2022

The Elastic Corporate Form in International Law

Julian Arato

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International law is distorting basic features of the corporate form like separate legal personality and limited liability, sometimes beyond recognition. Surprisingly, this is occurring in the law and institutions governing foreign investment—a field in which one would expect relative sensitivity to the stability and efficiency of the corporate form. The main driver is investor-state dispute settlement (ISDS), a treaty-based system which allows private investors to directly sue sovereign states in highly enforceable international arbitration. ISDS tribunals vary wildly in their respect for basic corporate formalities. As digested through the cases, the corporate form takes on a plasticity that undermines the basic expectations of all stakeholders—with costs for shareholders, management, creditors, governments and peoples.

This Article makes four main contributions. First, I identify a fundamental but overlooked elasticity in how international law grapples with corporate law. Second, I show how this distorts the corporate form, with inefficient and unfair consequences that drive up the costs of doing business for all concerned—the opposite of what investment treaties are designed to achieve. Third, I offer a coherent, if troubling, account of ISDS' ambivalent formalism. The pattern of cases cannot be explained doctrinally or functionally. The best account is rather an ex post *story of tribunals consistently expanding claimants' access to arbitration—at the expense of both investors' and states'* ex ante *interests in transactional efficiency. Finally, I argue that this account points toward a broader divergence between the stated purposes of ISDS and its practical functions. The investment treaty regime is regularly pitched as a vehicle for promoting efficient investment, but this goal has been gradually subordinated to expanding (privileged) access to justice through claims to damages.*

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[*] Professor of Law, Brooklyn Law School. I am indebted to Rick Brooks, Kevin Davis, David Dyzenhaus, Michael Waibel, and the participants in the *NYU Colloquium on Contract Law and Theory*; to Kathryn Judge, David Pozen, and the participants in the *Columbia Law School Faculty Workshop*; to Adam Feibelman, Ann Lipton, and the participants in the *Murphy Institute Colloquium* at Tulane; and to Lauge Poulsen, Federico Ortino, Mona Pinchis Paulson, and the participants in the 2021 *International Economic Law and Policy Workshop*. Thanks are also due to Katharina Pistor, Robert Scott, Zohar Goshen, J. Benton Heath, Benedict Kingsbury, James Gathii, Anu Bradford, David Schizer, Merritt Fox, Eric Talley, Victor Goldberg, George Bermann, Avery Katz, Matthew Waxman, David Zaring, Lori Damrosch, Tim Meyer, Karen Alter, Will Moon, James Nelson, Miriam Baer, Andrew Gold, Nicolas Lamp, Kathleen Claussen, Stratos Pahis, Rebecca Ingber, Pamela Bookman, Thomas Streinz, Harlan Cohen, Mohammed Hamdy, Simon Batifort, Andrew Jennings, Frank Pasquale, Alice Ristroph, Vijay Raghavan, Jocelyn Simonson, John Coyle, Steven Dean, and Julianne Marley.

INTRODUCTION

International law is warping the corporate form. The modern corporation is marked by a set of dependable hallmarks across domestic legal systems—such as separate personality, limited liability, and managerial control.[1] These basic features are central to the success of the corporation as a vehicle for efficiently organizing capital at scale and managing risk. Yet in international law, these formalities are today in flux. The distortion is occurring, of all places, in the law of foreign investment, where one would expect the stability and efficiency of corporate formalities to matter most. The main driver is investor-state dispute settlement (ISDS)—a treaty-based system of adjudication which allows corporate investors to sue sovereign states in highly enforceable international arbitration. ISDS tribunals have varied widely in their respect for basic corporate formalities. As digested through the cases, the form takes on a plasticity that undermines the basic expectations of all stakeholders—with costs for shareholders, management, creditors, governments, and peoples.

ISDS tribunals confront questions about corporate formalities regularly, if usually implicitly, such as when considering who can sue on a corporation's behalf, or when and where veil piercing might be appropriate. These matters are often not addressed, or not addressed clearly, in the underlying investment treaty. Tribunals are thus left to puzzle out the meaning of basic corporate formalities in international investment law anew, on a case-by-case basis.

Depending on the issue in question, tribunals' deference to form has been highly elastic. Some strands of cases are dismissive of basic formalities. For example, ISDS tribunals typically allow shareholders in a local company to bring claims against the state, and to recover directly, for injuries inflicted on the company—though such shareholder claims for indirect (or "reflective") loss are generally barred in domestic law. In opening this door, ISDS sweeps aside core assumptions about the separate legal personality of the corporation—including the firm's capacity to own property in its own name, to contract in its own name, and to initiate litigation on its own behalf.[2]

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1 John Armour, Henry Hansmann, Reinier Kraakman, Mariana Pargendler, *What Is Corporate Law?*, *in* JOHN ARMOUR ET AL., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 1 (3d ed. 2017) (noting five core features: (1) separate legal personality; (2) limited liability; (3) transferable shares; (4) centralized management; and (5) shared ownership).

2 *See* Julian Arato, *The Private Law Critique of International Investment Law*, 113 AM. J. INT'L L. 1 (2019); Julian Arato, Kathleen Claussen, Jaemin Lee, & Giovanni Zarra, *Reforming Shareholder Claims in*

Yet, in other case lines, tribunals have been highly formalistic. When it comes to limited liability, tribunals tend to venerate the corporate form. For example, they have recoiled at the invitation to look through an impecunious corporate entity to assess the wealth of its parent for purposes of posting security for costs. Still other cases extend and supercharge these formalities. For example, tribunals tend to insist on an ironclad presumption against veil piercing to determine the real or effective nationality of a firm, allowing investors to "shop" for treaty protection by structuring their investments through intermediary shell companies.[3] This pushes formalism to the point of providing cover for socially undesirable firm behaviors.

From the perspective of corporate law, several of these case lines are questionable in their own right—particularly the dismissal of form in relation to shareholder claims and the hyper-extension of form in relation to treaty shopping. They each create problems of efficiency, fairness, and equitable distribution. Taken together, the case law subverts the basic expectations of corporate insiders (shareholders and management) and outsiders (creditors and governments), undercutting the signal value of the corporate form as a means of organizing capital at scale.

Moreover, the ambivalence of ISDS tribunals' commitment to formalities raises its own synthetic questions—particularly as to whether there is some coherent policy basis for the elasticity of form in ISDS, or whether there is something else going on. This is not to overstate the formalism of domestic law. It is a fact that domestic corporate law is highly formalistic on some matters, and sometimes less so.[4] For example, under certain circumstances domestic courts abandon formalism in accepting veil piercing as an equitable remedy.[5] The lines policing form can be messy, but the patterns are usually at least reasonably discernable and at least usually based on *ex ante* policy goals (however contested these may be). This is not

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ISDS, (Acad. F. on ISDS Concept Paper 2019/9); David Gaukrodger, *Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law* (OECD Working Papers on International Investment, 2014/02, July 23, 2014), http://dx.doi.org/10.1787/5jz0xvgngmr3-en; Vera Korzun, *Shareholder Claims for Reflective Loss: How International Investment Law Changes Corporate Law and Governance*, 40 U. PENN. J. INT'L L. 189 (2018).

3 *See* George Kahale, *The New Dutch Sandwich: The Issue of Treaty Abuse*, COLUMBIA FDI PERSPECTIVES No. 48 (2011); Julian Arato, *Corporations as Lawmakers*, 56 HARV. INT'L L. J. 226, 275 (2015).

4 Mariana Pargendler, *Veil Peeking: The Corporation as a Nexus for Regulation*, 169 U. PENN. L. REV. 717, 719–722 (2021).

5 *See* Cheng-Han Tan, Jiangyu Wang, & Christian Hoffman, *Piercing the Corporate Veil: Historical, Theoretical, and Comparative Perspectives*, 16 BERKELEY BUS. L. J. 140 (2019) (comparing the grounds for veil piercing in the United States, England, Singapore, Germany, and China); Jonathan Macey & Joshua Mitts, *Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil*, 100 CORNELL L. REV. 99, 100 (2014).

what is happening in ISDS, where the relevant decisions are rarely justified on policy grounds. Here it is difficult to reconstruct any coherent justification for tribunals' solicitousness to form in some cases but not others.

This Article provides an account of the elasticity of the corporate form in ISDS. I acknowledge up front that the best explanation may simply be the contingent one—that the varied solicitousness to the corporate form and its functions is a mere byproduct of the cases' otherwise coherent focus on other doctrinal or policy matters. It is also possible that the divergent cases can be explained by arbitrators doing their best in a seemingly discrete area of international law, without the benefit of particular expertise in corporate law—perhaps coupled with a degree of path dependency. It is certainly not surprising that claimants' counsel would adopt differential emphases on form depending on what would best serve their litigation strategies.[6] But it is nevertheless worth thinking through whether a cross-cutting account is available. I suggest that there may be a common thread—one which prompts us to think more carefully about the beneficiaries of ISDS and the incentives set by the investment treaty regime.

I argue that the inconsistent solicitousness to the corporate form in ISDS can be best understood by focusing on winners and losers.[7] The elasticity cannot be explained doctrinally, as investment treaties are mostly silent on these questions. Neither can it be explained in simple functional or ideological terms as a case of pro-capital bias. Indeed, as I will show, the jurisprudence on corporate formalities is often inefficient for investors *ex ante*, and freezes certain investors out *ex post*. The best account of elastic formalism in ISDS is rather an *ex post* story of bias toward claimants (as opposed to the broader class of investors). Across the board, the pattern of cases consistently pushes toward opening access to claimants, broadening the scope of available claims, and reducing the risks of bringing suit. Without impugning any particular actor's motivations, I note further that these pro-claimant interpretations also dovetail with arbitrators' own material interests, given the typical fee-structure of ISDS disputes. These insights

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6 KATHARINA PISTOR, THE CODE OF CAPITAL 206 (2019) ("Asset holders . . . will take legal protection where they can find it. . . Often, the same asset holders who only recently waged a battle to have their private rights fully protected by law will then seek exemptions from those very rules, when they realize that these rules might also be used against them.").

7 *See* Nicolas Lamp, *How Should We Think about the Winners and Losers from Globalization? Three Narratives and Their Implications for the Redesign of International Economic Agreements*, 30 EUR. J. INT'L L. 1359 (2019); ANTHEA ROBERTS & NICOLAS LAMP, SIX FACES OF GLOBALIZATION: WHO WINS, WHO LOSES, AND WHY IT MATTERS (2021).

suggest a potential mismatch between the objectives of ISDS, its practical function, and its ultimate beneficiaries.

Part I explains the core features of the corporate form in domestic law, and how the basics of the form are classically mirrored in general international law. It then explains how the political economy of the investment treaty regime and contemporary investment practices put pressure on this general consensus. Part II turns to the cases, to illustrate the elasticity of the corporate form in ISDS, and to draw out its pathologies. Part III attempts to explain the cases, arguing that the common thread appears to be a "pro-claimant" instinct rather than a "pro-investor" one. I conclude by suggesting that the oscillating engagement of ISDS with the corporate form shows how the supposed core objective of investment treaties—promoting cross-border investment *ex ante*—is increasingly dwarfed by the instrumental goal of securing access to justice for a privileged class of economic actors *ex post*. All this further suggests that some targets for reform may be more promising than others.

I. FORM AND FUNCTION

Throughout this Article, I focus on two pillars of the corporate form: separate legal personality and limited liability. These principles are bedrocks of domestic corporate law, and public international law has adopted them wholesale. Yet ISDS is upending this general consensus, pushing the investment treaty regime to distort and abandon these basics. Investment law may seem a far-flung and narrow corner of international legal space, unlikely to affect corporate law and governance in any meaningful sense. But it turns out that decisions made in the peripheries of investment law and arbitration have effects that radiate back into domestic corporate governance. Any economic actor operating under the shadow of an investment treaty has to accept that this highly justiciable and enforceable regime of international law effectively re-orders the risks and incentives of investing abroad through corporations—effectively displacing contrary domestic corporate law.

This Part first sets out separate legal personality and limited liability as classical features of the corporate form, common to most domestic legal systems (I.A.). It then lays out the mostly deferential approach of general international law to these formalities (I.B). Finally, it explains how the realities of cross-border investment put pressure on separate personality and limited liability in the context of the investment treaty regime. (I.C). I turn to ISDS' distortive response to these pressures in Part II.

A. The Corporate Form in Domestic Law

The business corporation (or company) is the most common vehicle for large scale cross-border investment projects—i.e. those at issue in ISDS.[8] Across all legal systems, the corporate form exhibits the same core characteristics: (1) separate legal personality; (2) limited shareholder liability; (3) transferability of shares; (4) centralized management; and (5) shared investor ownership.[9] Together, these interrelated features provide a streamlined and efficient vehicle for mobilizing capital at scale—one which is "uniquely effective at minimizing coordination costs."[10] The primary function of corporate law everywhere is thus to *empower* private parties to organize their businesses through this uniquely efficient legal form.[11] Selection of the corporate form, in turn, signals the applicability of well-known basic rules, on which corporate insiders (shareholders and management), and outside constituencies (creditors, governments, and publics) all rely.[12]

The second key function of corporate law is *regulatory*. Despite its merits, the corporate form tends to create serious agency problems (or conflicts of interest): between shareholders and managers; between controlling and minority shareholders; and between shareholders and outside constituencies (especially creditors).[13] These problems largely arise out of the same features that give the corporate form its distinct value. The bulk of corporate law in all jurisdictions is dedicated to mitigating these conflicts to "reduc[e] the ongoing costs of organizing business through the corporate form."[14] Importantly, however, there is no single blueprint. Domestic legal systems differ markedly in which strategies they adopt to manage the relevant tradeoffs, reflecting substantial differences in values and priorities.[15]

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8 Gaukrodger*, supra* note 2; *See also* Armour et al., *supra* note 1, at 1.

9 Armour et al., *supra* note 1, at 5.

10 *Id.* at 1–2.

11 *Id.* at 1.

12 Gaukrodger*, supra* note 2, at 10.

13 Armour et al., *supra* note 1, at 2. As shareholders retain some control, the form can also create principal costs, which trade-off with agency costs depending on the precise corporate governance structures adopted. *See* Zohar Goshen & Richard Squire, *Principal Costs: A New Theory for Corporate Law and Governance*, 117 COLUM. L. REV. 767. These kinds of tradeoffs can arise for several of the questions at issue here, such as whether management or shareholders (and which shareholders) control the decision to litigate ISDS disputes with host states. *See infra,* Section II.A.

14 Goshen & Squire, *supra* note 13, at 784.

15 Domestic corporate laws also vary in how far they enshrine values external to firm efficiency, "such as reducing systemic risk, mitigating gender inequity, or protecting the environment." Armour, et al., *supra* note 1, at 24; *see also* AARON DHIR, CHALLENGING BOARDROOM HOMOGENEITY:

The distortion of form in international law tends to upset both the empowering and regulatory functions of corporate law. To illustrate the problem, I focus on ISDS tribunals' engagement with just two hallmarks of the corporate form: separate legal personality (arguably the most fundamental); and limited liability (probably the most salient to non-specialists). However, it should be clear by the end that investment arbitration can affect the other features of the form as well.

ISDS tribunals are rarely explicit about deviating from basic corporate law. It happens less on the terrain of grand principles, and more in the abandonment or inflation of seemingly narrow doctrines that turn out to be foundational. Teasing this out requires first briefly explaining the deep structure of separate personality and limited liability.

