Shareholder Protection Reloaded-- Redesigning the Matrix of Shareholder Claims for Reflective Loss

Julien Chaisse
The role of "reflective losses" is of considerable importance both to national company law and to international investment law. However, as a matter of practice and legal theory, domestic courts and international arbitration tribunals come to contrary conclusions as to whether shareholders can recover the loss of share values caused by wrongs done to the company. International arbitration tribunals tend to allow shareholders to recover loss of share value caused by states' breaches of investment treaties. Domestic courts generally bar such recovery under the "no recovery of reflective loss" principle. This Article provides an exhaustive account of investment awards that have dealt with the issue of "reflective losses" since 1998. It argues that allowing recovery for reflective loss is a sound legal principle from a practical, legal, and policy perspective and a key feature of international investment case law and should therefore be promoted. The tribunals' approach is not necessarily worse than the approach adopted by domestic courts. The domestic courts' approach is based on policy considerations like prevention of double recovery, sheltering wrongdoers from multiple claims by shareholders, respecting the plaintiff company's business decisions, etc. However, tribunals are not obliged to adopt all these policies since policies reflect how different courts prioritize various interests. The tribunals can have different priorities and policy considerations because, by their nature, investment treaties are contracts through which states promise to favor foreign investment in exchange for more foreign investment. The arbitration tribunal is there to uphold party autonomy. This should become the premise of reflection and of solving potential practical problems caused by allowing such recovery.

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The legal concept of "reflective loss" is defined as the loss incurred by shareholders as a result of wrongs done to their company. It is called "reflective" because the shareholders' loss reflects the loss of the company, and in theory the loss can be made good if the company enforces its claims against the wrongdoer. One typical example of reflective loss is the loss suffered by shareholders as a result of the diminution of share value caused by wrongs that decreases the company's asset value.

The general applicable legal proposition in various domestic jurisdictions is that, in these cases, shareholders cannot recover damages from wrongdoers for loss in the value of their shares. This is known as the "non-reflective loss principle." However, decisions by international arbitration tribunals in adjudicating investor-state disputes contradict this rule. Tribunals have admitted investors' (e.g., shareholders') claims against the states and allowed investors to recover the loss caused by the diminution of share value. The tribunals' decisions are heavily criticized by legal scholars for lacking careful reasoning, for wrongfully interpreting the scope of the rights attached to shares, and mostly for disregarding as a whole the policy considerations which underlie the non-reflective loss principle. The non-reflective loss principle is justified through various policy considerations and praised for helping courts achieve a good balance between the
interests of different parties, including the shareholders, the company, the wrongdoer, and the creditor of the company.

This Article discusses the divergence at national and international levels, taking into account company law, administrative law and international investment treaties. It argues that allowing recovery for reflective loss is a sound legal principle from a practical, legal, and policy perspective.

The Article will contrast the approach adopted by domestic jurisdictions with the approach adopted by international arbitration tribunals. In order to do so, it will first explore the possibility of recovering reflective loss under company law and administrative law in national courts. Given the inability to recover reflective loss under domestic law, the Article will introduce the rise of international treaties as alternative routes for shareholders to recover their losses (I). The second Part exhausts the case law of international investment tribunals on the issue of reflective loss and examines the tribunals’ reasoning in detail (II).

To understand and better evaluate the opposite approaches adopted by national courts and international tribunals, the third Part will examine in detail the policy considerations that justify the non-reflective loss principle and evaluate them in the context of international investment (III). It argues that allowing recovery for reflective loss has a sound policy basis. The fourth Part responds to the legal criticism that allowing recovery for reflective loss will undermine the “proper plaintiff” rule, namely, the rule that the company is the proper plaintiff with respect to its rights (IV). It argues that shareholders are the proper plaintiff in regards to rights arising from such loss.

The final Part proposes some procedural solutions for problems that may arise if reflective loss is recoverable, namely, the risk of double recovery and the risk of an unlimited number of lawsuits brought against the government (V).

I. BLURRING NORMATIVE LINES: THE REGULATORY OVERLAPS OF INTERNATIONAL INVESTMENT LAW AND DOMESTIC CORPORATE LAW

The concept of “reflective loss,” whether it allows or prohibits shareholders to claim compensation for their losses, is central to company law and investment law. Before discussing the opposite directions taken by domestic and international norms, this section unpacks the issue at the intersection of national company law and international investment law in order to shed light on the practical and theoretical need to reflect on the divergence of these approaches.

First, the Article summarizes the approach taken by various national company laws on the issue of “reflective losses” (including the United States, the United Kingdom, Hong Kong, France and Germany) (A). Second, it proceeds with an analysis of international investment law trends wherein investors obtain more substantial rights (B). Third, it discusses the possibility of invoking international investment treaties in domestic proceedings (C).

A. Exploring the Contours of the Principle of Non-Reflective Loss in Corporate Law

Broadly speaking, company law governs the formation, registration or incorporation, governance, and dissolution of a legal entity. Modern company law
Shareholder Protection Reloaded creates the notion of independent legal personality, allowing a company to take on rights and liabilities. On the other hand, shareholders suffering from economic loss in their investment in shares would always want to be compensated. Attempting to balance the conflict between the rights of shareholders and the core principle of modern company law gives rise to the discussion regarding allowing or disallowing reflective loss. There is no need to detail the reasoning by different jurisdictions since it is an accepted fact that different jurisdictions adopt this principle. The details of the non-reflective loss principle differ slightly from jurisdiction to jurisdiction. We summarize the positions of key civil law (France and Germany) and common law (United States, United Kingdom, and Hong Kong) jurisdictions.

I. Non-Reflective Loss in Civil Law Jurisdictions

Germany is representative as a civil law country. In Germany, derivative actions are provided for in the Aktiengesetz, sec. 142(2), according to which “[s]hareholders, upon application whose shares hundredth of the share capital or a proportionate amount of EUR 100 000 ‘may file’ a motion to appoint special auditors to audit [...] of not more than five years ago occurred within the management.” From this one can see that the action is structured so that the shareholder files for the benefit of the company and so that double plaintiffs do not arise—e.g., one whose damages would merely be a reflection of the other. Securities fraud damages in Germany would be measured like those in the United States—i.e., the damages would essentially reflect loss in the value of the company because of the fraud.

French company law does not include the concept of reflective loss. However, we suggest that French company law does not allow recovery of reflective loss on two grounds. First, shareholders do not have a personal claim in the loss of a company’s value. French company law provides that shareholders can sue directors both in their personal capacity and on behalf of the company. If shareholders sue in their personal capacity, they must establish the incurrence of personal prejudice. If shareholders sue on behalf of the company, compensation will be awarded to the company. French case law suggests that a loss to shareholders that results from loss in a company’s value caused by a director’s

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5 Douglas phrases it as “[C]orporate personality in municipal legal systems entails the company’s capacity to own property in its own right so that it is not merely agent or trustee for its shareholders.” DOUGLAS, supra note 3, at 416.

6 In an important article, Gaukrodger reviews different domestic jurisdictions’ rules on reflective loss. He reports that advanced national legal systems generally disallow the shareholders from recovering reflective loss. The legal systems that have been reviewed include those of the United States, Canada, the United Kingdom, Hong Kong, Germany, and France. Other legal systems, e.g., those of Singapore, New Zealand, and the European Union, also adopt the non-reflective loss principle. See Gaukrodger, supra note 3, at 15–17.

7 “Aktionären, deren Anteile bei Antragstellung zusammen den hundertsten Teil des Grundkapitals oder einen anteiligen Betrag von 100 000 Euro erreichen” may file “einen Antrag auf Bestellung von Sonderprüfern zur Prüfung [...] eines nicht über fünf Jahre zurückliegenden Vorgangs bei der Geschäftsführung.”

8 CODE CIVIL [C. CIV.] [CIVIL CODE] arts. 1843–5.
wrongdoing does not constitute personal prejudice. Further, in the French Cour de Cassation (French Court of Final Appeal) case 12-27901, a shareholder sued a bank for its negligence, which resulted in the liquidation of the company. The shareholder sued for damages to the value of his shares on the grounds that he suffered personal prejudice. The court held that the alleged negligence of the bank only caused prejudice to the company as an independent legal entity, but not to its shareholder. In another Cour de Cassation case, the court held that, when shareholders claim damages in a personal capacity for personal prejudice, they must establish that the company suffered a loss caused by wrong done to the company. The effect of the cases is that shareholders cannot recover reflective loss in France.

Second, the potential loss that shareholders suffer from the devaluation of their shares is not recoverable. This is so because the loss suffered by shareholders in the scenario of reflective loss is uncertain. In France, in all civil law matters—including tort and contract matters—the principle of compensation aims to put victims in the same position as if the wrong never took place. To succeed in the claim, first, the victim must first establish a causal link between the wrong and the damage. Second, the court will calculate compensation for actual damage incurred and for potential future damage. In terms of future damage, the court can compensate the victim for loss of business opportunities (e.g., “chance”) in tort or in contract matters. During the calculation, the real probability of the victim obtaining the chance in the first place will be an important consideration. Third, if the claim is under contract, the court looks to whether or not the damage is foreseeable. Fourth, the court excludes the unrecoverable type of damage.

French courts allow recovery of pure economic loss. The problem with reflective loss is that, unlike damage for loss of chance, it is not ascertainable. When a company loses the possibility of entering into a contract, the value of this loss of chance can be calculated. But it is not possible to calculate the loss of share value resulting from wrongs done to the company because shareholders may never sell their shares in the future. In addition, the wrong suffered by the company does not necessarily lead to a reduction of the company’s share price even after a company loses a business opportunity.

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9 Id.
11 “Alors que les associés d’une société coopérative agricole, qui n’agissent pas par la voie oblique et n’exercent pas une action sociale, ne sont recevables dans leur action personnelle que s’ils justifient d’un préjudice personnel distinct du préjudice subi par la personne morale dont ils sont membres ; que, lorsque les associés d’une société coopérative agricole intentent une action indemnitaire directement contre le cocontractant de la coopérative, jugé par eux coupable d’une brusque rupture des relations commerciales par laquelle la coopérative écoulerait ses produits, l’existence d’un préjudice spécifique à l’adhérent de ladite société coopérative agricole, laquelle est dotée de la personnalité morale et spécifiquement chargée de l’écoulement des produits, est ainsi une condition de recevabilité de l’action individuelle, et non de son bien-fondé ; qu’en considérant, au contraire, que cette question relèverait du fond, la cour d’appel a violé l’article 31 du Code de procédure civile.” Cour de cassation [Cass.] [supreme court for judicial matters] com., Feb. 8, 2011, Bull. civ. IV, No. 09-17034.
13 Id. at 37–47.
2. Non-Reflective Loss in Common Law Jurisdictions

The United States is representative because the concept of “reflective loss” does not exist in all of its fifty common law jurisdictions. In the context of a securities fraud action, the measure of the plaintiff shareholder’s loss is almost always the damage to the company (e.g., the price of shares before and after the fraud is discovered), and is thus a “reflection” of the company’s loss. In the context of a corporate law derivative action, the concept is implicit in the structure of the action, which protects the company itself and never results in damage awards to the shareholder upon the company’s initiative.

The United Kingdom’s position is also discussed, since British courts apply the strictest rule barring recovery for reflective loss. Worthington and Lesley summarize the United Kingdom’s rule, according to which the non-reflective loss principle ensures that a defendant can be sued only once for the same loss. Further, the company’s claim is prioritized. This principle prevents an entity other than the company from suing for the loss. This is the case even when the entity has a cause of action against the defendant, and even if the cause of action is different from the company’s. When deciding whether a certain loss is a reflective loss, courts generally focus on the type of the loss instead of looking at the cause of action. In other words, courts do not consider whether the shareholder brings the claim on a separate cause of action from the company; rather, they look at whether the wrong causes the same damage to the company and to the shareholder.

The Hong Kong court adopts the United Kingdom’s position and disallows the recovery of reflective loss. Hong Kong also provides an interesting example of resolving the issue of reflective loss by extending the scope of derivative action to allow multiple derivative actions. In Waddington Ltd v. Chan Chun Hoo, the plaintiff, a shareholder of a group’s parent company, filed an action on behalf of that parent company for damages incurred by the subsidiary on account of misconduct in the subsidiary. The case gives rise to the issue of reflective loss because the parent company (e.g., the shareholder of the subsidiary) sought to recover damages incurred by the subsidiary. The court held that the parent company could not recover damages suffered by the subsidiary because of the non-reflective loss principle, but it allowed the plaintiff to file an action on behalf of the subsidiary, e.g., allowed for a two-tiered derivative action filed on behalf of the subsidiary wherein payment would be made to that same subsidiary.

