IBA Report on Insolvency and Investment Arbitration

A project of the IBA Arbitration Committee's Insolvency and Arbitration Working Group

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About the Arbitration Committee

The **IBA Arbitration Committee** focuses on laws, practice and procedures relating to the arbitration of transnational disputes. Through its conferences, publications and projects, the Committee seeks to share information about international arbitration, promote its use and improve its effectiveness.

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Editorial note

The various chapters of this report were written by the authors listed under the heading of each chapter. The views and opinions expressed in a particular chapter are those of its authors. They do not necessarily reflect the views or positions of the other contributors, the Co-Chairs, the Academic Chair, or any entities or clients that they or the authors represent or may represent in the future.

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1. Introduction

Hamid Abdulkareem, Simon Batifort, Manuel Penades

1. This report examines how insolvency interacts with arbitrations arising under investment treaties.[1] The IBA Arbitration Committee's Insolvency and Arbitration Working Group has previously prepared a detailed Toolkit on Insolvency and Arbitration examining how insolvency interacts with commercial arbitration in multiple jurisdictions. This report expands on that toolkit by surveying issues particular to investment treaty arbitration, where distinct questions arise in applying treaties and international law as the applicable substantive law.

2. In Chapter II, Emma Lindsay and Robert Kovacs examine how insolvency can affect an arbitral tribunal's jurisdiction. They demonstrate that complex questions of jurisdiction *ratione personae* may arise where an insolvent claimant pursues an investment treaty claim, particularly concerning party representation. They also show how investment treaty arbitrators' permissive approach to shareholder reflective loss claims expands the range of arbitrable disputes under investment treaties by permitting shareholders in insolvent companies to assert claims based on interference with the companies' assets. In addressing jurisdiction *ratione materiae*, they show how arbitrators in investment treaty disputes may be called on to resolve claims brought by shareholders and creditors of an insolvent entity about the conduct of an insolvency proceeding.

3. In Chapter III, Calum Agnew surveys how arbitral tribunals have approached reflective loss claims, or claims by shareholders to recover losses suffered by the company in which they hold shares. He distinguishes the approach taken in international investment law from common approaches in national legal systems and in international law more generally, which prohibit such claims, and examines how investment law's permissive approach applies to various types of shareholder claims. He then examines tensions that arise when directly-affected corporations are involved in insolvency proceedings. In particular, he describes how investment law's approach to reflective loss claims may be in tension with the creditors' priority claim to recovery in insolvency.

4. In Chapter IV, Sarah Schröder and Tomas Vail examine issues of attribution under international law that arise in investment treaty arbitrations involving insolvencies. These issues may be simple or complex depending on the nature of the claims. A claim that a challenged State measure contributed to an investment company's insolvency, for instance, may not raise any unusual issues of attribution. Similarly, a State will be responsible for the conduct of its judicial system, and so challenges to judicial conduct in relation to an insolvency proceeding are unlikely to give rise to complex attribution questions. However, claimants in many cases have challenged the conduct of liquidators, insolvency trustees, and other court-appointed administrators. Such challenges have largely failed on attribution grounds. In some cases,

1 In this Report, the terms 'insolvency' and 'insolvency proceedings' refer generally to a range of possible proceedings, including liquidation or wind-up, insolvency, bankruptcy, administration and voluntary or involuntary restructuring. The concrete term applicable in each case will depend on the relevant governing law, which this Report does not discuss.

however, tribunals have found that an administrator may exercise unusual powers that involve elements of governmental authority, giving rise to attribution.

5. In Chapter V, Justin Jacinto and Charlotte Fromont examine fact patterns in which insolvencies may relate to the merits of an investment treaty arbitration. They examine cases involving claims that (i) wrongful State conduct caused an investment company to become insolvent; (ii) an investment company was wrongfully placed in insolvency proceedings; and (iii) an insolvency proceeding was conducted improperly. They explain how the first category of claims gives rise to issues generally similar to those that arise in any investment treaty arbitration; that the second category has arisen with particular frequency in the context of recent bank failures; and that the third category typically implicates the 'denial-of-justice' standard, which is a deferential standard of review.

6. In Chapter VI, Christina Beharry and Eva Paloma Treves show that insolvency proceedings raise significant issues in assessing damages. In particular, insolvency proceedings may reflect that an investment was facing adverse financial conditions independent of a wrongful State measure, precluding an investor from establishing causation. Even where a wrongful State measure did cause loss, particular valuation problems arise in assessing the residual value of the investment associated with an insolvent company, given that a loan to or an equity stake in an insolvent entity may have significantly less than its nominal value.