Separate legal personality has been called the *sine qua non* of the corporate form.[16] It allows the "firm to serve [a] coordinating role by operating as a single contracting party that is distinct from the various individuals who own or manage the firm."[17] Personality entails three core capacities: (i) separate ownership; (ii) the firm's capacity to contract in its own name; and (iii) the capacity to sue and be sued in its own name.[18] As will be seen, ISDS has come to undermine each of these functions. Some further specificity helps to show why.

Separate ownership (or "separate patrimony" in civil law) means that the corporation can own assets in its own right, hived off from its shareholders. Such patrimony includes "rights to use the assets, to sell them, and—of particular importance—to make them available for attachment by [the corporation's] creditors."[19] Conversely, the firm's assets are unavailable for attachment by shareholders' personal creditors. Emphasizing function over form, law and economics literature refers to this aspect as "entity shielding."[20] Separate ownership, or entity shielding, is produced by two distinct background rules: a creditor priority rule, granting the firm's creditors a claim on corporate assets prior to any claims by shareholders or

CORPORATE LAW, GOVERNANCE, AND DIVERSITY, chs. 4–5 (2015). Moreover, the particular mix of agency costs at issue are context specific and dynamic over time. *See, e.g.*, Ronald Gilson & Jeffery Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Reevaluation of Governance Rights*, 113 COLUM. L. REV. 863, 868 (2013) (arguing that the evolution of ownership patterns can require rethinking governance structures, as with the rise of ownership by passive institutional investors).

16 *See* Henry Hansmann, Reinier Kraakman, & Richard Squire, *Law and the Rise of the Firm*, 119 HARV. L. REV. 1335, 1338 (2006) (The core of separate legal personality, "entity shielding . . . can be achieved only through special proprietary rules of entity law" and not through ordinary contracts. "For this reason we believe that entity shielding is the *sine qua non* of the legal entity.").

17 Armour et al., *supra* note 1, at 5.

18 *Id.* at 5–7.

19 *Id.* at 5–6.

20 *See* Hansmann et al., *supra* note 16, at 1338.

their personal creditors; and a rule of liquidation protection, barring shareholders from withdrawing their share of corporate assets at will.[21] Together, these rules "protect the going concern value of the firm against destruction by individual shareholders or their creditors."[22] Entity shielding is a big part of what makes the corporate form efficient. It is what allows a firm to assure outsiders (such as creditors) that it will be able to carry out its obligations. It facilitates negotiating contracts and, ultimately, shareholder liquidity.[23]

The other two capacities of separate legal personality similarly require dedicated formal rules to make them fully viable. The capacity of a corporation to contract in its own name requires clear rules about who acts on its behalf—who may buy and sell in the company's name, or otherwise commit its resources.[24] Similarly, the capacity to sue and be sued requires background legal procedures specifying how the firm can initiate, or be subjected to, litigation. The locus of litigation rights will turn out to be central to the argument of this paper. Domestic laws generally provide that management makes litigation decisions on behalf of the corporation (not shareholders), and all recovery is due to the firm (not its owners).[25] In other words, shareholders may not directly sue and recover from third parties who have harmed the company, even if that harm diminishes the value of their shares ("shareholder reflective loss").[26] They can generally only sue third parties for interference with their specific rights as shareholders, like the right to vote their shares ("shareholder direct claims").[27] The only significant exception is the shareholder derivative suit, where, under narrow conditions, shareholders can bring claims on behalf of the corporation against

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21 Exit must rather be accomplished by sale of shares. *See* Armour, et al., *supra* note 1, at 6.

22 *Id.* at 7.

23 *Id.* at 8.

24 Some of these rules can be defaults. Corporations are generally free to decide how actual authority is delegated. However, the law must at least provide rigid legal rules on apparent authority to protect third parties. *Id.* Although I do not take up the issue here, I have shown in other work how ISDS tends to blur these lines. *See* Arato, *supra* note 2.

25 See classically *Johnson v. Gore Wood & Co.* [2001] 2 W.L.R. 72 (Eng. H.L.) and, more recently, *Sevilleja v. Marex Fin. Ltd* [2020] UKSC 31 (barring reflective loss claims in English law); Cour de Cassation (Chambre commerciale, financière et économique), no. 97-10.886 (Jan. 15, 2002) (confirming the prohibition in France); and *German Stock Corporation Act (Aktiengesetz)*, §§ 117(1) & 317(1) (codifying the prohibition in Germany). *See further* LUKAS VANHONNAEKER, SHAREHOLDERS' CLAIMS FOR REFLECTIVE LOSS IN INTERNATIONAL INVESTMENT LAW 54-63 (2020); Alan K. Koh, *Reconstructing the Reflective Loss Principle*, 16 J. CORP. L. STUD. 373 (2016).

26 Eilís Ferran, *Litigation by Shareholders and Reflective Loss*, 60 CAM. L.J. 245 (2001).

27 *Id.* at 247 (acknowledging that there can be difficult line drawing questions between direct and indirect claims that have to be resolved at trial).

management's wishes—with any recovery going to the firm.[28]

As a whole, separate legal personality facilitates efficient contracting, reduces conflicts of interest and associated agency costs, and, *ex ante*, serves to reduce the costs of capital. But it is not an on/off switch—it is the product of a complex of legal rules. "The outcomes achieved by each of these three types of rules—entity shielding, authority, and procedure—require dedicated legal doctrines to be effective"—rules which, empirically, national legal systems mostly provide without major differences.[29] Without ever dismissing separate personality by name, ISDS erodes each of its foundational rules.

Limited shareholder liability represents a second hallmark of the modern corporate form. The principle is that shareholders will not normally be liable for the debts of the company.[30] "[L]imited liability protects the assets of the firm's owners from the claims of the firm's creditors."[31] It can thus be understood as "owner shielding," mirroring the "entity shielding" component of separate legal personality.[32] Limited shareholder liability is typically very strong, but not absolute. Creditors of the firm may be able to "pierce the corporate veil" and attach shareholder assets under a limited range of circumstances.[33] National courts usually assert a presumption against veil piercing,[34] but this equitable remedy operates as an important safety valve where corporate formalism would lead to perverse outcomes, and it may be more available than is commonly assumed.[35]

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28 Derivative actions typically require demonstrating managerial conflict of interest, and clearing various procedural hurdles. Robert B. Thompson & Randall S. Thomas, *The Public and Private Faces of Derivative Lawsuits*, 57 VAND. L. REV. 1747, 1758–59 (2004). This exception to managerial control over litigation is not immutable. The scope and availability of the shareholder derivative suit has varied significantly over time. *See id.* at 1749; Albert H. Choi, *Fee-Shifting and Shareholder Litigation*, 104 VA. L. REV. 59 (2018); John C. Coffee, Jr. & Donald E. Schwartz, *The Survival of the Derivative Suit: An Evaluation and a Proposal for Legislative Reform*, 81 COLUM. L. REV. 261 (1981). It also varies considerably across domestic laws. *See* Martin Gelter, *Why Do Shareholder Derivative Suits Remain Rare in Continental Europe?*, 37 BROOK. J. INT'L L. 843 (2012); DAN PUCHNIAK, MICHAEL EWING-CHOW, & HARALD BAUM (EDS.), THE DERIVATIVE ACTION IN ASIA: A COMPARATIVE AND FUNCTIONAL APPROACH (2012).

29 Armour, et al., *supra* note 1, at 7–8.

30 *Id.* at 11 (suggesting that limited shareholder liability to victims of negligence by the firm "is arguably not a necessary feature of the corporate form, and perhaps not even a socially valuable one.").

31*Id.* at 9.

32 *Id.*

33 Macey & Mitts, *supra* note 5, at 100.

34 *See, e.g. DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*, 540 F.2d 681, 683 (4th Cir. 1976) ("This power to pierce the corporate veil . . . is to be exercised 'reluctantly' and 'cautiously' and the burden of establishing a basis for the disregard of the corporate fiction rests on the party asserting such claim.").

35 Recent empirical work suggests that the strength of the presumption against veil-piercing is wobbly. *See* Christina L. Boyd & David A. Hoffman, *Disputing Limited Liability*, 104 NW. U. L. REV. 854, 908 (2010) ("[p]laintiffs do win far more often during litigation than popular accounts of the doctrine's rare nature would have led us to expect, but their ultimate chance of obtaining relief on the merits is

A key function of limited liability is that it allows owners to hedge their risks in committing capital to a business venture, which in turn reduces costs. By purchasing shares in a firm, an owner commits a certain amount of her assets to the venture. The limited liability rule ensures that her losses will go no further than the capital committed—that, in other words, she does not risk more than she put in. This "permits parties to allocate the risk of an enterprise to a more efficient risk-bearer in particular circumstances" (i.e. to creditors).[36] The idea is that limited liability shifts the risks of investment, which can ultimately reduce those risks, tending to lower the cost of capital and incentivize investment.[37] The veil piercing remedy provides a backstop to police opportunism.

Separate personality and limited liability are mutually reinforcing. The combination of entity shielding and owner shielding sets up a regime of "asset partitioning" which allows firms to protect discrete aspects of their business from cross-infection where one or more initiatives fail.[38] Relatedly, this "permits firms to isolate different lines of business" for the purpose of obtaining credit.[39] All this enables firms to diversify risk internally by hiving off different business ventures through subsidiaries, and to shift certain risks to creditors.

Unlike separate personality, limited liability is not as absolute a feature of the corporate form. First, it is not an ontological necessity. Corporations can and have operated under unlimited liability regimes, and, historically, unlimited liability was the rule in several major jurisdictions.[40] Nevertheless, limited liability is today a nearly universal feature of the corporate form, and contributes to its efficiency.[41] Second, the optimal scope of limited liability is not as broad as it may seem, in theory or practice.[42] There are good reasons for limited liability in contract—i.e., to presumptively bar veil

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obscured by settlement, which disposes of two out of every three veil piercing cases filed in federal court."); *see also* Peter B. Oh, *Veil-Piercing*, 89 TEX. L. REV. 81 (2010).

36 Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1039 (1991).

37 *Id.*

38 PISTOR, *supra* note 6, at 59.

39 Armour, et al., *supra* note 1, at 9.

40 Limited liability did not become a standard feature of English corporate law until the mid-nineteenth century, and American corporate law until the twentieth century. *See* PAUL L DAVIES, GOWER'S PRINCIPLES OF MODERN COMPANY LAW 40–46 (6th ed. 1997); Phillip Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573 (1986); Armour, et al., *supra* note 1.

41 Armour, et al., *supra* note 1, at 9 ("This evolution indicates strongly the value of limited liability as a contracting tool and financing device.").

42 Thompson, *supra* note 36; Boyd & Hoffman, *supra* note 35; Oh, *supra* note 35; Christopher W. Peterson, *Piercing the Corporate Veil by Tort Creditors*, 13 J. BUS. & TECH. L. 63 (2017).

piercing by creditors who have contractual claims on the corporation, and who were, presumably, in a position to manage such risks. But these reasons may not extend to tort claims—i.e., claims involving involuntary creditors, such as third parties injured by corporate negligence.[43] Limited liability and the presumption against veil piercing are more universal as regards voluntary creditors than with involuntary creditors.[44] Limited liability is, today, central to the corporate form—but context matters. And, accordingly, the functional case for the veil varies contextually as well.[45] By contrast to its dismissiveness of separate legal personality, I argue that ISDS distorts limited liability and its corollaries by supercharging them and pushing them into novel and inapposite settings.

B. *The Corporate Form in International Law*

Every corporation is a creature of some domestic law.[46] International law does not entail any robust general law of corporations. It does not provide for incorporation and does not subsidize any uniquely international corporate form. Nor does international law go far toward regulating corporations.[47] Few treaties or rules of customary international law address matters of corporate governance and there are no generally accepted secondary rules for assigning international corporate responsibility.[48] International law does, however, encounter corporations frequently,

43 Some U.S. courts have maintained the full limited liability rule for tort creditors, while others have afforded tort creditors an easier path to veil piercing. David W. Leebron, *Limited Liability, Tort Victims, and Creditors*, 91 COLUM. L. REV. 1565, 1568 (1991) ("Limited liability toward tort victims . . . potentially removes significant social costs from the calculations of corporate decision-makers."). In choosing to contract with the corporation, contract creditors can protect themselves from risk of losses associated with the veil through various guarantees or security arrangements, or at least get comfortable with such risks by pricing them in. Tort creditors are less likely to have had an opportunity to allocate or mitigate these risks *ex ante*. Peterson, *supra* note 42, at 79; Armour, et al., *supra* note 1.

44 The empirical data on veil piercing reveals a messy picture. For several decades, the prevailing wisdom was that, while in theory tort creditors should prevail more often in veil-piercing efforts, the reality was that contract creditors were more favored by the courts. *See, e.g.*, Thompson, *supra* note 36. However, a more recent effort focusing on fraud claims suggests that the practice better aligns with the theory once the data is re-sliced to focus on the distinction between "voluntary" and "involuntary creditors. Oh, *supra* note 33.

45 *See* Pargendler, *supra* note 4.

46 LASSA F. L. OPPENHEIM, 1 OPPENHEIM'S INTERNATIONAL LAW 859–60 (Robert Y. Jennings & Arthur Watts eds., 9th ed. 1992) hereinafter OPPENHEIM] ("It is usual to attribute a corporation to the state under the laws of which it has been incorporated and to which it owes its legal existence; to this initial condition is often added the need for the corporation's head office, registered office, or its *siège social* to be in the same state.").

47 For instance, corporate social responsibility norms remain inchoate in international law, despite significant scholarly and public attention.

48 *But see* MARKOS KARAVIAS, CORPORATE OBLIGATIONS UNDER INTERNATIONAL LAW (2013).

particularly in the context of dispute resolution. Where forced to confront corporate entities, general international law typically draws rules wholesale from domestic law, on either a general principles methodology or by analogy.[49]

The *locus classicus* in international law is the 1970 Judgment of the International Court of Justice (ICJ) in *Barcelona Traction*.[50] The case involved a question about diplomatic protection (or espousal)—meaning the circumstances under which a state may bring an international claim on behalf of its national. In this case, the Claimant (Belgium), sought to bring a claim against Spain on behalf of several Belgian shareholders in a Canadian company, which Spain had injured. As the company was a Canadian national, there was no question that Canada could bring a claim on its behalf—but after initially doing so, it eventually chose not to pursue the matter.[51]

The question was whether Belgium could then bring a claim against Spain on behalf of the Belgian shareholders (as 88% owners) for the State's injury to the firm. The Court found that it could not, drawing on domestic corporate law to dispose of the case. In its view, "[w]henever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law."[52] This means looking to general principles of law common to domestic legal orders.[53]

The Court noted that all domestic legal orders sharply limit shareholders' rights of standing—generally barring shareholders from bringing claims for third-party harm to the firm that causes incidental harm to share value (shareholder reflective loss).[54] It accepted this as a

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49 *See* FERNANDO LUSA BORDIN, THE ANALOGY BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS 15-48 (2019) (examining the function and operation of analogy in international legal reasoning); Silja Vöneky, *Analogy in International Law*, *in* MAX PLANCK ENCYC. OF PUB. INT'L LAW (2008), at https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1375.

50 *See* Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Judgment, 1970 I.C.J. Rep. 3, ¶¶ 87–100 (Feb. 5) (finding that diplomatic protection does not generally extend to claims for shareholder reflective loss, though remaining open to equitable exceptions, or exceptions in *lex specialis*).

51 *Id.* at ¶ 77.

52 *Barcelona Traction*, ¶ 38.

53 *Barcelona Traction*, ¶ 50 ("it is to rules generally accepted by municipal legal systems…and not to the municipal law of a particular State, that international law refers.").

