SOEs, whose controllers are sovereign states. The fourth coded legal entity is the VIE, which will be examined in Chapter 6.

3. Research Questions

This thesis aims to answer the core question: *How should the access of various types of*

[35] Iss Europe, Shearman&Sterling, European Corporate Governance Institute, 'Report on the Proportionality Principle in the European Union' (External Report Commissioned by the European Commission) (2017) 7.
[36] Adolf A. Berle, Jr, ' "Control" in Corporate Law' (1958) 58 Columbia Law Review 1212, 1213.
[37] *Ibid*.

legal entity to ITA be determined?

This core research question could be elaborated into the following sub-questions:

Firstly: *From a general perspective: How can a legal entity be qualified as a foreign investor in order to gain access to ITA?* The access to ITA guarantees the premier conditions for foreign investors to acquire substantive protection in accordance with IITs. However, to what extent should international investment law regulate the access of legal entities to arbitration? Why does this thesis select three types of entity to make the analyses? What happens if arbitral tribunals give overly expansive or restrictive access to foreign investors in ITA? What detriments or perils will be brought to the international investment and ISDS regime if unfair access is granted? To answer these questions, this thesis will draw particular attention to the feature of ISDS and the general principle of ITA within Chapter 2 as this contains the theoretical framework.

Secondly: *How does the current ISDS regime regulate the access of foreign investors?* IITs are the legal sources of international investment law and the ISDS regime. ITA is a dominating part of the ISDS regime. How do IITs set requirements on the nationality of investors, especially corporate investors? How do IITs guarantee the access of ITA to investors? How are the provisions of IITs, concerning the accessibility of foreign investors, inputted and interpreted? To answer these questions, this thesis maintains that the legal concerns arise because of the blurred provisions in IITs. Therefore, this thesis will analyse the provisions of IITs in the content of each chapter.

Thirdly: *How does the current ISDS case law rule on the access of foreign investors?* This thesis conducts its analysis based on fact rather than perceptions. How do arbitral tribunals discuss the disputes concerning access? How do IITs function in practice? What is the position of arbitral tribunals, expansive, restrictive, or neutral? Which elements are taken into consideration by arbitral tribunals? Is there any other element that arbitral tribunals fail to analyse in their discussions? How can practices of arbitral tribunals contribute to the international investment protection regime? This thesis will investigate the case law of ITA in the content of each chapter to answer the questions mentioned above.

4. Research Objectives

To answer these questions, this thesis aims at approaching an analytical framework concerning the access of juridical persons to ITA.

Firstly, the analyses propose a comprehensive understanding of how to determine the legal status of legal entities in ITA. This thesis will examine applicable law in ITA and arbitration practice to point out the existing legal concerns.

Secondly, this thesis provides a systematic inventory of the accessibility of various legal entities in ITA. The frameworks of these coded entities are different, and the disputes on the access of these entities in ITA, therefore, arise from different disputes. However, these separate coded legal entities link with each other because all these entities relate to the issue of "control" criterion in ITA. Consequently, by examining the accessibility of these coded entities, this thesis also aims to provide a clear picture of the application and interpretation of the term "control." This thesis aspires to elaborate the arbitration practice in ITA concerning the determination of the access to the arbitration of the legal entities classed in this thesis.

Thirdly, ITA brings nearly two decades of case law practice to discover the legal disputes in the existing ISDS system. The ISDS system has met a growing legitimacy crisis. One of the challenges relates to the expansive and contradictory interpretation of the treaty provisions by arbitral tribunals. The crisis over access to arbitration is one of the representative circumstances. Consequently, this thesis gives timely suggestions to arbitral tribunals by offering comprehensive methods to determine the legal standing of investors. Added to this, the existing and potential challenges arising from the accessibility of foreign investors should be factored into the consideration of future IITs. As a result, this thesis also gives recommendations for future IIT negotiations by incorporating ITA practice.

5. Research Methodology

This research is undertaken throughout doctrinal legal research, including the study of legal propositions and the study of case law. Throughout legal reasoning or rational deduction, doctrinal research involves an analysis of case law, a study of legal institutions, arranging, ordering and systematising legal propositions.[38]

To answer the research questions and achieve the research goals, a theoretical framework will first be established. Then, based on a case study, the content chapters will discuss the legal disputes concerning the standing of the classed entities respectively. By using the theory presented, each chapter will test the arbitration practice and make a comparison where it is necessary. Such an approach intends to discover how arbitral tribunals conclude their jurisdiction, and which factors are considered by arbitral tribunals.

5.1 Establishing Theoretical Framework

The analyses of legal propositions and legal concepts are the foundation of doctrinal research. Such a research method helps to predict future development and explain the

[38] S.N. Jain, 'Doctrinal and Non-Doctrinal Legal Research' (1982) 24 Journal of the Indian Law Institute 341, 341.

areas of difficulty.[39] Throughout the analyses, this thesis provides systematic expositions of rules which are applied in ITA. In consequence, it will gather the rules in the context of international investment arbitration, including international treaties and domestic laws. To be specific, the relevant legal propositions in this thesis are international treaties and domestic laws related to the standing of legal entities. The research collects sources from legislation, regulations, guidance, official reports, historical preparation material, and literature. Based on these legal sources, this thesis will start to build its theoretical framework. The framework intends to portray the ISDS mechanism so as to provide essential criteria for use in the content chapters.

Hypotheses also play an important role in doctrinal research.[40] To start the research, hypotheses provide clarity in establishing the research question. By making a tentative assumption, the research can draw out and test the normative, logical and empirical consequences.[41] This thesis will further point out hypothetical questions to advance the current practice concerning foreign investor access to ITA. In addition, this thesis will present relevant legal issues so to discover potential disputes that may arise in the future.

5.2 Studying Case Law

This thesis will undertake its main analysis through case studies. Cardozo held that case law brought creativity to the law after the legal propositions were made.[42] He also quoted Munroe Smith who proposed, "the rules of principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the court of justice."[43] In consequence, having a theoretical framework, this thesis will discover how legal disputes concerning the standing of entities arise in investment arbitration practice.

In ITA, arbitral tribunals frequently cite, use and analyse the rulings of the predecessors as the principal authority for the rules of international law on which they base their awards.[44] Such an approach is generally regarded as the rule of precedent.[45] However,

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[39] Vijay M Gawas, 'Doctrinal Legal Research Method a Guiding Principle in Reforming the Law and Legal System Towards the Research Development' (2017) 3 International Journal of Law 128, 130.
[40] *Ibid*.
[41] Kevin D.Ashley, 'Hypothesis Formation and Testing in Legal Argument' (2006) 3 < https://pdfs.semanticscholar.org/344b/3be431605564220b49fc7a4d242ad0f2813b.pdf >.
[42] Benhamin N.Cardozo, *The Nature of the Juridical Process* (Yale University Press 1921) 23.
[43] Quated in *The Nature of the Juridical Process* (Yale University Press 1921) 23.
[44] Patrick M Norton, 'The Role of Precedent in the Development of International Investment Law', (2018) 33 ICSID Review – Foreign Investment Law Journal 280, 281. Julien Fouret, 'A Practical Guide: Research Tools in International Investment Law' in Katia Yannaca-Small (ed) *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (2nd edn, OUP 2018) 823, 823.
[45] Jan Paulsson, 'The Role of Precedent in ITA' in Katia Yannaca-Small (ed) *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (2nd edn, OUP 2018) 81, 81. This practice has also been named as (1) 'de facto system of precedent' by Roland Kla¨ger, *Fair and Equitable Treatment in International Investment Law* (CUP 2011) 35; Lucy Reed, 'The De Facto Precedent Regime in Investment Arbitration: A Case for Proactive Case Management' (2010) 25 ICSID Review-Foreign

the rule of precedent usually requires a supreme court authorised to impose or modify a rule on inferior courts, but in ITA, each arbitral tribunal is independent of others and no different levels exist between different arbitral tribunals.[46] Thus, it has been alleged that there is no rule of precedent in ITA and earlier decisions do not automatically bind the present arbitral tribunal.[47] However, no matter what role case law played in ITA, numerous arbitral awards contribute to the development of international investment law, as well as ITA. The analysis of various arbitration decisions will give a comprehensive picture to understand the issues in dispute.

Arbitral tribunals may discuss similar cases and similar disputes in different ways. The overlapping discussions result in consistency in arbitral decision-making, which is conducive to the development of norms.[48] Consistent decisions establish the common positions of arbitral tribunals on disputed issues. Nevertheless, arbitral tribunals may also have more than one way to examine the problem and do not have a concrete rule of decision. Inconsistent decisions enlighten the issues that are the subject of intense and legitimate debate.[49] More critical distinguishing features may be addressed by different arbitral tribunals, whose analyses improve the understanding of the issues in dispute. As a consequence, ITA case law can investigate the core disputes in the existing international investment law as well as investigate the solution of the disputes in the arbitration process.

Firstly, the research is largely based on international investment arbitration cases. This thesis includes mostly institutional arbitration cases as well as some ad hoc arbitration cases.[50] The majority of investment arbitration cases were brought under the ICSID

Investment Law Journal 95;or (2) 'jurisprudence constante' Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse?' (2007) 23 Arbitration International 357; Andrea Bjorklund, 'Investment Treaty Arbitral Decisions as Jurisprudence Constante' (2008) UC Davis Legal Studies Research Paper no 158 <http://ssrn.com/abstract=1319834>; or (3) 'common law of international arbitration' see at Curtis Bradley, 'Customary International Law Adjudication as Common Law Adjudication' in Curtis Bradley (ed) *Custom's Future: International Law in a Changing World (*CUP 2016) 1488, 1509; Jeffery Commission, 'Precedent in Investment Treaty Arbitration' (2007) 24 Journal of International Arbitration 129, 158.

[46] Patrick M Norton, 'The Role of Precedent in the Development of International Investment Law' (2018) 33 ICSID Review-Foreign Investment Law Journal 280, 286.

[47] *AES Corporation v Argentine Republic*, ICSID Case No ARB/02/17, Decision on Jurisdiction (26 April 2005) para 23. *SGS Socie´te´ Ge´ne´rale de Surveillance SA v Republic of the Philippines*, ICSID Case No ARB/02/6, Decision on Jurisdiction (29 January 2004) para 119. Julian Mortenson, 'The Uneasy Role of Precedent in Defining Investment' (2013) 28 ICSID Review-Foreign Investment Law Journal 254, 259.

[48] Jan Paulsson, 'The Role of Precedent in Investment Treaty Arbitration' in Katia Yannaca-Small (ed) *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (2nd edn, OUP 2018) 81, 83.

[49] *Ibid*.

[50] If an arbitration agreement states that the arbitration shall be administered by an arbitral institution, this arbitration is an institutional arbitration. If an arbitration is not administered by an arbitral institution, this arbitration is an ad hoc arbitration where parties have to determine all aspects of the arbitration themselves. However, not every arbitration case was published. Therefore, this research only discusses the investor-State arbitration cases that are publicly available.

Convention.[51] As of 2019, ICSID registered more than 700 investor-State arbitration cases under the ICSID Convention and Additional Facility Rules.[52] ICSID also provides administrative assistance to investment arbitrations under other rules, such as the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, Free Trade Agreements, and other ad hoc dispute settlement provisions.[53] This thesis also addresses other institutional arbitration cases registered in other arbitration institutions, such as the Permanent Court of Arbitration (PCA) and Arbitration Institute of the Stockholm Chamber of Commerce (SCC), subject to different arbitration rules.[54] Most of these institutional arbitration cases will be available online in comparison with the ad hoc arbitration cases. These awards published under these institutional arbitrations provide adequate legal resources from different perspectives for this thesis to gain practical experience in ITA. In addition, this thesis will also address the ad hoc arbitration cases with significant influence that were publicly available.

Secondly, this thesis will examine the significant cases in public international law, in particular those which have been accepted as customary international law. Public international law is regarded as one of the foundations of ITA. It guarantees the access of foreign investors to acquire the ISDS.[55] The International Court of Justice (ICJ) also issued its norms which are applicable and relevant to international investment law.[56] The norms also cover the issues concerning the legal status of legal entities in the dispute settlement. Hence, to comprehend the disputed issues, it is necessary to understand how a customary norm is developed in international law.

Thirdly, this thesis will also discuss the domestic cases which may contribute to understanding the standing issues in ITA. Domestic law retains its significance and indispensability in certain areas, such as admission into the host State.[57] In particular, treaties usually require that foreign investors should be legally established in their home states. The legitimacy of investors in their home jurisdiction is the premier condition of being qualified as a foreign investor to gain access to ITA. However, there are circumstances in which the legitimacy of some legal entities has not been clarified in domestic law. In consequence, this thesis will discuss these circumstances to show the relations between domestic law and the standing of legal entities.

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[51] Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 238.
[52] ICSID, 'Caseloads' < https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx >.
[53] ICSID, 'The ICSID Caseload-Statistic' (Issue 2018-2) <https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202018-2%20(English).pdf >.
[54] The PCA has registered 109 Investor-State Arbitrations so far. < https://pca-cpa.org/en/cases/ >. In total, the SCC has administered 112 investment treaty disputes where 75% was administered under SCC Rules. < https://sccinstitute.com/statistics/investment-disputes-2019/ >.
[55] Eric De Brabandere, *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications* (CUP 2014) 15-70.
[56] Julien Fouret, 'A Practical Guide: Research Tools in International Investment Law' in Katia Yannaca-Small (ed) *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (2nd edn, OUP 2018) 823, 831.
[57] M. Sornarajah, *The International Law on Foreign Investment* (4th edn, CUP 2017) 108.

5.3 Testing Legal Practice and Making the Comparison

The research conducts a traditional doctrinal legal study to answer the research question and sub-questions. Firstly, it will undertake a series of studies of legal disposition to discover legal problems. Secondly, this thesis will discuss legal practice, which will be conducted through the study of the case law.

After a study of various cases this thesis will examine legal practice based on the theoretical framework. By using the criteria presented, this thesis will give a comprehensive examination of the approaches of arbitral tribunals as well as domestic courts (where necessary). Lastly, this thesis intends to make a comparison in order to present a systematic analysis of the standing of legal entities in investment arbitration. The analysis will focus on two aspects. Firstly, based on the theory and practice, the comparison intends to identify the most essential elements that arbitral tribunals should take into consideration. Secondly, such a comparative analysis contributes to presenting relevant factors which could avail arbitral tribunals in comprehensively deciding on the standing issues.

6. Research Structure

This thesis starts with an introductory chapter (Chapter 1) and then establishes its theoretical framework (Chapter 2). The content chapters cover the discussions of controllers (Chapter 3), non-controllers (Chapter 4), and state-owned/controlled enterprises (Chapter 5). Added to these chapters, Chapter 6 will discuss the standing of one particular group of entities, the VIEs. This thesis ends with its comparison and conclusion in Chapter 7.

Chapter 1 introduces the background of the research and points out the research questions. To answer the research questions and achieve the goals of the research, this chapter gives the methodology, namely the traditional doctrinal legal research.

Chapter 2 builds up the theoretical foundation and analytical framework of this research. This framework guides the subsequent content chapters to conduct analyses. It starts with the general principle of international investment law and points out the brief interests and values of ITA. The framework further posits different approaches of scholars and practitioners towards foreign investor access to ITA. Chapter 2 will also propose criteria for the examination of the legal standing of foreign investors in the content chapters.

Chapter 3 starts to discuss the standing of legal entities who are under the control of other entities in ITA. To be specific, when a legal entity which is controlled by other controlling shareholders brings its claim, it stirs discussion on the accessibility of this legal entity. This controlled legal entity might be alleged as a shell company of its

controller. The controlling entity usually cannot bring the claim under the applicable treaty. As a result, the respondent state may argue that this legal entity is not a qualified investor in ITA. This chapter will therefore, investigate whether an investor-State tribunal should pierce the veil of that investor and determine its controller as the "real" investor.

Chapter 4 turns the focus on the legal standing of non-controllers in the company, namely shareholders holding minority voting stock without controlling effect. International investment agreements provide protection to a qualifying investor on the basis that this investor invests in a state with which its home state signed the investment protection treaty. The question arises whether shareholders can claim on their own behalf or on behalf of the company when a company suffers a loss. Alternatively, when the shareholders suffer their own losses, their capacity to bring a claim also generates concerns.

Chapter 5 examines the legal standing of SOEs/ SCEs, which combine public authority and commercial entities and are playing an increasingly important role in international investments. However, ITA is not designed to protect public investment. That being the case, when an SOE brings its claim, its legal status becomes the core dispute in ITA.

Chapter 6 continues to discuss the legal standing of VIEs in ITA. At the time of finalisation of this thesis, there is no ITA case law in which arbitral tribunals have discussed this issue. The issue is still a hypothetical dispute. However, this chapter will argue that potential disputes, which may arise out of ITA, still exist. The standing of VIEs is one example.

Chapter 7 sets out the conclusions to answer the research question based on the findings in previous chapters. This chapter will compare the approaches of arbitral tribunals to their examination of different legal entities. This comparison intends to discover a systematic and structural approach for arbitral tribunals to decide on the standing of legal entities. In addition, this chapter will also highlight the practical lessons and outline their relevance for treaty negotiations in the future.

CHAPTER 2 THEORITICAL FRAMEWORK

1. Introduction

The issue of access to arbitration is the front door of a dispute settlement process. It decides whether or not a claimant is qualified to be an investor to acquire substantive protection in the merit proceedings. Therefore, one of the first issues to be determined in investment arbitration is to establish the legal standing of the claimant. However, the standing issue has stirred increasing debates due to the booming amounts of access that were granted in investment arbitration.

ITA was created more than half-century ago when the structures of companies were less complicated and less diversified. The globalizing economics in present days has increased the motivations of companies to make international investment and to manage their structures to make more beneficial returns. Companies with a diversity of complex structures gain increasing access to the arbitration. The increase went beyond the expectations of the designers of this regime in the beginning. It also has significant effects on the legitimacy of this regime because numerous companies who are not obviously qualified as investors, have accessed investment arbitration. In some circumstances, the trend of unjustified access to arbitration may be heading in the opposite direction to the origins of this dispute settlement regime. To discover how widely this door to arbitration should be open in present days, this thesis starts with this theory chapter to answer the research question.

This thesis is confined to undertaking its analyses in ITA in order to answer to what extent the legal entities studied could gain access to this regime. For this reason, this chapter will establish a theoretical framework and lay the analytical foundation for this research. Section 2 of this chapter starts by giving an overview of ITA by drawing attention to the origins of this regime. A historical review introduces what interests are designed to be protected by the ITA mechanism. It also guides this thesis by presenting criteria to examine the approaches of arbitral tribunals to deciding on the jurisdiction.

After mapping the functions of ITA, Section 3 intends to discover how the standing issues of legal entities are generally regulated in arbitration practice. The discussions will be made from both legal and practical perspectives. This section will start by examining the legal foundations of ITA by presenting how the ICSID Convention and investment treaties determine the standing issues. Added to this, it will sketch two practical approaches that arbitral tribunals may undertake to decide on their jurisdiction,

namely the expansive approach and the restrictive approach. However, this thesis will argue that neither of these two approaches gives a comprehensive method to establish the standing of legal entities.

Consequently, for the purpose of this research, Section 4 develops open criteria for the determination of the access of foreign investors. The subsequent chapters of this thesis will use these criteria to examine the decisions of arbitral tribunals in practice and provide its elaboration on the determination of the access of foreign investors in ITA. Nevertheless, this chapter will introduce the common criteria for the subsequent chapters to use, but the criteria are not exclusive because the legal problems in different content chapters may vary from one to another. This chapter ends with a conclusion (Section 5).

2. Origins of Investment Arbitration

A historical study draws a picture of investment arbitration to understand: how this dispute settlement regime was created and what does its regime protect? The origins of investment arbitration indicate the feature of this dispute settlement mechanism in terms of the entities entitled to be regulated and protected. On the basis of the historical review, this section lays out the legal foundations of ITA in order for the subsequent chapters to make the analyses.

However, with the development of the economy, the structures of the entities turn out to be complex and the identities of the entities become difficult to determine. Tracking back to the history therefore contributes to discover whether the mechanism designed half century ago can still apply to solving the disputes nowadays. Added to this, the analysis will address the potential disputes that may occur if the mechanism fails to achieve its objectives.

2.1 Early Development of Foreign Investment Protection

The second half of the 19th century was the golden age of international economy.[1] During this period, international movements of capital were almost entirely free without formal restriction.[2] The world did not pay particular attention to the rules of protecting foreign investment.[3] Because during that period, investment was largely made in the context of colonial expansion, and this system were integrated with those imperial powers which gave sufficient protection for the investment flowing from the imperial

[1] Arthur I. Bloomfield, *Patterns of Fluctuation in International Investment Before 1914* (Princeton University Press 1968) 1-2.
[2] *Ibid*.
[3] Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 1.

system.[4] It was held that aliens coming to the territories of the States should have the same and no more protection in terms of their personal rights as the national citizens.[5] Consequently, in this early era, treaty practice offered the protection of foreign property by reference to the domestic law of host States, which usually assumed that national laws were sufficient to protect private property, both domestic and alien.[6]

In 1868, the famous Argentine jurist Carlos Calvo proposed his remarkable doctrine. He outlined that foreigners were only able to ask for domestic remedies instead of diplomatic protection by their respective home states or any other international remedies.[7] Historical and geographical circumstances promoted Calvo to promote this doctrine.[8] Calvo was born when Argentina had just achieved independence from Spain. It brought Calvo the idea that the sovereignty of a state should be the primary concern.[9] Accordingly, Calvo proposed to give absolute authority to the host States to exercise power over foreign property. As a corollary of the Calvo Doctrine, the Calvo clause was input in concession agreements between aliens and states. The clause required that aliens committed not to seek diplomatic protection from the States (the home States) of which they are nationals as against the host States which caused their alleged damage.[10] The Calvo doctrine was widely supported in many capital-importing countries but it was challenged by capital-exporting countries.[11] This doctrine was shared by the other Latin American States and was found in some jurisdictions there, such as in Article 27 of the Mexican Constitution Law.[12] In contrast to these countries, other major capital exporter countries reacted against this doctrine.[13] Because nationals of these capital exporting countries could only call for resolution of the alleged disputes by domestic adjudicators in the host States, and these capital exporting countries might not provide diplomatic protection to their nationals.

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[4] M. Sornarajah, *The International Law on Foreign Investment* (4th edn, CUP 2017) 24.

[5] John Bassett Moore, *A Digest of International Law* (Washington: Government Printing Office 1906) 5.

[6] Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 1. Dolzer & Schreuer mentioned the Article 2(3) of the Treaty between Switzerland and the United States of 1850: "

> In case of … expropriation for purposes of public utility, the citizens of one of the two countries, residing or established in the other, shall be placed on an equal footing with the citizens of the country in which they reside in respect to indemnities for damages they may have sustained."

[7] Carlos Calvo, *Derecho internacional teórico y práctico de Europa y América* (1868).

[8] Patrick Juillard, 'Calvo Doctrine/Calvo Clause', Max Planck Encyclopedia of Public International Law (January 2007) < https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e689>.

[9] *Ibid*.

[10] *Ibid*.

[11] Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 2.

[12] Patrick Juillard, 'Calvo Doctrine/Calvo Clause', Max Planck Encyclopedia of Public International Law (January 2007) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e689 >.

[13] Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 2.

The Golden Age is the miracle in human progress that the century preceding 1914 experienced.[14] World War One (WWI) occurred in 1914 and heralded a significant downturn of the international economy. Not until 1993, did trade as a proportion of the global economy, and not until 1996, did the international flows of capital reach the levels prior to 1913.[15] Moreover, the Communist Revolution of Russia in 1917 drew the attention of the world to the treatment of alien property. The Soviet Union expropriated the enterprises in the Union, both national and foreign, and justified their uncompensated expropriation of alien property by their national standard.[16] The exclusive competence of the local juridical system as the Calvo doctrine set up, was therefore questioned in this sense. As a result, some international standards of state practice emerged concerning the status of alien properties from the international level. For example, the US State Secretary, Cordell Hull, made a statement that the rule of international law should play a role on the status of the foreign property and it allowed expropriation of foreign property at the cost of prompt, adequate and effective compensation.[17] However, when he made the proposal, the matters of alien properties and foreign investment issue were not yet on the international agenda.[18] In the subsequent decades, World War II (WWII) between 1939 and 1945 further devastated the economies of countries around the world. Major cities lay in ruin with industry being locked out, and the surviving people unemployed during the war. After that, the world was eager to promote economic growth and development.

The end of WWII, the dissolution of empires, and decolonisation created a stronger need for a legal protection system of foreign investment.[19] To recover from the war disaster, states started to have awareness of increasingly positive views of private foreign investment. The neo-classical economic theory, as the main driving force behind the global push for the liberalisation of trade and investment regimes, propounded that foreign investment contributed positively to the host country.[20] Foreign investment could increase the level of economic activities, and hence the level of social wellbeing.[21] It also brought capital to influence the quality and quantity of capital formation in the host State, helped to develop the production function in developing countries by a superior one from advanced industrialised countries, and

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[14] Steve Forbes, 'The Horrid Economic Consequences of World War I-We Still Suffer from Them', *Forbes* (2 August 2014) <https://www.forbes.com/sites/steveforbes/2014/08/02/economic-consequences-of-the-great-war/#51cb88532b21 >.

[15] *Ibid*.

[16] Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 2.

[17] Green Gatwood Hackworth, *Digest of International Law, Vol 3* (United States Government Printing Office 1942).

[18] Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 3-4.

[19] Sergio Puig, 'No Right Without a Remedy: Foundations of Investor-State Arbitration', in Zachary Douglas, Joost Pauwelyn, and Jorge E. Vinuales (eds) *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014) 236, 238.

[20] Sherif H. Seid, *Global Regulation of Foreign Direct Investment* (Ashgate 2002) 9-10.

[21] *Ibid*.

generated employment.[22]

Consequently, the new theme of foreign investment protection started in order for states to attract additional foreign investment. There was a need for capital-importing countries to provide investors with a favourable environment for receiving foreign investment and it also allows the capital-exporting countries to give guarantees to investors.[23] These circumstances lead investment protection to an international level.[24] International treaties could set up the investment protection standard, and on the basis of such treaties, the status of alien property would be determined. To be more specific, treaties determined how to treat foreign property and how property would be compensated when it suffers from losses caused by states.

From a bilateral level, the era of modern investment protection treaties started when Germany signed the BIT with Pakistan in 1959, which proposed a multilateral scheme for investment protection.[25] The 1959 Germany-Pakistan BIT intended to create favourable conditions for investments by nationals and companies of either state in the territory of the other state. Soon after that, more bilateral investment protection treaties were successfully negotiated among states. On a multinational level, investment protection treaties were less easy to be negotiated. Different international institutions proposed the negotiation of investment protection treaties. Both intergovernmental organisations and private initiatives made respective attempts on drafting one universal treaty on foreign investment, but the private initiative did not make it successful because of the failure to gain widespread support from the government.[26] As a consequence, the proposals of intergovernmental organisations played a critical role.

After WWII, the United Nations (UN) was created as an intergovernmental organisation to take action on the issues confronting humanity, such as maintaining peace and security, developing friendly relations among nations, achieving international co-operation, etc.[27] With respect to economic cooperation, the United Nations Monetary and Financial Conference (known as the Bretton Woods Conference) endorsed a framework to promote international economic cooperation after the war. As a result of this agreement, the International Monetary Fund (IMF), the International Bank for

[22] *Ibid*.
[23] Crina Baltag, 'The ICSID Convention: A Successful Story-The Origins and History of the ICSID' in Crina Baltag (ed) *ICSID Convention after 50 Years* (Wolters Kluwer 2017) 1, 4.
[24] *Ibid*.
[25] The first BIT was concluded between Germany and Pakistan, some concepts of which have been expressed in earlier treaties from the 19th Century. See at Stephan Hobe, 'The Development of the Law od Aliens and the Emergence of General Principles of Protection under Public International Law' in Marc Bungenberg, Jorn Giebel, Stephan Hobe, and August Reinisch (eds) *International Investment Law: A Handbook* (Hart Publishing 2015) 6-12.
[26] Christopher F. Dugan, Don Wallace, Jr., Noah Rubins & Borzu Sabahi, *Investor-Sate Arbitration* (OUP 2012) 48. For example, the Abs-Shawcross Draft Convention on Investments Abroad in 1959. Added to this, this book also mentioned the Havana Charter on Trade and Employment in 1948, but due to the quilt of the United States, the preparation of this Charter was never done.
[27] Charter of the United Nations (signed on 26 June 1945, entered into force 24 October 1945) 1 UNTS 16, Article1.

Reconstruction and Development (as part of today's World Bank) and the General Agreement on Tariffs and Trade (GATT) were established. Moreover, the Organisation for Economic Co-operation and Development (OECD) consisting of high-income economies was also founded to stimulate economic progress and world trade.[28] These institutions or organisations took an active part in the establishment of a multilateral framework for protection and regulations of foreign investment since their establishment.

The UN introduced a series of resolutions to promote private capital in the early 1950s.[29] The Resolution 824 led by the UN General Assembly acknowledged that the international flow of private capital helped the economic development of underdeveloped countries and both developed and developing countries should facilitate and protect international private capital.[30] The UN Secretary-General also drafted a report to reflect the positions of the UN Member States on foreign investment by the questionnaire circulated among the States.[31] Different Member States had various approaches to setting the standards of foreign investment protection. Consequently, although the works of the UN brought insights on the historical development of international investment law, these works were not formulated into treaties.

The OECD also proposed the Draft Convention on the Protection of Foreign Property, the first draft in 1962, and followed by the second draft in 1967. The OECD draft Convention requested each state member to follow its substantive protection standard to the priority of the nationals of the other state members. It intended to reach a global consensus on the substance of investment rules.[32] However, the Member States of the OECD were all developed and capital-exporting countries at that time. The drafts proposed by the OECD were perceived as primarily reflecting the interests of the developed countries rather than the developing countries.[33] Consequently, the OECD drafts failed to be a universal treaty due to the lack of support from developing countries. However, the OECD drafts laid the groundwork as a draft model for the future investment regime concerning the recognised principles of foreign investment

[28] OECD, 'History' < http://www.oecd.org/about/history/ >. According to the history of the OECD, "The Organisation for European Economic Cooperation (OEEC) was established in 1948 to run the US-financed Marshall Plan for reconstruction of a continent ravaged by war. By making individual governments recognise the interdependence of their economies, it paved the way for a new era of cooperation that was to change the face of Europe. Encouraged by its success and the prospect of carrying its work forward on a global stage, Canada and the US joined OEEC members in signing the new OECD Convention on 14 December 1960. The Organisation for Economic Co-operation and Development (OECD) was officially born on 30 September 1961, when the Convention entered into force."

[29] UNGA Res. 824 (1954) GAOR, 9th Sess. Read at Christopher F. Dugan, Don Wallace, Jr., Noah Rubins & Borzu Sabahi, *Investor-Sate Arbitration* (OUP 2012) 45.

[30] UNGA, 'Progress Report of the Secretary-General' (1960) UN Doc E/3325.

[31] UNGA, 'Progress Report of the Secretary-General' (1960) UN Doc E/3492.

[32] Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 9.

[33] Christopher F. Dugan, Don Wallace, Jr., Noah Rubins & Borzu Sabahi, *Investor-Sate Arbitration* (OUP 2012) 49.

protection.[34]

To conclude, the historical overview indicates that setting up a universal substantive standard to satisfy both developed and developing countries was unrealistic and less practical at that time. The idea of creating an international mechanism for the settlement of investment disputes without confronting the contentious issue of substantive protection rules was explored.[35] This idea had a depoliticised effect in the sense that the procedural rules avoided confrontation between capital-exporting and capital-importing countries concerning the substantive standard of foreign investment protection.[36] Given the controversies among states within these intergovernmental institutions, the World Bank, under the leadership of the General Counsel, Aron Broches, proposed developing procedural rules instead of compromising on a substantial agreement for investment disputes.

2.2 A New Mechanism to Resolving Investment Disputes

2.2.1 The Dispute Settlement Mechanism in the Early Days

By the time Broches made his proposal in 1961, investment disputes were settled in several existing approaches, but all the approaches had short-comings. Firstly, as the Calvo principle insisted that investment was subject to the local law of the host State, an investor might seek direct access to the local court in the absence of an agreement to the contrary between the foreign investor and the host State. Local courts in host States are, in principle, competent to decide investment disputes raised by foreign investors.[37] However, it raised questions on whether domestic courts of host States could meet the desires of foreign investors.[38] The local systems in many countries might not be sophisticated enough to solve investment disputes and were not able to guarantee impartiality towards foreign investors.[39] Moreover, when the host State was involved in an investment dispute, the local judiciary might not always be relied upon

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[34] Rudolf Dolzer & Margrete Stevens, *Bilateral Investment Treaties* (Martinus Nijhoff 1995) 2.
[35] J. Christopher Thomas & Harpreet Kaur Dhillon, 'The Foundations of ITA: The ICSID Convention, Investment Treaties and the Review of Arbitration Awards' (2017) 32 ICSID Review-Foreign Investment Law Journal 459, 462.
[36] Ibrahim F.I. Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA' World Bank Working Paper Report 34898(1992) 5 <http://documents.worldbank.org/curated/en/335931468315286974/Towards-a-greater-depoliticization-of-investment-disputes-the-roles-of-ICSID-and-MIGA >.
[37] G. Sacerdoti, 'Bilateral treaties and multilateral instruments on investment protection' (1997) 269 Recueil des cours de l'Académie de Droit International 413.
[38] Christoph Schreuer, 'Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration' (2005) 4 The Law and Practice of International Courts and Tribunals 1, 2.
[39] G. Sacerdoti, 'Bilateral treaties and multilateral instruments on investment protection' (1997) 269 Recueil des cours de l'Académie de Droit International 413-414. Sacerdoti pointed out when local courts settle the disputes, the local law applies, but "this means of settlement may be unsatisfactory for the foreign investor when major disputes arise, especially when the application of international law rules is at the issue."

as being independent of political power.[40]

A foreign investor might also invoke the diplomatic protection awarded by his home state, and his national state can espouse his case and bring a claim before an international tribunal against the host State, such as the International Court of Justice (ICJ).[41] However, it is not an easy way for investors to obtain diplomatic protection.[42] Broches pointed out that, firstly, the waiving of diplomatic protection was usually required as a condition to enter a foreign investment permission.[43] Moreover, the home state of investors might regard espousing the case as an unfriendly act towards the host State and the home state might then refuse to provide diplomatic protection to the investor.[44] Secondly, even if the home state was willing to espouse the case, the correspondent host State might be unwilling to agree to bring the claim to an international tribunal.[45] In addition, a limited number of investors might be able to negotiate arbitration agreements with host States on foreign investment protection, but these negotiations were still questioned because host States might refuse to proceed with arbitration.[46]

Consequently, according to the approaches existing in the 1960s, investors did not have satisfactory mechanisms to proceed with international claims directly against the host State.[47] The absence of adequate machinery for international arbitration and conciliation hampered the settlement of investment disputes.[48] To solve this problem, the ICSID Convention came into play with a primary purpose to offer facilities and services to establish conciliation and arbitration of international investment disputes.[49]

2.2.2 The ICSID Convention

The World Bank designed a settlement mechanism to offer private investors direct access to an international tribunal against foreign states. The creation of this mechanism was regarded as the boldest innovative step in the modern history of international

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[40] *Ibid*.
[41] Draft Articles on Diplomatic Protection (United Nations 2006). According to Article 1, diplomatic protection refers to "the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility".
[42] Aron Broches, 'Transmitted to the Executive Directors: Settlement of Disputes between Governments and Private Parties' in ICSID, *History of the ICSID Convention* (Vol II-1) SecM 61-192 (28 August 1961) 1.
[43] *Ibid*.
[44] *Ibid*.
[45] *Ibid*.
[46] *Ibid*, 2.
[47] *Ibid*, 1.
[48] *Ibid*, 2.
[49] ICSID, 'Background Information on the International Center for Settlement of Investment Disputes', < https://icsid.worldbank.org/en/Documents/ICSID%20Fact%20Sheet%20-%20ENGLISH.pdf>.

cooperation in relation to the role and protection of foreign investment.[50] The ICSID Convention was subsequently created in 1965, and soon after that it entered into force quickly in 1966. This fast enforcement marked the success of the creation of this new mechanism and reflected the expectations of states. Broches suggested that "a recognition by States that agreements made by them with private individuals and corporations to submit such disputes to arbitration are binding international undertakings".[51] The binding force of such agreements was essential to establish the jurisdiction, and it was proper to have such force by entering into a treaty among states, as a result of the ICSID Convention.[52] The preamble of the ICSID Convention indicated that the Contracting States of the Convention should recognize that "mutual consent by the parties to submit such disputes to conciliation or arbitration through such facilities constitutes a binding agreement which requires in particular that due consideration be given to any recommendation of conciliators and that any arbitral award be complied with…" [53]

This mechanism was therefore designed to have the disputes settled by an international tribunal between foreign investors and the government of the country where the investment was made to promote private foreign investment.[54] The Preamble of the Convention also pointed out that the Contracting States should consider "the need for international cooperation for economic development and the role of private international investment therein"; and should bear in mind "the possibility that from time to time disputes may arise in connection with such investment between Contracting States and nationals of other Contracting States".[55] With a particular focus on arbitration, the ICSID Convention provides a procedural framework, rather than an offer for investment arbitration.[56] It respects host States by asking that the jurisdiction of an arbitral tribunal is based on consent. The consent might be in the form of an advance undertaking to submit any particular dispute to an arbitral tribunal, or the consent was made between the investor and the State after a dispute had arisen.[57] Host States may provide their consent to arbitration in individual investment contracts, national domestic investment laws, or treaties with investment provisions, such as BITs as well as TIPs.[58] The "investor-State arbitration" clauses might be invoked in BITs

[50] Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 9.
[51] Aron Broches, 'Transmitted to the Executive Directors: Settlement of Disputes between Governments and Private Parties' in ICSID, *History of the ICSID Convention* (Vol II-1) Year 1961, 2.
[52] ICSID, *History of the ICSID Convention* (Volume II-1) Year 1961, 3.
[53] Preamble of the ICSID Convention.
[54] ICSID, *History of the ICSID Convention* (Volume II-1) Year 1961, 1.
[55] Preamble of the ICSID Convention.
[56] Michael Waibel, 'Investment Arbitration: Jurisdiction and Admissbility' in Marc Bungenberg, Jorn Giebel, Stephan Hobe & August Reinisch (eds) *International Investment Law: A Handbook* (Hart Publishing 2015) 1212, 1215. Most of the negotiating history was concerned with elaborating the arbitration provisions rather than conciliation provisions. Read at J. Christopher Thomas & Harpreet Kaur Dhillon, 'The Foundations of ITA: The ICSID Convention, Investment Treaties and the Review of Arbitration Awards' (2017) 32 ICSID Review- Foreign Investment Law Journal 459, 463.
[57] ICSID, *History of the ICSID Convention* (Volume II-1) Year 1961, 2.
[58] Christoph Schreuer, 'Consent to Arbitration' (27 February 2007)

and TIPs to give the consent of states to arbitration.[59] As the ICSID Convention does not provide any substantive standard, it leaves to Contracting States to input the specific protection standard into their negotiating BITs or TIPs.

2.2.3 Investment Treaties and Treaties with Investment Provisions

A negotiated treaty could be regarded as a compromise between the inherently divergent interests of contracting states. In comparison with a universal investment treaty, bilateral or multilateral investment treaties to which only several states are involved are much easier to be negotiated and concluded. Such treaties are usually made on an ad hoc basis, and thus it was critical for treaties to be negotiated in a way to suit the mutual interests of the negotiating parties, whereas a universal treaty will meet difficulties.[60] Since around 1960, developing countries that usually also were capital-importing states took legal initiatives to conclude BITs with capital-exporting states to establish a favourable legal regime for foreign investors.[61] BITs granted guarantees to foreign investors with respect to substantive protection, such as most-favoured nation, national treatment, expropriation and compensation, etc.

Early treaties such as the Germany-Pakistan BIT in 1959 did not provide dispute settlement provisions. BITs started to contain state-to-state dispute settlement instruments by allowing the disputes concerning the interpretation or application of the treaties to be resolved between the contracting states.[62] The first BIT containing an ISDS clause was the 1969 BIT between Chad and Italy, Article 7 of which allowed foreign investors to submit an investment claim on the basis of the ICSID Convention. Ever since then, more BITs incorporated ISDS clauses, but it was still not universal in the 1970s and 1980s. Not until the 1990s did the inclusion of ISDS become the rule.[63]

The emerging inclusion of ISDS into BITs might be based on two facts. In the first place, the accession of former communist and developing countries presented BITs involving ISDS as vehicles for investment promotion.[64] For instance, China signed a large number of BITs during the period of the 1980s and 1990s.[65] From a more practical perspective, many countries including many developing countries ratified the

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< https://www.univie.ac.at/intlaw/con_arbitr_89.pdf >. UNCTAD, 'Dispute Settlement' (2003) < https://unctad.org/en/Docs/edmmisc232add2_en.pdf >

[59] The majority of the treaties with investment provisions are BITs. According to the Investment Policy Hub, there are 2896 BITs and 2339 of them are in force; while 318 out of 389 MITs or TIPs are in force. Available at < https://investmentpolicyhub.unctad.org/IIA >.

[60] M. Sornarajh, *The International Law on Foreign Investment* (OUP 2017) 218.

[61] Istvan Pogany, 'Bilateral Investment Treaties: Some Recent Examples' (1987) 2 ICSID Review-Foreign Investment Law Journal 457, 457.

[62] For instance, the first US BIT entered into force with Grenada as of 1989 and the first China BIT signed with as of 1982.

[63] Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2008) 25-26.

[64] *Ibid*, 27.

[65] According the database of the UNCTAD, China signed 91 BITs between 1982 and 1999.

ICSID Convention during that period.[66] The ICSID Convention was widely accepted, and the ICSID itself also emerged as the legal forum for ITA. Besides the ICSID Convention, contracting states could also invoke ISDS provisions and allowed the claims to be submitted to ad hoc arbitral tribunals or any arbitration institutions subject to the ICSID Additional Facility Rules, the UNCITRAL Arbitral Rules and any other arbitration rules.

In the beginning, investment treaties were usually concluded between capital-exporting and capital-importing countries, and later on, more capital-importing countries negotiated BITs among themselves.[67] These BITs were formulated on the basis of several major models of the capital exporting countries.[68] For instance, the text of the U.S Model Treaty Concerning the Reciprocal Encouragement and Protection of Investment of 24 February 1984 contained such ISDS provisions and allowed conciliation or bring arbitration of investment disputes should be done in accordance with the provisions of the ICSID Convention.[69] A more well-known version of the U.S. Model BIT was the 2004 version, Article 24.3 of which claimed that an investment dispute could be submitted to,

> "(a) under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the respondent and the non-disputing Party are parties to the ICSID Convention;
> (b) under the ICSID Additional Facility Rules, provided that either the respondent or the non-disputing Party is a party to the ICSID Convention;
> (c) under the UNCITRAL Arbitration Rules; or
> (d) if the claimant and respondent agree, to any other arbitration institution or under any other arbitration rules."[70]

The BITs of western European countries also have ISDS provisions, although the substantive provisions of these BITs varied from the U.S model BIT. The Agreement on Encouragement and Reciprocal Protection of Investment with the Kingdom of the Netherlands as of 2004 (the 2004 Dutch Model BIT) provided resolution of investment disputes to be submitted to the ICSID under the ICSID Convention.[71] A large number of BITs have been concluded and addressed the issues of foreign investment including such ISDS provisions, and there was also a trend to input the provisions on foreign

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[66] ICSID, 'Database of Member States' < https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx >.
[67] Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 8.
[68] Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2008) 27.
[69] 'Text of the U.S. Model Treaty concerning the Reciprocal Encouragement and Protection of Investment of February 24, 1984' (1986) 4 International Tax & Business Law 136, Article VI.3,
[70] U.S model BIT 2004. This provision was an early version of model BITs which have made effective influence in the BIT negations worldwide.
[71] Article 9 of the 2004 Dutch Model BIT. The 2018 Dutch Model BIT did not refer to the ICSID Convention, but have a "multilateral investment court" for resolution of investment disputes.

investment in the context of other agreements, such as free trade agreements (FTAs) or other TIPs.

TIPs which were concluded in the 1990s also contained the provisions in relation to the ISDS, for instance, the North American Free Trade Agreement (NAFTA) and the Energy Charter Treaty (ECT).[72] Article 1120 of the NAFTA indicated that a disputing investor might submit the claims to arbitration under the ICSID Convention, the Additional Facility Rules of ICSID or the UNCITRAL Arbitration Rules.[73] Although the newly revised NAFTA as of 2018 known as the US-Mexico-Canada Agreement (USMCA) eliminated ISDS arbitration between Canada and US, the ISDS arbitration between the US and Mexico was still permitted. It assumed that the exclusion of the ISDS arbitration between Canada and the US was in line with the US's efforts to encourage US investors to spend within the US rather than aboard.[74] At the same time, the USMCA shows that it is still necessary to preserve investment arbitration in some circumstances regarding the US-Mexico bilateral investment.[75]

Moreover, the ECT establishes a multilateral framework for energy cooperation throughout open and competitive energy markets with one of the focuses on the protection of foreign investments.[76] As energy is considered to have a significant impact on global growth, the ECT has promoted the economic development, and it has been recognised as the main legally-binding treaty to protect international investment in the energy sector since it entered into force.[77] Article 26 of the ECT required that an arbitration proceeding could be undertaken under the ICSID pursuant to the ICSID Convention, the ICSID Additional Facility Rules, or an ad hoc arbitration under the UNCITRAL rules, as well as the SCC Arbitration Rules.[78]

Until now, more than 90% of BITs or TIPs contain ISDS provisions to grant investors

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[72] North American Free Trade Agreement (NAFTA) (signed on 17 December 1992, entered into force on 1 January 1994), The Energy Charter Treaty (signed on 17 December 1994, entered into force on 24 April 1998)
< https://energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/ >
These two treaties play an important role in this research.

[73] NAFTA, Article 1120.

[74] Sarah E. Reynolds Soledad G. O'Donnell Timothy J. Keeler James T. Coleman, 'The "New NAFTA" Revised Dispute Resolution Mechanism' *Mayer Brown* (08 October 2018)
<https://www.mayerbrown.com/en/perspectives-events/publications/2018/10/the-new-nafta-and-its-revised-dispute-resolution-m >.

[75] The Free Trade Agreement between the United States, Mexico and Canada (signed on November 30 2018) < https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement>

[76] ECT, Preamble.

[77] Tomasz Bak, 'Potential Impact of the Energy Charter Treaty on FDI Promotion and Protection in view of Global Trends, Energy Governance and Possible Actions towards ECT Non-Members, Occasional Paper', Energy Charter Secretariat Knowledge Centre (20 November 2013).
< https://energycharter.org/fileadmin/DocumentsMedia/Occasional/ECT_and_FDI.pdf > 6.

[78] ECT, Article 26.

direct access to bring claims against host States.[79] However, there was a turning point in the year of 2017, when the lowest number of new BITs or TIPs was concluded since 1983, and the number of effective treaty terminations outpaced the number of new treaty conclusions.[80] This trend is predicated as major capital-exporting developed countries slowed down their steps on negotiating new treaties or modernising the existing treaties.

Developed countries created this ISDS mechanism and took advantage of this regime for their nationals to subject developing countries to arbitral panels. However, some developed countries showed their awareness that foreign investors were gradually using the ISDS mechanism against themselves. For instance, U.S investors brought many investment arbitration against other countries. Correspondingly, all the investment arbitration cases in which the US was the Respondent were brought by Canadian investors on the basis of the NAFTA, no investor from a developing country has brought claims against the US on a basis of investment treaties.[81] In the light of the ISDS practice, the dispute settlement provisions in the USMCA exclude the investment arbitration between Canada and the US, but still reserve the provisions between the US and Mexico.

Besides this, some developed countries might also terminate their BITs subject to the change of their legal functions. The Treaty on the Functioning of the European Union as of 2009, known as the Lisbon Treaty, gives the EU an exclusive competence for foreign direct investment.[82] This competence enables the EU to conclude international investment agreements or comprehensive trade and investment agreements with third parties, including the form of investment dispute settlement mechanism. Regulation No. 1219/2012 of the EU further implemented a set of rules for the foreign investment between individual EU Member States and non-EU Member States.[83] The EU Member States set the conditions to modify existing agreements and negotiate or conclude new ones. Concerning the BITs between EU Member States, there were over 190 intra-EU BITs signed before the Lisbon Treaty. EU Member States are moving towards the termination of all intra-EU investment treaties either on their own initiative or at the request of the EU.[84] Moreover, the European Commission clarified that EU law did not allow the investor-State arbitration between a Member State and an investor from

[79] According to the database of the UNCTAD, 2443 out of 2577 mapped treaties contained ISDS provisions.
[80] UNCTAD, 'IIA Issues Note 2018'
< https://unctad.org/en/PublicationsLibrary/diaepcbinf2018d1_en.pdf >1.
[81] Kevin P. Gallagher & Elen Shrestha, 'ITA and Developing Countries: A Re-Appraisal' (2011) Global Development and Environment Institute Working Paper No.11-01, 8.
[82] Treaty on the Functioning of the European Union, TFEU (signed on 3 December 2007, came into force on 1 December 2009), Article 206.
[83] Regulation No. 1219/2012 of the European Parliament and the Council.
[84] On 5 May 2020, 23 EU Member States signed an agreement for the termination of intra-EU bilateral investment treaties. See at European Commission, 'EU Member States sign an agreement for the termination of intra-EU bilateral investment treaties' (5 May 2020)
<https://ec.europa.eu/info/files/200505-bilateral-investment-treaties-agreement_en>

another Member State.[85]

Apart from the intra-EU BITs, the EU was also careful to apply investment arbitration into other investment treaties. For instance, the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada created a multilateral investment court system to replace the investment arbitration, and EU and Japan's Economic Partnership Agreement did not involve dispute settlement provisions.[86] From a worldwide perspective, other international agreements led by developed countries also negotiated the input of ISDS carefully. For instance, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) as a succession of the Trans-Pacific Partnership (TPP), contracting state parties only negotiated the substantive chapters concerning trade and investment and did not input any provisions on investment dispute settlements.[87]

However, some developing countries are still engaged in negotiating and concluding BITs, and China is one of them. As the second largest country to conclude investment treaties, China has signed 7 BITs and 10 TIPs since 2010 and signed 52 BITs and 21 TIPs since 2000. After China's adoption of BITs in the new generation, China embraced more investment protection for foreign investors, including investor-State dispute settlement provisions.[88] Such a motivation is understandable due to the fact of China's moving away from being exclusively a capital importer country to a capital exporter country.[89] From a perspective of arbitration practice, China has been involved in an increasing number of investment arbitration cases. Although China has been increasingly subjected to investment arbitration by foreign investors from other countries, Chinese investors are also taking advantage of this regime to claim their alleged loss against other countries.

In comparison with China in favour of ISDS, other developing countries might struggle with this regime. There is a growing trend of reconsideration of investment treaties including ISDS in the developing countries in South America, such as Ecuador and Argentina. Ecuador has made several moves to denounce investment treaties or to

[85] European Commission, 'Capital Markets Union: Commission provides guidance on protection of cross-border EU investments' (19 July 2018) < http://europa.eu/rapid/press-release_IP-18-4528_en.htm>. Case-284/16 *Slowakische Republik v Achmea BV* [2018].

[86] The Comprehensive Economic and Trade Agreement was singed on 30 October 2016; The EU and Japan's Economic Partnership Agreement entered into force on 1 February 2019. The Comprehensive Economic and Trade Agreement was signed on 30 October 2016.

[87] The Trans-Pacific Partnership (TPP), also called the Trans-Pacific Partnership Agreement, is a trade agreement proposed by Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam, and the United States. Although the treaty was signed on 4 February 2016, the agreement could not enter into force because the US withdrew its signature in 2017.The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) is a trade agreement between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam.

[88] Tyler Cohen, David Schneiderman, 'The Political Economy of Chinese Bilateral Investment Treaty Policy' (2017) 5 The Chinese Journal of Comparative Law 110, 128.

[89] Cai Congyan, 'Outward Foreign Investment Protection and the Effectiveness of BIT Practice' (2006) 7 Journal of World Investment & Trade 616, 638

restrict the existing ISDS since 2007, and took a large step to terminate more BITs in 2017.[90] Argentina signed the BIT with Qatar in 2016, but prior to this, it was 15 years ago when it signed the last BIT with the Dominican Republic in 2001.[91] Although Argentina wished to attract foreign investment, it explored carefully to conclude BITs due to its historical experience. During the last ten years of the last century, Argentina concluded almost 60 BITs to liberalize its economy, but the conclusion of BITs ended in 2001 as it coincided with the worst economic crisis in Argentina's history.[92] Foreign investors brought a significant proliferation of investment arbitration claims against Argentina for their alleged losses as a consequence of the severe economic crisis.[93] After that, the Argentina government suffered not only from the economic crisis but also the costs arising from the arbitration cases. Consequently, governments become very critical and careful about the ICSID Convention, investment treaties, and the ISDS mechanism.

To sum up, the first modern BIT was concluded by the end of the 1950s between developed and developing countries, but it did not have ISDS provisions. Later on, the ICSID Convention was concluded to establish a new procedural framework by offering foreign investors direct access to host States. The ICSID Convention offers foreign investors from one Contracting State to bring an ISDS claim against another Contracting State where they make the investment. The ICSID Convention becomes the main piece of the ISDS infrastructure and has been incorporated into subsequent BITs and TIPs. Investment protection provisions in investment treaties were also enhanced so that foreign investors might also bring investment claims on the basis of other arbitration rules besides the ICSID Convention. Both the ICSID Convention and TIPs play their respective roles, as the legal basis of the ISDS mechanism, which allow foreign investors to bring direct claims against host States. Foreign investors discover this effective dispute settlement mechanism, and therefore many countries have expanded the investment treaties since 1990.[94] However, this rush has gradually slowed down in recent years.[95] Because some developed countries changed their legal functions or found themselves having become the targets of this regime rather than designers and some developing countries also lost interests because they lost many cases from this regime. Consequently, a shared view has emerged to ensure that this mechanism could work for states, which requires that both states' interests and investors' rights should be considered.[96]

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[90] Kate Cervantes-Knox & Elinor Thomas, 'DLA Piper Publications' *DLA Piper* (15 May 2017) < https://www.dlapiper.com/en/mexico/insights/publications/2017/05/ecuador-terminates-12-bits-a-growing-trend/ >

[91] Investment Policy Hub, < https://investmentpolicy.unctad.org/international-investment-agreements >.

[92] Facundo Pérez-Aznar, 'Argentina is back in the BIT negotiation arena' Investment Claims' (14 November 2016) < http://oxia.ouplaw.com/page/argentina-bit/argentina-is-back-in-the-bit-negotiation-arena >.

[93] This research will give a comprehensive study of the arbitration cases involving Argentina.

[94] UNCTAD, *World Investment Report 2015*, 123.

[95] *Ibid*, 124.

[96] *Ibid*, 120.

2.3 Legal Foundation of Investment Treaty Arbitration

As a relatively young discipline, international investment law has experienced fast growth since its creation. This discipline, in which non-state actors play a significant role, also becomes the controversial sphere of international law.[97] ITA under international investment law brings an analytical challenge that this regime cannot be adequately rationalised as either a traditional form of public international dispute resolution or a private international dispute resolution.[98]

Public international law might be defined as 'the rules which determine the conduct of the general body of civilised States in their dealings with each other'.[99] In a general way, public international law intends to provide the principles and modalities governing the dispute settlement between two states in a peaceful way.[100] A dispute under public international law is a disagreement on a point of law or fact, a conflict of legal views, or a conflict of interests between two states.[101] An international peaceful settlement includes a variety of processes and outcomes, such as negotiation, mediation, conciliation, arbitration, as well as the standing court known as the ICJ.[102]

Private international law does not have a clear or globally recognised definition.[103] It covers the fields in relation to the choice of law and international civil procedure, such as jurisdiction as well as recognition and enforcement of foreign judgements.[104] Its broader scope also extends to the status of persons involved in international relations.[105] In general, private international law regulates relations (1) between private persons, (2) which qualify as objectively or subjectively international, and (3) which concern civil and commercial issues.[106] Consequently, the private international dispute resolution deals with commercial matters considered to have an international nature.

In both traditional public and private international dispute resolutions, the disputing

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[97] Patrick Dumberry and Erik Labelle-Eastaugh, 'Non-State Actors in International Investment Law' in Jean d'Aspremont (ed) *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Routledge 2011) 360.
[98] Zachary Douglas, *The International Law of Investment Claims* (CUP 2009) 6. Jan Paulsson, 'Arbitration Without Privity' (1995) 10 ICSID Review- Foreign Investment Law Journal 232, 256.
[99] Thomas Joseph Lawrence and Percy H. Winfield, *Handbook of Public International Law* (London, Macmillan and Co 1925)3
[100] Ian Brownlie, 'The Peaceful Settlement of International Disputes" (2009) 8 Chinese Journal of International Law 267, 267.
[101] *Ibid*, 268.
[102] *Ibid*, 270-281.
[103] Giesela Rühl, 'Private International Law, Foundations' in Jürgen Basedow, Giesela Rühl, Franco Ferrari & Pedro de Miguel Asensio (eds) *Encyclopedia of Private International Law* (Edward Elgar Publishing 2017) 1380, 1381.
[104] *Ibid*, 1381-1382.
[105] De Dycker Stéphanie, 'Private International Law Disputes Before the International Court of Justice' (2010) 1 Journal of International Dispute Settlement 475, 477.
[106] *Ibid*, 476.

parties in the settlement procedure are of the same nature as each other, a sovereign state to a sovereign state or a private party to a private party. However, the revolution in abandoning the simple dichotomy between public and private international law conceptions of dispute resolution does not exist anymore.[107] ITA emerged to break through this simple dichotomy. The subjects involved in ITA are the private investor on the one hand, and the sovereign state, on the other hand. From a general perspective, its legal framework for investment is founded on international law.[108] Although public international law is traditionally conceived as the law governing relations among states, it also gives a critical role to non-state actors.[109] Both investors and states fall in the scope of the subjects of international law. The subjects are defined as the entities that process international rights and obligations and having the capacity (a) to maintain its rights by bringing international claims; and (b) to be responsible for its breaches of obligation by being subjected to such claims.[110] In the sphere of legal relationships between private investors and sovereign states, the legal regime is therefore established by investment treaties and by the ICSID Convention where it is applicable.

As a consequence, the creation of ITA considers two aspects. Firstly, this regime grants private individuals or private companies a right of direct access to an international tribunal.[111] Secondly, this regime recognises that an agreement of a state to arbitrate an investment dispute with a private party constitutes a binding international obligation.[112] On the basis of these two considerations, investment treaties play a role in terms of the binding obligation, and establishing the legal relationship between the host State and the home state of investors.[113] In investment arbitration where the ICSID Convention is applicable, the ICSID Convention plays also a significant role in the legitimacy of the regime. The ICSID Convention regulates the fundamental institutional under-pinnings of recognising the right of direct access to the proceeding, and brings the legal characteristics of an agreement to arbitration.[114] Treaties may incorporate to apply the ICSID Convention as one dispute settlement mechanism in order to strengthen a binding relationship between foreign investors and host States.

Furthermore, BITs or TIPs create a *sui generis* system of international law to regulate investment disputes arising from the breach of the treaties.[115] Investment treaties

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[107] Zachary Douglas, *The International Law of Investment Claims* (CUP 2009) 7.
[108] Jeswald W. Salacuse, *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital* (OUP 2013) 305.
[109] *Ibid*.
[110] James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 115.
[111] J. Christopher Thomas & Harpreet Kaur Dhillon, 'The Foundations of ITA: The ICSID Convention, Investment Treaties and the Review of Arbitration Awards' (2017) 32 ICSID Review-Foreign Investment Law Journal 459, 463.
[112] *Ibid*.
[113] Zachary Douglas, *The International Law of Investment Claims* (CUP 2009) 7.
[114] J. Christopher Thomas & Harpreet Kaur Dhillon, 'The Foundations of ITA: The ICSID Convention, Investment Treaties and the Review of Arbitration Awards' (2017) 32 ICSID Review-Foreign Investment Law Journal 459, 463.
[115] Zachary Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (2003) 74 British Yearbook of International Law 152, 189.

envisage two spheres of rights and obligations: (1) the State/state sphere applicable to the legal relationship between contracting state parties; and (2) the investor/state sphere applicable to the legal relationship between the home state of investors and the host State.[116] With respect to the first sphere, investment treaties impose international obligations upon the contracting states, and general rules of state responsibility in international law apply to regulating the States.[117] A breach of international obligations by one state leads to the loss of rights of another state in international law. Concerning the investor/state sphere, a breach of international obligations by a state leads to the injury of the investors, rather than the host State. The contracting states of the treaty opt out of the rules of international responsibilities and the responsibilities relate to wrongful acts causing damage to private interests.[118] Thus, the investor from one state has direct rights against the other state which arise from the breach of investment treaties.[119]

On the basis of the treaties, the function of ITA was designed to reach a development goal. From a general point of view, since the beginning of the creation of investor-State arbitration, the world widely recognised the shortcomings of the existing remedies for government interference with foreign property rights, which led to the development of another alternative remedy.[120] Developed countries naturally supported the proposal of the new alternative remedy, which could bring greater protection and more access to markets for the capital of their nationals.[121] Conversely, developing countries also supported the proposal to supply the aid flowing with private capital in order to achieve their development goals.[122] As an illustration, this development goal has several sub-goals in different aspects.