7. Finally, in Chapter VII, Jean-Paul Deschamps and Horacio Risso demonstrate that insolvencies can give rise to a range of procedural issues in investment treaty arbitrations, concerning not merely party representation but requests for security for costs and complex interactions between parallel insolvency proceedings and investment arbitrations.

II. Jurisdiction

Emma Lindsay & Robert Kovacs

A. Introduction

8. Establishing a tribunal's jurisdiction over a particular dispute is a fundamental prerequisite to resolve claims in arbitration. In practice, tribunals will deal with jurisdictional issues either as part of the main award, or in bifurcated proceedings, with jurisdiction being determined in the first instance, separately from the merits of the dispute.

9. The applicable principles will vary by reference to which instrument gives authority to the tribunal. In the context of insolvency proceedings, there is a further layer of complexity, as mandatory jurisdictional rules in insolvency legislation may apply, which could impact the jurisdiction of an investment tribunal.

10. In general, for a tribunal to have jurisdiction over a dispute, a number of different elements must be satisfied. These can be categorised into the following five jurisdictional elements:

    - Jurisdiction *ratione voluntatis* (ie, whether the host State and the investor have consented that the dispute be settled through arbitration);
    - Jurisdiction *ratione personae* (ie, whether a claimant has standing to bring investor-State proceedings against a host State);
    - Jurisdiction *ratione materiae* (ie, whether subject matter of the 'dispute' satisfies the requirements in the applicable instrument);
    - Jurisdiction *ratione temporis* (ie, whether the proceedings are brought within the temporal scope of the substantive provisions on which the claim is based); and
    - Jurisdiction *ratione loci* (ie, whether an investment meets the territorial requirements in the applicable instrument).

11. This contribution will consider each element in turn in the context of investment disputes involving insolvency proceedings.

B. Jurisdiction ratione voluntatis

12. To access arbitration, the host State and the investor both need to provide consent. In practice, a host State's consent may be given in one of four ways: in a direct agreement with an investor, in the national legislation of the host State, in a bilateral investment treaty ('BIT') or in a multilateral treaty.

13. In general, a provision in a host State's national law containing consent to arbitration is an offer to arbitrate by the host State and requires acceptance by an eligible investor to perfect an agreement. Similarly, a host State's consent in a BIT constitutes an offer to an investor requiring acceptance by the

investor according to the BIT's terms. A number of multilateral treaties also offer consent to arbitration, such as Article 1122 of the North American Free Trade Agreement ('NAFTA') and Article 26(3)(a) of the Energy Charter Treaty ('ECT'). Being a State party to the ICSID Convention, in contrast, does not in itself constitute an offer to arbitrate by the State party. Rather, Article 25(1) of the ICSID Convention requires that both parties consent to submit a particular dispute to ICSID jurisdiction.

14. In all four scenarios, consent may be subject to certain conditions, timelines and formalities. *ST-AD GmbH v Bulgaria*,[2] which involved the use of the State's insolvency laws, illustrates how preconditions to consent can affect a claim in practice. In *ST-AD GmbH*, the claimant-controlled Bulgarian company, LIDI-R, was involved in a land ownership dispute with another Bulgarian company, JMB. The claimant argued that actions by the host State, including support for attempted insolvency proceedings brought by JMB against LIDI-R, amounted to expropriation.[3] The host State disputed, *inter alia*, jurisdiction *ratione voluntatis*, arguing that its consent to arbitrate under the Bulgaria-Germany BIT 1986 was: (i) conditional on Bulgaria's national courts deciding on the (il)legality of the expropriation; and (ii) limited to the question of compensation for an illegal expropriation. The tribunal found that no absolute obligation to go to the national courts existed; however, if an investor wanted to avail itself of the possibility to go to international arbitration, then approaching the national courts to determine the lawfulness of the expropriation was a precondition. Because the investor had not approached the national courts, the tribunal lacked jurisdiction *ratione voluntatis* as that precondition had not been met. In declining jurisdiction *ratione voluntatis*, the tribunal was compelled to clarify what it termed '*an incorrect view of the essence of international arbitration*':