54 This is consistent with the position across domestic law jurisdictions. *See supra* text accompanying note 25.

consequence of separate legal personality—such claims belong to the firm, which alone can sue and recover in its own name.[55] The Court acknowledged the common approach across domestic legal orders and adapted it to the context of international law.

> It is a basic characteristic of the corporate structure that the company alone, through its directors or management acting in its name, can take action in respect of matters that are of a corporate character. The underlying justification for this is that, in seeking to serve its own best interests, the company will serve those of the shareholder too.[56]

Thus, for the Court, it followed that "[t]he general rule of international law authorizes the national State of the company alone to make a claim."[57] This is completely consistent with domestic law. And other international courts and tribunals follow the ICJ's lead—including even highly judicialized settings like the European Court of Human Rights, where corporations enjoy a private right of action.[58]

I return to the matter of shareholder claims in greater depth below, in the context of ISDS. For now, what bears noting is the generally accepted methodology for deciding how public international law addresses the corporate form—largely by reference to common principles of domestic legal systems (general principles) and, where necessary, through extended reasoning by analogy.

However, the ICJ has recognized that States can and do opt out of general international law by establishing more specialized arrangements for regulating and empowering corporations in their (mostly bilateral) treaty arrangements (*lex specialis*)—particularly noting the realm of foreign

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55 *See infra* Section II.A.

56 *Barcelona Traction*, ¶ 42.

57 *Id.* ¶ 88.

58 *Albert and Others v. Hungary*, App. No. 5294/14 ¶¶ 124, 145 (Grand Chamber, 2020) (confirming that shareholder claims for reflective loss are barred as a general rule, except in "exceptional circumstances" where the applicants can give "weighty and convincing reasons demonstrating that it is practically or effectively impossible for the company to apply to the Convention institutions through the organs set up under its articles of association," or where the company and its shareholders are "so closely identified with each other that it is artificial to distinguish between the two"); *Agrotexim and Others v. Greece*, Series A no. 330, ¶¶ 68–71 (Oct. 24, 1995). The private right of action is rare in international law, and important in this context. Unlike in state-to-state disputes, private actors have little incentive to prioritize any particular state's policy interests in advancing novel legal interpretations in litigation. *See generally* Karen J. Alter, Emilie M. Hafner-Burton, & Laurence R. Helfer, *Theorizing the Judicialization of International Relations*, 63 INT'L STUD. Q. 449 (2019).

investment.[59] By the new millennium, such bilateral arrangements have mostly cleared the field of international investment law. Revisiting the issue in its 2007 *Diallo* judgment, the Court noted that the "protection of the rights of companies and the rights of their shareholders, and the settlement of associated disputes, are essentially governed by bilateral or multilateral [investment] agreements . . . ."[60] General international law continues to defer to the corporate form in lockstep with common principles of domestic law, but most such matters are today governed by specialized treaties which may (or may not) opt out of general international law—as remains to be seen.

It turns out that investment treaties say very little about the corporate form specifically—even though corporate formalities arise constantly in investment disputes. And as will be seen in Part II, ISDS tribunals do not typically follow the ICJ's lead in relying on domestic law to resolve these questions—they rather go their own way, undermining the basic functions of corporate law in the cross-border investment context. But before turning to the cases, it is worth pausing to see why the political economy of the investment treaty regime puts intense pressure on the corporate form—pressure which calls for some response, even if ISDS consistently responds in regrettable ways.

C. *The Political Economy of Formalism in Investment Law*

Investment treaties do not expressly set out to create international corporate law any more than public international law does.[61] Yet these treaties evidently extend substantive and procedural rights to corporations, as well as to their shareholders. This compels ISDS tribunals to make decisions on all kinds of legal questions relating to the corporate form, even if only implicitly. It is important to understand what investment treaties do

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59 *Barcelona Traction*, ¶ 90. For example, in the subsequent 1989 *ELSI* case, the Court found that a Friendship, Commerce, and Navigation Treaty between the United States and Italy afforded shareholders from either country bespoke rights to "organize, control, *and manage*" locally incorporated companies in the other. Elettronica Sicula S.p.A. (ELSI) (U.S. v. It.), Judgment, 1989 I.C.J. Rep. 14, ¶ 69–70, 106, 132–33 (July 20)[hereinafter ELSI] (emphasis added) (allowing the United States to espouse the claim of several shareholders in an Italian company for deprivation of their managerial rights, though ultimately finding no such deprivation had occurred). The Court accepted that affording shareholders additional direct rights would naturally expand the scope of diplomatic protection to cover shareholder claims (without opening the door to indirect claims for reflective loss). This language on managerial rights seems to have been a standard feature of period FCN treaties. *See* KENNETH VANDEVELDE, THE FIRST BILATERAL INVESTMENT TREATIES 447–48 (2017).

60 Ahmadou Sadio Diallo (Republic of Guinea v. Dem. Rep. Congo), Judgment, 2007 I.C.J. 582, ¶ 88 (24 May).

61 OPPENHEIM, *supra* note 46.

and why, and how this interacts with the realities of cross-border investment—because this political economy helps partially explain what has happened to the corporate form in ISDS.

Investing abroad without protection is risky. Foreign investors face various forms of political risk in the countries in which they invest, which may be unfamiliar or more volatile than the ordinary business risks they face at home.[62] Such risks are manifold, but include risks associated with sudden changes in government policy (or changes in government full stop), concerns about local courts, weaker protections for private property and contract enforcement, and the possibility of discrimination against foreigners.[63] Such "country risks" are exacerbated by the long timeframe of large scale investment projects, which can create hold-up problems. Where investors sink significant costs into developing a project prior to generating any profit, they come under significant risk of expropriation or forced renegotiation midstream.[64]

Investment treaties seek to manage political risk in three ways. *First*, they reduce the risk of treatment that investors might perceive as inadequate or unpredictable by guaranteeing certain substantive standards of protection, including guarantees against expropriation without compensation, as well as guarantees of fair and equitable treatment (FET) and non-discrimination. *Second*, they remove the risks of relying on local courts (real or perceived), by providing investors with a private right of action to vindicate treaty claims internationally through ISDS.[65] The right of action here is strictly diagonal: investment treaties empower nationals of one treaty party (the "home state"), to compel the other state party (the "host state") into binding international arbitration to resolve treaty disputes. And *third*, investment treaties mitigate the risk that a State will refuse to pay when compensation comes due, by keying into powerful mechanisms for the enforcement of arbitral awards worldwide.[66] The investment treaty system thus constitutes

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62 JONATHAN BONNITCHA, LAUGE N. SKOVGAARD POULSEN, & MICHAEL WAIBEL, THE POLITICAL ECONOMY OF THE INVESTMENT TREATY REGIME 37 (2017).

63 *Id.* at 3, 86.

64 *Id.*; AIKATERINI FLOROU, CONTRACTUAL RENEGOTIATIONS IN INTERNATIONAL INVESTMENT ARBITRATION (2020).

65 BONNITCHA, POULSEN, & WAIBEL, *supra* note 62, at 86.

66 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 UST 1270, 575 UNTS 159 (entered into force Oct. 14, 1966) [hereinafter ICSID Convention], Art. 54(1) ("Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligation imposed by that award within its territories as if it were a final judgment of a court in that State. …"); Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 UST 2517, [hereinafter NY Convention] requiring domestic courts to recognize and enforce covered foreign arbitral awards (art. 3), with only limited exceptions (art. 5).

a powerful regime for re-allocating country risk. The theory is that investment treaties represent credible commitments by states to foreign investors which reduce friction. Their purpose can thus be understood as a bargain, to protect investors in order to promote investment.[67]

To be clear, there is no single multilateral framework governing investment. The investment treaty regime is a complex of thousands of discrete bilateral and multilateral agreements. Each one represents a bargain between two (or more) States to protect one another's nationals, with its own specific terms and tradeoffs. However, most investment treaties tend to be very similar, making it possible to speak of investment treaty law in the abstract. At the same time, there is no single mechanism for dispute resolution. All awards are rendered on a one-off basis, and there is no system of precedent formally tethering things together. Yet ISDS awards are generally published, and litigants and tribunals tend to rely on prior awards—meaning that there is case law to work with. At the end of the day, it is possible to speak generally about an investment treaty regime, though care must be taken to remain grounded in the details of particular investment treaties in any particular case.[68]

Investment treaties mostly touch on corporate matters indirectly. They generally extend substantive and procedural rights to corporations and shareholders, by including natural and legal persons in the definition of "investor"; and by including enterprises, stocks, shares, and various interests in corporations within the definition of "investment." This extends beyond controlling stakes, to minority shares and even "indirect" equity—meaning shares in an enterprise held through intermediary companies.[69] A covered foreign investor possessing any of these assets is entitled to protection. The problem is that these treaties tend not to specify *how* their provisions apply

67 Although the tradeoffs seem fairly clear in hindsight, there is strong empirical evidence that, especially early on, capital importing states (usually of the Global South) tended not to understand the terms of the bargain being pushed by capital-exporting states (usually of the Global North). LAUGE POULSEN, BOUNDED RATIONALITY AND ECONOMIC DIPLOMACY: THE POLITICS OF INVESTMENT TREATIES IN DEVELOPING COUNTRIES 69-70 (2015).

68 BONNITCHA, POULSEN, & WAIBEL, *supra* note 62, at 2; JESWALD SALACUSE, THE LAW OF INTERNATIONAL INVESTMENT TREATIES 6, 16 (2010).

69 *See, e.g.*, Japan-Israel BIT art. 1(a) (signed Feb. 1, 2017, entered into force Oct. 5, 2017). ("the term 'investment' means every kind of asset . . . owned or controlled, directly or indirectly, by an investor, including: (i) an enterprise and a branch of an enterprise; [and] (ii) shares, stocks, and other forms of equity participation in an investment . . ."); US-Turkey BIT art. 1(c) (signed Dec. 3, 1985, entered into force May. 18, 1990) ("'investment' means every kind of investment owned or controlled directly or indirectly, including equity, debt . . . (ii) a company or shares, stock or other interests in a company or interests in the assets thereof"). Because most treaties cover indirect shares, their coverage potentially extends to long parent-subsidiary chains.

to corporations and their shareholders.[70] For instance, it is not at all clear that protection of an investor *qua* shareholder should entail the same procedural rights that would be afforded to the company itself. Tribunals are regularly forced to decide questions about the nature of separate legal personality in the context of ISDS, and the scope of limited liability. These matters come up in case after case, if not always explicitly, and some reflection on the realities of foreign investment makes clear why.

The political economy of the investment treaty regime puts intense pressure on the corporate form. It does so for three reasons, that operate in tandem. The first is the reality of local incorporation. Recall that investment treaties afford only a diagonal private right of action—in a bilateral investment treaty, each state only consents to be sued directly by the foreign nationals of the other party. However, in practice investors regularly invest through locally incorporated entities for a variety of reasons.[71] Often host states encourage or even require foreigners to do so in hopes of generating benefits for local development (such as jobs, transfer of know-how, and tax revenues).[72] As a national of the host state, the local company would not be covered by the typical investment treaty, losing out entirely on all of its risk-shifting benefits.[73] Thus the claim arises time and again that by including stocks and shares, the treaties must have been designed to cover foreign shareholders in local entities and to open the door to shareholder claims for all kinds of harm.[74]

A second source of pressure is the longstanding practice of investment structuring and arbitrage, which predates ISDS. Sophisticated investors (and counsel) have deep experience in structuring investments to reap the benefit of disparate treaties and domestic regulatory regimes to which they might not otherwise be entitled. Particularly in the field of taxation, companies regularly structure their assets through chains of subsidiaries, to take advantage of low tax jurisdictions, double taxation treaties that might not otherwise apply to nationals of their home state, and so forth.[75] Scholars like

70 Arato, *supra* note 2; Stratos Pahis, *Investment Misconceived: The Investment—Commerce Distinction in International Investment Law*, 45 YALE J. INT'L L. 69, 70-71 (2020); ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 172 (2005).

71 BONNITCHA, POULSEN, & WAIBEL, *supra* note 62, at 8, 41.

72 *Id.* at 47.

73 Note that modern treaties have ways of avoiding this problem, *see infra*, at text accompanying note 115.

74 To be clear, the treaties leave wide open exactly what kinds of claims shareholders are entitled to make. *See infra*, Section II.A.

75 Rebecca Kysar, *Unravelling the Tax Treaty*, 104 MINN. L. REV. 1755, 1756 (2020) ("Instead of alleviating double taxation, a dubious goal in and of itself for many reasons, the[se] treaties are the means to achieve double non-taxation."); Steven Dean & Rebecca Kysar, *Introduction: Reconsidering the Tax Treaty*, 41 BROOK. J. INT'L L. 967 (2016).

Tsilly Dagan and Katharina Pistor have shown how these strategies extend to all kinds of regulatory arbitrage, allowing businesses to claim any number of nationalities to maximize tax and regulatory advantages.[76] Sophisticated investors and counsel regularly deploy these strategies in the investment context as well. Because investment treaties cover attenuated (indirect) ownership interests, companies often attempt to use intermediary entities to lay claim to investment treaty benefits that would not ordinarily cover either the parent or the locally incorporated entity.[77]

A third factor is the ideational drive to reduce risk in the name of promoting investment. This is grounded in strongly held beliefs that FDI promotes wealth, and that credible commitments like investment treaties promote FDI.[78] These beliefs (or at least stories) proliferate among actors at all nodes of the regime, from treaty drafters and policy-makers, to adjudicators, to influential officials in related international organizations like the World Bank.[79] These beliefs are connected to the institutional structure of the regime. Investment treaties promise to shift country risk away from investors and on to states. They are asymmetric by design, empowering covered investors to sue states, but not vice versa.[80] This means that *ex post* it is always the investor who comes to the tribunal alleging harm, and always the state accused of reneging on its *ex ante* treaty-based commitments.[81]As a result, critical matters often have to be decided *ex post* when investors' legal claims to treaty protection are most likely to appear in a sympathetic light.

Taken together, all this puts pressure on the corporate form in the context of ISDS. It is clear, at least, that the investment treaty regime would not live up to its promise to protect and promote investment if in reality its central protections were not actually available to investors—or if access to the regime somehow saddled investors with new and unacceptable risks. Where a great deal of foreign investment occurs through locally

76 TSILLY DAGAN, INTERNATIONAL TAX POLICY: BETWEEN COMPETITION AND COOPERATION (2018), 128, 217; PISTOR, *supra* note 6.

77 Arato, *supra* note 3, at 275.

78 BONNITCHA, POULSEN, & WAIBEL, *supra* note 62, at 8 (casting these beliefs as so basic as to constitute basic regime principles that underpin the investment treaty system).

79 *Id.*, at 8; TAYLOR ST. JOHN, THE RISE OF INVESTOR-STATE ARBITRATION (2018), 110–17.

80 BONNITCHA, POULSEN, & WAIBEL, *supra* note 62, at 14 ("The second core norm of the investment treaty regime is that, while investors receive far-reaching rights, they have only few, if any, obligations.").

81 Some treaties provide for counterclaims, security for costs, and limited corporate social responsibility obligations, and there is an important growing literature about how far investor obligations ought to be brought into the system. *See generally* Martin Jarrett, Sergio Puig, & Steven Ratner, *Investor Accountability: Indirect Actions, Direct Actions by States, and Direct Actions by Individuals*, J. INT'L DISP. RES. (on file with the Virginia Journal of International Law Association).

incorporated companies, investors have naturally sought out alternative ways to lay claim to investment treaty protections. Claimants and their counsel regularly try to get around jurisdictional constraints by pushing shareholder claims and by treaty shopping—and by pushing interpretations that tend to limit investor risk in the dispute settlement phase.[82] All of this forces tribunals to confront basic questions of corporate law more or less explicitly, with little guidance in the underlying treaties.