The non-reflective loss principle may also be extended to personal guarantees made to shareholders of the company. In Suen Kwai Kam v. Zhong Hua

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15 SEALY & WORTHINGTON, supra note 14, at 673.
18 See id.
International Holdings Ltd and others, the Hong Kong Court of First Instance (CFI) ruled on whether the non-reflective loss principle applies to a shareholder’s claim brought under a personal guarantee agreement between a shareholder of a seller company and a buyer company. In this case, the buyer company breached the contract by failing to pay part of consideration to the seller company. The CFI held that the unfulfilled amount under the personal guarantee to the shareholder constituted reflective loss of the seller company. This was so because allowing the shareholder to recover against the guarantors under the personal guarantee would have deprived the seller company of its right to recover the unpaid consideration against the buyer company. In Hong Kong, the non-reflective loss principle encapsulates two objectives. The first is to avoid double recovery at the expense of the defendant/debtor. However, this objective does not apply in this context because there were different debtors, namely, the buyer company on the one hand, and the guarantors on the other hand. The other objective is to preclude the shareholder from recovering at the expense of the company, of its creditors, and of others, because the seller company would lose its claim under the share purchase agreement if the guarantors were paid out under the guarantee. If the decision in this case is followed by courts in the future, it will mean that personal guarantees relating to the payment of a company’s debts are inadequate, as they will be unenforceable under the non-reflective loss principle. It would also mean that, in cases where a guarantee from the shareholder or director of a debtor is needed to secure the debt, the guarantee should be made to the creditor company, and that company—not the shareholder—would be responsible for pursuing claims.

The general company law principle against reflective loss recovery means that shareholders need to look at other areas of law that might provide grounds for recovering their loss. The rise and design of investment treaties provides such an opportunity.

B. Conceptualizing International Law of Foreign Investment as Corporate Law

Foreign direct investments (FDI) represent one of the most coveted sources of financing the economy, and all countries around the world compete to attract foreign capital. The important role of foreign capital in the economic development of contemporary societies has influenced the regulation of foreign


The law on FDI has evolved slowly because of political confrontations, including ideological, economic, and especially international confrontations. Its international character has hardly changed over time, with a certain time lag in changes to economic relations deployed globally between different partners. In broad terms, this development reflects different meanings of the concept of sovereignty and of the role of the national court in relation to international law. Despite its increased importance for many years, foreign investment has remained attached to the internal legal order of the host state, with few exceptions. Thus, the state defines the law from the admission of investment into its territory to its possible liquidation. Any dispute that occurred in the application of the law must be submitted to the national courts of the host country in order to be settled in accordance with local law alone.

For several decades, the international law on investment underwent a phase of great uncertainty involving difficulties integrating the standards for foreign investment in international law. With the rise of multinational corporations and the internationalization of economic activity, there has been willingness to stabilize the contractual relationship between sovereign states and companies through the regulation of FDI. Through their number and similarities, bilateral treaties contribute to the creation of customary international law, and thus to the development of international law on FDI. Bilateral treaties also exert significant influence on other agreements concerning investment because the innovations introduced by a country in a bilateral investment treaty are also found in all the treaties that it negotiates with other countries. When these types of agreements are


22 For a discussion on how history, politics and ideology affect FDI laws, see M. Sornarajah, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 1–7 (2d ed. 2004).

23 For a discussion of sovereignty in international investment law, see J. E. Vifluales, Sovereignty in Foreign Investment Law, in THE FOUNDATIONS OF FOREIGN INVESTMENT LAW (Zachary Douglas et al. eds. 2014).

24 This legal controversy was the expression of the confrontation of economic interests between capital exporters and the host countries, who were importers of capital. To overcome the reluctance of developing countries with regard to the international protection of foreign investment, the interstate negotiation bodies have been diversified, thus marking a new step towards the internationalization of law of foreign investment. See Jeswald W. Salacuse, Towards a Global Treaty on Foreign Investment: The Search for a Grand Bargain, in ARBITRATING FOREIGN INVESTMENT DISPUTES 50, 61 (Norbert Horn ed., 2004). At about the same time the foundations of the conventional mechanisms which still constitute the main North–South investment regime were laid. All attempts, more or less successful, to regulate FDI at the multilateral level during the 1970s contributed to the process of internationalization of investment law.

25 Despite considerable controversy, it is now acknowledged that international rules apply to FDI and multinational enterprises. Gradually, states have waived their right to unilaterally regulate their economy and, by extension, to define the legal regime of investment. From 1980, the general trend towards liberalizing the legal, regulatory, and institutional aspects has resulted in a big reversal to foreign investment with the proliferation of bilateral agreements. The increasing number of bilateral agreements for the promotion and protection of foreign investment has resulted in more complex investment law and has also led to the emergence of a network of global treaties; these are in a permanent state of evolution. See generally Kenneth J. Vandevelde, A Brief History of International Investment Agreements, 12 U.C. DAVIS J. INT’L L. & POL’Y 157 (2005).

mutually reinforcing, bilateral treaties may also make an important contribution to the development of rules at the regional and multinational level.27

The growing number of regional agreements is part of the dynamic regulation of direct foreign investments and is designed to expand markets and exploit synergies in areas of geographical proximity.28 Regionalism has become the means of mitigating developing countries' economic failure and political weaknesses in international relations. The investment process exerts constant pressure on policymakers at all levels to create an appropriate legislative framework and to harmonize the needs and opportunities of the global economy. Nevertheless, governments want a guarantee that their decisions and actions in regard to their own investments will benefit both their own nations' economic development and their global growth.29 To place bilateral treaties into the context of the issue of reflective loss, this Section starts by explaining the concept of standards of treatment and investment protection in bilateral investment treaties and then introduces the treaties' built-in dispute settlement mechanism. Then, it explores the concept of investment and investors in the bilateral treaties, briefly demonstrating the broader protection that bilateral treaties are capable of providing to shareholders. The interpretations of these two concepts by international tribunals will be discussed later.

1. The Rise of the International Law of Foreign Investment: Importance of the Substantive Principles

In principle, domestic law—that is to say the law of the state of the investment—defines the treatment of international investment. Thus, an investment host state makes the rules and regulations applicable to investments in accordance with its desired orientation, incentive, or disincentive. Investment exporting countries, mostly northern countries, favor domestic law mechanisms because they allow them greater concessions in terms of treatment and protection from the state of territority. On the other hand, investment importing (and often developing) countries favor the mechanisms of international law because the use of an international treaty allows them to mitigate concessions and to welcome the capital exporting country's investment.30

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27 From the perspective of international relations and the globalization of the economy, a second phenomenon of historical significance for the evolution of international investment law is manifested by the unprecedented proliferation of regional arrangements. The movement towards regionalism is partly due to the difficulties in Uruguay Round negotiations and to the deterioration of trade relations between the United States and Japan. See Trakman & Ranieri, supra note 21, at 22.

28 Regional agreements, in their various forms, are contributing to a new judicialization of global society. According to their scale, regional treaties are multilateral treaties in which international law has finally taken its place to provide balanced solutions capable of taking into account the diversity of concrete situations. The regional framework allows to better apply the rules and, because of proximity, it provides more control and more appropriate sanction mechanisms.

29 Trakman & Ranieri, supra note 21, at 21.

30 This topic caused lively debate during the 1960s and caused the proliferation of conventional instruments on the treatment and protection of investments. In general, a treaty invariably stipulates the treatment that the host country should accord to investment once it is established in its territory. Very often bilateral treaties include one or more general principles, together or individually, intended to provide global criteria through which it is possible to judge whether the treatment accorded to an investment is satisfactory; they also help interpret the special situations to which more specific provisions should be applied. For a critical analysis of the evolution of this trend, see Roberto Echandi, What Do Developing Countries Expect from the International Investment Regime?, in THE EVOLVING
The concept of “investment treatment” is generally defined as the set of principles and rules in international and domestic law governing the regime of international investment, from the moment of its formation until its liquidation. An initial distinction can be made between general standards of treatment, that is to say, the standards that govern all aspects of the existence of a foreign investment in a host country, and specific treatment standards that refer to particular aspects of foreign investment. The general standards of treatment systematically found in a bilateral agreement include absolute norms and standards. “Generally” means that the absolute standards set out the treatment to be given. The standards define the required treatment by reference to the treatment accorded to other investments. However, it should be noted that “absolute” terms and “relative” terms are not universally accepted. Thus, this classification (mainly initiated and used by UNCTAD) has no legal implication. Generally, bilateral treaties can include several provisions on absolute standards for treatment and grant one or more provisions relating to the treatment.

As stated earlier in this Article, one of the main reasons why many developed countries took the initiative to conclude bilateral treaties during the 1960s was to protect their investments abroad. The legal concept of “investment protection” is defined as the set of principles and rules in national and international law that aim to prevent or suppress any public effect on the existence or consistency of international investment. The protection regime is intimately linked to the notion of permanent sovereignty, and its rules and principles laid down by the domestic law of the state of the investment of territoriality cover all the problems of expropriation and nationalization. Thus, the states of nationality of investors, especially in developed countries, do not want to depend on domestic investment protection rules made by the South. Therefore, the clauses designed to protect investments in the bilateral treaties are particularly important. In general, the provisions are designed to protect investments against expropriation, against war and civil unrest, and for the transfer of payments.

The dispute settlement provisions provide the means to ensure that the standards of treatment and protection granted by the treaty are binding and effectively implemented. As such, they play a critical role in bilateral treaties.
Based on experience, difficulties can easily arise concerning the interpretation and application of the treaties, and although some could be resolved by the parties themselves, others might require external means of resolution. The presence of effective mechanisms for conflict resolution is the ultimate guarantee of security for foreign investors. Investment disputes in BITs may involve disputes between private investors, between a state and investors of another state, or between state parties to a treaty. Conflicts between private parties are normally resolved by recourse to the courts of the state which has jurisdiction under the rules of private international law or commercial arbitration. Therefore, they are not the object of this study. The conflict between a state and investors of the other state should normally also be submitted to courts or competent national authorities. These conflicts could also be subject to another mutually agreed upon mechanism. This is currently the standard practice for BITs.

Before entering into the details of the disputes involving the issue of reflective loss, it should be noted that several treaties provide that the contracting parties shall consult each other on an aspect of the treaty at the request of either contracting party. Among the countries that adhere to this consultation clause are China, Denmark, Finland, the Netherlands, Norway, and the United States. Some treaties state that the parties must consult periodically to review the treaty and discuss issues concerning investments. There are arguments that the presence of a consultation provision in a treaty would be useless, because customary international law obliges countries to seek an amicable solution to the conflicts, starting with the negotiation duty of good faith. However, the existence of a consultation clause has several objectives. First, it creates an obligation to consult on all issues concerning the treaty, including those which may not be considered conflicting. Indeed, these consultations could prevent situations that can escalate into a dispute. Second, consultation clauses increase the amicable resolution of disputes between the parties, which is a very important cultural preference for certain countries. Third, in some treaties this clause is intended as a method of monitoring and enforcing the treaty.

Despite the consultations, the parties to a treaty can come to a conflict situation, for which bilateral treaties do or do not have specific provisions. To better understand which resolution mechanism is best suited to each situation, we must consider the two types of disputes that appear in the implementation of treaties, including disputes between the investor of one contracting party and its home state, and disputes between states.

2. The Capacious Scope of the Legal Concept of Foreign Investment: Shares as Foreign Investment

The concept of "investment" does not have a generally accepted definition, and is constantly evolving as a result of the emergence and development of new forms of investment by entrepreneurs, financiers, and multinational companies. In


37 See Julien Chaisse et al., Deconstructing Service and Investment Negotiating Stance: A Case Study of India at WTO GATS and Investment Fora, 14 J. World Inv. & Trade 44 (2013); see also
the absence of a generally recognized definition, the definition of investment contained in international instruments is of paramount importance. In fact, each BIT provides a definition for investment. Since the concept of investment represents a resource assembly for a given period and for future profits, the definition of investment varies significantly in international instruments. These differences can be classified into two broad categories, depending on the purpose of the treaty. Instruments that involve cross-border movement of capital and resources as their object tend to define investment in restrictive terms and consider foreign control of an enterprise an essential element of such a definition. The instruments designed to ensure investment protection, on the other hand, tend to use broad and comprehensive definitions based on assets to cover not only capital that crosses borders, but also other types of business assets. In general, BITs follow this second approach. The most recent treaties contain a relatively standard definition for direct investment abroad. These treaties emerged during the 1960s and their definition of investment has since undergone very little change.

The most commonly used expression in all definitions of investment is "any type of assets." However, in the bilateral treaties signed by the United States, the term used instead is "every kind of investment." It is also typical to add a list of assets to be included in this definition. As mentioned, the lists of assets protected under a BIT are not exhaustive, and this is due to several reasons. First, most treaty designers recognize the difficulty of drafting a comprehensive list. Second, it was deliberately decided to leave open the definition of investment, so that it can absorb new forms of investments as they arise. Lastly, a broad definition avoids the need to renegotiate the treaty in such situations. For others, it is an approach that is both synthetic and analytical, which has the effect of enclosing the different elements that can be an investment.

The broad scope of the definition of investment means that shares can be covered by the definition and thus provides a good incentive for shareholders to seek protection under investment treaties. A number of tribunals have not explicitly discussed the nature of shareholders’ rights, but have assumed that the broad meaning of "investment" is so encompassing that it would, without difficulty, allow a shareholder to claim in its own right damage suffered by investing in an enterprise. In doing so, these tribunals have implicitly validated the hypothesis of reflective losses under investment treaties.


For a detailed discussion on the definition of foreign investment, see ANGELOS DIMOPOULOS, EU FOREIGN INVESTMENT LAW 21-50 (2011). For a discussion of the historical evolution of the concept of foreign investment, see M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 7-18 (2d ed. 2004).

