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Research Article

Shareholders' Claim for Reflective Loss in International Investment Agreement through ISDS Arbitration Practice

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ABSTRACT: Shareholders' claims for reflective loss appear to be commonly accepted by the Investor-State Dispute Settlement (ISDS) tribunals. Several international investment agreements (IIAs) have construed the condition of losses or damage under IIA to address the shareholder reflective loss (SRL) issue. Nonetheless, through the ISDS decision, the interpretation appears to be disparate. This article will aim to analyze the status of SRL in IIA through conditions of losses or damages as investment dispute characteristics and IIA text formulation to limit such conditions in addressing SRL issues through juridical normative and comparative study with a descriptive-analytical characteristic. Foreign direct investment regimes driven by the IIA show how important the IIA's role is in providing adequate protection of investment including dispute mechanisms set through. The author will use the juridical and comparative methods by reviewing the existing statutory and case laws. The condition of loss or damage under IIA also appears to cover SRL. The limitation through the scope of allowed claims regarding whose losses, have been interpreted by several tribunals to limit a direct claim for SRL. However, the interpretation seems to be inconsistent with the other tribunals. An explicit text formulation and applying the loss-based general rule into IIA will then help to address consistent and genuine outputs of the applicable rule to limit the condition of losses or damage on the claim for SRL. In conclusion, the condition of losses or damage led the tribunal to allow the claim for SRL, yet through a limitation of the condition, the claim for SRL will be construed with specific requirements and procedures to avoid intersectoral issues. State parties in negotiating IIA are suggested to consider limiting the condition of losses or damage by adopting text formulation that led the ISDS tribunal's interpretation to a genuine meaning of the applicability rule which the parties intended to, specifically, regarding investor's right to claim SRL.

KEYWORDS: Foreign Direct Investment; International Investment; International Law.

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I. INTRODUCTION

Shares as an investment activity have become one of the highest activities in the world.[1] Within the scope of Foreign Direct Investment (FDI) regimes, shares are normally included as a protected investment form under the international investment agreements (IIA). [2] The protection of such investment has further led to Investor-State Dispute Settlement arbitration (ISDS Arbitration) tribunal to allow shareholders' claims of losses or damages due to the alleged treaty breach conducted by the Host State.[3] However, granting ISDS Arbitration access to the shareholder appears to raise other issues related to the indirect losses or damages suffered by the shareholder, known as shareholder reflective loss (SRL).

Despite several national laws and Public International Laws that have applied the "*no reflective loss*" principle, FDI regimes driven by the applicable IIA legal rule seem to allow the shareholder to submit a claim to ISDS Arbitration regarding their indirect losses suffered.[4] Research and discussion have suggested reforming the ISDS Arbitration mechanism in granting access to shareholders pursuing a claim for SRL.[5] The reform urgency is

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1 Jannici Damgaard, "Chart of the Week: Foreign Direct Investment: United States is World's Top Destination for Foreign Direct Investment", (7 December 2022), online: *Chart of the Week: Foreign Direct Investment: United States is World's Top Destination for Foreign Direct Investment* <https://www.imf.org/en/Blogs/Articles/2022/12/07/united-states-is-worlds-top-destination-for-foreign-direct-investment>.

2 *Indonesia - Singapore BIT 2018*; *North American Free Trade Agreement*; *Central America-Dominican Republic Free Trade Agreement*; Prita Amalia & Muhammad Lazuardy Thariq Makmun, "Multinational Corporations' Investments Made Through Its Subsidiaries Under the Latest Generation of Investment Treaties" (2021) 19:1 Indonesian Journal of International Law 113–135.

3 *LG&E Energy Corp, Et al v Argentine Republic (Decision on Liability) No ARB/02/1*, 2006 ICSID Arbitration; Vera Korzun, "Shareholder Claims for Reflective Loss: How International Investment Law Changes Corporate Law and Governance" (2018) 40:1 Univ Pa J Int Law 189–254; Gabriel Bottini, "Indirect Claims Under The ICISD Convention" (2008) 29:3 U Pa J Int'l L 563–639 at 565.

4 Korzun, *supra* note 3; *Eskosol S.pA in Liquidazione v Italian Republic (Award) No ARB/15/50*, 2020 ICSID Arbitration; *Blusun SA, Jean-Pierre Lecorcier and Michael Stein v Italian Republic ICSID Case No ARB/14/3*, 2016 ICSID Arbitration; *Daniel W Kappes, et.al v Republic of Guatemala (Decision on Respondent's Preliminary Objections) No ARB/18/43*, 2020 ICSID Arbitration; Giora Shapira, "Shareholder Personal Action in Respect of a Loss Suffered by the Company: The Problem of Overlapping Claims and 'Reflective Loss' in English Company Law" (2003) 37:1 The International Lawyer 137–152; *Case Concerning Barcelona Traction, Light and Power Company Limited (Belgium V Spain), Second Phase Judgement*, 1970 International Court of Justice; Parlie KOH, "The Shareholder's Personal Claim: Allowing Recovery for Reflective Loss" (2011) 23 Singapore Academy of Law Journal 863–889; *Oey Wan Nio, Et Al v Liquidator Team of Bankruptcy Case of PT Mimi Kids Garmindo, Et Al*, 2020 Bandung District Court.

5 *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eight session (Vienna, 14-18 October 2019)*, by the United Nations Commission on International Trade Law,

triggered by the possibility of harm from several aspects if the claim for SRL in ISDS Arbitration is allowed without any limitations condition.[6] Claim for SRL in ISDS Arbitration may cause multi-proceeding of ISDS in arbitration or even national court, inconsistency of interpretation and result, double recovery led to excessive damages, these risks would harm the Host State.[7] Moreover, a claim for SRL will disrupt corporate governance law, significantly affecting the company structure and its creditor's rights over the company assets.[8]

In these days of the new generation of IIA, several states have undertaken several mechanisms by adopting limitations condition of a claim for SRL to ISDS Arbitration into IIA. One to be focused on is the condition of losses or damage through the scope of claims permitted provision under IIA (Scope of Claim Provision).[9] The Scope of Claim Provision sets an option for a claim to be submitted in ISDS Arbitration and distinguishes whose loss or damage to be pursued in ISDS Arbitration.[10] The implementation of the Scope of Claim Provision is mostly reflected by North American Free Trade Agreement (NAFTA) ISDS Arbitration cases when all is said and done that claim for SRL to ISDS Arbitration is excluded since Scope of Claim Provision has set a pre-conditional of consent to arbitrate that prevent a

