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Introduction

International investment law is a young field with inconsistent decisions on important aspects of jurisdiction and the merits. Yet investment tribunals share two central premises as regards shareholder claims: (i) that shareholders are entitled to claim for damages vis-à-vis measures taken against the company[1] in which they hold shares and (ii) that 'contract claims' differ from 'treaty claims'. However, shareholder and company rights and treaty and contract claims are connected in important ways. Investment tribunals have generally failed to deal with the fact that company and shareholder rights under national and international law may refer to the same assets and damages. Shareholder claims under investment treaties for state measures against the company's assets are intertwined with related contract/national law claims, in particular regarding the substance of the claims.

International investment agreements (IIAs)[2] and other treaties containing investment protection provisions create international law rights and causes of action[3] and provide for the creation of

[1] The word company is used in this book broadly to refer to any legal person of a private law character recognized by some national law. See W. Herman, 'Provisions on Companies in United States Commercial Treaties' (1956) 50 *AJIL* 373, 380; *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)*, Preliminary Objections, Judgment, I.C.J. Reports 2007, p. 582, para. 61.

[2] The most numerous type of IIAs are bilateral investment treaties (BITs). While there may be considerable differences as to structure and scope between BITs and other kinds of IIAs (as well as among BITs), these differences are not always relevant for the present purposes. Thus, unless otherwise stated or evident from the context the acronyms IIAs and BITs are used interchangeably throughout this book.

[3] Cause of action refers to the factual and legal bases of an actual or potential claim, that is, the facts and legal provisions that may be invoked to base a claim. See *The Tatry*, ECJ, Case C-406/92, Judgment, 6 December 1994, para. 39; *Mærsk Olie & Gas*, ECJ, Case C-39/02, Judgment, 14 October 2004, para. 38. Cause of action is thus used interchangeably with the 'basis' or 'legal basis' of the claim. See *Waste Management, Inc.* v. *Mexico*, ICSID Case No. ARB(AF)/00/3, Decision of the Tribunal on Mexico's Preliminary Objection concerning the Previous Proceedings, 26 June 2002, para. 12. The word claim refers here to the request that a party may put forward against another party, based on a cause of action, whether or

international arbitral tribunals to enforce them. Prevailing theories and most investment tribunals conceptually separate treaty rights and causes of action from the facts to which they apply. Yet, however, we characterize the additional protection and entitlements IIAs provide, 'there is only one world'.[4] The underlying realities are all kinds of assets, contracts, property rights, and so on, which are subject to their own legal regimes. The notion that IIA rights and causes of action are largely isolated from such regimes is mistaken. For example, when a contract is protected by an IIA, the rights and causes of action created by the treaty co-exist with those arising from the contract. Nowhere do IIAs establish that investment tribunals should disregard the contract. Those other legal regimes protect rights and interests of people other than the shareholders bringing IIA claims, even though the assets involved may be the same. If tribunals do not deal appropriately with this overlap, the 'new source of rights' created by IIAs risks 'duplication of claims, proceedings and relief'[5] and connected problems relating to, inter alia, possible harm to third-party interests, inadequate application of the applicable law, and contradictory decisions.

The conceptual foundations of standing and the cause of action in shareholder treaty claims[6] are based on two complementary ideas of independence, that is, independence of shareholder treaty rights vis-à-vis the local company's contractual and national law rights,[7] and

not the request has been asserted in legal proceedings. See H. Wehland, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration* (Oxford: Oxford University Press, 2013), p. 4 (rightly noting that in a substantive sense the terms 'claim' and 'cause of action' may have similar meanings).

[4] J. Crawford, 'Treaty and Contract in Investment Arbitration' (2008) 24 *Arb. Int'l* 351, 352.

[5] B. M. Cremades Sanz-Pastor and D. J. A. Cairns, 'Contract and Treaty Claims and Choice of Forum in Foreign Investment Disputes', in B. Cremades Sanz-Pastor and J. D. M. Lew (eds.), *Parallel State and Arbitral Procedures in International Arbitration* (Alphen aan den Rijn; Paris: Kluwer Law International, 2005), p. 34.

[6] In this book, shareholder treaty claims refers to shareholder claims under IIAs and is used interchangeably with shareholder IIA claims.