Left to interpret these matters, ISDS tribunals have gravitated toward positions that meaningfully distort the general consensus about the corporate form in domestic and international law—in ways that ultimately harm both states and investors.[83] Moreover, their engagement with matters of form has been highly elastic across discrete interpretive questions, ranging from dismissiveness of formalities in some contexts (separate personality) to reverence and exaggeration in others (limited liability). This is only partially explained by the political economy explored above. Part II turns to the cases, to illustrate how ISDS has responded to these pressures on formalism, and the many pathologies of its responses.

II. ELASTIC FORMALISM IN ISDS

Deference to the corporate form has proven highly elastic in investment arbitration. On the one hand, tribunals have tended to waive away the basics of separate legal personality, particularly in admitting shareholder claims for reflective loss and allowing direct shareholder recovery for harms to the company. On the other hand, tribunals fetishize limited liability, tending to over-extend the associated presumption against veil piercing. These distortions are each harmful in their own right—imposing inefficient and unfair costs on *both* states and investors, all without much in the way of textual or policy justification. Taken together, the case law's ambivalent formalism appears odd and incoherent.

This Part lays out the various case lines in which ISDS has remolded the corporate form. I first demonstrate ISDS' dismissiveness of separate personality in allowing shareholder claims for reflective loss (II.A). I then contrast this to tribunals' apparent reverence for limited liability in the context of security for costs (II.B); and their hyper-extension of the presumption against veil-piercing to the inapposite context of treaty shopping (II.C). Part III then turns to accounting for this seemingly anomalous ambivalence, by shifting the focus to winners and losers.

82 This is similar to the dynamic described by PISTOR, *supra* note 6, at 206.
83 *See* Arato, *supra* note 2, at 32.

A. Shareholder Claims and Separate Legal Personality

While it is clear that investment treaties cover stocks and shares as investments, investment treaties tend to say very little about just how shareholder-investors may bring suit.[84] There is no reason to assume, from this, that the foreign owner of stock in a local company would have the same access to suit as that company might have had. In fact, the assumption that shareholders, as investors, possess unqualified access to ISDS undermines the foundations of separate personality—upsetting the careful tradeoffs of interests and values established by the domestic law of incorporation, with costs for corporate constituencies wherever they reside.[85]

The 2017 Japan—Israel Bilateral Investment Treaty (BIT) is typical in its indeterminacy.[86] Article 1 provides:

> (a) the term "investment" means *every kind of asset* . . . owned or controlled, directly or indirectly, by an investor, including . . . (ii) shares, stocks or other forms of equity participation in an enterprise.

Beyond that, Article 24(2) provides broadly that an investor

> . . . may submit to arbitration under this Article a claim: (a) that the respondent [state] has breached an obligation under Section I . . .; and (b) that the claimant has incurred loss or damage by reason of, or arising out of, that breach.

At first glance, these provisions may appear to cleanly empower shareholders to sue the state directly for any loss arising out of any treaty breach—including injuries to the firm that diminish share value.[87] That is

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84 Only a small handful of treaties address these matters with any specificity, mostly in attempting to exclude portfolio investment by limiting coverage for small shareholdings. *See, e.g.*, Turkey—Azerbaijan BIT art. 1 (signed Oct. 25, 2011, entered into force May 2, 2013) (excluding shareholdings below 10 percent). *See further* Arato, *supra* note 2, at 32-34.

85 I have examined the problem of reflective loss in investment treaty claims more fully elsewhere, and build on that work in this section. *See* Arato, *supra* note 2, at 32-39; Arato, Claussen, Lee, & Zarra, *supra* note 2. For much greater depth on this topic, see the previous excellent critical studies by Gaukrodger, *supra* note 2, and Korzun, *supra* note 2, and, most recently, the more apologetic comprehensive work by VANHONNAEKER, *supra* note 25 (concluding that the practice is normatively justified in order to both protect investors and promote investment—claims which I dispute below).

86 Japan-Israel BIT arts. 1(a), 24(2) (signed Feb. 1, 2017, entered into force Oct. 5, 2017).

87 *See, e.g.*, Impregilo v. Argentina, ICSID Case No. ARB/07/17, Award, ¶ 138 (June 21, 2011).

how most tribunals understand the typical treaty. But this reading is only deceptively simple, and there are strong interpretive and policy reasons to question ISDS' permissive approach to shareholder claims.

Where the investment in question is a pool of stock in a local company, basic questions about just what kind of suit an investor-shareholder may bring are left totally unaddressed. Evidently, she is entitled to some kind of access to ISDS. Clearly this includes claims on any direct injury to her rights as a shareholder. But the treaties are fairly ambiguous about just what harms she can claim when the company is injured. Left unaddressed is whether she can bring suit on her own behalf for diminution in share value (reflective loss); or whether she can claim on the company's behalf (a derivative claim); and whether recovery goes to her or to the firm. The strength of separate personality turns on these questions—which are left to arbitral interpretation. And while domestic legal systems consistently answer these questions restrictively, for clear policy reasons, ISDS tribunals generally take the opposite approach, with little policy justification.

As noted above, domestic corporate law everywhere sharply distinguishes two kinds of shareholder claims. Shareholders are always allowed to bring "direct claims" for injury to their shares (like interference with governance rights, or an outright taking of stocks).[88] But they typically may not claim for "reflective loss," incidental diminution in share value arising out of third-party harm to the company.[89] In general, injuries to the corporation must be vindicated by the company itself, at management's discretion (except in the case of shareholder derivative suits).[90] Most international jurisdictions follow this consistently restrictive domestic approach, including the International Court of Justice[91] and European Court of Human Rights.[92]

As Gaukrodger explains, the restriction of shareholder claims is rarely codified.[93] The doctrine is instead usually judge-made, even in civil law

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88 Gaukrodger*, supra* note 2, at 7.

89 *Id.*

90 *See* Thompson & Thomas, *supra* note 28, at 1758–59; *see also* David Gaukrodger, *Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency* 14–20 (OECD Working Papers on Int'l Inv., 2013/03), http://www.oecd.org/investment/investment-policy/WP-2013_3.pdf. (finding that U.S., U.K., Australian, German, French, and Japanese corporate laws all bar shareholder reflective loss claims).

91 *See* Barcelona Traction (Belg. v. Spain), Judgment, 1970 I.C.J. 3, ¶¶ 38, 44 (Feb. 5) (finding that diplomatic protection does not generally extend to claims for shareholder reflective loss, though remaining open to equitable exceptions, or exceptions in *lex specialis*); *see also* Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Preliminary Objections, 2007 I.C.J. 582, 605-06 (May 24).

92 *Albert and Others v. Hungary*, App. No. 5294/14 ¶¶ 124, 145.

93 Gaukrodger*, supra* note 90, at 24.

countries.[94] Courts typically draw this bright line to avoid significant harms to internal corporate governance and a range of externalities. The central policy concern is that direct shareholder recovery for reflective loss undermines entity shielding, and thus separate legal personality. It enables shareholders to siphon off recovery rightly belonging to the injured company (eroding liquidation protection) and thereby jump ahead of creditors and other shareholders (circumventing creditor priority). It further enables shareholders to undermine managerial decision-making about litigation and settlement. Reflective loss claims also create externalities by unfairly subjecting third-parties to claim proliferation and risks of double recovery.[95]

ISDS tribunals almost always deviate from this transnational consensus, interpreting investment treaties as permitting shareholder reflective loss claims.[96] They tend to assume that a permissive approach follows from vague treaty text, without much explanation or analysis.[97] They also allow shareholders to recover directly (in proportion to their stake in the company), reversing the domestic rule that all recovery should go to the firm.[98] In opening the doors, ISDS falls into two kinds of governance traps

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94 *See, e.g.,* Cour de Cassation (Chambre commerciale, financière et économique), no. 97-10.886 (Jan. 15, 2002). Some, like Germany have codified the prohibition on reflective loss claims. *See German Stock Corporation Act (Aktiengesetz)*, §§ 117(1) & 317(1). *See further* VANHONNAEKER, *supra* note 25.

95 Arato, Claussen, Lee, & Zarra, *supra* note 2, at ¶¶ 13-15.

96 ISDS case law is remarkably well settled on this point. *See, e.g.*, CMS Gas Transmission Co. v. Republic of Argentina, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, ¶ 65 (July 17, 2003); Enron v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on Jurisdiction, ¶ 49 (Jan. 14, 2004); Christoph Schreuer, *Shareholder Protection in International Investment Law*, 3 TRANSNAT'L DISP. MGMT. 4 (2005); DOUGLAS, *supra* note 70, at 455.

97 For example, in *Impregilo* the tribunal allowed an Italian shareholder to sue Argentina for allegedly injuring a local entity that it controlled—finding that the availability of claims for reflective loss followed from the inclusion of stocks and shares in the definition of investment in the Argentina—Italy BIT. Impregilo v. Argentine Republic, ICSID Case No. ARB/07/17, Award, ¶ 138 (June 21, 2011) (if the local company "was subjected to expropriation or unfair treatment with respect to its concession . . . such action must also be considered to have affected Impregilo's rights as an investor, rights that were protected under the BIT"). *See also* CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES §§ 6.77, 6.79, at 185-86 (2007) ("Given the wide definition of investment . . . there is no conceptual reason to prevent an investor recovering for damage caused to those shares which has resulted in a diminution in their value."). *But see* Bilcon of Delaware v. Gov't of Canada, PCA Case No. 2009-04, Award on Damages, ¶¶ 372–74, 392 (2019) (blocking shareholder reflective loss claims but inflating direct claims to include some things properly cabined as company claims).

98 That covering stocks and shares as investments, without more, implies allowing shareholder reflective loss claims is certainly one textual possibility. But other less distortive interpretations are also reasonable. One approach would require that such claims be brought on behalf of the firm, with any recovery going to the company. Another would be to limit shareholder claims to residual actions where management is unable or unwilling to advance a company claim for some inequitable reason. This is how the European Court of Human Rights resolved the matter of shareholder standing in its own

that domestic courts explicitly try to avoid—setting shareholders against creditors (and one another) by waving aside priority rules, and increasing the risk of ultimate liquidation. Similarly, this permissive approach leads tribunals to allow multiple claims against the state over the same alleged injury to the company—by the corporation itself, by controlling shareholders, by minority shareholders,[99] and even more attenuated owners of indirect equity.[100]

From the perspective of the state, the most immediate concerns are the *ex post* unfairness of multiple bites at the apple and the specter of double recovery. To their credit, tribunals have actively sought to avoid double recovery by limiting damages to shareholders on a pro rata basis. Yet double recovery may be unavoidable when the shareholder claim succeeds before the company claim is resolved (or even brought), because the shareholder cannot be easily blocked from participating in any subsequent company's recovery.[101] Meanwhile, the concern about multiple bites has mostly fallen on deaf ears.[102] Tribunals frequently and almost invariably admit shareholder claims overlapping with other claims in other fora—including

similarly ambiguous constituent treaty. *Albert and Others v. Hungary*, App. No. 5294/14 ¶¶ 124, 145..

99 *See, e.g.*, *Enron*, Jurisdiction, ICSID Case No. ARB/01/3, ¶ 49.

100 "Indirect equity," in the context of investment treaties, refers to economic interests in a company mediated through intermediary companies. Where ownership is structured through a chain of companies, most tribunals allow any entity in the chain to bring claims against the host state as indirect shareholders. *See* Ampal-American Israel Corp. v. Egypt, ICSID Case No. ARB/12/11, Decision on Jurisdiction, ¶ 343 (Feb. 1, 2016) [hereinafter *Ampal*] (refusing to "read into the Treaty restrictions . . . [on] 'passive, indirect and very small' holdings").

101 Tribunals have deployed a range of creative solutions to avoid double recovery in these cases. In one case, a tribunal avoided this problem by awarding the shareholder compensation for its reflective losses while ordering it to sell its shares to the State at their current (diminished) value—at Argentina's option. *See CMS Gas*, ICSID Case No. ARB/01/08, Award, ¶ 469.

102 The widely criticized awards in *CME v. Czech Republic* and *Lauder v. Czech Republic* provide the most famous illustration of the problem of overlapping claims. These cases involved separate claims arising out of the same injury to a local Czech company—by CME (the ninety-nine percent shareholder of the local entity) and Lauder (who controlled CME). CME v. Czech Republic, U.N. Comm'n on Int'l Trade L. (UNCITRAL), Final Award, ¶ 436 (Mar. 14, 2003); Ronald Lauder v. Czech Republic, UNCITRAL, Final Award, ¶ 178 (Sept. 3, 2001). The Czech Republic tried unsuccessfully to argue that *Lauder* should be dismissed, because, to the extent that any damages were due, recovery by CME would make all of its shareholders whole—*including* Mr. Lauder—while recovery by the latter would leave the other shareholders of CME empty-handed. *CME*, ¶ 436; *Lauder* ¶ 172. The two tribunals ultimately agreed on the admissibility of multiple separate shareholder suits on the grounds that Lauder could not be completely identified with CME. They then famously disagreed on the merits of essentially identical disputes: Lauder lost, while CME won an award in excess of $270 million (in which Lauder recovered as a shareholder). *CME*, UNCITRAL, Final Award, ¶ 649. *See also Enron*, Jurisdiction, ¶ 49; Eskosol v. Italian Republic, ICSID Case No. ARB/15/50, Decision on Respondent's Application Under Rule 41(5), ¶ 170 (Mar. 20, 2017). Though cases like these are much vilified, it bears noting that in *CME* and *Lauder* the respondent refused the investor's request to join the proceedings, which both tribunals held against it in allowing parallel claims. *Lauder*, UNCITRAL, Final Award, ¶ 178; *CME*, UNCITRAL, Final Award, ¶¶ 428–29; *see also Ampal*, Jurisdiction, ¶ 329.

claims by truly discrete shareholders in the same local company (*horizontal* overlap), and claims by parents and their subsidiaries (*vertical* overlap). A handful of tribunals have recognized that some kind of outer limit on all this is needed, focusing mostly on the manifest unfairness of vertical overlap.[103] The tribunal in *Orascom v. Algeria* went furthest in this regard. Invoking the equitable doctrine of "abuse of right," it limited parent-subsidiary chains to taking a single shot at the state (through whichever link in the chain they prefer).[104] But few tribunals have gone so far, and this solution is only a partial one. Even within these emergent limits, ISDS leaves ample room for claim proliferation, with some irreducible risk of double recovery. It also distorts incentives on all sides at the settlement stage and facilitates opportunistic hold ups.

From a corporate law perspective, the deeper structural harm is that ISDS hamstrings separate legal personality by weakening the entity shield. In allowing covered shareholders to sue host states and recover directly for reflective loss, ISDS empowers them to jump the line (avoiding priority rules) and to make off with assets rightly belonging to the firm (undermining liquidation protection and managerial control). From this perspective, opening the gates to shareholder claims raises the costs of business for all concerned—inefficiently distorting normal corporate governance expectations, elevating liquidation risk for companies investing abroad, and affecting the availability and price of credit *ex ante*.[105]

The economic consequences of reflective loss are most apparent where the firm is in distress—in the zone of bankruptcy or in actual bankruptcy proceedings—as is often the case in the context of ISDS, given the financial and reputational costs of litigation in this system.[106] Assume that

103 *See, e.g.* RSM v. Grenada, ICSID Case No. ARB/05/14, Award, ¶ 7.1.6 (Mar. 13, 2009) (drawing an outer limit based on complete identity of shares—barring separate claims by shareholders and their wholly-owned entities); and *Ampal*, Jurisdiction, ¶ 331 (barring separate direct and indirect shareholder claims over the same tranche of shares); *Ampal*, Liability, ¶¶ 11–12. These equitable solutions are weak and do little to ward off opportunism.