> It is indeed not because a State has given its consent to grant certain substantive rights to the investors of another State that it automatically flows from such consent that the State also gives its consent for these investors to sue the State directly in an international arbitration. For such right to come into existence, specific consent has to be given within the treaty. The State can shape this consent as it sees fit, by providing for the basic conditions under which it is given, or, in other words, the conditions under which the 'offer to arbitrate' is made to the foreign investors. [...] it is of the utmost importance not to forget that no participant in the international community, be it a State, an international organisation, or a physical or legal person, has an inherent right of access to a jurisdictional recourse. [...] An arbitral tribunal [...] does not have a general jurisdiction; it only has a 'compétence d'attribution,' which has to respect the limits provided for by the States.[4]

15. This illustrates how the scope of a State party's consent may be narrowed so as to exclude certain types of disputes. It is possible, although the authors are not aware of any examples in practice, that a State could exclude insolvency matters from the jurisdiction of an investment tribunal. In the context of commercial

2 *ST-AD GmbH v Republic of Bulgaria*, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013.

3 Note the tribunal found that the insolvency proceedings, being proceedings between two private parties, were 'completely extraneous to this arbitration and have no link with its alleged investment'. See id. at para. 260.

4 *Id.* at para. 361.

arbitration, several States consider insolvency disputes not to be arbitrable on the basis of public policy and creditor protection considerations.[5] Such principles, however, do not amount to exclusions of insolvency-related matters from the consent to arbitrate in the investment context. Equally, as explained in section II.D.1) below, these principles do not deprive investment tribunals of their jurisdiction to determine whether decisions taken by the authorities of a host State as regards insolvency matters are compatible with a State's obligations under a treaty.

C. Jurisdiction *ratione personae*

16. Personal jurisdiction requires that the proceedings are instigated between the proper parties, ie, a host State and a covered 'investor' as defined under the relevant investment instrument. In broad terms, the host State must be a contracting party to the relevant framework, at the relevant time, and the investor must meet the relevant criteria under the investment instrument. Typically in investment treaty cases, the definition of 'investor' is broad in scope, requiring an investor to be a national of a State party other than the host State, and either a legal or a natural person.

17. What constitutes the required link between an investor and a State party for jurisdictional purposes is typically regulated by the investment treaty, or other investment instrument. A number of approaches exist.

18. The most common approach is that of nationality. Many BITs define a natural person as a qualified investor subject to their nationality, while some also encompass other statuses such as permanent residency. Legal persons will usually meet the nationality requirement if the entity is incorporated or constituted under the laws of one of the contracting parties.[6] According to the UK Model BIT 2008, for example, qualifying investors can be either 'physical persons deriving their status as United Kingdom nationals from the law in force in the United Kingdom', or 'corporations, firms and associations incorporated or constituted under the law in force in any part of the United Kingdom or in any territory to which this Agreement is extended'.[7]

19. Some BITs require an entity to have its seat (*siège social*) or head office and/or activities, management or control in the territory of one of the State parties to qualify as an investor. The China-Germany BIT 2003 considers a German 'investor' to be 'any juridical person as well as any commercial or other company or association with or without legal personality having its seat in the territory of the Federal Republic of Germany [...]'.[8] Definitions of who or what an 'investor' is will typically link back to a State's national

5 For examples of national laws restricting insolvency matters to the domestic courts, *see* N. Blackaby, C. Partasides, A. Redfern and M. Hunter, Redfern and Hunter on International Arbitration (2023), at paras. 2.143-2.148. For a comparative study on this matter, *see* the IBA Toolkit on Insolvency and Arbitration (2021), Questions 1-3.

6 *See Case Concerning Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, Judgment, 1970 ICJ Rep. 3, in which Belgium sought compensation for the damage claimed to have been caused to its nationals, shareholders in the (Canadian) Claimant. It was undisputed between Belgium and Spain that Barcelona Traction was a company of Canadian nationality, 'having been incorporated under Canadian law and having its registered office in Toronto' (para. 103).

7 United Kingdom Model BIT (2008), Articles 1(c) and (d).

8 Agreement between the People's Republic of China and the Federal Republic of Germany on the Encouragement and Reciprocal Protection of Investments, signed 1 December 2003, Article 1.2(a).

laws, and as such the definition of 'investor' may vary from country to country within the same BIT.[9] In relation to legal entities, some BITs provide for a control test, such as the Switzerland-Iran BIT 1998, which extends protection to legal entities not established under the law of a State party where those entities are 'effectively controlled by' natural or legal persons having the nationality of a State party.[10]

20. In the context of insolvency, there are typically two categories of claimants who may bring a claim against a host State: (a) an insolvent entity itself either in its own name or through an insolvency administrator or trustee; and (b) a party related to an insolvent entity, such as a shareholder or creditor.