[7] *CMS Gas Transmission Company* v. *Argentina*, ICSID Case No. ARB/01/08, Decision on Jurisdiction, 17 July 2003, para. 68. Some of the most forceful defenders of diplomatic protection of foreign shareholders questioned, however, the idea of complete independence between the company and its shareholders under international law. See C. de Visscher, 'De la Protection Diplomatique des Actionnaires d'une Société contre l'Etat sous la Législation duquel cette Société s'est Constituée' (1934) 61 *Rev. Droit Int'l & Legis. Comp*. 624, 639–40.

independence of treaty claims vis-à-vis contract claims.[8] Thus, shareholders' treaty right to be treated in a fair and equitable way is independent from the company's contractual rights, not least because the holders of the rights and the applicable law are different. And, unless otherwise stated in the applicable IIA, any contract or national law claim that the company may bring leaves the commencement and prosecution of shareholder treaty claims unaffected. These ideas of independence[9] reflect the current jurisdictional position with respect to shareholder claims. Foreign shareholders hold protected investments (i.e. their shares, or even the company itself, and often also other assets connected to the company) and therefore enjoy certain rights under IIAs. A breach of treaty provisions protecting these investments 'will affect a specific right of that protected investor',[10] which shareholders have standing to directly enforce in international proceedings.[11] Because of this treaty basis, investment tribunals have asserted jurisdiction regardless of any conditions or restrictions stemming from contractual or national law provisions or proceedings.

[8] See M. J. Valasek and P. Dumberry, 'Developments in the Legal Standing of Shareholders and Holding Corporations in Investor-State Disputes' (2011) 26 *ICSID Rev/FILJ* 35–75, 49–50; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S.* v. *Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, para. 166. For a more recent assertion of the independence of shareholder treaty claims see *Salini Impregilo S.P.A.* v. *Argentina*, ICSID Case No. ARB/15/39, Decision on Jurisdiction and Admissibility, 23 February 2018, para. 178.

[9] The pursuit of autonomy is a recurrent theme in international arbitration. Referring to a preliminary draft of the ICSID Convention, in 1964 Aron Broches, then the World Bank's General Counsel, observed that '[t]he present draft was designed to establish a self-contained system as was found in judicial or arbitral proceedings between States under which there would be no recourse to an outside authority against decisions of tribunals or conciliation commissions'. *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (1970), Volume II-1, p. 427.

[10] *Sempra Energy International* v. *Argentina*, ICSID Case No. ARB/02/16, Decision on Jurisdiction, 11 May 2005, para. 78; E. C. Schlemmer, 'Investment, Investor, Nationality, and Shareholders', in P. Muchlinksi, et al. (eds.), *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008), p. 83.

[11] *Gas Natural SDG, S.A.* v. *Argentina*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005, paras. 34–5; *RREEF Infrastructure (G.P.) Limited and RREEF Pan European Infrastructure Two Lux S.à r.l.* v. *Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, para. 123. Here, the size of the shareholding is not relevant. See S. A. Alexandrov, 'The "Baby Boom" of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as "Investors" and Jurisdiction Ratione Temporis' (2005) 4 *Law & Prac. Int'l Cts. & Tribunals* 19, 28–30; Schlemmer, 'Investment, Investor, Nationality, and Shareholders', p. 83; *Salini* v. *Argentina*, Decision on Jurisdiction and Admissibility, 23 February 2018, para. 178.

However, the substance of shareholder treaty claims, defined here as the state measure or measures and particularly the losses involved,[12] is often identical or at least overlaps considerably with contract/national law claims (actual or potential) by the shareholder themselves or by the local subsidiary. As a rule, the source of the main rights invoked in the related claims differs: a treaty in investment arbitration proceedings and a contract in national court proceedings.[13] Still, the object of the claims in terms of the damages sought may be identical.[14] In principle, there is no reason why this potential duplication of damages claims should affect the jurisdiction of investment tribunals.[15] Provided the conditions attached to consent to international jurisdiction by the contracting parties to the IIA are present, a tribunal must uphold its competence.[16] But the potential for double recovery[17] and inconsistent decisions arising from parallel treaty and contract claims, among other undesirable consequences, is clear.[18] This book argues that decisions on the merits of investment claims have generally failed to discuss substantive similarities between contract/national

[12] To compare the substance of contract and treaty claims, this book follows the approach of the *ELSI* case, that is, to focus on the challenged measure and principally on the losses alleged in each claim. See *Elettronica Sicula S.P.A. (ELSI)*, Judgment, I.C.J. Reports 1989, p. 15, 45–6.