A/CN.9/1004 (Vienna: UNCITRAL, 2019); Korzun, *supra* note 3; Shapira, *supra* note 4; KOH, *supra* note 4; Lukas Vanhonnaeker, *Shareholders' Claims for Reflective Loss in International Investment Law* (Cambridge: Cambridge University Press, 2020); Jae Sung Lee, "Shareholder Claims for Reflective Loss in Investor-State Dispute and Reform Options" **通商法律**, 55–91; Panagiotis A Kyriakou, "Mitigating the Risks Entailed in Shareholders' Claim for Reflective Loss: Sugesstion for Investment Treaty Reform" (2018) Journal Of World Investment and Trade 19 698–721; *Azuric Corp V The Argentine Republic (Decision on Jurisdiction) No ARB/01/12*, 2003 ICSID Arbitration; *LG&E Energy Corp., Et. al v. Argentine Republic (Decision on Liability) No. ARB/02/1*, *supra* note 3; *AAPL v Sri Lanka (Award) No ARB/87/3*, 1990 ICSID Arbitration.

6 *supra* note 5, at 70.

7 OECD, *Shareholder Claims for Reflective Loss in Investment State Dispute Settlement: A "Component-byComponent" Approach to Reform Proposals* (UNCITRAL Publication, 2021); *supra* note 5; *Eskosol S.p.A in Liquidazione v. Italian Republic (Award) No. ARB/15/50*, *supra* note 4; *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic ICSID Case No. ARB/14/3*, *supra* note 4; Lee, *supra* note 5.

8 Korzun, *supra* note 3; David Gaukrodger, *Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency"* (OECD Working Papers on International Investment, 2013).

9 Article 1116 and 1117 of *North American Free Trade Agreement*, *supra* note 2; Article 17 of *Indonesia - Singapore BIT 2018*, *supra* note 2.

10 Lee, *supra* note 5.

shareholder submitting a claim for its indirect loss deriving from the company.[11]

While through NAFTA ISDS Arbitration cases and its contracting party consistently held the Scope of Claim Provision will bar claim for SRL to be submitted, the arbitral tribunal in the case of *Daniel W. Kappes, Et.al v Republic of Guatemala* shows a different approach to the Scope of Claim Provision applicability in limiting the condition of losses or damage claim for SRL.[12] Although with a different applicable IIA, Central America-Dominican Republic Free Trade Agreement (DR-CAFTA) have a similar formulation text of Scope of Claim Provision under NAFTA. Despite that, the majority tribunal pointed out for not finding a similar applicability of legal rules as what NAFTA cases have held.[13]

Indeed, a different applicable IIA would have a different legal effect on its applicability. Nonetheless, a similar provision and the arbitral tribunal decision may become a reference and precedent for future ISDS arbitral tribunals in deciding the same issues. ISDS Arbitration award only binds to the disputing parties, however, through the ISDS arbitral tribunal practices it is not rare to find the tribunal did consider other ISDS Arbitration legal considerations awards to settle similar issues.[14] Moreover, judicial decisions have been considered as a secondary means to the determination of rules of law.[15] As such, the disparate decisions in ISDS Arbitration related to the applicability of the Scope of Claim Provision in limiting the condition of losses or damage will affect the status of the SRL claim in IIA.

Among other recent BITs that Indonesia already concluded, Indonesia – Singapore BIT 2018 (BIT 2018) shows the most similar formulation under

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11 *United Parcel Service of America Inc v Government of Canada (Award on the Merits)*, 2007 UNCITRAL Arbitration; *William Richard Clayton, et al v The Government of Canada (Award on Damages)*, 2019 Permanent Court of Arbitration; Vanhonnaeker, *supra* note 5; *Gami Investment, Inc v The Government of The United Mexican States (Final Award)*, 2004 UNCITRAL.

12 *Daniel W. Kappes, et.al. v. Republic of Guatemala (Decision on Respondent's Preliminary Objections) No. ARB/18/43*, *supra* note 4.

13 *Ibid, at 49*.

14 *William Richard Clayton, et. al. v. The Government of Canada (Award on Damages)*, *supra* note 11; *Daniel W. Kappes, et.al. v. Republic of Guatemala (Decision on Respondent's Preliminary Objections) No. ARB/18/43*, *supra* note 4; *Siemens v Argentina (Decision on Jurisdiction) ICSID Case No ARb/05/18*, 2004 ICSID Arbitration.

15 *Statute of International Court of Justice*.

DR-CAFTA and NAFTA. Therefore, BIT 2018 could be utilized for this research study. Although there is still no existing case related to the applicability of the Scope of Claim Provision under the BIT 2018, the existing precedent might be affecting the inconsistent outputs of the Scope of Claim Provision under the BIT 2018.

The previous research has discussed how the existing IIA provides several safeguard mechanisms for SRL claims in ISDS Arbitration. This article will then aim to analyze the status of SRL in IIA through the condition of losses or damages suffered as the characteristic of investment dispute and what formulation under IIA limits the condition of losses or damage suffered. Initially, the authors will analyze the condition of losses or damages suffered under the Scope of Claim Provision as a part of investment dispute characteristic, the implementation will be reflected through ISDS Arbitration cases that lead to the status of SRL in IIA whether it is allowed or *vice versa*. ISDS arbitral tribunal only must respect and enforce what the contracting party consented to IIA and interpret it through the mechanism provided in Article 31 (1) and (3) of the Vienna Convention on The Law of Treaties 1969 (VCLT), which in accordance of the ordinary meaning, context and the light of object and purpose of the applicable IIA complimented with any international legal instrument that was binding to the disputing parties to determine the treaty text ordinary meaning.[16] It will highlight the cornerstone factors of to what extent the condition of losses or damages under IIA will fulfill the investment dispute characteristic.

The authors analyze the possible text formulation to limit the condition of losses or damages under IIA which will affect the status of SRL in IIA. The article will show the significance of limiting conditions of losses or damages through text formulation to determine the status of SRL in IIA and the role of tribunal decisions in creating the development of investment law regimes. By considering the middle path theory of FDI regimes, this article will give an option as a consideration for the state, including Indonesia, in concluding

[16] *Daniel W. Kappes, et.al. v. Republic of Guatemala (Decision on Respondent's Preliminary Objections) No. ARB/18/43*, *supra* note 4.

IIA that provides safeguards for Host State as well as protecting investor's investment equally in the future.