Firstly, investment arbitration provides direct access to justice for aggrieved investors claiming unfair treatment by the host State.[123] Foreign investors could therefore take advantage of arbitration for resolving disputes arising for the cross-border investors in the host States. Foreign investors have the preference for investment arbitration. It is

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116 *Ibid.*

117 'The Articles on the Responsibility of States for Internationally Wrongful Acts' in International Law Commission Report of the Fifty-third session (International Law Commission 2001) A/56/49 (Vol. I)/Corr.4. The Articles drafted by the International Law Commission (ILC) could bring guidelines. The draft articles intend to address the breach of international obligations by one state which is reflected by the creation of the other states. The obligations between the home state and the host state cover the "(i) adherence to the law of treaties in the interpretation and application of the investment treaty; (ii) the obligation not to frustrate an investor's recourse to international arbitration or the enforcement of any award against the host state."

118 Zachary Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (2003) 74 British Yearbook of International Law 152, 190.

119 *Ibid*, 191.

120 Christopher F. Dugan, Don Wallace, Jr., Noah Rubins & Borzu Sabahi, *Investor-Sate Arbitration* (OUP 2012) 45.

121 *Ibid*.

122 *Ibid*.

123 Sergio Puig and Gregory Shaffer, 'Imperfect Alternatives: Institutional Choice and the Reform of Investment Law' (2018) 112 American Journal of International Law 361, 369.

because foreign investments usually take place in emerging markets where the efficiency and impartiality of judicial systems may be viewed with scepticism by foreign investors.[124]

Added to this, investment arbitration is considered to promote resource allocation, increases national welfare, and thus supports economic development.[125] Inputting "investment arbitration" clauses into the BITs or the TIP also promotes bilateral or multilateral trust between investors and host States. Membership of the ICSID Convention is a positive element in the host States' policies and helps to establish an atmosphere of mutual trust between investors and host States.[126] In turn, growing investment will improve the economic situation of individuals, especially in the developing world; for instance, new employment opportunities will help people out of poverty.[127]

In addition, investment arbitration is considered to help to reduce interstate conflicts and to support peaceful and cooperative international relations.[128] Prior to the emergence of investment arbitration in the second half of the last century, investment disputes were sometimes resolved by the threat or even the use of military force.[129] Therefore, investment arbitration can be regarded as a progressive innovation to reduce sources of international tension and recourse to military force.[130] An investment arbitration regime ensures that investors could directly raise claims and resolve investment disputes by law instead of force or other coercion.[131] From a state-to-state perspective, host States and investors' home states would not have costly diplomatic confrontations, which could escalate and undermine cooperation between the two states.[132]

To conclude, treaties including the ICSID Convention, BITs and TIPs set up the new dispute settlement mechanism for the disputes between foreign investors and states. Therefore, the treaties consist of the legal foundation of ITA. When disputes occur, the

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[124] Deborah Burand, 'Resolving Impact Investment Disputes: When Doing Good Goes Bad' (2015) 48 Washington University Journal of Law & Policy 55, 76.
[125] Sergio Puig & Gregory Shaffer, 'Imperfect Alternatives: Institutional Choice and the Reform of Investment Law' (2018) 112 American Journal of International Law 361, 371.
[126] ICSID, *Annual Report* (1984*)* 6.
[127] Steven R. Ratner, *The Thin Justice of International Law: A Moral Reckoning of the Law of* Nations (OUP 2015) 351.
[128] Sergio Puig & Gregory Shaffer, 'Imperfect Alternatives: Institutional Choice and the Reform of Investment Law' (2018) 112 American Journal of International Law 361, 373.
[129] O. Thomas Johnson & Jonathan Gimblett, 'From Gunboats to BITs: The Evolution of Modern International Investment Law' in Karl P. Sauvant (ed) *Yearbook on International Investment Law and Policy* (OUP 2011) 649, 650-661. Andrew Paul Newcombe & Luis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 9.
[130] David Gaukrodger & Kathryn Gordon, 'Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community' (2012) OECD Working Papers on International Investment 2012/03, 9 < http://www.oecd.org/daf/inv/investment-policy/WP-2012_3.pdf >.
[131] Sergio Puig & Gregory Shaffer, 'Imperfect Alternatives: Institutional Choice and the Reform of Investment Law' (2018) 112 American Journal of International Law 361, 374.
[132] *Ibid*.

most important step is to examine the legal problems by using the applied treaties. If the treaties applied give a straightforward answer to the dispute, arbitral tribunals will use the treaties to resolve the problems. If the treaties do not provide a clear resolution, arbitral tribunals should interpret the blurred provisions in the treaties in order to resolve the disputes.

3. Access to Investment Treaty Arbitration

This thesis has a particular focus to examine the access of foreign investors to arbitration. As the Introductory Chapter made clear, only qualified investors are able to bring their claims against the States. Jurisdiction *ratione personae* as the fundamental requirement in every jurisdictional proceeding. The identity of claimants is the primary concern in ITA.

For this reason, Section 3.1 starts to address the importance of foreign investors' access to arbitration to express the significant role of access issues in ITA. Section 3.2 intends to discover the legal foundation of the ITA rules on the access issue and what potential concerns could arise from the treaties. From a practical point of view, Section 3.3 makes hypotheses on the theory: what would happen if claimants are guaranteed unlimited open access or extremely limited access to ITA? Such hypotheses help to understand the necessity of the balance between two different approaches of arbitral tribunals to give foreign investors access to arbitration.

3.1 Access to Arbitration as a Core Issue

ITA consists of the majority of known investor-State arbitration cases. The history of establishing ISDS puts forward that the mechanism was created to provide regulatory protection to foreign investors. When this mechanism was designed in the 1960s, the legal setting of foreign investment was adjusted to its specifics and complexities by way of an investment contract.[133] Investment contracts could reflect the bargaining power of both foreign investors and host States in individual projects.[134] In other words, one investment contract is concluded between one host State and a particular foreign investor. Therefore, different negotiating parties usually make different individual investment contracts. If the investment contract includes an ISDS clause, the foreign investor to the contract is able to bring investment arbitration claims.

As a growing number of investment treaties were concluded, an increasing scale of foreign investment was made on the basis of these treaties. Various investment treaties might use different criteria to determine the scope of their covered investors. However, the change of these treaties might not go the same way as the ISDS. The ICSID

[133] Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 79.
[134] *Ibid*.

Convention has remained the same during the past half-century, but a large number of BITs or TIPs have been concluded, renegotiated, and modified among contracting states. Consequently, the voice of amending the ICSID Convention and reforming the ISDS has increased all over the world in recent years. Regulating the access of foreign investors is also one of the major sets of options for reforming the mechanism to catch up with the current development of international investment.[135]

However, the identity of foreign investors gradually becomes more difficult to be determined. In the contemporary globalizing world and economy, the form of business has usually been operated by multinational and big enterprises with comprehensive structures.[136] Companies or other entities might be incorporated in one or several entities and agree with each other to co-ordinate their operations. In addition, the operations of international businesses may also involve the power of sovereign states when states are also willing to gain access to the global investment. The World Investment Report showed that more than 40% of foreign companies possessed multiple "passports", and this made the nationality of these companies become increasingly blurred.[137] Consequently, it becomes complex to identify these entities when they become foreign investors.

As a result, access to arbitration becomes a primarily important issue in international investment. It determines who can get involved into the protection regime of investment arbitration. However, the development of the global economy has stimulated the significance of this legal concern. The structures of foreign investors become increasingly complex. The major crisis raised up in ITA is how to determine the identity of foreign investors.

3.2 Legal Basis for Foreign Investors' Access to Arbitration

In ITA, the host State has given its consent to arbitration to all present and potential investors that satisfy the nationality criteria and whose investment is protected by the treaty applied in advance of the dispute.[138] With respect to jurisdiction concerning the access issue, two periods should be taken into consideration: the period before and the period after foreign investors brings claims. Before investors bring their claims, they are required to be legally established in their home state. In other words, the legitimacy of investors should be identified and ensured. After investors bring their claims and an arbitration process starts, arbitral tribunals should determine investors' legal standing in accordance with the rule of applicable law in ITA. Applicable law in this thesis means all laws applied to examining the access of foreign investors in investor-State arbitration.

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[135] UNCTAD, *IIA Issue Note International Investment Agreements* (March 2019) 5.
[136] Peter T. Muchlinski, *Multinational Enterprises & the Law* (2nd edn, OUP 2007) 3.
[137] UNCTAD, *World Investment Report 2016*, xii.
[138] M. Sornarajah, *The International Law on Foreign Investment* (4th edn, CUP 2017) 358.

In general, both international and national rules regulate foreign investments in different ways.[139] In the first stage, a qualified foreign investor should be a legalised entity subject to the law of its home state. Therefore, the domestic law of the home state is applied, such as the relevant legislation relating to commercial law, company law, and other relevant rules and regulations. When foreign investors gain access to invest in the host State, the operation of the investment will take place under the relevant local law of the host State. Relevant legislation includes domestic law, such as commercial law, company law, administrative law, labour law, tax law, foreign exchange law, as well as international law subject to the legal system of the host State.[140]

In the second stage, when arbitration proceeding starts, the rules of applicable law in the ITA regime will apply. Arbitral tribunals usually apply international law when they adjudicate foreign investment disputes.[141] Treaties use the terms 'investor', or 'national of a contracting state' or both to describe individuals or entities to obtain the substantive protection of the treaty.[142] However, there are still several disputes existing which concern the concurrence of domestic law in arbitration—i.e. whether international law should be applied exclusively and whether domestic law should not be applied in investment arbitration. No precise and coherent answer to this question has been given so far, because different theories focus on different features of the investment regime.[143] It has been pointed out that domestic law might apply to foreign investment disputes if the parties to the dispute agreed on the governing law.[144] Such an agreement works when the applicable BIT expresses the application of domestic law, such as in the definition sections of treaties.[145] In addition, investors' nationality should be examined in accordance with both domestic law and international law in ITA, because "nationality" is a legal concept of both domestic and international law.[146]

3.2.1 Article 25 of the ICSID Convention

The ICSID Convention is one origin of the legal foundation of ITA. According to the ICSID Convention, for an investor to gain access to arbitration, there is a positive, as

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[139] Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 288.
[140] *Ibid*.
[141] Florian Grisel, 'The Sources of Foreign Investment Law' in Zachary Douglas, Joost Pauwelyn & Jorge E. Viñuales (eds) *The Foundation of International Investment Law: Bringing Theory into Practice* (OUP 2014) 213, 217
[142] Christopher F. Dugan, Don Wallace, Jr., Noah Rubins & Borzu Sabahi, *Investor-Sate Arbitration* (OUP 2012) 294.
[143] José Enrique Alvarez, 'The Public International Law Regime Governing International Investment' (2009) 344 Recueil des Cours de l'Académie de Droit International 259.
[144] Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 288
[145] Florian Grisel, 'The Sources of Foreign Investment Law' in Zachary Douglas, Joost Pauwelyn & Jorge E. Viñuales (eds) *The Foundation of International Investment Law: Bringing Theory into Practice* (OUP 2014) 213, 223.
[146] *Ibid*. Oliver Dörr, 'Nationality', Max Planck Encyclopedia of Public International Law (2006).

well as a negative, nationality requirement on claimant investors.[147] The positive requirement is that an investor is required to be a national of a state that is a party to the ICSID Convention, and the negative requirement is an investor cannot be a national of a host State.[148]

More specifically, to establish the jurisdiction of the Centre, Article 25 of the ICSID Convention firstly requires that,

> "(1) The jurisdiction of the Centre shall extend to any legal dispute arising *directly out of* an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a *national of another Contracting State*, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."[149]

It further gives the meaning of "national of another Contracting State":

> "(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and
>
> (b) *any juridical person* which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and 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."[150]

As may be noticed, the ICSID Convention does not provide a specific definition of either 'investor' or 'national'. It is due to the fact that the drafters of the ICSID Convention gave the maximum flexibility to the Contracting States.[151] However, this flexibility leaves several legal challenges as follows which consist of the main

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[147] Christoph Schreuer, 'Nationality of Investors: Legitimate Restrictions vs. Business Interest' (2009) 24 ICSID Review-Foreign Investment Law Journal 521, 521.
[148] *Ibid*.
[149] The ICSID Convention, Article 25 (1).
[150] The ICSID Convention, Article 25 (2). The legal issues arising in connection with individuals and entities are distinct, and this research will address the issues of entities.
[151] Aron Broches, *Convention on the settlement of investment disputes between states and nationals of other states. Submitted to governments by the executive directors of the International Bank for Reconstruction and Development and accompanying Report of the executive directors*, note 33.

discussions of this thesis.

1) "Juridical person"

It concerns the scope of juridical persons in investor-State arbitration. Firstly, a juridical person or a legal entity should be legally established in accordance with the law of its home state in order to be qualified as an investor. Consequently, the legitimacy of that entity turns out to be the priority. However, the domestic law of the home state might be silent on the legitimacy of some entities, such as entities involved in the VIE structure. Therefore, it brings hypothetical debates on whether or not the entities involved in the VIE structure are considered to be incorporated under the law of their home state in order be qualified as an investor.

Added to this, private companies instead of sovereign states might be identified as the covered entities in accordance with Article 25 of the ICSID Convention. However, the question of whether or not this provision excludes state-owned enterprises as investors has been asked since the negotiation of the ICSID Convention.[152] This article does not explicitly state that an investor must be a private investor by nature, nor that an investor cannot be a public investor, such as SOEs. As a consequence, whether SOEs are qualified investors subject to Article 25 of the ICSID Convention largely depends on whether it has a foreign nationality, which requires a further determination by various legal systems and treaties.[153]

2) "Arising directly out of an investment"

According to Article 25, the claim which foreign investors submit to arbitration is required to be a legal dispute in nature, but also arise directly out of an investment. This requirement indicates another issue that this thesis will address, which is whether claims brought by some entities can be regarded as arising directly out of an investment. To be specific, being created in different jurisdictions, companies are designed to promote international investments by sharing similar features.[154]

For instance, companies have separate and distinctive legal personalities from their shareholders, and shareholders in the companies also acquire limited liability. The limited liability means that shareholders are not personally liable for the debts and obligations of their companies. Concerning the separate legal personalities and liability between companies and shareholders, how to protect the interests of companies and shareholders brings a wide variety of discussions. When a company suffers the loss of its investment, its shareholders may resent the loss and bring claims. The legitimacy and directness of the claims of these entities as shareholders have been widely debated

[152] ICSID, *History of the ICSID* (Volume II-1) 11.
[153] Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 47.
[154] Jeswald W. Salacuse, *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital* (OUP 2013) 9.

in investor-State arbitration. Consequently, this thesis will address this concern.

3) "Because of foreign control"

The term "foreign control" under Article 25 (2)(b) of the ICSID Convention brings another core dispute. Although this term appears in the ICSID Convention, the concept of foreign control has not been identified. Various approaches to understanding these provisions highlight the issues concerning the legal standing of the controlling entities. Whether legal entities or their ultimate controllers should be determined as the real investors raises challenges. This legal issue will be further examined in the subsequent chapters.

3.2.2 Criteria to Define Investors in Treaties

BITs and TIPs define the terms 'investor' and 'national' by reference to either natural persons or juridical persons. Generally, the term "nationality" is used in the context of natural persons. However, the notion of a special bond between a person and his State in the sense of personal loyalty makes less sense in the case of juridical persons.[155] Investment treaties envisage that juridical persons are the beneficiary of the treaties. With respect to the 'juridical person' as an 'investor', the definition usually gives a non-exhaustive list by addressing different forms of entities covered under the protection of the treaty, usually companies, corporations or enterprises.[156]

However, international law does not give any precise criteria which a State should use to determine the nationality of a juridical person or a legal entity.[157] With reference to legal and economic considerations, BITs or TIPs have essentially relied on the following criteria to make the determination.[158]

Firstly, the place of incorporation is the primary criterion that commonly appears in investment treaties.[159] This criterion sets up a formalist determination, which defines investors as legal persons incorporated according to the law of the contracting state. A company can qualify as a foreign investor when it is legally established under the law of the host State. According to the criterion, the only link between the company and the

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[155] Rudolf Dolzer & Margrete Stevens, *Bilateral Investment Treaties* (Martinus Nijhoff 1995) 35.

[156] Different Treaties cover different forms of entities. For instance, the 2018 Dutch Model BIT covers all types of legal person by stating that " 'investor' means with regard to either Contracting Party:… (ii) any legal person constituted under the law of that Contracting Party and having substantial business activities in the territory of that Contracting Party; or…" The 2012 US model BIT states that " 'enterprise' means any entity constituted or organised under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including a corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organisation; and a branch of an enterprise." In this research, the terms 'company', 'corporation' and 'Enterprise' are the same.

[157] Rudolf Dolzer & Margrete Stevens, *Bilateral Investment Treaties* (Martinus Nijhoff 1995) 35.

[158] *Ibid*.

[159] Suzy H Nikièma, 'Best Practices Definition of Investor' The International Institute for Sustainable Development Best Practices Series (2012).
<http://www.iisd.org/pdf/2012/best_practices_definition_of_investor.pdf > 8.

host State is the establishment and existence of the company. After this company is successfully registered and the authority of its state approves the registration, a foreign investor exists. This criterion has the advantage of being easily identifiable and fixed because the head and registration office of a company may not be easily changed.[160]

Moreover, the UNCTAD specifies that around 15% of mapped investment treaties further require foreign investors to run substantial business activities in their home states. These BITs may require that the head office of the company, the board of directors, or meetings of directors should resident or take place in the territory of the home state. The substantial operation criterion may require investors to have real management and it is usually applied in combination with the criterion of the place of incorporation. BITs or TIPs rarely use substantial criteria as the sole criterion to determine the identity of foreign investors.[161] This standard strengthens the link between foreign investor and states. Such a requirement seeks to avoid treaty shopping, such as mailbox companies.[162] When a foreign company becomes a foreign investor and gets benefits from the investment agreements, it is predictable that this company will actually run its business in its home state, which contributes to the economy of the host State in turn. This criterion requests the substantive activities undertaken by companies in order to prevent them from being created as vehicles to gain benefits that they may not able to receive.

The criterion of control appears in combination with the requirements of the place of incorporation. It states that a company might be regarded as a qualified foreign investor if it is established in accordance with the law of any state, but is under control, directly or indirectly, of nationals of a contracting state under the BIT. The UNCTAD Mapping Project shows that around 10% of mapped treaties define ownership or control of the legal entities.[163] However, investment agreements do not further define the concept of control in international investment. To what extent the facts of 'control' may exist and in which way the control is formulated are in question. Moreover, the purpose of the control criterion is also under debate. The criterion emphases the origin of foreign capital and foreign investment protection. The purpose of applying this criterion is to expand its protection to all kinds of foreign investment with a foreign nature. However,

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[160] *Ibid*.
[161] *Ibid*, 9.
[162] "Treaty shopping under international investment law occurs when an investor structures an investment (through incorporation and possibly by restructuring certain business operations) in order to seek to qualify for protections conferred by particular investment treaties." See at David Gaukrodger and Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Investment (OECD No. 2012/3) <http://www.oecd.org.eur.idm.oclc.org/daf/inv/investment-policy/WP-2012_3.pdf> 55.
"Mailbox companies" means "corporate entities without substantial business activities". The companies are usually "incorporated in the other contracting party have been recognized as protected investors, even if they are owned or controlled by host-State or third-State nationals." See at UNCTAD, *World Investment Report 2016*, 175 & 178.
[163] UNCTAD, 'Mapping IIA Content'< https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping#section-6>. It shows that 73 out of 2576 mapped treaties identify ownership and control of legal entities.

how to apply this criterion is determined. Consequently, the lack of explicit determinations raises legal challenges which will be discussed in this thesis.

To sum up, when drafting treaties, there is a need to strike a balance between details and generalities of regulations concerning foreign investment. In-depth detailed wordings of treaties tend to make a potential foreign investor ascertain his right, while general and vague terms allow flexibility to investors.[164] However, treaties do not provide clear answers on how to determine foreign investors' access to arbitration. They leave flexibility for arbitral tribunals to decide in practice. As a result, arbitral tribunals may apply different approaches to decide the standing of legal entities.

3.3 Practical Approaches to the Access to Investment Arbitration

Foreign investors have brought hundreds of ITA claims against states. It leads to a great number of awards in which arbitral tribunals have resolved ambiguities in the treaties.[165] Among them, the issues dealing with foreign investors access to arbitration are the major disputes.[166] Arbitral tribunals undertook expansive or restrictive approaches in order to resolve the disputes.[167] To understand the effects of these two approaches, this thesis examines the extreme circumstances in which arbitral tribunals provide foreign investors with maximum access and minimal access to investment arbitration. The examination shows why the approach applied by arbitral tribunals is important for both investors and host States. Besides this, it also shows how the approach should be undertaken in order for the ISDS mechanism to achieve its origins.

3.3.1 Open Access in an Expansive Approach

It was suggested that, on the basis of empirical analyses, arbitral tribunals have a strong tendency in favour of an expansive approach.[168] Under an unlimited expansive approach, as long as the legal entities that bring the claims meet the basic formalist requirements in accordance with the investment treaties, they can obtain the access to ITA. Theoretically and apparently, a series of advantages will occur if foreign investors are guaranteed unlimited open access to get involved in arbitral proceedings. The expansive approach maximises the protection of foreign investors. However, a rapid expansion of access to arbitration will generate a hysterical and irrational boom of cases,

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[164] Rudolf Dolzer & Margrete Stevens, *Bilateral Investment Treaties* (Martinus Nijhoff Publishers 1995) 14.
[165] Gus Van Harten, 'Leaders in the Expansive and Restrictive Interpretation of Investment Treaties: A Descriptive Study of ISDS Awards to 2010' (2018) 29 European Journal of International Law 507, 507.
[166] *Ibid*, 514.
[167] *Ibid*, 507. Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of ITA' (2012) 50 Osgoode Hall Law Journal 211, 213–214.
[168] Gus Van Harten, 'Pro- Investment or Pro- State Bias in Investment- Treaty Arbitration? Forthcoming Study Gives Cause for Concern' *Investment Treaty News* (13 April 2012) <https://www.iisd.org/itn/2012/04/13/pro-investor-or-pro-state-bias-in-investment-treaty-arbitration-forthcoming-study-gives-cause-for-concern/ >.

which will lead to a breakdown of the mechanism.

Firstly, unlimited access to arbitration would encourage foreign investors to pursue arbitration through controversial management, such as treaty shopping. With regard to international treaties, states' consent to arbitration is based on that foreign investors are nationals of the other contracting state. Therefore, states are not obliged to consent to arbitration with a company that merely formulates its structure to use the dispute mechanism. At the same time, treaty shopping makes it easier for a claimant to challenge the regulatory authority of the host State.[169] If a company does not satisfy the regulations of the State, it might move its business chain and company structure to another state to benefit from its favourable treaty.

In addition, the increasing use of treaty shopping will raise the number of arbitration claims; this increase will create high costs in relation to the defence against investment claims.[170] Consequently, the unlimited expansive approach will over-expose states to costly dispute settlement mechanism and the risk of exorbitant financial liabilities. Investment arbitration generates very high defence costs.[171] Not every state, especially developing countries, is able to afford such high costs.[172] The goal of foreign investment and the creation of the ITA is to improve the development of the States. However, money from the public treasury will be used to cover the costs in the investment arbitration process rather than the development of the countries themselves when the ITA cases increase considerably. In other words, host States with limited resources may allocate scarce public funds to shoulder arbitration costs.[173] For instance, the famous *Yukos* award issued by the PCA tribunals set a unprecedented high record of costs, and the respondent state, Russia, was asked to pay US $60 million in legal fees to the claimant which was 20 times bigger than any previous arbitral awards and equivalent to 20% of Russia's annual budget.[174] The PCA award was set aside by the Hague District Court because the Hague District Court found that the PCA Tribunal had

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169 Jorun Baumgartner, *Treaty Shopping in International Investment Law* (OUP 2016) 65.

170 *Ibid*, 59-85.

171 Jan Wouters and Nicholas Hachez, 'The Institutionalization of Investment Arbitration and Sustainable Development' in Marie-Claire Cordonier Segger, Markus Gehring &Andrew Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer Law International 2011) 620.

172 Jeswald W. Salacuse, 'Is There a Better Way? Alternative Methods of Treaty- Based, Investor- State Dispute Resolution' (2007)31 Fordham International Law Journal 138, 142.

173 Susan D Franck, *Arbitration Costs: Myths and Realities in ITA* (OUP 2019) 189.

174 Ben Knowles, Khaled Moyeed & Nefeli Lamprou, 'The US$50 billion Yukos award overturned – Enforcement becomes a game of Russian Roulette' *Kluwer Arbitration Blog* (13 May 2016) < http://arbitrationblog.kluwerarbitration.com/2016/05/13/the-us50-billion-yukos-award-overturned-enforcement-becomes-a-game-of-russian-roulette/ >. The PCA acted as registry in the Yukos Universal Limited (Isle of Man) v. The Russian Federation arbitration, which was conducted under the UNCITRAL Arbitration Rules (1976) pursuant to the Energy Charter Treaty (1994), The case is in conjunction with *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 226 and *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 228 PCA < https://pca-cpa.org/en/cases/61/>. This section takes the Yukos cases as an example because firstly, the Yukos case makes a huge impact because of its complicated arbitral and judicial proceedings and its remarkable awards; secondly, this research also looks into the case in the content chapters.

no jurisdiction over the claims.[175] Added to this, when arbitral tribunals open doors with no limits to foreign investors and they may not reach any compensation of costs to the parties in dispute in the end, the parties still have to pay the extra costs arising from the merit proceedings. These costs will impose an unnecessary financial burden on the parties.

Consequently, an unlimited expansive approach for arbitration goes against the origins of the ITA regime. The ITA regime was created to protect foreign investors and attract them to promote the economy of host States. The massive openness of this regime will make unqualified foreign investors tempt to take benefits from it and impose an excessive burden on host States.

3.3.2 Limited Access in a Restrictive Approach

The restrictive approach requires foreign investors to be qualified as "real" investors, both formally and substantially. Arbitral tribunals need to examine all the legal and factual elements to make the determination. A similar argument might be made with respect to the extremely restrictive approach to deciding the foreign investors' access to ITA.

The restrictive approach sets up a high requirement for foreign investors to bring claims. Host States might fail to offer an arbitration remedy to foreign investors. Besides this, arbitration will lack its constraining force to regulate the States when the restrictive approach applies. When a claimant tries to bring claims, states try to search for any possible elements that could obstruct the access of arbitration claims. Unreasonable obstruction will delay the process of the dispute settlement and increase the defending costs of arbitration. For instance, the delay may infringe upon the rights of foreign investors to claim the losses and protect their property from international investment law.

Investors' success in jurisdiction does not guarantee investor's ultimate win on merits. However, offering investor's access to arbitration provides investors with a possibility to search for an international remedy. ITA is designed to protect the interests of foreign investors. An extremely restrictive review of the access issue does not help to protect the substantive interests of foreign investors. Foreign investors make their investment with the expectation of the facts that they are offered the direct right against the host State by prosecuting investment arbitration claims. Unlimited access to arbitration will also lower the expectation of foreign investors and subsequently, reduce the interests of making investments in another country. Consequently, limited access granted to foreign

[175] However, in February 2020, the appellate reinstated the District Court's award and after that, Russia filed its appeal to the Supreme Court of the Netherlands in May 2020. By the time of the thesis submission, this case is still on-going. However, the thesis refers to this case in order to address that jurisdiction is one important issue that should be determined carefully by arbitral tribunals.

investors reduces the objectives of ITA.

To conclude, under the two situations above, neither the unlimited expansive approach nor the extremely restrictive approach could protect foreign investors and maintain the functions of the ITA regime. Attention must focus on developing an effective mechanism for resolving disputes that inevitably arise when host States fail to meet investors' expectations to be protected by the treaties.[176]

4. Criteria to Determine the Access Concerns

Overly generous or overly limited access to ITA does not help to set up a well-structured dispute resolution. On the basis of the discussions above, this thesis formulates several criteria that might play a role for arbitral tribunals to determine investors' access to ITA.

Section 4.1 gives the first criterion by arguing that the legal sources and foundation of ITA, the treaties applied, should be read and applied carefully subject to the rule of interpretation. The general rules of interpretation in international law are applied and they can be found in the Vienna Convention on the Law of Treaties (VCLT).[177] These rules under the VCLT should be integrated when it applies in ITA. Moreover, ITA has its speciality which encourages foreign investors to choose to pursue. Therefore, Section 4.2 puts forward the second criterion to address the objectives of the ITA which should be kept in mind. In addition, with a particular focus on juridical persons, Section 4.3 presents another criterion of this thesis which is applying the doctrine of piercing the corporate veil to make a practical examination.

4.1 Interpreting Treaties Based on the Rules of Interpretation

As the foundations of the ITA regime, investment treaties provide the primary sources of international investment law. Treaties are therefore the critical factor to resolve the disputes concerning the access of foreign investors. When the provisions of the treaty are clear enough or express directly how the issue should be resolved, it does not seem necessary to interpret or apply the treaty in different ways. However, disputed issues derive from the provisions of the treaty. Both expansive and restrictive approaches reflect situations in which disputes arise subject to a measure of ambiguity in the treaty applied.[178]

In consequence, this section sets the first criterion of this thesis, which is the application and interpretation of investment treaties. The core issue is how international investment treaties should be applied and should be interpreted in the treaties are not clearly

[176] Deborah Burand, 'Resolving Impact Investment Disputes: When Doing Good Goes Bad' (2015) 48 Washington University Journal of Law & Policy 55, 85.
[177] The Vienna Convention on the Law of Treaties (signed on 23 May 1969).
[178] Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration' (2012) 50 Osgoode Hall Law Journal 211, 226.

explained. From a general perspective, the law applicable to interpret a treaty is international law, rather than contractual or statutory interpretation rules or other domestic rules or laws.[179]

4.1.1 The Vienna Convention on the Law of Treaties

An internationally well-recognised standard of treaty interpretation has been incorporated into the VCLT. The VCLT is a collection of numerous codifications of treaty law by the International Law Commission (ILC).[180] It has also been regarded as a part of customary international law by both the ICJ and investor-State arbitral tribunals.[181] The VCLT is an instrument dedicated to being one of the most significant sources of international law, and binds all states even if they have not ratified it or if several provisions have been modified in practice.[182]

The VCLT could apply to interpreting bilateral or multilateral investment treaties and treaties with investment provisions, but not to the individual investment agreement between a state and a private investor.[183] Concerning the articles of treaty interpretation, the ILC stated that 'the Commission confined itself to trying to isolate and codify the comparatively few general principles which appear to constitute general rules for the interpretation of treaties'.[184] Interpretation is a process of discovering the true meaning of a treaty, and the VCLT designates the elements to be considered in that process.[185]

Three articles (Article 31 to Article 33) set out in Chapter 3 of the VCLT are devoted to treaty interpretation. Article 31 of the VCLT establishes the general rules of treaty interpretation, and Article 32 provides the supplementary means of interpretation. Article 33 of the VCLT provides the rules of interpretation of a treaty authenticated in two or more languages. However, as this thesis does not cover this circumstance, this section does not examine the role of Article 33.

In this thesis, Article 31 and 32 of the VCLT apply to the interpretation of the treaties including the ICSID Convention, BITs and TIPs. Article 31, "General Rule of Interpretation", is expressed in a singular form as the ILC sought to emphasise that all the paragraphs of this article formed one integrated rule.[186] In other words, the ILC did

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[179] J. Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration* (OUP 2012) 13.
[180] *Ibid*, 5.
[181] Andrea Saldarriaga, 'Investment Awards and the Rules of Interpretation of the Vienna Convention: Making Room for Improvement' (2013) 28 ICSID Review – Foreign Investment Law Journal 197, 198. J. Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration* (OUP 2012) 6.
[182] Mark Eugen Villiger, 'The 1969 Vienna Convention on the Law of Treaties: 40 Years After' (2011) 344 Recueil des Cours de l'Académie de Droit International 58-59.
[183] Article 60 of the VCLT.
[184] ILC, *Yearbook of the International Law Commission (1966-II)*, 218–9 para 5.
[185] Oliver Dörr, 'Article 31' in Oliver Dörr & Kristen Schmalenbach (eds) *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018) 521,522.
[186] ILC, *Yearbook of the International Law Commission (1966-II)* 220, para 8. Ian Sinclair, The *Vienna Convention on the Law of Treaties* (Manchester University Press 1984) 119. Anthony Aust, *Modern*

not intend to rank or give weights on all the elements.[187] Article 31.1 of the VCLT establishes the generally accepted principle of these elements. It lays down the fundamental rule of interpretation by requiring that "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*."[188] To examine the true meaning, the ordinary meaning as well as the object and purpose of a treaty should be combined to be taken into consideration.

Article 31.1 starts with the term "good faith" which establishes an umbrella rule that every treaty should be interpreted in good faith and it covers the entire process of interpretation. Good faith being an over-arching principle functions in two ways. Firstly, this principle identifies how to interpret treaties; secondly, it provides a general standard of reasonable and proper behaviour for the interpreter.[189] The objective functions on how to interpret treaties have been set up by the VCLT. However, the subjective functions are difficult to examine because the provisions of the VCLT leave the discretion to the interpreting authority, which is an arbitral tribunal in ITA.[190] To achieve this subjective function, the arbitral tribunal should perform in such a way as to respect the objective functions, apply the relevant principles of interpretation, and base their reasonings on valid substantive arguments.[191]

Article 31.1 formulates the differences between a treaty and its "terms": a treaty should be interpreted with a starting point to understand the ordinary meaning of its terms.[192] The ordinary meaning of a treaty means that the meaning given should be regular, ordinary or customary in the context.[193] It could be achieved throughout a linguistic and grammatical analysis, i.e. by using dictionaries or other sources of definitions.[194] However, it would be too narrow to restrict interpretation to a purely literal interpretation, such as an examination of terminology and the use of dictionaries.[195]

In addition, the ordinary meaning of terms should consider the temporal aspect of a

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Treaty Law and Practice (CUP 2000) 186–187. J. Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration* (OUP 2012) 38.

[187] J. Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration* (OUP 2012) 41.

[188] VCLT, Article 31.1.

[189] Eric De Brabandere & Isabelle Van Damme, 'Good Faith in Treaty Interpretation' in Andrew D. Mitchell, M Sornarajah & Tania Voon (eds) *Good Faith and International Economic Law* (OUP 2015) 37,59.

[190] *Ibid*, 55.

[191] *Ibid*, 57.

[192] Richard Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015) 164.

[193] Oliver Dörr, 'Article 31' in Oliver Dörr & Kristen Schmalenbach (eds) *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018) 521, 542. Richard Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015) 183.

[194] Richard Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015) 186.

[195] Herve Ascensio, 'Article 31 of the Vienna Conventions on the Law of Treaties and International Investment Law' (2016) 31 ICSID Review-Foreign Investment Law Journal 366, 370.

treaty at the time when it was concluded.[196] In other words, the process of treaty interpretation is not entirely a grammatical exercise.[197] The term needs to be understood in line with the contents of the treaty, such as the title, headings, chapters, the preamble of the treaty, structured schemes, related or contrasting provisions.[198] This textual logic helps to examine the precise meaning of a term in the treaty and points out what the treaty is trying to convey. It is useful to note that, although the textual logic is applied to understanding the disputed term, the "ordinary meaning" in Article 31.1 varies from the pure "literal meaning" or "textual meaning". The article denotes the idea of focusing the interpreter's attention on "expanding beyond the provision under consideration to the broader vision provided by the context", and it uses this wider view to help refine the definition of the meaning of the disputed terms.[199]

Furthermore, the distinct teleological and functional element that should also be taken into account is the object and purpose of a treaty.[200] In order to determine them, various ways exist, which will be addressed in the following sections. In general, Article 31.2 posits that the context for the purpose of the interpretation should comprise

> "(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."

As is mentioned, both Article 31.1 and Article 31.2 use the singular form "object and purpose" in their articles. Such a form indicates that the general rule of treaty interpretation requires a single over-arching notion to the telos of the entire treaty, despite the fact that some treaties might have different purposes in practice.[201] To reach this final goal, the principle of good faith is an umbrella rule which plays its role to prevent improper objects or purposes from being inserted into the treaty interpretation.[202] Furthermore, Article 31.3 requires that the interpretation of a treaty should take into account the following elements, 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;

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196 Oliver Dörr, 'Article 31' in Oliver Dörr & Kristen Schmalenbach (eds) *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018) 521, 543.
197 *Ibid*.
198 Richard Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015) 200-210.
199 *Ibid*, 210.
200 Oliver Dörr, 'Article 31' in Oliver Dörr & Kristen Schmalenbach (eds) *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018) 521, 545.
201 *Ibid*, 546.
202 *Ibid*.

> (c) any relevant rules of international law applicable in the relations between the parties."[203]

This provision pursues an objective of "systemic integration". It means that treaties are born to create an international legal system, and the operation of the treaties should be predicated from the beginning.[204] Moreover, Article 31.4 requires that "a special meaning shall be given to a term if it is established that the parties so intended."[205] Article 31.4 is an exception to Article 31.1 for cases in which parties intend to give a special meaning to a term to replace its ordinary meaning. In these circumstances, the VCLT gives its priority to party autonomy and respects the agreement between the parties.

In general, Article 31 provides the elements, which might be used in a single operation, rather than in a hierarchical relation.[206] In addition to the integral understanding within Article 31, a hierarchical application between Article 31 and Article 32 is further established. Article 32 serves as a supplementary approach of treaty interpretation, by stating that

> "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."[207]

Article 32 is given a lesser value as being supplementary to correspond to Article 31.2 and Article 31.3 which mention the relevant instrument and rules.[208] Article 32 comes into play to assume its interpretative function only after the entire application of Article 31.[209] Besides this, it mentions that the preparatory work or *travaux préparatoires*, in French, of the treaty might be taken into consideration as a non-exclusive option. The use of these documentary works can discover the position of each party and the meaning of what each party agrees to input into the treaty. It requires that some conditions should be fulfilled in order for these documents to be taken into account. Firstly, the selected work should be objectively assessed to be part of the preparatory work by interpreters;

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[203] VCLT, Article 31.2 & Article 31.3.
[204] ILC, 'Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law' (2006) (A/61/10) 180.
[205] VCLT, Article 31.4.
[206] Leo Gross, 'Treaty Interpretation: The Proper Role of an International Tribunal' (1969) 63 American Society of International Law Procedure 116,119. Andrea Saldarriaga, 'Investment Awards and the Rules of Interpretation of the Vienna Convention: Making Room for Improvement' (2013) 28 ICSID Review-Foreign Investment Law Journal 197, 202.
[207] VCLT, Article 32.
[208] Oliver Dörr, 'Article 32' in Oliver Dörr & Kristen Schmalenbach (eds) *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018) 571, 571.
[209] *Ibid*, 572.

secondly, the work should be liable to illuminate a common understanding of the parties.[210]

To sum up, all these measures contained in the VCLT give effect to express the intention of the parties, which can be found in the words of the treaties in the light of the relevant circumstances.[211] Although Article 31 and Article 32 do not provide an exhaustive list of applicable interpretative tools, the VCLT provides a general outline of treaty interpretation and constitutes a general expression of the principles of customary international law.[212] The ICJ made its judgement in the *Guinea-Bissau v. Senegal* case, which established that Articles 31 and 32 of the VCLT, which may in many respects be considered as a codification of existing customary international law for the first time.[213] The Court held the same approach to use the VCLT to interpret the terms of a disputed treaty in subsequent cases.[214] In general, Articles 31 and 32 of the VCLT reflect the customary rules of international law and have therefore been widely applied.

4.1.2 Applying the Vienna Convention on the Law of Treaties to Investment Arbitration

After having a broad picture of the VCLT, this section continues to address the application of the VCLT in ITA. It is usually maintained that the application of the VCLT is not an optional reference for arbitrators in the process of treaty interpretation.[215] If an investment treaty was concluded after the VCLT's entry into force on 27 January 1980, the VCLT could apply to interpreting the treaty.[216] In addition, it does not matter whether or not both state parties to the investment treaty have to be the parties to the VCLT. When both state parties to the investment treaty are the parties to the VCLT, the VCLT applies to interpret the treaty.[217] When the State

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[210] *Ibid*, 574-578.
[211] Lord A.D. McNair Q.C, *The Law of Treaties* (Clarendon Press 1961) 365 n1.
366.
[212] Sir Lan Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press 1984) 153-154.
[213] *Guinea-Bissau v. Senegal* (1991), ICJ Reports 53, para. 48.
[214] J. Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration* (OUP 2012) 24-26. For example, *Iron Rhine ('Ijzeren Rijn') Railway Arbitration* (Belgium v Netherlands) [2005] Award, para 45. *Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] Judgment, para. 65. The separate or dissenting opinions of the Court also referred to Article 31 of the VCLT in some earlier cases even before the VCLT came into force in 1980. Judge Ammoun, separate opinion in the Barcelona Traction case, ICJ Reports (1970) 304; Judge Dillard, separate opinion in the Appeal Relating to the Jurisdiction of the ICAO Council, ICJ Reports (1972) 107; Judge de Castro, separate opinion in the Fisheries Jurisdiction case (F. R. G. v Iceland), ICJ Reports (1974) 226; Judge de Castro, dissenting opinion in the Aegean Sea Continental Shelf case, ICJ Reports (1978) 68, 69; and Judge Mosler, separate opinion, Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility, ICJ Reports (1984) 392, 463.
[215] Andrea Saldarriaga, 'Investment Awards and the Rules of Interpretation of the Vienna Convention: Making Room for Improvement' (2013) 28 ICSID Review-Foreign Investment Law Journal 197, 198.
[216] VCLT, Article 4.
[217] Andrea Saldarriaga, 'Investment Awards and the Rules of Interpretation of the Vienna Convention: Making Room for Improvement' (2013) 28 ICSID Review-Foreign Investment Law Journal 197, 198.

parties to the investment treaty are not parties to the VCLT, the rules of interpretation are considered to reflect the customary rules of international law with regard to the treaty interpretation.[218]

However, the sole application of the VCLT does not provide a comprehensive understanding of investment treaties.[219] The previous research done by Saldarriaga showed that the difficulties and gaps arose from the application of the VCLT in investment arbitration.[220] In investment arbitration, the use of the VCLT is generally inconsistent, insufficient and flawed.[221] Firstly, arbitral tribunals fail to fully refer to the elements provided by Article 31 of the VCLT to interpret the investment treaty, such as the relevant agreements, instruments, rules of international law and state practice.[222] Selective applications of the provisions of the VCLT are attributed to a failure of justified and reasonable treaty interpretation.[223] Besides this, arbitral tribunals might not sufficiently respect the order of the application of Articles 31 and 32 of the VCLT. In this respect, the Secretary-General of the ICSID, Meg Kinnear addressed that,

> "Art. 32 clearly requires that supplementary sources not be considered other than to confirm the meaning of the provision as construed under Art. 31, or to determine the meaning when the interpretation according to Art. 31 leaves the meaning ambiguous or obscure or leads to a manifestly absurd or unreasonable result. Unfortunately most arbitral decisions do not follow this approach rigorously, and there is a tendency either not to explain why resort to supplemental means is needed or to approach Arts. 31 and 32 almost as a package rather than as two sequential steps."[224]

Moreover, the use of the VCLT is usually combined with other principles proposed by arbitral tribunals, such as the principles of effectiveness or general principles of international law.[225] However, the combination might not necessarily be framed within the context of the VCLT. It is understandable that general international law and common usage for standards are able to help to interpret the term. The ILC also mentioned that

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[218] Richard Gardiner, *Treaty Interpretation* (OUP 2008) 7.

[219] Andrea Saldarriaga, 'Investment Awards and the Rules of Interpretation of the Vienna Convention: Making Room for Improvement' (2013) 28 ICSID Review-Foreign Investment Law Journal 197, 198-215.

[220] This thesis has a close link with Saldarriaga's research because the selection of the arbitral awards covers the decisions on jurisdiction and includes arbitrations under the ICSID, the UNCITIRAL and the SCC Rules which are the same as the scope of arbitration in Saldrarriaga's research.

[221] *Ibid*, 203-204.

[222] *Ibid*, 204.

[223] Eric De Brabandere & Isabelle Van Damme, 'Good Faith in Treaty Interpretation' in Andrew D. Mitchell, M Sornarajah & Tania Voon (eds) *Good Faith and International Economic Law* (OUP 2015)37, 58.

[224] Meg N Kinnear, 'Treaties as Agreements to Arbitrate: International Law as the Governing Law' in Albert Jan van den Berg (ed) *International Arbitration 2006: Back to Basics? ICCA Congress Series* (Kluwer Law International 2007) 433.

[225] Andrea Saldarriaga, 'Investment Awards and the Rules of Interpretation of the Vienna Convention: Making Room for Improvement' (2013) 28 ICSID Review-Foreign Investment Law Journal 197, 209. Herve Ascensio, 'Article 31 of the Vienna Conventions on the Law of Treaties and International Investment Law' (2016) 31 ICSID Review-Foreign Investment Law Journal 363, 373-374.

customary rules and principles are of particular relevance to the interpretation of a treaty could be applied, especially where: "

> (a) the treaty rule is unclear or open-textured;
> (b) the terms used in the treaty have a recognised meaning in customary international law under general principles of law;
> (c) the treaty is silent on the applicable law and it is necessary for the interpreter, applying the presumption to look for rules developed in another part of international law to resolve the point…"[226]

Although it opens up the interpretive process to adopt other sources of law that are external to the VCLT, arbitral tribunals should still choose the external sources within the framework drawn up by the method of Article 31 of the VCLT in general.[227] In the event that arbitral tribunals refer to previous awards, they need to prove and identify how the facts or rules of such cases are applicable to the case at hand.[228] In the ITA regime, arbitral tribunals act individually in different cases in their respective competency. One arbitral tribunal in the subsequent case is not obligated to follow previous decisions even when the same issue calls for determination.[229] The individual act of the arbitral tribunal in each case also means that every case is relatively independent of others, and each case has its own speciality. As a consequence, arbitral tribunals in different cases should keep their focus on individual case facts to undertake the analyses.

The relevance of the legal basis applied are critical to treaty interpretation. When an arbitral tribunal interprets the treaty by referring to other cases, it should establish the links between the referred case law and the case at hand, especially when the reference is to international case law other than investment arbitration cases. As a critical part of customary international law concerning treaty interpretation, the VCLT could be, and has already been, applied in investment arbitration. However, more clarification of the application of the VCLT is necessary to encourage the effective and comprehensive application of treaty interpretation. This thesis acknowledges that arbitral tribunals have their competence to interpret a treaty provision, but this competence should be grounded in the conventional sense of treaty interpretation.

As a final point, Article 31 of the VCLT sets up a method to interpret the treaty, which appears to be a planned, integrated expression. It is also in connection with the text

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[226] ILC, 'Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law' (2006) UN Doc A/61/10, 180.
[227] Herve Ascensio, 'Article 31 of the Vienna Conventions on the Law of Treaties and International Investment Law' (2016) 31 ICSID Review-Foreign Investment Law Journal 363, 375.
[228] Andrea Saldarriaga, 'Investment Awards and the Rules of Interpretation of the Vienna Convention: Making Room for Improvement' (2013) 28 ICSID Review - Foreign Investment Law Journal 197, 210.
[229] Judith Gill, 'Is There a Special Role for Precedent in Investment Arbitration?' (2010) 25 ICSID Review-Foreign Investment Law Journal 87, 88.

under interpretation as a center of gravity.[230] Added to this, the purpose of the interpretation of a disputed term is to find out its ordinary meaning, which differs from the literal meaning of the term.[231] The object and purpose of a treaty have a close interaction with the ordinary meaning of the disputed term. All the elements in Article 31 must be assessed altogether with some room to adapt some supplementary rules as Article 32 lists and other relevant rules. This interaction provides a progressive restriction of all the possible interpretations together with additional rules and principles.[232]

4.2 Taking the Objectives of Investment Arbitration Mechanism in Mind

The second criterion of this thesis relates to the objectives of the investment arbitration mechanism. Determining the access to ITA should consider the balance between the rights of foreign investors to bring claims and the rights of host States to regulate foreign investment. The balance allows qualified foreign investors to gain substantive protection in accordance with the treaty and to prevent some claimants from misusing the regime to gain illegal benefits. Arbitral tribunals should therefore take the positions of both investors and host States into consideration.

On the one hand, foreign investors have rights to bring claims. Foreign investors may determine in advance the risks inherent in a long-term relation with the host State. Foreign investors bear normal commercial risks as well as potential risks arising from their foreign nature. Investment treaties guarantee foreign investors the rights to claim their losses in ITA. The only requirement is that the claimants in the ITA should be qualified as foreign investors in accordance with the treaties. The general principle of the rule of law provides foreign investors with the security and predictability that the State commitment by the treaty will be upheld.[233] The rule of law requires that law should provide certainty and predictability to guide action.[234] On the basis of the rule of law, foreign investors have their predictability in the access to arbitration, if and when a dispute occurs.

On the other hand, host States also have their rights to regulate foreign investments made in their territories. With regard to the narrow approach of definition, the State's right is identified as "the legal right exceptionally permitting the host State to regulate in derogation of international commitments it has undertaken by means of an investment agreement without incurring a duty to compensate".[235] With regard to a

[230] Herve Ascensio, 'Article 31 of the Vienna Conventions on the Law of Treaties and International Investment Law' (2016) 31 ICSID Review-Foreign Investment Law Journal 363, 386.
[231] *Ibid*.
[232] *Ibid*.
[233] Sergio Puig & Gregory Shaffer, 'Imperfect Alternatives: Institutional Choice and the Reform of Investment Law' (2018) 112 American Journal of International Law 361, 377.
[234] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (OUP 1979) 218.
[235] Aikaterini Titi, *The Right to Regulate in International Investment Law* (Nomos 2014) 33.

broader concept, the right to regulate is invoked to impose the regulatory power of the State in its domestic policymaking.[236] Through the legislative, administrative, and judicial bodies, a state is free to exercise its regulatory power.[237] Subject to this right, a state can also enter into investment treaties to undertake obligations of investor protection.[238] Consequently, foreign investment is bound by the law of the host State, so entities that make the investment should also be qualified as foreign investors in accordance with the law of the host State.

However, the right of the State to regulate covers mostly the substantive issues of foreign investment protection, such as expropriation or fair treatment, rather than imposing the procedural matters in relation to the identity of foreign investors.[239] However, arbitral tribunals should still bear the right of a state in mind when they examine the jurisdictional issue concerning the access of foreign investors. The provision which expresses the right to regulate might be contained in the preamble of the treaty. The preamble's provisions explain the reason for establishing the treaty rather than imposing any obligations on the investors or the host States.[240] To be specific, investment treaties usually decide their scope of protection to specific types of investors in the texts. The treaties applied, as the foundation of the ITA mechanism, also have their respective objectives. When an individual arbitral tribunal resolves each case, the treaty applied in each case guarantees the legitimacy of an arbitral tribunal and subsequently grants the authority to the arbitrators. The treaty applied should therefore be thoroughly analysed and applied by arbitral tribunals. Arbitral tribunals should make a comprehensive analysis of the entire treaty, including its preamble and specific provisions. The preamble of a treaty draws the blueprint, and the wording of a treaty reflects the solid content of substantive protection.

In the early stage of the treaty negotiation, BITs usually indicate their objectives at the beginning of the treaty texts. For instance, the 1959 BIT between Germany and Pakistan stated that the BIT was to "create favourable conditions for investments by nationals and companies of either State in the territory of the other States".[241] It further addressed that parties to the BIT should promote investment, encourage private industrial and financial enterprise and increase the prosperity of both states.[242] The 1959 Germany-Pakistan BIT pointed out two essential points, one was the objective of this BIT which was designed for the foreign investment; and the foreign investment should have a private nature. Moreover, the first BIT signed by China with Sweden in 1982 put

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[236] Vera Korzun, 'The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-outs' (2017) 50 Vanderbilt Journal of Transnational Law 355, 374.
[237] *Ibid*, 373.
[238] *Ibid*.
[239] *Ibid*, 373 & 375-383.
[240] *Ibid*, 374.
[241] Treaty for the Promotion and Protection of Investments (with Protocol and exchange of notes), Germany and Pakistan (signed on 25 November 1959, came into force on 28 November 1962) [herein after "the 1959 Germany-Pakistan BIT"].
[242] *Ibid*.

forward the desires of both States to maintain fair and equitable treatment of investments by investors of one Contracting State in the territory of the other Contracting State. Besides this, in the same year, the first U.S signed BIT stated that this treaty was to protect and promote foreign direct investment.[243]

Although the approach adopted by earlier BITs pointed out that their objectives were to promote and protect foreign investment, such an approach was less applied in more recent treaties. For instance, several TIPs concluded by the EU explain that the general objectives are to enhance bilateral investment, instead of giving special weight to foreign investment. The Investment Protection Agreement between the EU and Singapore addresses that its objective is to enhance the investment climate between the Parties in accordance with the provisions of this Agreement.[244] The Agreement between the EU and Japan for an Economic Partnership describes its aim as to liberalise and facilitate trade and investment, as well as to promote a closer economic relationship between the Parties.[245] The treaty texts demonstrate that their objectives are inclined to have different weights of protection to foreign investors.

Furthermore, another issue that should always be kept in mind is the objective of the ITA mechanism. ITA is created to protect foreign investors, so this regime should provide adequate and proper protection to foreign investors. ITA's objectives includes the purposes of arbitral proceedings and the goals of the treaties applied. ITA is a dispute settlement mechanism with a unique nature, which is a decisive factor of why foreign investors would choose this regime rather than other dispute settlement mechanisms. Foreign investors have their preference to settle their investment disputes within the ITA mechanism due to its particular purpose and objectives of protection. The preference is based on the fact that ITA provides a particular remedy and offers direct access to those investors that are qualified as foreign investors under the applicable treaties.

In sum, three points are addressed in this criterion. Firstly, in order to determine the access of foreign investors to arbitration, it is necessary to consider the balance between investors' rights to bring claims and host States' rights to regulate foreign investment. Secondly, treaties in the different periods were concluded subject to their particular objectives and they varied from each other. In each arbitration case, it is necessary to understand the objectives of each treaty applied. The preamble of a treaty can also play a role in the protection of foreign investors, which provides guidance for arbitral tribunals to issue awards. For instance, when the preamble may address that the treaty is to protect foreign investment, the foreign nature of investments should be examined by arbitral tribunals. Thirdly, the ITA mechanism was born to give foreign investors

[243] Panama Bilateral Investment Treaty between Panama and the U.S (signed 27 October 1982).
[244] The Investment Protection Agreement between the EU and Singapore (Signed on 18 April 2018, updated on March 2019) Article 1.1.
[245] The Agreement between the European Union and Japan for an Economic Partnership (signed on 17 July 2018, came into force on 1 February 2019) Article 1.1.

guarantees to bring direct claims against host States. In consequence, arbitral tribunals should bear the objectives of ITA in mind when they examine investors' access to arbitration.

4.3 Applying the Doctrine of Piercing the Corporate Veil

With a particular focus on legal entities, this thesis applies the theory in xalaw, namely the doctrine of piercing the corporate veil, to understand the operations of legal entities. This thesis only presents the common features and principles of the doctrine of piercing the corporate veil rather than presenting a comparative study on this doctrine across different jurisdictions.

The doctrine of veil piercing in company law is relevant in international investment law.[246] Every company is required to follow up with domestic law of its home state. According to the fundamental principle of company law, shareholders of a corporation are not liable for the obligations of the enterprise except to contribute to the shares which are authorised to be issued or specified in the subscription agreement.[247] In the earliest *Salomon v. Salomon* case, the final judgement established the general rule that a company is an entity distinct from the members of the company. However, this case paved the way to finding the liability of the controllers and to define their responsibility for the unlawful acts of their companies.[248] Legal entities might create businesses to facilitate commercial ventures or shield themselves from liability in business operation but this distinctive relation between the created company and its controller might be misused and subsequently abuse the law. With this in mind, the doctrine of "piercing the corporate veil" deals with the issues of the misuse of the separate and distinctive relationship between the company and its governors.

This doctrine means that courts can disregard the separate nature of the company and find the liability of the governors of this company.[249] The idea of piercing the corporate veil was used in different domestic jurisdictions concerning various aspects of legal concerns. Applying the doctrine of veil piercing to a company for a particular action does not result in denying its personality for every aspect of its commercial life, but for the specific circumstances.[250] In the *Re Darby* case, the court pierced the veil of a company because the court found that the governor created this company to defraud its investors.[251] In another well-known *Foss v. Harbottle* case, the legal personality of the

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[246] "Piercing" the corporate veil and "lifting" the corporate veil appear indistinctively. See at Albert Badia, *Piercing the Veil of State Enterprises in International* Arbitration (Kluwer International 2014) 55.
[247] Model Business Corporate Act (2003) § 6.22.
[248] *Salomon v. A. Salomon & CO. Ltd*. [1897] AC 22. Albert Badia, *Piercing the Veil of State Enterprises in International* Arbitration (Kluwer International 2014) 54.
[249] Robert B. Thompson, 'Piercing the Corporate Veil: An Empirical Study' (1991) 76 Cornell Law Review 1036, 1036.
[250] Albert Badia, *Piercing the Veil of State Enterprises in International* Arbitration (Kluwer International 2014) 49.
[251] Re Darby, ex parte Brougham [1911] 1 KB 95.

company and the distinction between shareholders and the company were at stake.[252] In this case, the core dispute was whether minority shareholders could bring an action for fraudulent corporate assets. In general, these cases set the roads to pierce the corporate veil. After these cases were made, an overwhelming number of authorities were advocating or loathing this doctrine. However, none of them was big enough to have a binding power, because many inconsistencies exist in various cases and arise between one case and another.[253] Although there is a vast range of tests to apply this doctrine , the doctrine of veil piercing indicates three primary principles of law, namely the principle of good faith, the principle of preventing the abuse of rights and the rule of equality.[254]

Being a general principle, good faith consists of a cluster of elements, such as subjective and objective honesty.[255] A controller of a company should have a subjective motivation and a sincere belief that its conduct is in the best interests of the company, and the controller should act in a truthful manner.[256] At the same time, good faith is also measured by the objective elements to prohibit the company and its controller from creating interests in conflict with the interests of other beneficiaries.[257] Therefore, good faith requires that the distinctive relationship between shareholders and the company should not be misused, and this requirement is also assimilated into international law.[258] As a general principle of international law, good faith further mandates a high level of cooperation and mutual confidence between the international actors involved.[259] The principle is usually used to resort to the case where a dispute fails to be settled on the basis of the treaties or customary law.[260] The legal notion of good faith is abstract and value-oriented with a combination of several moral elements such as trust, honesty, fairness, loyalty or reasonableness.[261] Determining the exact content of good faith in a specific situation is a formidable task, which must necessarily be context-specific.

Added to this, the principle of preventing the abuse of rights is a particularisation of good faith.[262] Abuse of rights is prohibited because no right is a priori absolute and the conduct of one right has close inter-connection with others and its community.[263] To

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[252] *Foss v. Harbottle* (1843) 2 Hare 461.
[253] Albert Badia, *Piercing the Veil of State Enterprises in International* Arbitration (Kluwer International 2014) 56-57.
[254] *Ibid*, 49.
[255] Melvin A. Eisenberg, 'The Duty of Good Faith in Corporate Law' (2006) 31 Delaware Journal of Corporate Law 1, 21.
[256] *Ibid*, 22.
[257] *Ibid*, 22-23.
[258] Cheng Bin, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge Groyius Publications Limited 1987)105.
[259] Andreas R Ziegler & Jorun Baumgartner, 'Good Faith as a General Principle of (International) Law' in Andrew D. Mitchell, M. Sornarjah & Tania Voon (eds) *Good Faith and International Economic Law* (OUP 2015) 9, 9-10.
[260] *Ibid*, 10.
[261] *Ibid*, 11.
[262] *Ibid*, 30.
[263] *Ibid*, 31.

be specific, companies cannot gain benefits from their misconduct. It has apparently been argued in investment treaty jurisprudence, in particular, in relation to the legitimacy of corporate restructuring.[264] For instance, abuse of rights may be applied in investigations of whether shareholders behind the company misuse the distinctive liability between the shareholders and their companies. It also applies to examine whether shareholders bring multiple proceedings which assumes that they are the same claims in essence.[265]

Furthermore, the rule of equality applies to asserting whether a right is misused and if so, the extent to which the same can be restored. Equality in international law develops to infuse notions of fairness and reasonableness into the justice.[266] The equality rule guarantees that the fraud of misusing distinctive company structure can be attributed to the liability of the directors and controllers of a company. It also grants the rights to non-controlling shareholders to claim for their losses subject to the particular circumstances.

To return to the application of the doctrine of piercing the corporate veil, it is a theorised and crystallised principle of these primary general principles. This doctrine has flourished in international law and raised a remarkable debate. For instance in the *Barcelona Traction* case, the ICJ provided hypothetical powers to apply the doctrine of "veil piercing".[267] Since 1970, the doctrine has been widely cited and further extended to investor-State arbitration[268] Furthermore, the same theory was also widely used when the dispute relates to SOEs' access to arbitration.[269] To be specific, whether arbitral tribunals should pierce the veil of SOEs and identify their sovereign states as the actual investors.

Altogether, it is widely acknowledged that a close relationship between companies is common in world commerce.[270] The investors should have positive rights to arrange their investments and structure their own corporate organisations. Nevertheless, investors cannot misuse their structures either to evade general principles and legal obligations or to damage the interests of a third person. Therefore, international law recognizes that the corporate veil may be pierced in cases of fraud or other serious

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[264] *Ibid*, 34.
[265] *Ibid*.
[266] *Ibid*, 27.
[267] Barcelona Traction, Light and Power Company, Limited (Belgian v. Spain) Judgment of 24 July 1964, I.C.J. Rep. 1970 [hereinafter "Barcelona Traction case"]. A detail of the case will be further examined in the content chapters.
[268] *Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema S.A.R.L. ('Sakima') v. Democratic Republic of the Congo,* ICSID Case No. ARB/98/7, Award (1 September 2000) [hereinafter "Banro case"]. In this case, the Tribunal ruled that the approach of "veil piercing" was "to go beyond procedural appearances and to view the actual Claimants in these arbitration proceedings as its parent company."
[269] Albert Badia, *Piercing the Veil of State Enterprises in International* Arbitration (Kluwer International 2014) 101.
[270] *Saluka Investment B.V v. The Czech Republic*, Case No. IIC 210. I Partial Award (17 March 2006), [hereinafter "Saluka case"] para 228.

illegality.[271] However, the doctrine should be carefully applied in each individual case. Factual elements in each case are very important for arbitral tribunals to decide the jurisdiction. In the light of the doctrine of veil piercing, taking the facts of cases into consideration helps to provide a comprehensive and practical understanding of the decisions made by arbitral tribunals in ITA.