[13] Although the distinction between treaty and contract rights depending on the type of instrument where the right is contained is conceptually simple, in certain circumstances 'maintaining the distinction . . . can be problematic'. Cremades and Cairns, 'Contract and Treaty Claims', 14. See also J. O. Voss, *The Impact of Investment Treaties on Contracts between Host States and Foreign Investors* (Leiden, Boston: Brill – Nijhoff, 2011), p. 160.

[14] Cremades and Cairns, 'Contract and Treaty Claims', 14.

[15] *Ampal-American Israel Corporation and others* v. *Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction, 1 February 2016, para. 329.

[16] The terms 'jurisdiction' and 'competence' have different meanings under the ICSID Convention, at least in the English and Spanish language versions. C. Schreuer, L. Malintoppi, A. Reinisch, and A. Sinclair, *The ICSID Convention: A Commentary* (New York: Cambridge University Press, 2nd ed., 2009), pp. 85–6. Unless otherwise stated, however, they are used interchangeably throughout this book.

[17] When this book refers to the risk of double recovery it includes the risk of multiple recovery, unless otherwise stated.

[18] H. Wehland, 'The Regulation of Parallel Proceedings in Investor-State Disputes' (2016) 31 *ICSID Rev/FILJ* 576, 577. As Brower and Henin note, however, risks of 'duplicative proceedings, double recovery, and inconsistent awards and decisions' also derive from '[t]he proliferation of international dispute settlement mechanisms' with '[o]verlapping and competing jurisdictions'. C. N. Brower and P. F. Henin, '*Res Judicata*, *ConocoPhillips* v. *Venezuela*, ICSID Case No. ARB/07/30', in M. Kinnear, et al. (eds.), *Building International Investment Law: The First 50 Years of ICSID* (Alphen aan den Rijn: Kluwer Law International, 2016), p. 54.

law and treaty claims or to seriously consider the consequences of any potential overlaps.

1.1 Shareholder Treaty Claims: Independence and Overlap

Shareholder claims under IIAs for measures causing harm to a company in which, directly or indirectly, they hold shares[19] are nowadays a significant part of investment arbitration.[20] As a jurisdictional matter, investment tribunals have virtually unanimously allowed these claims.[21] The theory behind this accepted position is that, regardless of who the direct addressee of the host state's measures is, as protected investors shareholders exercise their own treaty rights and hold an 'independent right of action' to pursue treaty claims.[22] From the shareholder claimant's perspective, the independence or separation between its international law right of action and that of the local company may have considerable advantages. For example, shareholders can bring such claims irrespective of forum selection clauses or other jurisdiction provisions applicable to local claims or related local proceedings;[23] due to lack of privity and

[19] This book refers to this type of claims as indirect claims, regardless of whether the shareholding is direct or indirect. Indirect claims is preferred over other concepts such as 'derivative claims' or 'claims for reflective loss' mainly because these latter concepts, while perhaps more precise in certain respects, also appear more closely connected to specific domestic legal systems often presenting idiosyncratic features. 'Reflective loss' means loss suffered by shareholders 'as a result of injury to "their" company, typically a loss in value of the shares'. D. Gaukrodger, 'Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency. A Preliminary Framework for Policy Analysis' (2013) OECD Working Papers on International Investment, No. 2013/3, 11. See also Z. Douglas, *The International Law of Investment Claims* (Cambridge: Cambridge University Press, 2009), p. 402; V. Korzun, 'Shareholder Claims for Reflective Loss: How International Investment Law Changes Corporate Law and Governance' (2018) 49 *U. Pa. J. Int'l L.* 189–253, 199.

[20] Gaukrodger, 'Investment Treaties', 11. For example, of the fifty-six arbitrations commenced against Argentina at ICSID only six did not involve shareholders claiming for harm to assets owned by the local company (including three filed by holders of security entitlements over sovereign bonds). See https://icsid.worldbank.org/en/ (accessed 21 September 2019).

[21] See E. Wu, 'Addressing Multiplicity of Shareholder Claims in ICSID Arbitrations under Bilateral Investment Treaties: A Tiered Approach to Prioritising Claims' (2010) 6 *AIAJ* 134, 134–5.

[22] See, for example, R. Dolzer and C. Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, 2nd ed., 2012), pp. 56–7; F. Fontanelli, *Jurisdiction and Admissibility in Investment Arbitration: The Practice and the Theory* (Leiden, Boston: Brill, 2018), p. 75.