II. METHODOLOGY

This research will use juridical normative supported with comparative methods as well as complemented by descriptive-analytical characteristics. The determination of the substance of the article will be determined through statute and case approach.[17] This article includes research on legal rules and synchronization, either vertical or horizontal. The author will use the juridical normative method to analyze the SRL issue in international investment law with the applicable theory, rule, law, or other general principle. Furthermore, the comparative study method applies in this research to analyze the applicable legal rules relating to SRL claims in England, the US, Singapore, and Indonesia and within the applicable rules in FDI regimes by comparing the legal rules that applied and reflected through the national court, international court, ISDS Arbitration cases and statutory legal instrument further be equipped with journal articles. This research will use secondary data obtained through primary legal resources consisting of; treaties, investment arbitration awards by ICSID Arbitration and Permanent Court of Arbitration (PCA), UNICTRAL Arbitration, and State's national court decisions; secondary legal resources which consist of; books; journal articles; working group discussion paper; and tertiary legal resource.

III. THE CONDITION OF LOSSES OR DAMAGE SUFFERED AS THE CHARACTERISTIC OF INVESTMENT DISPUTE

IIA has provided several regulations relating to elements granting access to ISDS. ISDS is an offered mechanism of dispute settlement between investors and the State relating to the investment activities under IIA, one of the forums that are usually offered is the ISDS Arbitration.[18] Subject

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[17] Bachtiar, *Metode Penelitian Hukum* (Tangerang: UNPAM Press, 2019).

[18] Pandu Rizky Putra Pratama & Prita Amalia, "The ISDS Mechanism and Standards of Protection in the Investment Treaty" (2020) 7:2 Jurnal Lentera Hukum 137–154.

matter and scope of dispute (*ratione materiae* limitations) is one of the threshold elements granting access to ISDS, in the context of this article, *ratione materiae* is also considered a pivotal element related to the applicability of SRL.[19] The elements of *ratione materiae* limitations also correlate with the definition of protected investment in IIA. The definition of investment under IIAs could be interpreted broadly. The phrase "*every kind of asset*" or "*any kind of asset*" with a non-exclusive list of investments by several ISDS arbitral tribunal interpretations is broad, with no specific reference to form the investment.[20] This broad interpretation has implied that there is no requirement for the investment shall be made, controlled, or owned either directly or indirectly.[21]

Some IIAs extend the requirement of *ratione materiae* by a condition that stipulates the investor, or its investment must suffer losses or damage due to the alleged treaty breach.[22] Such a model of the scope of investment dispute has been used in several recent generations of IIAs, for instance, BIT 2018, Japan – Kingdom of Bahrain BIT 2022, and Indonesia – Republic of Korea Comprehensive Economic Partnership Agreement 2020.

Under the ICSID Convention, the jurisdiction of ICSID Arbitration is formed concerning any dispute directly out of investment between the contracting state and a national contracting state.[23] The convention did not question the requirement of losses or damage that shall be suffered, rather only requires that the object of the dispute – the investment, is a protected investment under the applicable IIA and the disputing parties is the contracting state and an investor of other contracting state.

The condition of loss or damage is further set through the Scope of Claim Provision. The Scope of Claim Provision might mostly be found in the US and Canada IIAs model. NAFTA initially implemented the Scope of Claim Provision through Articles 1116 and 1117. The model was further adopted

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19 Joachim Pohl, *Dispute Settlement Provisions in International Investment Agreements* (OECD, 2012).

20 *Mera Investment v Serbia (Decision on Jurisdiction) ICSID Case No ARB/17/2*, 2018 ICSID Arbitration; *Siemens v. Argentina (Decision on Jurisdiction) ICSID Case No. ARb/05/18*, *supra* note 14; *Cemex v Venezuela (Decision on Jurisdiction) ICSID Case No ARB/0815*, 2010 ICSID Arbitration; *Ioannis Kardassopoulos v Georgia (Decision on Jurisdiction) ICSID Case No ARB/05/18*, 2007 ICSID Arbitration.

21 *supra* note 2.

22 Pohl, *supra* note 19.

23 *ICSID Convention, Regulations and Rules*.

by other IIAs, such as DR-CAFTA, the EU-Canada Comprehensive Economic and Trade Agreement (CETA), and the BIT 2018. However, the requirement of loss or damage through the Scope of Claim Provision application appears to be diverse, leading to the question of whether SRL which is an indirect loss falls within the investment dispute characteristic.[24]

The disparate outputs through ISDS Arbitration decisions over the condition of losses or damage are driven by the interpretation of IIA by the tribunals. VCLT aims to create a minimum harmonization method of interpretation to avoid the risk of diversity outputs.[25] The primary rule of interpretation method through VCLT consists of three main key points, the first is the ordinary meaning, contextual, and the treaty object and purpose. These three points are expected to lead to a conclusion of the treaty text's ordinary meaning.

Not disregarding the interpretations method set through Article 31 of VCLT as the primary rule. Within the ISDS Arbitration tribunal, the interpretation of IIA gravitates toward effective interpretation.[26] The tribunal often considers the object and purpose of the IIA under its preamble as huge factors in determining the prevailing legal rule.[27] In light of that, any ambiguous terms under IIA shall be determined by the tribunal under the customary interpretation method of the treaty to balance the interest of the host state and investor. In contrast, it is not rare to find the outputs show a cold-shoulder consideration of the reflected parties' intention through the IIA's formulation text.[28] Accordingly, the characteristics of IIA interpretation in ISDS Arbitration also led to the issue of allowing the claim for SRL as an investment dispute in ISDS Arbitration.[29] This section thus will breakthrough analysis of; (A) the condition of loss or damage under the scope of claim provision as investment dispute's characteristic; and (B) the

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[24] Vanhonnaeker, *supra* note 5.

[25] International Law Commission, *Draft Articles on the Law of Treaties with commentaries* (United Nation Publication, 2005).

[26] *Noble Venture, Inc v Romania (Award) ICSID Case No ARB/01/11*, 2005 ICSID Arbitration.

[27] Michael Waibel, "International Investment Law and Treaty Interpretation" (2011) from Clinical Isolation to Systemic Integration 29–52.

[28] *Ibid*.

[29] *RREEF Infrastructure (GP) Limited and RREEF Pan-European Infrastructure Two Lux v Kingdom of Spain ICSID Case No ARB/13/30 (Decision on Jurisdiction)*, 2016 ICSID Arbitration.

condition of loss or damage under the Scope of Claim Provision as investment dispute's characteristic in the BIT 2018.