Noah Rubins, The Notion of Investment in International Investment Arbitration, in ARBITRATING FOREIGN INVESTMENT DISPUTES 283, 291–92 (Norbert Horn ed., 2004). See also Julien Chaisse, Exploring the Confines of International Investment and Domestic Health Protections—Is a General Exceptions Clause a Forced Perspective?, 39 AM. J. L. & MED. 332 (2013) (explaining that variations in the scope of the investment definition also impact the scope of the investment treaty standards; the broader the concept of investment, the wider the protection offered by the treaty).


Rubins, supra note 39, at 291–92.

See the case analysis below.
As this issue is central to the Article’s key argument, we researched all of the relevant Awards that have proposed an analysis of the concept of investment, demonstrating its great practical potential. Out of the more than 300 investment awards made over the last three decades, we found fourteen awards that explicitly address the issue of the meaning of investment in the context of international disputes. The common thread of such awards is that the term “investment” as defined in the relevant and applicable treaty clearly embraced the investment of claimants in the corporate investment.

The very first award that dealt with this type of legal question was the *Goetz v. Burundi* Award of 1999 (containing the tribunal’s decision on jurisdiction and liability and the parties’ settlement agreement), which observed that “the applicable body of decisions which was rendered prior to the coming into force of the ICSID did not limit a right of standing to only those moral persons directly affected by the litigious measures but rather, extended rights of standing to those who were bona fide investors.”

The *Maffezini v. Spain* Decision on Jurisdiction found that capital investments are covered by the BIT. The *Genin v. Estonia* Award found that the term “investment” as defined in the BIT clearly embraces the investment of claimants in the corporate investment. The tribunal in *Azurix v. Argentina* Award on Jurisdiction found that the objective of the definition of “investment” in the applicable BIT is to include layers of corporate structures established for the exclusive purpose of the investment in order to protect the real party in interest.

The *Nykomb v. Latvia* Award stressed the idea that the claimant must be understood to claim losses or damages it has incurred itself. The *IBM World Trade Corporation v. Ecuador* Decision on Jurisdiction found that the parent investor could assert a BIT claim in respect of measures relating to its investment’s contractual rights. The *LG&E Energy v. Argentina* Decision of the Arbitral Tribunal on Objections to Jurisdiction found that, “for the purposes of the ICSID Convention and the Bilateral Treaty, the claimants are foreign investors, even though they did not directly operate the investment in the respondent’s territory, but acted through companies constituted for that purpose.”

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43 Antoine Goetz v. Republic of Burundi [1], ICSID Case No. ARB/95/3, Award, ¶ 89 (Feb. 10, 1999) (containing the Tribunal’s decision on jurisdiction and liability and the parties’ settlement agreement). The sentence in the original source is: “[L]e Tribunal observe que la jurisprudence antérieure du CIRDI ne limite pas la qualité pour agir aux seules personnes morales directement visées par les mesures litigieuses mais l’étend aux actionnaires de ces personnes, qui sont les véritables investisseurs.” The Article directly translates the sentence into English and quotes it.

44 Emilio Augustin Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction, ¶¶ 68–70 (Jan. 25, 2000).


46 Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award on Jurisdiction, ¶ 64 (Dec. 8, 2003); see also id. ¶¶ 69, 74.

47 Nykomb Synergetics Technology Holding AB v. Republic of Latvia, Arbitral Award, ¶ 2.4a (Dec. 16, 2003).


49 LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision of the Arbitral Tribunal on Objections to Jurisdiction, ¶¶ 50, 63 (Apr. 30, 2004).
Jurisdiction tribunal found likewise.\textsuperscript{50} The tribunal in \textit{Pan American Energy v. Argentina} Decision on Preliminary Objections found that the U.S. claimants in that case were investors due to their equity interests in certain Argentinian companies.\textsuperscript{51} The \textit{Vivendi v. Argentine Republic} Decision on Jurisdiction made the same finding.\textsuperscript{52}

The \textit{African Holding v. DRC} Decision on Jurisdiction and Admissibility found that the BIT’s reference to ownership or direct/indirect control permitted the indirect control of the investment; the assignor had standing because it was indirectly owned or controlled by one family (contracting party nationals) that also owned the assignee; the assignee had standing since it replaced the assignor and its rights, including the debt and the arbitration clause, through a transaction that did not implicate any change in nationality.\textsuperscript{53}

The \textit{Bogdanov v. Moldova II} Final Award found that an investor is entitled to seek treaty protection for damage inflicted on a locally incorporated company.\textsuperscript{54} The \textit{Sempra v. Argentina} ad hoc annulment committee agreed with the tribunal on this point but annulled the award on other grounds. The \textit{CEMEX v. Venezuela} Decision on Jurisdiction, citing Siemens, Kardassopoulos, Tza Yap Shum and Mobil, held that since the BIT covered indirect investments, it necessarily entitled the indirect investors to assert claims for alleged violations of the treaty concerning the investments that they indirectly owned.\textsuperscript{55}

The tribunal in \textit{Paushok v. Mongolia} Award on Jurisdiction and Liability rejected an objection to the claimants’ standing based on a failure to exhaust all contractual remedies, holding that “the right of an investor to claim under a BIT is a separate right from that of a company it controls to sue under the dispute resolution of a particular commercial contract and there is no obligation for such an investor to require that company resort first to the dispute resolution procedure of its contract, before the investor can exercise its own rights available to it under the provisions of a BIT.”\textsuperscript{56}

The tribunal in \textit{Teinver v. Argentina} Decision on Jurisdiction, by a majority, observed that other tribunals have iteratively disagreed on the notion that there is any “default” under international investment law that restricts the kinds of claims which can be brought. The tribunal in \textit{Teinver v. Argentina} noted further that “tribunals have refused to take their cues from domestic corporate law” and, “under this logic, the fact that the treaty does not explicitly permit ‘derivative’ actions is irrelevant because the very concept of a ‘derivative’ claim is alien to the

\textsuperscript{50} Compañía de Aguas del Aconquija S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Decision on Jurisdiction, ¶¶ 89–94 (Nov. 14, 2005).


\textsuperscript{52} Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Decision on Jurisdiction, ¶¶ 49–51 (Aug. 3, 2006).


\textsuperscript{55} CEMEX Caracas Investments B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/08/15, Decision on Jurisdiction, ¶¶ 151–56 (Dec. 30, 2010).

\textsuperscript{56} Sergei Paushok, CJSC Golden East Co. v. Government of Mongolia, Award on Jurisdiction and Liability, ¶ 598 (Apr. 28, 2011).
treaty or the ICSID Convention." Also, in the same dispute a separate opinion by Dr. Kamal Hossain disagreed with the majority's approach and criticized its reliance on the Siemens and Mobil decisions. Finally, the Levy de Levi v. Peru Award noted that “investors with an indirect interest, including a minority interest, may on the basis of the ICSID Convention request the protection of the rights accorded to them by an investment treaty.”

3. Ubiquity of Shareholders: Subjects of Corporate and Investment Law

To succeed in claiming rights under investment treaties, shareholders must also show that they are investors protected under the treaties. The purpose of a BIT is to encourage and protect investments by investors of both countries that are signatories to the treaty. To do this, the treaty must give these investors a sufficiently important link to their respective countries so as to deserve protection. The definition of “investor” usually includes physical persons and legal entities, often referred to generically as “undertakings” or “companies.” However, some BITs do not use the term “investor,” but refer directly to individuals and businesses. With respect to natural persons, most BITs give protection to persons who are “nationals” of each contracting country as individuals recognized in national laws as “national” or “citizen.”

The broad scope of the definition of investor means that shareholders, as individuals or entities, may be well qualified to seek protection under investment treaties. The Article will look at how investment arbitration tribunals deal with the issue of reflective loss in the next Part. However, before going to international tribunals, investors might also attempt to invoke international treaty protection in domestic courts.

C. From Theory to Practice: What Are the Possibilities of Invoking International Investment Treaties to Obtain More Substantial Rights in Domestic Proceedings?

Having discussed the fact that the concept of investor and investment can be broadly interpreted under bilateral investment treaties, the company whose investment is affected may realistically want to invoke international investment treaties to obtain remedies through domestic proceedings against the government.

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57 Teinver S.A. v. Argentine Republic, ICSID Case No. ARB/09/1, Decision on Jurisdiction, ¶ 212 (Dec. 21, 2012).
59 Levi v. Republic of Peru, ICSID Case No. ARB/10/17, Award, ¶ 144 (Feb. 26, 2014).
60 See Julien Chaisse, Debashis Chakraborty, & Jaydeep Mukherjee, Emerging Sovereign Wealth Funds in the Making: Assessing the Economic Feasibility and Regulatory Strategies, 45 J. WORLD TRADE 837 (2011) (discussing the different definitions of investors which have a significant impact on the scope of application of the treaty).
61 We leave aside the practice of treaty-shopping that further increases the importance of IIAs. See Julien Chaisse, Intellectual Property Rights, The Treaty Shopping Practice: Corporate Structuring and Restructuring to Gain Access to Investment Treaties and Arbitration, 11 HASTINGS INT’L BUS. L. J. 225 (2015) (discussing the consequence of a loose definition of investor that allows companies to structure and restructure their investments to gain access to international investment protection and arbitration).
(preferably damages or striking out domestic legislation that is inconsistent with investment treaties).

Generally, two paths are available to challenge public authority in domestic courts concerning investment losses. One is to challenge the decisionmaker’s compliance with legal standards through judicial review. The other is to challenge the constitutionality of certain legislation. In other words, under judicial review, the legislation affecting the investment is not itself challenged, but the decisionmakers’ execution of the legislation is. The constitutionality review serves to check whether the legislation in question contravenes higher law, for example, the constitution or other international obligations entered by the state through investment treaties.\(^{62}\)

The division of venues in different jurisdictions is determined by whether the legal system where the proceeding takes place is monist or dualist. Monist and dualist legal systems differ in the way they treat a state’s international obligations and in their approach to the pre-ratification approval and post-ratification incorporation of a treaty.\(^{63}\)

Broadly speaking, in a monist legal system, the state can ratify a treaty without pre-ratification approval and the treaty that is ratified will be automatically incorporated into national legislation. It prevails over other national laws, whether enacted prior to or after the treaty ratification. In a dualist legal system, a treaty’s constitutionality must be checked before it can be ratified. In addition, after ratification, the international treaty will only become national legislation if it is further incorporated by parliamentary enactment.

A potential problem under the dualist arrangement is determining which legislation should prevail in situations where a subsequent legislation conflicts with the legislation that embodies the treaty. This problem exists because, on one hand, there is the general legal principle of *lex posterior derogat priori*, e.g., a more recent law prevails over an inconsistent earlier law.\(^{65}\) On the other hand, the earlier law over which this recent law prevails is one that embodies an international treaty, which may stand at a higher level of the legal hierarchy.

In reality, the division between monist and dualist systems is not absolute since most legal systems present mixed features of both. For our purpose of analyzing the possibility of relying on an investment treaty in domestic court, we focus on the different approaches by legal systems at the post-ratification stage. We assume that the investment treaties to be relied upon have been ratified, because otherwise legal proceedings against the government are not available in the first place due to lack of standing.

Depending on how a state deals with potential conflicts between international treaties and national law, we categorize the investment treaty related

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\(^{62}\) For a general introduction on judicial review in the United Kingdom, see *William Wade & Christopher Forsyth, Administrative Law* (8th ed. 2000).


\(^{64}\) See Sloss, *supra* note 63, at 2–3.

challenges into two types: First, constitutionality review of subsequent legislations on the ground that the latter contravene with the international investment treaties in countries where international treaties are integrated by constitutional provisions or as higher law; second, judicial review where the international investment treaty breaches are invoked in domestic proceedings.66

Since each jurisdiction is specific, a general comparison is not possible. The background research for this Article investigated five jurisdictions in detail: Argentina (selected because there are many investment treaty cases against it in international arbitration), the United Kingdom (selected as the state with the most dualist features and an uncodified constitution), the United States (selected for its special monist and dualist character), Canada, and Australia.

This research produced a number of important conclusions. In Argentina, judicial review is available to invoke breaches of investment treaties in domestic court and the non-reflective loss principle does not apply. In the United Kingdom, judicial review/constitutional review is not available to invoke breaches of investment treaties. In Canada, judicial review is available to challenge government decisions inconsistent with investment treaties to the extent that the national legislation does not explicitly derogate from the investment treaties. In Australia, judicial review against public authority concerning Australian obligations under international trade agreements exists. However, there is no case for challenges brought in the context of bilateral investment treaties. Public authorities should respect an international investment treaty even if it is not incorporated domestically.67 However, domestic law can explicitly deviate from an international investment treaty. Nothing was found concerning the non-reflective loss principle in the context of judicial review. Finally, in the United States judicial review against public authority on grounds of breach of an international investment treaty seems unavailable.