[23] A. Siwy, 'Contract Claims and Treaty Claims', in C. Baltag (ed.), *ICSID Convention after 50 Years: Unsettled Issues* (The Hague: Kluwer Law International, 2017), p. 220.

differences in the causes of action, host states may struggle to invoke the local company's contractual and national law obligations applicable to the investment project; and any compensation awarded by the investment tribunal is owed to the shareholder, even if the claim relates to measures adopted against the company.

This book argues, however, that there is a substantive interdependence as to the content of the company's contract claims and shareholder indirect treaty claims. Shareholder indirect claims involve the same losses as the ones that may be claimed by the company pursuing non-international claims. Notably, this book does not dispute that IIAs directly confer rights on shareholders. Nor does it deny that shareholders are entitled to bring treaty claims based on these rights.[24] Rather, this book challenges the orthodox view that shareholder indirect claims are independent vis-à-vis the company's rights and vis-à-vis related contract/national law claims.[25] It analyses overlaps between shareholders' treaty rights and the local company's rights and between contract and treaty claims. It is fundamentally concerned with specific problems deriving from such overlaps, not least risks of multiple recovery and prejudice to the interests of parties not involved in the IIA claim. It further argues in favour of admissibility as a tool to address these problems, but subject to certain criteria that require that admissibility be applied only in appropriate circumstances. Admissibility is not the 'magic wand' to co-ordinate overlapping contract and treaty rights and claims.[26] Rather, it provides a conceptual framework for investment tribunals to identify and deal with such overlaps. At the same time, it is complementary to other approaches for co-ordinating related claims, including through a flexible application of the doctrines of *res judicata* and *lis pendens* and through treaty provisions specifically addressing the overlapping claims phenomenon in international law.

[24] D. Müller, *La Protection de l'actionnaire en droit international* (Pedone: Paris, 2015), p. 39.

[25] Schlemmer argued that in international law 'shareholders have a right to seek protection independent from the corporation'. Schlemmer, 'Investment, Investor, Nationality, and Shareholders', 81. To the extent it refers to shareholders' procedural right to bring proceedings autonomously in their own name, the statement is unobjectionable. See also Alexandrov, 'Baby Boom', 27; Müller, *Protection de l'actionnaire*, 359.

[26] A. Crivellaro, 'Consolidation of Arbitral and Court Proceedings in Investment Disputes', in Cremades and Lew (eds.), *Parallel Procedures*, p. 78.

1.1.1 *Protection of Assets under IIAs*

By definition, IIAs protect investments. This protection is broad in scope in that the term investment is generally defined through a non-exhaustive list of protected assets,[27] which includes concepts as general as 'business concessions and any other rights required to conduct economic activity and having economic value conferred by law or under a contract'.[28] And IIAs often expressly protect both interests and rights, and directly and indirectly (i.e. through intermediary entities) held entitlements over the protected assets.[29] Still, most views acknowledge national law's relevance to investment protection, at least for purposes of defining property rights under IIAs.[30] Thus, the same asset will typically receive concurrent protection under national and international rules, however the two protections differ and the applicable legal systems combine. This phenomenon is not unique to international investment law.[31] The international law of human rights protects property rights.[32]

[27] K. N. Schefer, *International Investment Law: Text, Cases and Materials* (Northampton: Edward Elgar Publishing, 2013), p. 60; *Orascom TMT Investments S.à r.l.* v. *Algeria*, ICSID Case No. ARB/12/35, Final Award, 31 May 2017, para. 372.

[28] Australia-Egypt BIT, Art 1.1(a)(v). See also *Flemingo Dutyfree Shop Private Limited* v. *Poland*, UNCITRAL Case, Award, 12 August 2016, para. 302 (arguing that 'a business concession does not necessarily need to be a concession for public works or for activities in areas that are key to the State's security, nor does it need to be granted by the State itself').

[29] See Schlemmer, 'Investment, Investor, Nationality, and Shareholders', 56; K. Hobér, '*Res Judicata* and *Lis Pendens* in International Arbitration' (2014) 366 *RCADI* 99, 343.