A. The Condition of Loss or Damage under the Scope of Claim Provision as Investment Dispute's characteristic

Implementing the Scope of Claim Provision in several ISDS Arbitration cases has resulted in many outputs of interpretations.[30] One of the main reasons is that the tribunal only applies the rule that the contracting parties have agreed under the IIA, and through the interpretation methods, the languages that contracting parties use in IIA lead the tribunal to a conclusion.[31] The question runs around whether the Scope of Claim Provision prohibits the claim for SRL, thus only granting access to a direct loss.

NAFTA cases at first also find the Scope of Claim Provision not to limit the condition of loss or damage. In the *Pope & Talbot* case where a case arising out of Canada's measure to implement the Softwood Lumber Agreement, which limits the free export of softwood lumber into the United States, led the Investor (shareholder) to submit a claim to UNCITRAL Arbitration. Canada stands their argument driven by the applicable legal rules in customary international law, Article 1116 of NAFTA gives an investor's right to claim its losses that are direct rather than derivative.[32] In the other provision under article 1117 of NAFTA, Canada further conveys that it only provides a way to claim for the enterprise's damage through the controlling shareholder if the enterprise is hindered from bringing their claim against the Host State.[33] Nonetheless, the tribunal found it outrageously conflicting to hold that both articles bar the investor from submitting the claim related to its loss of interest in enterprise based on the language provided through both articles is a non-mandatory characteristic.[34] The interpretation thus

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30 Vanhonnaeker, *supra* note 5.
31 *Nissan Motor Co Ltd (Japan) v Republic of India (Decision on Jurisdiction) No 2017-37*, 2019 Permanent Court of Arbitration.
32 *Pope & Talbot Inc v Government of Canada*, 2002 UNCITRAL Arbitration.
33 *Ibid.*
34 *Ibid.*

concludes that an investor's interest chain of losses in an enterprise falls within the scope of investment dispute characteristics.

Through the *GAMI* case where the Investor is the shareholder of 14.18% Mexican sugar production company, the United States also asserts the same standing as Canada submitted in the *Pope & Talbot* case.[35] The tribunal further could not accept the implication of both articles to limit the condition of losses and not part of the tribunal's jurisdiction limitation. Nonetheless, the tribunal highlighted that it is a matter of merits issue whether *GAMI* could show directness of loss or damage of its investment. Scope of Claim Provision under NAFTA is even further considered as a mere formality without any substantial implication to the context of the dispute or the question of the investment dispute's characteristic.[36]

The application of the Scope of Claim Provision further implied a different approach. Several tribunals refer to the relevant provision with the Scope of Claim Provision under IIA, the *waiver* requirement, and the award clause.[37] The recent tribunal recognizes the consistency of the Scope of Claim Provision implementation, specifically under NAFTA. In the *Bilcon* case, the Clayton group and Bilcon of Delaware are the investors of a quarry and a marine terminal in Canada (shareholder). The tribunal emphasized the different situations for each NAFTA ISDS Arbitration case relating to the Scope of Claim Provision implementation, however further, by pointing out the interpretation method provided in Article 31 of VCLT, the tribunal still did not find the explicit requirement that the Scope of Claim Provision is limited only to direct or indirect losses or damages condition as the characteristic of an investment dispute.[38] Nonetheless, the tribunal constantly questions the relationship between the claim submitted on behalf of the investor with the other that is submitted on behalf of the enterprise if it turns out that Article 1116 of NAFTA was providing a scope of a claim

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[35] *Gami Investment, Inc. v. The Government of The United Mexican States (Final Award)*, *supra* note 11.

[36] *United Parcel Service of America Inc. v. Government of Canada (Award on the Merits)*, *supra* note 11.

[37] *William Richard Clayton, et. al. v. The Government of Canada (Award on Damages)*, *supra* note 11; *Daniel W Kappes, Et.al v Republic of Guatemala (Partial Dissenting Opinion of Prof Zachary Douglas QC) No ARB/18/43*, 2020 ICSID Arbitration; Meg Kinnear N, *Investment Disputes under NAFTA an Annotated Guide to NAFTA Chapter 11* (Netherlands: Kluwer Law International, 2006).

[38] *William Richard Clayton, et. al. v. The Government of Canada (Award on Damages)*, *supra* note 11.

for the investor's standing in ISDS Arbitration to pursue the losses suffered reflectively.

Canada and the United States, as NAFTA contracting parties, mostly argue that the existence of Article 1116 of NAFTA is projecting the customary international law that a party may submit a claim to pursue losses suffered throughout the alleged breach of international obligation. The other, Article 1117 of NAFTA, allows the investor to submit a claim of losses suffered by its investment that foreclose a direct right for an SRL claim.[39] Canada and the United States' argument of Articles 1116 and 1117 NAFTA is due to the consistency of NAFTA state practice in limiting SRL practice to be applied directly by the shareholder without the derivative claim method.[40] ISDS tribunal finds this intention as a plausible reason for the existence of Scope of Claim Provision under IIA.[41] Noting how previous ISDS arbitral tribunals even considered the payment of compensation shall be paid to the enterprise instead of the investor if the claim is brought under Article 1117 of NAFTA clarifies the objectives to be pursued of each provision.[42] Moreover, given the facts that several other provisions under NAFTA are related to the implementation of Scope of Claim Provision, *e.g.*, Article 1117 (3) provides instruction for consolidation mechanism, Article 1121 regarding conditions precedent to submission of an arbitration claim, and Article 1135 (2) relating to the award if the claim brought under Article 1117 (1) of NAFTA; shall be read as an intention to prevent the harmful risk of a claim for SRL in ISDS Arbitration.[43] In other words, the Scope of Claim Provision under NAFTA limits the losses or damages condition only to direct losses or damages to be considered as investment disputes.

Both articles should not be read as only a formality without any significant effect on the context of the dispute. Rather, the authors found that the Scope of the Claim Provision will determine the pre-conditional consent to arbitrate that set under the IIA. Consent to arbitrate is a crucial issue of the

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39 *Ibid*.

40 KOH, *supra* note 4.

41 *Daniel W. Kappes, Et.al v. Republic of Guatemala (Partial Dissenting Opinion of Prof. Zachary Douglas QC) No. ARB/18/43*, *supra* note 37.

42 *United Parcel Service of America Inc. v. Government of Canada (Award on the Merits)*, *supra* note 11; *Mondev International Ltd v United States of America No ARB(AF)/99/2*, 2002 ICSID Arbitration.