5. Conclusion

Access to arbitration is the examination point of this thesis. It has stirred a lot of discussions in practice. After giving an overview of the origins of investment arbitration, putting forward the background of the creation and the legal foundation of the ITA regime, this chapter builds up a theoretical foundation for this thesis. In order to make a reasonable and convincing examination in the following substantive chapters, this chapter paves the way to establish several criteria.

Firstly, the examination should start with an examination of treaties applied in the cases, mainly BITs or TIPs and the ICSID Convention if applicable. Treaties are the legal foundation of the ITA regime, but they leave some legal gaps concerning the access of foreign investors to arbitration. The interpretation of these treaties is therefore critical for arbitral tribunals to make a comprehensive jurisdiction. A systematic application of the VCLT is needed to make a rational and legitimate interpretation of the disputed terms in a treaty.

Moreover, the function of the ITA regime should be considered. Foreign investors choose the ITA regime rather than other remedies because of its specialisation. Therefore, for the purpose of making a determination on the access to arbitration of foreign investors, arbitral tribunals should respect the objectives of the ITA regime. The objectives can not only be demonstrated throughout the origins of the mechanism but also throughout the objectives of the treaties applied in each individual case. After decades of treaty evaluation, each treaty has its particular objective which leads to the conclusion of its substantive contents. Consequently, an analysis of each treaty applied is very important.

Furthermore, the doctrine of piercing the corporate veil provides practical foundations, from a corporate law perspective, to solve the problems in relation to foreign investors' access to arbitration. This doctrine attempts to answer how to accommodate the interests of investors and those of the host States. It also helps to determine whether legal entities make the investment in a manner to satisfy the objectives of the regime and the purposes of the treaties.

By way of conclusion, the subsequent chapters will examine the disputes on the basis

[271] Case No. 1:14-cv-01996-ABJ, Filed 10/20/15, United States District Court for the District of Columbia, Expert Opinion of Professor Rudolf Dolzer, para 166.

of three major criteria. Given these three criteria as the common criteria, the content chapters will continue to examine the access to ITA of specific types of legal entities. The following chapters will discuss the legal standing of foreign investors' access to arbitration with targets of four different entities. The criteria presented in this chapter provide widely applied standards, but not exclusively, to examine the legal standing issues. Due to the various natures of different targeted entities, the subsequent chapters may also incorporate respectively relevant and important elements to provide comprehensive examinations of them.

CHAPTER 3 ACCESS TO INVESTMENT TREATY ARBITRATION: LEGAL STANDING OF LEGAL ENTITIES CONTROLLED BY OTHER ENTITIES

1. Introduction

This chapter examines the legal standing of the entities that are under the control of other legal entities (the controlled entities) in ITA. These controlled entities are the first to be examined in this thesis. The research question of this chapter deals with how to determine the legal standing of these controlled entities when they bring claims to ITA. This is important because in ITA only real investors are permitted to bring claims.[1] This chapter therefore analyses whether arbitral tribunals should pierce the veil of the controlled entities in order to identify their ultimate controllers as the real investors.[2]

To answer the research question, this chapter proceeds with the following sections. Section 1 provides an introduction. Section 2 analyses the current legal framework concerning how to determine the legal standing of the controlled entities. The mapping of the legal framework contributes to establishing the potential legal challenges concerning foreign investors' access to arbitration. Firstly, this section draws attention to customary international law which is always mentioned by disputing parties and arbitral tribunals when they examine the legal standing of the controlled entities. Secondly, it examines the legal foundation of ITA, the ICSID Convention and the investment treaties, including BITs and TIPs.[3] This section finds that the legal gap in the regulation of controlled entities in the treaties is the root of legal disputes because the legal framework does not give a clear answer on how to determine the jurisdiction when controlled entities bring their claims to ITA.

Consequently, in light of Section 2, Section 3 conducts a case study to address how the arbitral tribunals examine the legal standing of those controlled entities as investors. It discusses the investment arbitration cases in which arbitral tribunals highlight the legal issues by analysing whether the arbitral tribunal should pierce the veil of the controlled entities to establish the real investors. In international investment, legal entities in the form of the holding companies place their affiliates in the jurisdictions that provide certain fiscal benefits, regulatory or institutional regulatory advantages.[4] It is common to see that when a legal entity makes its investment in host countries, that legal entity

[1] See Chapter 2.
[2] The concept of the doctrine of piercing the corporate veil can be read from Chapter 2.
[3] See Chapter 2.
[4] UNCTAD, *World Investment Report 2016*, 135.

is held or controlled by other legal entities.[5] Therefore, Section 3 catalogues the representative situations in which legal disputes concerning the standing of legal entities arise out of jurisdiction issues.

In addition to giving a summary of the approaches of arbitral tribunals, Section 4 continues to use the criteria presented in Chapter 2 to question and criticize the approaches of arbitral tribunals in practice. Throughout the analyses, this section provides a comprehensive approach to determining the legal standing of controlled entities by answering the research question of this chapter. Moreover, case law also offers important insights into investment treaties. Because the current legal regime does not give a straightforward answer to the legal standing of controlled entities, one practical approach to resolving the disputes is to fill the gap in the legal framework. Consequently, Section 5 gives the lessons learnt from case law practice to give recommendations to the negotiation of BITs or TIPs, subject to the current development of investment treaties. This chapter ends with a conclusion (Section 6).

2. Legal Framework in Relation to the Legal Standing of Controlled Entities

This section firstly revisits the ICJ case, the Barcelona Traction case. The significant role of this case in ITA has highlighted the need for this section to examine case details. In addition, it continues to discuss the legal framework from the perspective of international investment law.

2.1 Customary International Law: Revisiting the Barcelona Traction Case (I)

In the *Barcelona Traction* case, the ICJ made remarkable and influential decisions concerning the issues of the nationality of foreign investors. The decision of the ICJ discussed whether the controller behind the investors should be regarded as the actual controller from a perspective of international law. The legal arguments presented in the case become the origin of the concerns about the legal standing of foreign investors in investment arbitration. [6] It has been increasingly mentioned in investment arbitration cases by the disputing parties and arbitral tribunals. The disputing parties refer to this case and ask the arbitral tribunal to pierce the corporate veil of the controlled entities.

The ICJ provided hypothetical powers to examine whether or not the veil of an investor

[5] To be more specific, the following circumstances are representative. An investor from the State C wishes to benefit from the BIT or the TIP between State A and State B. Then this investor exercises its control over a company in State A to invest in the State B in order to acquire favourable protection from the BIT or TIP between A and B. Moreover, when a particular BIT or TIP provides a more favourable provision to foreign investors than local investors, a domestic investor from the State A could make its investment in its home state throughout the exercise control over the foreign investor from the State B.

[6] *"The best starting point is the Barcelona Traction judgement of the ICJ, which is probably the most cited judgement in the decisions of modern investment tribunals*" cited at *KT Asia International Group B.V v. Kazakhstan,* ICSID Case No. ARB/09/8, Award (17 October 2013) [hereinafter "KT Asia case"] para 96.

should be pierced to identify the controller behind this investor as the real investor.[7] Since the judgement in the *Barcelona Traction* case was made in the 1960s, the doctrine established by the court has been widely cited and further extended to investor-State arbitration where investor-State tribunals regard veil piercing as a realistic approach to identifying the investor.[8] This case plants the roots for the disputing parties to argue about how to decide the identity of the investor in the dispute settlement mechanism.

Firstly, this section introduces the case facts. The Barcelona Traction, Light and Power Company, Limited (Barcelona Traction), was incorporated by its head office in Toronto (Canada). In order to create and develop electric power production and a distribution system in Spain, Barcelona Traction formed a number of subsidiary companies. Three of the subsidiary companies, owned wholly or almost wholly by Barcelona Traction, were incorporated under Canadian law with registered offices in Canada; the other subsidiary companies were incorporated under Spanish Law with registered offices in Spain. Barcelona Traction issued sterling bonds which were serviced out of transfers by its subsidiaries in Spain. The bonds were suspended due to the Spanish civil war. After the war, the Spanish authorities refused to authorize the bond transfer. Later on, the Spanish bondholders petitioned the Spanish Court for adjudging the company bankrupt due to the failure to pay the interest on the bonds. After Barcelona Traction was declared bankrupt in Spain, the shareholders including Belgian shareholders failed to claim their losses in the Courts of Spain. Then they searched for the diplomatic protection from the Belgian Government. Therefore, the Belgian Government filed an application against the Spanish Government to the ICJ. Conversely, the Spanish Government issued a number of preliminary objections to the ICJ and argued that the Belgian Government lacked the capacity to bring any claim.

With regard to the ownership of the Barcelona Traction, the Belgian Government argued that Barcelona Traction's shared capital was very largely held by Belgian nationals, some years after the First World War. In contrast, the Spanish Government contended that no evidence proved that the shareholders in dispute had the Belgian nationality of the shareholders. The Spanish Government maintained the allegations of unlawful damages sustained by the Canadian company and argued that the Belgian Government lacked *jus standi* in this case, even if the shareholders were Belgian.[9] One dispute concerns whether Belgium was able to exercise diplomatic protection of Belgian shareholders in a company incorporated in Canada.[10] Therefore, if the Belgian

[7] The concept of "piercing the corporate veil" can be read in Chapter 2.

[8] *Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema S.A.R.L. ('Sakima') v. Democratic Republic of the Congo,* ICSID Case No. ARB/98/7, Award (1 September 2000) [hereinafter "Banro case"]. In this case, the Tribunal ruled that the approach of "veil piercing" was "to go beyond procedural appearances and to view the actual Claimants in these arbitration proceedings as its parent company."

[9] *Barcelona Traction* case, para 25.

[10] International law requires that a State is responsible for injury to an alien as a result of that State's wrongful act or omission. Diplomatic protection is "the procedure employed by the State of nationality of the injured person to secure protection of that person, and to obtain reparation for the internationally

government was able to exercise its diplomatic protection, the priority was to determine whether Belgian nationals suffered the losses from the act of Spanish government to the Barcelona Traction.[11] However, the measures in the complaint were taken against the company itself rather than any Belgian shareholder of the company. Only the Belgian shareholder was capable to obtain diplomatic protection from its government. Consequently, in order to exercise its diplomatic protection to the company, the Belgian government argued that the Belgian nationals were the actual controller of the Barcelona Traction. If the ICJ pierced the veil of the Barcelona Traction to identify the Belgian nationals as the actual controller, the Belgian government was able to acquire the rights to exercise the diplomatic protection in the present case.

Under these circumstances, the ICJ examined whether it should pierce the veil of the Barcelona Traction and regard the Belgian shareholders as the actual controller of the Barcelona Traction. The ICJ firstly agreed that the interests of the shareholders were both separable and indeed separated from those of the company.[12] As a general principle, it is not sufficient for the shareholder to bring a claim if its loss results from an injury to the rights of its company. However, in some circumstances, there are exceptions that the independent existence between the legal entity and its shareholders cannot be treated as an absolute.[13] Accordingly, the ICJ pointed out how to apply the doctrine of "veil piercing". When the separate personalities were not employed for the sole purposes, they were originally intended to serve or when the corporate entity is unable to protect the rights of those who entrusted their financial resources, the process of "lifting the corporate veil" or "disregarding the legal entity" has been found justified and equitable.[14] The ICJ further explicitly addressed that the practice of domestic law indicated that the veil could be lifted in exceptional circumstances, to

> "prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations."[15]

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wrongful act inflicted." See at John Dugard, 'Diplomatic Protection', *Max Planck Encyclopedias of International Law [MPIL]* (2009). Also read at Draft Articles on Diplomatic Protection adopted by the Drafting Committee on second reading in 2006 (International Law Commission [ILC]) UN Doc A/61/10, 16. Part I General Provisions, Art.1 of the ILC Draft Articles on Diplomatic Protection gives a definition of the notion of diplomatic protection: "diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility."

[11] Diplomatic protection of the Belgian government to their nationals shall be called upon to recognize institutions of domestic law. Domestic law establishes a distinction between the rights of the company and the rights of shareholders of the company. How to distinguish between claims of shareholders and claims of the company brings another concern which will be addressed in the following chapter. This chapter draws the first attention on whether the ICJ shall pierce the corporate veil and identify the controller as the real investor.

[12] *Barcelona Traction* case, para 45.

[13] *Ibid,* para 56.

[14] *Ibid*.

[15] *Ibid*.

The ICJ concluded that "on the international plane also there may in principle be special circumstances which justify the lifting of the veil in the interest of shareholders."[16] Consequently, the ICJ examined whether these special circumstances existed in the present case. In the end, the ICJ does not find these exceptional circumstances existing in the present case, therefore the ICJ dismissed the claims of the Belgian government by a vote of 15 to 1. This judgement indirectly addresses the issues concerning how to determine the legal standing of the controllers in the company. This decision establishes two doctrines as customary international law. The first doctrine admits the separation between a company and its shareholder; the other posits situations in which piercing the corporate veil might occur.

However, the decision is argued to be subject to the limitations when it applies in ITA. Scholars hold that the *Barcelona Traction* case is no longer applicable because there is no doubt that there has been a sea change away from the principles set out in the Barcelona Traction case and other customary international law.[17] Firstly, some scholars hold that this 1970 decision should also be reconsidered because currently foreign investments are mainly made by multinational enterprises. Nowadays the complex structures of the enterprises make economic and juridical qualification less uncertain than that of the enterprises in the 1970s.[18] In particular, this decision was made when the investment arbitration mechanism was just born. It was less likely that the ICJ ever foresaw how its decision affected the investor-State arbitration concerning the jurisdiction disputes.

Secondly, some scholars admit that the findings in the Barcelona Traction case are only relevant in the context of diplomatic protection.[19] This opinion is confirmed by Article 9 to Article 12 of the ILC draft on diplomatic protection, in which the Barcelona Traction judgement has also been incorporated in relation to the protection of shareholders and their companies.[20] In other words, the Barcelona Traction judgement

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[16] *Ibid,* para 58.

[17] Ian Laird, 'A Community of Destiny-The Barcelona Traction case and the Development of Shareholder Rights to Bring Investment Claims' in Todd Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May 2005) 94.

[18] Pia Acconci, 'Determining the Internationally Relevant Link between a State and a Corporate Investor, Recent Trends Concerning the Application of the "Genuine Link" Test' (2004) 5 Journal of World Investment and Trade 139, 146.

[19] Patrick Dumberry, 'The Legal Standing of Shareholders before Arbitral Tribunals: Has Any Rule of Customary International Law Crystalised' (2010)18 Michigan State University College of Law Journal of International Law 353, 360. Campbell McLachlan QC, Laurence Shore & Matthew Weiniger, *International Investment Arbitration, Substantive Principles* (OUP 2008)186.

[20]Abby Cohen Smutny, 'Claims of Shareholders in International Investment Law' in Christina Binder, Ursula Kriebaum, August Reinisch & Stephan Wittich (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009) 363, 366. ILC, *Draft Articles on Diplomatic Protection* (UN Official Records of the General Assembly, Sixty-first Session Supplement No. 10, A/61/10, 2006), < http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_8_2006.pdf >. Article 11 of the ILC (draft) states "a State of nationality of shareholders in a corporation shall not be entitled to exercise diplomatic protection in respect of such shareholders in the case of an injury to the

exclusively applies to diplomatic protection by limiting the rights of shareholders in a company possessing a different nationality from its own.[21] Consequently, no unified approach is made to apply how to apply the *Barcelona Traction* decision in practice.

To sum up, the ICJ at that time established its rules on how to identify the nationality of a legal entity by implying the theory of veil piercing from a standpoint of international law. This decision provides guidelines and standards to identify the situations in which veil piercing applies and gives a general answer to the question of under what circumstances the veil of a corporate might be pierced in international law. However, difficulties still arise when an attempt is made to implement this judgement in ITA.

2.2 The ICSID Convention and Applicable Treaties

The nationality of foreign investors is an important instrument in international investment. The issue of nationality also plays a key role in ITA. The majority of countries worldwide set up their national investment rules with consideration for the nationality of their investors, such as by only allowing domestic investors to invest or by prohibiting foreign investors in particular industries.[22] From an international aspect, almost every international investment treaty applies to investors with the nationality of the treaty partner countries.[23] However, with the development of global business, the more complex structures of legal entities make their identity challenging to be determined. The trend that corporate structures are complex and consequently that the investor's nationality becomes gradually less clear has significant implications for national and international investment policies.[24] For instance, among international investors, the corporate structures of multinational enterprises mainly are highly complex. Almost all of the multinational enterprises have at least one foreign affiliate, and of these, the top 100 have on average more than 500 affiliates across more than 50 countries worldwide.[25]

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corporation." The ILC draft specifically confirms the rights of shareholders- with two exceptions: when "the corporation has ceased to exist according to the law of the State of incorporation for a reason unrelated to the injury" or "the corporation had, at the date of injury, the nationality of the State alleged to be responsible for causing the injury, and incorporation in that State was required by it as a precondition for doing business there." Article 12 also especially notes that "an internationally wrongful act of a State causes direct injury to the rights of shareholders as such, as distinct from those of the corporation itself, the State of nationality of any such shareholders is entitled to exercise diplomatic protection in respect of its nationals."

[21] Peter Muchlinski, 'Diplomatic Protection of Foreign Investors' in Christina Binder, Ursula Kriebaum, August Reinisch & Stephan Wittich (eds), *International Investment Law for the 21st Century* (OUP 2009) 352.

[22] UNCTAD, *World Investment Report 2016*, 125.

[23] *Ibid*, 126.

[24] *Ibid*, 125.

[25] *Ibid*, 134. The Report says that "Less than one per cent of MNEs have more than 100 affiliates, but these account for more than 30 per cent of all foreign affiliates and almost 60 per cent of global MNE value added. The top 100 MNEs in UNCTAD's Transnationality Index have on average more than 500 affiliates across more than 50 countries…Empirical analysis performed on a very large sample of MNEs

Consequently, when the legal entities become foreign investors, their nationality is one of the critical issues to be determined. In the increasingly global economy, some legal entities exercise their control over other entities to achieve their interests from other treaties, which is known as the treaty shopping. Treaty shopping will occur when legal operations aim to invoke or create a qualifying nationality or investment to benefit from a particular international treaty.[26] Another type of shopping, the forum shopping of the companies, will also occur when controllers behind legal operations make structural arrangement and use other entities as its marionettes to obtain benefits. Nevertheless, this shopping management needs to be regulated because it may raise challenges to the investment policies of States by breaking the stability of market transaction, abusing the legitimacy and the stability of law.[27] More specifically, the shopping arrangement makes it challenging for states to ascertain the exact scope of the commitments of the treaties and undermines the incentives of the Contracting States to negotiate treaties which only intends to give reciprocal benefits and burdens to specific groups of investors.[28] Moreover, the shopping may change the dynamics of treaty negotiation between contracting states and influences competition between investors. [29] Consequently, international investment law should heighten the need for the regulation of the identity of foreign investors.

In ITA, it is necessary to determine the identity of those foreign investors to decide who is entitled to bring arbitration claims on the basis of the applied investment treaty and the ICSID Convention (if applicable), both of which act as the legal foundation of the dispute settlement mechanism. As explained in the theory chapter, Article 25 of the ICSID Convention determines in the circumstances the ICSID could extend its jurisdiction to the dispute between a Contracting State and a national of another Contracting State. Article 25 (2) (b) further introduces the rule that "National of another Contracting State" covers two types of judicial persons.

Firstly, the jurisdiction extends to the juridical person that "*had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration*" (Provision i);

Secondly, the jurisdiction extends to "*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*

shows that almost 70 per cent of MNEs have only one foreign affiliate, and almost 90 per cent of MNEs have fewer than 5 affiliates…"

[26] Jorun Baumgartner, *Treaty Shopping in International Investment Law* (OUP 2016) 12.

[27] David Gaukrodger & Kathryn Gordon, 'Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community' (2012) OECD Working Papers on International Investment 2012/03, 55-57 < http://www.oecd.org/daf/inv/investment-policy/WP-2012_3.pdf >.

[28] *Ibid*, 57.

[29] *Ibid*.

State for the purposes of this Convention" (Provision ii).[30]

Nevertheless, the application of this provision brings a wide range of challenges. The provisions only are limited to what is a national of another Contracting State, but they do not explicitly identify the legal standing of the juridical person to ITA. It is left to the arbitral tribunals to implement the provisions to decide the legal standing of foreign investors. When the arbitral tribunals apply the provisions, explanation of the provision (i) and provision (ii) in Article 25 (2) (b) stimulates systematic debates.

More specifically, from an internal perspective, a coherent internal understanding between these two provisions, namely how to interpret the legal hierarchy between these two provisions, is one concern. In other words, whether either provision, in particular, the clause "foreign control" of the second provision, provides the exclusive legal basis for investor-State tribunals to pierce the corporate veil of foreign investors to identify their controllers as the real investors. These questions arise in several investor-State arbitration cases. For instance, in the *Burimi* case, the Tribunal held that the first provision was a general provision to make a jurisdiction over an investor, while the second provided an exception that a national of a host State might be regarded as a foreign investor when that national was under foreign control.[31] Likewise, in the *TSA* case, it was argued that the first clause was regarded as a formal legal criterion, while the second clause was considered as a material and objective criterion.[32] Specifically, the *TSA* Tribunal held that Article 25 (2) (b) set up two criteria: firstly, investors must fulfil the requirement of the first clause, that of nationality determined by the applicable BIT; whilst the second clause was applied by the arbitral tribunal to pierce the corporate veil to reach behind the cover of nationality.[33] Therefore, the application of the doctrine of veil piercing depends on whether the dispute falls under the first or second clause of Article 25 (2) (b).[34]

Furthermore, from an external perspective, it raises challenges on how to examine the hierarchy between the ICSID Convention and the applicable BITs or TIPs. Namely, whether these provisions are the only applicable rules to determine the legal standing of investors is the concern. As was mentioned earlier, BITs or TIPs usually do not directly address how to determine the legal standing of legal entities controlled by others, instead of using several criteria to decide the nationality of investors.[35] Consequently, a vast number of investor-State tribunals examine the standing of an investor and determine "veil piercing" under a combined understanding of the ICSID Convention and the respective BITs. Some investor-State tribunals might hold that the

[30] The ICSID Convention, Article 25 (2)(b).
[31] *Burimi SRL and Eagle Games SH.A v, Republic of Albania*, ICSID Case No. ARB/11/18, Award (29 May 2013) [hereinafter "Burimi Case"] para 112.
[32] *Thales Spectrum de Argentina v. Argentina*, ICSID Case No. ARB/05/5, Award (19 December 2008) [hereinafter "TSA case"] para 140.
[33] *Ibid*, para 140.
[34] *Ibid*, para 143.
[35] See Chapter 2.

ICSID Convention should be satisfied prior to the applicable BITs or TIPs. For instance, the *Burimi* Tribunal made their jurisdiction solely on the basis of the application of the ICSID Convention. The *TSA* Tribunal stated that the provisions of the BIT could not provide ICSID jurisdiction unless the conditions of Article 25(2) (b) of the ICSID Convention were satisfied.[36]

In contrast, other investor-State tribunals might hold that the ICSID Convention leaves broad discretion to the contracting states to define the nationality of an investor by setting up various tests in the BITs. For example, the *Tokios* Tribunal held that the ICSID Convention did not define the method for determining the nationality of juridical entities.[37] In the *KT Asia* case, the Tribunal found that it was a common ground that the ICSID Convention did not impose any particular test for the nationality of juridical persons not having the nationality of the host State, be it the place of incorporation, or the effective seat, or control.[38] The *KT Asia* Tribunal ascertained that the broad provision in the ICSID Convention left discretion to the Contracting States to define nationality, and particularly corporate nationality, under the relevant BIT. [39]

Given these points, there is no consistent interpretation and application of the ICSID Convention and the applied BIT or TIP. Arbitral tribunals may interpret and apply the treaties in their competence. The next section will analyse case law to provide a full understanding of how to apply these legal rules to make the determination in practice. Case law points out the practical challenges arising from this existing legal regime. The research then uses the criteria listed in the theoretical chapter to examine the practice of arbitral tribunals in ITA.

3. How the Legal Standing Issues are Examined in Investment Treaty Arbitration

This chapter chooses to analyse the investor-State arbitration cases in which arbitral tribunals examine the legal standing of the controller by analysing the doctrine of "piercing the corporate veil". The doctrine of 'piercing the corporate veil" is an ideal provision to describe the circumstances, because it has been widely applied in corporate law practice with regard to the relation between a company and its controller behind. Moreover, this doctrine is applied in international law. The ICJ in the Barcelona Traction case also examined the application of veil piercing doctrine in international law. In order to determine the scope of the relevant cases, this chapter searches the database by using the keywords: veil piercing, piercing the veil, and piercing the corporate veil.[40] Using these keywords enables this thesis to restrict the scope of the

[36] *Tokios* case, para 156.
[37] *Ibid*, para 24.
[38] *KT Asia International Group B.V v. Kazakhstan,* ICSID Case No. ARB/09/8 Award (17 October 2013) [hereinafter "KT Asia case"] para 113.
[39] *Ibid*.
[40] The database used is Investment Claims empowered by Oxford University Press, accessed via <https://oxia.ouplaw.com >

cases and provide an overview of the investment arbitration practice on the issues of the legal standing of controlled entities.

In practice, disputes concerning the access of foreign investors and the role of the controllers behind these investors usually occur in several situations. This section catalogues three basic circumstances. The respondent state in investment arbitration might challenge the legal standing of the claimant investor by arguing that the investor is under the control of a national of the host State or a third state. The respondent state might also argue that its nationals under foreign control are not able to bring the investment arbitration claims against itself. All these fundamental situations have already appeared in the investment arbitration cases and have shown their practical influence.

3.1 Situation One: The Claimant is Under the Control of a National of the Host State

The first situation represents the circumstance that the claimant in the dispute is under the control of a national of the host State. The host State argues that this claimant is a vehicle whose national identity is established for its controller to gain access to arbitration. Consequently, arbitral tribunals will decide whether or not the veil of the claimant company should be pierced to identity its controller as the actual investor.

In a few investor-State arbitration cases, the arbitral tribunals only interpret the ICSID Convention in order to establish the jurisdiction. In the *Burimi SRL* case, the Tribunal directly interpreted the first clause in order to know whether to apply the doctrine of "veil piercing" in the present case. [41] The Claimants were Burimi SRL, a company incorporated under the laws of Italy, and Eagle Games SH.A., a company incorporated under the laws of Albania. Eagle Games was founded by two Albanian nationals, and both of them owned half of the shares of the company. Therefore, the Respondent (Albania) argued that Burimi SRL was owned by two Albanian nationals. The Respondent asked the Tribunal to pierce the corporate veil to identify the nationality of the person or legal entity holding the majority of the capital (an Albanian national) as the actual controller for the purposes of Article 25(2) (b) of the ICSID Convention. In short, the Burimi case explains when the claimant that is under the control of host State nationals brings its claim against the host State, whether the investor-State tribunal should pierce the veil of this claimant. Figure 1 gives a clear picture to the facts of the *Burimi* case.

[41] The *Burimi* case. It does not usually happen that arbitral tribunals only interpret the ICSID Convention to make the decision. Among the cases presented in this chapter, the Burimi case is the only case in which the arbitral tribunal only interpreted the ICSID Convention to make the determination.

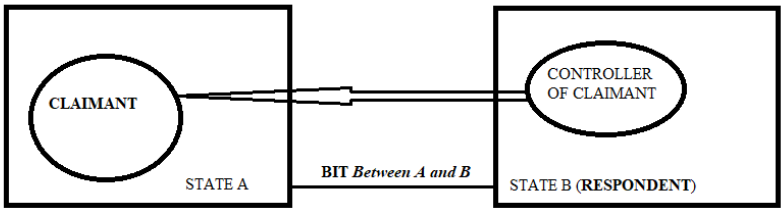

Figure 1 The Claimant is Under the Control of a National of the Host State

The *Burimi* Tribunal explained that the Respondent misunderstood the meaning of Article 25(2)(b) of the ICSID Convention because piercing the corporate veil was necessary to determine the nationality of a company that *already* had the nationality of a State other than the State party to the dispute.[42] According to the *Burimi* Tribunal, the phrase "foreign control" in the second clause of Article 25 (2)(b) did not provide an approach for the Tribunal to apply a "control test" and to pierce the corporate veil. Instead, the second clause afforded protection to the legal person without the nationality of the Contracting State but under the control of a national of the Contracting State. Consequently, the Tribunal held that the Claimant (Burimi SRL) was a judicial person with the nationality of a Contracting State (Italy) other than the State party to the dispute (Albania).[43] Therefore, the Tribunal concluded that the first clause of Article 25(2) (b) of the ICSID Convention should be applied, and then it was not necessary for the Tribunal to pierce the corporate veil.

Moreover, the *Tokios* case is another remarkable case in which the investor-State tribunal gives a detailed analysis addressing Situation One, which has been cited in many other investment arbitration cases. Because of its wide application, this chapter identifies the approach of tribunals in this case as the "Tokios Approach". The Claimant, Tokios Tokeles, was a publishing company established under the laws of Lithuania. Tokios created a wholly-owned subsidiary, Taki Spravy, which was established under

[42] *Ibid*, para 132.
[43] *Ibid*, para 130.

the laws of Ukraine. Tokios made a capital contribution to its subsidiary. After Taki published a book that was against Ukrainian politics, the Ukrainian authorities engaged in a series of actions against Taki Spravy. Later, Tokios and Taki submitted a joint request for arbitration to the ICSID, based on the Lithuania-Ukraine BIT. The Respondent (Ukraine) objected to the jurisdiction of the Tribunal by arguing that the Claimant was not a "genuine investor" in Lithuania because the Ukraine nationals controlled it. The simplified relations between different entities in the *Tokios* case are also demonstrated in Figure 1.

The Tribunal started its analysis by holding that the ICSID Convention only defined what a foreign investor was, but it did not enact the method of identifying a foreign investor. This omission left the BIT between the State parties to impose the explicit method. To reflect the intention of the party states, the Tribunal applied the test recorded in the BIT without adding further requirements. The Tribunal held this position on the basis of VCLT. Article 31 of the VCLT requires that the understanding of the treaty should express the ordinary meaning of the treaty. In the *Tokios* case, the applicable BIT is the Ukraine-Lithuania BIT. According to Article 1(2) of the BIT, the only requirement to be an "entity investor", is to be established in the territory of Lithuania in accordance with its laws and regulations.[44] On the basis of the VCLT, the Tribunal held that Article 1(2) of the BIT contained no additional requirements for an entity to qualify as an "investor" in Lithuania.[45] The Tribunal found that the object and purpose of the applied BIT is to provide broad protection to investors and their investment.[46] The Tribunal stated that respecting the definition of corporate nationality in the Ukraine-Lithuania BIT is essential to fulfil the parties' expectations, to increase the predictability of dispute settlement procedures.[47] It also enables investors to structure their investments to enjoy the legal protections afforded under the treaty.[48]

Consequently, the Tribunal refused to look beyond the Claimant to its shareholders or other juridical entities that might have had an interest in the claim. Therefore, the Tribunal maintained that the Claimant was a qualified investor under the BIT.

3.2 Situation Two: The Claimant is Under the Control of a National of a Third State

The second situation presents the situation where the claimant in the dispute is controlled by a national from a third state other than the host State or the home state of the claimant. With respect to this distinctive relation, the host State normally argues that the controller from the third state uses its ownership with the claimant to take advantage

[44] The Ukraine-Lithuania BIT, Article 1(2)(b).
[45] *Tokios* case, para 28.
[46] *Ibid*, para 32.
[47] *Ibid*, para 40.
[48] *Ibid*, para 40.

of the treaty between the host State and its home state to gain benefits that it is not qualified to obtain from the treaty. Consequently, when arbitral tribunals determine the access to arbitration of the claimant, they need to examine the role of the controller. Sharing the same debated point in the first situation, arbitral tribunals examine whether or not to pierce the veil of the claimant company in order to identify its controller as the actual investor.

The Tokios Approach has also been applied in several types of arbitration cases in which the respondent states argue that the claimant entities are owned or controlled by the nationals of the third-party states. In the *ADC* cases, the Claimants were ADC Affiliate Ltd. and ADC & ADMC Management Ltd.[49] Both companies were incorporated under the laws of the Republic of Cyprus. The Claimants submitted their claims to investor-State arbitration on the basis of the BIT between Hungary and Cyprus. The Respondent claimed that the Claimants were two shell companies established by Canadian investors. The Canadian investors operated the project of the company. The Respondent referred to the Statement of the ICJ in the Barcelona Traction case and asked the Tribunal to pierce the veil of the claimant companies. Figure 2 draws a clear picture. In this case, the eventual controllers come from a third country (Canada).

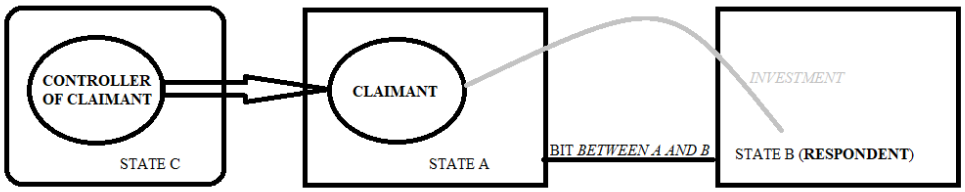

Figure 2 The Claimant is Under the Control of a National of a Third State

The Tribunal held that the issues about nationality were settled unambiguously by the ICSID Convention and the BIT. The ICSID Convention requires that the investors should be "*any juridical person which had the nationality*" of the other state (in this case, the State was Cyprus) as of the time at which the parties consented to this arbitration.[50] Moreover, the Cyprus-Hungary BIT was the applied treaty in this case, Article 1(3) (b) which required that "a Cypriot '*investor*' should be a '*legal person constituted or incorporated in compliance with the law*' of Cyprus."[51] The Tribunal

[49] *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary,* ICSID Case No. ARB/03/16, Award (2 October 2006) [hereinafter "ADC case"].
[50] *Ibid,* para 357.
[51] *Ibid*.

further emphasised that the terms of the BIT provided the necessary and sufficient criteria for determining corporate nationality."[52] Meanwhile, the Tribunal stated that the source of funds and the control of the Claimants by Canadian entities cannot prevent the Cyprus-Hungary BIT from being applicable.[53] Accordingly, the Tribunal concluded that the Claimants are constituted under the law of Cyprus and were regarded as an investor under the Cyprus-Hungary BIT.

In an *ad hoc* arbitration case subject to the UNCITRAL Rules, the *Saluka* case, Nomura, a Japanese Group company, bought the Czech Bank IPB and transferred the shares to a Dutch company, Saluka Investments B.V. (Claimant).[54] Nomura retained the voting rights associated with the shares and participated in the management. The Czech Republic government privatised the bank; therefore, Nomura and Saluka lost their investments. Saluka initiated the arbitration under Netherlands-Czech Republic BIT. The Respondent (Czech Republic) argued that the relationship between Saluka and Nomura was very close by claiming that "Saluka was a mere surrogate for Nomura".[55] The Respondent asked the Tribunal to pierce the veil of Saluka and argued that 'piercing the corporate veil' was permissible as an equitable remedy in which corporate structures had been utilised to perpetrate fraud or other malfeasance. Nomura had used corporate structures to realize profits and place the banking sector at risk, as well as to perpetrate fraud against the Czech Republic. Thus, the Respondent argued that the corporate veil of Saluka should be pierced and Nomura should be recognised as the investor with the real interest. Because Nomura was not within the definition of an "investor" under the Netherlands-Czech Republic BIT, the Respondent claimed that the Tribunal did not have jurisdiction.

In the *Saluka* case, the Tribunal discussed the relevant terms of the applied BIT by stating that Article 8.1 of the BIT applied to all disputes between one Contracting Party and an investor of the other Contracting Party concerning an investment of the latter.[56] Article 1 of the BIT mentions the definition of "investors" and to require the covered investors to be legal persons constituted under the law of one of the Contracting Parties.[57] The *Saluka* Tribunal stated that the contracting states to the BIT could, but did not, choose to import other requirements into the definition of "investor" and so it was beyond the powers of the Tribunal to add other requirements to determine the nationality of investors.[58] Therefore, the *Saluka* Tribunal concluded that the Claimant's shareholding was an investment and the Claimant was an investor in accordance with

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[52] *Ibid*, para 357-359.
[53] *Ibid*, para 355.
[54] *Saluka Investment B.V v. The Czech Republic*, Case No. IIC 210. I Partial Award (17 March 2006) [hereinafter "Saluka case"].
[55] *Saluka* case, para 184.
[56] *Ibid*, para194.
[57] The Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic (signed on 29 April 1991, came into force on 1 October 1992) Article 1.
[58] *Saluka case*, para 229.

Article 8 and Article 1 of the BIT.

In other multinational treaty-based arbitration, the Tokios approach is also applied. Investor-State tribunals based on the ECT also analyzed the legal standing issue under a Tokios approach. In the *Charanne* case that is the first investment arbitration award in an intra-EU dispute, one of the Respondent's objections on jurisdiction directly referred to "veil piercing".[59] One Claimant is Charanne BV, a Dutch company with headquarters in Amsterdam, and the other one, Construction Investment, was a Luxembourg Company with the registered office in Luxembourg. These two companies held 18.6583% and 2.8876% of the Spanish-registered company, T-Solar, respectively. After the Spanish government adopted new energy regulations and negatively affected the investment of the Claimant under the ECT, the Claimant submitted its request for arbitration against Spain. Based on the ECT, the Respondent argued that it was not a formal standard to require the legal entity to have a 'foreign' nature, but it was an objective condition that allowed the arbitral tribunals to lift the corporate veil to determine the real controller of the company as the actual investor.[60] However, according to the quality of investors as defined in the ECT. Article 1(7) of the ECT only required that the legal persons should be organised in accordance with the law applicable in that Contracting Party, and did not contain any other requirement.[61] Although the Charanne Tribunal maintained that veil piercing could be applied if the Claimant misused or had a fraudulent nature in its corporate structure, the Tribunal did not find the situation in which the Claimant abused its rights. Consequently, the Tribunal did not pierce the veil of the Claimant.

3.3 Situation Three: The Claimant is a National of the Host State

The third situation is slightly different from the first two situations. Concerning the first two situations, despite being controlled by other entities, the claimant still holds foreign nationalities other than the nationality of the respondent state. In the third situation, the claimant being a domestic company brings its investment arbitration claim against its home state by arguing that it is under foreign control.

In the *TSA* case, the Claimant, Thales Spectrum de Argentina SA (TSA), was a company incorporated in Argentina and was wholly owned by TSI Spectrum International NV (TSI), a company registered in the Netherlands which was owned by

[59] *Charanne B.V and Construction Investment S.A.R.L v. Kingdom of Spain,* SCC Case No. 062/2012, Award (21 January 2016), [hereinafter "Charanne case"]. The analysis is based on the translation by Mena Chambers. The Charanne case is influential, because this case is the first of a series of cases (around thirty cases) arising from Spain's reform of the renewable energy market. In this case, the Tribunal also addressed the effectiveness of the arbitration provisions in investment treaties between member states of the EU when the treaties were adopted after the TFEU entered into force for the first time.
[60] *Ibid,* para 413.
[61] *Ibid,* para 414.

a German-Argentine citizen, Jorge Justo Neuss.[62] TSA and the Undersecretary of Communications and the National Commission of Telecommunications of the Argentine Republic signed a Concession Contract. Later, CNC decided to terminate the Contract because TSA had breached the Contract. After negotiations failed, TSA submitted a request for arbitration. In this case, the Tribunal discussed how to determine the legal standing of TSA.

Figure 3 shows simplified relations between different entities in the TSA case. In this case, the Claimant came from the host State, which is intermediately controlled by the nationals of the other state, but the Claimant is eventually controlled by the nationals of the host State. As was previously mentioned, TSA is an Argentinian national. The Tribunal could not justify jurisdiction based on the first clause of the ICSID Convention because TSA is a domestic investor against Argentina. In consequence, the Tribunal ascertained the decisive matter was whether the Tribunal could base jurisdiction on the second clause.[63]

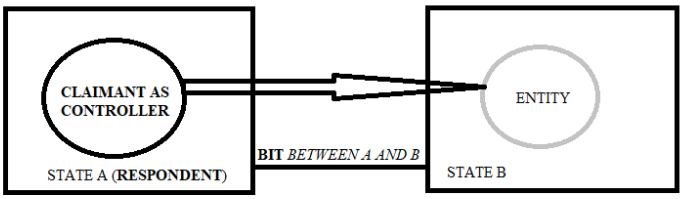

Figure 3 The Claimant is a National of the Host State

The TSA Tribunal decided to apply the "veil piercing" doctrine to investigate whether the second clause of Article 25(2) (b) was satisfied. Consequently, the Tribunal pierced the corporate veil to ascertain whether the domestic company was objectively under foreign control.[64] On the basis of the available information and evidence, the Tribunal found that the ultimate owner of TSA on and around the date of consent was an Argentinian citizen. Therefore, TSA could not be treated as a national of the Netherlands, and the Tribunal lacked jurisdiction.[65] In the end, the TSA Tribunal pierced the veil of the investor for the sake of determining the existence of "foreign

[62] *Thales Spectrum de Argentina SA v Argentina Republic*, ICSID No. ARB/05/5, Award (19 December 2008) [hereinafter the "TSA case"]. Among all the studied cases, the TSA case is the only case that represents the third situation. The original language of the award is Spanish. The analysis is partially based on the articles, which discussed the case. Michael Waibel, *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law International 2010) 15. Guiguo Wang, *International Investment Law: A Chinese Perspective* (Routledge 2014)105.
[63] *TSA* case, para 157.
[64] *Ibid*, para 160.
[65] *Ibid*, para 161-162.

control". The TSA Tribunal reached a different conclusion, distinguishing its case by pointing out that in other cases the issue is the determination of the nationality of foreign control rather than its objective existence.

4. Analysis of the Investment Arbitration Practice

After examining three representative situations in Section 3, this section conducts a systematic analysis of the investment arbitration practice. This section will ask the question: *how should arbitral tribunals determine the legal standing of controlled entities in ITA*?

Arbitral tribunals are in favour of the refusal against a claim by a foreign company that is owned and likely controlled by nationals of the host State and of a claim by a shareholder whose investment in the host State is owned by an intermediary company of a third state.[66] Therefore, arbitral tribunals apply an expansive approach to offering access to arbitration to legal entities. Arbitral tribunals tend not to pierce the veil of the disputed legal entity and identify its controller as the actual investor, as long as that disputed entity satisfies the other criteria under the treaty. There is an exception when the arbitral tribunal applies the doctrine of "veil piercing" as a tool to identify the existence of "foreign control" over domestic investors when such investors intend to bring ITA claims against their home states.[67]

Generally, the circumstances studied indicate that arbitral tribunals apply an expansive approach to determining the legal standing of the controlled entities. According to the research made by Gus Van Harten, in all the investment arbitration cases dealing with the legal standing of the corporate investor, a significant majority of the resolutions apply an expansive approach.[68] The expansive approach implies that arbitral tribunals usually allow a claim from a foreign company even if it is owned and likely controlled by other entities.[69] Arbitral tribunals may generally hold that the corporate form has priority over the control of the investment vehicle and the rejection of an implied origin-of-capital test.[70] In other words, arbitral tribunals mainly use the test in the treaty to determine the nationality of the company. Nevertheless, these tribunals do not take initiatives to determine the identity of the companies by further asking that the company should have substantial business in the host States. In comparison with the expansive approach, only a small number of the resolutions apply a restrictive approach. For

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[66] Gus Van Harten, 'Leaders in the Expansive and Restrictive Interpretation of Investment Treaties: A Descriptive Study of ISDS Awards to 2010' (2018) 29 European Journal of International Law 507, 544.
[67] *TSA* case.
[68] Gus Van Harten, 'Leaders in the Expansive and Restrictive Interpretation of Investment Treaties: A Descriptive Study of ISDS Awards to 2010' (2018) 29 European Journal of International Law 507, 515. This research codes all the known and publicly available awards in the ITA from the beginning of ISDS awards claims in the early1990s until May 2010. This research indicates that 85% of the entire resolutions apply an expansive approach.
[69] *Ibid*, 544.
[70] *Ibid*.

instance, arbitral tribunals make flexible use of veil-piercing or an indirect control test, or a test of substantial activities in order to preclude jurisdiction or admissibility.[71]

However, the expansive approach has some drawbacks. The representative cases studied indicate that arbitral tribunals usually make their determination under the Tokios approach. This approach shows that arbitral tribunals only pursue a literal understanding of the definition of investors in the treaties. A literature review of the applied treaties indicates that the tribunal could only use the tests recorded in the treaties. From a general perspective, it is accepted that investor-State tribunals exclusively apply BITs or TIPs. BITs and TIPs are direct resources and legal foundations through which investor-State tribunals can understand the rights and duties of both investors and states.[72] Nevertheless, BITs or TIPs applied in the cases provide broad provisions concerning the definition of foreign investors. These treaties do not express directly whether a legal entity under the control of another entity is able to bring investment arbitration claims. Although arbitral tribunals apply the Tokios approach to resolving the dispute by holding that treaties are not tasked with creating jurisprudence but tasked with resolving disputes, this approach does not provide a convincing argument [73]

For example, the chair of the Tokios Tribunal criticised the Tokios approach. The chairman of the Tribunal, Prosper Weil, held a dissenting opinion and introduced a distractive approach to determining the access of foreign investors to arbitration.[74] This dissenting opinion stated that "the ICSID arbitration mechanism is meant for *international* investment disputes, that is to say, for disputes between States and *foreign* investors."[75] He agreed with the majority of arbitrators in the *Tokios* case on the discussion of "lifting the veil", but held that "veil piercing" was not decisive for the Tribunal to find jurisdiction. Weil stated that the decisive issue was the simple, straightforward and objective fact that the dispute before this ICSID Tribunal was not between the Ukrainian State and a foreign investor but between the Ukrainian State and a Ukrainian investor. [76] Since the original capital was domestic, the claimant should not fall under the protection of international investment law, no matter whether the claimant entity misbehaved by taking advantage of the corporate formalisation.[77] This dissenting opinion gave a reflection on a particular appreciation of the purpose and object of the ICSID Convention.[78] Although a number of commentators disagree with Weil, his opinion forms the "out limits" of the ICSID Convention and highlights some

[71] *Ibid*.
[72] Chapter 2.
[73] Kathryn Gordon and Joachim Pohl, 'Investment Treaties over Time- Treaty Practice and Interpretation in a Changing World' (2015) OECD Working Chapters on International Investment 2015/02, 12 <http://www.oecd.org/investment/investment-policy/WP-2015-02.pdf >
[74] The dissenting opinion in the Tokios case highlighted the issue concerning the status of the legal entities controlled by other entities.
[75] Dissenting opinion of Prof. Weil in *Tokios* Case, para 5.
[76] *Ibid*, para 21.
[77] Campbell Mclachlan QC, Laurence Shore and Matthew Weiniger, *International Investment Arbitration Substantive Principles* (OUP 2008) 150.
[78] Christoph H. Schreuer, *The ICSID Convention, A Commentary* (2nd edn, CUP 2009) 290.

further dissenting concerns to solve the dispute between a state and a foreign investor.[79]

In general, although the common approach of arbitral tribunals is widely applied, it suffers from some practical limitations. Consequently, the next sections use the criteria listed in the theoretical chapter to examine this conventional approach.

4.1 Understanding the Treaties in a Comprehensive Manner

The common approach of arbitral tribunals fails to give a sufficient interpretation to establish their jurisdiction. With regard to the interpretation of treaties, arbitral tribunals in the studied cases misunderstand the "application" and "interpretation" of a treaty. "Interpret" means "to expound the meaning of and to make out the meaning of".[80] In his observation, McNair holds that "strictly speaking, when the meaning of the treaty is clear, it is 'applied', not 'interpreted'".[81] A treaty will be applied, not interpreted, if its meaning is clear. A treaty will be interpreted when the interpreter is confronted with treaty provisions the terms of which are either ambiguous or bear a different meaning.[82] With regard to the discussion of veil piercing, the investor-State tribunals do not interpret the ambiguous terms under the provision of the treaty; rather, they only apply the tests that are recorded in the agreements. Given a meaning to the text even where the meaning is perfectly apparent seems unnecessarily cautious.[83] Arbitral tribunals apply the tests recorded in the treaties, instead of giving, expounding or making out the meaning of the treaties. Therefore, the arbitral tribunals apply the nationality tests recorded rather than interpret the disputed provisions in the treaties.

Even if the approach of the investor-State tribunal can be regarded as an interpretation of a treaty, this literal approach does not satisfy the "ordinary meaning" requirement under the Article 31(1) of the VCLT. Article 31 of the VCLT has received increasing attention in investor-State arbitration, and this article seeks to offer clear guidance to interpret investment treaties.[84] It is the seminal provision which the arbitral tribunals rely on to discuss the veil piercing. Many interpreters may not go further than the first paragraph of Article 31 of the VCLT in order to investigate the ordinary meaning of the investment agreements.[85] The term "object and purpose" in Article 31(1) departs from a purely literal interpretation.[86] The literal approach of investor-State tribunals does not demonstrate the object and purpose of the investment agreements. On the one hand,

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[79] *Ibid,* 289-290. See also Hege Elisabeth Kjos, 'Tokios Tokelés v. Ukraine, Decision on Jurisdiction of April 29, 2004' (2004) 3 Transnational Dispute Management Journal.
[80] The Concise Oxford Dictionary.
[81] AD McNair, *The Law of Treaties* (Clarendon Press 1961) 365 n1.
[82] Tarcisio Gazzini, *Interpretation of International Investment Treaties* (Hart Publishing 2016) 69.
[83] Richard Gardiner, 'The Vienna Convention Rules on Treaty Interpretation' in Duncan B Hollis (ed) *The Oxford Guide to Treaties* (OUP 2012) 475, 478.
[84] Hervé Ascensio, 'Article 31 of the Vienna Conventions on the Law of Treaties and International Investment Law' (2016) 31 ICSID Review-Foreign Investment Law Journal 366, 366.
[85] *Ibid* 370.
[86] *Ibid*.

the first paragraph of Article 31 does not determine that the interpretation of a term is equal to its simple and plain meaning.[87] The term "ordinary meaning" under the VCLT not only refers to a literal and textual meaning of the terms of one treaty but also to the ordinary purposes of this treaty. On the other hand, the literal interpretation of the treaty should be double-checked against the context of the terms of the treaty and against the objects and purposes of this treaty.[88] Therefore, the literal understanding of the provisions and the purpose of investment agreements should be frequently applied as a whole.[89] Conversely, the interpretation of these terms in a treaty should be undertaken in the light of the context, the object, and the purpose of this treaty.[90]

As the dissenting opinion proposed by Weil, in the *Tokios* case, arbitral tribunals give less attention to the objectives of investment arbitration. The objectives of investment arbitration can be implied in accordance with the origins of the dispute settlement mechanism.[91] The objectives of investment arbitration also come from the purposes of the treaties applied in individual cases. For instance, the ICSID Convention points out the importance of having international factors in the investment. The preamble and content of the ICSID Convention are designed for the contracting states to consider the need for "international cooperation" and "international investment", and to "bear in mind the possibility that from time to time disputes may arise in connection with such investment between the Contracting States and nationals of other Contracting States."[92]

Apart from the objectives of the ICSID Convention, arbitral tribunals should also take the objectives of treaties into consideration. The purpose of various BITs is to create and maintain favourable conditions for the investments of the investor of one state in the territory of the other state. [93] Moreover, BITs may demonstrate that their purposes are to provide protection for investors to promote the investment by the other state's nationals. For instance, in the *Tokios* case, the preamble of the Ukraine-Lithuania BIT states that this BIT intends to "create and maintain favourable conditions for investments of investors of one state in the territory of the other State." A similar provision also appears in other applicable BITs in the analysed cases, such as the Cyprus-Hungary BIT in the ADC case, and the Netherlands-Czech Republic BIT in the *Saluka* case. In some circumstances, the objectives of TIPs might not give a particular focus on the foreign nature of investment as they are usually designed not exclusively to cover issues arising from foreign investment. For instance, the ECT is designed for

[87] Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 633.
[88] Tarcisio Gazzini, *Interpretation of International Investment Treaties* (Hart Publishing 2016), 67.
[89] *Ibid.*
[90] Max H Hulme, 'Preambles in Treaty Interpretation' (2015-2016) 164 University of Pennsylvania Law Review 1281, 1298.
[91] See Chapter 2.
[92] Preamble of the ICSID Convention.
[93] John P. Gaffney & James L. Lofits, 'The "Effective Ordinary Meaning" of BITS and the Jurisdiction of Treaty-Based Tribunals to Hear Contract Claims' (2007) 8 Journal of World Investment and Trade 5, 10

energy cooperation and foreign investment is only a part of its covered areas. [94] The *Charanne* Tribunal mentioned the intention of the drafters of the ECT, but found out there was no additional exclusion under the article. Therefore, the *Charanne* Tribunal concluded that the drafters did not intend to exclude the protection of an investor incorporated under the applicable law of a Contracting Party, and that was controlled by citizens or nationals of the State.[95] The *Charanne* Tribunal also shared the same position with the *Yukos* Tribunal. In the *Yukos* case, the Tribunal acknowledged that there were no general principles of international law that would require investigating the structure of a company or another organisation when the applicable treaty simply required the company to be organised in accordance with the laws of a Contracting Party.[96]

In general, among the studied treaties in these cases, BITs or some investment chapters in FTAs are proposed to cover the specific nationalities from specific countries. These treaties also address the issues of foreign investments made by foreign investors because they are investment related treaties. Conversely, other TIPs, such as the ECT, are open to countries all over the world, and might have their respective objectives. It is speculated that these treaties do not focus their objectives to address the foreignness of investor and investment. Therefore, when arbitral tribunals take the objectives of the applied treaties into consideration, they need to examine the objectives on a treaty-by-treaty basis.

To sum up, the vague approach of arbitral tribunals fails to demonstrate the ordinary meaning of the treaties because the arbitral tribunals partially apply the VCLT. To understand how to interpret the treaties, the first step is to use Article 31 of the VCLT in a single operation. The ordinary meaning of a term in the treaty is different from its literal meaning. The meaning of a term should be read to understand why this term is used in the treaty in accordance with the purposes and goals of the treaties. Therefore, the objectives of the treaties also play an important role in this aspect. Taking the objectives of investment arbitration into consideration helps to make a comprehensive understanding of the legal disputes. A straightforward way to interpret the objectives of investment arbitration is to understand the preamble of each applicable treaty in every case.

4.2 Taking Supplementary Factors into Consideration

Investor-State tribunals generally agree that investors should have the rights to arrange their investments and to structure their own corporate organisations. The theory of veil

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[94] The Energy Charter Treaty (updated on 09 April 2015)
< http://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/ > .
[95] The Charanne *case,* para 416.
[96] *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, No. PCA AA227, Interim Award on Jurisdiction and Admissibility (30 November 2009) [hereinafter "Yukos case"] para 417.

piercing only applies to determining the exceptional circumstances where arbitral tribunals find that the disputing parties abuse their rights.[97] Rudolf Dolzer concluded that international law recognised that the corporate veil may be pierced when the right of the company was abused, particularly in cases of fraud or other serious illegality.[98] The core issue is how to decide the circumstances in which the legal entities in the dispute abuse their rights to arrange their corporate structures or make their investment in an illegal manner. Accordingly, the respective investor-State tribunal also considers and examines the specific facts in each individual case.

Arbitral tribunals consider the activities of parties by considering their positions of both foreign investors and host States. Firstly, from the point of view of investors, arbitral tribunals would like to know the initiatives undertaken by the legal entities. Whether the investor evades its obligation can be inferred by looking into the duration of holding an investment and the date of making an investment. For example, in the *Tokios* case, because the enterprise was established six years before the Ukraine-Lithuania BIT came into force, the Tribunal found that the Claimant manifestly did not create Tokios for the purpose of gaining access to the ICSID arbitration under the BIT against Ukraine.[99] Moreover, the *Gold Reserve* Tribunal specifically held that the company may lose its rights to bring claims in certain situations, including "(1) the parent company entering the structure after the concession had been granted; (2) the parent company being inserted as a result of an internal corporate restructure; or (3) the new parent company being incorporated in a jurisdiction with a BIT which has previously not been relevant".[100] The common characteristic of these circumstances is that the arbitral tribunal discovers the compelling evidence to prove that the controller misuses its company structure to gain illegal benefits from the dispute mechanism.

The test of investors' initiatives has been widely applied by investor-State tribunals in practice. For instance, in the notable *Philip Morris Asia v. Australia* case, the arbitral tribunal analysed the initiatives of the claimant to determine its jurisdiction.[101] The Claimant, Philip Morris Asia (PMA), was registered in Hong Kong and purchased indirect ownership in Philip Morris Limited (PML), an Australian subsidiary, in 2011. The Respondent, Australia, issued package legislation for tobacco products to reduce smoking. On the basis of the Australia-Hong Kong BIT, the PMA brought its ITA claim under the UNCITRAL Arbitration Rules at the PCA in 2011 by arguing that such

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[97] Section III.

[98] *Hulley Entrprises LTD., Yukos Universal LTD., and Veteran Petroleum LTD., v The Russian Federation*, Case No. 1:14-cv-01996-ABJ, Filed (U.S. Dist. DC, Oct. 20, 2015), Expert Opinion of Professor Rudolf Dolzer, para 166.

[99] *Tokios* case, para 56.

[100] *Gold Reserve Incorporated v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1 Award (22 September 2014) [hereinafter "Gold Reserve case"] para 270.

[101] *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (17 December 2015) [hereinafter "Philip Morris case"]. The case was regarded as a notable flash point for the debates over investor-State arbitration and was a rare successful invocation of abuse of right under international law. Jerrod Hepburn and Luke, R. Nottage, 'Case Note: Philip Morris Asia v. Australia' (2017) 18 Journal of World Investment and Trade 307.

legislation restricted the use of trademarks by PML and constituted an expropriation. The Tribunal noticed that the Australian government intended to publish this packaging policy as early as 2008, so this intention was considered to be foreseeable to PMA.[102] The Tribunal further held that PMA commenced the ITA shortly after its purchase of PML. As a result, the Tribunal stated that the main reason for the arrangement and the restructuring of companies was to bring an investment claim on the basis of the BIT.[103] The Tribunal concluded that the Claimant abused its rights and then dismissed the Claimant's claim.[104]

Secondly, arbitral tribunals also seek to know the initiatives of the States. They examine whether the respondent states accept the facts that the investor is under the control of another company or whether the respondent state is aware of the criteria that the State intends to apply in the negotiated treaty to identify an investor. In the *ADC* case, the Tribunal noted that the Respondent was fully aware of and manifestly approved of the use of Cypriot entities.[105] In the *KT Asia* case, the Tribunal read the relevant Kazakhstan BITs to determine whether Kazakhstan was aware of the tests that it wished to involve in each BIT.[106] The Tribunal held that "in twenty-four Kazakhstan BITs, the Respondent had agreed to the same test as in the present one, the place of incorporation, while in ten other BITs it had added a requirement that the *siège social* or place of business or 'real economic activities' should be conducted there."[107] Thus, the Tribunal concluded that Kazakhstan could have insisted on a more demanding wording and more criteria to determine the identity of investors, but it did not. In consequence, Kazakhstan accepted the fact that only the place of incorporation was applied to identifying the nationality of an investor. Therefore, the Tribunal assumed that Kazakhstan has accepted that the nationality of a Dutch legal person is determined by their place of incorporation.[108]

However, each treaty has its own specific negotiated deal, different factors or backgrounds of negotiations, circumstances to make the conclusion, so all these situations should also be considered as achieving a thorough assessment.[109] In practice, various investment agreements are negotiated or signed with a diverse background.[110]

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[102] *Philip Morris Asia* case, paras 566-569.
[103] *Ibid*, paras 580-584.
[104] *Ibid*, para 588.
[105] *ADC* case, para 358.
[106] The KT Asia case concerns about whether a foreign company under the control of a domestic investor is able to bring its claims against the host state. A more detailed analysis can be read at, Anran Zhang, 'A Domestic National Controls a Foreign Investor in Investment Arbitration: in light of China's Negative Lists' in Julien Chaisse & Jedrzej Gorski (eds) *The Belt and Road Initiative Law, Economics, and Politics* (Brill 2018) 365.
[107] *KT Asia* case, para 123.
[108] *Ibid*, para 123.
[109] Trinh Hai Yen, *The Interpretation of Investment Treaties* (Brill 2014) 153.
[110] For example, Chinese BITs are considered to have three generations, 1980s, l990-1990s, and post-1990s, respectively. See at Norah Gallagher & Wenhua Shan, *Chinese Investment Treaties: Policy and Practice* (OUP 2009) 1.65. This chapter does not intend to distinguish the exact period of each generation,

The *KT Asia* Tribunal investigated 34 of all the BITs signed by Kazakhstan in order to know the intentions of the contracting state parties. However, the intentions of the Contracting States under different BITs will be affected by different factors. In different generations, Contracting States apply different rules and hold different positions to conclude BITs. The first Kazakhstan BIT was signed with Turkey on 1 May 1992, and the latest BIT was signed with Japan on 23 October 2014.[111] Different backgrounds and factors exist among those BITs that were signed in the past 22 years. As Chapter 2 pointed out, various treaties have their respective and special purposes to be concluded. Each treaty has its own negotiated background and each objective of the treaty should be considered individually. Moreover, the VCLT explicitly mentions that the reference to other treaties could only serve as a supplementary purpose of interpretation.[112] Consequently, when the investor-State tribunals try to interpret the provisions of a treaty, they need to consider the negotiating factors in that particular treaty, instead of other treaties signed by the contracting states.