1) Where the claimant itself is the insolvent entity

21. When a party to an arbitration agreement enters insolvency proceedings, the applicable domestic insolvency provisions can affect the capacity of that party to enforce the arbitration agreement. In certain jurisdictions, for example England and Wales, liquidators and administrators have the power to bring or defend legal proceedings on behalf of the company, including arbitration claims, should they consider it necessary.[11]

22. Domestic legal frameworks vary widely as to the role and powers of administrators. The IBA Toolkit on Insolvency and Arbitration seeks to address this in question 16. Specifically, it asks whether the insolvency administrator will take part in the proceedings exclusively or whether the insolvent party might continue to have procedural capacity to participate in proceedings in its own name. Question 16a then proceeds to ask '[i]f the insolvency administrator takes part in the arbitration, does she step into the shoes of (ie, replace) the insolvent party or can the insolvent party continue to appear in its own name?'.[12] National reports on these questions provide differing answers. For instance, some countries distinguish between liquidation and reorganisation proceedings. Brazil, China, Colombia, Peru, Poland, Switzerland, and the USA reported that the insolvent party maintains procedural capacity in reorganisation proceedings.[13] The Toolkit also confirms that in most countries, the liquidator will take part in arbitral proceedings exclusively. However, in some jurisdictions, the insolvent party retains procedural capacity 'when the subject matter of the arbitration is not part of the insolvency proceedings (*egeg*, unseizable assets and rights)'.[14] This is the case in Chile and Germany.[15] There are other countries[16] where an insolvent party may bring proceedings in its own name, sometimes to a limited degree, 'for example, by requiring authorizations from the insolvency court or the insolvency administrator to participate in the arbitration proceedings'.[17] The way in which a State's insolvency laws determines who

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9 *See, eg*, China-Germany BIT, Article 1.2(b); Agreement between the Swiss Confederation and the Islamic Republic of Iran on the Promotion and Reciprocal Protection of Investments, signed 8 March 1998, Article 1.1(b); Netherlands Model BIT [2019], Article 1(b)(ii).

10 Switzerland-Iran BIT, Article 1.1(c).

11 Section 167(1) and para. 4, part II, sch. 4 of the Insolvency Act 1986 (liquidation) and paras. 5 and 6, sch. 1 of the Insolvency Act 1986 (administration).

12 IBA Toolkit on Insolvency and Arbitration (2021), Question 16.

13 *Id.* at para. 97 and fn. 81.

14 *Id.* at para. 98.

15 *Id.* at fn 85.

16 *Id.* Chile, England, India and Singapore, fn. 87.

17 *Id.* at para. 99.

is the proper party with capacity will affect the legal standing of the party and may impact an investment tribunal's consideration of the requirements to be an 'investor' under the applicable instrument.

23. Typically, the insolvency administrator or liquidator will stand in the shoes of the insolvent party and be able to bring claims on behalf of the insolvent party.[18] For example, *Walter Bau v Thailand*[19] concerned a concession agreement between Thailand and the claimant company to construct and operate a toll highway in Bangkok. The claimant, through its insolvency administrator Werner Schneider, commenced UNCITRAL proceedings under the Germany-Thailand BIT 2002, alleging that Thailand had failed to fix or increase the level of tolls, resulting in the claimant's insolvency. Thailand raised several jurisdictional objections but did not contest that the insolvency administrator had served its Request for Arbitration on behalf of the insolvent entity. The tribunal subsequently accepted jurisdiction. In *SCB (Hong Kong) v Tanzania*,[20] the tribunal stated that '[t]here is no clearer principle common to all corporate insolvency law than that when a company is in liquidation, the liquidator stands in the shoes of the company in liquidation'.[21] The case involved a dispute over investments made through Independent Power Tanzania Limited in a power plant in Dar es Salaam, and over which several winding up orders had been made ultimately resulting in the expropriation against the claimant.