43 *William Richard Clayton, et. al. v. The Government of Canada (Award on Damages)*, *supra* note 11.

tribunal's jurisdiction which shows how important to distinguish the Scope of Claim Provision as a condition of losses or damage that further determines the condition of consent to arbitrate. Furthermore, element consent has also been considered as a key role in how international legal rule is formed between states due to the equal sovereignty right of a state to choose or not to bind to any international legal rule.

Looking at how the arbitral tribunals in the *Bilcon* case consider state practice in handling a claim for SRL, the below-mentioned table will explain the applicable rule in several states, consisting of England, the United States, Singapore, and Indonesia. The author chose such a state to show how SRL is handled by several legal systems, *i.e.*, civil law and common law, and not to mention this article will also analyze the applicability of SRL in the BIT 2018 (Indonesia and Singapore).

England	English law handles it through the rule of "*duty owed to*" that, in essence, a subject may only pursue recovery with legal merits based on the "*Duty*" of other subjects owed to them.[44]
United States	The United States adopted a "derivative" claim submitted by the company where shareholder held their shares to pursue the reflective loss suffered.[45]
Indonesia	Indonesia's national law through its Limited Liability Company Act has expressly stipulated that only directors have the right to represent a company, including representing the company in settling a dispute in arbitration. Through case No. 170/Pdt.G/2019/PN.Bdg the court held that any unlawful act which causes losses to the company may only be pursued by the company itself, *i.e.*, represented by its director.
Singapore	Singapore courts have recognized the rights of shareholders for personal claims over SRL. Singapore courts, through *the*

[44] Shapira, *supra* note 4; *Johnson v Gore Wood & co*, 1999 Court of Appeal, UK.
[45] KOH, *supra* note 4.

> *Jenton* case and the *Development Pte Ltd* case, have held that the principle of "no reflective loss" might not apply to the extent there is no risk of double recovery and harm to the company or enterprise creditors.[46]

The rule relating to the applicability of SRL in International Law is also reflected in Customary International Law, specifically through the *Barcelona Traction* case, which finds international law did not grant protection of dispute resolution relating to the losses suffered through a chain of financial resources of a company.[47] Such a rule shall be taken into account by the Tribunal in ISDS Arbitration while interpreting the condition of losses or damage to determine the rule of SRL, notably when the contracting parties of the applicable IIA show aligned practices with the customary international rule relating to the SRL.

The tribunal in NAFTA's ISDS cases shows an aligned interpretation of IIA with the reflected parties' intention through the treaty text formulation. Scope of Claim Provision under NAFTA appears to be determined by the tribunal to limit the condition of losses or damage only to a direct loss and bars a direct right of SRL claim. The tribunal interprets the Scope of Claim Provision without secluding the terms with other correlated terms, *e.g.*, consolidation mechanism, condition consent to arbitrate, and awarding clause. In addition, the interpretation is supported by the role of NAFTA state parties' consistent interpretation.[48] State parties' interpretation falls within the supporting method of treaty interpretation under Article 31 (3) (a) of the VCLT. Nonetheless, the importance of treaty state parties' authorized representation shall be underlined to create the accepted binding IIA terms interpretation.

In *Kappes's* case where the investor is the shareholder of Exploraciones Mineras de Guatemala, S.A, the tribunal also faces the same question of the

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[46] *Townsing v Jenton Overseas Investment Pte Ltd*, 2007 Court of Appeal Singapore.
[47] *Case Concerning Barcelona Traction, Light and Power Company Limited (Belgium V. Spain), Second Phase Judgement*, *supra* note 4.
[48] *supra* note 5.

Scope of Claim Provision implementation under DR-CAFTA. Focusing on the provision under Articles 10.16.1(a) and 10.16.1(b) of DR-CAFTA, the tribunal came with a question on whether DR-CAFTA provides jurisdiction for investors pursuing a recovery from the losses or damages suffered through a chain of investment. Although the tribunal recognizes and is on the same page with Canada that if the claimant or investor suffers indirect damages, the claim should be brought on behalf of the enterprise. Still, the tribunal cannot find the restriction for the investor shall only choose one of the scopes of a claim as there is an absence of terms that show a mandatory provision.[49]

Furthermore, the distinction between NAFTA and DR-CAFTA is the double waiver required for a claim submitted on behalf of the investor's interest that has an interest in a locally incorporated enterprise of the Host State (Article 1121 NAFTA) reassures the tribunal to a conclusion that DR-CAFTA does not indicate to have the same approach as what NAFTA adopt. Therefore, the majority of the tribunal held that there is no restriction for an investor pursuing their claim on behalf of their losses either directly or indirectly based on broad language in Article 10.16.1(a) of DR-CAFTA.

The majority tribunal interpretation in the *Kappes* case is one example of a tribunal applying an effective interpretation principle in ISDS Arbitration. Promoting the protection of investors' investments led to the tribunal's conclusion that limiting such losses would not be aligned with the object and purpose of the IIA.[50] The interpretation appears to be narrower only to one term under the IIA without considering the context through other related terms.

However, one of the members of the tribunal in the *Kappes* case has a partially dissenting opinion regarding the implementation of the Scope of Claim Provision under DR-CAFTA that one of the members of the tribunal disagreed with the majority's consideration that held a controlling shareholder has the right to pursue SRL under DR-CAFTA. Prof. Zachary Douglas Qc held that the existence of waiver requirement as pre-conditional consent to arbitrate and payment award clause under DR-CAFTA,

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[49] *Daniel W. Kappes, et.al. v. Republic of Guatemala (Decision on Respondent's Preliminary Objections) No. ARB/18/43*, *supra* note 4.
[50] Waibel, *supra* note 27.

whenever the claim is brought under Article 10.16.1(b), shows that DR-CAFTA contracting party intends to prevent a claim for SRL to be brought under Article 10.16.1(a). Consequently, DR-CAFTA limits the condition of loss or damage only to direct damages suffered and only allows the indirect loss to be submitted under Article 10.16.1(b) through a derivative request.[51] The dispute resolution models, specifically regarding the applicability of SRL in ISDS Arbitration, NAFTA and DR-CAFTA have the most specific and suitable requirement that mentions the condition of loss or damage as an investment dispute characteristic. However, it is important to note that the tribunal interpretation and coherence of the rule applied in dispute resolution models will determine the outputs of the applicable rule.