[30] Salacuse stated that how national law 'conceives of, defines, and enforces [property and contractual rights] is fundamental [for] an investment project'. J. W. Salacuse, *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital* (Oxford: Oxford University Press, 2013), p. 37. See also Z. Douglas, 'The Hybrid Foundation of Investment Treaty Arbitration' (2003) 74 *BYIL* 151, 198–9; C. McLachlan, L. Shore, and M. Weiniger, *International Investment Arbitration* (Oxford: Oxford University Press, 2017), pp. 379–80; *Tidewater Inc. et al.* v. *Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction, 8 February 2013, para. 116; *Vestey Group Limited* v. *Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, para. 257.

[31] Heiskanen argued that IIAs protect only 'income-producing property' and are thus, in this respect, 'narrower in scope than human rights treaties'. V. Heiskanen, 'Borderlines: Is There a Difference Between Protection of Property and Protection of Investment?' (2017) 14 *TDM* 1, 7. See also *Achmea B.V.* v. *Slovakia*, PCA Case No. 2008–13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, para. 261 (the concept of 'investment' in the applicable BIT was narrower than that of 'property' in the EU Charter on Fundamental Rights).

[32] See Universal Declaration of Human Rights, Art. 17; European Convention on Human Rights (ECHR), Protocol No. 1, Art. 1; American Convention on Human Rights, Art. 21; African Charter on Human and Peoples' Rights, Art. 14. See also A. Reinisch, 'Expropriation', in Muchlinski et al. (eds.), *The Oxford Handbook*, p. 416 (under the case-

In principle, the assets in question are also protected by at least one national legal system (typically that under which the relevant rights were created).[33] Further, a subject of international law may hold rights under both national and international law.[34] The fact that these rights may simultaneously refer to the same asset is not particularly problematic.

Nevertheless, international investment law has three peculiar features in this respect. First, the idea of internationally protected indirect rights or interests held by investors over assets or rights that may belong to a different person under national law[35] generally does not appear in other areas of international law.[36] This involves not only interaction and possible conflict between national and international rules, but also overlapping rights/interests of different persons over the same assets. The potential for conflicting claims and parallel proceedings is apparent here, particularly because most investment tribunals interpret IIAs as conferring protection not only on indirect, but also partial interests over (effectively somebody else's) assets.[37] Second, specifically in the case of shareholders it is argued that in international investment law 'protection is not restricted to ownership in shares; it extends to the assets of the company'.[38] It is also maintained that shareholders have a protected interest in the assets of the company.[39] Third, given IIAs' protection of indirect interests, more than one entity forming a sometimes long corporate chain may be able to claim vis-à-vis the same measure affecting the local company's assets and causing the same damage.[40] Thus,

law of the European Court of Human Rights protected 'possessions' include 'shareholder rights'); Heiskanen, 'Borderlines', 4.

[33] Dolzer and Schreuer, *Principles of International Investment Law*, p. 64; Salacuse, *The Three Laws*, p. 37.

[34] *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion: I.C. J. Reports 1949*, pp. 174, 179.

[35] *Les Laboratoires Servier, S.A.A. et al.* v. *Poland*, UNCITRAL, Award, 14 February 2012, para. 532; *Azurix Corporation* v. *Argentina*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, 1 September 2009, para. 94; *Flemingo* v. *Poland*, Award, 12 August 2016, para. 593; Müller, *Protection de l'actionnaire*, p. 422.

[36] J. Baumgartner, *Treaty Shopping in International Investment Law* (Oxford: Oxford University Press, 2016), p. 48.

[37] *Servier* v. *Poland*, Award, 14 February 2012, para. 532.

[38] Dolzer and Schreuer, *Principles of International Investment Law*, p. 59.

[39] Alexandrov, 'Baby Boom', 45.

[40] See A. Reinisch, 'The Use and Limits of *Res Judicata* and *Lis Pendens* as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes' (2004) 3 *LPICT* 37, 59; Hobér, '*Res Judicata* and *Lis Pendens*', 343; Wehland, 'Regulation of Parallel Proceedings', 580; Baumgartner, *Treaty Shopping*, 263; E. Gaillard, 'Abuse of Process in International

overlapping entitlements may derive not only from national and international law respectively. They may also stem from different IIAs protecting more than one entity at the same or different levels of the corporate chain.[41]