24. A potentially more controversial issue arises when considering whether an insolvency administrator or liquidator needs to satisfy the same *ratione personae* requirements as the insolvent party for a tribunal to have jurisdiction. This issue was discussed in *Eskosol S.p.A. in liquidazione v Italy*,[22] where Italy raised jurisdictional objections arguing a lack of foreign control of the claimant. The national insolvency proceedings were supervised by an Italian court and the appointed receiver was an Italian national. However, as Eskosol was at all relevant times 80 per cent controlled by its Belgian parent, Blusun, the tribunal dismissed the objection. It was held that Blusun retained residual control over the claimant, and the appointment of an Italian insolvency administrator did not mean that Eskosol was Italian-controlled:

> It is of course true that a bankruptcy receiver exercises significant influence over the management of a company's assets, under the supervision of a bankruptcy court, while the company remains in bankruptcy proceedings. However, the receiver does not exercise such authority on his own behalf, making him the ultimate party-in-interest to the company's fate, and therefore supporting some conclusion that it is his nationality that properly should govern for ECT and ICSID Convention purposes. Rather, the receiver acts essentially as a trustee or agent – not as a principal – on behalf of those with dominant legal and financial interests in the company (*egeg*, shareholders and priority creditors). The trustee administers the company in the shareholders' interests, not in his own. That agency moreover is a temporary power, not a permanent one, and it remains in place only so long as the entity remains in bankruptcy. That status could

18 *SCB (Hong Kong) v Tanzania*, ICSID Case No. ARB/15/41, Award, 11 October 2019, para. 349.

19 *Walter Bau AG v Thailand*, UNCITRAL, Partial Award on Jurisdiction, 5 October 2007.

20 *SCB (Hong Kong) v Tanzania*, ICSID Case No. ARB/15/41.

21 *Id.* Award, 11 October 2019, at para. 349.

22 *Eskosol SpA in liquidazione v Italian Republic*, ICSID Case No. ARB/15/50.

come to an end for various reasons, including (but not limited to) the possibility that an insolvent entity prevails in a legal claim and collects sufficient recovery to settle its outstanding debts.[23]

25. The *Eskosol* tribunal's analysis suggests that the 'proper' claimant in a situation where an insolvency administrator is involved should be the insolvent company itself. A related issue was debated in *Blue Bank International & Trust (Barbados) Ltd v Venezuela*.[24] That arbitration did not concern insolvency but rather the question of whether a trustee (Blue Bank) could bring an action in respect of assets held by a trust. The tribunal found that the trustee 'did not make the investment in its own behalf'[25] and declined jurisdiction.

26. In another case, *AS PNB Banka v Latvia*,[26] the claimant bank operating in Latvia alleged that it was subject to unfair and arbitrary treatment by Latvian authorities resulting in the bank's insolvency. The bank and its shareholders initiated arbitral proceedings, leading the tribunal to consider whether the administrator or a former bank director was the appropriate representative of the bank in the proceedings. While not strictly a question of jurisdiction – but rather one of capacity – the issue went to who the tribunal had jurisdiction over to resolve the dispute. Ultimately, the tribunal held that the administrator was the representative of the bank (except for an ancillary claim).[27]

2) Where the claimant itself is not the insolvent entity

27. There are also circumstances in which a potential claimant, who is not the insolvent entity itself, may nonetheless be connected to the insolvent entity such that it may wish to bring arbitral proceedings, for example as a shareholder or creditor of the insolvent company.

28. While the prohibition on claims for reflective loss[28] is firmly established in municipal law and general international law,[29] shareholder claims have been allowed under investment treaties. *Dan Cake v Hungary*[30] is an example of arbitral proceedings successfully brought by a Portuguese majority shareholder after its Hungarian subsidiary, Danesita, went into administration. The *Yukos Oil Company* arbitration[31] involved three parallel actions brought by minority shareholders in Yukos against the Russian Federation after Yukos entered into administration. In confirming jurisdiction *ratione personae*

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23 *Eskosol SpA in liquidazione v Italian Republic*, ICSID Case No. ARB/15/50, Award, 4 September 2020, at para. 234.
24 *Blue Bank International & Trust (Barbados) Ltd v Bolivarian Republic of Venezuela*, ICSID Case No. ARB 12/20.
25 *Id.* Award, 26 April 2017, at para. 198.
26 *AS PNB Banka (formerly AS Norvik Banka) and others v Republic of Latvia*, ICSID Case No. ARB/17/47.
27 *C.f., Carnegie Minerals (Gambia) Limited v Republic of Gambia*, ICSID Case No. ARB/09/19.
28 This is the general rule that a shareholder may not bring a claim for a loss suffered by a company where the company itself has a cause of action. See D. Gaukrodger, *Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law*, OECD Working Papers on International Investment (2014), at 7. For a detailed analysis of this issue in the context of investment arbitration and insolvency, see Chapter III below.
29 *Case Concerning Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, Judgment, 1970 ICJ Rep. 3; *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)*, Judgment, 2012 ICJ Rep. 324.
30 *Dan Cake (Portugal) S.A. v Hungary*, ICSID Case No. ARB/12/9.
31 *Hulley Enterprises Limited (Cyprus) v The Russian Federation*, PCA Case No. AA 226; *Yukos Universal Limited (Isle of Man) v The Russian Federation*, PCA Case No. AA 227; *Veteran Petroleum Limited (Cyprus) v The Russian Federation*, PCA Case No. AA 228.

