

Resources on Reflective Loss and Shareholder Claims

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UNCITRAL Secretariat Background Notes

The UNCITRAL Secretariat has produced two particularly relevant background notes:

- [A/CN.9/WG.III/WP.193 - Possible reform of investor-State dispute settlement \(ISDS\) - Multiple proceedings and counterclaims](#)
- [A/CN.9/WG.III/WP.170 - Shareholder claims and reflective loss](#)

UNCITRAL Webinar of July 2 (with links to video and slides)

The webinar, along with the presenters' powerpoints, is available [here](#).

UNCITRAL Academic Forum Paper

Some members of the academic forum have produced a paper on the topic, available [here](#).

Additional Suggested Reading*

This bibliography is based primarily on work by the OECD investment Roundtable on reflective loss and investment treaties. The Roundtable combines intensive policy analysis with detailed summaries of discussions of the issues by government investment treaty policy makers and negotiators. Government experts participate from over 50 OECD, G20 and other jurisdictions, large and small, capital exporters and importers, with a wide range of experience with investment treaties and ISDS. The papers for the Roundtable on reflective loss involve a substantial amount of reading. For those interested in 30-50 pages of analytical material, the following is recommended. Excerpts from cases are also cited below.

Analytical material

- The Conference material for the 2017 OECD Investment Treaty Conference on Treaty Shopping and Tools for Reform (pp. 11-15) provides a short explanation of reflective loss claims. It focuses on the treaty shopping power they generate in ISDS when coupled with protection that extends to indirect shareholders. [Treaty Shopping and Tools for Treaty Reform, Agenda and Conference Material \(Links to an external site.\)](#) (Mar. 2017), pp. 11-15. <https://www.oecd.org/daf/inv/investment-policy/4th-Annual-Conference-on-Investment-Treaties-agenda.pdf> (Links to an external site.)
- There are fairly detailed executive summaries (roughly 3 p. each) of three papers for the Roundtable (below) and the chapter in the 2016 OECD Business and Finance Outlook (BFO). They provide a good entry point and are closely tied to the full texts if more detailed information is desired. Those interested in the litigation consequences of claims for reflective loss (eg. multiple claims, high costs, etc.) should focus on the first paper on consistency and the section of the third paper on claim-limiting provisions. Those focused on the impact on investment should focus on the second working paper and the BFO chapter. Those focused on treaty drafting issues can usefully focus on the third Roundtable paper. Those interested in reforms based on existing practice may wish to look at the sections of the third paper addressing the NAFTA and deemed company claim models.

(Roundtable documents: Gaukrodger, D., “Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency”, OECD Working Papers on International Investment, 2013/03. <http://dx.doi.org/10.1787/5k3w9t44mt0v-en> (Links to an external site.); Gaukrodger, D., “Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law”, OECD Working Papers on International Investment, 2014/02. <http://dx.doi.org/10.1787/5jz0xvngmr3-en> (Links to an external site.); Gaukrodger, D., “Investment Treaties and Shareholder Claims: Analysis of Treaty Practice”, OECD Working Papers on International Investment, 2014/03. <http://dx.doi.org/10.1787/5jxvk6shpvs4-en>“and (Links to an external site.) OECD Business and Finance outlook: [The impact of investment treaties on companies, shareholders and creditors \(Links to an external site.\)](#)”,

* This bibliography is largely drawn from the bibliography used in CCSI’s annual executive training on investment law and arbitration from 2019.

OECD Business and Finance Outlook 2016, Chapter 8 (<http://oe.cd/1Zv> (Links to an external site.)).

- The government discussions in Roundtables 18 and especially 19 (with the summary of Prof. Ferran's presentation) are valuable to see the initial reactions of governments. (See Summaries of Roundtable discussions: [18th Roundtable \(Links to an external site.\)](http://oe.cd/1Zr) (<http://oe.cd/1Zr> (Links to an external site.)) (pp. 4-8); [19th Roundtable \(Links to an external site.\)](http://oe.cd/1Zs) (<http://oe.cd/1Zs> (Links to an external site.)) (pp. 12-19))
- The comparative analysis with advanced corporate law is based in particular on the work of the international group of scholars in the book *The Anatomy of Corporate Law*. The Roundtable work was based on the second edition of that book. A third edition, now incorporating Brazil, was published this year including in e-book format (John Armour et al, *The Anatomy of Corporate Law* (3d ed. 2017)). The first ten pages of the first chapter provide an excellent overview of the five common characteristics of the company under corporate law in many if not all jurisdictions. Consultation with corporate law and corporate finance specialists in your government is encouraged.