B. The Condition of Loss or DamageuUnder the Scope of Claim Provision as Investment Dispute's Characteristic in the BIT 2018

Considering how the arbitral tribunal in ISDS cases interprets the Scope of Claim Provision under IIA to determine of loss and damage condition, there are possibilities for outputs that Indonesia might face in the future relating to this Scope of Claim Provision in IIA. As mentioned before, in Article 17 (1), Indonesia -Singapore 2018 BIT also adopts the Scope of Claim Provision model which gives two options: claim regarding the investors' or the enterprises' loss. The provision also requires an element of control or ownership, either directly or indirectly, of the enterprise if the claim is submitted on behalf of an enterprise.

Article 17 of the BIT 2018 stipulates that the disputing investor may submit a claim relating to the losses suffered by the investor or on behalf of an enterprise that the investor directly or indirectly owns or controls. The other interconnected provisions with the Scope of Claim Provision under BIT 2018 are Article 17 (2) of the BIT 2018 relating to conditional upon submitting a claim to ISDS Arbitration, Article 24 relating to awards, and Article 27 relating to consolidation mechanism.

[51] Vanhonnaeker, *supra* note 5.

Reflecting through tribunal interpretation on NAFTA ISDS cases and *Kappes* cases there are possible outputs of the Scope of Claim Provision implementation under the BIT 2018, following the interpretation methods that the VCLT sets since it is also considered a customary international rule for treaty interpretation and other related tribunal's interpretations to the similar provision. The terms of "*investment dispute*" under the BIT 2018 imply an alleged breach of an obligation under the BIT 2018 causes loss or damage to the investor or its investment. The investment referred to Article 1 of the BIT 2018, which includes, but is not limited to, "*enterprise*" or "*shares, stocks, and other forms of equity participation in an enterprise, including rights derived therefrom*".

Article 17 (2) of the BIT 2018 provides several conditions that must be fulfilled to obtain the consent provided by Article 17(1) of the BIT 2018.[52] It includes; a matter of *ratione temporis* that the claim must be submitted within three years since the investor is aware of the alleged breach; the investor's written consent to arbitration; the factual basis of the exhaustion of the cooling-off period; written notice before the claim is submitted to arbitration; and no other final award that an international tribunal has produced to settle the dispute

The section of the investor's written consent to arbitration also shall include the waiver of the disputing investor's right to pursue a claim through the dispute settlement mechanism that is set under Article 17 (1) of the BIT 2018. [53] Furthermore, where the dispute is submitted regarding the enterprise's loss by the disputing investor, it requires a waiver of the enterprise's right to initiate or proceed with any dispute settlement set under Article 17(1) of the BIT.

The phrase "*on its behalf*" under Article 17 (1) of the BIT 2018 indicates whose interest to be brought. In other words, the investor will act on their benefit and then allow the disputing investor to submit a claim on their

[52] *William Richard Clayton, et. al. v. The Government of Canada (Award on Damages)*, *supra* note 11; Vanhonnaeker, *supra* note 5.
[53] *William Richard Clayton, et. al. v. The Government of Canada (Award on Damages)*, *supra* note 11; Vanhonnaeker, *supra* note 5.

behalf relating to the result of the breach.[54] Furthermore, the phrase "*incurred loss or damage*" implies that the disputing investor must show their injury that is not simply proven by the harm suffered by the enterprise in which it has an interest.[55] The disputing investor also shall demonstrate the causal link between the alleged breach to the loss suffered as Article 14 of the BIT 2018 puts a phrase of "*alleged breach of an obligation of the former under this agreement which causes loss or damage to the investor or its investment.*"

However, Article 17(1) of the BIT 2018 does not use any terms or phrases that show to prohibit the disputing investor from taking action to show the injury and causation link based on a chain of investments and events (*e.g.*, the investor claiming to have suffered losses through a chain of measure that the Host State enacts towards the enterprise which they have the interest in).[56] Therefore, according to the author's opinion, the ordinary text set under Article 17(1) of the BIT 2018 does not exclude the investor's right to establish a causation link of the injury suffered through the chain of causation.

Since the treaty also shall be interpreted considering its context, object, and purpose, thus the other interconnected provisions under the BIT 2018 also shall be included as the consideration of treaty interpretation. The Scope of Claim Provision under Article 17(1) of the BIT 2018 set two options that significantly affect who must prove the losses or damages condition without mandating investors only to choose one of the scopes.

Article 17 (2)(d)(iii) of the BIT 2018 requires the investor to set a waiver of the enterprise's right to pursue other dispute settlement forums if the claim was brought on behalf of the enterprise. Dissimilar to the dual waivers under Article 1121 (1)(b) NAFTA which show an intention as to what NAFTA's contracting party intended to limit the loss or damage condition only to a direct loss in ISDS Arbitration. The BIT 2018 does not show such clear intent. Therefore, Article 17(1) did not reflect a limitation to only "*direct*" losses, nor bars derivatives claim or claim for SRL.

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[54] *Daniel W. Kappes, et.al. v. Republic of Guatemala (Decision on Respondent's Preliminary Objections) No. ARB/18/43*, *supra* note 4.
[55] *Ibid.*
[56] *Ibid.*

Nonetheless, it is also possible that the Scope of Claim Provision under the BIT 2018 will be read to bar the claim for SRL from being submitted on behalf of the investor's losses. The existence of the option to submit the claim on behalf of the enterprise and the other intercorrelated provision (*i.e.*, waiver requirement and awarding) must be part of the *effet utile* principle concerning the applicability of the Scope of Claim Provision.[57] The waiver requirement for the enterprise to pursue the claim in another dispute settlement forum shows the intention to prevent multiple proceedings of the same issues. In addition, the requirement of awarding to be given to the enterprise shows the intention to prevent double recovery. Both intentions were to prevent several risks if a direct claim for SRL is allowed in ISDS Arbitration.[58]

With the abovementioned explanation, the condition of loss and damage suffered in IIA to bring a claim in ISDS Arbitration led to uncertainty for the status of SRL in IIA. Indeed, it will be reflected through the tribunal's interpretation of the Scope of Claim Provision. However, there are two possibilities for the implication of the Scope of Claim Provision to the status of the claim for SRL in IIA that are; the claim for SRL in ISDS Arbitration is allowed by IIA either submitted by the investor on behalf of the investor or the enterprise as the provision did use any explicit terms to limit a condition of losses or damage, as such the investor (shareholder) has the rights to show the chain of events that caused a loss or damage to the investor; or the claim for SRL shall be submitted only through a claim on behalf of the enterprise in the light of intercorrelated pre-conditional of consent requirements such as waiver and the awarding provision. The author is on the second option, IIA interpretation shall not show its cold shoulder towards the state parties' intention, there is always an intention of state parties to adopt the waiver requirement and awarding provision into IIAs whenever the claim is submitted on behalf of the enterprise, which is to prevent double recovery and multiple proceedings from happening simultaneously with the same issue to be settled. Nonetheless, through ISDS Arbitration's interpretation of the status of the claim for SRL, without any

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[57] *Daniel W. Kappes, Et.al v. the Republic of Guatemala (Partial Dissenting Opinion of Prof. Zachary Douglas QC) No. ARB/18/43*, *supra* note 37; *William Richard Clayton, et. al. v. The Government of Canada (Award on Damages)*, *supra* note 11; Lee, *supra* note 5; Kyriakou, *supra* note 5.