104 *Orascom*, Award, ¶ 542 ("An investor who *controls* several entities in a vertical chain of companies may commit an abuse if it seeks to impugn the same host state measures and claims for the same harm at various levels of the chain." (emphasis added)). In the tribunal's view, the first suit, by the direct shareholder in the local company, "crystalized" the dispute, blocking the controlling shareholder from making further claims. *Id.* ¶¶ 496, 523–24, 543. This "crystallization" theory is troubling, since the local entity's claim should be superior to that of its direct controlling shareholder's—irrespective of timing—particularly if the different entities have different creditors. And the tribunal refused to foreclose additional reflective loss claims by non-controlling shareholders. *Id.* ¶ 543 n.836.

105 Gaukrodger, *supra* note 2, at 20.

106 *Id.* (usually "[shareholder reflective loss] intervenes at a moment when the company is already weakened. What is at issue is the company's capacity to reconstitute its assets and expectations about

government action has destroyed a foreign-owned firm's value as a going concern.[107] Even if recovery from the state were eventually possible, the business may need to be wound down. There may not be enough assets to satisfy the firm's creditors, let alone the shareholders. Domestic corporate law guarantees creditors priority on these assets.[108] Creditors depend on this priority rule, and it is a key factor in the availability (and price) of credit *ex ante*.[109] ISDS, however, allows particular (treaty-protected) shareholders to recover immediately, reducing the total asset pool available for distribution to others. If the shareholder recovers a portion of the financially assessable harm in proportion to her shareholding, there may not be enough left to satisfy the firm's creditors (who expect priority) or fairly compensate other shareholders (who expect parity). Moreover, a substantial direct shareholder recovery undercuts the firm's capacity to reconstitute itself as a going concern, leading to an avoidable liquidation. By undermining creditor priority and liquidation protection, the ISDS rule thus cracks the entity shield at the heart of separate personality.

Even where the firm is not in distress, allowing shareholder claims for reflective loss in ISDS has costs. It allows individual shareholders to undermine managerial authority by second-guessing management's decisions about when and where to litigate, whether to try to preserve the relationship with the government, how to pursue lawsuits, and whether to settle.[110] The possibility of separate shareholder claims substantially weakens the company's hand at each of these moments and should diminish a rational state's confidence that an agreement with management at any of these stages will ultimately stick. This undercuts the firm's ability to serve as a single contracting party and to sue in its own name, further weakening its separate legal personality.[111]

All this creates substantial inefficiencies for both states and investors. *Ex post*, ISDS incentivizes shareholder opportunism at the expense of other slower moving or unlucky shareholders, creditors, and the company itself (not to mention the host state). It also incentivizes shareholders to race into litigation where a dispute arises, especially when the firm is in distress. And

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that capacity."); Korzun, *supra* note 2, at 196 ("This practice is especially dangerous for companies in financial distress."); Arato, *supra* note 2, at 38.

107 This hypothetical is adapted from Arato, *supra* note 2, at 38.

108 Under normal rules, when a business is wound down, all funds get paid out to the firm's creditors first and distributed pro rata among shareholders only thereafter. Saul Levmore & Hideki Kanda, *Explaining Creditor Priorities*, 80 VA. L. REV. 2103, 2123 (1994). This includes any recovery in pending litigation.

109 Armour et al., *supra* note 1, at 6–7.

110 Arato, *supra* note 2, at 39; DOUGLAS, *supra* note 70, at 456.

111 Gaukrodger, *supra* note 2, at 23–25.

it weakens the hand of management in its interaction with the state at critical junctures. All of these costs can affect future behavior, creating transactional inefficiencies *ex ante*. Creditors, in particular, have to account for the frailty of priority rules in the context of foreign investment. The weakened entity shield pushes creditors to either reduce the availability of credit or increase its price—affecting the overall cost of capital either way.[112]

There are, however, other models available. For example, ensuring the availability of company claims even in cases of local incorporation can secure investment treaties' protective goals without inefficiently undermining the corporate form. Some treaties do this by deeming local companies foreign for the purpose of ISDS by dint of foreign control.[113] Others, like the NAFTA, provide for derivative suits, allowing covered shareholders to claim in the local company's name, with all recovery going to the firm.[114] Either model ensures investors in local companies access to ISDS, while avoiding the fairness and efficiency costs detailed above.

States have increasingly sought to avoid the possibility of unfettered shareholder claims in their treaties in this way, often by providing for derivative company claims on the original NAFTA model.[115] Yet tribunals have tended to resist these efforts, by reading such treaties to allow *both* company claims and shareholder claims for reflective loss. The NAFTA case law provides a good example. Like other investment treaties, the NAFTA's investment chapter covered stocks and shares. But it distinguished between two types of shareholder claims. Article 1116 covered claims by an investor "on its own behalf." Article 1117 permitted an investor to bring a derivative claim "on behalf of" a locally incorporated enterprise that it "owns or controls, directly or indirectly," where recovery goes to the company.[116] The

112 *Id.* at 20; DOUGLAS, *supra* note 70, at 455.

113 *See* US—Argentina BIT, Art. VII(8); US—Turkey BIT, Art. VI(6); Energy Charter Treaty, Art. 26(7).

114 North American Free Trade Agreement art. 1139, Dec. 17, 1992, 32 I.L.M. 289, (entered into force Jan. 1, 1994) [hereinafter NAFTA].

115 See, for example, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership art. 9.19(1), Dec. 30 2018, https://dfat.gov.au/trade/agreements/in-force/cptpp/official-documents/Pages/official-documents.aspx [hereinafter CPTPP]; Dominican Republic—Central America Free Trade Agreement (DR-CAFTA) art. 10.16(1), Aug. 5, 2004, https://ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file328_4718.pdf; United States—Korea Free Trade Agreement (KORUS) art. 11.16(1), Sept. 24, 2018, https://ustr.gov/sites/default/files/uploads/agreements/fta/korus/Chapter_Eleven_Investment.pdf. Article 11.18(4) further bars an investor from pursuing a KORUS claim while its parent or subsidiary (owned or controlled, directly or indirectly) is litigating a separate claim over the same measure and "arising from the same events or circumstances."

116 *See also* CPTPP, *supra* note 115, at art. 9.19 (separating types of shareholder claims), art. 9.28 (incorporating joinder procedures); EU-Canada Comprehensive Economic and Trade Agreement

NAFTA parties consistently argued that these provisions mirror the classic separation between direct and derivative claims in domestic corporate law, with the intent of precluding shareholder reflective loss claims.[117] But while a few tribunals accepted this restrictive reading,[118] several others permitted reflective loss claims under Article 1116.[119] And tribunals have continued to interpret more recent treaties on this model as permitting shareholder reflective loss claims alongside company claims, even though allowing the former makes the latter superfluous.[120]

In sum, ISDS has opened the gates to shareholder claims over injuries to the firm—turning separate legal personality on its head. In doing so, ISDS stands alone among both domestic and international systems. ISDS has arrived at this result on the basis of ambiguous treaty text, with little policy justification.[121] And the permissive approach to reflective loss has become so sticky that ISDS tribunals largely resist states' efforts to contract out of it in their treaties. All this undermines key features of the corporate form in the context of FDI, with harmful spillover effects for all constituencies, both *ex post* (incentivizing multiple bites at the apple and shareholder opportunism) and *ex ante* (weakening managerial authority and ballooning transaction costs).[122]

(CETA), art. 8.22, Oct. 30, 2016, https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/ (extending waiver rules to cover both the foreign shareholder and a *locally* incorporated enterprise), art. 8.43 (incorporating joinder procedures).

117 The NAFTA parties have also argued that permitting minority shareholders to bring shareholder reflective loss claims under Article 1116 would render Article 1117 largely superfluous. *See* Bilcon of Delaware v. Gov't of Canada, PCA Case No. 2009-04, Canadian Counter-Memorial on Damages, ¶ 26 (June 9, 2017) (allowing shareholder reflective loss "undermines one of the most fundamental rules of corporate law in all three NAFTA Parties. . . . [This] will weaken the corporation's separate legal personality, create unpredictability for investors, creditors, banks, and others who participate in the foreign direct investment market, create unfair conditions of competition among these different sorts of investors, and hence, inevitably decrease the opportunities for investment in the NAFTA Parties"); GAMI v. Mexico, Submission of the United States, ¶ 17 (June 20, 2003); GAMI v. Mexico, Escrito de Contestación of Mexico, ¶ 167 (Nov. 24, 2003).

118 *See, e.g.*, Mondev Int'l v. United States, ICSID Case No. ARB(AF)/99/2, Award, ¶¶ 84–86 (Oct. 11, 2002) (highlighting the interests of creditors); *Bilcon*, Award on Damages, ¶¶ 372–74, 392.

119 GAMI v. Mexico, Award, ¶¶ 120–21 (Nov. 15, 2004) (acknowledging the policy tradeoffs); Pope & Talbot v. Canada, Award in Respect of Damages, ¶¶ 75–76 (May 31, 2002).

120 *See, e.g.*, Daniel W. Kappes & Kappes, Cassiday & Associates v. Guatemala, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections ¶¶ 140, 144 (disclaiming any authority to consider questions of policy, "the majority of the Tribunal is unable to find anything in the [DR—CAFTA] Treaty text itself … which would impose a limitation of "direct" losses, or an exclusion for derivative or reflective loss, onto Article 10.16.1(a)'s open language about a claimant pursuing its own losses on its own behalf").

121 DOUGLAS, *supra* note 70, at 455.

122 *See Eskosol*, ¶ 170; *GAMI*, Award, ¶¶ 120–21. *But see Mondev*, ¶¶ 84–86.

B. *Enforcing Costs Awards and Limited Liability*

While tribunals have been highly dismissive of corporate formalities in the context of separate legal personality, they insist on the sanctity of form in the context of limited liability. This is particularly evident where State-respondents have sought to reach the assets of a claimant corporation's shareholders. Investment treaties say nothing about limited liability or veil piercing—even less than they say about shareholder claims. Yet here tribunals recoil at deviating from formalism.

Outright corporate liability does not come up frequently in investment arbitration because ISDS is an asymmetric system, in which only investors can initiate claims. The claimant is always an investor, and the respondent is always the state. However, there are instances in which respondent states pursue claimants' assets, through counterclaims (where they are allowed), claims to security for costs, and in enforcing costs awards.[123] Limited liability questions arise where the claimant is an impecunious corporation owned by wealthy shareholders or an under-resourced corporate subsidiary owned by a wealthy parent company. In such settings it might be impossible for a state to enforce a counterclaim or a costs award against a corporate claimant unless it can attach the assets of its shareholders or the parent company. Where states have tried to pierce the corporate veil in these settings, tribunals have fallen back on form, seemingly as a matter of course, invoking limited liability in swatting down these attempts.

Churchill Mining v. Indonesia provides a good example.[124] There, the Claimant (Churchill) initially brought a $1 billion claim against Indonesia for interfering with coal mining licenses held by its subsidiaries.[125] The Tribunal found that the licenses were procured by fraud and that Churchill failed to exercise due diligence.[126] Ruling the claims inadmissible,[127] it imposed an $8.5 million costs award on the company.[128] Churchill initiated annulment proceedings and requested a stay on enforcing the costs award.[129] It argued

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123 *See* Gabriel Bottini, Julien Chaisse, Marko Jovanovic, Facundo Pérez Aznar & Catherine Titi, *Excessive Costs and Recoverability of Cost Awards in Investment Treaty Arbitration*, ACADEMIC FORUM ON ISDS REFORM CONCEPT PAPER 2020/1 (2020).

124 Churchill Mining v. Republic of Indonesia, ICSID Case No. ARB/12/14 and 12/40, Decision on Jurisdiction (Feb. 24, 2014).

125 *Id.* ¶¶ 15–19.

126 Churchill Mining v. Republic of Indonesia, ICSID Case No. ARB/12/14 and 12/40, Award, ¶ 528 (6 December 2016).

127 *Id.*

128 *Id.* ¶ 556.

129 Churchill Mining v. Republic of Indonesia, ICSID Case No. ARB/12/14 and 12/40,

that temporary relief was necessary because enforcement would force it into bankruptcy, potentially preventing it from seeking annulment.[130] Indonesia objected, insisting that any stay be conditioned on posting security for the entire costs award.[131] It argued that the Claimant could post security without undue hardship "because they can be financed by their shareholders (who have been supporting and funding the pursuit of the ICSID claim)."[132]

The Annulment Committee rejected Indonesia's arguments by appeal to the classical liability shield. It agreed with the Claimant that demanding security for the entire costs award would be too onerous for the impecunious company, finding that "their access to justice cannot be frustrated."[133] At the same time, it found that it could not expect the Claimant's shareholders to foot the bill—even if they were financing the current proceedings. "There is no reason . . . to pierce the corporate veil," in its view, absent any claim of abuse of formalities.[134] It emphasized that "there is no contention that the Applicants have voluntarily organized their insolvency to evade their commitment to enforce their Award."[135] The Committee thus leaned strongly into formalism, despite a clear risk that the Claimant (and its shareholders) could escape liability altogether.

While this strong limited liability approach seems more or less in bounds, it does fall on the more aggressive end of the spectrum of domestic approaches. Recall that domestic laws vary in how far they insist on the formal liability shield where questions of abuse and opportunism arise. In particular, courts are more open to veil piercing in cases involving involuntary creditors and claims of fraud.[136] *Churchill* is arguably just that sort of case. The whole basis for ISDS jurisdiction was a fraudulent investment, and the respondent state became an involuntary creditor of the company upon winning its initial costs award. Insisting on a strong presumption against veil piercing creates perverse incentives to challenge awards without fear of exposure to costs.

At the end of the day, some courts might insist on the form in cases like

Annulment Proceeding, Decision on the Request for Continued Stay of Enforcement of Award, ¶ 21 (June 27, 2017).

130 *Id.* ¶ 23. Its assets at that point amounted to less than a quarter of the value of the costs award. Churchill offered to post some of those assets as security for the duration of the proceedings (title to land worth at most $1.75 million). *Id.* ¶ 25.

131 *Id.* ¶ 31 (noting the "extremely high risk" that the claimant would escape complying with the costs award because it has "no money and no source of business").

132 *Id.* ¶ 31.

133 *Id.* ¶ 38.

134 *Id.* ¶ 39.

135 *Id.*

136 Oh, *supra* note 35

Churchill, and others likely would not.[137] Limited liability has its tradeoffs, and one can question where to draw the line. Recall that it serves to allow investors to limit their risks to the value of their shares and to enable corporations to diversify risk across various subsidiaries. This can leave creditors empty-handed in litigation—which is especially concerning in the case of involuntary creditors who were not in a position to manage the risks *ex ante*. Domestic courts vary in how they balance these tradeoffs, and ISDS' highly formalist posture is not beyond the pale—whether or not it reflects good policy.[138]

But these cases do not arise in a vacuum. What is jarring about investment tribunals' incantations about limited liability and veil piercing is the contrast to their irreverence toward separate legal personality. When it comes to shareholder claims, tribunals rarely hesitate in trampling the basic expectations of the corporate form; yet they fall back on formalism when it comes to limited liability. As shall be seen in the next section, tribunals take an even more aggressive formalistic posture in pushing the veil beyond questions of liability.

