CLAIMS FOR REFLECTIVE LOSS UNDER INVESTMENT TREATIES

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1. Contrast between domestic law and unique ISDS interpretation generally allowing reflective loss claims
2. Allowing reflective loss claims expands scope of ISDS and generates multiple potential claims for the same injury
3. Treaty shopping and forum shopping in ISDS using attribution of reflective loss claims
4. Minority shareholder claims for reflective loss
5. Effects of availability of reflective loss claims for some shareholders on corporate law and finance
6. Company recovery regimes: NAFTA-style derivative action and deemed foreign company models
7. Links and contact
Domestic Law: “No Reflective Loss” principle bars shareholder claims for reflective loss

- Indirect Shareholder
- Indirect shareholder
- Indirect shareholder
- Direct Shareholder Entity
- Government
- Operating company
- Creditors

No Reflective loss claims by shareholders

Alleged harm
Claim
Sole permissible claimant
ISDS: Reflective Loss Claim

- **Government**
  - Alleged harm
  - ISDS claim

- **ABLE**: Domestic operating company
  - Alleged harm

- **GRETEL**: Indirect covered shareholder (100%)
- **CHELSEA**: Foreign covered shareholder (60%)
- **DONNA**: Domestic and foreign non-covered shareholders (20%)
- **FRANK**: Foreign covered shareholder (20%)
- **HANSEL?**
- **JERRY?**
- **BAKER**: Creditors of ABLE
ISDS: Multiple Reflective Loss Claims – Unrelated Entities

**Government**

- **ABLE**: Domestic operating company
- **GRETEL**: Indirect covered shareholder
- **CHELSEA**: Foreign covered shareholder
- **DONNA**: Domestic and foreign non-covered shareholders
- **FRANK**: Foreign covered shareholder
- **HANSEL?**
- **JERRY?**

**Alleged harm**

**ISDS claim**

**ISDS claim**
ISDS: Multiple Reflective Loss Claims – Related Entities

- **Gretele**: Indirect covered shareholder
- **Chelsea**: Foreign covered shareholder
- **Donna**: Domestic and foreign non-covered shareholders
- **Frank**: Foreign covered shareholder
- **Hansel?**
- **Jerry?**
- **Government**: Alleged harm
- **Able**: Domestic operating company
- **Baker**: Creditors of Able
ISDS: Potential Claims 1

- **Government**: ISDS claim

- **GRETEL**: Indirect covered shareholder (100%)

- **CHELSEA**: Foreign covered shareholder (60%)

- **DONNA**: Domestic and foreign non-covered shareholders (20%)

- **HANSEL?**: Foreign covered shareholder (20%)

- **FRANK**: Foreign covered shareholder (20%)

- **ABLE**: Domestic operating company

- **BAKER**: Creditors of ABLE

- **JERRY?**: Alleged harm
ISDS: Potential Claims 2

Claim under contract or domestic law

ISDS claim

alleged harm

Government

GRETEL
Indirect covered shareholder (100%)

CHELSEA
Foreign covered shareholder (60%)

DONNA
Domestic and foreign non-covered shareholders (20%)

FRANK
Foreign covered shareholder (20%)

ABLE
Domestic operating company

BAKER
Creditors of ABLE

HANSEL?
JERRY?
ISDS: Potential Claims 3

- **GRETEL**: Indirect covered shareholder (100%)
- **CHELSEA**: Foreign covered shareholder (60%)
- **DONNA**: Domestic and foreign non-covered shareholders (20%)
- **FRANK**: Foreign covered shareholder (20%)
- **HANSEL?**
- **JERRY?**

**Government**

- **ISDS claim**

- **alleged harm**

- **ABLE**: Domestic operating company

- **BAKER**: Creditors of ABLE

- **ISDS claim**
KAPPA has several choices for shopping

Claim 1

Claim 2

Claim 3

Claim 4

Government

alleged harm

KAPPA
100% - covered
Nationality: K
K-G Treaty

Epsilon
80% - covered
Nationality: E
E-G Treaty

DELTA
100% - covered
Nationality: D
D-G Treaty

ALPHA
Operating company

Non-covered Shareholders
20%

Creditors

Creditors
ISDS: Forum Shopping Using Attribution of Reflective Loss Claim(s)

KAPPA has several choices for shopping:

- **Claim 1**: KAPPA (100% covered) - K-G Treaty - ICSID
- **Claim 2**: EPSILON (80% covered) - E-G Treaty - PCA
- **Claim 3**: DELTA (100% covered) - D-G Treaty - AI-SCC
- **Claim 4**: Government

KAPPA alleged harm to:
- **Non-covered Shareholders 20%**
- **Creditors**
- **Creditors**
ISDS: Minority Shareholder in Large Domestic Company

- Domestic non-covered shareholders (91%)
- Covered financial investor, e.g. hedge fund (9%)
- Government
  - alleged harm
- Large domestic company; Eg. market capitalisation USD 100 billion
- Creditors
  - ISDS claim
Domestic Law: “No Reflective Loss” principle bars shareholder claims for reflective loss

No Reflective loss claims by shareholders

Indirect Shareholder

Indirect shareholder

Indirect shareholder

Direct Shareholder Entity

Government

Operating company

Creditors

alleged harm

claim

sole permissible claimant
Corporate finance: repayment rank order

1. Secured debt
2. Unsecured debt
3. Subordinated debt
4. Preference shares
5. Ordinary shares (common equity)

Domestic Law: **Who is Protected? – All Investors**

- **Indirect Shareholder**
- **Indirect shareholder**
- **Indirect shareholder**

**No Reflective loss claims by shareholders**

- **Direct Shareholder Entity**
- **Operating company**
- **Creditors**

**Government**

- **Claim**
- **alleged harm**

*sole permissible claimant*
ISDS Reflective Loss Claim: **Who is Protected?**

*Note: This slide and the next slide have been corrected from the versions discussed at the side meeting. Frank's treaty coverage, which was inadvertently omitted, has been restored. Frank is not protected by the claim by Chelsea. It may bring its own ISDS claim if its individual loss is significant; this would generate multiple claims for the government and high costs while still leaving investors unprotected. Only a company claim protects all investors. On the categories of excluded and potential claimants for reflective loss in ISDS and claim incentives, see Gaukrodger (2013b), pp. 47-48, [http://dx.doi.org/10.1787/5k3w9t44mt0v-en](http://dx.doi.org/10.1787/5k3w9t44mt0v-en).*
ISDS Reflective Loss Claim: **Who is not Protected?**

- **DONNA**: Domestic and foreign non-covered shareholder
- **DOMINA**: Foreign covered shareholder
- **ABEL**: Domestic operating company
- **BAKER**: Creditors of ABLE
- **CHELSEA**: Foreign covered shareholder
- **FRANK**: Foreign covered shareholder
- **GRETEL**: Indirect covered shareholder
- **HANSEL?**
- **JERRY?**
- **Government**: alleged harm

The ISDS claim involves a complex network of entities and their relationships, including claims of harm and protection.
ISDS: NAFTA-style Derivative Claim

1. alleged harm

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

3. if claim successful, damages payable only to ABLE (company)
ISDS: Deemed Foreign Company Claim

1. alleged harm
2. ISDS claim
3. if claim successful, damages payable only to ABLE (company)


For questions or comments regarding this presentation, please contact david.gaukrodger@oecd.org.