and *ratione materiae*, the tribunal noted that all that was required was that the claimants met the definition of investor under the ECT.[32] As the claimants' expert, Professor Reisman, put it:

> Modern investment law, with which the ECT is consistent, does not require the ownership of a majority of the shares, but allows minority and non-controlling shareholders to bring a claim to an international tribunal.[33]

29. However, jurisdictional issues have arisen in cases where a shareholder has attempted to bring a claim for alleged breaches suffered by an insolvent subsidiary and authorisation is required under national insolvency law to permit the subsidiary to join in the claim. *Lotus Holding Anonim Şirketi v Turkmenistan*[34] and *Muhammet Çap & Sehil v Turkmenistan*[35] are contrasting examples, both under the Turkey-Turkmenistan BIT 1992. In *Lotus Holding Anonim Şirketi v Turkmenistan*,[36] Lotus Holding brought a claim against Turkmenistan for contracts entered into by its wholly-owned Turkish subsidiary, Lotus Enerji, which subsequently went insolvent and was placed under the control of the Turkish Bankruptcy Directorate. As Lotus Holding was not a party to the underlying contracts, the claimant had asked that Lotus Enerji be joined into the proceedings as co-claimant. To achieve that, however, the respondent argued that authorisation from the appropriate insolvency authority would be required. As Turkmenistan submitted:

> Claims for money owed to a bankrupt company belong to its bankruptcy estate and can only be pursued by the proper party, with the authorization of the Turkish bankruptcy authorities, in accordance with the requirements of Turkish law, and are payable only to the bankruptcy estate.[37]

30. The tribunal agreed with the respondent that the agreement of the trustee in insolvency would have been required, and that Lotus Holding was not the proper party to bring the claim. That case contrasts with *Muhammet Çap & Sehil v Turkmenistan*,[38] where express authorisation had been given by the Turkish insolvency authorities for insolvent Sehil to pursue its claims against Turkmenistan in that arbitration.

31. Accordingly, determining the question of whether an investment tribunal has jurisdiction *ratione personae* will depend on the complex interplay of domestic rules with the applicable bilateral and/or multilateral frameworks. A thorough analysis of this interrelation will be required to ensure that the arbitration is brought by the proper party.

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32 *Hulley Enterprises Limited (Cyprus) v The Russian Federation*, PCA Case No. AA 226, Interim Award on Jurisdiction and Admissibility, 30 November 2009, at para. 434; *Yukos Universal Limited (Isle of Man) v The Russian Federation*, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, 30 November 2009, at para. 435; *Veteran Petroleum Limited (Cyprus) v The Russian Federation*, PCA Case No. AA 228, Interim Award on Jurisdiction and Admissibility, 30 November 2009, at para. 491.

33 *Hulley Enterprises Limited (Cyprus) v The Russian Federation*, PCA Case No. AA 226, Interim Award on Jurisdiction and Admissibility, 30 November 2009, at para. 241; *Yukos Universal Limited (Isle of Man) v The Russian Federation*, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, 30 November 2009, at para. 241; *Veteran Petroleum Limited (Cyprus) v The Russian Federation*, PCA Case No. AA 228, Interim Award on Jurisdiction and Admissibility, 30 November 2009, at para. 241.

34 *Lotus Holding Anonim Şirketi v Turkmenistan*, ICSID Case No. ARB/17/30.

35 *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v Turkmenistan*, ICSID Case No. ARB/12/6.

36 *Lotus Holding Anonim Şirketi v Turkmenistan*, ICSID Case No. ARB/17/30.

37 *Id.* Award, 6 April 2020, at para. 113.

38 *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v Turkmenistan*, ICSID Case No. ARB/12/6.