C. *Corporate Nationality and The Veil*

ISDS tribunals strongly emphasize corporate formalities in the context of nationality shopping, although it is even less clear that such reverence is justifiable in this context.[139] Drawing on practices developed in the context of taxation, firms frequently structure their investments through corporate chains to acquire investment treaty protection. They typically do this by assigning the investment to a wholly-owned subsidiary incorporated in a State party to a favorable investment treaty with the host State. The question frequently arises whether a tribunal should admit a claim by a mere paper investor, set up for the sole purpose of acquiring nationality for treaty coverage.

Here again, tribunals regularly invoke the sanctity of the corporate form. Tribunals have proven generally unwilling to look through corporate subsidiaries in assessing whether they qualify as nationals of a state party to a particular BIT—invoking the presumption against veil piercing as a talisman to disclaim any authority to sort out the "real" or "effective"

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137 *Id.*

138 Armour et al., *supra* note 1, at 7–8; PISTOR, *supra* note 6, at 51–53.

139 *See further* Arato, *supra* note 3 (for a deeper discussion of nationality shopping in ISDS, and its consequences for the emerging autonomy of firm on the international plane); Kahale, *supra* note 3.

nationality of the firm.[140] As a result, the doctrine enables firms to easily shop for treaty protection wherever they choose to invest. Tribunals generally permit such treaty arbitrage before or after investing, without notifying the host state, so long as the firm acquires the requisite nationality before any actual dispute arises.[141]

Tokios Tokelés v. Ukraine nicely captures the extent of tribunals' formalism in the context of nationality shopping.[142] In its 2004 Award, the Tribunal held that investors can even sue their own state of nationality through creative structuring, absent extreme abuse of the corporate form (whatever that might mean). Tokios Tokelés, a Lithuanian company, sued Ukraine under the Ukraine—Lithuania BIT.[143] The state protested that the company was ninety-nine percent owned by two Ukrainian individuals, meaning that allowing the suit to go forward would internationalize a dispute between Ukraine and its own nationals. This, it contended, would not serve the purpose of a treaty regime designed to promote *foreign* investment. Yet, by majority, the Tribunal refused to "pierce the corporate veil,"[144] holding that "under the terms of the Ukraine–Lithuania BIT . . . the only relevant consideration is whether the Claimant is established under the laws of Lithuania."[145] Because the company met this meager test, the Tribunal refused to look past its formal nationality and asserted jurisdiction.[146]

A year later, the 2005 Decision on Jurisdiction in *Aguas del Tunari v. Bolivia* rounded out this permissive logic, illustrating the extent to which

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140 Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶ 56 (Apr. 29, 2004) (emphasizing irregularity of equitable veil piercing). On the idea of a "veil of nationality," see, for example, MICHAEL REISMAN, THE QUEST FOR WORLD ORDER AND HUMAN DIGNITY IN THE TWENTY-FIRST CENTURY 323–25 (2013).

141 *See* Philip Morris Asia Ltd. v. Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, ¶¶ 539, 550, 554 (Dec. 17, 2015) (noting that as an outside limit "the initiation of an investor-State arbitration constitutes an abuse of rights . . . when an investor has changed its corporate structure to gain the protection of an investment treaty at a point in time when a specific dispute was foreseeable," and noting further the "high threshold" to making such a finding); *see also* Phoenix Action v. Czech Republic, ICSID Case No. ARB/06/5, Award, ¶ 93 (Apr. 15, 2009); Mobil Corp., Venezuela Holdings, B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Decision on Jurisdiction, ¶ 190 (June 10, 2010); ConocoPhillips Petrozuata B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits, ¶¶ 267, 268, 273, 279 (Sept. 3, 2013).

142 *Tokios Tokelés*, Jurisdiction, ¶ 56.

143 The Ukraine–Lithuania BIT defines "investor" very broadly as "any *entity established* in the territory of the Republic of Lithuania in conformity with its laws and regulations." *Id.* ¶ 28.

144 *Id.* ¶¶ 54–56.

145 *Id.* ¶ 38.

146 The Tribunal noted in passing that the Claimant appeared to have engaged in "substantial business activity" in Lithuania, though it refrained from affirmatively deciding so—reemphasizing that that the question "is not relevant to our determination of jurisdiction." *Id.* ¶ 37.

tribunals balk at scrutinizing corporate ownership chains.[147] Here, the investor seemingly bargained away its ability to treaty shop in its investment contract with Bolivia.[148] Nevertheless, the investor eventually restructured to acquire treaty protection through a Dutch subsidiary, and the Tribunal allowed the claim to go forward under the Netherlands—Bolivia BIT.[149] This shows that private ordering may not be a readily-available option for states and investors to avoid Tribunal interpretations that they deem inefficient *ex ante*, as I have argued more systematically elsewhere.[150]

Tokios Tokelés and *Aguas del Tunari* were both subject to scathing dissents on the issue of treaty shopping. In *Tokios Tokelés*, the President of the Tribunal insisted that framing the issue in terms of veil piercing and abuse of the corporate form was "beside the point," and practically prejudicial—completely obscuring the economic realities and imposing a heavy burden on respondent States to show that corporate claimants engaged in extreme malfeasance.[151] The dissent in *Aguas del Tunari* emphasized that opening the door to nationality shopping would completely undermine the reciprocal nature of investment treaties. This would effectively transform each party's bilateral obligations under the BIT into an "infinite offer to arbitrate"—open not only to nationals of the other party, but to nationals of any country.[152]

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147 Aguas del Tunari, S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction (Oct. 21, 2005).

148 The Concession contract explicitly barred any transfer of a controlling stake in the local company to any other company, absent Bolivia's consent. Bolivia attempted to argue—to no avail—that this provision was "carefully structured to preclude changes in the foreign ownership of AdT that might bring it within the coverage of a BIT." *Id.* ¶¶ 156, 165.

149 *Id.* ¶ 160.

150 This may have been a case of bad drafting, but tribunals regularly ignore efforts at private ordering around investment treaty rights. For an in-depth analysis of how ISDS tribunals engage (or fail to engage) with negotiated terms in investment contracts which seem to opt out of investment treaty rules, see Arato, *supra* note 3; and Julian Arato, *The Logic of Contract in the World of Investment Treaties*, 58 WM. & MARY L. REV. 351 (2016).

151 Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Dissenting Opinion of President Prosper Weil, ¶ 21 (Apr. 29. 2004) (accepting that there is no evidence that Tokios Tokelés abused the corporate form, but insisting that the question of abuse or "lifting of the veil . . . is beside the point"). Weil challenged the majority's excessive formalism, contending that the "assumption that the origin of the capital is not relevant and even less decisive" is unwarranted, and here led to the perverse conclusion that two Ukrainian individuals could effectively bring an international suit against their own home state as "foreign" investors. *Id.* ¶ 6. For Weil, the majority's appeal to the language of veil piercing completely obscured the issue: in his view all that matters, and all that should matter, is "the simple, straightforward, objective fact" that the dispute is not really about foreign investment at all. *Id.* ¶ 21.

152 Aguas del Tunari, S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3, Dissenting Opinion of Arbitrator José Luis Alberro-Semerena, ¶¶ 8–9, 16 ICSID Rep. 303 (2005) (noting that examples of infinite offers of arbitration do exist in certain contexts—for example, where states make global offers to all foreign investors in their unilateral investment laws). *See* Jarrod Hepburn, *Domestic*

The dissenters in *Aguas del Tunari* and *Tokios Tokelés* perceived the stakes well, but their challenges soon faded to the background. The majority rules established in these early cases have since become entrenched, and contemporary tribunals take the viability of treaty shopping as practically a given. Thus, in *Mobil Corp. v. Venezuela* the Tribunal accepted outright that "the main, if not the sole purpose of the restructuring was to protect Mobil investments from adverse Venezuelan measures in getting access to ICSID arbitration through the Dutch–Venezuela BIT."[153] The fact of *post hoc* restructuring to acquire treaty protection was of no consequence, taken on its own.[154] As articulated in *Philip Morris v. Australia*, the only exception is cases of abuse or bad faith, particularly where restructuring occurs after a dispute has arisen or where, at least, a specific dispute is foreseeable.[155] As noted by the Tribunal in *ConocoPhillips v. Venezuela*, "the standard is a high one,"[156] and tribunals must bear in mind "how rarely courts and tribunals have held that a good faith or other related standard is breached."[157] The limited exception of abuse of right confirms the power of the rule. Indeed, only a few ISDS tribunals have dismissed a case for failure to meet this lofty test.[158]

States have increasingly attempted to reform their treaties to avoid these results by including "denial of benefits" clauses.[159] These clauses allow either party to deny treaty access to paper enterprises that are nationals of the other party but maintain no substantial business activities there and are themselves

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Investment Statutes in International Law, 112 AM. J. INT'L L. 658 (2018).

153 *Mobil Corp.*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, ¶ 190.

154 *Id.* ¶ 191. *See also ConocoPhillips*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits, ¶¶ 267-68, 273, 279 (considering it irrelevant—absent more—that ConocoPhillips' sole business purpose in restructuring through Dutch "corporations of convenience" was to acquire ICSID jurisdiction).

155 *Philip Morris v. Australia*, ¶ 554; *Mobil Corp.*, ICSID Case No. ARB/07/27, ¶ 205 (noting that "with respect to pre-existing disputes, the situation is different and the Tribunal considers that to restructure investments only in order to gain jurisdiction under a BIT for such disputes would constitute . . . 'an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs'") (quoting Phoenix Action v. Czech Republic, ICSID Case No. ARB/06/5, Award, ¶ 144 (Apr. 15, 2009)); *ConocoPhillips*, ICSID Case No. ARB/07/30. In both cases the Tribunals declined jurisdiction over aspects of the respective disputes born before the relevant restructuring processes were complete. *Mobil Corp.*, ICSID Case No. ARB/07/27, ¶ 206; *ConocoPhillips*, ICSID Case No. ARB/07/30, ¶¶ 287–89.

156 *ConocoPhillips*, ICSID Case No. ARB/07/30, ¶ 275.

157 *Id.*

158 *Philip Morris v. Australia*; *Phoenix Action*, ICSID Case No. ARB/06/5, Award, ¶ 93 (holding, on slightly different grounds and with perhaps more skepticism than usual, that "if the sole purpose of an economic transaction is to pursue an ICSID claim, without any intent to perform any economic activity in the host country, such transaction cannot be considered as a protected investment").

159 Such clauses also come from the world of international tax, and thus represent borrowing a tax solution to address what was originally a tax problem.

controlled by third-party nationals.[160] However, several tribunals have resisted such efforts, holding that states must deny benefits proactively and give notice *before* a dispute arises, imposing impossible monitoring costs on governments and leaving the utility of such clauses in doubt.[161] In any case, denial of benefits provisions are not especially common and can themselves be circumvented through careful investment structuring where the State is party to other more favorable investment treaties.[162]

The case law on nationality shopping exhibits an extreme reliance on form, in contrast to tribunals' irreverent attitude toward separate personality in the context of shareholder claims. It reflects a hyperextension of basic formalisms to contexts in which they do not readily fit. By drawing the presumption against veil piercing from the context of limited liability into the context of nationality shopping, ISDS tribunals transform apparently bilateral treaties into potentially limitless offers to arbitrate—open not only to foreigners, but even sophisticated nationals of the host State. This is

160 *See, e.g.*, U.S.–Peru Trade Promotion Agreement art. 10.12(2) ("A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of any Party, other than the denying Party, and persons of a non-Party, or of the denying Party, own or control the enterprise."); NAFTA art. 1113(2); Energy Charter Treaty art. 17. *See also* U.S. Model BIT art. 17; Canada Model BIT art. 18.

161 *See, e.g.*, Plama Consortium v. Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction, ¶¶ 161–62 (Feb. 8, 2005) (holding that under the Energy Charter Treaty a state must give advance notice to deny treaty benefits, though "a general declaration in a Contracting State's official gazette could suffice; or a statutory provision in a Contracting State's investment or other laws; or even an exchange of letters with a particular investor or class of investors"); Yukos Universal Ltd. v. Russian Federation, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, ¶ 458 (Nov. 30 2009); *see also Ampal*, Jurisdiction, ¶¶ 140–67 (finding that the applicable denial of benefits clause requires consultations between the treaty parties *prior to* any decision to deny benefits). *But see* Pac Rim Cayman v. El Salvador, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, ¶ 4.83 (June 1, 2012) (ruling that denial of benefits under the CAFTA–DR need not occur before the investor claimed benefits by filing for arbitration); Guaracachi America v. Bolivia, PCA Case No. 2011-17, Award (Corrected) ¶ 372 (Jan. 31, 2014) ("Whenever a BIT includes a denial of benefits clause, the consent by the host State to arbitration itself is conditional and thus may be denied by it, provided that certain objective requirements concerning the investor are fulfilled. All investors are aware of the possibility of such a denial, such that no legitimate expectations are frustrated by that denial of benefits."). On the controversy surrounding denial of benefits clauses, see further Tania Voon, Andrew Mitchell, & James Munro, *Legal Responses to Corporate Manoeuvring in International Investment Arbitration*, 5 J. INT'L DISP. RES. 41 (2014); Loukas Mistelis & Crina Mihaela Baltag, *Denial of Benefits and Article 17 of the Energy Charter Treaty*, 113 PENN. ST. L. REV. 1301, 1320–21 (2009); NILS ELIASSON, 10 YEARS OF ENERGY TREATY CHARTER ARBITRATION, https://www.josemigueljudice-arbitration.com/xms/files/02_TEXTOS_ARBITRAGEM/03_Convencoes_Arbitrais_Internacionais/Report_Ten_Years_of_ECT_Arbitration__30_June_2011.pdf. Note, in this regard, that the Canada Model BIT of 2004 allows a party to deny benefits to a shell corporation "subject to prior notification," while the 2012 U.S. Model BIT imposes no such condition. Canada Model BIT art. 18(2) (2004); U.S. Model BIT art. 17 (2012).

162 Arato, *supra* note 3.

materially unfair, as it allows corporate investors to avoid risks that they were paid to assume—particularly in cases like *Aguas del Tunari* where such risks were expressly allocated and paid for in the underlying investment contract. Tribunals offer little explanation for why the presumption against veil piercing should operate with as much force in the context of structuring as it might in the context of shareholder liability.

* * *

These trends in the ISDS case law on separate legal personality, limited liability, and veil piercing are each problematic in their own ways. Held against one another, they appear anomalous. The next Part turns to explaining the elasticity of form in investment arbitration, by shifting the focus to who wins and who loses.

III. ACCOUNTING FOR ELASTICITY

In general, international law is highly deferential to the basics of corporate form. But this is emphatically not the case in modern investment law. Over the last twenty years, investment treaty arbitration has distorted corporate formalities in all directions, in ways that are often inefficient and generally unfair. It is odd that this elasticity should emerge in ISDS, where one might have expected adjudicators to be most sensitive to well-trodden questions about the rules governing business associations and efficiency-oriented policy. Here is a regime which, after all, is premised on protecting investor expectations, in the hopes of reducing the risks and costs of investment for all stakeholders and thereby promoting cross-border investment among the treaty parties.[163] The key mechanism may be *ex post* dispute resolution, but the point is stabilizing the business environment *ex ante*. And yet here, of all places, the typically dependable corporate form is stretched and remolded through adjudication, without much basis in the underlying treaties or much in the way of policy justification.