In conclusion, it appears that only Argentinian courts would allow a claimant to invoke an international investment treaty with a view to benefit from its stronger protection, which may include a claim for reflective loss. However, no other jurisdiction (Australia, Canada, or the United States) replicates that solution, which ensures a certain degree of conformity between the investment treaties and the principles of company law in domestic jurisdiction. In other words, the non-reflective loss principle enshrined in domestic company law is not contradicted by the possibility of a claimant invoking investment treaties before domestic courts. In essence, these jurisdictions succeed by containing the two regimes: On the one hand company law, and on the other hand the investment treaty. There is no immediate normative conflict, but rather what we would call an indirect contrariety

66 See generally JUDICIAL APPLICATION OF INTERNATIONAL LAW IN SOUTHEAST EUROPE (Siniša Rodin & Tamara Perišin eds., 2015) (discussing the subject for southeastern European countries, including Albania, Bosnia, Croatia, Kosovo, etc.).

67 Emily Crawford, MONISM AND DUALISM—AN AUSTRALIAN PERSPECTIVE, in BASIC CONCEPTS OF PUBLIC INTERNATIONAL LAW—MONISM AND DUALISM 710, 724 (Marko Novakovic ed., 2013). See also Philip Menamara, THE IMPLEMENTATION OF TREATIES IN AUSTRALIA, in AUSTRALIA AND INTERNATIONAL LAW 41–55 (1986). Australia embodies a clear cut dualism. However, this dualism is subject to limitations. One limitation is that when the parliament has not incorporated a convention through legislation, the terms of the convention can still be used for domestic legislation interpretation. Further, administrative decision-makers “may have regard, in exercising discretions under international law to international obligations or agreements which have not been incorporated into the domestic law.” Robert French, Chief Justice, Supreme Court of New South Wales, Annual Conference: International Law and Australian Domestic Law 27 (Aug. 21, 2009).
due to the authorization of a reflective loss claim in the context of arbitration while the same is forbidden in company law.

II. UNVEILING THE SHAREHOLDER PROTECTION BY INVESTMENT TREATIES:  
THE TREATMENT OF “REFLECTIVE LOSSES” IN INVESTMENT ARBITRATION

In order to better understand the treatment of “reflective losses” in investment arbitration, it is important to recall that the concept is not directly regulated by investment treaties. There is no single investment treaty that has explicitly enshrined the concept of “reflective losses” in its text. However, the key issue regarding shareholders’ standing under investment treaties is the channel through which the term “reflective losses” has been discussed and addressed by investment tribunals. More precisely, a recurring issue in international law is the standing of shareholders (including minority shareholders) to bring claims in relation to measures affecting enterprises in which they have an interest, and whether that standing extends to the enterprise’s contractual rights. 66

In terms of methodology, we have looked at all the known awards decided under classical BITs or under any other kind of investment treaty. 69 It represents a rich case law and a number of awards which can be placed in two main categories. First, this Part presents the exhaustive list of important awards in which the tribunals have found that a shareholder can raise a claim in its own right for damage suffered by its investment in an enterprise (A). Second, a selection of the most relevant awards on the question is discussed in detail (B). Third, the tribunals note that this does not mean that any and all actions by the host state that cause damage or prejudice to the assets of the local company automatically and necessarily represent an indemnifiable treaty breach (C).

A. Shareholder Claims for Reflective Loss: Is There Case Law?

A general review of decided cases demonstrates that thirty-eight awards explicitly discussed whether a shareholder can raise a claim in its own right for damage suffered by its investment in an enterprise. We provide an account of these

66 Investment tribunals have dealt with a number of related issues and other standing rights questions which will not be discussed in this Article. See, e.g., Gami Invs., Inc. v. Government of the United Mexican States, UNCITRAL, Final Award (Nov. 15, 2004) (holding that “a minority shareholder is not restricted to complaining about direct damage to its investment” (e.g., its shareholding) and that it can complain of injury done to the enterprise in which it owns an interest). See Mondev Int’l Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Final Award, ¶ 79 (Oct. 11, 2002) (generally discussing the rights of standing). The Mondev v. United States Final Award noted that, given NAFTA’s detailed rules on standing, “there does not seem to be any room for the application of any rules of international law dealing with the piercing of the corporate veil or with derivative actions by foreign shareholders; the only question for NAFTA purposes is whether the claimant can bring its interest within the scope of the relevant provisions and definitions.” Id. The Waste Management v. Mexico II Final Award found that, where a treaty spells out in detail and with precision the requirements for maintaining a claim, “there is no room for implying into the treaty additional requirements, whether based on alleged requirements of general international law in the field of diplomatic protection or otherwise.” See Waste Mgmt. Inc. v. United Mexican States [II], ICSID Case No. ARB(AF)/00/3, Final Award (Apr. 30, 2004) at 37–41.

69 It appears that only one non-BIT-related dispute dealt with the issue of “reflective losses.” See Veteran Petroleum Ltd. (Cyprus) v. Russian Federation, PCA Case No. 228, Interim Award on Jurisdiction and Admissibility, ¶ 372 (Nov. 30, 2009).
thirty-eight awards before we focus on a selection of the six most important in the next section.

Only a minority of cases were not decided under BITs. The only non-BIT dispute involved the ECT, as held by the *Hulley Enterprises v. Russia, Yukos v. Russia, Veteran Petroleum v. Russia* Interim Awards on Jurisdiction and Admissibility.  

BITs have provided a rich case-law since all the other relevant awards, (i.e., thirty-seven in total) have been rendered under a BIT. We provide an exhaustive account of these awards in chronological order by noting their key findings.

The first tribunal that explicitly discussed the issue in detail did so in the *Lanco v. Argentina* case. In its Preliminary Decision on Jurisdiction, the arbitral tribunal held that the claimant, an 18.3% shareholder in a company holding a grant (and having signed the concession contract in its capacity as awardee and guarantor of the grantee’s obligations), was an investor under the applicable BIT.  

The *CME v. Czech Republic* Partial Award found that, since shares are an investment, the tribunal must examine whether the host state expropriated the local company in question since the expropriation of the company’s assets and rights could affect the value of the claimant’s shares.  

The *Compafiia de Aguas del Aconquija, S.A. & Compagnie Générale des Eaux v. Argentina* annulment decision found that the claimant could present its own claim and that its locally controlled company could also present its claim.  

The *CMS Gas Transmission v. Argentina* Award on Jurisdiction found “no bar.”

The tribunal in the *Enron v. Argentina* Decision on Jurisdiction relied on the text of the BIT in finding that minority and independent shareholders are protected; it also considered the respondent’s policy of mandating a locally incorporated operating company and took note of the United States’ arguments in NAFTA proceedings that shareholders cannot claim damages suffered by a partially owned company.  

The *Siemens v. Argentina* Decision on Jurisdiction rejected the respondent’s attempt to establish that the effective criterion for determining the nationality of a company limits the possibility of advancing indirect claims under the BIT; it also held that, under the applicable BIT, indirect claims can be brought by a shareholder based on damage to the company in which it holds shares.

In the *AES v. Argentina* Decision on Jurisdiction, the tribunal found the CMS Gas Transmission’s analysis of the shareholders’ standing to assert claims.
with respect to measures applying to the companies in which they have invested “convincing”; it also expressed agreement with the Lanco and Azurix views on the shareholders’ jus standi.” The Sempra v. Argentina Decision on Objections to Jurisdiction noted that the definition of investment in the treaty cannot be ignored since, as noted in Azurix, “it sought to facilitate agreement between the parties that the corporate personality of the company would not interfere with the protection of the real interests associated with the investment; it also affirmed Enron’s holding that a minority shareholder is protected by the treaty’s dispute resolution clause.”

The Camuzzi v. Argentina I Decision on Objections to Jurisdiction found that the “applicable BIT referred expressly to minority or indirect shareholders and was intended to ensure that even an investor who does not exercise control over the company may exercise its right to claim” (and it found Sempra v. Argentina to be instructive on this point). The Camuzzi v. Argentina I Decision on Objections to Jurisdiction cited GAMi v. Mexico for its holding that a “minority shareholder has a right of action for a loss deriving from damage to the company in which it had invested, agreeing that the fact that a host state does not explicitly interfere with share ownership is not decisive; rather, the issue was whether a breach of the treaty led with sufficient directness to the loss or damage in respect of a given investment.” The Camuzzi v. Argentina Decision on Objections to Jurisdiction held that a minority shareholder has a direct claim for violation of rights under the treaty (and not for violation of contractual rights of a concessionaire in which it has invested).

The Gas Natural v. Argentina Decision of the Tribunal on Preliminary Questions on Jurisdiction found that shares in a corporation organized under the law of the respondent state fall within the BIT’s definition of “investment.” The Bogdanov v. Moldova I Arbitral Award found that it is generally accepted that shareholders may be awarded indirect damages. In the Continental Casualty v. Argentina dispute, the Decision on Jurisdiction noted that, under the applicable BIT, the treaty protection is not limited to the free enjoyment of shares, which is the exercise of the rights inherent to the position as a controlling or sole shareholder, but also extends to the standards of protection spelled out in the BIT with regard to the operation of the local company that represents the investment.

The SAUR v. Argentina Decision on Objections to Jurisdiction found that the indirect shareholders can bring claims; to interpret the treaty otherwise would be contrary to the obligation to interpret a treaty in good faith. Also, the SAUR v.

77See AES Corp. v. Argentine Republic, ICSID Case No. ARB/02/17, Decision on Jurisdiction, ¶¶ 85–89 (Apr. 26, 2005).
79 See Camuzzi Int’l S.A. v. Argentine Republic [], ICSID Case No. ARB/03/2, Decision on Objections to Jurisdiction, ¶¶ 32, 58, 81–82 (May 11, 2005).
80 Id. at ¶ 63–64.
81 Camuzzi Int’l S.A. v. Argentine Republic [], ICSID Case No. ARB/03/7, Decision on Objections to Jurisdiction, ¶ 34 (June 10, 2005).
82 Gas Nat. SDG, S.A. v. Argentine Republic, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, ¶ 34 (June 17, 2005).
84 See Cont’il Cas. Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Decision on Jurisdiction, ¶¶ 79–80, 86 (Feb. 22, 2006).
Argentina Decision on Jurisdiction and Liability affirmed that that the investor is a minority shareholder which is, as such, not bound by an exclusive jurisdiction clause in the concession contract; further, the tribunal distinguished between contract and treaty claims that can be translated, since an indirect and minority shareholder can have a protected investment.  

In fact, the El Paso v. Argentina Decision on Jurisdiction held that an indirect minority shareholding in a local company is an "investment" within the BIT's definition and that the claimant therefore has jus standi.

The Suez, Barcelona and Interagua v. Argentina Decision on Jurisdiction noted that shares are "investments" under the applicable BITs. The Telefónica v. Argentina Decision of the Tribunal on Objections to Jurisdiction held that "where a claimant owns the entire share capital of a company of the other party, treaty protection is not limited to the free enjoyment of the shares, that is the exercise of the rights inherent in the position of a shareholder; it also extends to the standards of protection spelled out in the BIT with regard to the operation of the local company that constitutes the investment." The Total v. Argentina Decision of the Tribunal on Objections to Jurisdiction found that since the claimant (a minority shareholder) invoked treaty rights concerning its investment, the claim cannot be defined as an indirect claim (or "derivative" claim), as if the claimant were claiming on behalf of or in lieu of its subsidiaries in respect of rights granted under domestic law.

The Kardassopoulos v. Georgia Decision on Jurisdiction, citing Siemens v. Argentina, found that "indirect ownership of shares constitutes an "investment" under the BIT and the ECT." The BG v. Argentina Award found that the tribunal has jurisdiction for derivative claims based on indirect shareholdings, but rejected derivative claims for "claims to money" or "claims to performance." The RosInvestCo v. Russia Final Award noted that the applicable treaty expressly clarified that shareholders, be they majority or minority shareholders, also have a claim for protection under Article 5 if expropriatory measures that fall under paragraph (1) are taken "only" against the company and not directly against the shareholders themselves. The Impregilo v. Argentina Award, adverting to a similar situation in CMS Gas Transmission v. Argentina, found that, although the claimant can assert a claim with respect to its shareholding in a local company holding a concession, the company itself does not qualify as a protected investor under the ICSID Convention and the BIT, and its contractual rights cannot be

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85 See SAUR Int'l S.A. v. Argentine Republic, ICSID Case No. ARB/04/4, Decision on Objections to Jurisdiction, ¶¶ 89–90 (Feb. 27, 2006).
87 Suez v. Argentine Republic, ICSID Case No. ARB/03/17, Decision on Jurisdiction, ¶¶ 49, 51 (May 16, 2006).
88 Telefónica S.A. v. Argentine Republic, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, ¶ 76 (May 25, 2006).
89 Total S.A. v. The Argentine Republic, ICSID Case No. ARB/04/01, Decision of the Tribunal on Objections to Jurisdiction, ¶ 81 (Aug. 25, 2006).
90 Kardassopoulos v. Georgia, ICSID Case No. ARB/05/18, Decision on Jurisdiction, ¶ 124 (July 6, 2007).
considered protected investments; on the other hand, the claimant’s shares in the company were an investment protected under the BIT.93  

The **HOCHTIEF v. Argentine Republic** Decision on Jurisdiction found that the BIT is unequivocal in stipulating that an investment includes “shares, stocks in companies, and other forms of participation in companies” and therefore a claimant with a 26% shareholding in a locally incorporated company has standing under the BIT.94 The **El Paso v. Argentina** Award distinguished between the claimant’s shares in Argentinian companies and the rights granted to the companies themselves; the shares in the Argentinian companies qualify as “investments” under the BIT, but the rights granted to the companies themselves do not qualify as protected investments.95 The **Oostergetel v. Slovak Republic** Decision on Jurisdiction found that a shareholder can assert a claim for injury suffered by the companies through which he has invested.96 The **Daimler v. Argentina** Award found that the claimant’s shareholding in a local company constitutes a protected investment under the treaty and, further, that shareholding is only one of an otherwise broad and non-exhaustive definition that protects “any kind of investment” (such as returns).97