Moreover, it is disputable that arbitral tribunals use the initiatives of states during the BIT negotiation to determine the initiatives of the States in the actual case. Indeed, arbitral tribunals are correct that the contracting states should be fully aware of what tests they are in favour of determining the legal identity of the foreign investor. Nevertheless, the awareness of the applicable criteria in the investment treaties differs from the initiatives of contracting states in particular disputes. Following the understanding of arbitral tribunals, a contracting state is also presumed to have the intention to protect foreign investors from the other contracting state. Because since the beginning of the negotiation of investment agreements, contracting states also keep in mind that the treaties are to protect foreign investors.[113] Therefore, arbitral tribunals should take such a willingness to protect foreign investors from contracting states into consideration.

Another further concern refers to whether the common approach of arbitral tribunals can protect the "treaty-taker" countries. Scholars have suggested that the developed and capital-rich countries or unions including the US and the EU, in their own ways, have been stewards of the international rules-based order.[114] These developed countries always play essential roles as treaty makers in international investment law. In contrast, some developing and capital-poor countries will take the rules and sign the investment agreements made by the developed countries. The effects of the global markets are especially restrictive for capital-poor countries that need foreign investment for

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but instead just regards China as an example in order to prove that the State will have different generations of BIT in different times.

[111] Investment Policy Hub, 'Kazakhstan' < http://investmentpolicyhub.unctad.org/IIA/CountryBits/107#iiaInnerMenu>.

[112] VCLT, Article 32.

[113] See Chapter 2.

[114] Daniel S. Hamilton & Jacques Pelkmans, 'Rule-Makers of Rule-Takers? An Introduction to TTIP', in Daniel S. Hamilton & Jacques Pelkmans (eds) *Rule-Makers or Rule Takers* (Rowman & Littlefield International 2015) 1.

employment and development.[115] Moreover, developing countries are subject to be involved in more disputes than are developed countries.[116] To make the deal of the investment treaties, those treaty-taker countries may not be fully aware of which tests they wish to have to identify the investors in the agreements to identify the investors.

For instance, treaty-taker countries may only intend to offer international protection to foreign investors, not those investors under the control of their nationals, but they did not incorporate such intentions into the treaties. In those circumstances, when arbitral tribunals simply read the literal meaning of the term in the investment treaty, the approach is subject to the certain limitation of reflecting the actual objective of protecting foreign investors from the "treaty-taker" countries. Although the contracting states including "treaty-taker" countries should have responsibility for the investment agreements they signed, investigating the intentions of the contracting states on a specific treaty is also necessary.

In general, arbitral tribunals may consider the initiatives of the disputing parties, both the claimant investors and the respondent states. On the one hand, the arbitral tribunal should find out whether the claimant investor misuses its rights to obtain benefits from the investment treaty. On the other hand, the arbitral tribunal should also consider the initiatives of the host States to find out whether host States acknowledge the tests input to identify foreign investors. However, the issues about examining the initiatives of the parties of the dispute are sophisticated. An assessment system of the initiatives should be comprehensive to examine the essential elements to make the conclusion.

5. Recent Development and Reflections on Investment Treaties

The disputes regarding the access to the arbitration of the controlled entities arise because the treaties do not give a clear answer on how to regulate the standing concerns. The legal gap leaves the issues of deciding to the competence of the arbitral tribunals. Case law practice demonstrates the common approach of arbitral tribunals towards the access of foreign investors to ITA. The common approach of the arbitral tribunals suffers from some limitations. In order to eliminate these practical drawbacks, arbitral tribunals are recommended to apply advanced approaches as suggested in the last section.

Moreover, states can take arbitration practice into consideration in order to tackle the root of disputes when they negotiate new treaties. In the light of the arbitration practice, the State parties may be aware of the potential disputes that could arise from the treaty. In addition, it is already proved that negotiating state parties have started to incorporate

[115] Rachel L. Wellhausen, *The Shield of Nationality: When Governments Break Contracts with Foreign Firms* (CUP 2015) 36.

[116] Kevin P. Gallagher & Elen Shrestha, 'ITA and Developing Countries: A Re-Appraisal'(2011) Global Development And Environment Institute Working Chapter No.11-01 < http://www.ase.tufts.edu/gdae/Pubs/wp/11-01TreatyArbitrationReappraisal.pdf >

the case law practice into the treaty negotiation.[117] Therefore, following the analyses of the approaches of the arbitral tribunals, this section continues to examine the recent development of investment treaty negotiations. It also intends to give reflections on the negotiation or the modification of BITs or TIPs in the new era.

5.1 Addressing Who can Bring Claims in the Treaty

Contracting States should input detailed provisions in BITs or TIPs to address the role of legal entities in gaining access to arbitration. For instance, treaties can use more criteria to define the term "investor", such as using the place of incorporation criterion, the substantial business criterion, as well as the control criteria. Moreover, the investment chapter of the remarkable CETA determines the identity of investors in a different way.[118] The CETA determines not only the identity of an investor but also the legal subject that can submit claims in a positive manner. Article 8.1 of the CETA gives a detailed definition of investment and investor. Concerning the definition of an enterprise investor, Article 8.1 applies a place of incorporation criterion, a substantial operation criterion and a control criterion by stating,

> "investor means a Party, a natural person or an enterprise of a Party, other than a branch or a representative office, that seeks to make, is making or has made an investment in the territory of the other Party; For the purposes of this definition, an enterprise of a Party is:
> (a) an enterprise that is constituted or organised under the laws of that Party and has substantial business activities in the territory of that Party; or (b) an enterprise that is constituted or organised under the laws of that Party and is directly or indirectly owned or controlled by a natural person of that Party or by an enterprise mentioned under paragraph (a);locally established enterprise means a juridical person that is constituted or organised under the laws of the respondent and that an investor of the other Party owns or controls directly or indirectly."

Because the CETA will confer import tariff and non-tariff advantages on other competitors excluding the EU and Canada that are not entitled to gain benefits from the CETA, it assumes that those competitors may use the CETA as a gateway to be entitled

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[117] For example, the EU incorporated the case law practice into their investment treaty negotiation. It is particularly the case when Contracting States demonstrate to exclude the mail-box companies from the protection of the arbitration proceedings.

[118] Compared with other agreements signed by the EU, including EU-Singapore FTA and EU-Vietnam FTA, the CETA determines in a different way. The CETA is an ideal example which marks one of the most recent positions of the contracting (states) parties in international investment and trade. Both Canada and the EU stated that the CETA has generated significant benefits with increases in trade and investment between both parties. Read from, the Government of Canada, 'Benefits of CETA' (date modified 18 July 2019) < https://www.canada.ca/en/global-affairs/news/2019/07/benefits-of-ceta.html >. European Commission, 'The Benefit of CETA" (2016)
< https://trade.ec.europa.eu/doclib/docs/2016/july/tradoc_154775.pdf >.

to the benefits.[119] Therefore, the European Commission pointed out its position of the identity of foreign investors by pointing out that "the CETA does not protect so-called 'shell' or 'mailbox' companies. In order to be qualified as an investor under the treaty, the CETA requires the investor to have real business operations in the territory of one of the treaty parties.[120] In addition, the first paragraph of Article 8.23 of the CETA addresses this concern and further determines who can submit a claim to an investor-State tribunal, which states:

> "If a dispute has not been resolved through consultations, a claim may be submitted under this Section by:
> (a) an investor of a Party on its own behalf; or
> (b) an investor of a Party, on behalf of a locally established enterprise which it owns or controls directly or indirectly."[121]

This provision makes it easier for arbitral tribunals to distinguish the identity of investors in accordance with the treaties and the identity of the Claimant in practice. Furthermore, the EU also input this provision in its newly released EU-Singapore Investment Protection Agreement (EUSIPA).[122] For the first time, the EU separates the IPA from the FTA, and Article 3.1 of the EUSIPA claims that the claimant refers to "an investor of a Party which seeks to submit or has submitted a claim pursuant to this Section, either acting on its behalf, or acting on behalf of a locally established company… which it owns or controls." Moreover, a similar provision might also be found in the other IITs, for instance, the annexe 9-J of TPP also rules on who can submit a claim.[123]

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[119] Peter Glossop, Riyaz Dattu & Margaret Kim, 'The Canada-Europe Free Trade Agreement: Advantages for Canadian and European businesses' *Osler* (27 February 2017) <https://www.osler.com/en/resources/cross-border/2017/the-canada-europe-free-trade-agreement-advantages >. The authors gave an example that "some businesses may wish to consider shifting some of their manufacturing to Canada to create Canadian-origin products entitled to duty-free entry into the EU".

[120] European Commission, 'Investment Provisions in the EU-Canada Free Trade Agreement (CETA)' < http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf >.

[121] Article 8.23 of the CETA. The fourth paragraph of the Article 8.23 of the CETA further expands that "for greater certainty, a claim submitted under subparagraph 1(b) shall satisfy the requirements of Article 25(1) of the ICSID Convention".

[122] European Commission, 'Singapore' (April 2018) < http://trade.ec.europa.eu/doclib/press/index.cfm?id=961 > .

[123] TPP has been stalled since the withdraw notification by President Trump in January 2017. Annex 9-J of the TPP states, "Submission of A Claim to Arbitration

> 1. An investor of a Party may not submit to arbitration under Section B (Investor-State Dispute Settlement) a claim that Chile, Mexico, Peru or Viet Nam has breached an obligation under Section A either:
> (a) on its own behalf under Article 9.19.1(a) (Submission of a Claim to Arbitration); or(b) on behalf of an enterprise of Chile, Mexico, Peru, or Viet Nam, that is a juridical person that the investor owns or controls directly or indirectly under 9.19.1(b) (Submission of a Claim to Arbitration), if the investor or the enterprise, respectively, has alleged that breach of an obligation under Section A in proceedings before a court or administrative tribunal of Chile, Mexico, Peru or Viet Nam."

Although the TTP is defunct, this provision indicates the trend that the IIT negotiation will establish a separate rule to deal with the identity of the claimants in investor-State arbitration.

These provisions reflect that investment agreements may not only define "what is an investor" but also "who can bring claims". The "who can bring claims" provision directs arbitral tribunals to make a determination on the identity of the claimant, which might avoid confusion about the legal standing of the claimant. However, such provisions only apply in certain treaties, such as the CETA or the EUSIPA, in which an investor or a controller of an investor is always ensured, coming from either the EU or Canada (or Singapore). Therefore, it may not provide comprehensive solutions to solve the disputes in which the investor is under the direct or indirect control of a national of a third state. Despite those limitations, this approach, that separates the definition of investor and the determination of a claimant under the ISDS, brings new insights into the investment treaties. This approach also directly responds to the issue that neither the ICSID Convention nor the TIPs have answered the question of who can bring claims in accordance with the applicable treaties.

5.2 Introducing Denial of Benefits Clauses

Investment treaties could also include negative factors, namely denial of benefits (DoB) clauses, in which treaties clearly articulate the circumstances in which a controlled entity cannot claim their alleged losses in accordance with the agreement. According to the UNCTAD mapping project, 221 out of 2577 mapped treaties include DoB clauses, most of which require that there is a substantive business in the host State.[124] A substantive business requirement might require claimant investors to have substantial business activities in their states, although they may be under the control of other companies. DoB clauses are input in a number of multilateral investment agreements. For instance, this method can be found in some American agreements which include DoB clauses, such as the NAFTA[125], the revised USMCA, the US-Dominican Republic-Central America Free Trade Agreement (CAFTA), and other US investment treaties.[126]

Article 14.14 of the USMCA states that,
" Denial of Benefits:
1. A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such Party and to investments of such investor if investors of a non-Party own or control the enterprise and the denying Party:
(a) does not maintain diplomatic relations with the non-Party, or

[124] United Nation Conference on Trade and Development (UNCTAD). UNCTAD, 'IIA Mapping Project' < http://investmentpolicyhub.unctad.org/IIA/mappedContent>. It is a collaborative initiative between UNCTAD and universities worldwide to map the content of IIAs. The resulting database serves as a tool to understand trends in IIA drafting, assess the prevalence of different policy approaches and identify treaty examples. 412 out of 2577 mapped treaties require investors to have substantive businesses in their state.
[125] NAFTA, Article 1113.
[126] Both US model BIT (2004) and US model BIT (2012) have a similar clause to NAFTA and CAFTA.

(b) adopts or maintains measures with respect to the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.

2. …a Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such Party and to investments of such investors if investors of a non-Party own or control the enterprise and the enterprise has no substantial business activities in the territory of the Party under whose law it is constituted or organised."

Article 10.10 of the CAFTA also involves a similar provision.[127] In the *Pac Rim Cayman v. El Salvador* case, which is the first CAFTA case interpreting the DoB provisions, the Tribunal addressed that whether or not the Claimant has substantial business activities determines the tribunal's jurisdiction.[128] In this case, the Claimant, Pac Rim Cayman, was a US-organised legal person which was controlled by a Canadian legal person. Canada was not a contracting party of CAFTA. In accordance with the object and purpose of the CAFTA, the Tribunal pointed out two conditions which must be satisfied to apply the DoB clause. One condition was the Claimant had no substantial business activities in the US and it was controlled by persons of a non-CAFTA State (in this case Canada). The other condition was whether the respondent state brought this DoB claim within a time limit. These provisions in the CAFTA require the claimant company to run its business in the territory of the other state in order to make sure that this company as an investor has actually invested in the other state. On the basis of these conditions, the *Pac Rim Cayman* Tribunal found it had no jurisdiction.[129]

The DoB clauses in other non-US investment agreements also allow the host State to withdraw the protection of the investment treaty to investors in certain circumstances, such as Article 19 of the ASEAN Comprehensive Investment Agreement (the ASEAN agreement). [130] In contrast, the DoB clauses within both the USMCA and the ASEAN

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[127] Article 10.12 of CAFTA has a similar clause to NAFTA.

[128] Guiguo Wang, *International Investment Law: A Chinese Perspective* (Routledge 2015)161-162. *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).

[129] Similar decisions can also be found in *Ulysseas Inc v. The Republic of Ecuador,* UNCITAL Arbitration, Interim Award (28 September 2010) 143; *Guaracachi America, Inc and Rurelec v. The Plurinational State of Bolivia,* PCA Case No. 2011-17, Award (31 January 2014) 140.

[130] The ASEAN Comprehensive Investment Agreement was signed on 26 February 2009. Article 19 states

> "1. A Member State may deny the benefits of this Agreement to:
> (a) an investor of another Member State that is a juridical person of such other Member State and to investments of such investor if an investor of a non-Member State owns or controls the juridical person and the juridical person has no substantive business operations in the territory of such other Member State;
> (b) an investor of another Member State that is a juridical person of such other Member State and to investments of such investor if an investor of the denying Member State owns or controls the juridical person and the juridical person has no substantive business operations in the territory of such other Member State; and
> (c) an investor of another Member State that is a juridical person of such other Member State and to an investment of such investor if investors of a non-Member State own or control the juridical person, and the denying Member State does not maintain diplomatic relations with

agreements are made extensively to dispute settlement provisions.[131] With regard to Article 14.14 of the USMCA, a party is able to deny the benefits of the investment if any listed situation in the treaty occurs. In companion with this broad application, other treaties posit that the DoB clauses are applied in substantive procedures. Article 17 of the ECT also deals with the cases of DoB by stating,

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

This article gives contracting states the right to exclude benefits conferred by alleged investors owned or controlled by citizens or nationals of third countries, which are not economically bound to the host State.[132] One concern is whether or not this DoB clause should extend to dispute settlement mechanism provisions. If investment treaties elucidate the circumstances under which a controlled entity cannot bring claims to investor-State arbitration, arbitral tribunals may have direct legal basis to exclude the access of those entities to arbitration. However, it is debated that Article 17 does not apply to dispute resolution mechanisms.[133] One reason is that this article is inserted in the substantive part because Article 17 is a part of the *Investment Promotion and Protection Sessions* of the ECT. Even though the DoB provision in the ECT could not apply to examining the jurisdictional issues, it can still be applied in the substantial proceedings. Therefore, the disputing party could still preserve its right to bring the DoB argument when the arbitral tribunal examines the merits.

To sum up, there is a changing trend that new treaties start to involve DoB clauses.[134]

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the non-Member State…"

[131] Albert Badia, 'Chapter 5: Piercing the Veil of Investors in Nationality Claims' in Albert Badia (ed), *Piercing the Veil of State Enterprises in International Arbitration* (Kluwer Law International 2014) 133, 139-140.

[132] Loukas A Mistelis and Crina Mihaela Baltag, 'Denial of Benefits and Article 17 of the Energy Charter Treaty' (2009) 11 Penn State Law Review 1301, 1313.

[133] Albert Badia, 'Chapter 5: Piercing the Veil of Investors in Nationality Claims'in Albert Badia (eds), *Piercing the Veil of State Enterprises in International Arbitration* (Kluwer Law International 2014) 133, 139. Zachary Douglas, *The International Law of Investment Claims* (CUP 2009) 469.

[134] With regard to the BITs discussed in the studied cases, the BITs referred to in this research do not include DoB clauses. And there is no provision in any of these BITs directly clarifying whether an entity investor from one contracting state but controlled by the nationals of either the host state or a third state can bring claims.

DoB clauses input the negative criteria to give investor-State tribunals an explicit legal basis to deny the jurisdiction when investors abuse their rights in international investment, such as creating a mailbox company to acquire benefits from the investment treaties. Meanwhile, the DoB clauses also serve to balance the rights of both states and investors by giving the rights to the host States to prevent foreign investors from misusing this mechanism to gain protection from ITA.[135]

6. Conclusion

Referring back to this chapter's research question, this chapter found answers to the question of whether arbitral tribunals pierce the veil of controlled entities to regard their ultimate controllers as the real investors. Firstly, what is revealed is that the current legal regime does not provide a straightforward answer to this question and leaves this legal gap to arbitral tribunals. On the basis of case law, this chapter then analyses three significant situations in which arbitral tribunals examine the legal standing of the controlled entities in ITA. Arbitral tribunals usually apply an expansive approach to resolving the legal disputes in these situations.

It rarely happens that arbitral tribunals pierce the corporate veil of a foreign entity under the control of a domestic investor or an investor from a third state. Nevertheless, arbitral tribunals will pierce the veil of a domestic investor to discover whether it is under foreign control when that investor bring its arbitration claim. The starting point of arbitral tribunals is to establish their jurisdiction rather than find the actual ultimate investors. However, this approach contradicts the objectives of the ITA mechanism. As stated in the theoretical chapter, the ITA mechanism is designed to protect the qualified investors, who make foreign investments. To put it another way, ITA does not offer unlimited protection to any mailbox company controlled by a domestic investor or an investor from a non-contracting state.

This chapter speculates that one interpretation is that the arbitrators' fee plays an incentive. After the jurisdiction is established, the arbitration process continues and arbitral tribunals will rule on the merits. As a result, the costs of arbitration will be increased. The expenses including the arbitrator's fees, arbitrator's and institute's expenses, administrative fees, and other related costs will increase. Even if arbitral tribunals do not order any compensation of costs, the disputing parties will still have to pay for the costs in the merit process.

To solve the problem, the chapter provides a solution to dealing with the issues of access to the arbitration of foreign investors. Firstly, although arbitral tribunals use the VCLT on which to base their jurisdiction on an exclusive application of the criteria in the treaties, they do not apply the VCLT in a comprehensive manner. Arbitral tribunals

[135] Loukas A Mistelis & Crina Mihaela Baltag, 'Denial of Benefits and Article 17 of the Energy Charter Treaty', (2009) 11 Penn State Law Review 1301, 1321.

should ascertain the original meaning of a disputed term subject to a systematic analysis of the VCLT. Secondly, to resolve the specific disputes, arbitral tribunals should make the judgement based on the analyses of case facts. Arbitral tribunals should look into the initiatives of both investors and host States to determine in which circumstances they pierce the veil of the controlled entity and identify its controller as the actual investor.

Added to this, the way to fill the legal gaps in the treaties is by inputting detailed provisions to address the issue of the legal standing of the controlled entities. Consequently, this chapter suggests incorporating the arbitration practice into the negotiation or the modification of the treaties in the new era. This approach would help to develop a practice-based foundation to resolve the problems concerning the legal standing of investors. Some development in the recently negotiated treaties proves that this idea is practical from two aspects. Firstly, treaties may include provisions which directly refer to legal entities that are capable of bringing claims. Secondly, treaties may include the DoB provisions to indicate the circumstances in which a legal entity is not able to bring investment arbitration claims.

In conclusion, arbitral tribunals should apply a comprehensive approach to determining the legal standing of controlled entities. Contracting states are recommended to take the arbitration practice into consideration when they are drafting new treaties.

CHAPTER 4 ACCESS TO INVESTMENT TREATY ARBITRATION: LEGAL STANDING OF SHAREHOLDERS

1. Introduction

Since the negotiation of the ICSID Convention, experts have debated the issue of the shareholder's standing.[1] However, issues around shareholder claims in investor-State arbitration are still fraught with misinterpretation.[2] A company as an investor has a right to bring investor-State arbitration claims if the company meets all the requirements of the investment agreements. The shareholders behind this company may also wish to benefit from this investment protection mechanism in certain circumstances if they suffer losses in international investment.[3] The research question of this chapter is therefore how to determine the legal standing of shareholders. With this in mind, this chapter pays special attention to non-controlling shareholders and indirect shareholders.[4]

In order to address the research question, the chapter starts with a discussion on the current legal framework of international investment law to examine the applicable law to deal with the standing issue. In the first place, in addition to the introduction, Section 2 first limits the focus of this thesis to the jurisdiction disputes arising out of the standing of shareholders. In the past years, debates on the shareholder claims have occurred on a large number of occasions. The standing of shareholders has become one of the core issues.[5] This section continues by discussing the legal framework in relation to the standing issue from a perspective of international law by revisiting the Barcelona Traction case. The judgement of the Barcelona Traction case is also often mentioned when the disputing parties argue about the status of shareholders. From a perspective of international investment law, this section also draws

[1] ICSID, *History of the ICSID Convention* (Volume II) Year 1970 705.

[2] Daniela Páez-Salgado, 'Settlements in Investor–State Arbitration: Are Minority Shareholders Precluded from Having its Treaty Claims Adjudicated?' (2016) 8 Journal of International Dispute Settlement 101, 101. Zachary Douglas, *The International Law of Investment Claims* (CUP 2009) 398.

[3] David Gaukrodger, "Investment Treaties and Shareholder Claims: Analysis of Treaty Practice" in *OECD Working Papers on International Investment* (2014/03)8-11.

[4] As the Introductory Chapter explains, to avoid misunderstanding, non-controlling shareholders also mean minority shareholders in this research. Chapter 3 has already discussed the circumstances in which the shareholders who suffered the losses were controlling shareholders of their companies. Therefore, Chapter 4 especially discussed the legal standing of the rest of the shareholders, namely non-controlling and indirect shareholders. The OECD gives a definition on "direct investor" by stating, "a direct investor is an individual, an incorporated or unincorporated public or private enterprise, a government, a group of related individuals, or a group of related incorporated and/or unincorporated enterprises that has a direct investment enterprise (that is, a subsidiary, associate or branch) operating in an economy other than the economy or economies of residence of the foreign direct investor or investors" OECD, 'Glossary of Foreign Direct Investment Terms' (OECD 2001) unpublished" < https://stats.oecd.org/glossary/detail.asp?ID=625 >.

[5] Gus Van Harten, 'Leaders in the Expansive and Restrictive Interpretation of Investment Treaties: A Descriptive Study of ISDS Awards to 2010' (2018) 29 European Journal of International Law 507, 516.

attention to how investment treaties and the ICSID Convention determine the standing of shareholders.

Moreover, this chapter reveals that scholars gave an introduction to the issue of shareholder claims.[6] However, the key questions which investor-State tribunals deal with, still need to be examined. The analyses of the key questions are the essential driving factors of a comprehensive understanding of how the standing of shareholders should be determined. Therefore, Section 3 continues with a case study analysing a series of investment arbitration cases against Argentina which increasingly attract the attention to the standing of shareholders.[7]

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[6] M. Sornarajah, *The International Law on Foreign Investment* (4 th edn, CUP 2017) 387-388; Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (2 nd edn, OUP 2012) 56-60; Christopher F. Dugan, Don Wallace, Jr. Noah Rubins & Borzu Sabahi, *Investor-State Arbitration* (OUP 2008) 318-319; Peter Muchlinski, Federico Ortino and Christoph Schreuer, *The Oxford Handbook of International Investment Law* (OUP 2008) 81-86.

[7] ICSID, 'Database' <https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx>. The cases are the followings: 1) *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Jurisdiction (17 July 2003) [hereinafter "CMS case"]; 2) *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (14 January 2004) [hereinafter "Enron case"]; 3) *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (3 August 2004) [hereinafter "Siemens case"]; 4) *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Jurisdiction (11 May 2005) [hereinafter "Sempra case"]; 5) *Camuzzi International S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Jurisdiction (10 June 2005) [hereinafter "Camuzzi case"]; 6) *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Jurisdiction (30 April 2004) [hereinafter "LG&E case"]; 7) *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Decision on Jurisdiction (22 February 2006), [hereinafter "Continental Casualty case"]; 8) *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction (16 May 2006) [hereinafter "InterAguas case"]; 9) *Suez, Sociedad de Aguas de Barcelona S.A., and Vivendi S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19 and *AWG Group Limited v. The Argentine Republic* (UNCITRAL Rules) (jointly decided), Decision on Jurisdiction (3 Aug 2006) [hereinafter "Vivedi AWG" case]; 10) *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Objections to Jurisdiction (25 August 2006) [hereinafter "Total S.A case"]; 11) *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction (27 April 2006) [hereinafter "El Paso case"]; 12) *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award (21 June 2011) [hereinafter "Impregilo case"]; 13) *Hochtief Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction (24 October 2011) [hereinafter "Hochtief case"] ; 14) *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award (22 August 2012) [hereinafter "Daimler case"]; 15) *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction (21 December 2012) [hereinafter "Teinver case"] and 16) *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award (8 December 2016) [hereinafter "Urbaser case"]. There are also two other cases,;despite not being published on the ICSID website, the cases are still available online: *Lanco International Inc. v. The Argentine Republic*, ICSID Case No.ARB/97/6, Decision on Jurisdiction (8 December 1998) [hereinafter "Lanco case"] and *Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic*, ICSID Case No. ARB/03/13 and *BP American Production Company et al v. The Argentine Republic*, ICSID Case No. ARB/04/8 (jointly decided), Decision on Preliminary Objections (27 July 2006) [hereinafter "Pan American case"]. This chapter mainly refers to the cases under the ICSID Convention provisions, but some of the cases mentioned in the chapter are with ad hoc arbitrations. This chapter chooses to analyse these series of Argentina cases because of the following reasons. Firstly, the same respondent state brings the same objections to jurisdiction. Thus investor-State tribunals are able to establish their common approaches of the examination. Each case has a similar background, and such a background helps to establish the core issues examined by arbitral tribunals in order for this chapter to make a critical analysis. Secondly, the number of available cases provides an opportunity for this chapter to make an exclusive summary and analysis. There are 54 cases against Argentina, 25 out of which have English decisions published. 16 out of those 25 decisions have discussed whether the claimants as minority shareholders or non-controlling shareholders can bring their claims.

Argentina has raised the same objections concerning the legal standing of indirect shareholders or non-controlling shareholders in more than twenty international investment arbitrations, each time without success.[8]

Consequently, on the basis of a series of case studies, Section 3 discusses two common core issues concerning the standing of shareholders. The first key issue is whether a shareholder has an independent right to bring its claims to investment arbitration. The second key issue is whether a claim made by a shareholder can be regarded as a claim arising directly out of an investment. Section 4 then uses the criteria presented in Chapter 2 to analyse the arbitration practice to answer the research question. Furthermore, following the same structure as the last chapter, Section 5 incorporates the arbitration practice into the negotiation of BITs or TIPs in the new generation. This chapter concludes with Section 6.

2. Legal Framework in Relation to the Legal Standing of Shareholders

Shareholders play important roles in corporate governance, and subsequently in international investment when their companies act as investors. There are three scenarios in which foreign shareholders may bring claims for their alleged losses.[9] In the first scenario, individual shareholders might bring their "derivative claims", on behalf of their company. In this case, the cause of losses is vested in the company and shareholder seeks relief on behalf of the company.[10] Secondly, shareholders also bring "direct claims" for immediate interference with their shares in the company.[11] In the second scenario, the shareholder is always the one whose right is affected by the third party. The affected rights of shareholders are always administration rights, such as voting rights, and economic rights, such as receiving dividends.[12] In the third scenario, shareholders may make claims for the "reflective loss" (SRL) when the company suffers a loss of an opportunity to make profits and, consequently, experiences a negative impact on its investment.[13] In other words, SRL refers to the loss incurred as a result of injury to "their" company by the third party, typically a loss of value in the shares.[14] Consequently, in ITA, when a company is injured by foreign states, the shareholder of the company may seek remedy for its direct loss and SRL. Therefore, the issue concerning shareholder claims is complicated and law should set up its regulation. With this in mind, this section analyses how

These cases also are brought from 2001 to 2012, the time span during the period of which ITA has developed increasingly enables this chapter to give timely examination as well

[8] *Daimler* case, para 76.

[9] Jimmy Skjold Hansen, 'Missing Links in Investment Arbitration: Quantification of Damages to Foreign Shareholders' (2013) 14 Journal of World Investment and Trade 434, 438. Daniela Páez-Salgado, 'Settlements in Investor–State Arbitration: Are Minority Shareholders Precluded from Having its Treaty Claims Adjudicated?' (2016) 8 Journal of International Dispute Settlement 101, 107.

[10] Companies Act 2006 < https://www.legislation.gov.uk/ukpga/2006/46/section/260>, s260 (1)

[11] Jimmy Skjold Hansen, 'Missing Links in Investment Arbitration: Quantification of Damages to Foreign Shareholders' (2013) 14 Journal of World Investment and Trade 434, 438-439.

[12] *Ibid*, 439.

[13] Daniela Páez-Salgado, 'Settlements in Investor–State Arbitration: Are Minority Shareholders Precluded from Having its Treaty Claims Adjudicated?' (2016) 8 Journal of International Dispute Settlement 101, 108.

[14] OECD, 'Roundtable on Freedom of Investment 18' Summary of Roundtable discussions by the OECD Secretariat (20 March 2013)
< https://www.oecd.org/investment/investment-policy/18thFOIRoundtableSummary.pdf > 4.

the legal framework of international investment law regulates the claims of shareholders.

2.1 Jurisdiction Focus of the Standing Dispute

In the first place, this section limits the scope of this thesis to the jurisdiction aspect of the standing of shareholders. There are still debates about whether the issue concerning the claims of shareholders is a matter of jurisdiction or admissibility.

According to the OECD Working Chapter, claims of shareholders can raise several concerns about admissibility.[15] The standing concern is regarded as an issue of admissibility rather than jurisdiction.[16] Firstly, it is argued that determining the nationality of a company is always a public issue; because it makes it possible for states to ascertain the law and treaties applicable to claims made by the company.[17] When shareholders can bring claims autonomously for their losses, their claims may make the investment dispute settlement mechanism less attractive and less predictable to the State.[18] Moreover, treaty shopping may occur because the structure of shareholder ownership is easy to modify. For instance, the company may seek to structure its affairs, being a shareholder of the other company, to obtain benefits.[19] Double recovery raises other concerns regarding a shareholder's claim.[20] A respondent state may argue that a shareholder's claim could result in a double recovery. Double recovery occurs when the shareholder brings the claims first and recovers; then the company brings the claims and recovers as well.[21] However, the issue concerning double recovery is still under debate. Some investor-State tribunals hold that double recovery is a theoretical issue rather than a real and practical problem.[22] It was also argued that the issue belongs to the merits, not to the jurisdiction, of the dispute.[23]

Nevertheless, the concern is also a jurisdiction challenge arising out of ITA. Firstly, a jurisdictional objection declares that arbitral tribunals can not hear the claim, while an admissibility objection seeks to establish the alleged impediments to the discussion of the

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[15] David Gaukrodger, 'Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency' OECD Working Chapter on International Investment 2013/03, (OECD Publishing 2013). < http://www.oecd.org/corporate/WP-2013_3.pdf >.

[16] Eda Cosar Demirkol, 'Admissibility of Claims for Reflective Loss Raised by the Shareholders in Local Companies in ITA'30 (2015) ICSID Review-Foreign Investment Law Journal 391, 393-396; Gabriel Bottini, 'The Admissibility of Shareholder Claims: Standing, Cause of Action, and Damages' (Dphil thesis, University of Cambridge 2017).

[17] David Gaukrodger, 'Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency' OECD Working Chapter on International Investment 2013/03 (OECD Publishing 2013) < http://www.oecd.org/corporate/WP-2013_3.pdf > 32.

[18] *Ibid,* 33.

[19] *Ibid*.

[20] *Ibid,* 34.

[21] Julien Chaisse and Lisa Zhuoyue Li, 'Shareholder Protection Reloaded Redesigning The Matrix of Shareholder Claims For Reflective Loss' (2016) 52 Stanford Journal of International Law 51,86. Elizabeth Wu, 'Addressing Multiplicity of Shareholder Claims in ICSID Arbitrations Under Bilateral Investment Treaties: A 'Tiered Approach" to Prioritising Claims?'6 Asian International Arbitration Journal 134, 139.

[22] *Impregilo* case, para 139.

[23] *Sempra* case, para 102; *Camuzzi* case, para 91.

merits of the dispute without the investiture of the tribunal.[24] Therefore, when the objections focus on whether a tribunal is competent to make decisions on alleged foreign investment, such objections are regarded as jurisdiction matters.

Secondly, the standing issue is a jurisdiction concern when arbitral tribunals discuss whether the shares of minority shareholders are direct investment. In other words, whether a shareholder has an independent and direct right to bring claims to ITA is a jurisdiction dispute. As explained in the theory chapter, Article 25 (1) of the ICSID Convention issues on the jurisdiction of the Centre by requiring that the legal dispute should arise directly from an investment.[25] The wording "directly" proves that the objections on the directness of shares of shareholders are jurisdictional concerns. Accordingly, with a particular focus on jurisdiction issues in this thesis, this chapter only addresses the jurisdiction perspective of the legal standing of shareholders.

2.2 Customary International Law: Revisiting the Barcelona Traction Case (II)

This section seeks to find out which role customary international law plays in the determination of the legal standing of non-controlling shareholders, by revisiting the Barcelona Traction case. The reference and the application of customary international law, the Barcelona Traction case in particular, is widely debated.[26] Respondent states object to the jurisdiction with arguments which state that customary international law does not allow non-controlling shareholders to bring claims.

With regard to the Barcelona Traction case, the discussion refers to the opinion of the ICJ in relation to shareholder claims. [27] The ICJ stressed the separation of property rights between a company and its shareholders.[28] The ICJ maintained that shareholders had the rights to bring their claims, but their rights are subject to certain restrictions.

> "To protect the company against abuse by its management or the majority of shareholders, several municipal legal systems have vested in shareholders (sometimes a particular number is specified) the right to bring an action for the defence of the company, and conferred upon the minority of shareholders certain rights to guard

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[24] Jan Paulsson, 'Jurisdiction and Admissibility', in Gerald Aksens (ed), *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in honour of Robert Briner* (ICC Publishing, 2005) 616-617.

[25] Article 25 (1) of the ICSID Convention.
The jurisdiction of the Centre shall extend to any legal dispute *arising directly out of* an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally. [Emphasis added].
A detailed, both historical and literal, understanding of Article 25 (1) will be discussed in the following sections.

[26] For instance, most of the Argentina cases have referred to or discussed customary international law. *CMS* case, para 43-48; *Enron* case, para 19; *Siemens* case, para 141; *Sempra* case, para 89.151-152; *Camuzzi* case, para 48; *LG&E* case, para 52; *Continental Casualty* case, para 82; *Pan American* case, para 209-217; *InterAguas* case, para 50; *Vivedi AWG* case, para 50-51; *Total* S.*A* case, para 78; *Impregilo* case, para 112.130; *Hochtief* case, para 95; *Dailmer* case, para 90; *Teinver* case, para 215-221; *Urbaser* case, para 210-249.

[27] See Chapter 3 for the case background.

[28] *Barcelona Traction* case, para 41.

> against decisions affecting the rights of the company vis-à-vis its management or controlling shareholders."[29]

The ICJ further distinguished between the interests and the aggrieved rights of shareholders. It said that whenever shareholders' interests are damaged by an act done to the company, the Court must look to institute appropriate actions. Moreover, even though two separate entities may have suffered from the same wrongful act, only the rights of one of the entities have been infringed.[30] As such, in a case where an act is directed against, but only infringes upon the rights of the company, not the rights of shareholders, if the interests of shareholders are affected, the shareholders cannot bring claims to reparations.[31] The Court made a distinction between a direct infringement of the shareholder's rights and other losses that the shareholder may be exposed to as a result of the situation of its company.[32] This distinction states that a shareholder will gain the right to bring its claim, if the complaint is aimed at the direct rights of the shareholder. [33]

However, whether this decision is still applicable to determine a shareholder's standing in investment arbitration has been criticised. Many investor-State tribunals hold that this decision is irrelevant because the disputes in the ICJ case solely concern the right of a State under public international law to grant diplomatic protection to nationals who are shareholders in foreign companies.[34] Arbitral tribunals also distinguish between a right to obtain diplomatic protection and a right to obtain investment arbitration protection. The distinguishing point is the identity of the entity who makes the request for the protection. With regard to the ICJ judgement, arbitral tribunals hold that a state whose investors are the shareholders in the other states can bring claims for diplomatic protection. In contrast, foreign investors bring investment claims for investment protection on the basis of investment agreements. Apart from the concerns on diplomatic protection, some arbitral tribunals also pointed out the other concerns about the Barcelona Traction's discussion in details.[35] For example, the *Teinver* Tribunal held that there was an absence of the specific framework of a BIT in the *Barcelona Traction* case by stating that international law was silent on the issue of shareholder's rights, instead the provisions of the applied BIT establish the standing to shareholders.[36]

In sum, the ICJ in the Barcelona Traction case did not have such a straightforward answer to address the role of shareholders. The findings from these studies suggest that customary international law, like the *Barcelona Traction* case, offers introductory guidelines on the shareholder rights to bring claims, but it does not consolidate a general principle in investment

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[29] *Ibid*, para 43
[30] *Ibid*, para 44.
[31] *Ibid*, para 46.
[32] *Ibid*, para 47.
[33] *Ibid*.
[34] *Siemens* case, para 141; *LG&E* case, para 52, *InterAguas* case, para 50; *Vivendi c*ase, para 50; *Daimler* case, para 90; *Urbaser* case, para 210. In other Argentina cases (except *Teinver* case), arbitral tribunals mention the Barcelona Traction decisions, but did not have detailed analyses.
[35] *Teinver* case, para 217-219.
[36] *Teinver* case, para 218-219.

arbitration. Arbitral tribunals hold different approaches to applying the customary international law when they discuss shareholders' claims.

2.3 How to Apply International Treaties

In addition to an analysis of international law, this section analyses the legal foundation of ITA, the BITs or TIPs and the ICSID Convention (if applicable). On the basis of cases studied, two concerns are usually addressed by arbitral tribunals.

The first concern is how to tackle the issue of the relation between the treaties and the ICSID Convention The BITs or TIPs usually include shares of the company as the protected investment.[37] However, as Chapter 2 mentioned, Article 25 of the ICSID Convention raises challenges concerning whether shareholders' claims can be seen to arise directly out of the investment.[38]

Moreover, the second concern in relation to the role of national law is revealed through a study of the Argentina cases. The regulations on shareholder claims in domestic corporate law and international investment law are inconsistent.[39] Therefore, whether a tribunal should apply national corporate law or international treaties to determine the standing of shareholders is always argued by the disputing parties.[40] The respondent states may argue that the claimant is not able to bring its claim because the domestic law does not allow a shareholder to bring a claim.

Although all shareholders in the companies should be protected, corporate law and international investment law have different approaches to regulating the shareholder's claim. From a corporate law perspective, although controllers of the companies, such as majority shareholders or directors, have control over the companies, with particular economic and corporate rights, non-controlling shareholders deserve adequate protection as well. [41] Corporate law also demonstrates concerns for minorities by expanding its framework, and shareholder protection seems to have become the centre of the corporate governance model.[42] Non-controlling shareholders' protection, including the rights to bring claims, is omnipresent, but subject to particular conditions.[43] In the case that the corporate entity operates its business

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[37] David Gaukrodger, 'Investment Treaties and Shareholder Claims: Analysis of Treaty Practice' OECD Working Papers on International Investment 2014/03 (OECD Publishing 2014) 12.
[38] Chapter 2.
[39] Michael Waibel, 'Coordinating Adjudication Processes', in Zachary Douglas, Joost Pauwelyn & Jorge E. Viñuales (eds) *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014) 499, 508.
[40] For instance, in the following cases, the issue of applicable law has been referred to or discussed. *CMS* case, para 42; *Enron* case, para 17; Siemens case, para 149; *Camuzzi* case, para 15; LG&E case, para 55; InterAguas case, para 47; *Vivedi AWG* case, para 46; Total S.A case, para 80-81; *Daimler* case, para 88; *Teinver* case, para 226-228; Urbaser case, para 243-244.
[41] Julian Javier Garza, 'Rethinking Corporate Governance: The Role of Minority Shareholders - A Comparative Study' (2000) 31 St. Mary's Law Journal 613,619.
[42] Anupam Chander, 'Minorities, Shareholder and Otherwise' (2003) 113 Yale Law Journal 119, 123.
[43] *Ibid*.

in the absence of fraud, illegality or conflict of interest, non-controlling shareholders could bring their claims.[44] For instance, the generally known *Foss v. Harbottle case* in corporate law indicates that "a shareholder has no right to bring an action on behalf of the company in order to protect the value of his shares… a shareholder can bring an action where the majority do not wish such an action to be brought."[45]

In contrast, international investment law addresses different concerns in relation to shareholders' claims. From a perspective of international investment law, on the one hand, the creation of a company depends on the willingness of the State that is expressed in the domestic law.[46] Consequently, the rights of a company, including the rights of its shareholders, are also determined under domestic law. With respect to some domestic law, shareholder's claims might be restricted. National courts reject SRL by considering the risk of multiple suits and double recovery.[47] For instance, Argentina argued that its domestic law limited shareholders to claim damages which were either allegedly caused to the company by its managers or for alleged direct damage to the shareholder's property.[48] In this situation, Argentina requested arbitral tribunals to apply the domestic law in order to support its objection on the jurisdiction.

On the other hand, the ICSID Convention does not address any unified substantive rules of law concerning foreign investments made by an investor, although its Article 42 presents the rules of law which are applicable to the disputes. [49] Respondent states might resort to the second part of Article 42(1) of the Convention, which calls for the application of domestic legislation and international law to solve investment disputes.[50] Schreuer holds that Article 42 only addresses the substantive law to be applied, not procedural law.[51] In practice, arbitral tribunals also maintain that Article 42 was designed to govern the applicable law in connection with the merits rather than jurisdiction; instead, Article 25 and the terms of the applied BITs determine

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[44] *Ibid*.

[45] *Geogre Fischer (Great Britain) Ltd v. Multi Construction Ltd* [1995] BCC 310. *Foss v. Harbottle* (1843) 2 Hare 461. Victor Joffe, Minority Shareholders: Law and Procedure (Butterworths 2000) 3.

[46] M. Sornarajah, *The International Law on Foreign Investment* (4th edn, CUP 2017), 234

[47] OECD, 'Roundtable on Freedom of Investment 18' (20 March 2013) < https://www.oecd.org/daf/inv/investment-policy/18thFOIRoundtableSummary.pdf> 6.

[48] Argentina Commercial Companies Law (No. 19550). It has been stressed in Daimler case, para 67. See the English Summary at, Alberto Navarro, IBA Guide on Shareholders' Agreements, <https://www.ibanet.org/Document/Default.aspx%3FDocumentUid%3DB72A030C-B13F-48B3-A496-1BC9547AFE12+&cd=5&hl=nl&ct=clnk&gl=nl>.

[49] Domenico Di Pietro, 'Applicable Law under Article 42 of the ICSID Convention. The Case of Amco v. Indonesia" in Odd Weiler (ed) *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron 2005) 223, 235-236. Article 42 of the ICSID Convention states:

> "(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.
>
> (2) The Tribunal may not bring in a finding of non liquet on the grounds of silence or obscurity of the law.

(3) The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute ex aequo et bono if the parties so agree."

[50] For instance, *Sempra* case, para 25.

[51] Christoph H Schreuer, *The ICSID Convention: A Commentary* (2nd edn, CUP 2009) 550.

the standing of an investor.[52] Thus, it becomes a questionable cycle that Article 25 of the ICSID Convention does not serve to clarify the legal standing of shareholders. However, arbitral tribunals still regard this provision as the only applicable rule to decide the jurisdiction.

As a consequence of the lack of explicitly applicable law, it raises challenges on whether investment treaties or national law of the host States should be applied to resolving the dispute. The relationship between international law and the national law of host States under the ICSID Convention is very complicated and involves myriad theories.[53] When it comes to applicable law in relation to the legal standing of shareholders, the arbitral tribunal may hold that international law, namely the investment treaties, should play its role to make the determination. For instance, the *Amco* Tribunal maintains that international law plays a subsidiary role: "if there are no relevant host-state laws on a particular matter, a search must be made for the relevant international laws."[54] The *LG&E* Tribunal holds that international law should override national law when a contradiction occurs, as a state cannot justify its international obligations.[55] In the exceptional cases, arbitral tribunals may recognize the role of the host State's domestic legislation with regard to determining the issues related to jurisdiction.[56] For instance, in the *Inceysa* case, the Tribunal held that the legality of the investment was a premise for its jurisdiction.[57] Therefore, the *Inceyasa* Tribunal designated the validity of the investment by discussing whether the dispute was made in accordance with the national legislation of the host State.[58] However, international law and national law may apply as a combination in investment arbitration.[59] Nevertheless, this combined application is usually applied to dealing with substantive issues rather than merely procedural matters. As Hirsh holds, Article 42 directs the arbitral tribunal on how to choose the substantive law which will apply to solving the disputes.[60] Consequently, there is still no consistent approach taken by arbitral tribunals in resolving the issues concerning the applicable law.

In general, there are various law issues on the standing of shareholders. Customary international law presents the situations in which shareholders can bring claims. Domestic law, such as company law, regulates the role of shareholders. However, investor-State tribunals uphold that neither of them has been applied to discovering the standing of shareholders from an international investment law aspect. Nevertheless, as mentioned, investment treaties do not give a straightforward answer to the status of shareholders in ITA either. Consequently, it raises

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[52] *Sempra* case, para 27.
[53] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment law* (2nd edn, OUP 2012), 292. R. Doak Bishop, James R. Crawford and W. Michael Reisman, *Foreign Investment Disputes Cases, Materials and Commentary* (2nd edn, Kluwer 2014) 14.
[54] *Amco Asia Corporation, Pan American Development Limited and P.T. Amco Indonesia v. The Republic of Indonesi*a, Award in Resubmitted Proceeding (31 May 1990) para 40.
[55] *Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections (27 July 2006) para 117.
[56] Christoph H Schreuer, Loretta Malintoppi, August Reinisch, and Anthony Sinclair, *The ICSID Convention: A Commentary* (2nd edn, CUP 2009) 552.
[57] *Inceysa* case, para 209.
[58] *Inceysa* case, paras 222-264.
[59] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment law* (2nd edn, OUP 2012) 293.
[60] Moshe Hirsh, *The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes* (Martinus Nijhoff Publishers 1993) 110.

several questions in ITA practice.

3. How the Legal Standing Issues are Examined in Investment Treaty Arbitration

Shareholder claims bring several challenges to the jurisdiction of investor-State tribunals. The core concern is whether a shareholder has an independent and direct right to bring its claim. Whether a shareholder is a majority or minority shareholder, whether it is controlling or non-controlling and whether it has direct or indirect ownership of the shares might largely determine its standing.[61] Majority shareholders, especially those that control or own the company, can represent their company to bring their claims. When it comes to shareholders, various laws present ambiguous regulations on their claims.[62]

On the basis of a comprehensive study of the Argentina cases, when a shareholder brings its claim, two key issues are usually argued by the disputing parties in ITA. Respondent states may challenge the jurisdiction by arguing that shareholders with non-controlling or indirect company's shares lack an independent right to bring arbitration claims. Moreover, states may doubt that whether the alleged losses of shareholders in the form of shares should be regarded as indirect investments (also known as portfolio investments). By holding this argument, the disputing parties argue that indirect investment should be excluded from the protection regime of ITA.

3.1 Key Question One: Do Shareholders Have Independent Rights to Bring Claims?

The ICSID Convention does not specify whether a shareholder of a company or an investor of a state party can bring a claim, either on behalf of its company or on its own behalf. The legal gap raises the first key question on the identity of the claimant. This issue concerns the independence of the right of a shareholder to bring investment claims. Having an independent right means that a shareholder has its capacity to bring the claim. In a number of investment arbitration cases, respondent states challenge the jurisdiction by arguing that a shareholder lacks the independent right.[63] In order to present a general picture of how investor-State tribunals discuss this issue, the case study starts with the CMS case, which is the first fully published case against Argentina.[64]

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[61] Christopher F. Dugan, Don Wallace, Jr., Noah Rubins & Borzu Sabahi, *Investor-Sate Arbitration* (OUP 2012) 314.

[62] *Ibid*, 315.

[63] For instance, in the following Argentina cases, whether a minority shareholder has its independent right has been referredto, most of which discusses whether this minority shareholder can bring the claim on its own behalf. *CMS* case, para 60, 68; *Enron* case, para 27; *Siemens* case, para 131; *Sempra* case, para 93.154; *Camuzzi* case, para 30-32; *LG&E* case, para 48; *Continental Casualty* case, para 85; *Pan American* case, para 154; *InterAguas* case, para 51; *Vivedi AWG* case, para 47; *Total S.A* case, para 38; *EL Paso* case, para 137-139; *Impregilo* case, para 112; *Hochtief* case, para 116; *Dailmer* case, para 65; *Teinver* case, para 198; *Urbaser* case, para 232.

[64] Regarding to the ICSID database, the *Lanco* case is partially published. The CMS Tribunal gave a detailed analysis of the standing of a minority shareholder, and the decision was cited by the subsequent tribunals.

The Claimant, CMS, was a U.S. company holding 29.42% shares of an Argentinian company, TGN. Due to Argentina's economic and financial crisis, CMS claimed that Argentina had taken various measures but failed to protect its investment in TGN. When an investor-State tribunal determined its jurisdiction, the Tribunal first stated that the protection of both majority and minority shareholders should be granted equally. Therefore, the Tribunal maintained that "no bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned, not even if those shareholders are minority shareholders."[65] Moreover, the CMS Tribunal examined the Argentina-United States BIT, Article 1 of which states,

> "(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..."[66]

This article provides a broad definition of investment, which covered shares, stocks, and other interests in a company. Therefore, on the basis of a plain understanding of the provisions of this article, the CMS Tribunal found that this article did not make any differentiation as to the origin of the shares which constituted the investment.[67] Therefore, the Claimant could be regarded as an investor and it could also claim the losses for the full shares it owned.[68]

Soon after the *CMS* case, by reading the US-Argentina BIT as well as ICSID Convention and by examining the cases under international law, the *Enron* Tribunal held the same position. In the *Enron* case, Argentina also argued that the claimants, as non-controlling shareholders (holding 35.263% shares) of TGS, the company that was charged with the alleged illegal taxes, could not bring claims. Argentina accepted that an investment in shares qualifies for protection when certain measures affect the shares as when the expropriation of shares or other measures directly affect the economic rights of shareholders. However, the Claimant stressed its own rights as a U.S. investor with investments qualifying under the treaty, instead of claiming the losses on behalf of TGS. The Tribunal highlighted that there was nothing contrary to international law in upholding the concept that shareholders could claim independently from their company.[69] Even if those shareholders were not in control of the company, they were still able to bring claims.[70] The broad provisions in the US-Argentina BIT opened the door for arbitral tribunals to commonly accept this approach. The Tribunal then established its jurisdiction in cases where there was no ban preventing shareholders from holding shares as an investment.

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[65] *CMS* case, para 46, 48.
[66] *CMS* case para 57. Argentina-United States BIT (date of signature, 14 November 1991; date of entry into force, 20 October 1994).
[67] *CMS* case, para 69.
[68] *Ibid*.
[69] *Enron* case, para 38-39.
[70] *Ibid*. The decisions of the Enron Tribunal are also referred to in details in El Paso case, para 137..

Added to this, a similar approach is also adopted in the situation where the applicable treaty in the dispute is a TIP. On the basis of NAFTA, the GAMI Tribunal specifically discussed the issue of a non-controlling shareholder's standing.[71] The Claimant, GAMI Investment, was a US investment company that owned 14.18% of shares of GAM. GAM was a company whose controlling shareholders were Mexican. The dispute concerned whether GAMI was entitled to claim on account of its derivative prejudice being a shareholder.[72] NAFTA provides a non-controlling shareholder with an independent right to bring claims. In consequence, the Tribunal allowed GAMI, holding 14.18% shares of GAM, to seek relief for an alleged breach of the treaty.[73]

Another compelling discussion made by the GAMI Tribunal is the examination of the initiatives of the rest of the shareholders that were the owners of the other 85.82% shares. The Tribunal pointed out a hypothetical theory that those majority shareholders might, for their own reasons, had chosen not to seek relief before the domestic court.[74] Those shareholders may simply have been defeatists or have made their separate peace or abandoned the complaint in return for offsetting benefits with the government.[75] However, the Tribunal ascertained that the Claimant, GAMI, had an independent right under the NAFTA because the nature of NAFTA was to "create a regime in which a foreigner's entitlements do not necessarily coincide with those of a citizen even concerning ownership of identical types of assets."[76] In particular, the Tribunal listed the specific situations where shareholders could bring their claim. The Tribunal held that in the case of expropriation, the independent right of shareholders would never change even if the domestic legalisation upheld the expropriation or rescinded the expropriation partially.[77]

The *GAMI* case prompts two comments. The first indicates that a treaty can not only cover shares as the protected investment, but can also offer shareholders rights to bring claims.[78] The right to claim, as clearly demonstrated in the NAFTA, is an active right of a shareholder to argue for its compensation. Whereas a right to obtain protection, as most BITs offer in other cases, serves as the passive right of a shareholder to obtain protection.[79] The other comment on the GAMI case is that the Tribunal may also take the initiatives of majority shareholders of the company into consideration when the minority shareholders of the company bring claims.[80] Consequently, in this case, the Tribunal found that being a (non-controlling) shareholder did not affect the GAMI's right to seek international arbitral protection.

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[71] On the basis of NAFTA, Mondev case also discussed the same issue. *Mondev International Ltd. v United States,* Award, ICSID Case No. ARB(AF)/99/2 (11 October 2002).
[72] *GAMI* case, para 27.
[73] *Ibid*, para 29, 37.
[74] *Ibid*, para 37.
[75] *Ibid*.
[76] *Ibid*, para 38.
[77] *Ibid*.
[78] *Ibid*, para 29.
[79] *Ibid*, para 33.
[80] *Ibid*, para 37.

To sum up, because the ICSID Convention does not regulate whether or not a shareholder can bring its claim, arbitral tribunals apply the BITs or TIPs to make the decision. It is commonly accepted that shareholders have a separate and independent standing from their companies to submit claims.[81] With regard to the cases discussed above, some treaties expressly cover shareholders as the qualified investors. Arbitral tribunals may apply these treaties to establish the standing of shareholders. However, treaties may not regulate whether a shareholder can bring its claim; instead, they provide broad definitions of "investment" by including shares. Arbitral tribunals still admit the standing of shareholders by holding that their shares are investments covered by the treaty.

3.2 Key Question Two: Is the Shareholder's Investment a Direct Investment?

The other key question concerns whether shareholders' claims arise directly out of their investment. On the basis of Article 25(1) of the ICSID Convention, the jurisdiction of the ICSID only extends to the legal disputes that arise directly out of an investment. It has been argued that claims made by a shareholder are an indirect claim because the dispute does not arise directly out of an investment. To be specific, the key question refers to whether the claim of a shareholder is a direct claim as required by Article 25 (1) of the ICSID Convention. In several cases, arbitral tribunals discuss shareholders' claims in order to know whether the claims fulfil the direct requirement under the ICSID Convention.[82]

A historical analysis of the direct requirement under the ICSID Convention offers a view to address why this requirement has been mentioned. In the beginning, the qualification of "direct" for foreign investment was not inserted when the first draft (Doc.43) of the ICSID Convention come out, Article 26(1) which states,

> "the jurisdiction of the Centre shall extend to all legal disputes between a Contracting State (or one of its political subdivisions or agencies) and a national of another Contracting State, *arising out of or in connection with* any investment, which the parties to such disputes have consented to submit to it."[83]

During the legal committee meetings, a number of state representatives criticised this draft article, by arguing that it offered too broad authority to a tribunal.[84] The representative of Spain, Mr. Melchor firstly referred to the concept of direct investment and argued only "direct

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[81] Stanimir A. Alexandrov, 'The "Baby Boom" of Treaty-based Arbitrations And The Jurisdiction of ICSID Tribunals: Shareholders as "Investors" And Jurisdiction Ratione Temporis' (2005) 4 The Law and Practice of International Courts and Tribunals 19, 30.

[82] For example, the following Argentina cases refer to the directness requirement under the investment agreements. *CMS* case, para 61; *Enron* case, para 22; *Siemens* case, para 136-139, 150; *Sempra* case, para 90; *Camuzzi* case, para 55-59, 81; *LG&E* case, para 63; *Continental Casualty* case, para 71-73; *Pan American* case, para 66-70; *InterAguas* case, para 29-32; *Vivedi AWG* case, para 27-31; *Total S.A* case, para 62-66; *EL Paso* case, para 100; *Impregilo* case, para 126; *Dailmer* case, para 67; *Teinver* case, para 199; *Urbaser* case, para 231.

[83] ICSID, *History of the ICSID Convention* (Volume I) Year 1970 116,

[84] ICSID, *History of the ICSID Convention* (Volume II) Year 1970, 699-705. SID/LC/SR/4 (December 21. 1964) Summary Proceedings of the legal committee meeting, November 25, Afternoon.

investors" could appear before the Centre. He believed that a state should know by whom it can expect to be sued with regard to particular investments. [85] The starting point of the Spanish representative focused on the initiatives and the purposes of host States in terms of treaty negotiation. The Spanish representative stressed: "the reference to direct investments would have the advantage of preventing shareholders of a company from suing the foreign State where the company's investment was made".[86] Even though the requirement of "directly out of an investment" continues to be argued by other representatives, the motivation of prohibiting a shareholder's claim was not mentioned by other state representatives. In addition, the representative of the Central African Republic suggested that because the French translation of the term, 'in connection with' means "*indirectement*", these words should be excluded, because the Centre only settled the dispute concerning a right or obligation arising directly from the implementation of an agreement concerning an investment.[87] The representative of Portugal also stressed that a dispute should arise directly out of investments, in particular, an investor can ask for "indemnification of the damage caused to him by a particular action of the State directed at him."[88] In the following working group meetings, the representatives of the Central African Republic proposed that a dispute should only arise from an investment. In the end, by a majority vote of 26 to 8, the word "directly" was inserted as an additional qualification.

The requirement to insert "directly" demonstrates that the intention of state parties is to limit the scope of disputes. However, during the preparation and discussion, the meaning of "direct" was not further identified. The modified final article, Article 25(1) of the ICSID Convention, does not offer any definition or further explanation of "directly", either.[89] Therefore, it cannot be proved that this article intends to prohibit a shareholder's claim. Scholars interpret the wording of the ICSID Convention: the requirement of "directly out of an investment" as an objective criterion for establishing the Centre's jurisdiction relates to the relationship between the dispute and the investment, instead of to the nature of the investment.[90] As a consequence, a shareholder might bring the claim if its claim has a direct link with the investment. In a very early *Fedax N.V.* case, the Tribunal pointed out that "directly" in the ICSID Convention related to the "dispute" instead of "investment". The Tribunal further clarified that "jurisdiction can exist even in respect of investments that are not direct, so long as the dispute arises directly from such transaction." [91] In other words, the core issue is when a shareholder brings a dispute, that dispute should arise out of the investment in a direct manner.

In practice, it is argued that shareholders lack a direct relation between the dispute and the investment because they are the indirect holders of the investment made by their companies. Therefore, shareholders' claims are not regarded as direct claims. With regard to the cases studied, a number of arbitral tribunals dealing with an Argentina BIT analyse "direct claims",

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[85] ICSID, *History of the ICSID Convention* (Volume II) Year197, 705.
[86] *Ibid* 705.
[87] *Ibid* 707.
[88] *Ibid* 708.
[89] Christoph H. Schreuer, *The ICSID Convention: A Commentary* (2nd edn, CUP 2009) 106.
[90] *Ibid*. Loukas A. Mistelis, *Concise International Arbitration* (Kluwer 2010) 69.
[91] *Fedax N.V. v. The Republic of Venezuela,* ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction (11 July 1997) para 24

and reach a similar conclusion by confirming that shareholders have a right to claim, which also extends to non-controlling shareholders.[92]

In the *Siemens* case, the meaning of "direct claim" was discussed in detail for the first time.[93] The Claimant, Siemens, used its wholly-owned company, SNI, to establish a local company (SITS) as its investment in the territory of the Respondent State, Argentina. Argentina argued that Siemens lacked a direct relationship with the investment because Siemens was not the direct holder of the shares in the dispute. Argentina especially pointed out that:

> "A claim is direct if it originates from an injury caused directly to a right of whoever files a claim. A claim is indirect if it relates to a measure affecting the assets or rights of a third party and indirectly affects the expectations of whoever claims (shareholder), who is not the holder of such assets or rights."[94]

However, Siemens stated that in the treaty that there was no reference to a direct relationship between the investor and the investment, nor did it establish any requirement on which investment is entitled to gain protection.[95] With regard to the nature of the shareholder investment, the Tribunal explained the meaning of "indirect". The Tribunal held that there were two approaches to understanding "indirect".