[58] Kyriakou, *supra* note 5.

explicit exclusion of certain types of loss or damage condition, the Scope of Claim Provision shall be complemented with other intercorrelated provisions such as double waiver requirement as a pre-conditional consent to arbitrate.

Claim for SRL is a possible condition to happen in investment disputes with its weakness, leading to the risk of harm the Host State suffers. ISDS tribunals should interpret the Scope of Claim Provision carefully to determine the condition of loss or damage by the primary rule of interpretation. The existence of other Intercorrelated provisions with the Scope of the Claim Provision (*e.g.* double waiver requirement, awarding provision) shall be part of the *effet utile* principle about the applicability of the Scope of the Claim Provision. Therefore, the arbitral tribunal shall consider other related provisions to the Scope of the Claim Provision to adopt consistent implementation practices in determining the applicability of SRL as an international investment law standard and the desired outputs of the contracting party. To prevent misinterpretation that leads to inconsistency of the international investment law harmonization development, particularly SRL issues, it is important for the tribunal also to understand the coherences of other related ISDS Arbitration decisions and the provision under IIA to determine the legal rule of Scope of Claim Provision.

IV. TEXT FORMULATION UNDER IIA TO LIMIT LOSSES OR DAMAGES SUFFERED BY THE SHAREHOLDER CONDITION

The capacity to conclude a treaty should be given to all sovereign States. This is also followed by the fact that the State is one of the subjects of public international law. Three common forms of treaties are known as "*Bilateral Treaties*", "*Multilateral Treaties*", and "*Regional Treaties*". The difference between the treaty forms can be seen through the number of States bound to the treaty. The obligation under a treaty may only take into force as an obligation for a State when the State already gives consent to be bound to a treaty. Consent to be bound is a statement by a State to be legally bound to an international treaty through several steps consisting of signature,

ratification, accession, and/or any other way agreed upon by the contracting States of the treaty.

The approaches to form the legal norm for the protection of FDI can be made through national laws and regulations, customary international law, international agreements (treaties), and relevant soft law in the FDI regime.[59] Through customary international law, two fundamental principles are applied in FDI regimes, *i.e.,* the principle of police power and the principle of minimum standard. Nonetheless, in these modern days for FDI regime, it is prevalent to find an international agreement concluded between States known as IIA. Several clauses address issues related to implementing the promotion and protection of investment in IIA. Such clauses include but are not limited to; (a) scope and definition; (b) national treatment clause; (c) most-favoured-nation treatment clause; (d) Fair and equitable treatment clause; (e) full protection and security; (f) expropriation; and (g) dispute settlement clause.

In concluding an IIA, the State party has the freedom to choose the relevant applicable policy to regulate the rights and obligations under IIA. Furthermore, the implementation of the chosen policy by the IIA's contracting party will also be decided through the interpretation that the ISDS arbitral tribunals may conduct. The method of treaty interpretation refers to the customary international law reflected in Articles 31 – 33 of the VCLT.[60] Through this method, the implementation of the applicable policy that the contracting parties have chosen will be respected and applied.[61]

Such method of interpretation that is reflected under Articles 31 and 32 of the VCLT is based on several international law principles relating to the treaty interpretation consisting of; (1) Intention interpretation, which is the principle where the interpretation shall be based on the party's will in concluding the treaty; (2) Textual Interpretation, this principle is also known as the restrictive interpretation of the treaty. The principle puts the textual

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[59] UNCTAD, *Trends in International Investment Agreements: an Overview* (United Nation Publication, 1999).

[60] Panos Merkouris, "Interpreting the Customary Rules on Interpretation" (2017) International Community Law Review 126–155.

[61] *Nissan Motor Co. Ltd (Japan) v. Republic of India (Decision on Jurisdiction) No. 2017-37*, *supra* note 31.

approach in a treaty to conduct interpretation by the ordinary meaning given and read from the words put into the treaty, further comes to the contracting party's will and the object and purpose of the treaty; Teleological interpretation put the weight of interpretation on the general object and purpose of the treaty which in the same realm with the interpretation method according to the purpose under Article 31(1) VCLT. As such, the treaty will be interpreted broadly and increase the definition to the extent that it still falls within the object and purpose of the treaty. [62]

When it comes to negotiating the text adoption of IIAs between the State party, it is essential to consider several issues that may appear in the time the treaty has entered into force, including the implementation of IIA. Although the object and purpose of IIA aim to promote and protect FDI activities, such promotion and protection indeed have to be implemented reciprocally. However, when it comes to the implementation of ISDS, the principle of reciprocity has come to the difficulty of its ability to provide its nature of principle for both disputing parties. In addition, IIA also recognizes that the existence of investment will create more excellent sustainable development of the State. As such, the formulation of IIA must support the protection and promotion of investment simultaneously without derogating the State's obligation to protect its national interest. Such purpose aligns with the middle path theory, where FDI regimes need to be formed to positively impact the Home State of the investor with its investment and the Host State. [63]

Noticing how the claim for SRL in ISDS Arbitration seems to be unaligned with the legal rules applied in state national law and public international law, also the nature of ISDS Arbitration decision that only final and binds to the disputing parties which led to the other arbitral tribunal lose the consistent path in adopting the resolution. Therefore, it is necessary to encourage harmonization of the legal rule applied in IIA related to the claim for SRL through a limitation condition of losses or damages. The Tribunal also plays

[62] Ninne Zahara Silviani, "Interpretasi Perjanjian Internasional Terkait Historical Rights Dalam UNCLOS 1982" (2019) 6:2 Jurnal Selat 154–171.