The **Euram v. Slovak Republic** Award on Jurisdiction confirmed that, given the broad definition of “investment” in the Austria–Slovakia BIT, indirect investment through a locally incorporated subsidiary in Slovakia benefits from the treaty protection.98 The **Standard Chartered Bank v. Tanzania** Award distinguished Cemex based on differences in the treaty language and on the evidence of control or direction in the case before it.99 The **Urbaser v. Argentina** Decision on Jurisdiction found that the claimants failed to make indirect or derivative actions based on legal rights that belong to another person and, in any event, confirmed that the definition of “shares” as an “investment” holds irrespective of whether the only rights attached to these titles under domestic law are related to the company’s standing and operation. Also, the **Urbaser v. Argentina** Decision on Jurisdiction found that an “indirect investment may also be held through a subsidiary company holding shares in the local company that serves as the “investment vehicle” in practice.”100

The **Arif v. Moldova** Award rejected the respondent’s objection that a BIT’s protections are limited to direct investments, holding further that the shareholder’s protection is not restricted to ownership in the shares and extends to

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97 See Daimler Fin. Servs. AG v. Argentine Republic, ICSID Case No. ARB/05/1, Award, ¶¶ 83–84 (Aug. 22, 2012).
the assets of the company. The Abengoa v. Mexico Award, by majority, rejected Mexico’s preliminary objection and found that COFIDES, a minority shareholder in the local company that owned the investment, did not act on behalf of the Kingdom of Spain when it acquired its shares. Therefore, it qualified as an investor under the 2006 BIT between Mexico and Spain. The ST-AD v. Bulgaria Award on Jurisdiction concurred that an investor whose investment consists of shares of a company does not need to have a majority of those shares in order to be considered a protected investor under the BIT, and it also agreed with the decision in Lanco v. Argentina on this point. Further, the ST-AD v. Bulgaria Award on Jurisdiction, although accepting that shareholders can bring investment claims, confirmed that an investor has no enforceable right in arbitration over the assets and contracts that belong to the company in which it owns shares; an investor whose investment consists of shares cannot claim, for example, that the assets of the company are its property and ask for compensation for interference with these assets.

The ECE and PANTA v. Czech Republic Award held that the definition of “investment” encompasses the claimants’ shareholdings or other participatory interests and rejected the contention that they must have additionally been “invested” to fall within the treaty definition. The Tulip v. Turkey Award considered that it is “well-established that an indirect shareholding in a local vehicle may form the basis for an investment.” The Hochtief v. Argentina Decision on Liability found that the BIT and its Protocol make it clear that minority shareholders have standing to bring claims on their own behalf. The Awdi v. Romania Award confirmed that “majority shareholders, minority shareholders, and indirect shareholders can bring investment treaty claims, obviously within the limits of their shareholding.”

Lastly, the Poštová Banka v. Greece Award reviewed the jurisprudence on shareholder claims and found that a shareholder of a company incorporated in the host state may assert claims based on measures taken against such company’s assets that impair the value of the claimant’s shares. However, such claimant has no standing to pursue claims directly over the assets of the local company, as he or she has no legal right to such assets.

102 See Abengoa, S.A. v. United Mexican States, ICSID Case No. ARB(AF)/09/2, Award, ¶¶ 530–62 (Apr. 18, 2013).
107 Awdi v. Romania, ICSID Case No. ARB/10/13, Award, ¶ 194 (Mar. 2, 2015).
B. The Centripetal Force of the Case Law

This Article provides an exhaustive list of the thirty-eight awards which explicitly discuss whether a shareholder can claim in its own right damages suffered by its investment in an enterprise. The first lesson is that there is genuine case law with a significant number of diverse cases treating the matter at stake in a consistent manner. Following this macro-view, the present Part focuses on six awards that deserve closer attention because the competent tribunals abundantly deliberated on the issue of "reflective losses," which indicates that these six decisions represent the core of the case law on the matter.


The subject of the case is a dispute submitted to the ICSID pursuant to the ICSID Convention and the Argentina–USA BIT.\(^\text{109}\) The claimant was the El Paso International Energy Company, a U.S. company that was a shareholder of several Argentinian companies that produced oil and generated electricity (the Companies). The respondent was Argentina.

The dispute arose from the economic loss suffered by the Companies, caused by measures taken by Argentina during the 1998–2002 economic crisis. The measures taken fixed the exchange rate from the U.S. dollar to the peso and eliminated the existing mechanism that had allowed price adjustment for electricity and gas supply. In addition, oil exportation was limited in order to reduce the oil price in the domestic market. The Companies suffered economic damage from the decrease of gas and electricity selling prices as a result of the exchange rates being fixed, and they also suffered from revenue loss caused by oil export control.

The claimant in this dispute sought damages for harms caused to its alleged investment in Argentina, which mainly consisted of the loss to its share value in the Companies and the loss related to the Companies' other contractual rights. The tribunal found that the applicable law in this case was the Argentinian law and the BIT. It held that Argentinian law regulated the content of commitments by Argentina to the claimant, and the BIT decided whether changes to such rights constituted a violation of the BIT. Concerning what constituted a 'investment' under the BIT, the claimant submitted that its investment included its shares in the Companies and the legal and contractual rights of the Companies. The respondent submitted that the contractual rights of the Companies were not protected at an international level. The rules governing the foreign shareholders' rights at the international level are those of diplomatic protection, under which only the foreign shareholders' personal rights are protected.

The tribunal, disagreeing with both parties' reasoning, found that the protected investment under the BIT consists only of the claimant's shareholding in the Companies. According to the tribunal, the Companies are Argentina-incorporated. This means that their rights can be protected under the BIT only if they are qualified as protected investors by virtue of foreign control. The Companies owning the contractual rights are not foreign-controlled, and therefore

their rights do not enjoy the BIT’s protection. The tribunal found no difficulty in concluding that the claimant’s shareholding in the Companies, irrespective of whether it is a majority or a minority shareholding, is part of the definition of investment. This is so because investment has a broad scope under the BIT; investment can be owned or controlled by foreign persons, and investments consist of shares in assets. This finding is consistent with the tendency to protect foreign shareholders where incorporation is often a condition for making investments. As the tribunal summarized: What is protected are “the shares, all the shares, but only the shares.” The claimant alleged violation of its rights under various grounds, including expropriation, discrimination, violation of the protection and security standard, violation of its rights under an umbrella clause, and violation of the fair and equitable treatment clause. The tribunal found that the respondent had breached the fair and equitable treatment standard and had failed to establish a defense. Damages were awarded accordingly.

2. The European American Investment Bank AG (Austria) v. Slovak Republic Award (2012)

The subject of the case is a dispute submitted to the ICSID pursuant to the UNCITRAL Rules and the Austria–Czech and Slovak BIT. The claimant was Euram Bank, an Austrian company that was a shareholder in EIC, a Slovakian company. EIC was a shareholder of Apollo, a public health insurance provider. The respondent was the Slovak Republic. EIC presented to the Slovak health authority that the claimant had no economic activities in Slovakia. The dispute arose from economic losses suffered by EIC as a result of legislative changes in Slovakia in 2007 and 2008. As a result of the new legislation, Apollo was unable to distribute dividends to EIC.

In response, the claimant sought damages to its alleged investment in Slovakia on the basis that the newly enacted Slovak legislations amounted to a breach of various BIT provisions. The respondent objected the tribunal’s jurisdiction on several grounds, including that the claims did not arise out of a qualifying investment. Moreover, the respondent submitted that the dispute arose out of a shareholding in Apollo, which was owned by EIC, a Slovakia incorporated company. However, the BIT only covers investments that are directly made by an Austrian investor in Slovakia. It does not include investments by a local company where an Austrian party has an interest. Further, international law generally prohibits shareholders from recovering damages caused to the assets of the company, and the travaux préparatoires demonstrate the parties’ intention to exclude indirect investments by a foreigner through a local subsidiary. The claimant submitted that the treaty is lex specialis (i.e., the law governing a special subject matter) and thus that it displaces customary international law. Under the treaty, investment comprises both direct and indirect investments.

The tribunal held that investment under the BIT included assets invested by an Austrian investor in Slovakia through a Slovak subsidiary. The tribunal agreed with the respondent that the issue in question was not what type of asset could constitute an investment but rather what link was required between that asset and

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the investor. The asset in this case was the shareholding in Apollo. The tribunal held that the assets did not need to be owned directly by the investor to constitute a protected investment. The common practice is that when an investor of State A obtains control of a shareholding in a company incorporated in State B, State A would be described as investing in State B regardless of whether the investor had bought the shares in its own name or through a local company. The claimant in this case controlled the decision-making of EIC, which the claimant owned entirely. The tribunal distinguished Diallo and Barcelona Traction on the ground that these two judgments were concerned with the extent of rights under the doctrine of diplomatic protection. Finally, the tribunal found that the travaux préparatoires do not exclude indirectly owned investments from the definition of "investment" under the BIT.


The subject of the case is a dispute submitted to the ICSID pursuant to the ICSID Convention and the Tanzania–UK BIT.111 The claimant was Standard Chartered Bank. The respondent was Tanzania. The claimant invested in a Tanzanian power company (the Company) through its Hong Kong subsidiary. The Company thereafter entered into various contracts with a Tanzanian state-owned electricity company and the Tanzanian government. The investment was made in the form of a secured loan during the process of the Company’s debt restructuring. The loan was provided by a Hong Kong subsidiary. Subsequently, the Company defaulted. As a result, the Hong Kong subsidiary obtained secured interest in the Company, including rights under various contracts.

The dispute arose from damages suffered by the claimant in its alleged investment in the Company. The claimant alleged that measures by the respondent constituted breaches of various provisions under the BIT. The respondent objected to the tribunal’s jurisdiction on several grounds, including that the claimant failed to meet the jurisdictional requirement of the BIT by establishing that the loan in question was the claimant’s investment. This was so because the investment in question was not made or directly owned by the claimant but by its Hong Kong subsidiary. The respondent argued that the claimant merely held ownership in the Hong Kong subsidiary which made the investment, but that it did not exercise any control over the investment. This was because the claimant had no voting rights in the Hong Kong subsidiary. The claimant submitted that the definition of investment under the BIT did not require control but only ownership of the investment.

The tribunal held that it lacked jurisdiction because the claimant had failed to establish that the investment in question was “of Claimant.” The ownership of the Company through an indirect chain did not in itself confer the status of investor. The important factor was that the claimant needed to get involved in investment activity as part of the investment process, either directly or through an entity under its direction. After interpreting the treaty language and taking the treaty’s object into consideration, the tribunal held that to benefit as a protected investment, a claimant must demonstrate that the investment was made at its direction, and that

111 See Standard Chartered Bank v. United Republic of Tanzania, ICSID Case No. ARB/10/12, Award (Nov. 2, 2012).
the claimant funded or controlled the investment in an active and direct manner. In this case, the claimant made no active contribution to the loans, exercised no control over the loans, and gave no directions to its Hong Kong subsidiary.


The subject of the case is a dispute submitted to the ICSID pursuant to the ICSID Convention and the Argentina–Spain BIT. The claimants were Urbaser S.A. and CABB, companies incorporated in the United States. They were shareholders of AGBA, an Argentine company holding a concession contract for the supply of drinking water and sewage services in a region of Argentina. The respondent was Argentina.

The dispute arose from the economic loss suffered by the claimants from measures taken by Argentina at a time of economic crisis. The respondent’s emergency legislation prohibited the claimant from calculating tariffs by reference to the U.S. price index. Also, the respondent fixed the exchange rate from U.S. dollars to the peso at a ratio of 1:1 when the peso was undergoing great depreciation. As a result, AGBA went into liquidation. Meanwhile, the respondent granted the entity replacing AGBA tariff increases and subsidies. The claimants had been given no compensation. The claimants sought damages caused by Argentina’s alleged breaches of various BIT provisions. The respondent objected to the jurisdiction of the tribunal on several grounds, including the legal standing of the claimants to bring the action. The respondent submitted that both claimants were shareholders of AGBA, and thus their investments were limited to shares in AGBA. Further, it was submitted that the claimants’ action disregarded the general principle of law that, where a third party undermines a corporation’s right, it is the company that must have been affected. In this case, the contractual rights under the concession agreement were owned by AGBA instead of by the shareholders. Therefore, the claimants could not sue as shareholder. Furthermore, since there was no direct or derivative shareholder action available in the Argentina–Spain BIT, in the ICSID Convention, or in Argentine law, the claimants could not seek to enforce rights belonging to AGBA. The claimants argued that their claims were not based on their shareholder rights, but on their investor rights.