Firstly, one "indirect" circumstance occurs when the shareholder of a company controls it through another company.[96] Secondly, another "indirect" circumstance takes place when a shareholder claims damages suffered by a company in which it holds shares.[97] In the present case, the Tribunal considers the first understanding by reading the details of the treaties. The Tribunal finds that the definition of "investment" is very broad under the applicable BIT of this case.[98] The investment referred to all kinds of property that an investor of one Contracting Party invested in the territory of the other Contracting Party in accordance with its legislation.[99] The literal reading of this BIT does not exclude indirect investments.[100] As a result, the Tribunal considered Siemens an investor *ius standi*.

Furthermore, a second understanding was adopted by the *Continental* Tribunal. The Respondent, Argentina, argued that the Claimant submitted an indirect claim as a shareholder for damages suffered by the company that represented its investment.[101] However, the

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[92] Ian Laird, 'A Community of Destiny-The Barcelona Traction case and the Development of Shareholder Rights to Bring Investment Claims' in Todd Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May 2005), 91-92.
[93] In the *CMS* case and the *Enron* case, the issue of "directness" is also referred to but not discussed in detail.
[94] *Siemens* case, para 142, para 126.
[95] *Ibid*, para 128.
[96] *Ibid*, para 136.
[97] *Ibid.*
[98] *Ibid*.
[99] Article 1 of Argentina and Chili BIT, "El concepto "inversiones" designa, de conformidad con el ordenamiento jurídico del país receptor, todo tipo de bienes que el inversor de una Parte Contratante invierte en el territorio de la otra Parte Contratante de acuerdo con la legislación de ésta,"
[100] *Siemens* case, para 137.
[101] *Continental* case, para 76.

Tribunal pointed out that one key issue in investment arbitration is whether a controlling or a non-controlling foreign shareholder can bring a claim for the damages suffered by the local company as a result of expropriation or other measures.[102] The Tribunal started its analysis on the applicable BIT. The applicable BIT is also the Argentina-US BIT.[103] It also protects "associated activities" undertaken by foreign investors, including the organisation, control, operation, maintenance and disposition of companies.[104] The Tribunal stated that this treaty protected the free enjoyment of the shares and the exercise of the rights inherent to the position as a controlling shareholder.[105] In order to strengthen its position, the Tribunal referred to the object and purpose of the BIT, which was to encourage and protect investment, and concluded that the applicable BIT did not exclude a portfolio investment.[106] Consequently, the Tribunal maintained that the claimant was a qualified investor subject to the BIT.

In both cases, arbitral tribunals pointed out that the broad provisions of the applicable BITs grant the rights to claim to the investors who are not the controlling shareholders.[107] Arbitral tribunals do not decide their jurisdiction on the basis of whether the shareholders make a direct or indirect investment. When the contracting states of the treaties express their intention to allow a shareholder to claim by writing these provisions into the treaty texts, arbitral tribunals admit the standing of the shareholders.[108] However, some treaties might be silent on the question of shareholder claims. For instance, the *Enron* Tribunal stated that a treaty may include the protection of certain shareholders rights, while another treaty might not include such rights.[109] However, the Tribunal stated that the treaty's omission concerning shareholders' claims does not imply there was an intention to exclude these rights.[110] Consequently, even if the treaty does not provide a determination on shareholders' claims, arbitral tribunals are still in favour of granting the rights to arbitration to shareholders.

4. Analysis of the Investment Arbitration Practice

After addressing the two key questions, this section concludes and analyses the arbitration practice in reference to shareholders' claims. It seeks to answer the question: *how should arbitral tribunals determine the legal standing of shareholders?* The cases studied in the last section indicate that arbitral tribunals usually conclude that shareholders have the legal standing. Firstly, they admit that shareholders have their independent rights to gain access to arbitration. Secondly, arbitral tribunals conclude that whether the shares of shareholders are regarded as direct or indirect investment, they do not exert influence on their standing, unless

[102] *Ibid*, para 77.
[103] Article I (1)(a) of the Argentina-US BIT referred to "every kind of investment in the territory of one party owned or controlled directly or indirectly by nationals or companies of the other party…"
[104] Article I(1)(e) of the Argentina-US BIT.
[105] *Continental* case, para 79.
[106] *Ibid*, para 80.
[107] *Ibid*, para 49.
[108] Gabriel Bottini, 'Indirect Claims under the ICSID Convention' (2008) 29 The University of Pennsylvania Journal of International Law 563,573.
[109] *Enron* case, para 46.
[110] *Ibid*.

the treaty exclude indirect investments.

From a general point of view, arbitral tribunals hold a treaty-based approach to deciding on jurisdiction.[111] A shareholder may rely on the inclusion of shares as a qualifying part of the definition of investment in the treaty concerned with establishing the standing.[112] A shareholder has an independent right to bring a claim for alleged losses if it meets other requirements in the treaties. When the treaty states that a shareholder is able to bring claims on its own behalf or on behalf of its company, the shareholders are permitted to bring their claims for their losses. The shareholder also has the standing when the treaty provides a broad definition of investment which covers the shares or ownership of an enterprise as the protected assets. Added to this, the directness issue has led to another discussion in investment arbitration. Arbitral tribunals hold that the nature of the shareholder investment, direct or indirect, is not the decisive factor. Any shareholder claim is allowed as long as there is no prohibition of the particular type of claims in the treaty.

However, the common approaches taken by arbitral tribunals still have some limitations. The critics usually come from the respondent sides because the expansive approach opens an overly wide door for the shareholders to bring investment arbitration claims.[113] This section will address two issues subject to a dialectic analysis in accordance with the criteria presented in the theoretical chapter.

4.1 A Comprehensive Understanding of the "Direct" Requirement

The standing concern arises because of the blurred regulation using the words "arising directly out of an investment" requirement in the ICSID Convention. To understand the standing dispute, it is essential to make a thorough understanding of the "direct" requirement.

From a historical perspective, the "direct" requirement has never been identified since the beginning of drafting the ICSID Convention. In the beginning, the requirement of "directness" was proposed to prohibit shareholders' claims.[114] Contracting States intended to exclude shareholders' claims from being covered by the treaty in the negotiation process. However, in the end, the requirement only requires the dispute to have a direct link with the investment.

Subject to a literal understanding, the direct requirement of the ICSID Convention does not mean to prohibit "a shareholder claim". To understand the treaty, the VCLT is the starting point for the interpretation. According to the VCLT, the original meaning of the "direct" requirement in the ICSID Convention requires that the dispute claimed by investors should arise directly

[111] Ian Laird, 'A Community of Destiny-The Barcelona Traction case and the Development of Shareholder Rights to Bring Investment Claims' in Todd Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May 2005) 94.
[112] OECD, *International Investment Law: Understanding Concepts and Tracking Innovations* (OECD 2008) 42.
[113] OECD, 'Roundtable on Freedom of Investment 18' <https://www.oecd.org/daf/inv/investment-policy/18thFOIRoundtableSummary.pdf> (20 March 2013).
[114] See Section 3.2.

out of an investment. It can be speculated that as long as the claim brought to arbitration is direct, whether the identity of the claimant is a company or the shareholder of the company is not the decisive factor. Shareholders are able to bring their claims only when their claims have a direct link with their investment.

When a claimant brings its arbitration claim, arbitral tribunals decide their jurisdiction in order to offer the remedy to recover the alleged loss. However, arbitral tribunals do not focus their analysis on the nature of the claim. As stated in the previous section, shareholders may claim for the direct injury to their rights as a shareholder as well as for the SRL as a result of injury to their company. [115] Case law shows that arbitral tribunals allow any claim by a shareholder without limiting the claim to the shareholder's interest in the value and disposition of the shares.[116] However, this approach does not establish a sufficient link between the claim and the investment in all the circumstances. Firstly, when the direct right of shareholders suffers losses from the host State, such as the right to vote, shareholders can bring their direct claims. Such claims have a direct link with the investment. Secondly, when shareholders claim for their SRL on their own behalf, the claims also have a direct link with their investment in the form of shares.

Nevertheless, when shareholders bring the SRL claims on behalf of their company, such claims may not have a direct link with their investment. In such a case, the dispute arises out of the direct rather than the indirect injury of their company. The third circumstance has no effect when the shareholders are the controller of the company, because the controlling shareholders are able to bring such claims.[117] When non-controlling shareholders bring their claims for their company's losses, the direct link between the claim and the investment is not solid. For instance, it may bring multiple claims and double recovery after one shareholder receives the compensation, and the rest of the shareholders bring their separate claims.

With the ICSID Convention in mind, when a shareholder of a company brings a claim, that shareholder should also meet the requirement of being an investor in the applicable BITs or TIPs. Concerning the arbitration practice, it shows that a shareholder can bring a claim unless the applied treaties specifically prohibit the shareholder from bringing arbitration claims. In addition to the requirement set in the treaties, arbitral tribunals also discover the objectives of treaties.[118] Arbitral tribunals pretend to allow for shareholder claims when the treaty objective is to protect foreign investment. However, arbitral tribunals should keep in mind that the purpose of treaties cannot be applied exclusively to interpret the disputed terms in accordance with Article 31 of the VCLT. Arbitral tribunals should still take the context of treaties into consideration to discover the original meaning of a disputed term. In the present situation, a broad scope of protecting foreign investment in the objectives of the treaties does not symbolize

[115] See Section 2.
[116] Gus Van Harten, 'Leaders in the Expansive and Restrictive Interpretation of Investment Treaties: A Descriptive Study of ISDS Awards to 2010' (2018) 20 European Journal of International Law 507, 515, 545. In general, when arbitral tribunals examine the legal standing of minority shareholders, around 92% of them adopt an expansive approach.
[117] See Chapter 3.
[118] See the *GAMI* case and *Continental* case.

the recognition of the shareholders' standing. Therefore, to determine the standing of shareholders, both the ICSID Convention and the investment treaties applied should play a role.

To sum up, the inclusion of shares, as the qualified investment in the investment treaties, guarantees the protection to the investment of shareholders. However, such an inclusion is not sufficient to establish the legal standing of shareholders. As expressed above, the core issue of allowing shareholders to seek redress for damages to its investment to the ICSID arbitration is to find out the direct link between the claim and their investment. Hence, shareholder's claims should still have a direct link with the investment, even though the broad provisions in the treaties cover the shares of the company as the protected investment.

4.2 Taking Initiatives of Shareholders into Consideration

The GAMI Tribunal brought an insight into the examination of the shareholders' standing. The Tribunal held that the initiatives of both controlling and non-controlling shareholders should be discussed to examine the dispute over their legal standing. It reminds potential claimants that the rights of non-controlling shareholders and controlling shareholders to bring claims are independent from each other but also connected with each other. The approach borrows the idea from the company law theory.

Under domestic law, a non-controlling shareholder is restricted to bringing claims in certain situations. A non-controlling shareholder can bring its claims when its company gives ratification of claims or when its company lacks the ability to protect its interests, especially in receivership or liquidation.[119] Such claims known as derivative claims intend to protect non-controlling shareholders from the failures of corporate governance.[120]

With this in mind, the doctrine of veil piercing applies to address the standing dispute. In corporate law, the separation between the company and its shareholders is a general principle, so the veil of the company is rarely pierced.[121] A non-controlling shareholder's right to bring claims may therefore be restricted. However, the interests of non-controlling shareholders should also be protected. The right of shareholders, especially non-controlling shareholders, to bring claims will be allowed when the company does not misuse the structure to gain benefits based on bad faith.[122] For instance, the director of the company may not act *bona fide* but from an improper motive, such as to block a take-over bid.[123] The controller or the owner of the

[119] Victor Joffe, *Minority Shareholders: Law, Practice and Procedure* (Elsevier 2000) 16-27.
[120] David Gaukrodger, "Investment Treaties and Shareholder Claims: Analysis of Treaty Practice" in OECD Working Papers on International Investment (2014/03) 22.
[121] Michael Waibel, 'Coordinating Adjudication Processes'. In Zachary Douglas, Joost Pauwelyn, and Jorge E. Viñuales (eds) The Foundations of International Investment Law: Bringing Theory into Practice (OUP 2014) 499, 509.
[122] David Gaukrodger, "Investment Treaties and Shareholder Claims: Analysis of Treaty Practice" in OECD Working Papers on International Investment (2014/03) 16-27.
[123] *Ibid*, 18, 24.

company might not seek any remedy for some other ulterior purposes. By allowing shareholder claims in exceptional circumstances, corporate law practice limits the risks of multiple claims and double recovery for the same loss.[124] In contrast, the ITA practice does not touch upon such limitations. In ITA, the standing of shareholders is overlooked because of the limitation in international investment law on shareholder claims. Nevertheless, using the theory frequently applied in domestic law is not part of the "daily tool box" of arbitral tribunals.[125] In this situation, the doctrine of piercing the corporate veil still applies to provide some reflections on arbitral tribunals as the GAMI Tribunal did.

When it comes to ITA, the rights of both groups of shareholders consist of the rights of their companies. It is therefore necessary to consider whether the rights of non-controlling shareholders might affect the rights of controlling shareholders with majority interests in the company. When the controlling shareholders decide not to bring ITA claims, they are still able to get the remedy from arbitration.[126] It shifts the power between the two groups of shareholders. Simultaneously, the initiatives of controlling shareholders should not affect those of non-controlling shareholders in their search for protection under an investment treaty. For instance, in some circumstances, the controlling shareholders of the company may sign a separate agreement with the host State to avoid arbitration. It might be made to achieve certain peaceful relations between the company and the host State, and also to keep a long-term cooperation between the host State and the company. However, such an agreement is likely to damage the interests of non-controlling shareholders if they are not allowed to claim for their losses. To make explicit determinations on these circumstances, arbitral tribunals in the disputes could investigate the initiatives of shareholders.[127]

5. Recent Development and Reflections on Investment Treaties

A dispute arises because it is argued that a shareholder's claim does not arise directly out of the investment as required by the ICSID Convention. The ICSID Convention does not prohibit a shareholder's claim, although the earlier draft of the Convention intended to do so. Consequently, arbitral tribunals may decide their jurisdiction on the basis of the investment treaties. Treaties usually do not answer the question of whether a non-controlling shareholder has its standing. Instead, there is usually a reference to shares in the treaties stating that shares qualify as assets in an investment.[128] However, regarding shares as the investment does not mean that the holder of the shares has the right to bring arbitration claims on its own behalf or on behalf of its company. Thus, treaties may be elaborated on provide a clear regulation of the shareholder's claim. The arbitration practice can bring some ideas to the negotiation and modification of the treaties.

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[124] Michael Waibel. 'Coordinating Adjudication Processes'. In Zachary Douglas, Joost Pauwelyn, and Jorge E. Viñuales (eds) The Foundations of International Investment Law: Bringing Theory into Practice (OUP 2014) 499, 509-510.
[125] *Ibid*, 530.
[126] *Ibid*.
[127] *GAMI* case.
[128] David Gaukrodger, "Investment Treaties and Shareholder Claims: Analysis of Treaty Practice" in *OECD Working Papers on International Investment* (2014/03) 12.

5.1 Containing Specific References in the Definition

The cases studied show that investment treaties may give a broad definition of investment. Some treaties state that shares qualify as an investment. For example, treaties regard every kind of investment made by a foreign investor in the host State as the investment; or explicitly allows the shares of a company owned by the investor to become the qualified investment.[129] The general terms in investment treaties cover shares as the protected investment. This section which names these treaties as the "Non-prohibited Agreements" normally does not specifically mention whether a shareholder may bring its claims, but rather include all forms of equity participation, like shares or stocks, in an enterprise as protected investments.[130]

In the Argentina cases, the Argentina-Germany BIT and the Argentina-France BIT have also been applied in several cases. [131] Both the Argentina-Germany BIT and the Argentina-France BIT contain the same broad definition of investment as the Argentina-US BIT, both of which apply to assets including shares:
Article 1(1) of the German-Argentine BIT:

> "The term 'investment' shall include any kind of investment in accordance with the laws of the Contracting Party in whose territory the investment is made in accordance with this Treaty, in particular, but not limited to…b) *shares or stock* in a company or any other form of participation in a company; c) claims to money which has been used to create an economic value or claims to any performance hailing an economic value; [emphasis added]

Article 1(1) of the Argentina-France BIT:

> "The term "investment" shall apply to assets such as property, rights and interests in any category, and particularly but not exclusively to: …
> b) *Shares*, issue premiums and other forms of participation, albeit minority or indirect, in companies constituted in the territory of either Contracting Party… [emphasis added]

Furthermore, the Argentina-Italy BIT also defines investments including any kind of asset, such as shares, invested or reinvested by an individual or a legal entity of one Contracting Party in the territory of the other Party, but especially include a *minority or indirect interest* in a company incorporated in the territory of either Contracting Party.[132] Consequently, arbitral tribunals determine that non-controlling shareholders can bring their investment claims when the applied BITs include minority or indirect interests in a company as covered investment. As

[129] See the Argentina-US BIT, the Argentina-German BIT, the Argentina-France BIT.
[130] For instance, the US model BIT 2012 and The Comprehensive Economic and Trade Agreement between EU and Canada, CETA.
[131] The *Siemens* case and the *Daimler* case, the *InterAguas* case, *Vivendi* case and *Total S.A* case.
[132] Article 1(1)(b) of the Argentina-Italy BIT. *See* the translation at *Impregilo* case, para 123.

a result, arbitral tribunals admit that a shareholder can bring its claim because the treaty covers the shares as the investment.

In addition, this section also points out that the directness of shareholders' claims makes a significant impact on the investment agreement negotiations from an EU perspective. This is because it will raise concerns about whether the investment in the dispute which is alleged to suffer losses, and is raised by shareholders, falls into the competence of the EU. The Treaty on the Functioning of the European Union (TFEU) indicates that the common commercial policy, including foreign direct investment, should be based on uniform principles.[133] The first opinion on this issue, the Opinion 2/15 of the Court of Justice of the EU holds that the EU-Singapore (EUSFTA) falls within the exclusive competence of the EU, including the future investment agreement negotiations, but such competence rules out the provisions related to non-*direct* investment between the EU and Singapore and investor-State dispute settlement provisions.[134] The updated EUSFTA separates its FTA from the Investment Protection Agreement (EUSIPA)[135], which is also in the form of the Non-Prohibition Agreement to deal with the investment made by shareholders.

With respect to the EUSIPA, Article 1.2 mentions that the investment covered in this agreement refers to any investment *owned/controlled directly or indirectly* by a covered investor of this agreement, in particular including "an enterprise including a branch**,** *shares, stocks and other forms of equity participation* in an enterprise, including rights derived therefrom" [emphasis added].[136] Furthermore, the EUSIPA covers all the juridical persons that have an investment in the territory of the other party in the EUSIPA. The treaty only requires that investors are duly constituted or organised in any form of corporation, trust, partnership, joint venture, sole proprietorship or association.[137] With a broad range of investors covered by the EUSIPA, non-controlling or minority shareholders of an enterprise will also be covered subject to the expansive interpretation of arbitral tribunals. As long as such shareholders are from the other state rather than from the host State, they can gain protection from the EUSIPA.

The non-prohibition approach has been widely applied and allows investor-State tribunals to obtain more competence to determine the standing of shareholders. The majority of IIAs, 2499 out of 2577, involve a list of assets in the provisions of the "definition of investor".[138] The definition indicates whether the direct and/or indirect investment is covered. Throughout this intermediate approach, arbitral tribunals will recognize the standing of both groups of shareholders in order to protect their shares covered by the IIAs as one of these assets. However, arbitral tribunals should provide a comprehensive analysis to determine the shareholders' standing in the light of the suggestions provided by Section 4.

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[133] Article 207 (1) of the Treaty on the Functioning of European Union, TFEU.
[134] Opinion 2/15 [2017].
[135] European Commission, COM (2018) 194 final, Proposal for a Council Decision on the conclusion of the Investment Protection Agreement between the European Union and its Member States of the one part, and the Republic of Singapore, of the other part.
[136] Article 1.2.1-1.2.2 of the EUSIPA.
[137] Article 1.2.4 of the EUSIPA.
[138] UNCTAD Mapping Project

5.2 Expressing Acceptance or Prohibition of Shareholders' Claims

In accordance with the arbitration practice, one suggestion is that a treaty may give a straightforward answer on whether the shareholder claims are accepted or prohibited. A treaty may also address which kinds of claims are allowed, controlling or non-controlling, direct or indirect. There are some BITs or TIPs that explicitly confirm that shareholders have the rights to bring claims. For instance, the NAFTA is one representative treaty. This section refers to those agreements as "Permission Agreements". Such permission agreements clearly confirm that shareholders are capable of bringing their claims to ITA for their alleged losses.

Some treaties specially admit the standing of non-controlling shareholders. For example, the NAFTA points the way forward on the standing of shareholders. Article 1116-1117 of the NAFTA states that a non-controlling investor in a company can bring its claim when this investor has incurred losses or damages because the State breaches its obligation.[139] It is held that the NAFTA provides a solution to point the way forward, with respect to waiving or consolidating the particular legal rights.[140] The solution gives a coordination mechanism for arbitral tribunals to solve the disputes.[141]

In contrast, the successor of the NAFTA, the USMCA, adopts this approach upon the shareholders' claims, but only the claims of controlling shareholders are allowed. Firstly, shares, stock and other forms of equity participation in an enterprise or an enterprise as a whole are covered investment under the USMCA.[142] With regard to the disputes between Mexico and the United States, a claimant could bring a claim to arbitration on its own behalf if that claimant incurred losses or damages by reason of, or arising out of, the alleged breach of the respondent state.[143] However, a claimant is allowed to bring a claim against the respondent state on behalf of an enterprise of the respondent state only if that claimant owns or controls the enterprise; thus it should not be a non-controller of that company.[144]

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[139] Article 1116 of the NAFTA:

"Claim by an Investor of a Party on Its Own Behalf

1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation ….and that the investor has incurred loss or damage by reason of, or arising out of, that breach…"

Article 1117 of the NAFTA:

"1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under…

3.Where an investor makes a claim under this Article and the investor or a *non-controlling* investor in the enterprise makes a claim under Article 1116 arising out of the same events that gave rise to the claim under this Article, and two or more of the claims are submitted to arbitration under Article 1120, the claims should be heard together by a Tribunal established under Article 1126, unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby…"[Emphasis added]

[140] Michael Waibel. 'Coordinating Adjudication Processes'. In Zachary Douglas, Joost Pauwelyn, and Jorge E. Viñuales (eds) *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014) 530.

[141] *Ibid*.

[142] Article 14.1 of the USMCA.

[143] Article 14.D.3 of the USMCA

[144] *Ibid*.

Conversely, this thesis did not discover any "Prohibition Agreement", which prohibits a shareholder from bringing its investment arbitration claim against a host country. From a practical view, "Prohibition Agreements" directly limit the right of foreign investors to bring claims and make it difficult to attract foreign investment. In particular, the exclusion of the protection of shareholders makes it difficult to protect those foreign investors that are only required to hold minority shares over the domestic company when they make their investments. Instead of excluding non-controlling shareholders from protection, BITs or TIPs may exclude portfolio investment as covered investment. Treaties may exclude the portfolio investment if the State party intends to do so.[145] However, the case studied shows that the exclusion of portfolio investment does not mean the exclusion of shareholder claims. Shareholders' claims may still be allowed if the claims have the direct link with the investment.

6. Conclusion

Since the *Barcelona Traction* case, the issue concerning shareholder claims has come a long way. [146] In particular, non-controlling shareholders in the companies have brought an increasing number of claims to investor-State arbitration for alleged losses. Questions concerning the standing of shareholders are complex. However, the current legal regime does not disclose the answer to the questions. In particular, domestic law and international investment law hold distinctive approaches on deciding the shareholders' standing. The legal gaps on shareholder claims leave the issue to be determined by arbitral tribunals.

On the basis of case law study, the chapter finds that arbitral tribunals address two important issues. The first is whether a shareholder has an independent right to bring its claim. The second is whether the loss of a shareholder can be regarded as a direct investment. Arbitral tribunals usually formulate an approach to determining the standing of shareholders and conclude that shareholders have independent rights to bring their arbitration claims for their direct losses and SRL. In addition to that, arbitral tribunals state that only if treaties specifically exclude the indirect investment, whether the shareholder's investment is direct or indirect will not determine the shareholders' standing. The decisive issue is that a direct link between the dispute and the investment should exist.

Referring back to the research question, the chapter addresses the issues that the approach of arbitral tribunals does not provide a comprehensive solution to resolving the standing of shareholders. It opens a wide door for any shareholder to bring arbitration claims against host States. As a result of this, the costs of arbitration will increase. A host State would have to resolve many disputes with the shareholder claimants that the State did not expect. Besides this, double recovery may occur and host States, loaded with more burden, have to pay for more compensation than the actual losses. Even though, in the end, arbitral tribunals do not rule in

[145] According to the UNCTAD mapping project, only 26 out of 2577 mapped treaties exclude the portfolio investment as protected investment. For instance, the South African Development Community (SADC) 2012 model BIT.

[146] Christoph Schreuer, 'Shareholder Protection in International Investment Law' (23 May 2005) < https://www.univie.ac.at/intlaw/pdf/csunpublpaper_2.pdf> 20.

favour of any party, the disputing parties have to pay more expenses in the ensuing proceedings. Arbitral tribunals receive more returns after establishing their jurisdiction and ruling on the merits.

To solve the problem, this chapter suggests that arbitral tribunals should give a full understanding of the direct requirement by paying more attention to the nature of the alleged losses. Such direct links exist when shareholders claim for their direct losses or their RSL, but not for the losses of their company. Moreover, the initiatives of the company and its other shareholders also need to be examined. Arbitral tribunals could look into the case facts and discover their initiatives in order to decide their jurisdiction.

Furthermore, practical challenges arise due to the broad provisions concerning shareholders' claims contained in the BITs or TIPs. To build on the feature of the investment treaties, this chapter provides methods to incorporate these arbitration practices into treaty negotiations. Firstly, as the general approach adopted by current treaties indicates, treaties give references to shares in their texts. For instance, treaties could address whether the shares of shareholders are direct or indirect investment. This approach is particularly important in the situation where the EU as a sole contracting party signed the BITs or TIPs with non-EU Member States. Secondly, treaties can address the shareholder claim by indicating whether a shareholder can bring an arbitration claim, and also which type of shareholders can do so. Such a provision in the treaty provides a direct answer to arbitral tribunals on shareholders' standing.

CHAPTER 5 ACCESS TO INVESTMENT TREATY ARBITRATION: LEGAL STANDING OF STATE-OWNED ENTERPRISES

1. Introduction

This chapter draws attention to the legal standing of SOEs in investor-State arbitration, notably whether or not SOEs can bring investment arbitration claims. The term "SOEs" means enterprises that are owned by sovereign states. States will have a significant control over their SOEs by holding full, majority or significant minority ownership.[1] In terms of a much broader concept, any enterprise over which the State exercises ownership could be considered an SOE.[2] An SOE might exercise its power as a public authority and also acts as a private investor subject to that power.[3] This duality raises concerns regarding the capacity of an SOE to obtain protection from IITs. It has been widely accepted that the designers of ISDS seek to attract and protect private investment rather than facilitate transnational sovereign capital.[4] As a result, there has been some debates about whether arbitral tribunals should pierce the veil of an SOE to look through its sovereign owner, the State, as the actual investor. To tackle this problem, the chapter therefore examines the legal standing of SOEs.

SOEs have been engaging in global investment in recent years, in the form of state-owned companies, sovereign wealth funds and other sovereign commercial vehicles.[5] Around 1,500 multinational SOEs, with more than 86,000 foreign affiliates, which represent close to 1.5% of the multinational entities and 10% of global affiliates all over

[1] Kathryn Gordon and David Gaukrodger, 'Foreign Government-Controlled Investors and Host Country Investment Policies: OECD Perspectives' In Kal P Sauvant and Lisa E. Sachs, and Wouter P.F. Schmit Jongbloed (eds), *Sovereign Investment: Concerns and Policy Reactions* (OUP 2012) 497.

[2] *OECD Guidelines on Corporate Governance of State-Owned Enterprises* (OECD 2015) 14.

[3] Luca Schicho, *State Entities in International Investment Law* (Auflage 2012) 15.

[4] Paul Blyschak, 'State-Owned Enterprises and International Investment Treaties: When are State-Owned Entities and Their Investment Protected?'6 Journal International Law & International Relations (2011) 1, 19.

[5] *Ibid*,1; Paul Michael Blyschak, 'State-Owned Enterprises in International Investment' (2016) 31 ICSID Review-Foreign Investment Law Journal 5. Wei Yin, 'The Role of State-Owned Investors and Chinese Investments in Europe: The Implication of the China-EU BIT'(2017) 14 Transnational Dispute Management < https://www.transnational-dispute-management.com/article.asp?key=2477 > . Sovereign wealth funds refer to "special purpose investment funds or arrangements, owned by the general government." See also at International Working Group of Sovereign Wealth Funds, 'Sovereign Wealth Funds Generally Accepted Principles and Practices "Santiago Principles"'
< http://www.ifswf.org/sites/default/files/santiagoprinciples_0_0.pdf > (27 October 2008). Kathryn Gordon and David Gaukrodger, 'Foreign Government-Controlled Investors and Host Country Investment Policies: OECD Perspectives' in Kal P Sauvant and Lisa E. Sachs, and Wouter P.F. Schmit Jongbloed (eds) *Sovereign Investment: Concerns and Policy Reactions* (OUP 2012) 497.

the world, play important roles in the global economy and international investment.[6] Consequently, due to the significant role of SOEs in international investment, international investment law needs to provide a systematic regulation of SOEs. Under these circumstances, after giving an introduction in Section 1, Section 2 introduces the legal framework in relation to the standing of SOEs in international investment law. This section analyses the foundation of the ITA, the ICSID Convention as well as investment treaties respectively.

In addition, Section 3 gives a case law study to find out how the dispute concerning SOEs' standing is discussed in ITA. The case law study aims to analyse the timely and important ITA cases to discover the approaches of arbitral tribunals. Added to this, Section 4 conducts an analysis of case law practice. In the light of the criteria presented in Chapter 2, it discusses the common practice of arbitral tribunals. This section also intends to answer the research question of this chapter. Furthermore, in view of the current development of investment treaties, Section 5 incorporates arbitration practice to bring some reflections of the treaty negotiation. Section 6 gives the conclusion.

2. Legal Framework in Relation to the Legal Standing of SOEs

This section introduces the current legal framework to discover how the legal standing of SOEs has been regulated. The discussion will be focused on the ICSID Convention and investment treaties. The debates concerning the status of SOEs arise, owing to the fact that the ISDS mechanism is reputedly designed to protect private foreign investment rather than sovereign investment.

2.1 The "Private" Requirement in the ICSID Convention

The ICSID Convention was born to recognize a private entity's right to have direct access to international jurisdiction.[7] The establishment of the ICSID originally intended to strengthen partnerships among countries and to promote economic development by protecting private capital.[8] This intention can be read through the official documents affiliated to the ICSID Convention. The first sentence in the preamble of the ICSID Convention specifically requires the Contracting States to consider "the need for international cooperation for economic development, and the role of private international investment."[9] Compared with the first draft of the ICSID

[6] UNCTAD, *World Investment Report 2017*, 30. This report mainly discusses the transnational SOEs instead of all types of SOEs.
[7] Aron Broches, *Working Chapter in the Form of a Draft Convention for the Resolution of Disputes between States and Nationals of Other States* (5 June 1962) Section 5, Article 2.
[8] C.F. Amerasinghe, 'The International Centre for Settlement of Investment Disputes and Development through the Multinational Corporation' (1976) 9 Vanderbilt Journal of Transnational Law 793, 794.
[9] Preamble of the ICSID Convention.

Convention, the final version specifically sets the term "private" into the text.[10]

The Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States stressed,

> "9. In submitting the attached Convention to governments, the Executive Directors are prompted by the desire to strengthen the partnership between countries in the cause of economic development. The creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of **private international capital** into those countries which wish to attract it…
>
> 12. The Executive Directors believe that **private capital** will continue to flow to countries offering a favourable climate for attractive and sound investments, even if such countries did not become parties to the Convention or, having joined, did not make use of the facilities of the Centre. On the other hand, adherence to the Convention by a country would provide additional inducement and stimulate a larger flow of private international investment into its territories, which is the primary purpose of the Convention."[11]

The report repeatedly addressed the protection of private investment rather than public investment.

With this in mind, the distinction between public and private investments becomes the core issue. Although both kinds of investments are important in international investment, they play different roles. Public investment involving sovereign participation raises both political and legal challenges. A sovereign state might approach its SOE as a vehicle to pursue the political objectives in another state, which poses national security risks to that host State.[12] When investments, which are politicised by the home state of SOEs, are made in some key industries, they might

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[10] *Draft Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (First Draft, 11 September 1964).
"Preamble
The Contracting States Considering the need for international cooperation for economic development, and the role of international investment therein…"

[11] International Bank for Reconstruction and Development, *The Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (18 March 1965) < http://icsidfiles.worldbank.org/ICSID/ICSID/StaticFiles/basicdoc/partB-section03.htm >. This clause is also cited in, C.F. Amerasinghe, 'The International Centre for Settlement of Investment Disputes and Development through the Multinational Corporation' (1976)9 Vanderbilt Journal of Transnational Law 793, 794. Christoph H. Schreuer, *The ICSID Convention: A Commentary* (2nd edn, CUP 2009) 4.

[12] Paul Michael Blyschak, 'State-Owned Enterprises in International Investment' (2016) 31 ICSID Review 5, 6. Wouter P.F. Schmit Jongbloed, Lisa E. Sachs, and Karl P. Sauvant, 'Sovereign Investment: An Introduction' in Karl P. Sauvant, Lisa E.Sachs, Wouter P.F. Schmit Jongbloed (eds) *Sovereign Investment: Concerns and Policy Reactions* (OUP 2012) 3, 10.

make detrimental impacts on host countries. Such concerns are driven by the fear of the participation and motivation of SOEs to make the investment in order to facilitate political plans.[13] Moreover, in view of the close relation between SOEs and their states, the structure and the governance of SOEs are questioned due to the lack of transparency and unfair competition.[14]

As the State's public capital is stable, it can give continuous support to SOEs. It is therefore not necessary for SOEs to regard their commercial interests as primary interests in the way that other private entities do.[15] At the same time, SOEs are usually large companies, and if they do not have these marketing strategies to achieve commercial interests, SOEs might bring unfair competition with other private investors. Furthermore, a large number of SOEs lack transparency.[16] Such a lack makes it difficult for other companies to reconsider their market efficiency and regulatory compliance, as a result of the information disparity in the competition.[17] Consequently, the screening and review of foreign investment made by SOEs may be introduced and enhanced to identify perceived threats.[18] The domestic law of host States determines whether SOEs are permitted to make their investment. However, once SOEs have gained access to investing in the host States, they may still search for an international remedy when they suffer losses.

When the ICSID Convention was negotiated, the distinction between private investment and public investment was pointed out and discussed. Private international investment is therefore considered by Contracting States to be protected in accordance with the Convention. The preamble of the ICSID Convention asks the Contracting States to take the role of private international investment into consideration. However, it does not give a straightforward answer to the status of SOEs. Article 25 of the ICSID Convention states that the jurisdiction of the ICSID extends to the dispute between one Contracting State and a national of another Contracting State. Nevertheless, it does not specifically argue that an investor should be a private investor by nature, nor that an investor should not be a public investor. The national of another Contracting State should be either a natural person or a juridical person. Therefore, a sovereign state is excluded by the ICSID Convention from being qualified as an investor. An SOE is not

[13] Wouter P.F. Schmit Jongbloed, Lisa E. Sachs, and Karl P. Sauvant, 'Sovereign Investment: An Introduction' in Karl P. Sauvant, Lisa E.Sachs, Wouter P.F. Schmit Jongbloed (eds) *Sovereign Investment: Concerns and Policy Reactions* (OUP 2012) 3, 12.

[14] Paul Michael Blyschak, 'State-Owned Enterprises in International Investment' (2016) 31 ICSID Review 5, 6. Wouter P.F. Schmit Jongbloed, Lisa E. Sachs, and Karl P. Sauvant, 'Sovereign Investment: An Introduction' in Karl P. Sauvant, Lisa E.Sachs, Wouter P.F. Schmit Jongbloed (eds) *Sovereign Investment: Concerns and Policy Reactions* (OUP 2012) 3, 12.

[15] Wouter P.F. Schmit Jongbloed, Lisa E. Sachs, and Karl P. Sauvant, 'Sovereign Investment: An Introduction' in Karl P. Sauvant, Lisa E.Sachs, Wouter P.F. Schmit Jongbloed (eds) *Sovereign Investment Concerns and Policy Reactions* (OUP 2012) 3, 12.

[16] *Ibid*.

[17] *Ibid*.

[18] For example, European Commission, 'Screening of Foreign Direct Investment' (10 April 2019) < http://trade.ec.europa.eu/doclib/press/index.cfm?id=2006 >.

a juridical person because it has a corporate nature. Nevertheless, its corporate nature is mixed with public capital and profitable private interests. To be more specific, an SOE has a corporate form, but it runs to achieve sovereign interests. Therefore, due to their mixed nature, it is often questioned whether they can be qualified investors in accordance with the ICSID Convention.

2.2 Legal Standing of SOEs in Investment Treaties

Apart from the ICSID Convention, SOEs should also meet the requirement in investment treaties in order to be qualified as investors. Investment treaties define SOEs as either "governmentally owned" or "governmentally owned or controlled".[19] Some treaties also directly use the term "state enterprise" or "state-owned enterprise". OECD published a survey to address the investment treaty practice in relation to SOEs.[20]

According to the survey, only a few treaties expressly exclude SOEs from being regarded as covered investors. Although trade agreements usually include an entire chapter to regulate SOEs, BITs are not likely to do so. The survey mentions that there are three BITs signed with Panama in 1983, which excluded SOEs as protected investors.[21] This section refers to this approach as the "Panama Model". Article 1 of the Panama-UK BIT first explains that "shares, stock and debentures of companies or interest in the property of such companies" are the "investment" under this agreement. The Panama Model expressly excludes SOEs without reservations from its scope of investors. Therefore, SOEs are no longer protected investors under the Panama Model treaties. With respect to Panama, SOEs having domiciles in the territory of Panama are qualified as corporate investors. Conversely, with respect to UK, the corporate investors mean "companies, associations incorporated or constituted under the law…in any part of the United Kingdom…", which does not expressly exclude SOEs.[22] However, the Panama-UK BIT was signed more than 35 years ago when SOEs might not have been crucial players in global investment. In contrast, as mentioned above, SOEs can not now be replaced in international investment. The Panama model is therefore out of date and very exceptional. As a consequence, it was rarely adopted in international treaties

[19] Yuri Shima, 'The Policy Landscape for International Investment by Government-controlled Investors: A Fact Finding Survey', *OECD Working Chapters on International Investment* (OECD Publishing 2015) 12.

[20] *Ibid*.

[21] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Panama for the Promotion and Protection of investments, [hereinafter "Panama-United Kingdom BIT"] (signed on 07 October 1983); Entre le Gouvernement de la Confédération Suisse et le Gouvernement de la République du Panama concernant la promotion et la protection des investissements [herein after "Panama-Switzerland BIT"] (signed on 19 October 1983); Convenio entre la Republica de Panama y la Republica Federal de Alemania sobre Fomento y Proteccion reciproca de lnversiones de Capital [hereinafter "Panama-Germany BIT"] (signed on 02 November 1983). Since the Panama-UK BIT is the first but also the only available BIT among these three BITs, further discussion might focus on the Panama-UK BIT.

[22] Article 1(d) (ii) of the Panama-UK BIT.

according to the OECD working paper.[23]

Regarding the OECD survey, the majority of treaties neither distinguish between the ownership of investors, nor do they mention SOEs.[24] This OECD survey states, of the 1813 agreements surveyed, 1,524 (84%) agreements do not explicitly mention any type of government control investors (SOEs, state-owned investment funds or a government itself) as investors in the provisions of investor definition. Instead, these treaties only give broad definitions of investors. 16% of IITs specified to cover SOEs, including "public institutions," "state corporations and agencies," "governmental institutions," and so forth. Consequently, the majority of existing investment treaties do not give a direct answer as to whether SOEs are qualified investors.

In sum, the ICSID Convention specifies that the role of foreign private investment is the key factor to be considered when the Convention was drafted. However, the Convention neither includes nor excludes the SOEs as covered investors. In addition, the majority of investment treaties do not address the standing of SOEs. Owing to the legal blanks in the treaties, arbitral tribunals make their determination under their respective approaches to decide the jurisdiction.

3. How the Legal Standing Issues are Examined in Investment Treaty Arbitration

Investigating the standing issues merits an assessment from a Chinese perspective.[25] Firstly, from a practical point of view, Chinese SOEs play an important role in international investment. According to the World Investment Report, China is the second largest (after the EU) home economy in which multinational SOEs are headquartered. China is also the largest home state with more than 250 multinational SOEs (about 20% of global multinational SOEs).[26] Moreover, the majority of Chinese companies listed in Forbes Global were SOEs.[27]

Secondly, the role of SOEs has significant implications on political and economic reforms in China.[28] After a long period of war, China's SOEs have been playing a role

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[23] Yuri Shima, 'The Policy Landscape for International Investment by Government-controlled Investors: A Fact Finding Survey', *OECD Working Chapters on International Investment* (OECD Publishing 2015) 11.
[24] *Ibid*.
[25] Mark Feldman, 'State-owned Enterprises as Claimants in International Investment Arbitration' (2016) 31 ICSID Review-Foreign Investment Law Journal 24. Jo En Low, 'Perspectives on topical foreign direct investment issues', (2012) Columbia FDI Perspectives No 80; Mark Feldman, 'The standing of state-owned entities under investment treaties' in Karl P. Sauvant (ed) *Yearbook on International Investment Law and Policy 2010-2011* (New York: OUP, 2011). Norah Gallagher, 'Role of China in Investment: BITs, SOEs, Private Enterprises, and Evolution of Policy' (2016) 31 ICSID Review-Foreign Investment Law Journal 88-103.
[26] UNCTAD, *World Investment Report 2017* (UNCTAD 2017), Figure 1.25.
[27] Forbes, 'Forbes Global 2000' < https://www.forbes.com/global2000/ >
[28] OECD, *OECD Working Group in Privatisation and Corporate Governance of State Owned Assets: State Owned Enterprises in China* (OECD 2009) 1.

in undertaking nation-building tasks.[29] Following the economic reform and opening-up policies in 1978, China began to attract foreign investment, while Chinese companies started to make their investment abroad. The year 2015 marked the first time China became a net capital exporter, which means that Chinese investment overseas exceeded the foreign investment in China. In the past 30 years, China's SOEs have gone through various processes of transformation, resulting in smaller SOEs closing down, merging, or being sold. Large SOEs have transformed from inefficient production units operating under the State's economic plans into profitable business entities.[30]

Thirdly, China takes a gradualism approach to reform its economy, referred as "touching stones, crossing the river."[31] Nevertheless, this gradualism makes the nature and classifications of Chinese SOEs complex.[32] The structures of Chinese SOEs are complicated and there are different laws and governmental authorities governing Chines SOEs.[33]

However, the previous analyses concerning Chinese SOEs in ITA were still rather theoretical. It was due to the fact that there was no available case law in which arbitral tribunals actually examined the disputes. Until 2017, two cases issued their respective decisions on jurisdiction, in which arbitral tribunals discussed the status of SOEs from various aspects. The cases made a great impact on arbitration practice.

Subsequently, this section investigates the approaches of arbitral tribunals with a particular focus on the cases involving Chinese SOEs. It also analyses other remarkable cases to highlight the common approaches of arbitral tribunals.

3.1 Substantive Approach: Applying the Broches Test

Arbitral tribunals may apply a substantive approach to determining the legal standing of SOEs. Such an approach has been applied substantially in many remarkable cases. On 31 May 2017, in the *Beijing Urban Construction Group Co., LTD (BUCG) vs. Republic of Yemen* case, the ICSID tribunal issued a decision on the legal standing of Chinese SOEs.[34] For the first time, an arbitral tribunal examined whether a Chinese

[29] Gang Fan & Nicholas C. Hope, ' The Role of State-Owned Enterprises in the Chinese Economy' (China-US Focus) < https://www.chinausfocus.com/2022/wp-content/uploads/Part+02-Chapter+16.pdf> 2.
[30] *Ibid*
[31] OECD, *OECD Working Group in Privatisation and Corporate Governance of State Owned Assets: State Owned Enterprises in China* (OECD 2009) 1.
[32] *Ibid*.
[33] Ru Ding, ' 'Public Body' or Not: Chinese State-Owned Enterprise' (2014) 48 Journal of World Trade 167, 184-187.
[34] *Beijing Urban Construction Group Co., LTD (BUCG) vs. Republic of Yemen case,* ICSID Case No. ARB/14/30, Decision on jurisdiction (31 May 2017) [hereinafter the "BUCG case"]. This summary is partially based on the author's blog, Anran Zhang, 'Another First: Chinese SOEs in Investor-State Arbitration' (Leiden Law Blog, 25 July 2017) < http://leidenlawblog.nl/articles/another-first-chinese-soes-in-investor-State-arbitration>. Anran Zhang, 'The Standing of Chinese State-Owned Enterprises in

SOE was a qualified investor under investor-State arbitration.[35]

The Claimant, BUCG, was a company incorporated under the Chinese law which undertook to construct the terminal facility in Yemen (the Respondent).[36] On 28 February 2006, BUCG signed a contract with Yemen Civil Aviation and Meteorology Authority (CAMA) regarding constructing the Yemen-funded Sana's International Airport project (Project). CAMA was also assisted by the Netherlands Airport Consultants B.V. (NACO). On the basis of the Agreement on the Encouragement and Reciprocal Protection of Investments Between China and Yemen (the China-Yemen BIT), the Claimant (BUCG) brought its claim. It alleged the Respondent's unlawful deprivation of its investment in July 2009. The deprivation included employing state military forces, assaulting and detaining the Claimant's employees, and denying the Claimant's access to the site to continue with the project.[37] Therefore, it made the Claimant fail to complete the contract to earn a profit. However, the Respondent denied those claims and contended that the arbitral tribunal lacked jurisdiction. In its first objection, the Respondent argued that the Tribunal lacked jurisdiction because the Claimant was as an SOE, so it failed to qualify as "a national of another Contracting State" under Article 25(1) of the ICSID Convention.[38] In order to examine the dispute, the arbitral tribunal applied the Broches Test.

In the *BUCG* case, both disputing parties referred to the Broches test. The Broches test is named after the first Secretary-General of the ICSID, Aron Broches, who is also one of the first drafters of the ICSID Convention. In 1972, Broches pointed out the qualification as a national of another Contracting State, which specifically referred to the standing of SOEs in investor-State arbitration. Broches stated that the ICSID Convention did not answer whether a "national of another Contracting State" should be a privately owned entity, but its preamble indicated its broad purpose, which is to promote private foreign investment.[39] However, Broches believed that using the source of the capital to distinguish between private and public foreign investment was not practical. Firstly, nowadays many companies have combined capital between private and governmental assets.[40] Secondly, some government-owned companies act

Investor-State Arbitration: the First Two Cases (2018) 17 Chinese Journal of International Law 1147, 1147.

[35] Prior to the BUCG case, in the following ICSID cases the nationalities of the claimants were Chinese, *Tza Yap Shum vs. Republic of Peru*, ICSID Case No. ARB/07/6 (concluded); *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited* ,ICSID Case No. ARB/10/20 (Concluded); *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited vs. Kingdom of Belgium*, ICSID Case No. ARB/12/29 (Concluded). But in these cases, none of these claimants are state-owned. This chapter only discuss the dispute in relation to the standing of SOEs. It will not discuss the issues concerning other objections to jurisdiction, nor the merit disputes.

[36] The BUCG case, para 3.

[37] *Ibid*, para 25.

[38] *Ibid*, para 29.

[39] Aron Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (1972) 136 *Recueil des Cours de l'Académie de Droit International* 354.

[40] *Ibid*.

privately in their own legal characteristics when they conduct their activities.[41] For instance, throughout a nationalisation process, a state might take over a private company; by offering bailouts and stimulus packages, the State could also intervene in private business. [42] Conversely, an SOE might be privatised: a private company invites a state to contribute to its capital.[43] With this in mind, Broches proposed his well-known statement concerning the role of SOEs,

> "In today's world, the classical distinction between private and public investment, based on the source of the capital, is no longer meaningful, if not outdated. There are many companies which combine capital from private and governmental sources and corporations all of whose shares are owned by the government, but who are practically indistinguishable from the completely privately owned enterprise both in their legal characteristics and in their activities. It would seem, therefore, that for purposes of the Convention a mixed economy company or government-owned corporation should not be disqualified as a 'national of another Contracting State' unless it is *acting as an agent for the government* **or** is *discharging an essentially governmental function*."[44]

In the *BUCG* case, disputing parties and the arbitral tribunal accepted that the Claimant was a publicly funded and wholly established by the PRC (People's Republic of China) government. The disputes were concerned with whether the SOE played its role as a PRC agent or simply followed the instruction of the PRC government. The Respondent held that the Claimant, being an SOE, was an agent for the PRC government, therefore discharging PRC's function. However, the Claimant acted with its commercial capacity arising out of the contract. With regard to the Broches test, the Tribunal noticed the word "or" in the last sentence which means that if an SOE was a qualified investor, it needs to apply either branch of the criteria to make the determination.[45] Consequently, the Tribunal started to examine the circumstances to establish whether either of criteria was applied in the present case.

Firstly, the Tribunal investigated whether the Claimant acted as an agent for the PRC government. The first issue arising out of this investigation was the interpretation of being "an agent of the government" with regard to the Broches Test. Some scholars believed that the Draft Articles on the Responsibility of States for Internationally

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[41] *Ibid*.
[42] Albert Badia, *Peircing the Veil of State Enterprises in International Arbitration* (Kluwer Law International 2014) 5-6.
[43] *Ibid*, 5.
[44] Decision on Jurisdiction, para 33. Aron Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (1972) 136 *Recueil des Cours de l'Académie de Droit International* 355, referred to by Christoph H Schreuer, *The ICSID Convention: A Commentary* (2nd edn, CUP 2009) 161 (RL-003).
[45] *BUCG* case, para 31-36.

Wrongful Acts (the DA) provided a proper definition.[46] According to Article 8 of the DA, if natural or legal persons "acting on the instructions of" the State "in carrying out the conduct," or if persons act "under the direction or control of the State," those persons should have attribution of responsibility.[47] These examples listed in the DA clarify the links between the entities and the State, which are centred on involving the State as a party to the proceedings.[48]

For instance, in the *Tulip* case, the Tribunal applied the DA to find whether the conduct of an SOE may be attributable to the State,[49]and agreed that the DA constitutes a codification of customary international law concerning the issue of attribution of conduct to the State.[50] Nevertheless, the Tribunal maintained that "there is no basis under international law to conclude that ownership of a corporate entity by the State triggers the presumption of statehood."[51]

However, although the DA was widely discussed and even considered to be an expression of customary international law, it may not always be applied to determining the standing of SOEs automatically.[52] The general principle of the DA is to assert that "every internationally wrongful act of a State entails the international responsibility of that State".[53] It intends to provide broad and substantial protection in order to attribute any wrongful act by a state. In contrast, the standing of SOEs in investor-State arbitration is concerned with the jurisdiction issue by discussing whether an SOE might take off its public authority character to be a private legal entity.

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[46] Srilal M.Perera, 'State Responsibility: Ascertaining the Liability of States in Foreign Investment Disputes' (2005) 6 Journal of World Investment and Trade 499, 499. International Law Commission, 'Responsibility of State for Internationally Wrongful Acts' Text reproduced and corrected by document (A/56/49 Vol. I/Corr.4.) < http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf >.

[47] Article 8 of this Draft Articles states, "
The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."

[48] Luca Schicho, *State Entities in International Investment Law* (Auflage 2012) 43-44.

[49] *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award (10 March 2014) [hereinafter the "Tulip case"] para 281. In this case, the Dutch Claimant made its investment project, in partnership with a company (named Emlak) in the State (Turkey). Emlak was 100% owned by the Housing Development Administration of Turkey (TOKI). On the basis of the BIT between the Netherlands and Turkey, the Claimant brought its ICSID arbitration against the State by arguing that the actions taken by the State deprived it of its entire investment. In particular, both Emlak and TOKI harassed the investment by delaying approvals. In its award on 10 March 2014, the Tribunal concluded that the Sate did not breach BIT obligations, but arbitrators held different opinions on the issues concerning the attribution of the State. However, the Claimant launched its annulment application to challenge the award. On 30 December 2015, the ad hoc committee made a decision and dismissed the Claimant's challenge. In particular, the annulment committee agreed with the majority of the Tribunal's reasoning on attribution. *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment (30 December 2015) [hereinafter the "Tulip case, annulment"].

[50] *Tulip* case, para 281.

[51] Ibid, para 289; Tulip case, annulment, para 184.

[52] *Ibid*, 43.

[53] Article 1 of the Draft Articles.

In the BUCG case, on the basis of the PRC governmental publications and directives, the Respondent argued that the Claimant was authorised by the State in order to undertake, manage and advance government assets.[54] The Respondent further claimed that the Communist Party communities in the Claimant were required to supervise human resources, finance and materials, and were responsible for following national policies and development concepts in order to promote the SOE to lead political and social responsibility.[55]

The official profile of the BUCG shows that the Communist Party can decide issues regarding the regulation and operation of BUCG.[56] The Party Committee, together with the Commission for Discipline Inspection and Trade Union Committee, led the function departments of BUCG and its business departments and business units.[57] Within the Function Departments, there were the Party Affairs Department, Publicity Department, Discipline Supervision, and Investigation Department, together with the Trade Union and Youth League Committee. However, the BUCG stated that similar structures existed in a number of Chinese SOEs.[58] The socialism with Chinese characteristics determines that the Communist Party plays a key role in regulating Chinese SOEs. Consequently, a majority of projects undertaken by SOEs should reflect the Party's positions. The Central Committee of the Communist Party of China requires important decisions of central SOEs to be discussed by the Party Committee of SOEs prior to being referred to its Board of Directors.[59]

The BUCG Tribunal held that the government control and the party control were common in Chinese SOEs, but this was not the key point. Instead, the core issue was not the framework of an SOE, but whether that SOE functions as an agent of the State. The Tribunal discussed the case facts by investigating the evidence recorded. It found that the Claimant followed an open tender, made a bid as a general contractor, and competed with other potential contractors during the selection. Furthermore, the Tribunal discovered that the Respondent contended that one reason to terminate the contract was the failure of the Claimant to perform its commercial services.[60] In consequence, the Tribunal held that the Respondent accepted that the Claimant's act

[54] *BUCG* case, Resp. Mem. ¶ 47
[55] *BUCG* Case, para 38.
[56] BUCG, 'Group Profile' < http://english.bucg.com/profile/zzjg/ >.
[57] Commission for Discipline Inspection (CDI, 纪律检查委员会 *in Chinese*) is an internal-control institution of the Communist Party of China, whose missions are enforcing the Party's rules and combatting corruption and malfeasance within the Party. There are different levels of CDIs in different levels of governments. A trade union is a working-class mass organisation voluntarily joined by employees.
[58] Since the structure of the biggest Chinese SOEs are always available online, this chapter points out several company structures of China's biggest companies. According to the Fortune Global 500 list (2017), Top 2-4 are Chinese SOEs. Available at Fortune, 'Global 500' <http://fortune.com/global500/list/>.
[59] Qingjiang Kong, 'Emerging Rules in International Investment Instruments' (2017) 3 The Chinese Journal of Global Governance 57, 71.
[60] *BUCG* case, para 40

was based on commercial interests based. Consequently, the Tribunal held that the Claimant did not fall into the first branch of the criteria.

Furthermore, the Respondent argued that the Claimant carried out the governmental functions.[61] To argue the Claimant's governmental functions, the Respondent referred to the Statement of the PRC Foreign Economic and Trading Department (now known as the Ministry of Commerce, MOFCOM) regarding BUCG, which required that BUCG "shall be administered, coordinated, and regulated by the Department."[62] Accordingly, the Respondent held that the PRC government ultimately decided on key management and made operational and strategic decisions.[63] The Tribunal held that the argument of the Respondent was convincing but not relevant, as there was still no clear evidence to prove that the Claimant implemented its governmental function in the current project.[64] Moreover, since Yemen's allegedly unlawful military enforcement was enacted against the project contractor, BUCG, and against the PRC government, the arbitral tribunal held that in the project the Claimant was a commercial contractor; accordingly, the Claimant did not fall into the second branch of the Broches Test, either.[65]

Another notable case, the CSOB case was also examined by the BUCG Tribunal. In that case, the Broches test was also discussed. The Claimant, Československá Obchodní Banka (CSOB), was a partially state-owned commercial bank. The CSOB alleged that its loss was incurred during the privatisation of CSOB undertaken by the Respondent (the Slovak Republic). In order to receive the compensation, the CSOB brought its claim in front of the Tribunal. The Respondent State brought its objections on the jurisdiction, one of which argued that the Claimant as an agent of the Czech Republic did not qualify as an investor under Article 25 of the ICSID Convention.

In order to apply the Broches test in the CSOB cases, the Tribunal examined the activities of the CSOB. Firstly, the Tribunal acknowledged that the CSOB acted "on behalf of the State in facilitating or executing international banking transactions and foreign commercial operations" according to the State wishes.[66] However, in order to determine whether the CSOB exercised governmental functions, the Tribunal placed its focus on the nature of activities taken by the CSOB, not on the purpose of the activities.[67] After examining all activities, the Tribunal held that the purpose of the CSOB's activities was to promote the governmental (or state) policies, but the nature

[61] *Ibid*, para 42.
[62] *Ibid*, para 43. The Foreign Economic and Trading Department of China, 'Reply on Approving Beijing Urban Construction Group General Company to Undertake Foreign Economic and Technological Cooperation Business' (No. 1859) (17 December 1994).
[63] *BUCG* case, para 43.
[64] *Ibid*.
[65] *Ibid*.
[66] *Československá Obchodní Banka v. Slovak Republic*, ICSID Case No. ARB/97/4 (24 May 1999) Decision of the Tribunal on Objections to Jurisdiction, [hereinafter the "CSOB case"] para 20.
[67] *CSOB* case, para 20.

of those activities was essentially commercial.[68] As a consequence, despite being an SOE, the CSOB was still an investor.

In summary, the arbitral tribunals in both cases discussed the standing of SOEs by applying the Broches Test. Arbitral tribunals examined the substantive activities of SOEs in order to decide whether they made their investment subject to their commercial activities.

3.2 Formalist Approach: Applying the Criteria in the Treaties

In addition to the substantive approach, arbitral tribunals may apply a formalist approach to examining the standing of SOEs. The formalist approach refers to the fact that the arbitral tribunal determines the legal standing of the SOEs based on a textual understanding of the treaties rather than the Broches Test to examine the jurisdiction disputes. In another case, the arbitral tribunal adopted such an approach to deciding on the jurisdiction dispute.

On 30 June 2017, the Permanent Court of Arbitration (PCA) made its award concerning the disputes between Chinese investors (the Claimant, CBQ) and the government of Mongolia (the Respondent).[69] The Claimants are (1) China Heilongjiang International Economic & Technical Cooperative Corp (China Heilongjiang), (2) Beijing Shougang Mining Investment Company Ltd (Beijing Shougang), and (3) Qinhuangdaoshi Qinlong International Industrial Co. Ltd (Qinlong), all of which were established under the law of China. China Heilongjiang and Beijing Shougang were SOEs, while Qinlong was a limited liability company whose principal shareholder was Mr. Li Xiaoming. Mr. Li served as the Deputy Head of the Commodities Trading Department of China Heilongjiang years ago. BLT LLC (BLT) was a limited liability company established in Mongolia that held a mining licence. Tumurtei Khuder was a Mongolian corporation formed on 19 June 2002, in the form of a joint venture between BLT (holding 30% equity interest) and Qinlong (holding 70% equity interest). Qinlong transferred 41% of Tumurtei Khuder shares to China Heilongjiang and to Beijing Shougang later. In the end, China Heilongjiang held 11% shares, Beijing Shougang held 30% shares, Qinlong held 29% shares of Tumurtei Khuder. After managing the corporate formation, Darkhan Metallurgical Plant (Darkhan), a competitor and a Mongolian state-owned company, pursued a criminal investigation into the licence of BLT. The authorities of Mongolia investigated Tumurtei Khuder, revoked its licence and granted the licence to Darkhan.

Accordingly, after failing to claim in front of Mongolian courts, the Claimants brought their claims to the PCA pursuant to the Agreement between the Government of the

[68] *Ibid*.
[69] The Agreement between the Government of the Mongolian People's Republic and the Government of the People's Republic of China concerning the Encouragement and Reciprocal Protection of Investments (signed on 26 August 1991) [hereinafter "Mongolia-China BIT"].

Mongolian People's Republic and the Government of the People's Republic of China concerning the Encouragement and Reciprocal Protection of Investments (the China-Mongolia BIT).[70] The Respondent objected to the jurisdiction of the Tribunal. One of the objections was because two companies of the Claimant were SOEs, neither China Heilongjiang nor Beijing Shougang were investors under the China-Mongolia BIT, which required investors to be economic entities.[71] Article 1(2) of the China-Mongolia BIT defines "investors",

> "in respect of the Mongolian People's Republic, as:
> (a) Natural persons who have nationality of the People's Republic of China;
> (b) *Economic entities* established in accordance with the laws of the People's Republic of China and domiciled in the territory of the People's Republic of China."[72] [Emphasis added]

The Parties agreed that the Claimants were established in accordance with Chinese law and domiciled in the territory of China. In accordance with the wording of the BIT, the Respondent applied a restrictive interpretation by arguing that, compared to other Chinese treaties, which expressly include "public entities" as covered investors, Article 1(2) of the China-Mongolia BIT only placed limits on private entities.