D. Jurisdiction *ratione materiae*

32. The jurisdiction *rationae materiae* of an investment tribunal can be impacted by the insolvency of a party in at least two ways. One concerns the notion of 'investment' (1). The second relates to the notion of arbitrability and the ability of the arbitral tribunal to assess the compatibility of certain decisions in State insolvency proceedings with the host State's investment treaty obligations (2).

1) The concept of 'investment' in the context of insolvency proceedings

33. To make out jurisdiction *ratione materiae*, investors must establish the existence of a legal dispute in relation to an investment. For ICSID proceedings, the requirement is that there is a 'legal dispute arising directly out of an investment'.[39] When proceedings are brought under the ICSID rules, both this and the definition of an 'investment' under the applicable investment instrument need to be satisfied. As such, the terms of the relevant instrument will determine if an investment is covered. While the ICSID Convention itself does not offer a definition, the so-called *Salini* test is often employed by tribunals (even in non-ICSID disputes). In essence, the *Salini* test considers various criteria or descriptors, such as whether there has been: (a) a commitment of resources; (b) a certain duration; (c) an element of risk; and (d) a contribution to the economic development of the host State.

34. Often, the definition of 'investment' in investment treaties is broad and includes shareholdings or contributions by joint venture partners. For that reason, insolvency has often not been a barrier to the establishment of jurisdiction *ratione materiae*. Thus, in the case of *Dan Cake v Hungary*, for instance, the tribunal concluded that 'there is no doubt that Dan Cake's shares in [its insolvent subsidiary] Danesita are a direct investment in Hungary. It has not been contended that this investment was not made in conformity with Hungarian law. The liquidation of Danesita therefore affects Dan Cake's direct investment in Hungary, and Dan Cake has a right to the protection offered by the Treaty in relation to it'.[40] In another insolvency-related case, *Sistem Mühendislik Inşaat Sanayi ve Ticaret A.Ş. v Kyrgyz Republic,*[41] the parties had entered into a joint venture with a Kyrgyz company which was subsequently declared insolvent by a Kyrgyz court. While the Kyrgyz State contended that the joint venture partner Sistem had not made an investment because it had not transferred 'its own money or resources',[42] 'the tribunal decide[d] that Sistem had made an investment, in the form of its investment of know-how and services in the construction of the hotel, its operation of the hotel, its purchase of [the other joint venture partner] Ak-Keme's share of the participation in the project, its payment of Ak-Keme's debts, and its reinvestment of (a share of) its profits from the running of the hotel'.[43]

39 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 18 March 1965, entered into force on 14 October 1966, 575 UNTS 159 ('ICSID Convention'), Article 25(1).

40 *Dan Cake (Portugal) S.A. v Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability, 24 August 2015, at para. 73.

41 *Sistem Mühendislik Inşaat Sanayi ve Ticaret A.Ş. v Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1.

42 *Id.* Decision on Jurisdiction, 13 September 2007, at para. 85.

43 *Id.* at para. 96.

35. Indeed, an investment may be constituted by several, arguably independent, activities as illustrated by *Festorino Invest and others v Poland*.[44] In that case, the claimants were shareholders in a Polish company, Blue Gas N'R'G Holding Sp. Z.o.o. ('Blue Gas Holding'), which had been granted concessions for exploration and extraction of natural gas in Poland. The claimant alleged that the delayed issuance of licenses and administrative approvals by the Polish authorities resulted in the insolvency of one of the Special Purchase Vehicles ('SPVs') set up by Blue Gas Holding, Blue Gas Uników. The respondent argued that the various SPVs could not be seen as one investment as they involved separate licensing agreements and lacked a singular business plan. The tribunal held that while there was no clear test applicable in cases such as this to determine whether arguably independent projects can be considered a unified venture to the extent of qualifying as a single investment, the interrelation of the SPVs' activities under the overarching Blue Gas Group business concept was sufficient to constitute a single investment.