The tribunal held that the claimants had a legal title to submit a claim based on their status as investors in relation to the shareholding. Although the shares of a company represent rights and obligations in relation to the company, they can have other vested rights. Shares are assets and investments that are not limited to rights under corporate law. Shares are also an investment under the BIT protection. The rights under the BIT have a legal standing of their own, and they are governed exclusively by international treaty law and cannot be altered by the domestic law. The claimants were acting under their own rights as investors through their shares acquired in AGBA and the BIT, which differ from their rights attached to shares under domestic law. The effects of allowing the claimants’ recovery for damages, like double recovery, should not affect the tribunal’s jurisdiction.

The claimant, a company incorporated in Germany, initiated arbitration proceedings under Article 4(3) of the Reciprocal Encouragement and Protection of Investments Treaty, between Germany and Bulgaria (BIT), against the Republic of Bulgaria.\footnote{See ST-AD GmbH v. Republic of Bulgaria, PCA Case No. 2011-06 (ST-BG), Award on Jurisdiction (July 18, 2013).} The dispute arose from the ownership of a 15,600m\textsuperscript{2} piece of land with commercial buildings and a factory in Sofia, Bulgaria. Prior to 1947, the Semedzhiev family owned the property. Since then, it had been nationalized, and it was occupied and used by LIDI-R, then a wholly state-owned company. In 1992, the property was returned to the ownership of the Semedzhiev family, which subsequently transferred it to a Bulgarian company JMB, but LIDI-R did not vacate it. A Bulgarian court ruled against LIDI-R. LIDI-R was privatized in 2002, and the new shareholder, a Bulgarian national, challenged the restitution of the property judicially, but lost. The claimant became a shareholder of LIDI-R in 2006 with an initial share of 40%, which later increased to 80%. Its continued attempt to reverse the restitution failed in the Bulgarian courts. It claimed in arbitration that the restitution of the property to the Semedzhiev family was unlawful. The claimant invoked European Union law, along with the agreements in the Bulgaria–Germany BIT. The respondent raised objections to the jurisdiction of the tribunal under Article 4(3) of the BIT. These objections included the dispute over the property arising before the claimant became an investor and the claimant owning no investment that could be protected by the BIT. Moreover, the respondent alleged that the claimant abused the legal processes. The respondent argued that the claimant’s additional claims in its submission on the merits were unrelated to the issue of the title to the property. The respondent interpreted the whole case as one of abuse of the arbitration by the claimant to purposely address a domestic dispute through a BIT instead of through domestic litigation. The respondent consequently sought moral damages because it viewed the claimant as having repeatedly harassed Bulgaria’s judicial and law enforcement. With regard to the respondent’s claim that the claimant had made no investment to be protected, the arbitral tribunal made two findings: First, that an investor need not be a majority shareholder of the company in order to be eligible to invoke the arbitration proceeding under the BIT; and, second, that, although a shareholder has no enforceable right in arbitration over the assets and contracts of the company, the BIT allowed the investor to claim any loss of value of its shares resulting from an interference with the assets and contracts of the company in which it owns the shares. In other words, the tribunal recognized the investor’s right to seek the reflective loss in arbitration. The tribunal ultimately ruled in favor of the respondent because the claimant became the investor in 2006, long after the restitution of the property to the Semedzhiev family (which was the alleged illegal action by the respondent) had taken place, despite the fact that the respondent’s action had an effect on the claimant’s right as a shareholder. The tribunal found that the claimant also failed to exhaust domestic remedies before it sought arbitration. It agreed with the respondent that the claimant became a shareholder of LIDI-R for the purpose of invoking arbitration procedures under the BIT to resolve the dispute with the respondent, which was an abuse of the investment arbitration system. Just as the previous Bulgarian shareholder could not
invoke the BIT arbitration mechanism against the respondent, neither could the claimant under the principle of *nemo dat quod non habet* (in Latin, ‘no one gives what he or she does not have’).  


The subject of the case is a dispute submitted to the ICSID pursuant to the Slovakia–Greece BIT, the Cyprus–Greece BIT, and the Washington Convention.  

The claimants were Poštová Banka, a Slovak bank, and Istrokapital, a Cypriot Public Limited Liability Company that was a shareholder of Poštová Banka. The respondent was the Hellenic Republic. The dispute involved Poštová Banka’s ownership of Greek Government Bonds (GGBs). The global financial crisis of 2008 led to five series of Greek Government Bonds being downgraded. The European Union supported Greece’s program to reduce its fiscal deficit in 2010, and the Eurozone member states agreed on financial support for Greece to secure financial stability. The adjustment program required the implementation of fiscal, financial, and structural measures. In 2010, Poštová Banka purchased bonds belonging to five series of GGBs issued by Greece between 2007 and 2010. Greece issued the GGBs to participants in the system who delivered the bonds to the primary dealers, who provided the funds for the acquisition by the participants and sold the GGBs on the secondary market. The Poštová Banka used capital from consumer deposits to acquire GGB interests which took place between January 2010 and April 2010. The GGBs were further downgraded in July 2011 and the IMF required “Private Sector Involvement” (PSI) to help address the significant funding gap. The Greek Bondholder Act encapsulates the invitations to bondholders on behalf of the Greek Government to decide whether to accept the modifications proposed by Greece. In 2012, Greece restructured its sovereign debt and exchanged outstanding GGBs for new titles. The new titles had a face amount of 31.5% of the nominal amount of the exchanged GGBs. Poštová Banka’s board of directors voted against the proposed restructuring, yet the restructuring was approved by other majority bondholders. On March 12, 2012, new securities were delivered and the outdated GGBs were removed.

The ICSID arbitration was instituted by the claimants to protect what they called an investment. The respondent objected to the jurisdiction of the ICSID tribunal on several grounds. It argued that the tribunal lacked jurisdiction *ratione materiae*, first because Poštová Banka’s interests in GGBs were not protected investments under the Slovakia–Greece BIT and the Washington Convention and, second, because Istrokapital did not make an investment that could be protected either under the Cyprus–Greece BIT or the Washington Convention. The tribunal also lacked jurisdiction *ratione temporis*, as the claims could be viewed as an abuse of process. Further, the tribunal lacked jurisdiction *ratione personae* over Istrokapital because it was not a “National of Another Contracting State” of the Washington Convention, or a protected investor under the Cyprus-Greece BIT. The

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tribunal also lacked jurisdiction over the claimants’ claims and, by consequence, the claimants failed to establish those claims *prima facie*.

The tribunal agreed with the respondent that Istrokapital, a shareholder, did not have standing to assert claims for an alleged impairment of a company’s assets. The tribunal distinguished between a case in which a shareholder claims a loss of its share value and a case in which a shareholder asserts a claim to the contract right or the license right that belongs to the company. Whereas the former is allowed, the latter is not. The tribunal found that the claimants had failed to establish how the Cyprus-Greece BIT allows Istrokapital to make claims for rights or claims which Poštová Banka has against Greece. The tribunal also rejected jurisdiction over Poštová Banka’s claim because it did not make an investment within the protection of the Cyprus-Greece BIT or the Washington Convention. The Cyprus-Greece BIT narrowly defined investment to exclude sovereign debts. Poštová Banka’s interest in GGBs did not involve an operational risk to be an investment under the “objective” criteria used under the Washington Convention.

C. *Limits of the Centripetal Force: Not All Actions by the Host State Represent an Indemnifiable Treaty Breach*

In some cases, the tribunals felt it necessary to clarify that, although they agree that under the applicable treaty a shareholder can claim in its own right for damage suffered to its investment in an enterprise, this does not mean that any and all actions by the host state that causes damage or prejudice to the assets of the local company automatically and necessarily represent an indemnifiable treaty breach.

The tribunal in the *Continental Casualty v. Argentina* Decision on Jurisdiction laid out the general principles for when damage or prejudice to the assets of a foreign investor’s local company may represent an indemnifiable treaty breach. The *Telefónica v. Argentina* Decision of the Tribunal on Objections to Jurisdiction found that arbitral tribunals often take for granted that a BIT protects rights like licenses and guarantees pertaining to the investment. This protection applies to nationals’ companies that are owned by the local subsidiary or local subsidiaries that are controlled by the foreign claimant (in some instances, the protection was even extended to a subsidiary that was not controlled by the foreign claimant). The basis of such a decision is that the definition of “investment” in BITs is generally broad, and the purpose of BITs is to promote and protect investments by the nationals of one contracting party in the territory of the other. Although this broad view appears to be appropriate when dealing with jurisdiction, the separate legal personalities of the foreign investor, on the one hand, and of the local company in which such investor has invested, on the other, should not be ignored without adequate consideration of the facts of each case. Finally, the tribunal in *Standard Chartered Bank v. Tanzania* Award found that to benefit from the treaty’s arbitration provision, a claimant must demonstrate one of three things:

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116 See Julien Chaisse & Christian Bellak, *Navigating the Expanding Universe of Investment Treaties—Creation and Use of Critical Index*, 18 J. INT’L ECON. 79 (2015) (explaining that the concept of “investment” can be defined in many different ways, from a narrow definition to a very broad one).

117 *Cont’l Cas. Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Decision on Jurisdiction, ¶ 89 (Feb. 22, 2006).

118 *Telefónica S.A v. Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, ¶ 74 (May 25, 2006).
that the investment was made at the claimant's direction; that the claimant funded the investment; or that the claimant controlled the investment in an active and direct manner—passive ownership of shares in a company not controlled by the claimant where that company in turn owns the investment is not sufficient.\(^{119}\)

III. CRITICIZING THE INVESTMENT CASE LAW: REFLECTIVE LOSS SHOULD BE RECOVERABLE AS A POLICY DECISION

One criticism of the tribunals' decisions is that they disregard the underlying policy considerations of the non-reflective loss principle, making it so that persuasive decisions by tribunals in the future will need to deal with policy considerations adopted by domestic courts. The two questions are: Which propositions should form policy considerations, and what is the best approach to address those policy concerns in the context of international investment? To decide whether the tribunals should adopt or adjust the policy considerations adopted by the domestic courts, this Section (A) summarizes these policy considerations, (B) reflects on the nature of policy considerations, explaining why investment protection should form part of the policy considerations, and (C) analyzes these policy considerations and situates them in the context of international investment.

A. Policy Considerations Underlining the Non-reflective Loss Principle

The non-reflective loss principle is essentially a product of policy considerations. Several courts of the highest authority have explicitly determined this. The House of Lords expressed that "the disallowance of the shareholder's claim in respect of reflective loss is driven by policy considerations."\(^{120}\) Similarly, the Hong Kong Court of Final Appeal stated that reflective loss is not recoverable as "a matter of legal policy."\(^{121}\) What, then, are these policy considerations? Lord Millet identified most of these policy considerations in Johnson and Gore Wood & Co.\(^{122}\) The following points explain these policy considerations and also analyze them against the background of investment treaty arbitration. First, the shareholder may have double recovery at the expense of the defendant. The shareholder can recover twice. In the first instance, it recovers the loss resulting from the diminution of share value. In the second instance, if the company succeeds in its claims, it is compensated so as to make good on its loss. As a result, the value of its shares will return to its level before the wrongs occurred. At this moment, there is double recovery.

Second, when the shareholder alone can recover, the recovery will be at the expense of the company, other shareholders, and the creditors. If a shareholder's claim bars a company's claim, the company and other shareholders' losses remain irrecoverable. This is because damages to shareholders will not go to the pool of company assets. For the same reason, creditors suffer loss because the shareholder's recovery is not subject to a creditor's claim at the time of liquidation.

\(^{119}\) Standard Chartered Bank v. United Republic of Tanzania, ICSID Case No. ARB/10/12, Award, ¶ 230 (Nov. 2, 2012).


\(^{121}\) Gaukrodger, supra note 3, at 398.

Third, in the context of investment treaty arbitration, allowing recovery for reflective loss will be prejudicial to the defending state. It will open the floodgates to claims against the state from the minority shareholders of large companies. As a result, the investment treaty regime will become unsustainable. This policy concern is shared by the domestic courts, where it is often said that allowing recovery for reflective loss will lead to a flood of litigation and thereby damage the judicial system. Being exposed to unlimited claims from minority shareholders is prejudicial to the state for yet another policy reason. This policy concern is sometimes referred to as "no double jeopardy," the idea that the wrongdoer state should not be sued for the same wrongdoing on multiple occasions.

Fourth, the possible increase of shareholder claims means that the states will not be able to predict the extent of liability. When companies alone can sue, the states know who the claimants may be. If all the shareholders can sue, it is hard for the states to estimate the number of potential claimants. Many shareholders are corporate entities with complicated corporate structures. It will not always be evident to the states which shareholders are qualified to bring claims under which investment treaty.

Fifth, making reflective loss recoverable is more likely to produce inconsistent decisions in investment treaty arbitration than in domestic jurisdictions. Shareholders may start proceedings in different tribunals on matters with virtually the same facts and issues of law. The possibility that tribunals will find differently for the same facts is greater than in domestic courts since tribunals are less coordinated than international courts. A very famous example is the inconsistent decisions in the cases of *CME v. Czech Republic* and *Lauder v. Czech Republic*. The facts of the cases are virtually identical. However, the tribunals made different decisions as to liability and the amount of compensation.

Finally, allowing shareholders to recover reflective loss has a negative effect on judicial economy. Both the defendant states and the claimants will incur expensive costs if the number of claims increases. Moreover, it would also make it harder to settle cases between the company and the defending state, leading to a waste of judicial resources.