This Part considers how to account for this elastic formalism in investment arbitration. Some elasticity can, of course, be expected. Domestic corporate law is itself not blindly formalist, and domestic courts prioritize different formal characteristics over time and across different contexts.[164] Nations also vary somewhat in which formalities they

163 Julian Arato, *Two Moralities of Consistency*, *in* INVESTMENT PROTECTION STANDARDS AND THE RULE OF LAW (August Reinisch & Stephan Schill ed., forthcoming 2021); BONNITCHA, POULSEN, & WAIBEL, *supra* note 62.

164 Pargendler, *supra* note 4; Thompson, *supra* note 36; Choi, *supra* note 28.

prioritize.[165] What needs elucidation here is ISDS' stark deviation from the most common precepts of domestic law (on which investors and creditors generally rely), as well as the unexplained bimodality in the case law. I argue that it is possible to get purchase on this elasticity by focusing on who wins and who loses.

I first consider two accounts that key in to common stories about the winners and losers of the investment treaty regime more broadly. The first suggests that states may be simply getting what they bargained for in signing on to investment treaties, which are being faithfully executed by arbitrators. This is essentially a doctrinal account (III.A.). The second is a story about the regime tending to favor investors. This comes in both a critical flavor (as an ideology-based account of pro-investor bias) and an apologetic flavor (as a functional account, linking investor protection to investment promotion) (III.B.). All of these stories are commonplace in the field and are occasionally deployed to justify aspects of the case law examined above. The problem is that these accounts all fail to accurately capture the true beneficiaries of the regime's ambivalent formalism. I argue that it is not investors as such, but the much narrower class of *ex post* claimants that consistently win out (III.C.). This insight reveals much about the winners and losers of the investment treaty regime writ large and calls into question how far it is serving its supposed goals.

A. State-Centric Accounts

One possible explanation for investment law's anomalous formalism is that this is simply what the law demands. States make investment treaties and retain the power to unmake them. They can and do replace their agreements over time. A (too) easy account would be that arbitrators are faithfully executing the underlying treaties, and states are getting what they bargained for *ex ante*: a regime that grants substantial benefits to one another's nationals to incentivize them to engage in cross-border investment. On this theory, even if states lose particular cases, they may still be the ultimate beneficiaries of the regime—and where they come to regret some aspect or another they are fully competent to make changes. This rests on a simplistic doctrinal account, which ultimately does not hold water.

Doctrinally, it would of course be possible for investment treaties to displace and tweak aspects of the corporate form for purposes of ISDS disputes. Though public international law generally defers to the basics of

165 Gelter, *supra* note 28.

the corporate form in domestic law, it certainly allows states to opt-in to more specific arrangements through their specialized treaty regimes.[166] If treaties expressly elevated the form in some contexts, while weakening formalities in others, the case law would be perfectly explicable—even if it might raise significant policy questions.

But the fact is that most investment treaties do not address matters of corporate form clearly, if at all. The elasticity of form has emerged from the iterative interpretation of sparse and highly open-textured treaty provisions that touch on corporate and shareholder standing in only the most general terms. None of this is clearly supported by treaty text or purpose.

There is no clear textual justification for allowing shareholder claims for reflective loss. All investment treaties include stocks and shares as investments and allow owners of those investments to sue where their rights are infringed (e.g., expropriated or otherwise treated unfairly and inequitably). This obviously covers shareholder direct claims—i.e., claims about rights associated with shares, like expropriation of the shares themselves or interference with governance rights. But nowhere do any of these treaties say that shareholder-investors gain a cause of action to enforce rights to corporate assets that their shares do not entail—rights that would, indeed, prove anathema to the basic bargain of corporate investment. True, they do not expressly foreclose such claims either—but that is no answer. The fact is that investment treaties are almost invariably indeterminate on this question (except when they try to close the door on reflective loss claims). Given this indeterminacy, the law of treaties *requires* interpreters to look to general international law, which, in turn, enshrines the common features of the corporate form in domestic law.[167] In other words:

166 *Barcelona Traction*, ¶¶ 88, 90. The ICJ itself recognized this possibility in *ELSI*, allowing diplomatic protection of shareholders to enforce atypically expansive treaty-based managerial rights (as direct claims). *ELSI*, ¶¶ 69–70. More recently, the ICJ opined that investment treaties could alter the corporate form more fundamentally, even by allowing shareholder claims for reflective loss—without finding that any treaty actually does this. *Diallo*, ¶ 88.

167 The law of treaties requires a treaty interpreter to take into account "other relevant rules of international law applicable in the relations among the parties," which includes customary international law and general principles of law. VCLT art. 31(3)(c). Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 INT'L & COMP. L. Q. 279 (2005) ("Every International Convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve in express terms and in a different way."). In international legal doctrine, this principle of "systemic integration" is a strong requirement to take into account extrinsic legal rules in treaty interpretation—at least formally (if not sociologically), this criterion of interpretation has the same status as the ordinary meaning of the text and the treaty's object and purpose in Article 31(1). *See International Law Commission, Draft Articles on the Law of Treaties with Commentaries*, 1966 Y.B. I.L.C., Vol. II, 219–20 (clarifying that there is no hierarchy among the interpretive criteria in VCLT Article 31: "[a]ll the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give rise to the legally relevant

investment treaties *could* contract out of international law and upend the corporate form for any number of purposes; but since most do not do so with any clarity, the law of treaties requires reference to the formalist posture of general international law (which, here, accords with domestic law).[168]

There is similarly no textual justification for venerating limited liability in the context of security for costs. Here, the ISDS approach is aggressive, if not outlandish. But there is no special doctrinal explanation for such strong formalism here, when formalities are dismissed so handily in the context of shareholder claims and separate personality.

Doctrinal explanations for the extended presumption against veil piercing in relation to corporate nationality are also weak. Here, at least, typical treaty text does offer some support for ISDS' exaggerated formalism. The treaties usually state that a legal person incorporated in the territory of one state party qualifies as an investor, provided that it owns or controls a covered asset in the territory of the other. Control is open to interpretation,[169] but this language at least suggests that mere shell companies qualify as investors. Yet text is not everything—in fact, the international law of treaties gives equal weight to purpose and context in puzzling out party intent.[170] As the dissent in *Aguas del Tunari* saw clearly, investment treaties are mostly *bilateral* instruments meant to promote and protect investment between the two countries involved—not "infinite

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interpretation"); Julian Arato, *Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and their Diverse Consequences*, 9 L. & PRAC. INT'L CTS. & TRIBUNALS 443, 458 (2010).

168 This interpretive principle of systemic integration is controversial and can be highly dubious where the presumption is too easily triggered, or where it is invoked to justify reference to non-binding or otherwise attenuated international legal instrument. Bruno Simma & Theodore Kill, *Harmonizing Investment Protection and International Human Rights: First Steps Toward a Methodology*, *in* INVESTMENT LAW FOR THE 21ST CENTURY 680, 682, 695, 698–702 (Christina Binder et al. eds. 2009); Julian Arato, *Constitutional Transformation in the ECtHR: Strasbourg's Expansive Recourse to External Rules of International Law*, 37 BROOK. J. INT'L L. 349 (2012). But the scope of shareholder claims in investment treaties is an easy case—where the treaties are indeterminate, and the position of general international law (and domestic law) is otherwise clear and generally applicable. Indeed, the uniformity across national and international jurisdictions arguably indicates that the restriction of shareholder claims reflects a general principle of international law. In any case, tribunals have not been persuaded in the few cases where Respondents have raised these objections. *See* Teinver S.A. v. Argentine Republic, ICSID Case No. ARB/09/1, Jurisdiction, ¶ 212 (Dec. 21, 2012) ("refus[ing] to take their cues from domestic corporate law"); and *CMS Gas*, Jurisdiction, ¶ 48 (recognizing that general international law bars shareholder reflective loss claims, but insisting that BITs are *lex specialis*); and *Enron*, Jurisdiction, ¶ 34.

169 Aguas del Tunari, S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, ¶¶ 223, 264 (Oct. 21, 2005).

170 VCLT art. 31(1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

offer[s] to arbitrate" with investors anywhere in the world.[171] If states wished to open up substantive and procedural investment protections to all comers, they could easily do so unilaterally through their domestic investment laws. Several countries do this in the interest of incentivizing as much investment as possible. That states parties to investment treaties choose to regulate investments through bilateral agreements should have some contextual weight. States may have all kinds of reasons for limiting the scope of covered investors to those really hailing from their counterparties,[172] which would speak against a very heavy veil of nationality.

What's more, tribunals have tended to prioritize approaches honed in the case law even when interpreting more recent treaties that expressly attempt to reverse ISDS positions. Tribunals have mostly resisted states' efforts to curb reflective loss claims in treaties like the NAFTA, even in the face of submissions by all of the parties that the treaty was specifically designed to bar such claims.[173] Similarly, ISDS tribunals have resisted giving meaningful effect to mechanisms for limiting treaty shopping, like denial of benefits clauses.[174] This is not to say that all tribunals ignore such provisions. But it does tend to show that their default presumptions are so strongly held that that they tend to resist treaty-based change. This is perhaps the strongest indication that there is no simple doctrinal explanation for distortions of the corporate form in the cases.

States seem to be getting more than they bargained for. This not a clear-cut case of tribunals faithfully executing the treaties. The fact is that the treaties are highly indeterminate on all of the relevant questions. Mere doctrine does little to explain tribunals' ambivalent formalism. That states are consistently frustrated in their efforts to reformulate treaties in line with the normal expectations of corporate law is the clearest indicator that there is something else going on.

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171 *Aguas del Tunari*, Dissenting Opinion of Arbitrator José Luis Alberro-Semerena, ¶¶ 8–9, 16 (2005).

172 POULSEN, *supra* note67, at *xv*, 16–22.

173 *See, e.g.*, *GAMI*, Award, ¶¶ 120–21 (Nov. 15, 2004) (acknowledging the policy tradeoffs); *Pope & Talbot*, Award in Respect of Damages, ¶¶ 75–76 (May 31, 2002); Kappes v. Guatemala, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections, ¶¶ 157–59 (Mar. 13, 2020). *But see Bilcon*, Award on Damages, ¶¶ 372–74, 392 (for a rare example of a tribunal accepting the treaty party's arguments that the division of labor between NAFTA Arts. 1116 and 1117 was meant to preclude claims for shareholder reflective loss).

174 *See, e.g.*, *Plama Consortium*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, ¶¶ 161–62; *Ampal*, Jurisdiction, ¶¶ 140–167. *But see Pac Rim Cayman*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, ¶ 4.83 (Jun. 1, 2012) (giving the denial of benefits clause effect).

B. Investor-Centric Accounts

Looking at the pattern of cases, the conventional (critical) view might predict that the elasticity of form tends to benefit investors—that here, as in other cases, tribunals are biased toward investors. This would fit well with the overwhelming conventional wisdom in the scholarship on investment law and ISDS over the last decade. A more apologetic gloss is that investment arbitrators favor *investment* and understand their role in terms of holding the line on State's credible commitments.[175] However, neither version of the "pro-investor" account adequately captures the elastic formalism of ISDS. This is because the pattern of cases does not actually benefit investors *as a class*. This point requires something of a reset in how we think about the main players in the investment treaty regime.

ISDS scholarship and policy discussions often frame the trade-offs in ISDS in zero-sum terms, as either benefitting investors at the expense of states, or vice versa. I have argued elsewhere that this view of the regime is a mistake, which obscures more than it reveals.[176] At least on one side of the equation, the story admittedly fits: all of the ways in which ISDS distorts corporate formalities impose heightened costs on states (and their populations). But it does not necessarily follow that these distortions therefore favor investors.

A simplistic "pro-investor" account misses the real impact of the cases. At first glance, it might seem that investors reap the benefits of corporate law formalism while managing to avoid all restrictive formalities.[177] The problem is that this takes investors as an undifferentiated class at too narrow a time slice. It focuses only on the interests of investors in dispute resolution (securing recompense) and not in the making of investments (maximizing future returns). Investors exist both *ex ante* and *ex post*. Investment treaties

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175 *See, e.g.*, Charles Brower & Jawad Ahmad, *Why the "Demolition Derby" That Seeks to Destroy Investor-State Arbitration?*, 91 S. Cal. L. Rev. 1139 (2018); Alan O. Sykes, *The Economic Structure of International Investment Agreements with Implications for Treaty Interpretation and Design*, 113 AM. J. INT'L L. 482, 498 (2019); Henrick Horn & Pehr-Johan Norback, *A Non-technical Introduction to Economic Aspects of International Investment Agreements* 5-6 (Rsch. Inst. Indus. Econ. IFN Working Paper No. 1250, 2018), https://www.ifn.se/wfiles/wp/wp1250.pdf; Stratos Pahis, *BITs and Bonds: The International Law of Sovereign Debt*, 115 AM. J. INT'L L. 242, 254 (2021).

176 Arato, *supra* note 2; *see also* Gregory Shaffer & Sergio Puig, *Imperfect Alternatives: Institutional Choice and the Reform of International Investment Law*, 112 AM J. INT'L L. 361 (2018) (examining treaty reform in terms of trade-offs among imperfect options that serve a wide constellation of values and interests, without being easily reducible to a zero-sum game between states and investors).

177 PISTOR, *supra* note 6, at 206 ("Asset holders . . . are not interested in sharing their spoils . . . They are not even interested in the rule of law as such, only to the extent that it advances their own interests.").

are concerned as much with encouraging economic activity by investors *ex ante* as they are with providing them means of redress *ex post*—indeed the latter is only justifiable insofar as is it serves the former goal. *Ex ante,* at least, the case law's ambivalence toward the corporate form introduces serious transaction costs into the making of investments which can undercut the interests of investors as much as those of states.

As explained above, opening the door to shareholder claims for reflective loss imposes serious costs on a wide range of investors, corporate insiders and outsiders. It shifts risks to creditors which they can either stomach or build into the price of credit, and which will tend to raise the cost of doing business for all stakeholders *ex ante*. It also creates significant governance inefficiencies internal to the firm, setting shareholders against management and against one another—all the more so where the firm finds itself in distress.

The same goes for the super-charged veil of nationality. Adequately informed states have to assume that any local company may enjoy upstream treaty coverage and must thus price in investment protection and ISDS for every corporate investor in every transaction. These costs are compounded by the unavailability of private ordering, given tribunals' skepticism of contracting around investment treaty terms.[178] Thus, the case law's elastic formalism does not necessarily serve the interests of investors as a class, and cannot be taken as clearly "pro-investor" in an *ex ante* sense—except, perhaps, contingently, where investors engage with less sophisticated states and/or creditors insufficiently aware of the full meaning of the investment treaty regime (a point I return to below).

Even *ex post*, the ISDS version of formalism may also favor only some investors and not others, potentially affording differential benefits to participants in the same investment project. The elasticity benefits those covered by investment treaties when disputes arise (and particularly first movers). But not everyone will be covered. Some shareholders and creditors may well be frozen out.

C. The Pro-Claimant Account

Where the case lines do ultimately converge is in consistently benefiting *claimants*—that narrow subset of investors that have decided to bring suit *ex post*. Yes, in the asymmetric ISDS system all claimants are investors. But not all investors are, or ever will be, claimants. These figures exist in different time slices. The figure of the investor straddles the making of investments

178 Arato, *supra* note 2.

and investment disputes; the claimant lives only in the *ex post* world. And even *ex post*, plenty of disappointed investors will not be entitled to bring claims under investment treaties (including shareholders from third states lacking investment treaty coverage, and various creditors). Although they are almost always conflated, claimants and investors connote very different figures with very different constellations of interests.