IIAs create international causes of action potentially for a myriad of legal entities by protecting their interests, even if indirect and/or partial, in assets (no matter who they belong to under national law). In this sense, the concept of investment appears as a particularly broad expression of property.[42] It includes both rights and interests and not only the idea of ownership but also that of control, even with respect to assets that under national law are more generally described, from a legal perspective, as being owned rather than controlled by someone.[43] Thus, under IIAs not only companies but also 'contractual rights', 'tangible property', and so on are subject to control.[44] The term control appears wide enough to encompass not only ownership rights, but also the 'exercise of powers or directions' in respect of assets.[45] The notions of indirect interests or control over assets, plus the idea that shares' status as protected investments confers on shareholders enforceable

Arbitration'; (2017) 32 *ICSID Rev/FILJ* 17 (discussing four 'duplicative' IIA arbitrations against Egypt by shareholders at different levels of the corporate chain as well as by the local company); *Flemingo* v. *Poland*, Award, 12 August 2016, para. 339.

41 A. K. Bjorklund, 'The Continuing Appeal of Annulment: Lessons from Amco Asia and CME', in T. Weiler (ed.), *International Investment Law and Arbitration: Leading Cases from ICSID, NAFTA and Customary International Law* (London: Cameron May, 2005), p. 510; *CME Czech Republic B.V.* v. *Czech Republic*, UNCITRAL, Final Award, 14 March 2003, para. 433.

42 V. Lowe, 'Injuries to Corporations', in J. Crawford, et al. (eds.), *The Law of International Responsibility* (New York: Oxford University Press 2010), p. 1020; *Venezuela Holdings, B. V., et al.* v. *Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment, 9 March 2017, para. 172. Standards of treatment in international investment agreements often provide far-reaching protections, particularly in terms of standing and cause of action (by granting standing to persons with relatively loose connections to the affected asset, whose owner will typically also have a cause of action under national law). Yet in terms of the scope of protection, national law may provide a more 'comprehensive protection of property rights' than discrete IIA standards. See *European American Investment Bank AG (EURAM)* v. *Slovakia*, PCA CASE NO. 2010–17, Award on Jurisdiction, 22 October 2012, para. 402.

43 See Canada-Trinidad and Tobago BIT, Art. I.f.vi ('"investment" means any kind of asset owned or controlled either directly, or indirectly through an investor of a third State [including] rights, conferred by law or under contract').

44 See Georgia-US BIT, Art. I(d).

45 *Aguas del Tunari, S.A.* v. *Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objection to Jurisdiction, 21 October 2005, para. 227. Douglas observed that the right of ownership is the 'strongest form of control' that may be acquired over property. Douglas, *Investment Claims*, 300.

interests over the company's assets, considerably increase the possibilities of co-extensive entitlements of different persons over the same assets deriving both from national law and as many IIAs as may be applicable. This potentially multiplies the number of persons with standing to claim.[46] No matter how many additional persons are granted entitlements over an asset, however, the protected asset remains the same. At least under national law the asset generally has a defined owner, who in the case of shareholder indirect claims differs from the party claiming for damage to the asset. And not only the local company as the owner, but also third parties may have protected interests over the asset in question.

1.1.2 Problems Deriving from Concurrent Entitlements

This book focuses on the phenomenon of concurrent entitlements over the same assets deriving from the protection of rights or interests of shareholders under IIAs, on the one hand, and of the local company under national or contract law, on the other hand. Such protected rights and interests are generally enforceable before some forum and thus constitute a basis for advancing claims. Yet two or more investors may never bring the different claims available and thus, as such, a problem of how to co-ordinate parallel or subsequent related proceedings may or may not arise. However, if a claim by the company is not filed or is partly or wholly discontinued as a result of an IIA claim by one of its shareholders, the company abandons certain rights. This concerns not only the company's position, but may also affect the rights or interests of non-claiming shareholders and other third parties such as the company's creditors. In this sense, the analysis of concurrent entitlements of local companies and shareholders is somewhat different than and is not limited to that of actual parallel or subsequent proceedings – a topic that has already been covered thoroughly in the literature.[47]

Conversely, the study of overlaps between shareholder rights under IIAs and the local company's contract/national law rights is concerned with the relationship between claims before investment

[46] See *Ampal* v. *Egypt*, Decision on Jurisdiction, 1 February 2016, paras. 10–15, 328.

[47] See generally Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford: Oxford University Press, 2003); C. McLachlan, '*Lis Pendens* in International Litigation'; (2008) 336 *RCADI* 199; Wehland, *Coordination of Multiple Proceedings*; L. E. Salles, *Forum Shopping in International Adjudication: The Role of Preliminary Objections* (Cambridge: Cambridge University Press, 2014).