### B. Understanding the Nature of Policy Considerations

Before discussing whether international tribunals should adopt the above policy considerations when forming the principle on reflective loss, we need to consider the term "policy." Courts frequently invoke holdings based on policy reasons. However, courts often identify certain propositions as policy without clearly explaining what the term "policy" means and what the source of a certain policy is. To evaluate policy considerations and to decide which ones should form the basis of a legal principle, we must understand the meaning and characteristics of the term "policy."

Eisenberg's insights into policy considerations in common law are helpful because policy reasons are mostly invoked in case law reasoning processes. According to Eisenberg, "policies characterize states of affairs as conducive or

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123 DOUGLAS, supra note 3, at 399.
124 Gaukroder, supra note 3, at 41-43.
adverse to the general welfare." In other words, policy considerations are goals that would help to improve the state of affairs for the community in accordance with the community's beliefs. Greenawalt defines policy as "the pursuit of a forward-looking social objective." For example, increasing economic production or efficiency is a policy consideration.

Policy considerations can conflict with each other. When they do, the court needs to weigh the policies against each other to decide what legal principle should be formulated. For example, in a case of reflective loss, protecting shareholders who suffer loss, protecting the company, and protecting the creditors are all desirable policies, though they are conflicting ones. The non-reflective loss principle is a result of courts compromising the interests of different parties.

What are the sources of policy considerations? Eisenberg suggests that the courts can look at official sources and unofficial sources to identify whether a certain proposition has the support of the community in order to decide whether it should shape the courts' policy judgment. A good policy has the support of a substantial portion of the community. Statutes and legal texts are examples of official sources where courts can read the statements made by the legislature. For unofficial sources, judges should make their own observations on society as well as hear expert opinions. For example, a court finds the proposition that commerce should be facilitated to be a policy. The court identifies this policy by observing that the economy is capitalistic.

What can be inferred from Eisenberg's theory on policy is that policies are not static. They reflect the evolving needs of the community where they originate, and thus they are context-sensitive. Therefore, policy considerations underlining the non-reflective loss principle that are developed by the domestic courts should not be blindly adopted by international arbitration tribunals adjudicating investment treaty disputes. Instead, the tribunals should first analyze the policy considerations in the context of international investment and economic development.

C. Refining Policy Considerations in the Context of International Investment

This Part attempts to identify the most suitable legal principle concerning reflective loss in the context of international investment treaty arbitration. It does so by reflecting on various policy considerations that are relevant to the issue of reflective loss. It first argues that international tribunals should adopt the proposition that foreign investment should be protected as a policy consideration. It then argues that the domestic courts' policy considerations opposing the recovery for reflective loss do not justify barring reflective loss in investor-state disputes.

1. Protecting Foreign Investment Should Be Adopted as a Policy Consideration

Protecting foreign investment is not a policy consideration in the domestic courts. However, this proposition should become a policy consideration for

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127 Id. at 257–58.
international arbitration tribunals. Applying Eisenberg’s theory, protecting foreign investment should become a policy because it is a social objective with substantial community support evidenced both by official and non-official sources.\(^{128}\)

In official sources, protecting foreign investment is a widely recognized goal. This goal is documented in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). The ICSID Convention is an important official source because it establishes the most important dispute resolution body for investor-state disputes. It also governs jurisdictional issues in investor-state disputes.\(^{129}\)

Similar provisions can be found in the Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of other States.\(^{130}\) The drafting committee submitted this report along with the final draft of the ICSID Convention. Protecting foreign investment was one of the purposes behind the establishment of ICSID. The report states that ICSID was created to “promot[e] an atmosphere of mutual confidence and thus stimulat[e] a large flow of private international capital to those countries that wish to attract it.”\(^ {131}\)

In their case law, international arbitration tribunals recognize that same objective of protecting investment. In Abaclat v. Argentina, the tribunal said that the ICSID spirit is to ensure the effective protection of private investment. It also refers formally to the Preamble of the ICSID Convention in its reasoning.\(^ {132}\)

In the non-official sources, economists have widely recognized that promoting foreign investment is positively correlated to economic development. There is community consensus that protecting foreign investment is a desirable goal since it can benefit economic development. For example, as early as 2001, an IMF working paper concluded that foreign direct investment correlates positively to economic growth,\(^ {133}\) a conclusion generally supported by economic theories and empirical evidence.

Therefore, international arbitration tribunals should find it an important policy consideration to protect foreign investment. This policy consideration is a favorable factor for a rule that foreign investors as shareholders should be able to recover loss resulting from the diminution of share value.

\(^{128}\) See Julien Chaisse & Mitsuo Matsushita, Maintaining the WTO’s Supremacy in the International Trade Order—A Proposal to Refine and Revise the Role of the Trade Policy Review Mechanism, 16 J. INT’L ECON. L. 9–36 (2013) (discussing the interaction between trade and investment and the need to integrate FDI regulation in the WTO architecture); WTO Working Group on the Relationship between Trade and Investment Note from the WTO Secretariat, June 11, 2002, WT/WGTI/W/119 (discussing the idea that social objectives can be achieved through FDI attraction).

\(^{129}\) In its preamble, the Convention recognizes the goal of protecting foreign investment: “Considering the need for international cooperation for economic development, and the role of private international investment therein. . . .” Convention on the Settlement of Investment Disputes between States and Nationals of Other States Preamble, Mar. 18, 1965, 4 I.L.M. 532.

\(^{130}\) For the content of the report, see ANTONIO R. PARRA, THE HISTORY OF ICSID 410–18 (2012).

\(^{131}\) Id. at 411–12.

\(^{132}\) Abaclat v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶ 349 (2011).

2. **A Risk of Double Recovery Does Not Justify a Bar of Reflective Loss**

When a company is wronged and a shareholder suffers loss because share value decreases, four scenarios may exist: (1) Only the company sues; (2) only the shareholder sues; (3) the shareholder sues first and recovers and then the company sues and recovers; and (4) the shareholder sues first and recovers, and then the company sues and recovers, where, by the time the company recovers, the shareholder has already sold its shares (i.e., the ownership of the share is transferred). Among all these scenarios, double recovery occurs only in the third scenario. The risk of the third scenario happening is not adequate for barring the reflective loss. First, this is only one theoretical possibility among four. Second, there is no empirical evidence suggesting that double recovery will become the dominant case if reflective loss is recoverable. The tribunals should not tie their decision to a particular scenario.

If the shareholders have rights to claim loss resulting from decreases in share value, the rights should not be taken away merely because there is a risk of double recovery. Instead, tribunals should develop practical solutions to deal with the double recovery scenario. The New Zealand Court of Appeal supports this way of handling double recovery. That court held that, if separate duties are owed to the company and to the shareholders, the court needs to evolve principles to meet the problem of double recovery. Some practical solutions to this problem will be proposed later in this Article.

3. **Tribunals Have Nothing to Fear from Opening the Floodgates to Claims**

According to *Camuzzi v. Argentina* and *Enron I*, the assertion that allowing shareholders to claim reflective loss will lead to an unlimited chain of claims is a theoretical concern. First, many shareholders will have no standing to bring the cases because they lack the legal connection to the investing states. Second, the investing states can control the scope of claims by controlling the scope of the consent given in an arbitration clause. With this method, states can raise the threshold of satisfying the jurisdiction requirement. The tribunals' argument is criticized for not being able to become the panacea for dealing with all such problems. We find it unnecessary to address this criticism because the policy concerns behind the floodgate argument are inapplicable in the international arbitration scenario.

To avoid opening the floodgates of litigation is an argument frequently used by courts and lawyers arguing against a decision. The idea is that, if this decision is made, it would lead to a large number of new claims. Levy took the

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134 There is no direct data available for this issue. However, Romano shows that shareholder litigation brings less favorable results than derivative action. R. Romano, *The Shareholder Suit: Litigation Without Foundation?*, 7 J.L. ECON. & ORG. 55 (1991). If this is true, the inference that could be made is that shareholders will opt to recover under reflective loss.


137 Gaukrodger, *supra* note 3, at 399.

chance to analyze the function of the floodgate argument in the U.S. Supreme Court.\textsuperscript{139} She observed that the court has invoked the floodgate argument in order not to burden the executive branch, not to usurp the legislation, and to keep the case volume manageable within the court itself.\textsuperscript{140}

What can be inferred from her analysis is that concerns for opening unlimited cases are irrelevant for international arbitration disputes. The purpose of avoiding a flood of claims is to protect the domestic courts that are subject to public funding restrictions and that need to observe separation of powers principles. Such protection is unnecessary for international arbitrations.

First, arbitration tribunals are privately funded by the parties to the arbitration. Second, arbitration tribunals do not need to observe the principles of separation of powers during their decision-making. Arbitration tribunals function under their own mandate granted by an investment treaty.\textsuperscript{141} Third, under investment treaties, the states should not be treated as an executive body that needs to be protected from exposure to litigation. This is because the very reason arbitration is used as a mechanism to resolve investor-state dispute is to depoliticize the investment disputes arising from investment treaties.\textsuperscript{142}

4. \textit{Allowing Recovery for Reflective Loss Is Prejudicial to Nobody}

Allowing shareholders to recover reflective loss is not prejudicial to the company, to the other shareholders, to the creditors of the company, or to the defendant states.

First, if a shareholder recovers reflective loss, it is not prejudicial to the company or the other shareholders. If the shareholder has an independent cause of action from the company, the company and other shareholders can always bring their own claims if they are protected parties under investment treaties.

Second, it is not prejudicial to the creditors. The creditors only have claims against the company’s pool of assets. The company’s claim towards the wrongdoer is unaffected by the claimant shareholder’s action. If the pool of assets shrinks because the company decides not to sue the wrongdoer, it is not caused by the shareholder recovering for reflective loss.

Third, allowing shareholders to recover reflective loss may expose states to multiple claims. However, being exposed to multiple claims is not necessarily prejudicial. The law of civil wrongs is designed to allow wrongdoers to compensate their victims. When a wrong is done to multiple victims, all the victims have a right to recover. If a defendant assumes separate responsibility to a company and a shareholder, he consents to being doubly liable if he defaults on his obligations. There is no reason why courts should disallow such arrangements.\textsuperscript{143}

This applies to investor-states disputes. If states assume responsibility towards all

\textsuperscript{139} \textit{Id.} at 1013.

\textsuperscript{140} \textit{Id.} at 1058–64.

\textsuperscript{141} Gami Investments, Inc. v. The Government of the United Mexican States, UNCITRAL, Final Award, ¶ 41 (Nov. 15, 2004).


\textsuperscript{143} Charles Mitchell, \textit{Shareholders’ Claims for Reflective Loss}, 120 L.Q.R. 457, 461–62 (2004) (It is not in dispute that shareholders can recover personal loss against the company.).
foreign investors, the states are liable for damages caused by defaulting on these obligations.

Sometimes, the principle against double jeopardy is used to advocate for the proposition that defendant states should not be exposed to multiple claims. This argument is incorrect. The right against double jeopardy precludes subsequent criminal proceedings, and its aim is to protect individuals in front of the government. This principle does not justify the non-reflective loss principle.

Furthermore, the possibility that states would face more uncertainty as to the extent of their liability does not justify the non-reflective loss principle. The diversity of the foreign investors' portfolios determines the uncertainty and unpredictability that states face. States should have considered these factors when entering into investment treaties with other states.

5. *If Inconsistency Is a Problem, the Non-reflective Loss Principle Is Not the Cure*

If reflective loss is recoverable, the likely result is an increase in parallel proceedings and inconsistent decisions. Some scholars argue that inconsistency is not a problem for investor-state arbitration. Even if this is a problem, it should be resolved in the general procedural framework of arbitration instead of by disallowing recovery for reflective loss.

The reason that inconsistent judicial decisions and parallel proceedings would increase is that traditional mechanisms dealing with these two issues in arbitration are inapplicable for cases involving reflective loss. Two doctrines are applied to avoid the two issues: The doctrine of *lis pendens* (i.e., a law suit is pending elsewhere) and the doctrine of *res judicata* (i.e., the decision has already been made). These two doctrines are inapplicable in claims concerning reflective loss because, in order for the doctrines to apply, the parties must pass the "triple identity test." This means that: (1) The parties in the two proceedings must be the same parties; (2) the causes and grounds on which the action is brought must be identical and the parties must claim the same rights; and (3) the parties must apply for the same kind of remedies. However, when shareholders and companies bring different proceedings, they will be considered as different parties, even if the shareholder is the controlling shareholder of the company. This is so because companies and shareholders are different legal entities. Furthermore, if a claim for reflective loss is a separate cause of action by the shareholders, the two proceedings will logically fail to satisfy the second identity test.

In fact, that is what happened in the CME/Lauder case. The tribunal's findings were later challenged in the Svea Court of Appeal. The challenge failed

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147 Ronald S. Lauder v. The Czech Republic, UNCITRAL, Final Award, ¶ 171 (Sept. 3, 2001).
because the court decided to apply the triple party test strictly.\textsuperscript{148} Therefore, allowing shareholders to bring claims on reflective loss and recognizing the recovery of reflective loss increases the possibility of parallel proceedings and inconsistent decisions.