Especially in the context of investment disputes, where the stakes are typically enormous for all sides, a claimant's *ex post* interests may be very much misaligned from the generalized interests of investors *ex ante*, or from the interests of non-covered or non-litigious investors *ex post*. Acting as a claimant, a particular investor can be expected to litigate doggedly in her own interest—not in the interests of the investor class. A shareholder-claimant in a multi-million-dollar dispute will not likely think of the interests of hypothetical similarly situated investors—that is a job for the courts, the legislator, or anybody else at all. Such a claimant is also not likely (or not always likely) to prioritize the interests of other shareholders, other stakeholders, or the firm itself—not unless forced to do so by operation of law, as occurs in the context of bankruptcy and sovereign debt restructuring.[179]

Given the purposes of the regime—to protect covered investors generally and promote efficient investment—one might expect tribunals to take both retrospective (*ex post*) and prospective (*ex ante*) considerations into account. But at least in relation to the corporate form, they almost invariably prioritize the particular claimant in the particular case. Putting aside questions of the adjudicators' intentions, ISDS always seems to expand the availability of claims and to reduce the risk of making claims. Allowing shareholder reflective loss means more claims about more matters by more stakeholders.[180] Allowing treaty shopping effectively globalizes every bilateral treaty, opening the internationalized private right of action to firms

179 Thomas E. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857, 857 (1982) ("most of the bankruptcy *process* is in fact concerned with creditor distribution questions. . . . [T]he rules governing priorities determine who, among the claimants, will get what and in what order."); Edward Janger, *Crystals and Mud in Bankruptcy Law: Judicial Competence and Statutory Design*, 43 ARIZ. L. REV. 559 (2001); and in the context of sovereign debt, see Pahis, *supra* note 175, at 246 (noting that while "there is no international sovereign bankruptcy law . . . [nor any] central forum for managing creditor claims or rationally distributing sovereign assets," sovereign defaults are nevertheless still "governed by a number of interdependent yet uncoordinated institutions."); *see also* Michael Waibel, *Opening Pandora's Box: Sovereign Bonds in International Arbitration*, 101 AM J. INT'L L. 711, 711 (2007); Josef Ostřanský, *Sovereign Default Disputes in Investment Treaty Arbitration: Jurisdictional Considerations and Policy Implications*, 3 GRONINGEN J. INT'L L. 27, 44 (2015).

180 Arato, Claussen, Lee, & Zarra, *supra* note 2.

anywhere in the world.[181] And even barring veil piercing in relation to security for costs reduces the risk of bringing claims, seeing claims to the end (even against the odds), and seeking annulment. While these case lines always seem to expand options for particular claimants in particular disputes *ex post*, they can be quite inefficient for investors (and states) *ex ante*.

Beyond efficiency, there is something fundamentally unfair in how ISDS prioritizes claimants' interests. By opening the door to shareholder reflective loss claims, tribunals are allowing some privileged shareholders to recover returns for which they did not pay—shifting these costs to states, certainly, but also to other shareholders, creditors, and the firm itself. By subsidizing treaty shopping, ISDS allows claimants to avoid risks that they were already paid to assume—particularly insofar as the doctrine allows companies to shop for treaty coverage *after* investing, without notifying the government, even in cases where they contractually committed not to engage in treaty arbitrage.[182] In both cases, tribunals appear to be taking from states and/or other stakeholders and giving to those who bring claims.[183] Intentionally or not, all this pro-claimant solicitousness is effectively a story of Robin Hood in reverse.[184]

Admittedly, the interests of claimants and investors can overlap, if only imperfectly. The extent of this overlap will vary quite a bit depending on the state of knowledge amongst all relevant stakeholders about how ISDS interacts with the corporate form in practice. I have so far been operating on the assumption that all stakeholders have adequate knowledge about the existence and consequences of the investment treaty regime and, in particular, the ISDS case law on the corporate form. This is an admittedly artificial assumption. Perfect knowledge by market actors can never be assumed. And most stakeholders of investment treaties are far from perfectly informed.[185] Repeat investors (like oil majors) or creditors (like major financial institutions) may be sufficiently aware of these developments to adequately price them into investment relationships—and likewise particularly well-resourced states with repeated exposure to the regime. But for many investors, creditors, and state officials, the salience of ISDS remains low—surprisingly so, considering the deep costs it can impose.[186]

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181 STEPHAN SCHILL, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW (2009).

182 Arato, *supra* note 3, at 277.

183 *See* Pahis, *supra* note 175, at 262–263 (describing a similar dynamic with ISDS claims to enforce sovereign debt obligations).

184 I owe this important point to Daniel Greenwood.

185 BONNITCHA, POULSEN, & WAIBEL, *supra* note 62.

186 *Id.*

In practice, it thus remains unlikely that the ISDS case law on the corporate form will always (or often) be built into price *ex ante*. In that world, the line between claimant and investor becomes increasingly thin, though they never completely overlap—the efficiency costs faced by investors *ex ante* may be more marginal and worth internalizing in the interest of securing ISDS as a low-cost (or even free) insurance policy. But even on these modified assumptions, some investors will ultimately lack treaty protections *ex post*, and the case law will continue to impose inefficiencies and unfairness on most parties at all stages. Moreover, learning is possible, and the salience of investment law seems to be on the rise among governments.[187]

The full scope of these trade-offs involves thorny empirical questions that are difficult to answer in the abstract and are likely to vary a great deal for different kinds of investors (privately held corporations versus big public companies, for instance) and different kinds of creditors (large, repeat players versus smaller entities with less market power).[188] Testing these questions empirically with sufficient granularity is beyond the scope of this paper, but may prove a productive field for future research. Suffice it to say, here, that as the consequences of the investment treaty regime for corporate law and governance grow in salience, one can expect increasingly inefficient price effects *ex ante*. But even where salience is low, the ISDS jurisprudence on the corporate form remains intensely unfair for all but the privileged few who actually bring claims.

All this suggests, then, that the best account of the elastic corporate form in investment arbitration is a "pro-claimant" story, rather than a "pro-investor" one. I make no claim of intentional or conscious bias here. What is clear is that these seemingly ambivalent case-lines consistently prioritize the narrow interests of claimants, as opposed to the broader interests of investors (let alone states). In fact, the cases tend to sacrifice investors' *ex ante* interests in the service of claimants' interests *ex post*.

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187 See various state proposals to close off SRL claims in ISDS in the U.N. Commission on International Trade Law's Working Group III, for example the Submission from the Government of South Africa, UN Doc. A/CN.9/WGIII/WP.176, ¶ 74 ("Only loss recovery by directly injured companies should be allowed and not indirect claims … This ensures that there is no double recovery. Many indirect claims are associated with abusive practices such as forum shopping and parallel proceedings)" (July 17, 2019), Submission from the Governments of Chile, Israel, Japan, Mexico and Peru, UN Doc. A/CN.9/WG.III/WP.182 (Oct. 2, 2019); More generally, Anthea Roberts and Taylor St. John have demonstrated how the UNCITRAL reform process is becoming an important learning process for governments, making the mechanics and pitfalls of the investment treaty regime much more salient. Anthea Roberts & Taylor St. John, *UNCITRAL and ISDS Reforms: The Divided West and the Battle by and for the Rest*, EJIL:*Talk!* (April 30, 2019); *see also* Anthea Roberts & Taylor St. John, *Complex Designers and Emergent Design: Reforming the Investment Treaty System*, 116 Am. J. Int'l L. 96, (2022).

188 Gaukrodger, *supra* note 2.

Given the institutional structure of the regime, it needs to be said that this pro-claimant story also dovetails with an account about the interests of arbitrators. In ISDS, arbitrators are generally compensated on the basis of hourly fees. I make no claim that such interests are *motivating* arbitrators to take positions that make things easier for claimants. There is no causal evidence for that. But at the same time, no fair accounting of the winners and losers can ignore that adjudicators' objective interests dovetail with the outcomes.[189]

There are several possible explanations for these results that range from benign to malign. On the former end, this could be a story of simple contingency and path-dependence. The easiest explanation is that arbitrators are simply doing their best to address the questions before them, in the terms set by the litigants, and usually without any particular expertise in the niceties of corporate law.[190] Both of the main case-lines criticized here were early innovations in a young regime, in which nearly all detail is left up for grabs by the treaties.[191] Arguably their solutions were simply contingent, and only crystalized over time with a healthy dose of path-dependency and quasi-precedential reasoning. Whether or not precedential reasoning is appropriate or desirable in so fragmented a regime, it should come as no surprise that early solutions tended to be sticky.[192]

Other causal and motivation-based explanations are also possible. This could also be a benign story about arbitrators' focusing on the *ex post* dispute

189 BONNITCHA, POULSEN, & WAIBEL, *supra* note 62, at 29 ("[I]t is highly unusual in any regime of public international law to have its adjudicators work for profit. Some critics suggest that such financial rewards give arbitrators an incentive to increase the judicial scope of the regime to facilitate more arbitrations.").

190 Most ISDS arbitrators come from backgrounds in commercial arbitration or public international law—and, increasingly, some are specialists in international investment law. *See* Michael Waibel, *Sociology of Arbitrators*, *in* CAMBRIDGE COMPENDIUM OF INTERNATIONAL COMMERCIAL AND INVESTMENT ARBITRATION (Andrea Bjorklund, Franco Ferrari, & Stefan Kröll eds., 2021). Relatively few have backgrounds in corporate law or private law.

191 The availability of shareholder claims for reflective loss was crystallized already by the earliest jurisdictional decisions arising out of the Argentine financial crisis of 2001-2002, such as *CMS Gas* (2003) and *Enron* (2004). The rigid veil of nationality crystallized early in the case law as well. *Tokios Tokelés* (2004) and *Aguas del Tunari* (2005) were subject to scathing dissents at the time. *Tokios Tokelés*, ICSID Case No. ARB/02/18, Dissenting Opinion of President Prosper Weil (bemoaning the majority's reliance on inapposite analogies to limited liability); *Aguas del Tunari*, ICSID Case No. ARB/02/3, Dissenting Opinion of Arbitrator José Luis Alberro-Semerena. But their majorities' approaches to limiting veil piercing would become the consensus view within a few years. *Id.* ¶¶ 8–9. *Philip Morris v. Australia* (setting as an outside limit that shopping for treaty protection after a dispute with the state arises would constitute abuse of right); *Phoenix Action*, ICSID Case No. ARB/06/5, Award, ¶ 93; *Mobil Corp.*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, ¶ 190.

192 Richard Chen, *Precedent and Dialogue in Investment Treaty Arbitration*, 60 HARV. INT'L L.J. 47 (2019).

in front of them, rather than *ex ante* effects.[193] It could also be a more troubling story about tribunals buying into investor-friendly ideology (as claimed by the critics), while simply failing to appreciate the differences between investors' *ex post* and *ex ante* interests. And lastly, it is possible that we are seeing a degree of malign rent-seeking. Finally, there is little reason to assume that just one of these accounts explain the adjudicators' behavior—given the lack of any centralized institutional system and the diversity of actors involved, it is just as likely that some or all of these explanations operate in tandem. It is troubling enough that all of these stories are plausible.

In any event, intent and motivation do not matter as much as effects. It is clear, at least, that the incentives here are problematic. Motivations aside, these findings feed into literature calling the fee-structure of ISDS into question.[194]

At the end of the day, one has to zoom out and ask which of the regime's goals are being served by the way investment treaties are being interpreted. Here at least, in how ISDS tends to interact with the corporate form, the regime's *ex ante* investment promotion goals are taking a backseat. All priority, intentionally or not, seems focused on the *ex post* goal of access to justice—that is, access to justice for a specific privileged class of treaty-covered investors. It might be that in some contexts privileged access to justice can increase investors' willingness to invest, with positive price effects. But the foregoing suggests that the priority the investment treaty regime gives to dispute resolution *ex post* can be counterproductive for the making of investments *ex ante*—as well as generally unfair to a wide range of stakeholders.

CONCLUSION

I have argued that international law is distorting the corporate form, particularly within the law of foreign direct investment. The main driver is ISDS, in which one-off tribunals are confronted with all kinds of questions of corporate law. This Article shows how tribunals have varied widely in how far they hew toward typical corporate law assumptions—proving consistently deferential to the corporate form in some cases (like limited liability) and consistently irreverent of "mere" formalities in others (like

193 *See* D. Brian King & Rahim Moloo, *International Arbitrators as Lawmakers*, 46 N.Y.U. J. INT'L L. & POL. 875 (2014).

194 BONNITCHA, POULSEN, & WAIBEL, *supra* note 62, at 29.

separate legal personality). Taken together, the corporate form has become highly elastic in investment law. And given how enforceable ISDS awards are at the national level, this effectively distorts domestic corporate governance wherever investment treaties are in force—at least from the private perspective of the firm's various stakeholders.[195] All this elasticity appears to be largely inefficient *ex ante*, driving up the costs of doing business for states and investors alike, and indeed for all of their internal constituents (governments and populations on the one hand, and shareholders, management and creditors on the other). It also leads to unfair surprise *ex post* for states with less sophistication in this unfortunately still obscure field, and for investors who miss out on claims (especially where there are not enough assets to go around).

Popular criticisms of the field tend to assume that the investment treaty regime systematically favors investors. It may be that some rulings are more investor-friendly than others, but this is not the case with the interpretations considered here. Breaking the black box of "the investor" helps reveal a deeper bias in the system, which does not necessarily benefit either states or investors *as such*.

The main class of actors that the case law consistently benefits is claimants—i.e., that particular subset of investors who choose to bring claims *ex post*. Intentionally or not, all of the variation in approach to the corporate form proves consistent only insofar as it always tends to expand access to ISDS and sustain ISDS claims. In other words, the cases exhibit a systemic "pro-claimant" bias, but not a "pro-investor" one. Claimants' interests do not dovetail neatly with the broader interests of investors as a class, and may even cut against their interests *ex ante* (by driving up the costs of doing business) and *ex post* (by freezing out unprotected investors). At the same time, it needs to be acknowledged that a pro-claimant stance also benefits all who stand to reap rewards from the making of arbitration claims.

This account yields surprising insights about how well the investment treaty regime serves its varied purposes under prevailing interpretations. These treaties are purportedly designed to promote efficient investment.[196] Particularly for capital-importing states, the tradeoff involves taking on highly enforceable commitments and strangling their flexibility in engaging with foreigners, all in the hopes of enticing foreign investment. The idea is that investors can rely on these commitments to mitigate political risk, reduce transaction costs, and in turn generate positive price effects for all concerned. Yet, this Article suggests that in practice the more instrumental

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195 Arato, *supra* note 2.
196 BONNITCHA, POULSEN, & WAIBEL, *supra* note 62.

object of *ex post* access to justice tends to be prioritized above the purportedly core object of investment promotion (*ex ante*).

A close look at how the investment treaty regime engages with the basics of corporate law reveals how investment promotion tends to take a back seat at the dispute settlement phase, where vague treaty standards are filled out through arbitral case law. Unlike common law courts, which typically navigate both *ex ante* and *ex post* interests, ISDS tends to prioritize the latter. This analysis suggests that the regime's priorities may be shifting, intentionally or not, from its original promise of facilitating efficient cross-border investment, to expanding and sustaining possibilities for claims to damages. If that proves to be the case across the board, states should seriously consider what they are getting out of subsidizing a privileged form of access to justice for foreigners far beyond what they offer their own citizens.[197]

197 Ivar Alvik, *The Justification of Privilege in International Investment Law: Preferential Treatment of Foreign Investors as a Problem of Legitimacy*, 31 EUR. J. INT'L L. 289 (2020).