[63] Sornarajah M, *International Law on Foreign Investment (Third Edition)*, third ed (Cambridge: Cambridge University Press, 2010).

a significant role in a duty to contribute to harmonizing the development of investment law, as such the Tribunal indeed must adopt or render a dispute resolution through the ISDS Arbitration decision, which is aligned with the consistent previous cases.[64]

IIA, as one of the legal instruments ruling the FDI regime, is to be expected as a means to achieve such purposes, which lead to the formulation of IIA shall consider other affected aspects, either directly or indirectly, related to the protection of FDI.[65] Including the interest of the Host State to create a stable and consistent legal environment, corporate law structure, and the right not to double compensate that cause excessive damage to the Host State.

The importance of precise text formulation for the applied policy under IIA may increase the consistent interpretation outputs with the contracting parties' intentions. The loss or damage condition through the Scope of the Claim Provision depends on how the provision will be regulated under the IIA. Several NAFTA cases and with the NAFTA's contracting party have confirmed that the Scope of Claim Provision under NAFTA aims to prevent the claim for SRL or limit the condition of loss or damage only to a direct loss.[66] Such a conclusion appears since there is the requirement of double waiver in Article 1121 (1)(b) of NAFTA that requires any investor that submits a claim for loss or damage to its investment in an enterprise of another party, the enterprise shall waive the right to pursue any dispute settlement procedures.

A double waiver is the cornerstone of the NAFTA ISDS tribunal's interpretation to hold that the Scope of Claim Provision should be read to prevent direct claims for SRL from being submitted. Therefore, where the State parties agree to limit the loss and damage condition of SRL with a "*no reflective loss*" policy, the Scope of Claim Provision model in NAFTA may be adopted. Through this model, the investor (shareholder) can still submit

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[64] *Burlington Resources Inc v Republic of Ecuador*, 2010 ICSID Arbitration.
[65] Rudolf Von Ihering, *Law As a Means to an End* (Boston: The Boston Book Company, 1913).
[66] *William Richard Clayton, et. al. v. The Government of Canada (Award on Damages)*, *supra* note 11; *supra* note 5.

a claim for its reflective loss through a derivative claim provided by Article 1117 of NAFTA.

The formulation of Scope of Claim Provision may also be strengthened through the formulation of explicit obligation that the Tribunal shall conduct a consolidation mechanism whenever there is a claim for SRL alongside the enterprise submitting a claim relating to the same events.[67] Furthermore, if so agreed, the State may also apply a stricter explicit requirement relating to the Scope of Claim Provision by explicitly stipulating consent to the submission of ISDS Arbitration only if the condition of damages is directly related to the protected investment. Such provision may also be found in the Korean–United America Free Trade Agreement under Article 11.16 where the Scope of Claim Provision requires the submitted claim only related to direct damage of the covered investment. The explicitly detailed text might help create the genuine meaning outputs of legal rules applied that the state parties intended to through IIA.

Another possible treaty text model to be proposed is if the contracting party agrees by creating a specific provision related to the requirement granting a standing for a shareholder in IIA.[68] The provision will include a preclusion of claim by the shareholder to a condition of indirect loss suffered through the company's injury since it will use the loss-based general rule that excludes SRL to be submitted by the shareholder to ISDS. Furthermore, the provision will emphasize that regardless the shareholder has the control or ownership of shares in a company, such ownership or control should not exceed the company assets and a non-satisfactory amount of interest in company assets to have a standing for SRL claim in ISDS.[69] Stricter than the Scope of Claim Provision model, this provision only grants a claim to a shareholder for its SRL if; (a) The company where the shareholder holds the share suffered a direct and whole expropriation by the Host State; (b) The shareholder that owns or controls the locally incorporated company in the Host State on behalf of the company has been subject to a denial of justice;

[67] Kyriakou, *supra* note 5.
[68] *supra* note 7.
[69] *Postova Banka AS and Istrokapital SE v The Hellenic Republic Case No ARB/13/8 (Award)*, 2015 ICSID Arbitration.

(c) On its behalf, the controlling shareholder claims SRL if the locally incorporated company has sought remedy through the domestic court of the respondent and is subject to treatment of denial of justice.

In the Scope of Claim Provision, the shareholder may submit a claim on behalf of the company without any Host State's denial of justice treatment towards the company. Nonetheless, stricter requirements may make it hard to reach an agreement between the contracting state of IIA. The Host State's interest may be protected through a stricter provision. Yet the purpose of IIA as the core consideration of ISDS tribunal's interpretation, is to promote and protect investors' investment. Considering shares in a company is one of the highest investment activities in the world.[70] The existence of adequate protection and promotion for such activity will affect the contracting party's willingness to reach an agreement.

The existence of IIA should aim for the promotion and protection of investment. However, it shall not derogate the obligation of the State to protect its national interest. The possible harm, if a claim for SRL could be implemented in ISDS Arbitration, could harm the national interest, such as double compensation that causes excessive damage to the Host State, the inconsistency with the corporate law and structure, and further impact the Host State's economic development. When negotiating, Indonesia or other States may consider the formulation that suits the State party's intentions to apply the "*no reflective loss*" policy through limiting conditions of losses or damages under the IIA. Such intentions may be expressed through an explicit text adoption or double waiver requirement. Furthermore, the treaty text shall be interpreted by the primary rule of interpretation, to prevent derogating the party's intention and the object and purpose of the treaty itself.

V. CONCLUSION

Interpretation and coherence are the pivotal keys in determining the legal rule applied to the Scope of Claim Provision in IIA and further show the

[70] Damgaard, *supra* note 1.

status of SRL in IIA. However, in ISDS Arbitration practices, it is not hard to find that the tribunal failed to heed the pivotal keys. This led to the uncertainty of the applicable legal rule of SRL, which eventually made the claim for SRL to be submitted with every potential harmful risk thereon.

To support the consistent interpretation and coherences, it is necessary to harmonize the rule of SRL in IIA. Through precise treaty text, adopting NAFTA's Scope of Claim Provision, or applying a loss-based general rule may be used as the main key in limiting conditions of losses under IIA. Therefore, the state party also the tribunal are encouraged to consider every aspect that may affect the outputs of the interpretation, including but not limited to, other related cases, other relevant rules that apply to the disputing parties, and other related provisions that show the context and purpose of the treaty text.

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COMPETING INTEREST

The authors declared that they have no competing interests.

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