However, inconsistency is not necessarily a problem. According to Schultz, pursuing consistency "only has a very relative value" for an arbitration regime. In international arbitration, arbitrators are not regulators and arbitration awards are not there to produce a regulatory regime. The purpose of the exercise of investor-state dispute adjudication is to make more sound decisions than consistent decisions.\textsuperscript{149}

In any case, barring recovery for reflective loss is not the solution to inconsistency. Parallel proceedings and inconsistency in decisions are not unique phenomena for proceedings involving the issue of reflective loss. As D'Agostino observes, concurrent claims and conflicting decisions under international investment treaties are possible since all investors affected by the same host states can "pursue their own claims with their own tribunals."\textsuperscript{150} Therefore, if consistency is a goal to pursue, it is the whole investment treaty arbitration regime that must find the solution.

To summarize, the approach adopted by international tribunals has a sound policy basis. These underlying policy considerations are: (1) That foreign investment needs to be protected and (2) that shareholders suffering property loss are compensated while all the other parties are not prejudiced. Furthermore, practical problems like the risk of double recovery and the possibility of inconsistent decisions can be addressed with some procedural mechanisms, which will be discussed later.

IV. SUPPORTING THE INVESTMENT CASE-LAW: LOSS RESULTING FROM DIMINUTION OF SHARE VALUE SHOULD BE RECOVERABLE AS A RIGHT ATTACHED TO SHARES

This Article has devoted much space to arguing that allowing recovery for reflective loss is a principle well supported by policy considerations. This is because reflective loss is mostly a policy decision. However, the legal criticism that allowing recovery for reflective loss will undermine the "proper plaintiff" rule needs to be addressed as well.

The following Part argues in support of the tribunal's finding that shareholders have an independent cause of action when the value of its shares decreases. If this proposition can be established, there is no issue of undermining the proper plaintiff's rule since the company and the shareholders will be claiming to recover damages to their properties, respectively. To establish that shareholders have independent causes of action, this Article contrasts (A) the approach that

\textsuperscript{148} See SVEA Court of Appeal Judgment Case no. T 8735-01, p. 69–70. The court held that there was no identical identity between Lauder and the CME, and the claims are different since they are brought under different investment treaties and the injuries caused are also different.


defines shares as mere contractual rights with (B) that which includes the economic value of their shares as part of the rights attached to the shares.

A. Shares Merely as Contractual Rights

Those who argue that allowing recovery for reflective loss will damage the "proper plaintiff" rule view shares merely as contractual rights. The "proper plaintiff" rule arises from the fact that a company is a separate legal personality. Thus, a company is the sole claimant for wrongs done to the company.

According to Buckle, shareholders are not wronged because they suffer no personal loss for the diminution of share value. This is so because "shares are a right of participation in the company on the terms of the articles." The right of participation includes the right to dividends, the right to share in the proceeds of liquidation, and the right to participate in the management of the company. Shares are unaffected by any wrong done to the company. So, in case the share value decreases as a result of wrong done to the company, the company is the sole claimant who can sue. Therefore, the recovery of reflective loss must be barred as a legal principle to uphold the proper plaintiff rule.

This view is in line with Douglas's argument when it comes to international investment treaties. Although investment treaties create a new source of legal obligation, this new obligation does not alter the scope of rights attached to the shareholding. Therefore, when tribunals make a decision on whether to allow reflective loss, they should look at the domestic legal systems to ascertain the scope of the rights. The diminution of share value is outside the scope of rights attached to shares because the property rights of shares do not include economic value.

This reasoning was adopted in Prudential, the genesis case creating the non-reflective loss principle. The United Kingdom's Court of Appeal reiterated the view that shares do not contain independent rights because, "when the shareholder acquires a share, he accepts the fact that the value of his investment follows the fortunes of the company and that he can only exercise his influence over the fortunes of the company by the exercise of his voting rights in general meetings."

This view that shares are merely contractual is not unchallenged. The recent view by scholars and courts is that economic value is part of property rights attached to shares.

153 Gaukrodger, supra note 3, at 400–07.
155 Id. at 222.
B. Shares as Intangible Property

Shares are more than contractual rights. Worthington observed that a share is a piece of intangible property. With the development of the company as a separate legal concept, shareholders lost direct interest in the assets of the company. Instead, shares emerged as legal property. This intangible property includes more than a bundle of contractual rights. Shares are themselves "things" that can be dealt with—they are not "merely" personal rights.\(^{156}\)

The New Zealand Court of Appeal found that "the diminution in the value of [the claimants'] shares in the company is by definition a personal loss and not a corporate loss."\(^{5}\) Even in Johnson & Gore Wood, where the most rigid rule on the non-reflective loss principle originates, the House of Lords recognized the fact that a share is a piece of property belonging to the shareholders with economic value.\(^{158}\)

The Hong Kong Court of Final Appeal shares the same position.

A finding by international tribunals that rights attached to shares include the economic value of the shares would thus be a legally sound decision. Such a finding would also have practical advantages because the diminution of share value does not always correspond to the loss by the company. This is so because the diminution in the value of shares would not always be made good if the company enforces its claims.\(^{159}\) For example, the entire value of the company can be greater than the aggregate value of the shares.\(^{160}\) Another example is if the company business is destroyed as a result of the damage. In this situation, even if the company recovers, the value of the shares cannot be restored.\(^{161}\)

If the property rights of shares include the economic value of shares, then shareholders would have an independent cause of action against the defendant state. The legal principle of separate personality would not be undermined.

V. RECONCILING PROS AND CONS: CREATING MECHANISMS TO RESOLVE PRACTICAL PROBLEMS

Allowing recovery for reflective loss is a sound principle from the perspective both of policy considerations and law. However, to be considered as a principle with practicality, tribunals need to find solutions to practical problems associated with this principle.

This Article provides certain options. (A) It discusses practical ways to avoid double recovery. (B) It provides mechanisms to manage the number of


\(^{157}\) Enron Corp. v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on Jurisdiction and Admissibility, ¶ 52 (Jan. 14, 2004), adopted in Camuzzi Int'l S.A. v. Argentine Republic, ICSID Case No. ARB/03/2, Decision on Objection to Jurisdiction, ¶ 65 (May 11, 2005).


\(^{160}\) Short v. Treasury Commissioners, [1948] A.C. 534 (HL) at 546.

\(^{161}\) The facts in Giles v. Rhind are a demonstration. As a result of a director's breach of duty, both a shareholder and the company suffered loss. The company entered into receivership. The shareholder sued the director independently under the shareholder agreement. Even if the company can recover damages, it is doubtful that the value of the shares will return to before the wrong was done. Giles v. Rhind, [2002] EWCA Civ. 1428 (Oct. 17, 2002).
claims in order to avoid the scenario where minority shareholders cannot sue because of the high legal cost and the scenario where the states are tied by unlimited law suits. These scenarios are problematic not because of legal principles. They need to be dealt with to save costs for all the parties of international investment treaties. Furthermore, managing the number of claims would also help to mitigate the inconsistencies in tribunals’ decisions.

A. Practical Solutions to Avoid Double Recovery

One mechanism that tribunals have created is to give governments an option to acquire the claimant’s shares. This mechanism prevents double recovery because the share is transferred before the claimant shareholder can recover twice. The government as the new shareholder will recover if the company recovers.

A potential problem with this mechanism is that the government may need to pay substantial costs to obtain shares. Even after the company has been wronged, the value of its shares can still be high. Furthermore, this approach is in effect a process of the nationalization of companies. Nationalization is an important political and economic policy for a state, and it often attracts heated debate. It is unwise for arbitral tribunals to interfere in this area.

A similar mechanism can be shareholder undertakings. The claimant shareholder could be required to make undertakings that, if the company sues and recovers, it will pay back the double-recovered part to the state. Tribunals have not explored this mechanism.

This mechanism is very good in theory. But this mechanism requires tribunals to be granted more power. In domestic courts, an undertaking is an enforceable promise that has the effect of a court order. Thus, undertakings are obligations to the courts. If the party fails to honor the undertaking, the party may be held to be in contempt of court. This obligation that the undertakers have to the courts is what makes undertakings powerful. But arbitrators do not have similar powers to hold any party in contempt of court.

Another practical solution worth considering is a contractual arrangement between the defendant state and the claimant shareholder concerning the scenario of double recovery. Although the basis of this approach is the consent of both parties, it is likely that the parties will give consent since it is a win-win agreement. A claimant shareholder can get compensation for the current case, and the government can avoid double recovery for the future case.

B. Dealing with Multiple Claims (and Inconsistency) with Consolidation Mechanisms

The increase of cases with multiple claims in ICSID proceedings has given rise to a real need to come up with some effective solutions. For example, in Abacalat v. Republic of Argentina there are 60,000 claimants. It is necessary to search for a timely, affordable, and efficient way to settle the disputes. Different consolidation mechanisms have been proposed. Cremades and Madalena advocate
the usage of a consolidation mechanism in arbitration proceedings. A consolidation mechanism has already been available in NAFTA. NAFTA provides the possibility to consolidate different claims when: (1) The proceedings are highly connected and the decisions are interdependent; (2) the consolidation will be in the best interest of the parties; (3) the parties consent to the consolidation; and (4) the dispute mechanisms pursued by different parties are consolidable. This mechanism can be very effective for cases concerning reflective loss. This is so because the most difficult issue when applying the consolidation mechanism is that the parties' commercial information is often confidential. It is therefore hard to consolidate different cases. However, when it comes to claims for reflective loss, it is less likely to be an issue because claimants are shareholders of the same company.

Another procedural mechanism advocated is a mechanism that is similar to class action in the United States, which was applied in the case Abaclat v. Republic of Argentina. This kind of class action requires shareholders with the same harms to pursue their claims as one.

The advantage of trying to create procedural mechanisms is that it is enough for ICSID tribunals to use the ICSID Convention to consolidate claims. For now, tribunals have relied on Article 44 of the ICSID Convention as a foundation to introduce creative procedural mechanisms. Article 44 provides that “if any question of procedure arises which is not covered by the Section or the Arbitration Rules or any rules agreed upon by the parties, the Tribunal shall decide on the question.”

This Article could not elaborately discuss different procedural mechanisms that may help to solve the practical problems that could arise if reflective loss is recoverable. It merely suggests the point that solutions to certain practical problems linked with the recovery of reflective loss can be found together with other problems that international investment treaty arbitration faces. Barring the recovery for reflective loss is not a practical solution.

CONCLUSION

The diverging approaches of domestic courts and tribunals raise further theoretical and practical challenges. Practically, the U.K. domestic courts have adopted the non-reflective loss principle while the U.K. BITs do not exclude this from the scope of its international obligations. Although shareholders will be barred by domestic courts from seeking relief, foreign shareholders whose company

163 Id. at 534.
164 Id. at 534.
165 D’Agostino, supra note 150, at 196.
167 Convention on the Settlement of Investment Disputes between States and Nationals of Other States and Accompanying Report of the Executive Directors, supra note 129, art. 44.
would have suffered losses because of the action of inaction of the U.K. authorities would be entitled to compensation if there is a breach of the treaty. In essence, foreign and national shareholders would be given a totally different treatment depending on whether they are subject to domestic or international rules. The same is true with regard to British shareholders in foreign companies. As soon as a British shareholder is operating abroad, and subject to U.K. BITs, he or she will be entitled to file an investment claim against a foreign state while he or she will not have such a right “at home” if he or she has to file a claim before the domestic jurisdictions. What is said here in the example of a British shareholder is also true for any other jurisdictions where the non-reflective loss principle is applied.

Is such a divergence a major contradiction which should generate new thinking? It is probably not a major blow to the necessary consistency of laws and practices because actually the number of times where the non-reflective loss principle has been applied and played a practical role is quite limited. However, the issue we have discussed in this Article brings us to the intersections of national and international law and of company and investment law. We are actually dealing with a complex problem at the intersection of two legal orders (company/investment) and on two different planes (national/international), and it is difficult to recommend full consistency. However, the current legal scenario gives rise to a possible erosion of the non-reflective loss principle because, practically, it might be possible for shareholders to use a BIT to seek compensation. In essence, international investment law offers a backdoor for shareholders to seek and obtain compensation which practically strengthens the value of investment treaties and investment arbitration. This in turn should be a matter of reflection to policy-makers to understand how to refine the international investment regime.

The approach adopted by international arbitration tribunals allowing shareholders to recover reflective loss under investment treaties has attracted much criticism. Its contradiction with the approach of domestic courts is often seen as a problem that needs to be solved or a disease that requires a cure. This Article has proposed an alternative way of viewing the alleged “problem.” It does so by exploring the merit of the alternative approach and it argues in its defense. The Article first examined the policy foundations for the non-reflective loss principle and then concluded that allowing recovery for reflective loss has a sound policy basis. This Article then argued that allowing recovery for reflective loss does not undermine the rule that the company should be the sole claimant for the wrongs done to it. Shareholders have an individual cause of action for such loss because the economic value of their shares is part of the property rights attached to the shares. Finally, the Article has explored some procedural mechanisms that could tackle problems like double recovery and multiple claims. Its aim is to show that some potential problems relating to reflective loss being recoverable can be better solved with creative legal mechanisms than by barring the reflective loss. The tribunals’ approach does challenge the conventional approach of domestic courts. However, the tribunals’ approach may lead to a better solution for the conflict of interests between foreign investing shareholders and all the parties and hence provide an opportunity for domestic courts to reflect their approach.