CLAIMS FOR REFLECTIVE LOSS UNDER INVESTMENT TREATIES

David Gaukrodger

Senior Legal Adviser
Investment Division
OECD
Domestic Law: “No Reflective Loss” principle bars shareholder claims for reflective loss

Indirect Shareholder

Indirect shareholder

Indirect shareholder

Direct Shareholder Entity

No Reflective loss claims by shareholders

Government

operating company

Creditors

sole permissible claimant

alleged harm

claim
Sample corporate structure and potential claims

- **EPSILON**: 60% covered controlling shareholder
- **OMEGA**: Non-covered foreign and domestic indirect shareholders
- **DELTA**: 85% covered shareholder
- **GAMMA**: Domestic shareholder 10% non-covered
- **KAPPA**: Creditors of GAMMA
- **SIGMA**: Non-covered local shareholders -5%
- **ALPHA**: Domestic operating company
- **BETA**: Creditors of ALPHA
- **Government**: alleged harm

The image illustrates the corporate structure with relationships and potential claims.
Sample corporate structure and potential claims

- **EPSILON**: 60% covered controlling shareholder
- **DELTA**: 85% covered shareholder
- **OMEGA**: Non-covered foreign and domestic indirect shareholders
- **GAMMA**: Domestic shareholder 10% non-covered
- **KAPPA**: Creditors of GAMMA
- **SIGMA**: Non-covered local shareholders -5%
- **ALPHA**: Domestic operating company
- **BETA**: Creditors of ALPHA
- **Government**: alleged harm
- **ISDS claim**

Claims:
- **ISDS claim**: alleged harm
Sample corporate structure and potential claims

- **GAMMA**: Domestic shareholder 10%
- **SIGMA**: Non-covered local shareholders -5%
- **KAPPA**: Creditors of GAMMA
- **OMEGA**: Non-covered foreign and domestic indirect shareholders
- **DELTA**: 85% covered shareholder
- **EPSILON**: 60% covered controlling shareholder
- **ALPHA**: Domestic operating company
- **BETA**: Creditors of ALPHA
- **Government**: Alleged harm
- **ISDS claim**
Sample corporate structure and potential claims

- **EPSILON**: 60% covered controlling shareholder
- **OMEGA**: Non-covered foreign and domestic indirect shareholders
- **DELTA**: 85% covered shareholder
- **GAMMA**: Domestic shareholder 10% non-covered
- **KAPPA**: Creditors of GAMMA
- **SIGMA**: Non-covered local shareholders -5%
- **ALPHA**: Domestic operating company
- **BETA**: Creditors of ALPHA
- **Government**: alleged harm
- **Commercial arbitration claim/domestic admin law claim**
Sample corporate structure and potential claims

- **EPSILON**: 60% covered controlling shareholder
- **OMEGA**: Non-covered foreign and domestic indirect shareholders
- **DELTA**: 85% covered shareholder
- **GAMMA**: Domestic shareholder 10% non-covered
- **KAPPA**: Creditors of GAMMA
- **SIGMA**: Non-covered local shareholders -5%
- **Government**: Domestic operating company
- **ALPHA**: Creditors of ALPHA

**ISDS claim**

- **alleged harm**

**Commercial arbitration claim/domestic admin law claim**
Sample corporate structure and potential claims

- **EPSILON** 60% covered controlling shareholder
- **OMEGA** Non-covered foreign and domestic indirect shareholders
- **GAMMA** Domestic shareholder 10% non-covered
- **KAPPA** Creditors of GAMMA
- **SIGMA** Non-covered local shareholders -5%
- **DELTA** 85% covered shareholder
- **ALPHA** Domestic operating company
  - Commercial arbitration claim/domestic admin law claim
  - Alleged harm
- **BETA** Creditors of ALPHA
- **ISDS claim**
Multiple Claims by Unrelated Shareholders
(domestic law claims omitted)
Treaty shopping using attribution of reflective loss claim(s)

KAPPA has several choices for shopping

KAPPA
100%
Covered
Nationality: K

EPSILON
80%
Covered
Nationality: E

DELTA
100%
Covered
Nationality: D

Non-covered Shareholders
20%

Creditors

Creditors

alleged harm
NAFTA-style derivative claim

1. alleged harm

2. derivative ISDS claim on behalf of ABLE; requires waiver of other recourse by CHELSEA and ABLE

3. if claim successful, damages payable only to ABLE (company)
Deemed foreign company claim

- **EPSILON**: 60% covered controlling shareholder
- **OMEGA**: Non-covered foreign and domestic indirect shareholders
- **DELTA**: 85% covered shareholder
- **GAMMA**: Domestic shareholder 10% non-covered
- **KAPPA**: Creditors of GAMMA
- **SIGMA**: Non-covered local shareholders -5%

1. alleged harm
2. ISDS claim
3. if claim successful, damages payable to company

**Government**

**ALPHA**: Domestic operating company (deemed foreign for ISDS due to foreign control)

**BETA**: Creditors of ALPHA