Indeed, a number of China-signed BITs specifically include the term "economic entities" in the definition of "investor."[73] However, the Tribunal applied a broad understanding of the terms of "economic entity." The Tribunal did not distinguish between investors on the basis of "organisational type," "business purpose," "ownership," or "control."[74] With respect to the VCLT, the Tribunal held that if the State parties intended to exclude public entities from "economic entities," the parties should have assigned this intention into the treaty.[75] Consequently, the Tribunal explained that it would not exclude SOEs as protected investors, because the treaty drafters did not indicate such an exclusion in the treaty text.

Furthermore, the Respondent argued that the Claimants, being state-owned, cannot be regarded as "economic entities," because "economic entities" meant "private,

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[70] *China Heilongjiang International Economic & Technical Cooperative Corp., Beijing Shougang Mining Investment Company Ltd., and Qinhuangdaoshi Qinlong International Industrial Co. Ltd. v. Mongolia*, PCA Case No.2010-20, Award (30 June 2017) [hereinafter "the CBQ case"] para 404.

[71] Article 1(2) of the China-Mongolia BIT.

[72] For instance, the China-Finland BIT (1984 terminated); the China-Bulgaria BIT (1989); the China-Hungary BIT (1991); the China-Greece BIT (1992); the China-Albania BIT (1993); the China-Croatia BIT(1993); the China-Estonia BIT (1993); the China-Lithuania BIT (1993); the China-Slovenia BIT (1993); the China-Azerbaijan BIT (1994); the China-Bahrain BIT (1999);the China-Barbados BIT (1998); the China-Bosnia Herzegovina BIT (2002); the China-Germany BIT (2003); the China-the Netherlands BIT (2001); the China-Portugal BIT (2005). This is based on UNCTAD, "Investment Policy Hub Database' < http://investmentpolicyhub.unctad.org/IIA/CountryBits/42#iiaInnerMenu >.

[73] *CBQ* case, para 412.

[73] Article 31(4) of VCLT states "A special meaning shall be given to a term if it is established that the parties so intended."

[74] *CBQ* case, para 412.

[75] VCLT, Article 31(4).

commercial entities" or to "entities of any kind engaging in economic activities."[76] According to the Rejoinder of the Respondent, SOEs were not "economic" in nature because of the following reasons. Firstly, the SOEs were "not motivated to make a profit in the sense that an economic entity would ordinarily be thought to be".[77] Secondly, the SOEs did not have "sufficient independence" from the Chinese government.[78] Thirdly, the SOEs were "quasi-instruments of the Chinese government" in order to "serve China's foreign policy goals."[79] In order to examine this argument, the Tribunal read the evidence in the record and found that no evidence indicated that the SOEs acted to achieve the State's political goals:

> "The Tribunal does not find any evidence in the record to support such a conclusion, or a conclusion that they acted under the Chinese Government's 'express instruction to invest abroad in order to serve China's foreign policy goals.'" [80]

Consequently, the Tribunal dismissed the Respondent's objection on the standing of SOEs. The CBQ case is an ad hoc arbitration rather than an ICSID arbitration. It represents the situation in which the Tribunal only replies on the basis of the investment treaties to make the determination on the SOEs' standing. Compared to the BUCG decision, the CBQ Tribunal examined the standing of SOEs in a rather simple and formalist approach, which was to determine whether SOEs might be regarded as "economic entities" in accordance with the treaty applied.

In general, the Tribunal applied a formalist approach to reading the texts in the BIT. In the first step, by giving a broad interpretation, the Tribunal held that SOEs might still obtain treaty protection because the treaty did not prohibit SOEs' claims. In the second step, the Tribunal ascertained that the SOE was achieving its economic or political goals. Although the analysis and conclusion of the Tribunal in the award is very general, it may be assumed that the Tribunal will take the purpose of the SOE's act into account to make the determination.

4. Analysis of the Investment Arbitration Practice

Due to the lack of reference to the role of SOEs in both the ICSID Convention and TIPs or BITs, arbitral tribunals examine the legal standing issues in specific cases. In general, they will not deny their jurisdiction although the claimant is owned or controlled by a sovereign state. To solve the problems, arbitral tribunals could apply a substantial approach or a formalist approach.

These two approaches reach the same conclusion that as long as there is no restriction

[76] *CBQ* case, para 408.
[77] *Ibid*.
[78] *Ibid*.
[79] *Ibid*.
[80] *CBQ* case, para 418.

on the legal standing of SOEs, an SOE is qualified as a claimant in ITA. The exception would be if such an SOE acts as an agent of its state or undertakes its governmental functions in international investment. Such an exception also responds to the general principle of the ITA mechanism because it was born to protect private international investment. The doctrine of "piercing the corporate veil" is also applied to explaining the approaches undertaken by arbitral tribunals. If arbitral tribunals discover that the investment is made by SOEs subject to the governmental functions to achieve a governmental goal, they would pierce the veil of the SOE to regard the State as a public investor. By doing so, the SOEs are not able to bring a claim in ITA.

Although arbitral tribunals achieve consistent conclusions, they do not provide consistent and comprehensive analyses. For instance, the distinction between the purposes of SOEs and the nature of SOEs' investment is blurred. Added to this, although arbitral tribunals gave a brief answer to the standing of SOEs, they did not further clarify to what extent these SOEs are able to run their business in international investment in order to be qualified as investors in ITA. To overcome the potential limitations, the next sections examine the approaches of arbitral tribunals in the light of the criteria presented in Chapter 2.

4.1 Discovering the Purpose and Nature of SOEs' Activities

In the *CBQ* case, when the Tribunal explained whether these SOEs were economic entities under the BIT, the arbitral tribunal discovered the goals of the SOEs. Nevertheless, the BUCG decision recalled that the distinction between the purpose and the nature of SOEs' activities was unclear. The BUCG Tribunal, therefore, held that both the purpose and nature were applied to determining the jurisdiction in practice.

With respect to the purpose of SOEs' activities, it is not easy to distinguish between the commercial purpose and the governmental purpose of SOEs. Firstly, in international investment, SOEs may not have a sole aim for either profitable commercial interests or political interests. Instead, they may pretend to achieve commercial benefits under the directions of their states. Besides this, the distinction between the nature and the purpose of the SOE's transaction is unclear.

Firstly, there is no clear distinction between the nature and the purpose of the commercial transaction. From an international law perspective, the UN Convention on the Jurisdictional Immunities of States and their Property puts the approach forward for determining the commercial transaction of a state. It states that "the nature of the contract or transaction shall be referred to but the purpose of the contract or transaction shall also be taken into account if the contract or transaction parties agree or this

purpose is relevant to make the determination."[81] In contrast, from a domestic law perspective, courts make a different distinction.[82] Under domestic law courts will only exercise jurisdiction over "non-sovereign" activities, so the commercial transaction of an entity is also tested.[83] Domestic courts usually consider the nature rather than the purpose of the entity's activities in order to find out whether the entity is undertaking its commercial transaction.[84]

In addition, the real dilemma is that SOEs make their global investment to gain commercial benefits and follow governmental strategy at the same time. For instance, when China proposed its "One Belt One Road" initiative (OBOR) in 2013, a large number of Chinese SOEs made their investment, especially the infrastructure investment, to follow up with this initiative. On 18 October 2017, during the 19th National Congress of the Communist Party of China (known as "Shíjiǔ Dà"), Chinese President Xi stressed his ambition to promote international investment, especially under the OBOR. He particularly referred to the evaluation of SOEs in order to promote SOEs to become "stronger," "better," and "bigger" in the global investment order.[85] China's OBOR has become a national strategy and Chinese SOEs have been engaged in international investment. As a consequence, the goals of those SOEs may not have a clear distinction from those of their state in their investment. Especially when SOEs make an investment in some rural areas with poor conditions for attracting other foreign investors, SOEs will necessarily gain appropriate returns from the investment. In these circumstances, it raises the problem of distinguishing between the commercial purposes of the company and the political influence behind the investment. For this reason, SOEs will run a risk of making the investment by following national strategies. By doing so, these SOEs might be excluded from ITA protection, even though they intend to achieve their commercial interests.

4.2 Investigating Actual Links between SOEs and States

Referring back to the approach taken by arbitral tribunals, the purpose of the analysis is to discover the actual link between the SOE and its state. Likewise, the DA gives a list of elements to be considered in order to find the link between a state and persons or entities exercising elements of governmental authority.[86] Article 5 of the DA aims to

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[81] United Nations Convention on Jurisdictional Immunities of States and Their Property. < https://treaties.un.org/doc/source/recenttexts/english_3_13.pdf > Article 2.

[82] It is accepted that courts only exercise their jurisdiction over "non-sovereign" activities, read from Paul Blyschak, 'State-Owned Enterprises and International Investment Treaties: When are State-Owned Entities and Their Investment Protected?' (2011) 6 Journal International Law & International Relations1,30.

[83] *Ibid*.

[84] *Ibid*.

[85] Chinese Government, 'The Report of Shijiu da: Secure a decisive victory in building a moderately prosperous society in all respects and strive for the great success of socialism with Chinese characteristics for a new era' < http://www.gov.cn/zhuanti/2017-10/27/content_5234876.htm >.

[86] Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) Article 5.

establish to what extent the conduct of persons or entities, which are not State organs but are able to exercise elements of the governmental authority, can be attributed to the State.[87] This article covers the situations in which private companies retain public or regulatory functions in particular.[88] Its commentary provides certain guidelines to determine those functions. To be more specific, it states that to determine the governmental feature of entities, it is necessary to consider the particular society, namely the history and traditions of those entities.[89] Besides this, it is also important to consider how the authority given to the entity is conferred, the purpose of the entity, as well as to what extent the entity is accountable for exercising its authority.[90] Conversely, in the light of the DA, arbitral tribunals can also take these elements into consideration to establish the link between SOEs and their states.

Moreover, the DA does not respond to the question of the SOE's standing in ITA, but it contributes to giving a list of elements to discover the link between entities and their states. Although the commentary of the DA does not give an inclusive definition and leaves tribunals to make their final determination on a case-by-case basis.[91] It is speculated that there are no simple criteria to identify the link between the State and the entity, but a number of elements have been coordinated to make a determination. Added to this, the commentary shows that whether there is any link or whether the links satisfy all the criteria does not matter[92]. Instead, what matters is whether the SOE holds enough links with the State in order to give the SOE's investment a governmental nature.[93]

However, the extent of "enough" if still difficult to define. For instance, the *Tulip* Tribunal took a number of elements to make the determination on whether an SOE is a state organ, including whether the entity is separate from the State, whether the entity

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"Conduct of persons or entities exercising elements of governmental authority

> The conduct of a person or entity which is not an organ of the State…but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance."

87 *Ibid*.

88 Malcolm N. Shaw, *International Law* (7th edn, CUP 2014) 572-573. James Crawford and Simon Olleson, 'The Character and Forms of International Responsibility' in Malcolm D Evans (ed), *International Law* (4th edn, OUP 2014) 443-508, 445.

89 The International Law Commission, *Draft Articles on Responsibility of States for International Wrongful Acts, with Commentaries* (2001), 43.

90 *Ibid*. Also see at, James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP 2002)101. These Commentaries are widely referred to and discussed. For instance, Srilal M.Perera, 'State Responsibility: Ascertaining the Liability of States in Foreign Investment Disputes' (2005) 6 Journal of World Investment and Trade 499, 512; James Crawford, *Brownlie's Principles of Public International Law*（8th edn, OUP 2012）544. Isabelle Van Damme, 'The Appellate Body's use of the Articles on State Responsibility in US-Anti-dumping and Countervailing Duties (China)' in Christine Chinkin & Freya Baetens (eds), *Sovereignty, Statehood and State Responsibility, Essays in Honour of James Crawford* (CUP 2015) 363-388, 381.

91 Gillian D Triggs, *International Law Contemporary Principles and Practices* (2nd edn, Lexis Nexis 2011) 518.

92 James Crawford, *Brownlie's Principles of Public International Law*（8th edn, OUP 2012）544.

93 *Ibid*.

is a part of the governmental structure, how the law of the State determines the status of SOEs.[94] In addition, in order to know whether the SOE's conduct can be attributed to its state, the Tribunal analysed (1) whether the SOE is empowered by the law of the State to exercise governmental authority ; (2) whether the conduct by the SOE in the dispute relates to the exercise of that governmental authority.[95]

With regard to the extent of the links between an SOE and its State, the decisions made by Hong Kong Courts concerning the separation between (Chinese) SOEs and the government may also bring essential reflections. In the *TNB Fuel Services SDN BHD v. China National Coal Group* case, the Court set out the explicit test which can be applied to examining whether the SOEs can assert Crown immunity before the Hong Kong Courts.[96] The concept of "Crown Immunity" was firstly discussed in the *Intraline Resources SDN BHD v. Hua Tian Long* case.[97] As a common law concept, "Crown Immunity" means that the Crown enjoys immunity from being sued in its own courts.[98] In these cases, the Courts both agreed that the immunity was enjoyed by the Chinese government since Hong Kong returned to China from the British Crown in 1997.[99]

In the *Intraline* case, the Court gave an explicit explanation of the Crown immunity. It also granted immunity to the Respondent *Hua Tian Long* (the name of the Vessel in dispute), the owners of which was Guangzhou Salvage Bureau (GSB). However, in this case, GSB was not regarded as an SOE by the Court. The Court took the establishing history of the GSB into consideration, together with its initial registration with the government administration.[100] It was found that GSB was not a separate legal entity without any shareholder, and it formed part of the governmental authority.[101] In addition, the Court agreed that the GSB was established by the State as an institutional organisation and lacked all the essential features of an SOE.[102]

However, in the TNB case, the Court examined the status of the Respondent (China National Coal Group) as an SOE. The core issue is to what extent an SOE undertakes its commercial or governmental activities in order to invoke Crown immunity. The Court firstly held that the assertion of Crown immunity was an issue of Hong Kong law,

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94 *Tulip* case, para 290.
95 *Ibid*, para 292.
96 *TNB Fuel Services SDN BHD v. China National Coal Group*, HCCT 23/015, Decision (8 June 2017) [hereinafter "TNB case"]. This section picks up these cases because of the following reasons: firstly, the Hong Kong Court also discussed the separation between Chinese SOEs and Chinese governmental authority; secondly, these two cases gave detailed analyses; judgement, and arguments from the parties, and experts' opinions in these two cases are influential and professional.
97 *Intraline Resources SDN BHD v. Hua Tian Long*, HCAJ 59/2008, Judgement (23 April 2010) [hereinafter "Intraline case"].
98 *Ibid*, para 45.
99 *Ibid*, paras 45-90.
100 *Ibid*, para 111.
101 *Ibid*, paras 112-114.
102 *Ibid*, para 113.

while the question of whether the Respondent was controlled by the Chinese government is a matter of Chinese law.[103] The Court took relevant Chinese law and regulations into consideration, including the Company Law, the Law on State-Owned Assets in Enterprises (referred to as "Assets Law"), as well as the Provisional Regulations for Supervision and Administration of State-Owned Assets in Enterprises (referred to as "Regulations").[104] The Court found that the law made a clear distinction between the administrative functions of the government and the government's function of being a contributor to state-owned assets.[105] In particular, the Court explained that the law "segregates government bodies from enterprises, and expressly refers to the State Council's and local governments' non-intervention in the legitimate and independent business operations of enterprises."[106] The law also requires a separation of "ownership from management", "segregating state ownership of assets/enterprises from state management of the enterprises."[107] The Court found that the Respondent has autonomy and extensive independence in carrying out the business because the law has expressly granted autonomy.[108] According to Chinese domestic law, the Respondent, as an SOE, "enjoys the rights to possess, use, profit from and dispose of its property, has operational autonomy, and is able to exercise independence of its own." [109]

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[103] *TNB* case, para 9.

[104] Company Law of People's Republic of China, (Adopted at the Fifth Session of the Standing Committee of the Eighth National People's Congress on December 29, 1993; amended in 1999, 2005, 2013and 2018. The Law of the People's Republic of China on the State-Owned Assets of Enterprises**,** was adopted at the 5th session of the Standing Committee of the 11th National People's Congress of the People's Republic of China on October 28, 2008, is hereby promulgated and shall came into force on May 1, 2009. Provisional Regulation on the Supervision and Administration of State-owned Assets of Enterprises, (Issued by the Order No. 378 of the State Council of the People's Republic of China on May 27, 2003; Revised in according to the Decision of the State Council on Abolishing and Amending Some Administrative Regulations by the Order No. 588 of the State Council of the People's Republic of China on January 8, 2011), the newest one was revised in 2019 but in the TNB case, the 2011 revision was applied.

[105] The TNB case, para 55. The Court read Article 6 of the Assets Law and Article 7 of the Regulations. Article 6 of the Assets Law states,

> "The State Council … shall establish a State-owned assets supervision and administration authority respectively. The State-owned assets supervision and administration authority shall, under the authorisation, perform the responsibilities of an investor in accordance with the law, supervise and administer State-owned assets of enterprises in accordance with the law…" [Emphasis added]

The Court further stated that Article 7 of the Regulations echoed Article 6 of the Assets Law by stating, "

> People's governments at all levels shall strictly abide by the laws and regulations on State-owned assets management, and persist in the separation of government functions of social and public administration from the functions of an investor of State-owned assets, persist in the separation of government functions from enterprise management and separation of ownership from management.
>
> The State-owned assets supervision and administration authority shall not perform the functions of social and public administration assumed by the government. Other institutions and departments under the government shall not perform the responsibilities of an investor of State-owned assets of enterprises." [Emphasis added]

[106] TNB case, para 55.

[107] *Ibid*.

[108] *Ibid*, para 70.

[109] *Ibid*, para 80.

In addition to the analyses of the legal provisions, the Court also examines whether and when the State controls the SOEs over their contract in dispute so that those SOEs can assert sovereign immunity before the courts. In consequence, the Court applied the "control test" to decide on the degree of control asserted by the State on the SOEs.[110] It expressly considered the following factors:

(1) Independent discretion enjoyed by the entity;
(2) Control exercised by the State as the investor;
(3) The separate legal personality of the entity;
(4) The power of the State to appoint and remove senior officers of the entity;
(5) The financial autonomy of the entity.[111]

The Courts analysed the case facts and concluded that the governmental authority was not in charge of the daily business or commercial activities of the Respondent.
[112]

In general, the juridical practice in Hong Kong Courts remains that domestic law in SOEs' states may also play a role to identify the links between SOEs and States. In addition, there might not be fixed criteria which can be used to identify the function of SOE. However, a number of factors can be taken into consideration in terms of the specific case facts.

4.3 Taking the Factual Elements into Consideration

Case law demonstrates that arbitral tribunals, as well as the Hong Kong courts, ultimately go through the factual situations in the disputes to investigate the functions of SOEs in the investment. In order to make a determination, the doctrine of veil piercing plays a role. The doctrine applies in exceptional cases to discover whether the director of a company uses the company to achieve the interests that it cannot obtain on its own behalf.[113] In the event of SOEs' standing disputes, arbitral tribunals apply the doctrine to decide whether the veil of SOEs is pierced and identify their controllers (states) as the real investors.

In the first place, arbitral tribunals discover the initiatives of SOEs by paying attention to case facts. SOEs' substantive activities are examined by arbitral tribunals in order to know whether or not SOEs have commercial characteristics. Arbitral tribunals should also investigate some pre-investment commercial activities, such as the bids and

[110] *Ibid*, para 25. *Intraline* case, para 116.
[111] *TNB* case, para 29.
[112] *Ibid*, para 73. The Court found that the authority managed some matters, such as an initial public offering of shares, restricting and overseas listing, change in stock rights, and share transfers, it did not hold these matters change the status of the respondent.
[113] Chapter 2.

offers.[114]

Added to this, they should discuss the activities of SOEs to make the investment, such as whether or not they gain the investment opportunities as a result of a fair bid, or whether or not the SOEs run the business for a commercial purpose. The examination aims at investigating the role of SOEs in international investment, namely how they take part in the investment. It seeks to find out that to what extent SOEs in the dispute are engaged in making their investment in the foreign state. For example, when SOEs joined the fair bids as other private investors, they may be considered to be exercising their commercial characteristics. Furthermore, arbitral tribunals should examine the initiatives of host States. It may happen that, on the one hand, host States welcome the investment access from SOEs, but on the other hand, the host States usually argue that SOEs are not able to bring claims to the investor-State tribunals when disputes occur. In practice, when the host State makes its decision resulting in alleged losses, arbitral tribunals may discover whether such a decision targets the SOE or the State behind that SOE.[115] For example, the BUCG Tribunal found that the Respondent contended that one of the reasons to terminate the contract was the failure of the Claimant to perform commercial services.[116] Therefore, the Tribunal held that the respondent state accepted that the Claimant's investment was commercial-interests based. In sum, arbitral tribunals should also discover the initiatives of the host State.

5. Recent Development and Reflection on Investment Treaties

The disputes about the legal standing of SOEs in ITA arise out of the treaties, because treaties are silent on the role of SOEs. In the beginning, investment treaties do not touch upon the SOEs' standing, although trade agreements usually give a detailed regulation on SOEs. Treaties in the early era rarely give a straightforward answer on the extent to which SOEs are qualified as foreign investors. The gap leaves potential challenges in the ITA practice. However, treaties in the new generation have drawn gradually increasing attention to the role of SOEs in ITA.

5.1 Inputting Specific Definition of Investor: The US Model

Contracting States can give a detailed definition of investors by indicating that SOEs are qualified investors. The OECD survey indicates that 100% of U.S. IITs explicitly include SOEs in the definition of investor. This chapter names this approach as the "US model." As the definition indicated in the 2012 US model BIT states,

> "enterprise means any entity constituted or organised under applicable law,

[114] For instance, *BUCG* case.
[115] See *BUCG* case.
[116] *BUCG* case, para 40

> whether or not for profit, and whether privately or *governmentally* owned or controlled, including a corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organisation; and a branch of an enterprise."[117]

The US model BIT specifically points out that governmentally owned or controlled enterprises are covered investors. It also further defines "state enterprise" as enterprise owned, or controlled through ownership interests, by a Party (state). The US model BIT concerning SOEs appeared after its earlier 1994 and 2004 versions. Both models have been emphasised in some US-related IITs.[118] Although the same definition has not been adopted in the investment chapter of the USMAC, the US model has been widely applied by many other states that explicitly include SOEs in their treaty texts. Interestingly, those states are all "big" countries in various ways. Some countries have a big territory, such as Australia and Canada: 92% of Australian IITs and 81% of Canadian IITs define SOEs in their investor definitions.[119] Some countries have a large economy, such as Japan.[120] 72% of Japan-related IITs also explicitly mention SOEs in the definition of investor.[121]

The US model admits that an SOE could be regarded as an investor under the IITs. Article 2 (2) of the 2012 U.S. model BITs further points out that a state should have attribution of responsibility for the acts of its SOEs, if SOEs exercise any regulatory, administrative, or other governmental authority delegated to it by that state.[122] Governmental authority means "a legislative grant, and a government order, directive or other action transferring to the State enterprise or another person, or authorizing the exercise by the State enterprise or another person of, governmental authority."[123] However, an SOE is not considered to exercise "governmental authority" if it acts as

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[117] United States of America, '2012 US Model Bilateral Investment Treaty' < https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> .

[118] Article 15 of 1994 US Model BIT. See at Kenneth J Vandevelde, *U.S. International Investment Agreements* (OUP 2009) 823. United States of America, '2004 US model BIT' < https://www.state.gov/documents/organization/117601.pdf> Art 1.

[119] For instance, Article 1.10 of the latest individual BIT between Canada and China covers any enterprise "constituted or organised in accordance with the laws of a Contracting Party, such as public institutions…and private companies, …"; Article 9 of the investment provisions under the Australia-China FTA states that "enterprises" in this agreement "means any entity constituted or organised under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including a corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organisation; and a branch of an enterprise…"

[120] Japan is one of the largest world economies. International Monetary Fund, 'Japan', < http://www.imf.org/en/Countries/JPN>. Prableen Bajpai, 'The World's Top 10 Economies' *Investopedia* (7 July 2017) <https://www.investopedia.com/articles/investing/022415/worlds-top-10-economies.asp > .

[121] Yuri Shima, 'The Policy Landscape for International Investment by Government-controlled Investors: A Fact-Finding Survey', *OECD Working Chapters on International Investment* (OECD Publishing 2015) 13.

[122] 2012 US Model BITs, Article 2. Lee M Caplan & Jeremy K Sharpe, 'United States' in Chester Brown (ed), *Commentaries on Selected Model Investment Treaties* (OUP 2013) 755,773.

[123] 2012 US model BITs, Note 8.

a commercial participant in the marketplace.[124] As a result, the model BIT sets up two rules. On the one hand, it might seem that an SOE could assume responsibility for its state if it acts as a governmental authority. On the other hand, an SOE is an investor as a commercial participant in international investment.

Apart from these investment agreements, some comprehensive trade agreements with investment chapters also regulate SOEs; for instance, the texts of the Trans-Pacific Partnership (TPP) move a further step and establish an entire chapter on SOEs.[125] The provisions usually require an SOE to engage in commercial activities, and avoid a government evading its obligations by delegating its authority to an SOE.[126] To be brief, the US model in relation to the status of SOEs has been commonly and widely applied, in BITs and occasionally in TIPs.

5.2 Requesting Economic Activities by SOEs: An Experienced EU Approach

Moreover, the EU also made its own approach to determining the legal standing of SOEs by incorporating the arbitration practice. Nevertheless, there will not be a unified EU model to determine the legal standing of SOEs. The EU has expressly renounced adopting a one-size-fits-all model for investment agreements with third countries.[127] However, one can see a representative approach of the EU concerning the role of SOEs throughout the existing investment agreement texts.

In the first place, the US model is also adopted in the negotiating investment chapter of the Transatlantic Trade and Investment Partnership (TTIP, currently on hold). [128] Article 1.3 of the EU proposal stated that " 'juridical person' means any legal entity duly constituted or otherwise organised under applicable law, whether for profit or otherwise, and whether privately-owned or *governmentally-owned*, including any corporation, trust, partnership, joint venture, sole proprietorship or association."[129]

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[124] *United Parcel Service of America, Inc v Government of Canada*, Second Submission of the United States (13 May 2002) para 8.

[125] The Trans-Pacific Partnership (TPP) (signed on 4 February 2016) Chapter 17. US withdrew its signature from the TPP on January, 2017. Office of United State of America Trade Representative, 'The United States Officially Withdraws from the Trans-Pacific Partnership <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/US-Withdraws-From-TPP>.

[126] Office of United State of America Trade Representative, 'Chapter Summary: State-Owned Enterprises (SOEs) < https://ustr.gov/sites/default/files/TPP-Chapter-Summary-State-Owned-Enterprises.pdf > . After the U.S.' withdrawal, the renamed Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) formed a new treaty between 11 members that incorporates much of TPP, but the provisions regarding SOEs are still under negotiation.

[127] European Commission, 'Towards a comprehensive European international investment policy COM (2010) 343 final' (5 March 2014) 6. According to this decision, "a one-size-fits-all model for investment agreements with 3rd countries would necessarily be neither feasible nor desirable".

[128] European Union, 'Trade in services, Investment and E-Commerce' (31 July 2015) < http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153669.pdf>2-3.

[129] *Ibid*.

Consequently, the EU proposal made a clear statement that the agreement would cover SOEs. Compared with the subsequent investment treaties or trade agreements with investment chapters, the use of the US model in the TTIP proposal indicates the EU's intention of adopting the US model provision regarding SOEs.

The EU usually includes the regulations concerning SOEs in their trade agreements.[130] However, on 18 April 2018, the EU announced the EUSIPA which is the first separate investment agreement in which the status of SOEs are mentioned. Likewise, later in August 2018, the EU revised and announced that its individual investment protection agreement with Vietnam also applied a similar approach with the EUSIPA in relation to SOEs. This EUSIPA enhances the protection over SOEs. Article 1.2 (Definition) of the EUSIPA firstly covers investors including 'a natural person or a juridical person of one Party that has invested in the territory of the other Party'.

Added to this, the EUSIPA further determines the meaning of juridical person which is "any legal entity duly constituted or otherwise organised under applicable law, whether or not for profit and whether privately-owned or *governmentally-owned*, including any corporation, trust, partnership, joint venture, sole proprietorship or association."[131] This provision also applies to the US model to define the investment, but the supplements of the definitions further require that the investor should carry out the economic activities in the investment. "Economic activities" means "activities of an economic nature except activities carried out in the exercise of governmental authority."[132] In particular, activities not carried out on a commercial basis or in competition with one or more economic operators are not considered as economic activities. This provision responds to the core disputes presented in the CBQ case. One can speculate that case law brings reflections to the treaty negotiations.

The provision under the EUSIPA applies the Broches Test and specifically requests non-governmental activities undertaken by investors. Such an approach not only determines the jurisdictional issues of SOEs but also extends to the substantive activities of SOEs. SOEs are obliged to compete with other companies and run their investments in an economic and non-governmental manner. Accordingly, the EU has gained practical experience from the investor-State arbitration practice.

6. Conclusion

SOEs bring a significant contribution to global investment, but also raise concerns

[130] The first most comprehensive FTA negotiated by the EU and its first partner Asia country is the EU-South Korea FTA. Article 11.5 of this agreement points out that a state monopoly should be adjusted in a commercial character. CETA and the EU-Japan Economic Partnership Agreement (EPA) also provide detailed regulations. However, the definition provisions in the investment parts of these two agreements do not mention SOEs explicitly.

[131] EUSIPA, Article 1.2.

[132] EUSIPA, Article 1.2.11..

regarding their standing in investor-State arbitration. When an SOE bring its claims, the standing issue might become one of the jurisdictional disputes raised by the other state party. With respect to the current legal framework, the ICSID Convention only focuses on the protection of private foreign investment, but without any prohibition on SOEs' claims. BITs and TIPs have different approaches to cover SOEs as investors. It is speculated that developed economies usually give a detailed definition of an investor in their investment treaties. For instance, investment treaties signed or negotiated by the US, Japan, Canada, Australia, and the EU always include SOEs as covered investors. At the same time, developing economies in which SOEs play a significant role in their national economy are also open to foreign investment made by SOEs. For example, China has included the entities under the control of the State as protected investors in its latest BITs and TIPs.[133] Although investment treaties cover SOEs as investors, they do not specify how to determine SOEs' standing to arbitration. Consequently, arbitral tribunals determine the standing of SOEs in their competence.

The case law study indicates that arbitral tribunals may adopt either a substantive or formalist approach in making their determination. If the treaty applied does not expressly exclude SOEs, arbitral tribunals will analyse the activities of SOEs to decide the jurisdiction. In both approaches, distinguishing the commercial character and the public authority identity is key for an SOE to obtain protection from in investment arbitration. In other words, referring back to the research question, it accepts that an SOE will have its standing in accordance with treaties if it acts in its private commercial characters rather than in its public characters. As has been noted, such a conclusion is usually accepted. However, the real problem is that no standard and comprehensive criteria to distinguish between private and public characters of SOEs have been established.

To be specific, the approaches of arbitral tribunals do not give a final answer on the extent to which an SOE makes its investment in its commercial capacity. Some tribunals may investigate the purposes and/or natures of SOEs' activities in order to make the decision. Nevertheless, it is a complicated issue for SOEs to make a clear distinction between their investment and their purpose for making that investment. The board of directors in an SOE may decide to conduct a project to follow its national strategy and to gain commercial benefits at the same time. Therefore, in order to make a comprehensive analysis, arbitral tribunals should take all the factual elements into

[133] For instance, the Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments (signed on 09 September 2012). Article 1.10 covers public institutions as covered enterprises; The Agreement between China and Republic of Uzbekistan (signed on 19 April 2011). Article 1.2 admits government controlled enterprises as covered investors; The Free Trade Agreement between China and Australia (signed on 17 June 2015), Article 9.1 state that this treaty covers any entity constituted or organised under applicable law, whether or not for profit, and whether privately or *governmentally owned or controlled*, including a corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organisation; and a branch of an enterprise. Similar provisions can also be found in Article 1.4 of the China-Japan-Korea Trilateral Investment Agreement (signed on 13 May 2012).

consideration. Arbitral tribunals should discover the link between an SOE and its state during the investment on the basis of case facts. If there is a link, the decisive issue refers to whether such a link has converted the private characteristic of an SOE into a public characteristic.

Moreover, with the increasingly important role of SOEs in international investment, contracting states start to address the SOEs' status in their treaty texts. Among those investment agreements mentioned in this chapter, the Panama model excluding SOEs as protected investors rarely applies. In contrast, recently updated versions of treaties record more detailed provisions in the issues of SOEs to varying degrees. The US model covering SOEs as investors in their treaties is one increasingly accepted approach. Added to this, the EU further posits its approach to incorporating the arbitration practice into its proposed agreements, which requires SOEs to undertake particular economic activities.

In conclusion, concerning the SOEs' legal standing, arbitral tribunals may adopt two different approaches but draw the same conclusion. Although treaties have gradually covered SOEs as protected investors, arbitral tribunals still need to make a comprehensive analysis of case facts. Such an analysis helps to establish to what extent a state influences the SOE's investment. If the influence is significant, arbitral tribunals should pierce the veil of that SOE and regard its state as the real investor, which cannot bring claims to ITA.

CHAPTER 6 ACCESS TO INVESTMENT TREATY ARBITRATION: A STUDY OF VARIABLE INTEREST ENTITIES

1. Introduction

This chapter focuses on a particular type of legal entities, VIEs. The VIE structure has been widely debated in the formulation of domestic laws. Foreign entities are able to use a VIE structure to bypass the domestic rules in some industrial fields in which foreign entities are prohibited or restricted from making investments. However, this chapter posits that the existence of VIEs has a significant, although still silent, impact on ITA. In addition, this chapter recognises VIEs as representative of new entities that emerge as a result of growing global business; with the development of international investment, it is likely that new entities will be created. A comprehensive and systematic determination on their status is necessary. In consequence, this thesis puts forward a discussion on the VIEs in order to show how to advance the ITA mechanism and to resolve the potential disputes.

Section 2 of this chapter introduces the current legal regime concerning VIEs. In the first place, it gives a general overview of the VIE structure by presenting the origins of VIEs. This chapter bases its analysis on a particular aspect of Chinese law and practice, where the VIE structure is regarded as being particularly used by Chinese entities or involves Chinese entities. Many Chinese companies used this structure to list themselves on overseas stock exchanges.[1] At the same time, foreign entities also gain foreign investment access to China in contravention of China's series of restrictions and prohibitions in specific industrial fields. The use of the VIE structure circumvents Chinese law in relation to foreign investment access. Therefore, there is a constant threat that China might crackdown on these investments; foreign investors take a risk

[1] Fredrik Öqvist, 'Statistics on VIE usage' *China Accounting Blog* (11 April 2011) < http://chinaaccountingblog.com/weblog/statistics-on-vie-usage.html >. Paul L.Gillis, 'Accounting Matters Variable Interest Entities in China' *China Accounting Blog* (18 September 2012) < https://www.chinaaccountingblog.com/vie-2012septaccountingmatte.pdf >.
According to the database in 2012, half of Chinese companies listed in US stock exchanges used a VIE structure. For instance, the Sina corporation, the Baidu company and the Alibaba Group all used this structure in their operations and were listed on the NASDAQ Stock Exchange. A great number of Chinese companies used the VIE Structure to trade on other international exchanges, such as the Hong Kong Stock Exchange, the Toronto Stock Exchange, and the London Stock Exchange. The US Securities and Exchange Commission (SEC) administers and enforces the law "to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation". SEC, 'The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation' *U.S. Sec & Exch Commn* (20 July 20 2012) < http://www.sec.gov/about/whatwedo.shtml >. The SEC requires the publicly listed companies to disclose the fundamental information and financial issues, but it does not explicitly refer to the VIEs.

in their investments, and place the global economy in great jeopardy.[2] As a consequence, this chapter chooses to analyse the VIE structure and take Chinese practice as an example because of its wide application. Such an analysis may offer some reflections to other jurisdictions where the VIE structure is applied.

Bearing these remarks in mind, Section 3 describes the existing legal regime concerning the VIE structure. The use of VIE structures is a domestic law issue. Therefore, the section discusses the (Chinese) domestic legal regime to discover the law governing the VIE structure. From a perspective of legal practice, several published cases have been judged by Chinese courts. In line with case law study, this chapter examines the judicial practice to demonstrate China's attitude towards the VIEs. Chinese practice is representative in terms of addressing the potential crisis regarding the legal status of the entities.

Adding to the analysis of the domestic legal regime, Section 4 argues that judicial practice in domestic law results in potential disputes in international investment law. Firstly, blurred domestic regulations cannot provide a predictable environment for investors to make their investments. Secondly, domestic regulation on VIEs exercises influence on whether foreign investors can gain protection from the ITA mechanism, given that international investment law usually requires that investments be made in accordance with the law of the host States. Consequently, this section presents the hazards that may arise under the VIE structure in international investment law. This chapter ends with a conclusion.

2. Overview of VIEs

This section gives an introduction to the VIE structure. Section 2.1 starts to present the background in order to address why the VIE structure was created. With this in mind, Section 2.2 shows the component factors within the VIE structure.

2.1 Background of Using the VIE structure

This chapter examines the use of the VIE structure by foreign investors to gain access to the prohibited or restricted investment industrial fields in the host State. Take China as an example. China's economic reform, also known as the "Open-Door Policy", was approved during the third plenary session of the 11th Central Committee of the Communist Party of China in 1978. As a turning point in the history of China, this policy was the first nation-wide economic principle, centring on market mechanisms

[2] Samuel Farrell Ziegler, 'China's Variable Interest Entity Problem: How Americans Have Illegally Invested Billions in China and How to Fix It' (2016) 84 The George Washington Law Review 539, 539.

and foreign resources to spur economic growth.[3] Since then, China has enacted a series of laws and policies to encourage economic development and attract foreign investment. However, particularly being a socialist country, China is also fully aware of the potential risk to state control which foreign investors might bring. Therefore, China sets its limitations on the industries where its socialist interests and state stability might be threatened, including sovereign wealth, security, and matters of public interest such as education. In these industrial fields, in order to maintain its domestic capital, China does not allow foreign companies either to hold any equity or hold majority equity over a domestic company, depending on the nature of the business.

More specifically, China classifies foreign investment into four different levels: (1) encouraged; (2) permitted; (3) restricted; (4) prohibited. Generally, China encourages or permits foreign investors to invest in many industries which are subject to less stringent government review. However, foreign investment industries that fall within the restricted and prohibited categories receive a more extensive government review.[4] When foreign investment is within the "restricted" category, the investment is subject to certain restrictions, which include identifying the ownership of the foreign investment and the types of company (Sino-foreign venture, Sino-foreign cooperation, or domestic-control corporation). Moreover, foreign investors are not allowed to make those investments within the "prohibited" category in China. However, despite China's restrictions, foreign investors may still wish to seek benefits from these industries and get involved in the business, because of the great attraction of good returns. In order to gain access to the Chinese market without violating China's limitations on foreign capital, the VIE structure was therefore created.

The creation of the VIE structure was based on the idea that entities set up links with each other in the form of contracts other than equity. In consequence, foreign entities will not be bound by the equity limitations in domestic legislation. The equity model regards a reporting entity with the majority of voting interests in a legal entity as having a controlling financial interest in this legal entity. In contrast, in the VIE structure, the control relation between entities is established by way of a corporate arrangement, which could have an impact upon the VIE economic activities but does not include voting rights. Contracts signed between a VIE and its beneficiary and controller establish the controlling relations between different entities.[5] The contracts give controllers significant rights and power to direct the essential business of the VIEs. For

[3] William I. Friedman, 'One Country, Two System: The Inherent Conflict Between China's Communist Politics and Capitalist Securities Market' (2002) 27 Brook Journal of International law 477, 477. Serena Y. Shi, 'Dragon's House of Cards: Perils of Investing in Variable Interest Entities Domiciled in the People's Republic of China and Listed in the United States' (2014) 37 Fordham International Law Journal 1265, 1271.

[4] Samuel Farrell Ziegler, 'China's Variable Interest Entity Problem: How Americans Have Illegally Invested Billions in China and How to Fix It' (2016) 84 The George Washington Law Review 539, 546.

[5] Deloitte, 'Road Map Series' (10 December 2015) <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/audit/ASC/Roadmaps/us-aers-roadmap-consolidation-12102015.pdf > 9.

instance, the controller can appoint the VIEs' directors, influence decisions, and absorb losses.

With this arrangement, a series of contractual agreements are operated that enable an international company to control the activities of a Chinese domestic company. Under such a contractual arrangement, a Chinese domestic company runs the investment business, but its ultimate beneficiary is a foreign company. Moreover, this foreign company could get its expected returns from the investment on the basis of the contract rather from ownership of shares in the company. Thus, foreign entities can establish the VIE structure in the industrial fields in which the PRC laws, regulations and policy restrict or prohibit foreign investment.

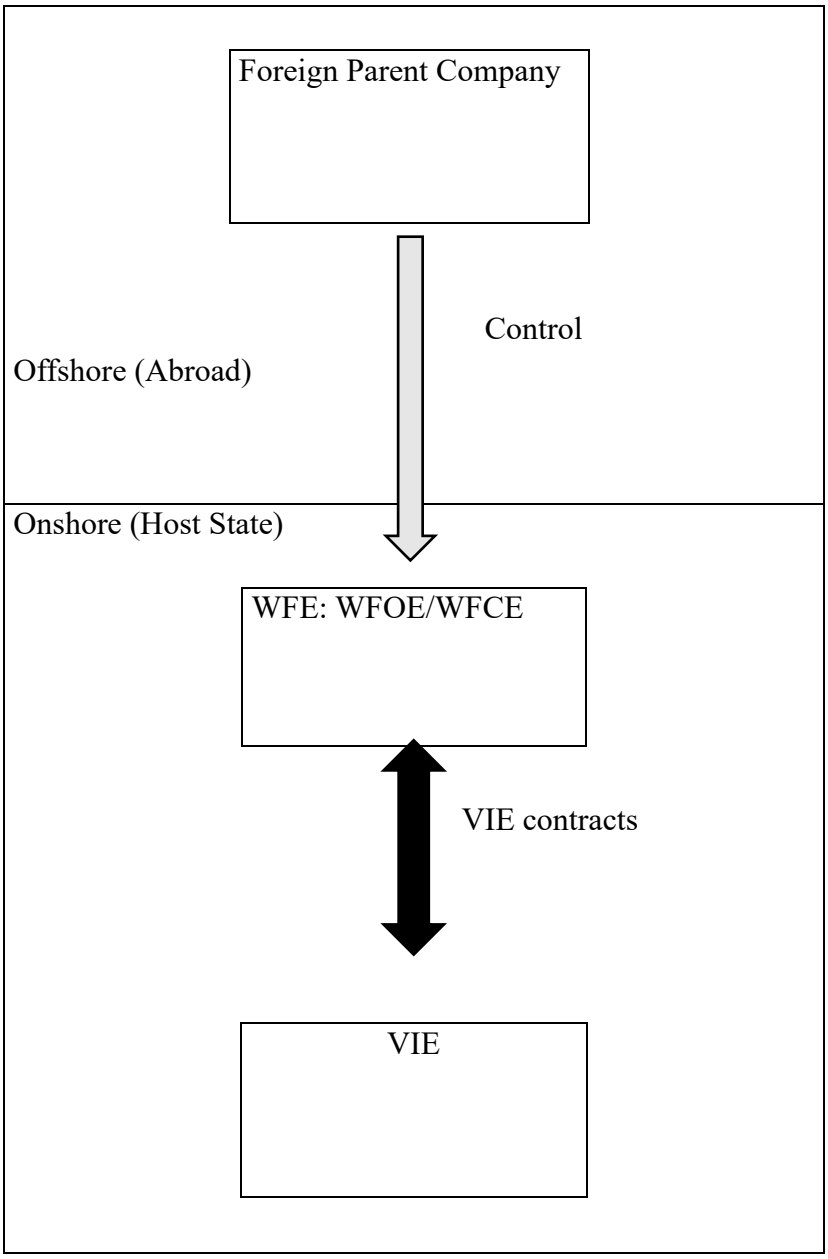
2.2 Component Factors in the VIE Structure

The basic VIE structure is shown in Figure 1. There are three components in one VIE structure. The first component is a VIE. A VIE is usually a domestic Chinese entity that is established under Chinese law, and it undertakes a business where foreign investment is restricted. The second component is a wholly foreign-owned/foreign-controlled enterprise (WFOE/WFCE, or WFE). The WFE established under Chinese law undertakes a particular business but is bound by specific restrictions. Thirdly, a foreign parent company becomes the controller of the WFE.[6] The controller of the WFE is an offshore company which is established under the laws of another state, usually the Cayman Islands, in order to obtain benefits.[7]

[6] David Schindelheim, 'Variable Interest Entity Structures in the People's Republic of China: Is Uncertainty for Foreign Investors Part of China's Economic Development Plan' (2012) 21 Cardozo Journal of International & Comparative Law 195, 203. Paul Gillis, 'Explaining VIE Structures' (China Accounting Blog (March 20 2011) < http://www.chinaaccountingblog.com/weblog/explaining-vie-structures.html.>. "These contracts are designed to ensure that the WFOE, or the offshore holding company, can exercise all corporate governance controls over the operating company even though a shareholding control is not able to be achieved under the current law." Wei Shen, 'Face Off is China a Preferred Regime for International Private Equity Investments? Decoding a "China Myth" from the Chinese Company Law Perspective' (2010) 26 Connecticut Journal of International Law 89, 128.

[7] David Schindelheim, 'Variable Interest Entity Structures in the People's Republic of China: Is Uncertainty for Foreign Investors Part of China's Economic Development Plan' (2012) 21 Cardozo Journal of International & Comparative Law 195, 204.

Figure 4 The Basic VIE Structure

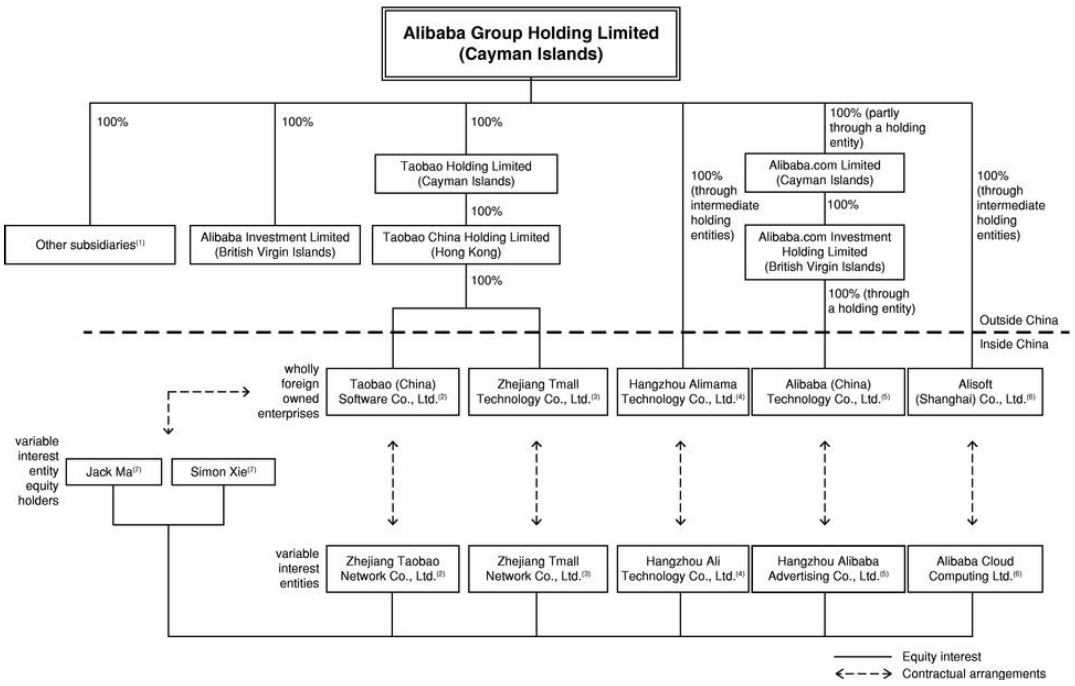


The company structure of Alibaba, which attracted a record-breaking offer price at Initial Public Offering (IPO), explicitly reflects the VIE structure. Figure 5 shows the structure of the Alibaba Group.[8]

[8] Listed companies are requested to provide transparent information concerning the structure of the company, this article examines the listing company overseas in order to give a detailed introduction. Elizabeth M. Lynch, ' 60 Minutes Goes Light on Alibaba' *China Law and Policy* (29 September 2014) < http://chinalawandpolicy.com/tag/vie/ >.

According to the SEC filings of the Alibaba Group, *Alibaba Group Holding*, being a foreign company, obtained citizenship in the Cayman Islands.[9] The *Alibaba Group*, the parent company, owns several Alibaba affiliated companies which are registered overseas (outside mainland China), including the British Virgin Island and Hong Kong. These companies have further established foreign-owned companies in mainland China (*Taobao Software, Zhejiang Tmall, Hangzhou Ali Technology, Alibaba Technology, Alisoft, Alipay*) in the forms of online shopping platform companies, technical platform companies, and financial platform companies. Those WFEs signed VIE agreements with the VIEs registered in China as domestic companies. The VIEs usually have similar names as their remainders (WFEs). Take one example that the WFE *Taobao (China) Software Co, Ltd* signed a contractual agreement with the domestic VIE *Zhejiang Taobao Network Co.Ltd*. With their different natures, two companies play a significantly different role in this VIE arrangement. *Zhejiang Taobao* runs its business onshore in a field of which only domestic company can invest. The other party (*Taobao Software*) serves as an intermediate platform through which its foreign parent company (*Taobao Hong Kong*) gains access to the Chinese (mainland) market.

Figure 5 Structure of Alibaba Group



In general, Alibaba Group uses this structure in order to list itself overseas, and many other companies have also used this structure. From another perspective, the purpose

[9] Alibaba, 'Amended Statement of Beneficial Ownership' SC 13D/A (15 November 2016) < https://sec.report/Document/0001104659-16-157276/>.

of using this structure is not only to list the company overseas but also to get access to the domestic market. This structure has also become a shopping tool for foreign investors to exploit to gain benefits. By applying it, foreign companies do not become involved with various treaties but, instead, they formulate their structures and exercise their controlling power over other domestic companies based on the VIE contract.

3. Legal Regulation and Judicial Practice: From a Domestic Law Perspective

The VIE structure is an example of corporate structure shopping in which foreign companies can invest in specific industrial fields. These fields are usually crucial to the public interests and public security of the host State. The host State may hold a position that restricts or prohibits the access of such foreign investment. Consequently, whether this structure shopping violates the laws and regulations of the host State becomes an essential point of discussions.

This section will discover how domestic law regulates such structure shopping. It takes Chinese domestic legal regime as a starting point for examination. Section 3.1 presents the current legal regime. In addition, Section 3.2 discusses the domestic case law in order to show how domestic courts address the VIE issue.

3.1 Legal Regulations: In Light of Chinese Law

This Section introduces the current legal regime from two perspectives. The first sub-section presents the law concerning the entities involved in the VIE structure. The second sub-section focuses on the law concerning the VIE contract.

3.3.1 Law Concerning Entities Involved

a. Company Law

Chinese Company Law ("CL") applies to limited liability companies and companies limited by shares established within the territory of China under the law, which establishes a general regulation of the companies and their shareholders.[10] CL was firstly adopted in 1993, and further revised in 1999, 2005 and 2013. From a historical perspective, CL was enacted to reform state-owned companies.[11] To achieve this purpose, CL absorbs the theory of the separation between the ownership and control in a company, established by Berle and Means, who determined the forms of control over

[10] Company Law of the People's Republic of China (Adopted at the 5th Session of the Standing Committee of the 8th National People's Congress on December 29 1993; revised in 1999, 2005, 2013, and 2018) Article 2.
[11] You Zhou, 'Reflection on the Separation of Two Rights in Company Law' (2017) 4 China Legal Science 285, 293 [in Chinese].

a company guided by ownership of its equity.[12] With this in mind, CL also applies a similar approach, which is known as the Equity Equality Principle or *One-Share-One-Vote* Principle. Article 103 of the CL states that "shareholders present at a general meeting shall be entitled to one vote for each share held".[13] According to the principle, the only method of exercising more control is by acquiring more equity. However, this principle only applies to inter-governance of the corporation in relation to the shareholder's meeting, but it does not apply to regulating the contractual relations between the VIE and the WFE.

CL gives a detailed regulation concerning the internal regulation of a company, including its establishment and organisational structure, issuance and transfer of shares, qualifications and obligations of directors and supervisors, corporate bonds, financial concerns, merger and division, and so forth. However, no provision has been created in relation to the corporate affiliations; instead, CL allows companies to invest in other companies, and to establish their subsidiaries.[14] However, companies and their controllers are bound by certain obligations and face liabilities for violating the law. Article 21 of CL addresses the liability issues by stating that, "the controlling shareholder, *de facto* controller, directors, supervisors and senior officers of a company may not use their affiliation to harm the interests of the company. Anyone that violates the provisions of the preceding paragraph and causes losses to the company shall be liable for compensation."[15] Although this provision regulates the controller of a company using its affiliation to bring damages to the interests of the company, it does not address the issue concerning using the VIE structure to achieve benefits. Consequently, the existing CL does not provide any regulation on the VIEs.

b. Three Foreign Joint Entities Laws

Companies with foreign capital might also be subject to the regulation of China's three foreign-invested entities laws, namely the Sino-Foreign Equity Joint Ventures Law (FEJV), the Sino-Foreign Contractual Joint Ventures Law (FCJV) and the Wholly Foreign-Owned Enterprises Law (FOE).[16] These laws reflect both the encouragement and protectionist attitude of China towards foreign investment engagement. In order to attract foreign investment and reach the political goals of the central government, China enacted FEJV in 1979, covering joint ventures with foreign capital. FEJV allows foreign companies or individuals to establish equity joint ventures with Chinese

[12] Adolf A. Berle & Gardiner C. Means, *The Modern Corporation and Private Property* (the Macmillan Company 1932) 69-70.
[13] Company Law, Article 103.
[14] Yue Wu, 'Systematic Defects of Chinese Company Law Under a Reform Approach' (2003) 25 Modern Law Science 119, 126 [in Chinese].
[15] Company Law, Article 21.
[16] Law of the People's Republic of China on Sino-Foreign Equity Joint Ventures (adopted in 1 July 1979, amended in 2016); Law of the People's Republic of China on Sino-Foreign Contractual Joint Ventures (adopted 13 April 1988, amended in 2017); Law of the People's Republic of China on Wholly Foreign-Owned Enterprises (adopted 12 April, 1986, amended in 2016)

companies in China's territory. Article 3 of the FEJV requires that Chinese nationals and foreign nationals sign the equity joint venture agreements, contracts or articles of association to establish an equity joint venture. It regulates project approval of foreign investment, the establishment of the venture, the organisational structure and the management of the enterprise. After FEJV, FOE and FCJV were enacted in 1986 and 1988 respectively. FOE set out to protect and regulate under relevant Chinese laws the rights of enterprises established in China by foreign investors exclusively with their own capital.[17] FCJV requires both Chinese and international parties to prescribe the contractual joint venture contract by "the investment or conditions for cooperation, the distribution of earnings or products, the sharing of risks and losses, the manners of operation and management and the ownership of the property at the time of the termination of the contractual joint venture."[18]

These three laws adopt similar structures regarding the approval, establishment, and management of a specific company. China has also published other laws and regulations related to companies with foreign capital, including the Sino-Foreign Joint Venture Enterprises Income Tax Law (1980), the Foreign Economic Contract Law (1985), and the State Council's Regulation on Encouraging Foreign Investment (1986). Until 1993, these laws and regulations were the legal system in terms of regulating companies with foreign capital. After 1993, CL applied to limited liability companies with foreign investment.[19] Where laws concerning Sino-foreign equity joint ventures, Sino-foreign contractual joint ventures and foreign-funded enterprises provide otherwise, the provisions of these laws prevail.[20] Accordingly, China has established its parallel legal system regarding companies with foreign capital.

In short, Chinese laws may regulate the entities involved in the VIE structure because the VIE contracting parties, WFOEs and VIEs, are registered in China. Because these laws only cover the protection of the companies established in the territory of China, foreign parent companies are excluded from the application of these laws. To be specific, the VIE is a Chinese domestic entity that may be regulated by CL. WFOEs may be under the protection of the FOE law when the foreign parent company owns 100% of the equity of its WFOE. Added to this situation, WFCEs could also exist in the form of a FEJV or a FCJV. Figure 4 shows the relation between the laws and their companies covered.

[17] FOE, Article 2.
[18] FECJ, Article 2.
[19] Company Law, Article 217.
[20] *Ibid*.

Table 1 Law and Governed Companies

	VIE	WFE		Foreign Parent Company
		WFOE	WFCE	
CL	√	√	√	---
FEJV			√	---
FCJV			√ (or)	---
FOE		√		---

"√" means the law applies to regulate the entity.

The figure shows that CL is the only law which covers both VIEs and WFEs. However, its general provision clarifies that CL"has been enacted in order to standardize the organisation and activities of companies, protect the lawful rights and interests of companies, shareholders and creditors, safeguard the social and economic order and promote the development of the socialist market economy."[21] With a particular focus on the institutional regulations, CL does not play a role in regulating the VIE structures as a whole. As a consequence, CL does not determine the legitimacy or otherwise of a VIE.

c. Foreign Investment Law in the New Generation

In January 2015, MOFCOM published a draft Foreign Investment Law (FIL, draft), together with its explanation letter and asked for public comments. This FIL (draft) is intended to replace FEJV, FCJV and FOE laws.[22] Chapter 2 of the FIL (draft) explicitly defines foreign investors and foreign investment. With a particular focus on the determination of "control" relations between different entities, Articles 11 and 18 of the FIL (draft) are designed to identify the actual controller in international investment.[23]

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[21] Company Law, Article 1.

[22] The FIL (draft), Article 107.

[23] Jones Day, 'Foreign Investment Law of the People's Republic of China (Draft for Comments)' <https://www.uschina.org/sites/default/files/2015%20Draft%20Foreign%20Investment%20Law%20of%20the%20People%27s%20Republic%20of%20China_JonesDay_0.pdf > [unofficial translation]. The translation was futher slightly modified by the author.

Article 11 Foreign Investments

For the purpose of the Law, the term "foreign investors" refers to the following parties who make investments within the territory of China:

1. Natural persons without Chinese nationality;
2. Enterprises incorporated in accordance with laws of other countries or regions;
3. Governments of other countries or regions and their subordinate departments or agencies; and
4. lnternational organisations. Domestic enterprises controlled by the parties prescribed in the preceding paragraph shall be deemed as foreign investors.

Article 18 Control

Article 18 of the FIL (draft) addresses the point that control power over an entity can be achieved by way of rights or interests, other than holding majority shares in an entity. Thus, according to these articles, the ultimate controller of the VIE is determined to be a foreign investor. Furthermore, Article 149 of the FIL (draft) draws particular attention to finding legal liability for circumvention, including contractual control. When a foreign investor circumvents the law to make a foreign investment without access permission throughout a contract, contractual control or any other arrangement, that foreign investor will be obligated to its liability by Article 149. Thus, for the first time, China indicated its intention to regulate the VIE structure through legal provisions.

However, this preliminary proposal was not accepted by the new FIL which was adopted at the Second Session of the 13th National People's Congress on March 15 2019 and was promulgated for implementation as of 1 January 2020.[24] Article 2 of the FIL addresses that the scope of the law applies to a foreign investment made in the territory of China, directly or indirectly conducted by foreign investors.[25] The FIL specifies the circumstances in which foreign investors can invest,

> "1. A foreign investor establishes a foreign-funded enterprise within the territory of China, independently or jointly with any other investor;
> 2. A foreign investor acquires shares, equities, property shares or any other similar rights and interests of an enterprise within the territory of China;
> 3. A foreign investor makes investment to initiate a new project within the territory of China, independently or jointly with any other investor; and
> 4. A foreign investor makes investment in any other way stipulated by laws, administrative regulations or provisions of the State Council."[26]

The new FIL is intended to give a unified approach for all types of foreign investment

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For the purpose of the Law, a party shall have the "control" over an enterprise under any of the following circumstances:

> 1. Where the party holds, directly or indirectly, 50% or more of shares, equity, shares in property, voting rights or other similar rights and interests in the enterprise;
> 2. Where the party holds, directly or indirectly, less than 50% of shares, equity, shares in property, voting rights or *other similar rights and interests*, but *any of the following conditions* are satisfied: I) The party is entitled to, directly or indirectly, appoint at least half of the members in the board of directors or a similar decision-making body of the enterprise; (2) The party is capable to ensure that its nominated persons can occupy at least half of the seats in the board of directors or a similar decision-making body of the enterprise; and (3) The voting rights to which the party is entitled are sufficient to exert a significant impact on the resolutions of the shareholders' meeting, the general meeting of shareholders, board of directors or any other decision-making body of the enterprise.[Emphasis added]
> 3. Where the party is capable of exercising a decisive impact on the enterprise's

[24] Foreign Investment Law of the People's Republic of China (FIL) (Adopted at the Second Session of the 13th National People's Congress on March 15 2019, Order of the President of the People's Republic of China No. 26). The Translation for reference is available at < http://www.fdi.gov.cn/1800000121_39_4872_0_7.html>. According to Article 52 of the FIL, the FEJV, the FECV, and the FOE laws will be repealed simultaneously when the FIL came into force

[25] *Ibid*, Article 2.