ISDS cases

Broad arbitral acceptance of reflective loss (many cases)

- *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, [Decision on Objections to Jurisdiction \(Links to an external site.\)](#), paras. 36-48
- *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, [Award \(Links to an external site.\)](#), 425-429

Recent cases taking a narrower view of shareholder claims

- *Lotus Holding v. Turkmenistan*, ICSID Case No. ARB/17/30, Award (April 6, 2020)

Recent NAFTA government and investor claimant submissions on reflective loss, and arbitral decision

- The *Bilcon v. Canada* damages phase provides valuable and rare access to government and investor claimant submissions on reflective loss, rather than only arbitral summaries in decisions.
 - *Bilcon v. Canada*, [Canada - Damages Counter-Memorial Public version \(Links to an external site.\)](#), pp. 1-4, 8-18.
 - *Bilcon v. Canada*, [Investors - Reply Damages Memorial - Public version \(Links to an external site.\)](#), pp. 118-137.
 - *Bilcon v. Canada*, [Canada - Damages Rejoinder Memorial - Public version \(Links to an external site.\)](#), pp. 1-26.
 - *Bilcon v. Canada*, [United States - Damages Article 1128 Submission \(Links to an external site.\)](#), pp. 1-10.

- *Bilcon v. Canada*, [Award on Damages \(Links to an external site.\)](#) (UNCITRAL) (10 Jan. 2019), pp. 92-119.

Recent domestic cases and disputing party submissions on reflective (derivative) loss

- *United States v. Starr Int'l Co. Inc.*, 856 F.3d 953 (Court of Appeals of District of Columbia Circuit, 9 May 2017), <https://www.leagle.com/decision/infco20170509141> (Links to an external site.), leave to appeal to the United States Supreme Court denied (*denied*), 26 Mar. 2018), <https://www.supremecourt.gov/docket/docketfiles/html/public/17-540.html> (Links to an external site.) .
- *Starr Int'l Co. Inc. v. United States of America*, Brief of the United States in opposition to request for leave to appeal to the United States Supreme Court [in opposition to *writ of certiorari*] (Feb. 2018), https://www.justice.gov/sites/default/files/briefs/2018/02/13/17-540_starr_intl_co_opp_-_revised.pdf (Links to an external site.), pp. 13-19.
- *Garcia v Marex Financial Ltd* [2018] EWCA Civ 1468 (England Ct. App. 26 June 2018), <http://www.bailii.org/ew/cases/EWCA/Civ/2018/1468.html> (Links to an external site.).
- *Brunette v. Legault Joly Thiffault, s.e.n.c.r.l.*, (Supreme Court of Canada, 7 Dec. 2018), <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17404/index.do> (Links to an external site.) (English); <https://scc-csc.lexum.com/scc-csc/scc-csc/fr/item/17404/index.do> (Links to an external site.) (Français).

Customary international law

- *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment, International Court of Justice, paras. 49-96 (<http://www.icj-cij.org/files/case-related/103/103-20070524-JUD-01-00-EN.pdf> (Links to an external site.))

Comparative context: Addressing corporate structuring, treaty shopping and tax treaty abuse -- recent work at the OECD.

- OECD, OECD/G20 Base Erosion and Profit Shifting Project, “Preventing the Granting of Treaty Benefits in Inappropriate Circumstances”, Action 6, 2015 Final Report, pp. 9-11 (executive summary), <https://www.oecd-ilibrary.org/docserver/9789264241695-en.pdf?expires=1557147650&id=id&accname=ocid84004878&checksum=D002A3C108A92F207979D6BDF0AC075F> (Links to an external site.)
- David G Duff, "Tax Treaty Abuse and the Principal Purpose Test: Part II" (2018) 66:4 Can Tax J., https://commons.allard.ubc.ca/cgi/viewcontent.cgi?article=1468&context=fac_pubs (Links to an external site.) , pp. 1-9.