[26] *Ibid*.

coming into China. [27] It does not take the same approach as the draft proposal to give explicit definition to foreign investment or foreign investors using different criteria. Instead, the FIL provides a broad and general definition of "foreign investor" and "foreign investment". The FIL also avoids using the term "control". Such an approach to definition infers that the FIL is still silent on the legitimacy of using the VIE structure to set up the control relationship between various legal entities. As a result, the existing legal regime does not set up any specific rules to determine the legitimacy of VIEs and the WFOEs.

To sum up, even though each entity within the VIE structure is regulated by Chinese domestic law, domestic law pays attention to the governance within the entities rather than addresses the contractual relationship between different entities. In consequence, there is no valid Chinese domestic law available to provide direct regulation of the legitimacy of the VIE structure.

3.1.2 Law Concerning the VIE Contract

Within the VIE structure, the other issue that needs to be examined is whether VIE contracts violate the domestic law. As previously mentioned, the VIE contract bypasses China's ban on equity ownership by foreign investors. In consequence, the legitimacy of VIE contracts determines the legal status of VIEs.

China used to publish foreign investment catalogue to provide an industrial guidance on foreign investment access. In the past years, such catalogues have been revised several times, in 1997, 2002, 2004, 2007, 2011, 2015, 2017, 2018, 2019 and most recently, 2020. These industrial fields, which restrict or prohibit the access of foreign investment, normally cover natural resources, telecommunications, banks, insurance, internet news information services, and so forth, in which FDI usually takes advantage of the VIE structures. Consequently, foreign investors do not necessarily need to hold mimic equity ownership in specific industrial fields, and some investors could exercise control power over domestic entities in the restricted or prohibited sectors. [28]

Take the 2017 catalogue as an example. Based on the practice and experience of the Shanghai Free Trade Zone, on 28 June 2017 China's National Development and Reform Commission (NDRC) and the MOFCOM published the "Foreign Investment Industrial Guidance Catalogue" (the 2017 Catalogue). For the first time, China introduced its "Negative List" which enumerated the measures for foreign investment access. The first

[27] *Ibid,* Article 42. After the FIL comes into effect. and all the legal entities with a foreign investment nature are also required to follow the corporate governance rules in accordance with China's CL. For those foreign-funded legal entities established prior to the adoption of the FIL, the FIL allows for a five-year transition which permits the governance of those entities to be in line with the CL.

[28] David Schindelheim, 'Variable Interest Entity Structures in the People's Republic of China: Is Uncertainty for Foreign Investors Part of China's Economic Development Plan' (2012) 21 Cardozo Journal of International & Comparative Law 195, 206.

part of the 2017 Catalogue related to12 major industries in the sectors of which the foreign investors are encouraged to make an investment. The second part provided an outline of restricted foreign investment (35 sectors) and prohibited foreign investment (28 sectors). Moreover, it should be noted that fields not covered by the list, including national security, public order, public culture, financing regulation, and government purchases had to follow the existing regulations. Thus, the 2017 Catalogue was not the only officially released guidance about foreign investment access, and investment access should be determined in combination with other legal regulations.

For instance, in the field of education, the Chinese-foreign Cooperative Education approved by the Ministry of Education also applies.[29] The measures concerning foreign investment access are also subject to China's Education Law, Law on Vocational Education and the Law on Promotion of Privately Run Education, and these measures are applied "to regulate the activities of Chinese-foreign cooperative education activities, to strengthen foreign exchange and cooperation in education, and to promote the development of education undertakings."[30] Article 6 of the Measures sets up the prohibition on foreign investment access, which requires that "Chinese-foreign cooperative educators may cooperate to launch education institutions at various levels. Nevertheless, they may not launch any institution carrying out compulsory education, or education of special natures, such as military, police and politics."[31]

In practice, when VIE contracts are signed, related business and investments fall within the fields of Chinese restricted or prohibited list of foreign investment. Therefore, it is questioned whether such a contract breaks Chinese law. In the first place, VIE contracts are signed between VIE and WFE, both of which are seen as Chinese nationals, so contracts are regulated by China's Contract Law. Article 52 of China's Contract law lists the circumstances in which a contract is invalid,

> "(1) One party induced conclusion of the contract through fraud or duress, thereby harming the interests of the State;
> (2) The parties concluded in bad faith, thereby harming the interests of the State, the collective or any third party;
> (3) The parties intended to conceal an illegal purpose under the guise of a legitimate transaction;
> (4) The contract harms public interests;
> (5) The contract violates a mandatory provision of any law or administrative regulation." [32]

[29] Regulations of the People's Republic of China on Chinese-foreign Cooperative Education (adopted on 19 February 2003). This section takes the education field as an example because the cases analysed below relate to the education industry.
[30] *Ibid*, Article 2.
[31] *Ibid*, Article 6.
[32] The Contract Law of the People's Republic of China (adopted at the Second Session of the Ninth National People's Congress on March 15 1999) [Unofficial translation by WIPO]
< http://www.wipo.int/edocs/lexdocs/laws/en/cn/cn137en.pdf >

The Contract Law states that if either contracting party or both contracting parties made the contract agreement through fraud, which harms the interests of the public, the State or a third party, the contract is regarded as invalid. Moreover, if the contract is negotiated in order to achieve an illegal purpose or to violate the mandatory rules of Chinese law and regulations, it is also invalid. Furthermore, an invalid contract is unenforceable because it fails to contain any essential elements, including an offer, an acceptance and a consideration of a contract. In addition, according to the Contract Law and the General Principles of Civil Law, invalid contracts do not have any legal effects and may result in other legal consequences, such as rehabilitating the original state, returning the property, discounting compensation, and compensating fault damages.[33]

Furthermore, on 28 May 2020, China announced its long-expected Civil Code at the third session of the 13th National People's Congress.[34] The Civil Code will take effect on 1 January 2021 when many laws including the Contact Law and the General Principles of Civil Law will be abolished. For instance, Article 153 of the Civil Code, which will replace Article 52 (v) of the Contract Law, states that any civil action is invalid if it violates a mandatory provision of any law or administrative regulation. In consequence, after the Civil Code came into force, the legitimacy of VIE contracts will still be under debate.

As a result, when VIE contracts are signed, whether they are valid or not depends on whether those contracts fall into any of the invalidating circumstances under the Chinese laws. When a validity issue arises, domestic courts will decide on this issue. Thus, the next section moves on to discuss how domestic courts examine the validity of VIE-related contracts.

3.2 VIE in Practice: Judgement of Domestic Courts

This section presents two cases, which have been discussed by different Chinese courts. They have also been seen by many commentators to be the cases in which Chinese courts express their opinions concerning VIEs.[35]

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[33] Contract Law, Article 58 and the General Principles of the Civil Law, Article 157. General Principles of the Civil Law of the People's Republic of China (adopted on 12 April 1986, amended in 2009 and 2017).

[34] Mingmei, 'China's Civil Code Adopted at National Legislature' *Xinhuanet* (28 May 2020) < http://www.xinhuanet.com/english/2020-05/28/c_139095109.htm>. The Civil Code of the People's Republic of China, adopted on 28 May 2020, will come into effect on 1 January 2021.

[35] For instance, Neil Gough, ' In China, Concern of a Chill on Foreign Investments' *The New York Times Chinese edition* (03 June 2013) < https://cn.nytimes.com/business/20130603/c03yuan/zh-hant/dual/>. Sun Binbin and Wen Han, 'Is VIE structure legal? How did the Supreme Court decide?' *Zhonglun's View* (21 March 2017) < www.zhonglun.com/Content/2017/03-21/1818439077.html >.

3.2.1 The *Chinachem* Case

In late 2012, China's Supreme People's Court (SPC) rendered the case between *Chinachem Financial Services Limited* (Chinachem, a Hong Kong company, the plaintiff) and *China Small and Medium Enterprise Investment Co.Ltd*, (China SME, the defendant).[36] The *Chinachem* case is influential in the sense that the significant remedy awarded marked the ending of a 12-year dispute.[37] Chinese courts have taken various approaches to determine the entrusting of agreements of holding shares, and among them, the Chinachem case provides clear guidelines for subsequent judgements.[38]

In order to acquire shares in *China Minsheng Banking Corp.Ltd* (Minsheng), Chinachem signed an entrustment agreement with the mainland Chinese company, China SME. With regard to this entrustment, Chinachem asked China SME to act as its proxy to buy the shares in Minsheng, and subsequently held 6.5% of Minsheng's shares. The dispute occurred when China SME claimed its ownership over the 6.5% shares and further insisted its contract with Chinachem was a standard load contract. Chinachem counter-claimed that its contract was a valid entrustment agreement.

The SPC examined the nature of the contract in dispute, with a particular discussion on its legitimacy. The SPC held that the entrustment under the agreement intended to circumvent China's restrictions on foreign investment in the fields of the banking sector. China's restrictions centred in particular on firstly, Article 12 of the Provisions on Equity Investment in Financial Institutions (Interim) issued by the People's Bank of China in 1994 provides that foreign capital and joint venture financial institutions or companies are prohibited to invest in Chinese financial insitutions.[39] In addition, Article 4 of the Measures for the Administration of the Investment and Shareholding in Chinese-funded Financial Institutions by Foreign Financial Institutions issued by the

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[36] The *Chinachem* case No. is Final Ruling No.30 [2002] of the 4th Civil Division of the Supreme Court of People's Republic of China. However, this case remains unpublished according to the China Judgements Online (the official publishing system of China) <https://wenshu.court.gov.cn/website/wenshu/181029CR4M5A62CH/index.html>.
The following analysis is based on the secondary available resources, including Wen Kah Ming & Harietta Leung, 'Case Analysis of Chinachem Financial Services Ltd v. China Small and Medium Enterprise Investment Co. Ltd.' (2016) 2 China Law 74 <http://www.lawinfochina.com/DisplayJourn.aspx?lib=qikan&Gid=1510167643&keyword=&EncodingName=gb2312 > . Zhongbin Hu, 'Hong Kong Chinachem's Entrusted Investment Loses the Lawsuit: VIE Gets Shot, the Founder Highlights the Hidden Danger of Rebellion' *EEO* (1 June 2013) < http://www.eeo.com.cn/2013/0601/244834.shtml> [in Chinese]. In this report, the journalist claimed that he obtained the judgement in paper from the Supreme Court.

[37] Morrison &Foerster LLP, 'China VIEs: Recent Development and Observations' <https://www.lexology.com/library/detail.aspx?g=90f823b1-02cb-4b6a-aabb-de857e45c246>. Global Law Office, 'Global Law Bulletin' (August 2013) < http://www.glo.com.cn/upload/contents/2014/05/536c9e4942e2f.pdf> [in Chinese].

[38] Wen Kah Ming & Harietta Leung, 'Case Analysis of Chinachem Financial Services Ltd v. China Small and Medium Enterprise Investment Co. Ltd.' (2016) (Issue 2) China Law 74.

[39] The Provisions on Equity Investment in Financial Institutions (Interim), China People's Bank, No.[1994]186 (issued on 28 July 1994) Article 12.

China Banking Regulation Commission (CBRC) in December 2003 provides that "to make investments or hold shares in a Chinese-funded financial institution, a foreign financial institution shall obtain the approval of CBRC".[40]

In consequence, relying on Article 52 of the Contract Law, the SPC found that the parties concealed "an illegal purpose under the guise of a legitimate transaction." Therefore, the SPC ruled that the contract was invalid and unenforceable. The SPC held that the nature of the Chinachem contract was an agreement with a domestic company, and a foreign company could obtain an indirect right to gain access to an industrial field which is prohibited or restricted to foreign investors. Although the contract between Chinachem and China SME had a similar purpose to a VIE arrangement, the structures were not entirely the same. Firstly, a VIE is based on an agreement which should be reached between a Chinese national, the VIE and a WFE that is under the control of a foreign company. In the Chinachem case, the agreement concerning the entrustment of buying shares was signed between a PRC mainland company and a foreign investor (at the moment of signing the contract, a Hong Kong company was regarded as a foreign investor). Moreover, this foreign investor was not further under the control of any other international company. Accordingly, this judgement does not reflect the approach of the Chinese court concerning the legitimacy of a VIE contract.

However, the Chinachem case provides guidance in determining "a lawful form covering an illegal objective" in subsequent cases.[41] Chinese courts have expressed the opinion that any investment circumventing the restrictive and prohibited provisions of Chinese law on particular industries would be considered as a lawful form covering an illegal objective. By holding this position, the courts can pierce the veil of the transaction form and scrutinise the transaction. Arbitral tribunals in China may also take a similar approach. For instance, in *GigaMedia* case, the arbitral tribunal held that if a share arrangement violated Chinese regulations that prohibit foreign investors from exercising control over specific businesses in China, the agreement was invalid.[42]

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[40] Measures for the Administration of the Investment and Shareholding in Chinese-funded Financial Institutions by Foreign Financial Institutions, China Banking Regulation Commission [2013] No.6 (5 December 2003) Article 4.

[41] For instance, *Hong Kong Hung Feng Transportation ltd (P) v. Grand Ocean Transportation Ltd (d)*, Zhuhai Intermediate People's Court. Cited by Wen Kah Ming, Harietta Leung. Another interesting discussion in the Chinachem judgement is the asset allocation in a contract since the contract was concluded invalid. The Supreme Court affirmed the lower Court's decision on the legitimacy of the contract but held a different approach towards the remedies. According to Article 58 of Contract Law which rules on remedies in the case of invalidation or cancellation,

> "After a contract was invalidated or cancelled, the parties shall make restitution of any property acquired thereunder; where restitution in kind is not possible or necessary, the allowance shall be made in money based on the value of the property. The party at fault shall indemnify the other party for its loss sustained as a result. Where both parties were at fault, the parties shall bear their respective liabilities accordingly."

In this case, both parties signed the contract as a result of their fault. Therefore, both the Chinachem and China SME bear their liabilities.

[42] Charles Comey, Paul McKenzie, Shery Yin and Michelle Yuan, 'China VIEs: Recent Developments and Observations' *Morrison Foerster* (15 August 2013) < https://media2.mofo.com/documents/130716-

Since the nature of this private arbitration proceeding was confidential, and the decision was not entirely published, this section will not conclude on the basis of this decision. However, the section argues that when the courts or tribunals acquire evidence to prove that the parties entrust shares in order to circumvent China's regulations, this entrustment contract can be expected to be deemed invalid.

3.2.2 The *Ambow* Case

The *Ambow* case was another case, with two decisions made by the Hunan High Court and the SPC. This case is remarkable because a direct and clear VIE structure was evident in the structure of the company in the dispute. On 2 July 2016, the SPC made its appellate decision in *Changsha Yaxing Real Estate Development Company Limited v. Beijing Shida Ambow Education Technology Co., Ltd.* Case (Yaxing vs Ambow) concerning the legitimacy of a VIE agreement.[43] The first instance judgement was made by the People's High Court, Hunan Province, in which the plaintiff, Yaxing, disagreed with the High Court and subsequently brought its appellate claim.

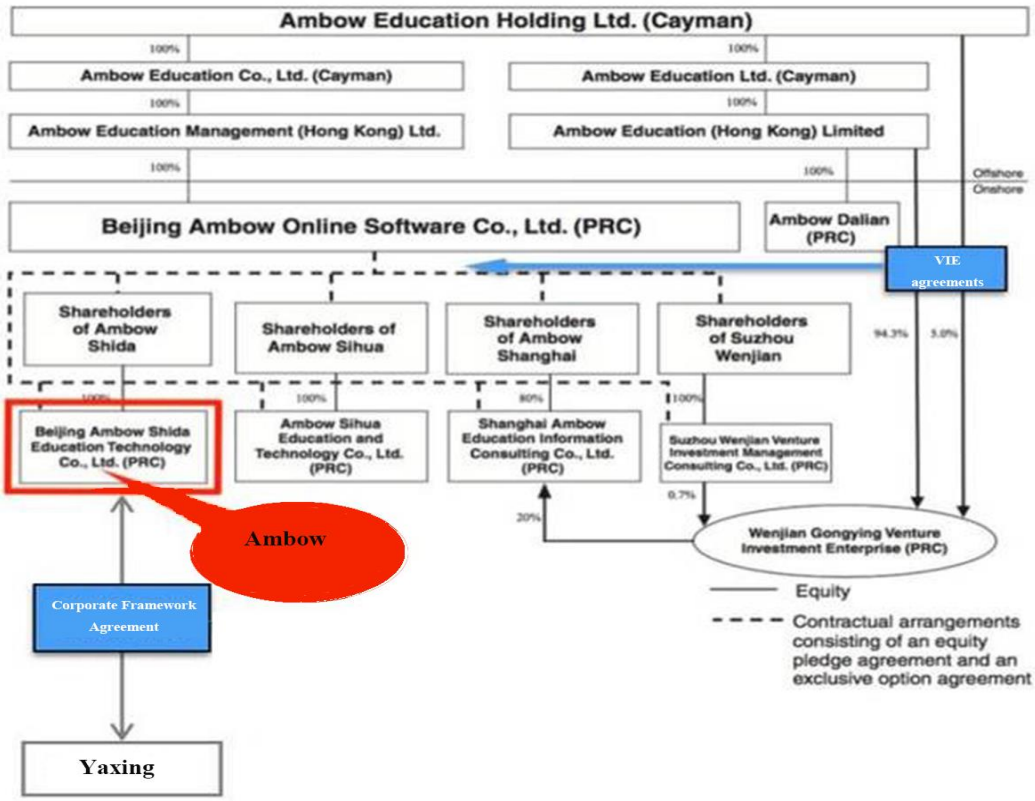
Yaxing is a domestic company registered in China and signed a "Corporate Framework Agreement" (CFA) with Ambow. The *Ambow Education Holding Ltd* ("Ambow Holding", registered in Cayman with NASDAQ: AMBO) and its wholly foreign-owned entity, *Beijing Ambow Online Software Co. Ltd* ("Ambow Online" registered in China) control Ambow throughout a series of control arrangements, mainly VIE agreements. Figure 6 shows the links between different entities in dispute.[44]

variable-interest-entities-china.pdf >. The case was administered by Shanghai CIETAC. The China International Economic and Trade Arbitration Commission (Shanghai Commission), known as "Shanghai CIETAC", declared its independence in 2013 and changed its name to Shanghai International Arbitration Center (SHIAC).

[43] *Changsha Yaxing Real Estate Development Company Limited v. Beijing Shida Ambow Education Technology Co., Ltd*. (2015) Civil 2nd Final, No. 117. The case background mentioned below is based on the Chinese judgments.

[44] This figure was first read at, Zhou Shichang & Yang Qianwu, 'Comments on the first VIE case: Its Impact on Listing Overseas and Merger' (01 April 2017) < http://mp.weixin.qq.com/s/Ki3YTUXrWuZQ0EQGbIPAtg > [in Chinese]. The full English figure shown in this research was edited by the author.

Figure 6 Corporate Structure in *Ambow* case



To give a brief background, Yaxing sold 70% of the entire stocks in two schools in Changsha, Hunan Province to Ambow by signing a CFA. The transferred rights included rights of teaching, rights of operating income (excluding the balance before the sale), rights of operating disposal, intangible assets, and real estate together with the teaching equipment of the schools before the day of signature. Contracting parties also signed another supplemental agreement to clarify other subsequent interests and made a consideration for the stake interests. Both parties agreed that half of the consideration money was paid in cash and the remainder was paid in shares of Ambow Holding. To perform the CFA, both parties also signed a series of supplementary agreements and contracts. On 28 September 2009, the Education Bureau of Yuhua District in Changsha approved the change of schools' ownership, and the CFA was subsequently performed.

According to the CFA, the stocks that Yaxing may obtain from Ambow Holding were American Depositary Receipts listed on the US New York Stock Exchange. If Yaxing wished to sell the stocks, Yaxing had to transfer the Receipts to the Shares in order to make a public transaction with a 2:1 ratio. After 180 days, the lock-up period from Ambow Holding's listing on 5 August 2010, its Receipts were open to make a public transaction. However, the stock met a sharp and continuous decline and the stock was suspended on 22 March 2013. On 6 March 2012, Yaxing asked Ambow Holding to transfer its Receipts to Shares, but Ambow Holding insisted that Yaxing should make

the transfer in its own capacity. Therefore, after Ambow failed to transfer the shares and the stocks were suspended, Yaxing filed a lawsuit against Ambow.

Yaxing made several claims, one of which was that the CFA was deemed invalid since it violated the PRC laws and regulations in relation to the foreign investment restrictions: more specifically, the Regulations of Sino-foreign Cooperative Education and the Catalogue of Industries for Guiding Foreign Investment (the 2007 revision).[45] The 2007 Catalogue stated that foreign investment was prohibited in the educational fields of education-compulsory education, military, police, political, party and other particular educational institutions. Therefore, Yaxing argued that Ambow Holding and Ambow Online used the benefit of VIE structures to sign the CFA with Yaxing to acquire the schools by domestic investment, maliciously evading the law and industrial regulations on the prohibition of foreign investment in the field of compulsory education. The CFA marked the illegal purposes in legal form for list stocks overseas, which should be regarded as invalid. However, Ambow argued that the CFA and other agreements were legal and valid since they reflected the parties' real willingness, followed the current law and regulations, were approved by the governmental administration and were performed well by the parties. Moreover, Ambow argued that the CFA was signed between two domestic companies which excluded the adjustment of foreign investment laws. Furthermore, Yaxing failed to prove that Ambow Online was the actual controller of Ambow. Consequently, Yaxing's claims were solely on the matter of transferring its commercial risks.

a. Hunan High Court Judgement

The High Court in Hunan Province held that the core issue was whether the CFA was valid. In the light of the case fact, the High Court concluded that the CFA was under the protection of the Court because it reflected the actual willingness of parties and its content did not violate the mandatory regulations in relation to the contract validity according to Chinese law and regulations.

Firstly, the evidence failed to prove that Ambow was a foreign investment enterprise. According to the case facts, Ambow was registered in November 2004, and its shareholders were Chinese natural persons or legal persons at that time. Therefore, according to Contract Law, Ambow was not a foreign investor when it was established. Although Ambow's shareholders had changed, the Court did not find firstly that there were any other foreign investors making the investment and becoming shareholders. Furthermore, the registration form of Ambow was never changed. As a domestic company, Ambow signed the CFA with Yaxing with respect to transferring the shares of the schools in order not to contravene China's foreign investment policy. Yaxing

[45] State Development & Reform Commission & Ministry of Commerce, 'Catalogue of the Industries for Guiding Foreign Investment (2007 Revision)'(issued on 31 October 2007) [hereinafter the "Catalogue 2007"]. The 2007 Revision was invalidated by the Catalogue of Industries for Guiding Foreign Investment (2011 Revision).

claimed that the shareholders of Ambow, *XIE Xuejun* and *XUE Jianguo* signed agreements and transferred their control to Ambow Online. However, the Court found that this argument was not convincing. Being shareholders, XIE and XUE only entrusted their voting rights and provided several benefits to Ambow Online. Therefore, from a legal perspective, the shares of Ambow were still registered under the name of Chinese nationals, instead of Ambow Online. As a result, the owners of Ambow were still Chinese nationals. With consideration to its operation and management policy, Ambow transferred the shareholders' voting rights and interests' benefits to foreign investors. However, such a transfer would not change the legal registration type of Ambow.

Secondly, the Court held that it lacked legal certainty to identify the corporate nature by using the agreement control theory. The Court stated that Chinse law distinguishes between domestic and foreign companies in terms of their identity. Ambow Online controlled Ambow on the basis of the contract. However, when Ambow's shareholders signed other agreements to transfer their voting rights, it was difficult to determine whether Ambow Online was still able to control Ambow. In consequence, when both of Ambow's shareholders are natural persons, Ambow was identified as a domestic enterprise.

Thirdly, the High Court took public interests into consideration. The Court noted that the 2007 Catalogue listed prohibited investment fields in order to protect public interests. Because the CFA was also related to the educational industry, the Court explored whether the CFA, as well as the affiliated agreements, would damage national security. The Court found that the agreements only transferred the operating income rights of the schools from Ambow to Ambow Online. In other words, Ambow Online only exercised its actual control over the income of the schools, instead of the teaching arrangement of the schools. As a result, Ambow Online still followed the Chinese educational policy. In addition, as a domestic company, Amnow still met all the obligations set by laws, regulations and policy, even five years after Ambow had taken over the schools. It indicated that Ambow Online, as an actual controller, did not influence the teaching arrangement in the schools. Relying on these analyses, the Court believed that the agreement between Ambow and Ambow Online did not violate China's Catalogue concerning the prohibition of foreign investment.

Lastly, the Court held that denying the effectiveness of the CFA would encourage a dishonest transaction by Yaxing. The content of the CFA indicated that Yaxing was aware of the agreement between Ambow and Ambow Holding. For instance, the remainder was paid by the Ambow Holding's shares, not by Ambow. Therefore, Yaxing had been fully aware that Ambow Holding controlled Ambow since the beginning of the transaction. Taking the principle of good faith into account, the CFA demonstrated the purposes of the parties. In order to protect the security of the commercial operation, given that Ambow had taken over the schools for five years previously, the Court

rejected Yaxing's claims.

b. Supreme People's Court Judgement

After the Hunan High Court rejected the claims, Yaxing brought its appellate petitions to the SPC. From a general perspective, the SPC held the same conclusion as the Hunan High Court in terms that the CFA was legal and valid. However, the interesting point was that the SPC explained its legal reasons in a different way.

Firstly, the SPC also noted that Ambow's shareholders, XIE and XUE, were both Chinese nationals. In addition, Ambow had registered itself as a domestic limited company without having any foreign shareholders. Moreover, the SPC found that there were no legal grounds for identifying the nature of Ambow based on its sources of registration funds. In consequence, the contract between Ambow and Ambow Online in relation to the entrustment of shareholders' rights did not give Ambow Online the identity of being a shareholder.

Secondly, the CFA reflected the actual willingness of the parties. Parties acquired corresponding benefits and signed a series of agreements in order to perform the CFA. The Court did not find any evidence which showed any fraud, threat or any other unwillingness between the parties. Therefore, the SPC agreed with the Hunan High Court on this point.

Thirdly, the CFA did not violate any mandatory regulations, laws or administrative regulations. Although Yaxing claimed that the CFA violated the 2007 Catalogue and further violated the Sino-foreign Cooperative Education Regulations and the 2007 Catalogue. However, the SPC held that the 2007 Catalogue were the departmental rules which were published by a ministry and were neither law nor administrative regulations. It cited Article 52.5 of PRC Contract Law which states that:

> "A contract is invalid…[it] violates a mandatory provision of *any law or administrative regulation*." [Emphasis added]

Moreover, the Court referred to the "Explanations by the Supreme People's Court on Certain Issues Concerning the Application of the Contract Law (1) ", Article 4 of which claims that:

> "After the Contract Law takes effect, on determining the invalidity of a contract, the People's courts shall follow *laws* promulgated by the National People's Congress and its Standing Committee and *administrative regulations* adopted by the State Council *instead of l*ocal regulations and regulations passed by various

departments and commissions of the State Council." [46] [Emphasis added]

As a consequence, the SPC held that the 2007 Catalogue, as well as other regulations, were not the legal basis for examining the validity of the contract. In the present case, when Ambow acquired the operating rights of compulsory education institutions, whether its shareholder, being a foreign company, violated the Cooperative Education Regulations was addressed. The SPC asked the opinion of the Policy and Regulation Division of the Ministry of Education (MOE). MOE clarified a reply to the effect that: "the control, in the form of the agreement between a domestically-funded enterprise with foreign capital and its shareholders, is not tantamount to direct involvement with school operation and management. It is, therefore, beyond the regulatory scope of the Cooperative Education Regulations."[47]

As Ambow was a domestic company, the CFA was not subject to the Regulations of the MOE. Consequently, in the light of the MOE's opinion, the SPC did not apply the Cooperative Education Regulations to examine the CFA. At this stage, the SPC reviewed the registration of Ambow in order to identify its nationality regardless of whether Ambow was under the control of foreign investors. This approach indicated that the Court would apply a formalistic approach to determining the nationality of an entity, rather than use a substantial path to find the *de facto* foreign entity. Only when the law expressly includes the contractual arrangement as one control method for building relations between the entities, Ambow might be identified as a foreign entity. By then, the nature of the CFA would be different because it would not be signed between two domestic companies, but between one domestic company and one foreign company.

Furthermore, the SPC held that whether Yaxing could obtain its investment benefits was not relevant to the validity of the CFA. The agreement between Ambow and Ambow Online was also irrelevant to the CFA because the Educational Administrative Department in Changsha (the capital city in Hunan) approved this transfer and there was no evidence to indicate that either parties or the administrative department violated the law. Therefore, there was no factual or legal basis to prove the CFA went against public interests. As a result, the SPC concluded that the CFA was valid in the case. The SPC also separated its examination between the CFA signed between Yaxing and Ambow and the VIE agreement signed between Ambow and Ambow Online. The Court believed that such a clear separation is reasonable and practical because in fact these two agreements are indeed different and separated from each other. The CFA was valid

[46] Interpretation I of the Supreme People's Court of Several Issues concerning the Application of the Contract Law of the People's Republic of China, Unofficial Translation, (Adopted at the 1090th meeting of the Trial Committee of the Supreme People's Court on December 1 1999).
< http://www.accaglobal.com/content/dam/acca/global/pdf/chnlaw_jud.pdf >.

[47] Richard Ma & Jonathan Pfister, 'The PRC Supreme Court's Approach to VIEs Assessing Yaxing v. Ambow' *Dahui Lawyers* (4 May 2017) < http://www.dahuilawyers.com/publications/The-PRC-Supreme-Courts-Approach-to-VIEs-assessing-/ >.

and legal if it did not violate other provisions in Contract Law. Both Yaxing and Ambow were fully aware of their rights and duties when they signed the contract. Consequently, the Court believed that the CFA was valid.

However, it is acknowledged that the Court was not willing to answer the question of whether or not a VIE agreement is valid or not under Chinese Law. The SPC stressed that it was the obligations of educational administrations to determine whether there was a danger to education security and public interests when a foreign investor merged shares and took part in or exercised actual control over the compulsory education. Consequently, the SPC sent its judicial advice to the MOE. The Court suggested that the MOE made the necessary progress in order to regulate the process of administrative approval and supervision in order to protect public interests and educational security.

In general, the decision issued by the highest court in China will undoubtedly affect subsequent judgements by lower courts. However, it is interesting that the SPC firstly did not resolve the legitimacy of a VIE contract but left this question to the MOE. There is no doubt that a clear answer given by the SPC would be an indirect response to China's opinion on VIEs. However, China does not seem to be ready to give such an answer. On the other hand, since the share entrustment was actually argued in the case and also played a significant role; the SPC made it clear that share entrustment should be carefully regulated since it would allow foreign entities to make indirect investment access to restricted or prohibited industries.

3.3 Analysis of the Juridical Practice

In both cases discussed, the courts made it clear that a business that was made in a form to achieve an illegal objective bypassing the law would be prohibited. It becomes a general principle that Chinese domestic courts follow that they should examine the legitimacy of a contract. When the courts discover that the contract has an explicit purpose of achieving interests banned by law, they will determine that the contract is invalid on the basis of Contract Law. However, the determination becomes complex when the contract in dispute is a VIE contract, because the VIE contract may not indicate an illegal objective on its own. Because an illegal objective may be achieved by the WFE and the FOE, but the VIE contract is signed by two other entities, the WFE and the VIE. Consequently, the general principle established by the Contract Law may not directly apply to solve legal concerns about the VIE structure.

In the first place, both cases do not give a final answer to the legitimacy of the VIE structure in China. In particular, in the Ambow case, the SPC limited the understanding of law and regulation by holding that the guidelines by MOFCOM were regarded as neither law nor regulation. The SPC interpreted the concept of law and regulation based on China's Legislation Law. Article 2 of the Legislation Law claims that any national law, administrative regulation, local decree, autonomous decree and special decree are

all laws under the governance of the Legislation Law.[48] The Legislation Law requires that law should only be proposed, deliberated, and approved by the National People's Congress, and in particular situations, by the Standing Committee of the National People's Congress; administrative regulations are made by the State Council.[49] Moreover, the Provincial People's Congress, autonomous regions, municipalities and their respective Standing Committees can enact local provisions, autonomous regulations, and special regulations. Any other legal rules announced by other authorities are not qualified as either law or regulations. For instance, the departments and committees of the State Council, the People's Bank of China, and the Auditing Office and its directed institutions with regulatory functions can draft administrative rules, and the local governments can enact local governmental rules.[50] In sum, under Chinese law, a "law" could be passed by the National People's Congress and its Standing Committee, and a "regulation" can be authorised by the local People's Congress and its Standing Committee and the State Council.

Bearing this definition in mind, the dispute turns on whether the violation of foreign investment catalogues issued by MOFCOM equates to a violation of the mandatory provision of any law or administrative regulation subject to Article 52 of the Contract Law.[51] The Judicial Interpretation (I) of the Contract Law defines the scope of a "law or administrative regulation". Article 4 of the Judicial Interpretation adopts the same approach as the Legislative Law to refer to the legal rules passed by the National People's Congress and its Standing Committee as "law" and legal rules passed by the local People's Congress and its Standing Committee and the State Council as "regulations". Accordingly, the Chinese courts incorporate the judicial interpretation and the legislation by applying a restrictive interpretation to exclude foreign investment catalogues published by MOFCOM as neither law nor regulation. Based on this approach, when foreign investors use the VIE structure to gain access to the industry which is not supposed to be open to foreign capital, such investment assessment may not yet be seen as a violation of Chinese law or regulations.

However, the approach has some drawbacks. For instance, some local decrees announced by the local authorities or departmental rules published by ministries are made in the light of local developments or the need to develop particular industrial sectors. In practice, the rest of the rules other than the law and regulations still play a critical role as a tool in determining the legitimacy of a contract, although the courts

[48] Legislation Law of the People's Republic of China (adopted on 15 March 2000, amended on 15 March 2015) Meanwhile, the Legislation Law also carries out the enactment, amendment and repeal of administrative rules promulgated by agencies under the State council and local rules promulgated by the local governments.
[49] Legislative Law, Article 7 and Article 65.
[50] *Ibid*, Article 80 and Article 82.
[51] Contract Law, Article 52 (v).

can not refer to the provisions of these rules directly.[52] Such rules have their respective legal effect in many circumstances.[53] When other rules are made on the basis of upper law (if there is one) which only provides some general principles without explicit provisions, they may add specific provisions. Furthermore, particular rules may be made to protect the public interest. For instance, the foreign investment catalogues are based on research by MOFCOM, which is supposed to give a straightforward, comprehensive and effective guidance on foreign investment. As a result, these rules may have their particular legal roles. Therefore, applying a restrictive interpretation to exclude these rules as law or regulation may reduce their practical effect.

When it comes to the approach of the Chinese courts, it can be seen that they are not yet ready to determine the legitimacy of the VIE structure. The courts admit general principles, such as not allowing the use of a lawful form covering illegal objectives. However, they avoid answering whether it is permissible to use the VIE structure in practice.

On the one hand, Courts have justified taking the view that investment in relation to a VIE structure is not illegal: foreign investment catalogues are not law and regulations subject to the Legislation Law, and so the VIE contract might not be invalid even though it is contrary to the catalogues. On the other hand, the approach lacks coherence because the catalogues and guidelines by the NDRC and MOFCOM are still critical supplements to the law and regulations concerning foreign investment access. Moreover, these supplementary rules serve as the departmental regulations in terms of foreign investment access. In the light of public interests, NDRC and MOFCOM are authorised to publish a catalogue on foreign investment access. As a result, even though violation of the catalogues might not fall into Article 52.5 of the Contract Law, it might still be regulated by Article 52.4 of the Contract Law.[54] Besides, as the guiding rules for foreign investment access, the foreign investment catalogue creates a predictable and transparent environment for foreign investors to invest. If the Catalogue is never considered to be law or regulation, the guidelines lose their effectiveness and bring legal uncertainty to the instructions on foreign investment access.

4. Hazards of Investing Under the VIE Structure in Investment Arbitration

The current judicial practice in Chinese domestic courts reflects the legitimacy of the use of the VIE structure. Although it opens doors for foreign investors to continue using this structure, the lack of a clear interpretation leads to potentially serious legal challenges in investment arbitration.

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[52] Shaogang Zhu, 'Understand and Review: the Criteria of the Invalid Contract, Article 52(v) of the Contract Law as a Core Issue" (2013) 129 Journal of Gansu Institute of Political Science and Law 127, 127 [in Chinese].

[53] Liming Wang, *Research on Contract Law* (Remin University Press 2011) 634 [in Chinese].

[54] Article 52.4 of Contract Law states that the violation of public interests may result in a contract invalid.

4.1 Predictable Investment Environment for Foreign Investors

These legal blanks concern the legitimacy of the VIE structure under domestic law. Such blanks also bring potential challenges in international investment arbitration. The loopholes in the regulations in relation to the VIE structure provide significant flexibility to foreign investors to gain access to the host State's market. Such flexibility may bring commercial benefits to global investment, but it also challenges the legal certainty of domestic law, and subsequently to international investment law. Foreign entities use the VIE structure to circumvent restrictions and prohibitions on the foreign ownership of investment in some strategically critical industries.[55] However, it is argued that the use of the structure allows investors to put their investment at risk by disregarding the law of the host State.[56]

With respect to the current legal regime, foreign entities within the VIE structure stand on a precarious footing in terms of its legality.[57] From a Chinese perspective, the relevant law does not deal with the establishment and regulation of the VIE structure. At the same time, there is also no law effectively supporting the VIE contract. Article 52 of the Contract Law may play a role in determining the legitimacy of the VIE contract. However, it is left to domestic law to make the determination on specific cases.

The use of the VIE structure in the current legal landscape leads to foreign investors being in a precarious position if they make investments, given that the current legal landscape does not create a predictable and transparent investment environment. As a cornerstone of a well-functioning regulatory process, investment policy transparency requires that the governing rules are publicly available, regardless of the content or the changes in laws and regulations.[58] Thus the public laws and regulations of the host State create a predictable investment environment for foreign investors and so boost their confidence.[59] In line with this principle, host States should also meet basic expectations that are considered by foreign investors, in that the host State should act in a consistent manner, avoid ambiguity, and be transparent in its relations with foreign investors.[60] It is also expected that foreign investors should know beforehand all the

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[55] Samuel Farrell Ziegler, 'China's Variable Interest Entity Problem: How Americans Have Illegal Invested Billions in China and How to Fix It' (2016) 84 The George Washington Law Review 539, 561.
[56] *Ibid*, 561; Paul L. Gillis, 'Accounting Matters Variable Interest Entities in China' *China Accounting Blog* (18 September 2012) <https://www.chinaaccountingblog.com/vie-2012septaccountingmatte.pdf > 6-8.
[57] Serena Y. Shi, 'Dragon's House of Cards: Perils of Investing in Variable Interest Entities Domiciled in the People's Republic of China and Listed in the United States' (2014) 37 Fordham International Law Journal 1265, 1295.
[58] OECD, *Transparency and Predictability For Investment Policies Addressing National Security Concerns: A Survey of Practices* (OECD 2008) < https://www.oecd.org/daf/inv/investment-policy/40700254.pdf > 2.
[59] Emilie M. Hafner-Burton, Zachary C. Steinert-Threlkeld, and David G. Victor, 'Predictability Versus Flexibility Secrecy in International Investment Arbitration' (2016)68 World Politics 413, 414. Helen V. Milner, 'Introduction: The Global Economy, FDI, and the Regime for Investment' (2014) 66 World Politics 1–11.
[60] *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2,

rules governing their investment, as well as relevant policies and administrative practices or directives.[61] Subject to such a formulation, the host State should also act consistently with its domestic laws.[62]

As discussed in the last section, Chinese domestic courts still hesitate to give a straightforward answer. It is suspected that by leaving the VIE issue in a legal grey area, China is able to attract growing foreign investment to bolster essential sectors of the economy while keeping the right to clamp down if it so desires.[63] However, such hesitation leads to potential disputes in the sense that the foreign investments that are subject to the VIE structure may still be declared invalid, because the use of the VIE scheme strategically ignored China's restriction on foreign investment. Consequently, if the VIE fails and goes wrong because of a government decree, managerial rift or other operational decisions, investors will have difficulties using juridical measures to recover losses.[64]

4.2 Potential Disputes in Investment Treaty Arbitration

Apart from asking for a local remedy, foreign investors might also seek international dispute resolution. As addressed in the theoretical chapter, ITA may work as a vehicle for providing international protection to foreign investors. However, one prerequisite to gaining protection from ITA is the legality of the investment.[65] The legality of an investment is regarded as a powerful weapon for states to defeat investment treaty claims.[66]Indeed, respondent states may argue that claimant investors do not comply with the law of the host State when they invest, and so they should be prevented from pursuing claims in ITA.[67] Due to the lack of clarity on the VIEs' legitimacy in domestic law, it may be alleged that an investment made throughout a VIE structure should be excluded from the ITA mechanism.

Award (29 May 2003) para 154 [hereinafter the "Tecnicas case"]. Christopher M Ryan, 'Meeting Expectations: Assessing the Long-Term Legitimacy and Stability of International Investment Law' (2008) 29 University of Pennsylvania Journal of International Law 725, 739.

[61] *Tecnicas* case, para. 154.

[62] Christopher M Ryan, 'Meeting Expectations: Assessing the Long-Term Legitimacy and Stability of International Investment Law' (2008) 29 University of Pennsylvania Journal of International Law 725, 739.

[63] Dena Aubin, 'Investor risk lurks in legal structure of China IPOs – Lawyers' Reuters' *Reuters* (2 November 2013) < https://uk.mobile.reuters.com/article/amp/idUKBRE95M0CE20130623>.

[64] *Ibid*; Serena Y. Shi, 'Dragon's House of Cards: Perils of Investing in Variable Interest Entities Domiciled in the People's Republic of China and Listed in the United States' (2014)37 Fordham International Law Journal 1265, 1299.

[65] See Chapter 2.

[66] Jarrod Hepburn, 'In Accordance With Which Host State Laws? Restoring the 'Defence' of Investor Illegality in Investment Arbitration' (2014) 5 Journal of International Dispute Settlement 531, 532.

[67] Rahim Moloo and Alex Khachaturian, 'The Compliance with the Law Requirement in International Investment Law' (2011) 34 Fordham International Law Journal 1473, 1475.

4.2.1 "In Accordance with the Law" Requirement in Investment Treaties

A qualified investment made by an investor can obtain protection from ITA on the basis of investment treaties and/or the ICSID Convention. Since the ICSID Convention does not contain any definition of an investment, it is left to investment treaties to adapt their techniques for defining an investment. For instance, treaties may require that the investment be made subject to the law of the host State in order for investors to achieve investment benefits and obtain protection. More than 60% of BITs and TIPs require that the investment should be made in conformity with the laws and regulations of host States.[68] In practice, when treaties expressly require the investment to be made in accordance with the host-state's law, the requirement becomes a jurisdictional prerequisite.[69]

However, the provisions worded in treaties make no reference to a clear definition on the scope of the "law of the host State". Arbitral tribunals may deny their jurisdiction when they find that investors have failed to invest on the basis of the laws of the host States, as required by the BIT applied.[70] Nevertheless, arbitral tribunals may not deprive investors of the rights to gain protection when they only find minor breaches of laws.[71] In consequence, the lack of a universal definition of "in accordance with law" raises several practical questions.

One of the first questions concerns whether "law" refers to the national law of the host State or international law. In the remarkable *Fraport* case, the Tribunal held that the word "law" in this context refers to the national law of the host State.[72] The Tribunal stated that the BIT is an international instrument, but the provision "in accordance with the law" affects "a *renvoito* national law" and "a failure to comply the national law to which a treaty refers will have an international legal effect."[73] Added to this, the *Inceysa v. El Salvador* Tribunal held that "law" should also relate to international law.

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[68] UNCTAD Mapping Project. 1648 out of 2577 mapped treaties include the provisions which require that the investment shall be made in accordance with the law and regulation of host states.

[69] Rahim Moloo and Alex Khachaturian, 'The Compliance with the Law Requirement in International Investment Law' (2011) 34 Fordham International Law Journal 1473,1499.

[70] *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award (6 February 2008) 104 [hereinafter "Desert case"]; *Fraport AG Frankfurt Airport Serv. Worldwide v. Republic of the Philipplines*, ICSID Case. No. ARB/03/25, Award (16 August 2007) para 394 [hereinafter 'Fraport case']. This case has been annulled because the annulment tribunal held that the Claimant was not given the right to be heard on certain evidence. See at *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Phillippines*, ICSID Case No. ARB/11/12, Award (10 December 2014) However, the annulment decision does not affect the legal reasoning of the tribunal in the first proceedings; *Inceyasa Vallisoletana, S.L v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (2 August 2006) para 195 [hereinafter "Inceyasa" case]; *Tokios Toleles v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction (29 April 2004) para 84; *Saba Fakes v. Turkey, ICSID Case No. ARB/07/20*, Award (14 July 2010) para 126 [hereinafter "Saba Fakes" case].

[71] Thomas Obersteiner, "'In Accordance with Domestic Law' Clauses: How International Investment Tribunals Deal with Allegations of Unlawful Conduct of Investors' (2014)31 Journal of International Arbitration 265, 277.

[72] *Fraport* case, para 394.

[73] *Ibid*.

The Tribunal discovered that the Constitution Law of El Salvador recognizes that the BIT is a valid national law and that the BIT applied also requires that arbitration be based on the generally recognised rules and principles of international law.[74] In addition, this case was also the first one in which the arbitral tribunal denied jurisdiction by holding that the investment violated the provisions of "in accordance with the law" in the treaty.[75] In both cases, the national law of the host State is significant.

Another issue concerning the scope of "in accordance with the law" in disputes is whether the law refers to any law of the host State or only the law inherently related to investment.[76] In the *Saba Fakes* case, the Respondent (Turkey) argued that "if an investment is made in breach of any of the host State's laws in any way, such breach would 'taint' the investment and deprive it of the protection under the BIT and the ICSID Convention."[77] In contrast, the Claimant held that "a certain level of violation is required to interpret the provision and only a violation of a fundamental legal principle results in an illegal investment."[78] In the view of the Tribunal, "the legality requirement contained therein concerns the question of the compliance with the host State's domestic laws governing the admission of investments in the host State."[79] The Tribunal drew this conclusion on the basis of the plain meaning of the provision in the BIT which says that "investments… established in accordance with the laws and regulations…"[80] In addition, the Tribunal held that when investors violate other domestic laws, states have the power to take action against those investors within domestic legislation, which is beyond the sphere of the investment regime.[81] Therefore, "in accordance with the law" may be limited to law in relation to the initiation of the investment.[82] The Tribunal in the *Gustav* case found that the wording of the BIT in the case showed that "the legality of the creation of the investment is a jurisdictional issue; the legality of the investor's conduct during the life of the investment is a merits issue."[83] However, this position has not been widely and/or wholly accepted. It is

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[74] *Inceyasa* case, paras 219-224.

[75] Rudolf Dolzer and Christoph H. Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 95.

[76] Jarrod Hepburn, 'In Accordance with Which Host State Laws? Restoring the 'Defence' of Investor Illegality in Investment Arbitration' (2014) 5 Journal of International Dispute Settlement 531, 546.

[77] *Saba Fakes* case, para 117. In this case, the BIT applied is the Netherlands-Turkey BIT, Article 2 (2) of which states,

> " The present Agreement shall apply to investments owned or controlled by investors of one Contracting Party in the territory of the other Contracting Party which are established in accordance with the laws and regulations in force in the latter Contracting Party's territory at the time the investment was made."

[78] *Saba Fakes* case, para 118.

[79] *Saba Fakes* case, para 119.

[80] *Ibid*.

[81] *Ibid*.

[82] Rahim Moloo & Alex Khachaturian, 'The Compliance with the Law Requirement in International Investment Law' (2011) 34 Fordham International Law Journal 1473, 1500.

[83] *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award (18 June 2010) paras 126-127 [hereinafter the "Gustav case"]. It states that: "Article 10 of the BIT contains a specific requirement for compliance with the host State"s legislation….[t]his Treaty shall also

believed that when the investment violates any domestic rules, it may be excluded from the substantive guarantees in the treaty.[84] However, the word "law' in the "in accordance with law" limitation is believed to apply not only to the admission and establishment of the investment but also cover other substantive legal rules, such as rules related to corruption.[85]

Furthermore, some treaties may not contain "in accordance with the law" provisions in the texts.[86] However, this does not mean that investors are able to pursue claims even when their investments do not accord with the law.[87] Where no requirement appears in the treaties applied, arbitral tribunals may still be prepared to read in the requirement.[88] In the first place, in the light of the preamble and the history of the treaty, arbitral tribunals may believe that the treaty was designed to be in line with generally recognised rules and principles.[89] The lack of "in accordance with the law" provisions in the treaty does not prevent tribunals from examining the legality of an investment in accessing the admissibility of a claim.[90] As a consequence, the dispute may become an admissibility question in the sense that investors whose investment was not in conformity with the law of the host State should be precluded from having their claims heard, whether or not the arbitral tribunal has jurisdiction.[91] However, it is still a subject of debate as to whether decisions dealing with the legality requirement is a jurisdiction or admissibility issue.[92]

In sum, the "in accordance with the law" requirement is still a controversial issue in arbitration. This section only discusses a small number of cases in order to reveal the legal questions. However, the discussion shows that there are still several practices that are widely accepted by arbitral tribunals as common positions. As a general rule, international investment law does not protect illegal investments that fail to conform to the law of the States. In particular, when the establishment and admission of an investment have illegal aspects, it may result in jurisdictional hurdles. This conclusion remains the same whether or not the treaties in dispute include an "in accordance with the law" provision. However, the interpretation and application of the provisions may

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apply to investments made prior to [the Treaty's] entry into force by nationals or companies of either Contracting Party in the territory of the other Contracting Party consistent with the latter's legislation."

[84] Rudolf Dolzer & Christoph H. Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 93.

[85] *Ibid*.

[86] For instance, the ECT does not include the "in accordance with the law" provision.

[87] Rahim Moloo and Alex Khachaturian, 'The Compliance with the Law Requirement in International Investment Law' (2011) 34 Fordham International Law Journal 1473,1499.

[88] Jarrod Hepburn, 'In Accordance With Which Host State Laws? Restoring the 'Defence' of Investor Illegality in Investment Arbitration' (2014) 5 Journal of International Dispute Settlement 531, 532.

[89] *Plama Consortium Ltd v. Republic of Bulgaria*, ICSID Case No.ARB/03/24, Award, (27 August 2008) para 138.

[90] Rahim Moloo & Alex Khachaturian, 'The Compliance with the Law Requirement in International Investment Law' (2011) 34 Fordham International Law Journal 1473, 1484.

[91] *Ibid*,1499.

[92] Veijo Heiskanen, 'Me´nage a` trois? Jurisdiction, Admissibility and Competence in ITA' (2014) 29 ICSID Review-Foreign Investment Law Journal 231, 242.

vary from tribunal to tribunal. Among various approaches by arbitral tribunals, the common ground is that the national law of the host State is essential although international law may also play a role.

4.2.2 Fundamental Legal Principles in the "In Accordance with the Law" Requirement

Another question concerns whether the "law" within the "in accordance with the law" requirement covers the fundamental legal principles. For instance, in the *Vannessa Ventures* case, the Claimant argued that the legality requirement in the treaty was "limited in its application to breaches of fundamental principles of law and of laws concerning foreign investments."[93] However, by giving the plain and ordinary meaning to the legality requirement, the Tribunal held that the laws of the host State refer to "the laws and regulations made by, or under the authority of, the public authorities of the State, and do not extend to purely contractual obligations."[94] However, this does not mean that any fundamental principles of law will not be considered by arbitral tribunals. Investors should still comply with general principles such as fraud and good faith and avoidance of corruption.[95] This is was also known as the *clean hands* doctrine, which means that "[h]e who comes to equity for relief must come with clean hands" as the *ex injuria non oritur jus* principle.[96]

In the famous *Yukos* case, the *clean hands* doctrine in ITA was highlighted by the arbitral tribunal and the case has also been widely debated.[97] The Respondent argued that the Tribunal should not admit the claimants' claims because of its "unclean" hands.[98] The Tribunal did not dispose of the Respondent's argument and held that the *clean hands* doctrine is not a general principle of international law that would bar the investors' claims.[99] This approach has been supported because only certain forms of the doctrine have received recognition in international jurisprudence, but other forms lack such recognition, especially when the issue relates to unlawful activity concerning

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[93] *Vannessa Ventures Ltd v. Venezuela*, ICSID Case No. ARB(AF)/04/6, Award (16 January 2013) para 132[hereinafter the "Vannessa Venturescase"].
[94] *Vannessa Ventures* case, para 134.
[95] Jarrod Hepburn, 'In Accordance with Which Host State Laws? Restoring the 'Defence' of Investor Illegality in Investment Arbitration' (2014) 5 Journal of International Dispute Settlement 531, 546.
[96] Gerald Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law' (1957) 92 Recueil des Cours de l'Académie de Droit International 119.
[97] Aloysius Llamzon, 'Yukos Universal Limited (Isle of Man) v. The Russian Federation: The State of the "Unclean Hands" Doctrine in International Investment Law: Yukos as both Omega and Alpha' (2015) 30 ICSID Review-Foreign Investment Law Journal 315, 316. Patrick Dumberry, 'State of Confusion: The Doctrine of "Clean Hands" in Investment Arbitration After the Yukos Award' (2016) 17 Journal of World Investment and Trade 229, 229. Ori Pomson, 'The Clean Hands Doctrine in the Yukos Awards: A Response to Patrick Dumberry' (2017) 18 Journal of World Investment and Trade 712, 712.
[98] *Yukos Universal Ltd (Ise of Man) v. Russian Federation*, PCA Case No. AA 227, Interim Award on Jurisdiction and admissibility, para 436 [hereinafter "*Yukos* case"].
[99] *Ibid.*

the subject-matter of the case.[100] In contrast, the approach of the *Yukos* Tribunal can be questioned because other arbitral tribunals have endorsed the doctrine as a valid ground for the inadmissibility of claims and have applied the doctrine to events after the initial investment was made.[101]

In consequence, whether arbitral tribunals should regard the *clean hands* doctrine as a general principle of law is controversial. However, the limitation to the fundamental principle is still the core issue to be determined by arbitral tribunals. In the light of the scope of this thesis, this section presents one particular situation in which the law of host States in dispute sets up a limitation requirement on foreign ownership. In the *Fraport* case, the host State's domestic law reserves the ownership and control of certain infrastructure to its nationals. More specifically, the Constitution of the Respondent state (the Philippines) requires that only up to 40% foreign equity is allowed in the operation and ownership of public utilities: this issue is also covered by the Philippine's Anti-Dummy Law.[102] In this case, the core dispute is whether the Claimant's concealment of secret shareholder agreements in relation to its investment with actual control of a Philippine airport, breached the Anti-Dummy Law.[103] The Tribunal stated that this jurisdictional question concerned "whether an economic transaction by a German company was made 'in accordance with' the Philippine law and thus qualified as an 'investment' under the German-Philippine BIT."[104] It further discovered that the Claimant "knowingly and intentionally" circumvented the Anti-Dummy Law by using secret agreements and the officials of the Respondent "could not have known of the violation".[105] As a result, the Tribunal concluded that it lacked jurisdiction *ratione materiae*.[106] It is believed that the fundamental principles of the law of the State are very difficult to identify.[107]

However, in the *Fraport* case, the Constitution of the State gives a precise answer which represents one of the initial steps in identifying the principles.[108] The reasoning is believed not to be applied widely because not every provision of a constitution of a state gives an "obvious" answer to form its general principles in relation to foreign ownership in the investment fields.[109] In addition, many other arbitral tribunals have said that strong evidence is needed to apply the fundamental principles in order to make

[100] Ori Pomson, 'The Clean Hands Doctrine in the Yukos Awards: A Response to Patrick Dumberry' (2017)18 Journal of World Investment and Trade 712, 733.
[101] Patrick Dumberry, 'State of Confusion: The Doctrine of "Clean Hands" in Investment Arbitration After the Yukos Award' (2016) 17 Journal of World Investment and Trade 229, 258-259.
[102] *Fraport* case, para 309.
[103] *Fraport* case, para 383 & para 395.
[104] *Fraport* case, para 399.
[105] *Ibid*, para 401.
[106] *Ibid*.
[107] Jarrod Hepburn, 'In Accordance With Which Host State Laws? Restoring the 'Defence' of Investor Illegality in Investment Arbitration' (2014) 5 Journal of International Dispute Settlement 531, 538.
[108] *Ibid*.
[109] *Ibid*, 539.

the determination.[110]

This section acknowledges that the issue of the fundamental legal principles is still in debate. Nevertheless, jurisdictional challenges in relation to foreign ownership may arise. States may regard foreign ownership limitations in investments as fundamental legal principles to argue that investors fail to follow the law. Furthermore, in order to assess the compliance of an investment with the law, the *clean hands* doctrine may be argued to test the intentions of investors. Added to this, the intentions of the States should also be examined. On the grounds of good faith, states should be consistent in their attitudes to the given factual or legal situations in order to provide stability and predictability in state conduct.[111] For this reason, it is argued that states should be estopped from arguing the illegality of the investment if they acknowledge and condone the existence of the illegality.[112] In other words, when states know the illegality of the investment but still allow the investment, states should be prevented from "raising violations of its own law as a jurisdictional defence".[113]

However, the use of the estoppel principle has its limitations. The estoppel principle is subordinated to other principles, such as the *clean hands* doctrine of investors and the rule of law.[114] When investments breach international public policy by means of fraud, bribery, or corruption, those investments cannot be declared legal on the basis of estoppel.[115] In contrast, the foreign ownership limitations imposed by the States are not regarded as international public policy because such limitations are seen as a national strategy.[116] The *Fraport* Tribunal held that "an expression of approbation or an endorsement" from the State on its acknowledgement of the illegality is the key to applying estoppel.[117] Therefore, a covert arrangement on ownership is not sufficient for estoppel because, by its nature, the State is not aware of that ownership arrangement.[118]

In sum, this section addresses two essential issues from the perspectives of both investors and states when the "in accordance with the law" requirement is applied in

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[110] *LESI, S.p.A and Astaldi, S.p.A v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Decision on Jurisdiction (12 July 2006); the Desert case; *Quiborax v. Bolivi*, ICSID Case No. ARB/06/2, Decision on Jurisdiction (27 September 2012).

[111] I.C. Macgibbon, 'Estoppel in International Law' (1958)7 International &Comparative Law Quarterly 468, 468-469.

[112] Rahim Moloo & Alex Khachaturian, 'The Compliance with the Law Requirement in International Investment Law' (2011) 34 Fordham International Law Journal 1473, 1501. Jarrod Hepburn, 'In Accordance With Which Host State Laws? Restoring the 'Defence' of Investor Illegality in Investment Arbitration' (2014) 5 Journal of International Dispute Settlement 531, 549.

[113] *Fraport* case, 346.

[114] Jarrod Hepburn, 'In Accordance With Which Host State Laws? Restoring the 'Defence' of Investor Illegality in Investment Arbitration' (2014)5 Journal of International Dispute Settlement 531, 556.

[115] *Ibid*, 555.

[116] *Ibid*, 556. As explained earlier, China announces its foreign investment guidance on the basis of its national strategy.

[117] *Fraport* case, paras 346- 347.

[118] *Ibid*.

practice. Investors should still follow up with the *clean hands* doctrine. In a like manner, states are bound by the estoppel principle from arguing the investment's illegality when they are actually aware of the investment.

4.2.3 "In Accordance with the Law" Requirement and the VIE structure

Finally, this section discusses the links between the "in accordance with the law" requirement and the VIE structure. International treaties may require the investment to be made under the law of the host State. In consequence, the legitimacy of the VIE structure is the critical factor for the investment made under that regime to gain protection from international treaties.

Firstly, from a Chinese perspective, more than 80% of Chinese BITs and TIPs contain the "in accordance with the law" provision.[119] With respect to the VIE structure, Chinese laws and regulations are silent on its legitimacy. In practice, Chinese courts require legal entities to conform to the general principles, such as good faith. Investors may be bound by this principle in the name of the *clean hands* doctrine. However, the Chinese SPC has not provided a concrete conclusion on the legitimacy of VIEs. Therefore, the estoppel principle of the States may not apply in this situation. Whether the investment made under the VIE regime is in accordance with Chinese law is still unclear and uncertain. Thus, it becomes difficult to prove that China is inconsistent in its attitude to the legitimacy of the VIE regime.

Secondly, Chinese courts give a narrow definition of the "law" of the State. In line with the judicial practice in Chinese courts, the "law" may only refer to the law made the National People's Congress and its Standing Committee. On the basis of this definition, the guidelines and catalogues for foreign investment access are excluded from the scope of "law". However, they constitute the essential parts of Chinese legal rules in relation to the admission and the establishment of foreign investment.

In contrast, arbitral tribunals may have an expansive definition on the scope of "the laws and regulations of the host State." The existing case law demonstrates that arbitral tribunals may examine any law related to foreign investment. Arbitral tribunals may have a particular focus on the law concerning the admission and establishment of investment, although they may refer to the laws in other areas, such as education, as they relate to investment. When the legitimacy of the VIE regime is under debate in Chinese law, arbitral tribunals may be persuaded to examine the disputes in two different ways. On the one hand, they could apply Chinese Legislation Law to define the scope of the law. This approach may exclude those foreign investment catalogues and guidance from Chinese "law". Although the exclusion adopts the same interpretation as Chinese courts, it may make those catalogues and guidance lose their

[119] According to UNCTRAD database, 97 out of 113 mapped international investment agreements signed by China have the "in accordance with the law" provision.

international legal effect. On the other hand, arbitral tribunals may broaden Chinese law to any legal rules governing foreign investment. Arbitral tribunals may hold that the plain meaning of the treaty requires the investment to be established under the laws and regulations of the States. Therefore, the catalogues and guidance will subsequently have their effects, because they are created for regulating foreign investment access.

Although investment treaties are not able to change the domestic legislation of the States, they can clarify the meaning of provisions. The enactment of an investment treaty between two states brings a solution by offering a delicate balancing of interests to satisfy the interests of both contracting states.[120] Investment treaties may include additional elements into the content of the treaty. For example, treaties may clarify the scope of the law and regulation of the contracting states in order for arbitral tribunals to apply the identified law. Moreover, treaties can also clarify the content of the "control" criterion applied. Thus, treaties may also define a definition of the "control" criteria when treaties apply it. The control criterion is one of the main criteria for determining the scope of foreign investment.[121] Treaties may express how the control relationship is set up between two entities, such as owning a majority of voting equities of an entity or having other influential power over an entity. In particular, a treaty may mention whether signing a contractual agreement with an entity is also a way of setting up a control relationship. By addressing the concept of "control", treaties can clarify the legitimacy of the investment made by using the VIE structure from a treaty perspective.

5. Conclusion

This chapter discusses the standing of entities within the VIE structure in order to present one situation in which arbitral tribunals have not yet undertaken their examination yet. The chapter shows that potential challenges will still be raised along with other standing disputes, in relation to controlled entities, shareholders, and SOEs studied in the earlier chapters.

The VIE structure is a creative model in international investment. This model gives foreign investors opportunities to obtain returns from prohibited or restrictive industries. This model may contribute to promoting global business, while also creating potential challenges in the legal system concerning the foreign investment access in the host State. The VIE structure has two conflicting functions: firstly, it needs to be legal under the domestic law of a host State in which foreign investors are not allowed to own or control domestic entities in selected sectors; secondly, the foreign investors must bypass the law to have sufficient control over the domestic entities through the contractual agreement.

[120] Samuel Farrell Ziegler, 'China's Variable Interest Entity Problem: How Americans Have Illegally Invested Billions in China and How to Fix It' (2016) 84 The George Washington Law Review 539, 554.
[121] Chapter 2.

From a Chinese perspective, the relevant law and legal practice in China are still underdeveloped and generally remain silent on the legitimacy of the VIE structure. There is no systematic regulation giving clear and explicit governance to the VIE scheme. In practice, China adopts a careful approach to determining the legitimacy of the VIE structure. Chinese courts prohibit the violation of the laws, in particular, to conceal an illegal purpose under the guise of a legitimate transaction. Nevertheless, courts have not given direct opinions on the role of VIEs.

The legal blank on the regulation of VIEs in domestic law creates a less predictable environment for investors. Added to this, in ITA, investment is usually required to be established by the law of the host State in order to receive protection in investment treaties. Therefore, meeting the requirements of domestic legislation in the host State is a preliminary requirement for a foreign investor to gain substantive protection for international investment. Nevertheless, domestic law makes no straightforward reference to the legitimacy of the VIE structure.

As a consequence, the standing of the entities within the VIE structure is another potential area of dispute that may arise in relation to the controlled entities in international investment law. This chapter suggests that domestic law should clarify the regulations of the VIE structure in order to create an expected and transparent investment environment for foreign investors and to ensure that the role of the entities within the VIE structure is legal. Moreover, investment treaties could contain more detailed provisions with a focus on the potential disputes arising from the VIE structure. For instance, treaties may indicate the scope of the “law and regulations” in the contracting states. Treaties may also further identify the control relationship between different entities by clarifying the meaning of the control criterion applied.

To conclude, the standing of the entities in the VIE structure is one particular situation that this thesis discusses. The analysis set out to show that legal disputes in domestic law would interact to raise the investment challenges in international investment law. It also shows that potential disputes concerning the standing of controlled entities may arise in ITA.

CHAPTER 7 GENERAL CONCLUSIONS

1. Introduction

Jurisdiction *ratione personae* is a core issue in international investment arbitration. It determines the identity of those entities that are qualified to be investors subject to investment treaties. Added to this, it allows qualified investors to obtain substantive protection in the merit process. However, the standing of legal entities has stirred a growing number of disputes in ITA. As Chapter 1 introduced, such disputes pertaining to access to arbitration of legal entities arise as a consequence of several reasons which are outlined as follows.

Firstly, the ISDS mechanism was established more than a half-century ago when international business was simpler, and investors' corporate structures were less complicated than those of today. The ISDS, including ITA, had its limitations when it was designed in terms of regulating specific types of entities. Added to this, being the legal foundation of ITA, neither the ICSID Convention nor BITs/TIPs give a precisely clear answer to how to determine the standing of specific entities. The law leaves the standing of those entities, including controlled entities, shareholders, and SOEs, to be determined by arbitral tribunals. Moreover, the legal blanks in domestic law, such as the legitimacy of VIEs, also provide potential challenges to ITA.

However, arbitral tribunals do not provide consistent approaches to deciding the standing issue and their analyses are not comprehensive and convincing. Furthermore, there is a trend that arbitral tribunals are giving expansive access to arbitration to foreign investors. Such an increasing trend makes states re-consider the function of ISDS and ITA. States argue that the wide-open doors opened by arbitrators to investors, give them an excessive burden to appear in the arbitral proceedings. States, therefore, make a serious and careful consideration to reform the ISDS mechanism, including limiting the standing of investors. Some contracting parties exclude the ISDS provisions, such as ITA clauses, in their newly negotiated treaties. As a consequence, the disputes arising out of legal entities' access to arbitration become a primary issue to be settled in ITA.

In order to resolve the disputes, this thesis establishes a comprehensive approach to examining the standing of legal entities. This chapter concludes this thesis by answering the research question addressed in Chapter 1: *how should the access of various types of*

legal entities to investment treaty arbitration be determined? To resolve this question, the theoretical framework of this thesis, Chapter 2, portrayed a brief history of the ISDS mechanism and the legal foundation of ITA in order to present the research criteria for determining foreign investors' access to arbitration. On the basis of those criteria, the content chapters, Chapters 3 to 5, addressed the research question from different aspects by examining the standing of three groups of legal entities. Chapter 6 discussed one particular type of entity, VIEs, in order to argue that there are still potential challenges existing in ITA.

Section 2 presents the legal problems and shows that access to arbitration is the core dispute in ITA. Section 3 will make a systematic application of the research criteria presented in Chapter 2 to show how each criterion was applied by arbitral tribunals to examine the standing of different entities. This section will give general answers to the research question and provide a comprehensive approach to arbitral tribunals. Subsequently, Section 4 will address how the approach proposed by the thesis will be implemented. The legal disputes arise as a result of the blurred provisions in the treaties, so the legal recommendations will be given to the treaty negotiations. Although this thesis provides a study which is as extensive as possible, it still has research limitations. Therefore, Section 5 will address the research limitations and point out topics to be addressed in the future. Section 6 will bring new insights into future research. Section 7 ends this thesis with some final observations.

2. Access to Arbitration as the Core Dispute in Investment Treaty Arbitration

This section presents the reasons for undertaking this thesis by answering why "access to arbitration" has become the core dispute in ITA. Two primary reasons will be discussed. The first reason relates to the origins of the ITA mechanism. It argues that the blurred ICSID Convention and investment treaties result in the standing disputes arising in investment arbitration. The second reason concerns the features of the ITA mechanism, which give rise to challenges against the arbitral tribunals' approaches.

2.1 The History of the Investor-State Dispute Settlement Mechanism

The history of creating the ICSID Convention shows that the ISDS mechanism is a product as a result of compromises between different state parties. The ISDS mechanism was proposed to provide the safeguards to foreign investors and protect their interests. However, investors' access to arbitration has not been regulated explicitly since the beginning of establishing the ISDS mechanism was established. Therefore, the identity of investors is the core issue to be determined. However, the ICSID Convention was proposed to develop procedural regulations, rather than substantive regulations, on international investment. In consequence, states did not agree on a unified and explicit regulation on the standing of entities in investment arbitration. Article 25 of the ICSID Convention establishes the jurisdiction of the ICSID,

but it does not clarify which specific types of entities are able to gain access to arbitration. Article 25 (1) states that any dispute submitted to arbitration should arise *directly* out of an investment between a Contracting State and a national of another Contracting State. However, the term "directly" has not been further interpreted. It results in legal disputes concerning whether shareholders' claims are regarded as arising directly out of the investments.

With regard to the legal entities, Article 25 (2) further requires that an investor should have the nationality of a Contracting State other than the State party to the dispute. One exception is that an entity with the nationality of the State party to the dispute can also be the qualified investor if that is under foreign control. However, the ICSID Convention did not explain what "foreign control" means and how to identify the standing of the investors that are under foreign control. Therefore, whether the entities, who are controlled by other entities, are qualified investors or not, becomes a legal problem. Moreover, Article 25 also does not provide further information on the scope of the legal entities, such as which types of entities are covered. For example, whether SOEs or particular types of entities, such as VIEs, are qualified investors has not been addressed. In these circumstances, the ICSID Convention only provides vague provisions concerning the standing of legal entities. The drafters of the ICSID Convention intended to leave the contracting states to make separate agreements to determine the identities of the entities. With this in mind, the drafters believed that the vague provisions contained in the Convention could make it easier for states to agree on substantive investment protection on a bilateral or multilateral level rather than at a universal level.

BITs and TIPs started to include investor-State arbitration provisions as one dispute settlement option from the late 1960s and early 1970s. Contracting states use different criteria to describe the entities that are covered in the BITs and TIPs. Three criteria are usually applied in the treaties, including the place of incorporation criterion, the substantial business criterion, and the control criterion. The place of incorporation criterion usually establishes a formalist determination and asks an investor to be incorporated in accordance with the law of the State. The substantial business criterion further requests an investor to run an actual business in its state. The control criterion typically admits an entity to be covered by the treaty if it is controlled by nationals of the contracting states subject to the treaty. However, treaties usually do not clarify the concept of "control", such as how to determine the existence of "control" and what is the form of "control". As a result, BITs and TIPs define the identity of investors from different approaches and leave arbitral tribunals to apply the criteria to decide on the investors' access to arbitration.

In the first few years after the ICSID Convention was signed, no investor-State arbitration case was brought by investors. Although it became standard practice to include the ISDS provisions in the BITs and TIPs, only a limited number of arbitrations

were initiated in the 1990s. The situation concerning the few investor-State arbitration cases changed dramatically in the 2000s, especially after Argentina's financial crisis. More than 1000 investment arbitration cases have been brought based on the investment treaties and/or the ICSID Convention so far. With the steady rise of the investment arbitration claims, states bear an increasing burden of appearing in arbitration proceedings and recovering investors' losses (if states lose their cases). In consequence, states are engaged in reforming the ISDS mechanism to limit the investors' legal standing. [1] States hold that investors have been given excessive access to arbitration, and the frivolous or unmeritorious claims increase the length and cost of the ISDS proceedings.

Furthermore, the ISDS mechanism was established in the late 1960s when the global investment was less comprehensive, and investors had less complicated structures than those of today. In the context of that time, drafters of the mechanism might not expect the complex corporate structure so that they did not provide detailed provisions concerning the standing of legal entities. Nowadays, corporate groups, especially those international investors, have complex structures, different ownership and various types of entities. In particular, it is common to see legal entities alter their structures when they make international investments in order to maximize their benefits. The existence of those entities makes it more challenging to determine the identity of investors. In view of these difficulties, several legal entities are discussed in this thesis, and they all play an essential role in international investment, including controlled entities, shareholders, SOEs, and VIEs.

2.2 The Features of Investment Treaty Arbitration

The features of ITA further complicate the issues concerning the standing of investors. The ICSID Convention and investment treaties are the legal foundations of ITA, but they only provide confusing provisions to regulate investors' access to arbitration. The absence of clear and detailed guidance in the treaties allows arbitral tribunals to have relatively strong competence to make their determination. Nevertheless, the rule of precedent does not apply in ITA, so the decisions made by earlier arbitral tribunals do not bind the later arbitral tribunals. As a result, when disputes occur, the arbitral tribunal in one case is independent of other arbitral tribunals and makes its own independent decisions. Although the non-binding effect develops the investment arbitration case law, it also gives rise to the debates concerning the inconsistent and incomprehensive decisions made by some arbitral tribunals.

Concerning the standing of investors, arbitral tribunals may apply an expansive or restrictive approach to examining the disputes. However, if arbitral tribunals open

[1] UNCTAD, 'Draft report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session' (A/CN.9/964) 109-123.

unlimited doors to investors, they will impose an excessive burden on the States. Conversely, when arbitral tribunals grant investors restricted accesses to arbitration, it will make the mechanism fail to achieve its objectives. In practice, arbitral tribunals are in favour of applying the expansive approach to deciding their jurisdiction. Only in a few situations, the jurisdiction is not established on the basis that arbitral tribunals find claimants are not qualified investors subject to the treaties applied. One possible reason is that arbitrators' fees and arbitrators' power have some relevant effects. If arbitral tribunals are not able to establish that the claimants are manifestly disqualified as investors, they would prefer to continue the case instead of giving up their power to examine the merits in the following proceedings. Arbitrators' personal feelings and ambitions such as maximizing their juridical powers, would make an impact on their decision-making. It is worth noting that this speculation does not question the professionalism of the arbitrators. However, it would be another interesting interdisciplinary research to discover to what extent the psychological feelings of arbitrators who hear the case will influence the decisions of arbitral tribunals in their jurisdiction. Given these points, this thesis provides its own approach, as comprehensive as possible, to determine the investors' access to arbitration. Otherwise, the failure of determining the investors' standing would result in unfair treatment to the parties in dispute.

To sum up, this section shows why investors' access to arbitration is a legal problem to be determined in ITA. Investors' legal standing has been a potential dispute since the creation of the ISDS mechanism. The cause of the problem is the vague provisions contained in the ICSID Convention and the treaties. With the development of global investment, the complex structures and types of investors further complicate the standing issue. Until now, the standing of investors has been listed on the agenda of the ISDS reform. From a practical point of view, the features of ITA result in various approaches made by different arbitral tribunals concerning the standing disputes. In order to resolve the legal problem, this thesis covers two critical aspects. The first aspect is to provide the comprehensive approach of the thesis to determining the standing of entities. Tracking back to the origins of the legal problems, the second aspect is to clarify those vague provisions in the ICSID Convention and treaties. It uses the practical experience gained in investment arbitration cases to offer recommendations for treaty negotiations.

3. A Comprehensive Approach to Determining the Standing of Legal Entities

This section presents its comprehensive approach to determining the standing of legal entities in ITA. Section 3.1 makes a systematic application of the research criteria followed by the research in earlier chapters. The application contributes to providing the factors, which should be considered by arbitral tribunals. In the light of this, Section 3.2 gives general answers to the research question of this study.

3.1 Systematic Application of the Research Criteria

In Chapter 2, three main criteria were presented; these are divided from the general practice of international law, general principles of international investment law and the theory of corporate law. Due to the vague provisions in the treaties, the first criterion requires that the treaties should be interpreted in a comprehensive manner. As a recognised treaty in international law, the VCLT serves as a useful example to interpret the international treaties in dispute. In addition, arbitral tribunals should make their determination in the context of international investment law. More specifically, the objectives of the ITA mechanism, which indicates its specialisation from other dispute settlement mechanisms, should be considered. Moreover, as this thesis focuses on four different entities, the doctrine of "piercing the corporate veil" contributes to analysing the entities' legal standing.

All of these three criteria formulate the basis of the content chapters to examine the arbitral tribunals' approaches. However, this section mentions that some additional factors should also be considered, because different cases may have separate backgrounds, which are not specified by the general rules. In order to discover the similarities and differences of these approaches, this section shows how arbitral tribunals should apply these criteria in ITA.

3.1.1 Interpreting the Treaties in a Comprehensive Manner

Concerning the standing of investors, the provisions in the ICSID Convention and treaties are blurred. It leaves great flexibility to arbitral tribunals to interpret the disputed provisions. The ICSID Conventions, BITs and TIPs are all international treaties. In order to interpret them, the VCLT should be applied, which incorporated the general rules of interpretation in international law. In practice, arbitral tribunals regularly refer to the VCLT to establish their legal basis of treaty interpretation. However, not every tribunal applies the VCLT in a rational and accurate way. Some arbitral tribunals only partially apply the VCLT to make their interpretation.

In particular, the partial application of VCLT has frequently been made in cases relating to the standing of controlled entities in Chapter 3.[2] With respect to the standing of those entities, the rule of interpretation usually applies where arbitral tribunals discuss how to apply the criteria to determine entities' nationality. Some arbitral tribunals simply apply the test recorded in the "definition of investor" provisions in the treaty to examine the nationality of the entities. Take the place of incorporation criterion as an example. A treaty may require a legal entity to be established in accordance with the law of the State in order to be qualified as an investor. Some arbitral tribunals only apply this sole criterion to make their determination and hold that this approach follows the plain meaning of the provision in the treaty. However,

[2] See Chapter 3 for the definition of "controlled entities".

this position is incorrect. Firstly, the approach of arbitral tribunals only technically applies, not interprets, the treaty provisions. Secondly, the VCLT requests the "ordinary meaning" of the treaty provisions to be understood in its context as well as in the light of its object and purpose. When the treaty objective indicates that the treaty is designed to protect foreign investors or investors with a particular nationality, arbitral tribunals should consider the foreign nature of the investors and the real nationality held by the investors.

With regard to the dispute on the standing of shareholders discussed in Chapter 4, arbitral tribunals usually interpret the "direct" requirement under Article 25 of the ICSID Convention to determine if the dispute arises "directly" out of the investment. The dispute concerns whether shareholders have independent rights to bring arbitration claims and whether the shareholders' claims are seen to arise directly out of the investment. In the light of the VCLT, the ordinary meaning of the "directly" in the ICSID Convention refers to the links between the dispute and the investment. Consequently, the direct link between the dispute and its investment is the key for an investor to have its legal standing, rather than its identity, whether shareholders or not.

Moreover, Chapter 5 discovers that arbitral tribunals do not explicitly apply the VCLT to analyse the standing of SOEs. The core issue of the SOE's standing is whether an SOE can be regarded as a private investor in arbitration. Arbitral tribunals reach the same conclusion that an SOE is a qualified investor unless it invests in its public authority character. Therefore, it is not compulsory to apply the VCLT or other rules of interpretation to guide arbitral tribunals to interpret that requirement further. As a result, arbitral tribunals usually do not apply the VCLT in this regard.

Furthermore, as an international rule of interpretation, the VCLT does not apply when examining the legal status of VIEs in domestic law. Nevertheless, one hypothetical question will be raised in the context of international investment. To be specific, investors are required to be established in accordance with the law of the host State. However, the law of the host State may not clarify the legitimacy of VIEs in domestic law. For example, Chapter 6 discussed the approaches of Chinese courts and found that the courts are silent on the legal status of VIE related issues. In this situation, arbitral tribunals may not ascertain whether the VIEs are in line with the law of the host State. In consequence, arbitral tribunals will interpret the "in accordance with the law" provision in order to determine the legitimacy of VIEs, subject to the VCLT.

3.1.2 Analysing in the Context of Investment Arbitration

The second criterion requires arbitral tribunals to analyse the legal issues in the context of ITA. In particular, the objectives of investment arbitration should be taken into consideration. This criterion is based on a historical review of the investor-State arbitration mechanism to discover how this mechanism was created and what is

protected. This dispute settlement mechanism has its specialisation since it was designed in the very beginning. Because of the specialisation, claimants choose ITA to bring their claims rather than other alternative dispute settlement mechanisms. Therefore, the determination on the standing of entities should be made within the context of this mechanism.

The criterion includes two major aspects of consideration. The first aspect shows that the nature of investors is the key factor that differentiates between the ITA and other mechanisms. To be specific, the "foreignness" of claimants is required when a legal entity brings a claim, and it should be regarded as a foreign investor. Moreover, ITA is to resolve the dispute between private parties and states. Therefore, investors should also make their private investment as private entities. Secondly, this criterion addresses the issue that the balance of the rights between investors and host States is important. Foreign investors are offered the rights to bring their direct claims against host States. Conversely, states preserve their rights to regulate foreign investment in their competency. Eventually, this criterion further suggests that arbitral tribunals should take both investors' and states' rights into consideration in order to make a comprehensive determination.

Concerning the standing of controlled entities, Chapter 3 explains that investors should have their "nature of foreignness" in order to gain access to arbitration. ITA was designed to protect foreign investors. In the light of this speciality, when arbitral tribunals examine the standing of the entities, their nature should be taken into account. For instance, when solid evidence shows that one foreign entity is created by a domestic entity to gain benefits from the investment arbitration mechanism, then a foreign entity should not be identified as a foreign nature. As a result, that entity will not have its legal standing. However, this position was not widely accepted by arbitral tribunals. Only a few arbitral tribunals considered the objectives of the investment arbitration mechanism. The ignorance of the objectives results in the mechanism being ineffective in terms of protecting foreign investment rather than domestic investment.

The same idea also applies to examine the status of shareholders' claims. As one of the legal bases of the investment arbitration mechanism, the ICSID Convention requires that a dispute should have a direct link with the investment. In order to discover the reason for having this requirement, Chapter 4 tracks back to the negotiation history of the ICSID Convention. Although no record shows why the final version of the Convention used that specific wording, the direct requirement was proposed to avoid all kinds of disputes that could be brought to arbitration. However, this requirement addresses the importance of the direct links between the dispute and the investment, to which arbitral tribunals should pay attention. In consequence, Chapter 4 holds that the examination of arbitral tribunals should focus on the directness issue when the disputes are concerned with the standing of shareholders.

Concerning the standing of SOEs, Chapter 5 also made a historical review of the investment arbitration mechanism. The review investigates whether the mechanism was designed to protect those entities which are controlled by the States and have public characteristics. By referring to the negotiation report, the Convention proposed to regulate the flow of international private capital. In order to further indicate the scope of the Convention, the *Broches* test proposed by the drafter of the Convention was also used. The application of the test identifies the types of investors that are covered by the Convention. The *Broches* test clarifies that SOEs are generally qualified as investors in investment arbitration unless they invest as agents for their governments. Therefore, when SOEs bring their claims, the core issue to be determined is whether they make investments on behalf of their states.

Furthermore, in view of the theoretical framework, this criterion also claims that host States should provide a predictable environment for foreign investors to invest. ITA is a mechanism created in order to protect foreign investors. Therefore, foreign investors should be granted the rights and responsibilities subject to the mechanism. The rights of foreign investors include the expectation of making their investment and the acknowledgement of the legal regulations that may affect their investment. More specifically, the investment legislation in the host State should be predictable to investors in order for them to follow up. With this intention, investors should comply with the investment rules of host States. For this reason, Chapter 6 applies this criterion by arguing that unclear legislation concerning VIEs in the host State may present challenges to those investors that use the VIE structure to invest. As a result, the second criterion may still be taken into account by arbitral tribunals, although the dispute related to VIEs is still a potential one.

3.1.3 Investigating Corporate Misconduct

This thesis has a particular focus on legal entities. Chapter 2, therefore, presented the only criterion from the perspective of company law, which was the doctrine of piercing the corporate veil. This doctrine allows the court to investigate the misconduct of the company. Based on this doctrine, the court can disregard the separation between the company and its shareholders/controllers and find the liability of the entity who abused its rights. This doctrine also demonstrates several general principles of law, including the principle of good faith, the theory of the abuse of rights, and the rule of equality.

When it comes to the standing of the controlled entities, the wording “piercing the corporate veil” has been explicitly mentioned in many cases. It has always been argued that arbitral tribunals should pierce the veil of the controlled entities which bring claims, in order to identify their controllers as the real investors. Arbitral tribunals usually allow the entities to reserve their right to manage their structure and to arrange their investment. However, arbitral tribunals usually do not pierce the veil of the controlled entities, even when they are controlled by the entity from the host State or a third state,

which is not a party to the treaty applied. In this situation, arbitral tribunals should conduct a more in-depth analysis to discover the initiatives of the entity. Any possible misconduct made by the entities that bring the claims should be examined, such as whether controlled entities are created with improper objectives in order to gain access to arbitration.

Alternatively, the same argument appears when the controller of the entity is a sovereign state. Chapter 5 showed that arbitral tribunals discuss whether they should pierce the SOE's veil to determine the State as the real investor. If so, the SOE is prevented from bringing claims in investment arbitration. In this situation, the misconduct of SOEs refers to making investments of public character. In ITA, arbitral tribunals held the same approach to determining the standing of SOEs. However, a number of specific factors should be considered to identify the actual link between SOEs and their states in international investment. For instance, arbitral tribunals should investigate whether the government authority takes charge of the daily business and commercial activities of the SOE, especially in the disputed investment.

Moreover, this doctrine also plays a role in a situation where shareholders bring their claims. The traditional corporate law theory claims that there are separations between the company and its shareholders. Shareholders, especially those with non-controlling powers, are restricted in bringing their claims. For instance, non-controlling shareholders are allowed to bring claims when the company and/or controlling shareholders misuse the separated corporate structure to gain improper benefits. However, those shareholders with non-controlling powers should still be protected in ITA if they are qualified as investors subject to other requirements of the treaties. In view of this, the doctrine will resolve the disputes concerning the standing of shareholders in ITA. This means that companies' veils can be pierced to allow shareholders' claims when their companies fail to protect the shareholders' investment.

Furthermore, this doctrine was also applied to resolving the disputes in relation to VIEs. From a domestic law perspective, "piercing the corporate veil" has been applied, although the courts may not refer to the same wording. The domestic courts usually state that the principle of good faith serves a general standard. It is also not permitted to bypass the legal rules and to establish a corporate form in order to achieve an illegal objective. Chinese courts also do not allow the misuse of the corporate structure for illegal purposes, but they remain silent on the legitimacy of VIEs. Nevertheless, one potential dispute is investment treaties which request the investment to be made "in accordance with the law" of the host State, so it was argued whether the investment made within the VIE structure conforms with the law of the host State. The "in accordance with the law" requirement also expresses the *clean hands* doctrine in a way and only allows entities who are acting legally to bring claims. It also shares the same idea with the "piercing the corporate veil" doctrine in terms of prohibiting corporate misconduct. Therefore, once the dispute arises, arbitral tribunals should still consider

this criterion.

To sum up, the three major criteria interconnect and work together for a comprehensive determination on the legal standing of entities. In particular, although the third criterion borrows the doctrine from domestic law, it also shares the same values with the first two criteria. Firstly, the third criterion focuses on the investigation of corporate misconduct. Therefore, it intends to guarantee good faith in international investment. The first criterion addresses that "good faith" is also an important umbrella rule that is explicitly mentioned in the VCLT. A comprehensive treaty interpretation contributes to giving a fair and good decision to parties in the dispute. Secondly, investigating corporate misconduct ensures the parties do not abuse their rights and even gain benefits from their misbehaviour. Alternatively, the investigation also grants equality to both investors and states. In the context of investment arbitration mechanism, the second criterion shows that equal rights between the investors and states are also required. In consequence, all these criteria presented in this thesis play their respective and interconnect roles in guiding arbitral tribunals to making the determination.

3.1.4 Considering Supplementary Factors

In line with the general principles of international law, investment law and corporate law, the three criteria have been applied to examine the approaches of arbitral tribunals. However, Chapter 2 mentioned that the criteria are non-exclusive. With regard to the research context, the disputes which arise from the standing of the entities covered in this thesis are different from each other. To be specific, Chapter 3 deals with the disputes concerning when an entity brings its claim, whether its controller should be regarded as the real investor. It refers to the situation where the foreign investors, who bring the claim, are controlled by the domestic investor or the investor from a third state. Alternatively, another situation concerns a domestic investor who brings an arbitration claim, but the investor is controlled by foreign investors. Moreover, the main focus of Chapter 4 is whether a shareholder's claim should be regarded as a dispute arising directly out of an investment. By a different token, Chapter 5 argues about how to determine the standing of entities with public authorities when investment arbitration only intends to protect international private capital. In Chapter 6, one potential dispute will arise in ITA when the host State does not make a precise determination on the legitimacy of a particular entity. The dispute relates to whether the entity is established in accordance with the law of the host State in order to become a qualified investor. Although the legal problems in each chapter are all related to the standing of investors, individual chapters have separate sub-research problems.

In addition, the features of ITA show that the rule of precedent does not apply as a fixed rule to be followed. Arbitral tribunals in individual cases do not need to follow the consistent decisions made by earlier tribunals to make their jurisdiction. Due to the variety of the research scope and the features of ITA, the theoretical chapter did not

give the exclusive list of the research criteria. Indeed, arbitral tribunals should still consider other factors in the light of case facts. This section will introduce these additional factors that have been mentioned by arbitral tribunals. These factors should also be considered as a supplementary guideline, and they will bring some insights into subsequent arbitration proceedings.

In the first place, the initiatives of states should also be analysed when arbitral tribunals examine investors' initiatives. It is an expression of the equality principle to consider the other respondent state when an investor brings a claim. For instance, concerning the standing of controlled entities, arbitral tribunals may maintain that contracting states should be aware of the test used in the treaty to identify investors. As the legal foundation of ITA, treaties express the initiatives of states in the treaty provisions. However, in some cases, arbitral tribunals examine the State's initiatives by comparing the disputed treaty with other treaties signed by the same state. The approach should not be supported because each individual treaty has its negotiation background. Therefore, each treaty applied should be interpreted by following the VCLT. The interpretation should be made subject to its individual objectives rather than other treaties.

Concerning the standing of shareholders, when one group of investors bring claims, arbitral tribunals may also take the rest of the investors from another group into account. As presented in Chapter 4, when non-controlling shareholders bring their arbitration claims, arbitral tribunals may also consider the initiatives of the controlling shareholders. Such a consideration contributes to concluding a comprehensive understanding of why those non-controlling shareholders bring their claims. Nevertheless, this thesis suggests that this consideration only serves a supplementary but not a decisive role, because the rest of the shareholders are not a party to the dispute.

Moreover, some separate factors are mentioned in the research. Concerning the determination of SOEs' standing, arbitral tribunals lack sufficient factors to establish the link between the SOEs and their states. In order to rectify this situation, Chapter 5 refers to some practice in Hong Kong courts. The courts give some guidelines on how to distinguish between the SOEs' commercial activities and those activities that SOEs undertake with their state's authority. For instance, considering case facts, the guidelines can be the SOE's independent discretion, separate legal personality, and financial autonomy as well as the State's control power as an investor. In addition, arbitral tribunals should also consider the law of the SOE's home state, which provides its regulations on the legal status of SOEs.

Furthermore, with regard to the disputes concerning VIEs, Chapter 6 presents some potential legal disputes. Its analysis does not provide any additional factors to arbitral tribunals, because it is still unknown how arbitral tribunals will make the analysis. However, arbitral tribunals may be alarmed that the legitimacy of the investment in the

host State would be most likely questioned.

To conclude, these additional factors may usually be minor elements considered by some arbitral tribunals. This thesis suggests arbitral tribunals should gain some lessons from the factors. These factors are usually based on the examination of case facts. The legal theory behind them is usually the general rule of good faith, the rule of equality, and the *clean hands* doctrine. To a certain degree, these factors share the same ideas with the doctrine of piercing the corporate veil. All these factors intend to prevent the party to the dispute from misusing the mechanism to gain improper benefits. However, the factors are not exclusive. With the development of arbitration cases, more specific factors may be mentioned. If this section must make its conclusion, it will be that arbitral tribunals should consider all the factors in view of the three major criteria, the supplementary factors and case facts.

3.2 General Answers to the Research Question

After a systematic application of the research criteria, this section gives the general answers to the research question: *how arbitral tribunals should determine the legal standing of entities in ITA*? Overall, legal entities can gain access to ITA if they are qualified as foreign investors. Nevertheless, when disputes arise in arbitral proceedings, this thesis suggests that arbitral tribunals should determine the access of legal entities to ITA as follows.

In the first place, arbitral tribunals should acknowledge the content of the treaties applied and respect the objectives of the treaties to conclude their jurisdiction. The ICSID Convention and investment treaties are the legal basis for arbitral tribunals to make the determination. In order to apply the applicable treaties and/or the ICSID Convention, the first step is to interpret the disputed provisions in the treaty. With regard to interpreting international treaties, the VCLT usually plays its role to guide the interpretation. Consequently, arbitral tribunals should make a comprehensive and systematic application of the VCLT in order to discover the original meaning of the disputed provisions.

Added to this, arbitral tribunals should also take the objectives of the ITA regime into consideration. The analyses of arbitral tribunals should be made in the context of the ITA mechanism. The focus should be on three particular perspectives. Firstly, from a historical perspective, ITA was created to resolve the disputes between foreign investors with qualified identities and host States. Therefore, investors are required to have a foreign nature in order to acquire protection. Secondly, foreign investors should make private investments because the mechanism was designed to protect international private capital. Thirdly, the rights of investors and states should be balanced. The ITA mechanism, as a procedural mechanism, gives direct access to arbitration to investors. It allows private investors and host States to be equal in the dispute settlement

proceeding. However, this direct access does not refer to unlimited access. Therefore, when arbitral tribunals examine the access of investors, they should regard investors and states as equal parties to the dispute and respect their respective rights. All these aspects demonstrate that ITA is different from other mechanisms. In consequence, the specialisation of the mechanism is seen as the primary reason for investors to resolve investment disputes, which should become the umbrella rule to guide arbitral tribunals.

Furthermore, the decisions made by arbitral tribunals are made on the basis of case facts. Although legal entities have the rights to manage their international investment or re-arrange their structures, the rights should be subject to certain limitations. When arbitral tribunals find any circumstance in which the entity manages its structure in order to gain improper benefits from the arbitral proceeding, they should dismiss the claims. The doctrine of piercing the corporate veil plays its unique role in the situation. Investors are not permitted to gain benefits from their misconduct in ITA.

In sum, this section presents general answers about how to examine the access of various legal entities to ITA. This research covers different entities and the legal disputes arising from one entity differ from those of another. Arbitral tribunals still need to consider the specific disputed issues in view of the general answers to make a final and comprehensive determination.

4. Implementing the Research's Suggestions

After answering the research question, this section further presents the ideas concerning how to implement the suggestions proposed in this research. As claimed earlier, investors' access to arbitration becomes a critical problem because the provisions contained in the ICSID Convention and treaties are not clear. In consequence, this section holds that more detailed explanations should be incorporated into treaties. Therefore, it proposes the legal recommendations to the amendment of the ICSID Convention and the treaty negotiation in the future.

4.1 Implementing the Comprehensive Approach

Section 3 provides a comprehensive approach to examining the legal standing of investors. On the basis of this approach, arbitral tribunals are able to determine the access to arbitration of different types of legal entities. "What approach should arbitral tribunals take" is one important issue, while "how to implement the approach" is the follow-up question. This section gives two suggestions to the arbitration practice.

The first suggestion is given to parties to the disputes, namely claimant investors and respondent states. Although this thesis guides arbitral tribunals on their determination, it also brings insights to the parties. In light of this thesis, parties will be aware of the legal disputes that will be argued and the arguments that will be made. Parties can also

bear in mind the potential legal problems discussed when they make or accept the investments. To be specific, parties should address in their submissions all of the factors mentioned by this study in order to support their arguments. The parties should provide a comprehensive interpretation of the disputed treaty in the context of ITA mechanism and presents all the facts to address the investors' conducts and states' initiatives. In arbitration, when either party mentions any factor, arbitral tribunals have to examine that factor in their award. In consequence, the parties' exhaustive arguments will urge arbitrators to determine the standing disputes in a comprehensive manner.

The second suggestion is to provide a guide of conduct to arbitral tribunals to examine the investors' standing for arbitral tribunals. For instance, the secretariats of the ICSID and the UNCITRAL released a draft code of conduct for adjudicators on 1 May 2020.[3] The draft conduct reflects the work of UNCITRAL Working Group III (the ISDS Reform) and the amendment process of the ICSID rules.[4] It applies to all the adjudicators including arbitrators in ITA and requests them to display the "highest standards" of integrity, fairness and competence.[5] More specifically, parties to the dispute should be treated equally and given reasonable opportunities for presenting the case.[6] Likewise, the comprehensive approach presented earlier requires the parties to be given equal and sufficient opportunities to examine the standing disputes.

Moreover, in light of the UNCITRAL Working Group III report, the draft Code also requires arbitrators to "take reasonable steps to maintain and enhance the knowledge, skills and qualities necessary to fulfil their duties.".[7] The knowledge includes public/private international law, international trade and investment law, as well as different investment policies and relevant domestic legal systems.[8] For instance, When it comes to the disputes related to SOEs and VIEs, the domestic law of the host States is also one crucial factor to be considered.

In the end, the draft Code is still a proposal made by the ICSID and the UNCITRAL, and it still needs to be implemented in practice. However, the content addresses some essential aspects that arbitral tribunals should consider. For instance, in order to determine the standing of investors in the highest standard, arbitral tribunals can sign a separate memorandum to ensure all the factors related to determining jurisdiction will be considered and to make the best and most comprehensive decision.

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[3] ICSID, 'ICSID and UNCITRAL Release Draft Code of Conduct for Adjudicators' (1 May 2020) < https://icsid.worldbank.org/en/Pages/News.aspx?CID=365 >. The Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement, released on 1 May 2020 [hereinafter "Draft Code"]

[4] *Ibid*.

[5] Draft Code, Article 3.

[6] Draft Code, Article 7.

[7] *Ibid*.

[8] A/CN.9/1004/Add.1, para 97.

4.2 Incorporating Recommendations into Treaties

If the disputing parties wish to prevent conflicts, the treaties that they apply should be clear and as detailed as possible. ITA practice has effects on the development of investment treaties. A gradually increasing number of investment treaty negotiations establish the correlations between the ITA practice and the modification of new provisions in the treaties. A general recommendation of this section is for detailed provisions concerning the standing of legal entities in the treaty text in order to avoid any misconceptions. It covers two aspects: recommendations to the amendment of the ICSID Convention and recommendations to BITs/TIPs.

However, the process of producing international treaties has a political function because states and society assert their interests and values to achieve respective values. In consequence, treaty negotiations are also bound by political pressures coming from negotiating state parties. Contracting States may negotiate treaties with mixed motivations, including legal and political considerations. It makes investment treaty negotiation become more than a purely legal issue. However, this thesis limits itself to purely legal research. It gives recommendations to future treaty negotiation from a legal perspective by incorporating the lessons learnt from arbitration practice. States are encouraged, from a legal perspective, to adopt the recommendations given by this thesis. However, how the recommendations will be implemented is also subject to the political positions of the States.

4.2.1 Recommendations to the ICSID Convention

The broad provisions contained in the ICSID Convention result in those various legal challenges. Firstly, the nature of the ICSID Convention varies from any investment treaties or TIPs. The ICSID Convention is designed as a framework for dispute settlement mechanism rather than setting out any universally applied substantive standards.[9] However, the current ISDS reform concerns the arbitration process and arbitration outcomes as well as the guidance to arbitrators.[10] At the present time, the ICSID and its Member States do not intend to change the jurisdiction provision in the ICSID Convention. Instead, they are only proposing to amend the rules governing arbitration and conciliation under the ICSID Convention and the ICSID Additional Facility Rules, as well as new stand-alone rules for fact-finding and mediation in investment disputes.

The amendment of the ICSID Convention will be a remarkable and long-term project, which should be carefully considered. When the amendment occurs in the future, its Article 25 needs to be further clarified. This thesis have already addressed several potential disputes which arise out of that article. In the light of the legal problems

[9] Chapter 2 of this research.
[10] UNCITRAL, A/CN.9/WG.III/WP.142.

discussed, further clarifications should be given to the scope of "national of another Contracting State". To be specific, concerning "juridical person" in Article 25 (2)(b), whether some specific types of entities are covered in this article, such as SOEs, and VIEs should be clarified. Moreover, the issue of what claims, such as shareholders' claims, will be regarded as arising "directly out of an investment" should be elaborated. Furthermore, the phrase "because of foreign control" term in Article 25 (2)(b) should be carefully determined, including the forms, types and scopes of control. It helps to identify the real identity of the controller of the investors, when the controlled entities bring their claims.

4.2.2 Recommendations to BITs and TIPs

In addition to the recommendations to the ICSID Convention, BITs and TIPs should also be further elaborated. Individual recommendations to treaties concerning the legal entities studied might be given to treaties as follows.

Recommendations concerning the legal standing of controlled entities: Firstly, treaties can use more detailed provisions to determine who is an investor, and further to express who is entitled to bring claims directly. For example, when a treaty uses the control criterion to define investors, it should also give the meaning to the term "control." Based on the interpretation, arbitral tribunals are able to discover the real identity of the entities that are controlled by other entities. In consequence, arbitral tribunals can make a direct determination on the standing of the controlled entities. Secondly, treaties can address the circumstances in which controlled entities are not allowed to receive remedy from investment arbitration. For instance, treaties can include the Denial of Benefits clauses in order to prevent corporate misconduct. It aims at ensuring entities which bring claims are qualified as foreign investors subject to the treaties.

Recommendations concerning the legal standing of shareholders: The majority of treaties grant broad definitions to their covered investment and investors. Some treaties expressly address the issue that shares of an enterprise can be classed as a covered investment. Nevertheless, the approach to giving broad definitions does not provide a straightforward answer to shareholders' claims. In consequence, treaties should directly confirm the eligibility of shareholders to submit their independent claims in ITA when they suffer losses.

Recommendations concerning the legal standing of SOEs: Due to the critical role in international investment, SOEs are usually allowed to bring their claims to investment arbitration as long as they invest in their commercial capacity. It is an exception to see that a treaty excludes SOEs as covered investors. Nowadays, given the growing importance of SOEs in global economic relations, treaties increasingly include provisions which expressly expand their scope to SOEs to varying degrees. Moreover, some treaties cover SOEs as investors explicitly. Added to this, treaties can make a

further determination by defining the specific activities that SOEs are able to undertake in order to acquire protection from the ITA.

Recommendations concerning the legal standing of other entities, such as VIEs: The standing of VIEs is one potential problem that states should foresee. The broad concept of this legal issue relates to the lawfulness of the investors and their investments in their host States. Investment treaties cannot change the law of the States, but they may help to clarify some disputed terms. For instance, when treaties require the investment to be made in accordance with the law of the host State, they should also add a reference to interpreting the meaning of the "law" and identifying its scope. To be specific, the "law" in the provision is limited to the law as a particular legal text, or it may extend to any legal rules in relation to foreign investment.

To sum up, the recommendations to treaties mentioned above exhibit a wide range of features. Future contracting states can take these features into consideration, and future treaty drafters can use them to solve the standing disputes. Contracting States should bear in mind all the potential challenges and disputes, together with those inexplicit provisions that could be brought to both the States and foreign investors. Future drafters may make full use of these recommendations, which are based on a systematic study of arbitration practice.

5. Research Limitations

The content chapters address the legal standing of different entities, which cover controlled entities, shareholders, and SOEs. It also singles out a particular entity, the VIE, to make a hypothetical analysis. The selection is intended to cover all the legal issues concerning the standing of controlled entities and their access to ITA. With the development of international investments, the structure of legal entities will become gradually more complex. In unexpected and exceptional circumstances, this thesis may not cover the legal issues arising out of the complex structures of legal entities in the far future. The discussion on VIEs represents one possibility. Consequently, more investigation will be needed if new entities pursue investment arbitration.

One practical limitation is the cases selected in this research. This thesis limits its scope to the representative cases in relation to foreign investors' access, but these cases are not exclusive. In the first place, it is not possible to cover all the investment arbitration cases addressing the legal standing issues. Many investor-State arbitration cases were published online, on the websites of the arbitration institutions or some major reference websites.[11] However, there are still many other cases that are not published because the

[11] For instance, the ICSID website, <https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx>; Some major reference caseload websites are, ITALAW < https://www.italaw.com/ > Investment Policy Hub < https://investmentpolicy.unctad.org/ >; Oxford Reports on International Law Investment Claims <https://oxia.ouplaw.com/ >; Max Planck Encyclopedia of Public International Law, 'Investment' < https://opil.ouplaw.com/search?sfam=&q=investment&prd=EPIL&searchBtn=Search>.

parties to the dispute do not consent to publish or do not agree due to some technical problems. These unpublished cases may also include disputes about the legal standing of foreign investors.

Despite the limitations, the most important and remarkable cases that are publicly available have been discussed to examine the legal problems in the content chapters. For example, when it comes to the legal standing of controlled entities, the *Tokios* cases are usually referred to by the arbitral tribunals in the subsequent cases. Moreover, a number of Argentina cases were analysed in order to discover the similarities and differences of the arbitration practice related to shareholders' access to arbitration. With regard to the legal standing of SOEs, the *CSOB* case is also an example mentioned by arbitral tribunals in the latter proceedings. In addition, this thesis only discusses the VIE practice from a Chinese perspective. However, this choice is made because the VIE has raised several debates in Chinese law, and the structure has been widely used in China.

Consequently, although the research does not conduct an empirical study to analyse all the ITA cases, the cases discussed in the research are representative and critical. These cases studied are also influential in the sense that many are always mentioned by the subsequent arbitral tribunals. Those cases selected still made a significant effect on the development of ITA and broadly ISDS.

6. Future Research

Future research in the context can draw attention to resolving the limitations pointed out above. Currently, there is no available database for making an exclusive case study of all the ITA cases in relation to the standing of legal entities. For instance, Italaw is a comprehensive database on investment treaties, investment law and investment arbitration, but it is still unable to cover every detail of arbitration cases. Many on-going projects are keen to build up a system to code variables of the investor-State arbitration, such as the PITAD or the UNCTAD Investment Policy Hub.[12] By gaining access to these databases, it may be possible to investigate all the cases recorded in relation to the standing disputes. However, although these databases will provide a comprehensive study by coding the various legal disputes in the investment treaty regime, they may still be subject to some limitations. For instance, the coding system is subjective, so it

The recommendations of these websites can be found at Peace Palace Library, 'Foreign Direct Investment Database Section' < https://www.peacepalacelibrary.nl/research-guides/economic-and-financial-law/foreign-direct-investment/#database >

[12] PluriCourts Investment Treaty Arbitration Database (PITAD) is a research project of the PluriCourts-Center for the Study of the Legitimate Roles of The Judiciary in the Global Order at the University of Oslo. PITAD claims that "In PITAD, we provide a comprehensive, regularly-updated and networked overview of all-known international investment arbitration cases."
< https://www.jus.uio.no/pluricourts/english/topics/investment/research-projects/database.html >. The Investment Policy Hub of the UNCTAD has been explained in the previous chapter.

needs to be checked manually for consistency.[13] Moreover, the coding process in some situations is linked to external databases as well as the caseloads of the arbitration institutions, like the ICSID, the PCA or the SCC. Therefore, it is necessary to ensure the accuracy of the cases coded. To resolve this concern, if needed, arbitration institutions should also take part in the process and cooperate with each other by offering their first-hand case information.

In the near future, new technology such as artificial intelligence (AI) may be able to record all the investment arbitration cases.[14] With the application of AI, it could be efficient to portray the whole universe of ITA cases by providing the case information, giving the opinions of arbitral tribunals, and referring to relevant cases. AI has also played its role in the judicial process to ensure uniformity in sentencing.[15] In particular, the coherence and consistency of arbitral awards are on the agenda of the ISDS reform led by the UNCITRAL Working Group III, which maintains that a coherent dispute settlement system may ensure that its components are logically related without contradictions.[16] Nevertheless, these suggestions do not mean AI can replace arbitral tribunals to make the decisions. The determination process still needs arbitral tribunals to make comprehensive analyses by using their professional expertise and experience. Instead, this suggestion shows that the development of global business may create new challenges, but the new technology created during the development can also be applied to resolving the legal problems.

7. Final Observations

Access to arbitration is the primary issue to be determined in the ISDS mechanism. The importance of this legal problem is reflected in the following aspects. Firstly, legal entities having access to arbitration means that they establish the legal standing of the arbitration proceeding. It allows their substantive disputes to be further examined by arbitral tribunals. Therefore, having legal standing is a prerequisite for investors' obtaining protection in ITA. Secondly, being the main form of ISDS, ITA was created to provide a particular dispute settlement for foreign investors and host States. In consequence, a comprehensive determination of investors' status guarantees the operation of the ISDS mechanism. Thirdly, an accurate determination can improve

[13] The introduction of the PITAD project. The UNCTAD project is also incorporated with other institutions, such as universities.

[14] Ibrahim Mohamed Nour Shehata, 'The Marriage of Artificial Intelligence & Blockchain in International Arbitration: A Peek into the Near Future' *Kluwer Arbitration Blog* (12 November 2018) < http://arbitrationblog.kluwerarbitration.com/2018/11/12/the-marriage-of-artificial-intelligence-blockchain-in-international-arbitration-a-peak-into-the-near-future/ >. Lucas Bento, 'International Arbitration and Artificial Intelligence: Time to Tango?' *Kluwer Arbitration Blog* (23 February 2018) < http://arbitrationblog.kluwerarbitration.com/2018/02/23/international-arbitration-artificial-intelligence-time-tango/ >.

[15] Adam Liptak, 'Sent to Prison by a Software Program's Secret Algorithms' *The New York Times* (1 May 2017) < https://www.nytimes.com/2017/05/01/us/politics/sent-to-prison-by-a-software-programs-secret-algorithms.html >.

[16] UNCITRAL, A/CN.9/WG.III/WP.142, 7/11.

investors' confidence, increase international investments, enhance the development of states, and then promote global development.

However, the legal problems concerning investors' access to arbitration have never been resolved in a systematic way. A growing number of conflicts arise as a result of lacking a comprehensive approach for determining investors' legal standing. Moreover, the problems have become particularly difficult and have been frequently argued nowadays because the corporate structures of investors are complex due to global development. For example, disputing parties challenge arbitral tribunals because they do not make consistent and convincing decisions on standing disputes. Investors are not clear whether they can gain accurate access to arbitration. State parties allege that they bear too much burden to deal with unlimited investors' claims. All these concerns pose a challenge to the ISDS mechanism, which in turn pose a danger to the protection of international investment.

Given these points, when legal entities knock on arbitrators' doors, whether or not arbitration should open the doors to them and how wide the doors should be opened are the focus of the research. The goal of this research is to provide a comprehensive approach to guiding arbitral tribunals to determine the legal standing of different entities in ITA. In order to achieve the goal, this thesis established the theoretical framework on the basis of the general rules of international law, a historical study of the ITA mechanism and corporate law theory. Based on the framework, the arbitral decisions have been analysed in this respect in different cases in order to find both the common and different lines of determining the investors' standing. This thesis can advise arbitral tribunals on how they should make the decision, what factors they should consider, and how wide they should open doors to investors in the future. The entire study can also be of interest to both investors and states. Investors will know whether they can gain access to arbitration and how they should argue about their legal standing in ITA. Alternatively, policymakers and treaty drafters should interpret the provisions which are not clear in the existing treaties, and clarify the provisions in as much detail as possible in their future treaties.

International investment continues growing, and the identity of investors will become gradually more complex. The development of international investment will bring challenges to identifying investors' legal standing, but it will also bring opportunities. Future research can use the new technology to make an exclusive analysis of all the investment arbitration cases. An empirical study can present every factor considered in arbitration practice and evaluate each arbitral decision. Moreover, an inter-disciplinary study can be made to discover the relations between the arbitrators' legal decisions on jurisdiction and their psychological activities concerning financial interests, juridical powers, and reputations.

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Summary

When legal entities knock on arbitrators' doors in order to gain access to investment treaty arbitration (ITA), their accessibility to arbitration is one of the primary issues that need to be determined. Jurisdiction *ratione personae* implies deciding what entities are qualified as foreign investors in accordance with the treaties, and allows those qualified investors to pursue their substantive protection. However, since the establishment of ITA, treaties do not give a precisely clear answer concerning the question of how to determine the standing of specific types of entities. In practice, arbitral tribunals do not provide consistent and comprehensive approaches to determining the standing issues, which challenges the functionality of the investor-State dispute settlement mechanism. Moreover, with the development of international investment and global business, the structures of legal entities have become more complex, which brings increasing difficulties in identifying investors in ITA.

Given these points, when legal entities bring their claims, whether or not arbitration should open the doors to them and how wide the doors should be opened are the focus of the research. This thesis answers the research question: *How should the access of various types of legal entities to ITA be determined?* The research identifies four different entities, the status of which lies behind the majority of legal challenges concerning jurisdictional disputes in ITA. The entities studied include (1) controlled entities, (2) shareholders, (3) state-owned enterprises, and (4) variable interest entities.

The research objective is to provide a comprehensive approach to guiding arbitral tribunals to determine the standing of legal entities. In order to achieve the goal, the research builds up a theoretical framework based on the general rules of international law, a historical study of the ITA mechanism and corporate law theories. Based on the Framework, this research analyses and examines arbitral decisions and related domestic cases in order to find the common and different lines in determining the investors' standing. The analysis identifies the essential elements that arbitral tribunals should take into consideration and presents relevant factors which could avail arbitral tribunals in comprehensively deciding standing issues. Moreover, the existing and potential challenges should be factored into the consideration of future investment treaties. In consequence, this research also provides recommendations for future investment treaty negotiations.

This thesis can advise arbitral tribunals on how they should make their decisions, what factors they should consider, and how wide they should open the doors to investors in

the future. It can also be of interest to both investors and states. Investors will know whether they can gain access to arbitration and how they should argue about their legal standing in ITA. Alternatively, policymakers and treaty drafters should interpret the provisions which are not clear in the existing treaties, and clarify the provisions as much detail as possible in their future treaties.

Samenvatting

Wanneer rechtspersonen bij arbiters aankloppen om toegang te krijgen tot investeringsarbitrage (ITA), dient doorgaans als eerste te worden vastgesteld of zij in aanmerking komen voor arbitrage. De bevoegdheid *ratione personae* impliceert dat bepaald moet worden welke entiteiten op grond van de verdragen kwalificeren als buitenlandse investeerders en stelt deze gekwalificeerde investeerders in staat hun inhoudelijke bescherming na te streven. Sinds de oprichting van ITA geven verdragen echter geen duidelijk antwoord op de vraag hoe de status van specifieke soorten entiteiten moet worden vastgesteld. In de praktijk voorzien arbitragetribunalen niet in een rechtlijnige en integrale aanpak voor wat betreft het beoordelen van de statuskwesties, hetgeen de functionaliteit van het schikkingsmechanisme in een geschil tussen de investeerder en de Staat in twijfel trekt. Tevens is de structuur van rechtspersonen, door de ontwikkeling van internationale investeringen en wereldhandel, complexer geworden, waardoor het steeds lastiger wordt om investeerders te identificeren in ITA.

In het licht van deze argumenten focust het onderzoek zich, wanneer rechtspersonen hun claims indienen, op de vraag of en in hoeverre arbitrage voor hen tot de mogelijkheden behoort. In dit proefschrift wordt de volgende onderzoeksvraag beantwoord: *Hoe zou de toegang van verschillende soorten rechtspersonen tot ITA moeten worden bepaald?* Het onderzoek constateert vier verschillende entiteiten, waarvan de status het voorwerp is van bevoegdheidsgeschillen in ITA. De bestudeerde entiteiten zijn, onder meer, (1) gecontroleerde entiteiten, (2) aandeelhouders, (3) staatsbedrijven en (4) Variable Interest Entities

Het doel van het onderzoek is een gedetailleerd plan van aanpak te verschaffen ter begeleiding van arbitragetribunalen bij het vaststellen van de status van rechtspersonen. Teneinde het doel te kunnen bereiken, stelt het onderzoek een theoretisch kader op dat gebaseerd is op de algemene regels van het internationale recht, een historisch onderzoek van het ITA mechanisme en theorieën vanuit het vennootschapsrecht. Op basis van het Framework worden arbitrale besluiten en aanverwante nationale zaken geanalyseerd en onderzocht teneinde de overeenkomsten en verschillen te ontdekken voor wat betreft de bepaling van de status van investeerders. De analyse krijgt de essentiële elementen boven tafel die arbitragetribunalen in overweging zouden moeten nemen en toont relevante factoren aan die tribunalen van pas kunnen komen bij het nemen van een integrale beslissing over statuskwesties. De bestaande en potentiële

uitdagingen zouden tevens moeten worden verdisconteerd in de behandeling van toekomstige investeringsverdragen. Dit heeft ertoe geleid dat dit onderzoek ook voorstellen doet voor toekomstige onderhandelingen over investeringsverdragen.

Dit proefschrift kan arbitragetribunalen adviseren over de wijze waarop zij hun besluiten zouden moeten nemen, welke factoren zij zouden moeten betrekken en in hoeverre zij de deur in de toekomst zouden moeten openzetten voor investeerders. Het kan ook interessant zijn voor zowel investeerders als voor de Staat. Investeerders zullen weten of arbitrage voor hen een optie is en hoe zij hun juridische status moeten beargumenteren in een ITA. Subsidiair zouden beleidsmakers en verdragsopstellers de onduidelijke bepalingen uit de huidige verdragen moeten uitleggen en zo gedetailleerd mogelijk moeten verduidelijken in toekomstige verdragen.

Curriculum vitae

ZHANG Anran
a.zhang@law.eur.nl
ryanzhanganran@outlook.com

Short bio	
ZHANG Anran has been working at Rotterdam Institute of Law and Economics & Erasmus China Law Center, Erasmus University Rotterdam since 2018. His doctoral research focuses on international investment law and dispute settlement mechanism. During his PhD trajectory, he presented his research in numerous academic conferences, participated in renowned international congresses, and made a wide range of publications. He worked as a consultant and a legal intern at the ICSID (World Bank Group) in 2020. He undertook his research at Europa Institute, Leiden University (2016-2018) and was a visiting researcher at University of Cambridge (2017). He gained his Master of Laws degree at Uppsala University with the IPK scholarship and attended the summer course at the Hague Academy of International Law (2015). Before his path in the international legal journey, he was conferred Bachelor of Laws by Southwest University of Political Science and Law and Bachelor of Arts in English Literature by Sichuan International Studies University (2014). He passed the Chinese Bar Exam and Test for English Major Grade 8 in 2013.	
Education	
PhD Candidate- Erasmus School of Law, Erasmus University Rotterdam	2018-2020
PhD Exchange- Faculty of Law, University of Cambridge	2017
LL.M- Faculty of Law, Uppsala University	2014-2015
B.A- School of English, Sichuan International Studies University	2011-2014
LL.B- School of Economic Law, Southwest University of Political Science and Law	2010-2014
Work experience	
Legal Intern -International Centre for Settlement of Investment Disputes, World Bank Group	2020
Doctoral Researcher/Staff Member-Europa Institute, Leiden University	2016-2018
Research Intern/Team Leader- Development Research Centre of the State Council, PRC	2017
Prizes and awards	
Awardee of International Scholarship Exchange of PhD Candidates	2020

and Academic Staffs at University of Lodz-The European Union and Polish Government	
Awardee of National Scholarship for Interning at International Organisations- China Scholarship Council	2020
Conference Grant- Asian Society of International Law, Korean Chapter	2017
Awardee of National Scholarship for PhDs- China Scholarship Council	2016
Publications	
Chinese State-Owned Enterprises in Africa: Always a Black-and-White Role? in *Transnational Dispute Management Journal* (Vol 6, Co-author YIN Wei)	2020
The Role of State-Owned Enterprises in Investment Protection Agreements: A More Experienced EU Approach? in "Investment Protection, TTIP and beyond" *LawTTIP Jean Monnet Network Working Paper Series*	2019
The Standing of Chinese State-Owned Enterprises in Investor-State Arbitration: The First Two Cases, in *Chinese Journal of International Law* (Vol 17)	2018
Challenges of Bilateral Investment Between Czech Republic and China: Investment Policy and Legal Concerns, in *Czech Yearbook of Public and Private International Law* (Vol 9)	2018
A Domestic National Controls a Foreign Investor in Investment Arbitration: In Light of China's Negative Lists in J Gorski & J Chaisse (eds) *The Belt and Road Initiative, Law, Economics, And Politics* (Brill Nijhoff)	2018
Six Blog Posts at Leiden Law Blog	2017-2018
Others	
Membership, American Society of International Law	2020-
Membership, Society of International Economic Law	2016-
Membership, European Society of International Law	2016-
Membership, International Council for Commercial Arbitration	2016-2017

PhD Portfolio

Name PhD student : Anran Zhang
PhD-period : 2016-2020
Promoters : Michael Faure and Yuwen Li

PhD training

EDLE courses	***year***
EDLE ESL Academic Writing Skills for PhD Students	2019
Specific courses	***year***
Effective Communication Training	2017
Academic Writing for PhDs	2017
Data Management Training	2017
WTO and Investment Law	2017
Empirical Research Methods in Law	2016-2017
Qualitative Research Methods	2016
Philosophy of Science for Lawyers	2016
Seminars and workshops	***year(s)***
Erasmus China Law Center Seminars	2019
European Doctorate in Law and Economics Seminars	2018-2020
Behavioural Approach to Contract and Tort Seminars	2018-2020
EU Case Law Lunch & Dinner Series	2016-2018
Presentations	***year***
Guest Lecturer, Qingdao Center for Global Governance and International Law, Qingdao University, Online	2020
Speaker, Erasmus Graduate School Lunch Lecture Series, Erasmus University, the Netherlands	2018
Speaker, 1st LawTTIP Young Researchers Workshop, King's College London, UK	2018
Speaker, Ius Commune Congress, the Netherlands	2017
Co-presenter, Chinese Society of International Economic Law, China	2017
Speaker, Junior Scholar Workshop, Asian Society of International Conference, South Korea	2017
Speaker, Asian International Economic Law Network Conference,	2017

China	
Speaker, EU Law at Liverpool, Liverpool-Leiden-Oslo PhD Colloquium, UK	2017
Speaker, Resolution of International Disputes at COFOLA Conference, Czech Republic	2017
Attendance (selected) conferences	***year***
Global Infrastructure Forum (online)	2020
Asian Infrastructure Investment Bank Annual Meeting (online)	2020
American Society of International Law Annual Meeting (online)	2020
Georgetown International Arbitration Month, US	2020
Asian Infrastructure Investment Bank Annual Meeting, Luxembourg	2019
Fédération Internationale Pour Le Droit Européen (FIDE) XXVIII Congress, Portugal	2018
The Fourth Annual OECD Investment Treaty Conference, France	2018
The Postgraduate and Early Professionals/Academics Network of the Society of International Economic Law, the Netherlands	2017