36. Tribunals have also found that loans and debts arising from arbitral awards may indirectly constitute investments. In *Frontier Petroleum Services Ltd v The Czech Republic*,[45] the Canadian claimant company had obtained interim and final awards in Swedish arbitration proceedings against a Czech company, MA. MA was declared insolvent before the awards were made. When Frontier sought to enforce the awards in the Czech Republic, the courts refused to recognise or enforce them, leading Frontier to bring arbitral proceedings for the Czech courts' wrongful failure to recognise and enforce the awards in accordance with the New York Convention. While the host State disputed that there was a sufficient nexus between the 'measures' taken and the 'investment', the tribunal held:

> Claimant's original investment consisted of the payments made to MA [...], which were transformed into an entitlement to a first secured charge in the Final Award. The Tribunal also notes that Article 1(a) of the BIT provides that '[a]ny change in the form of an investment does not affect its character as an investment'. Accordingly, by refusing to recognise and enforce the Final Award in its entirety, the Tribunal accepts that Respondent could be said to have affected the management, use, enjoyment, or disposal by Claimant of what remained of its original investment.[46]

37. Similarly, in *MNSS B.V. and Recupero Credito Acciaio N.V v Montenegro*,[47] the tribunal agreed that loans made to a later insolvent entity alongside share acquisitions amounted to investments.

38. The above cases illustrate the degree of flexibility, definitional breadth and regard to economic reality that may be employed when analysing the 'investment' requirement, particularly in the insolvency context.

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44 *Festorino Invest Limited, Fosontal Limited, Petry Salesny, Peter Derendinger and Petra Rojicekblu v The Republic of Poland*, SCC Case No. 2018/098.

45 *Frontier Petroleum Services Ltd v The Czech Republic*, PCA Case No. 2008-09.

46 *Frontier Petroleum Services Ltd v The Czech Republic*, PCA Case No. 2008-09, Final Award, 12 November 2010, at para. 231.

47 *MNSS B.V. and Recupero Credito Acciaio N.V v Montenegro*, ICSID Case No. ARB(AF)/12/8.

2) *Extent of tribunals' jurisdiction in relation to insolvency in treaty arbitration*

39. In commercial arbitration, there are certain issues in respect of insolvency which fall outside the jurisdiction of an arbitral tribunal or are considered to be 'non-arbitrable'. For example, as noted above, a tribunal cannot arbitrate certain types of disputes due to public policy reasons, including declarations of insolvency, appointment of trustees, and distribution of assets. In general, these issues are considered to be 'core' or 'pure' insolvency issues, almost universally accepted to be decided exclusively by competent State courts with jurisdiction over insolvency proceedings.

40. Other cases demonstrate that in the investment treaty context, an arbitral tribunal may have jurisdiction to decide on the compatibility of certain decisions in State insolvency proceedings with the host State's investment treaty obligations. This is to be contrasted with commercial arbitration where it is accepted that there are certain 'core' or 'pure' insolvency issues which fall outside the jurisdiction of an arbitral tribunal or are considered to be 'non-arbitrable', such as declarations of insolvency, appointment of trustees, and distribution of assets.

41. The case of *Dan Cake v Hungary*[48] is a pertinent example. After the claimant had acquired a majority shareholding in Hungarian company Danesita, several of Danesita's creditors had initiated liquidation procedures against it, leading the Hungarian Insolvency Court to declare the company insolvent and appoint a liquidator. Under the Hungarian Insolvency Act, the liquidator is obliged to proceed with the public sale of a company's assets within 120 days of the date of the liquidation order, unless the creditors agree to postpone the sale process. Danesita exercised its right to request the court to convene a composition hearing, where creditors may approve an agreement with the company. The Insolvency Court denied Danesita's request and ordered it to make several supplementary filings, listing seven requirements to be fulfilled before a composition hearing could be convened. The decision also noted the liquidator's statutory duty to sell the company's assets within 120 days of the liquidation order. Shortly after the Insolvency Court's decision (which could not be appealed), the liquidator announced and executed the public sale of Danesita's assets. The tribunal found that the Hungarian Insolvency Court's conduct of the liquidation proceedings constituted a breach of Hungary's obligations under the Hungary-Portugal BIT to accord fair and equitable treatment to Dan Cake's investment and not to impair the investment by unfair measures.

42. Similarly, the case of *Sistem Mühendislik Inşaat Sanayi ve Ticaret A.Ş. v Kyrgyz Republic*[49] resulted in the tribunal's review of national insolvency proceedings. The case concerned a joint venture formed in 1992 by the claimant and a Kyrgyz company, Ak-Keme, for the purpose of building and operating a hotel in Bishkek. Ak-Keme went into insolvency in 1998 and the claimant became the sole owner pursuant to a share purchase agreement. The tribunal held that the decision of the Leninskiy District Court of the City of Bishkek, which was upheld by the Bishkek City Court and the Kyrgyz Supreme Court, abrogated the claimant's ownership rights by invalidating the agreement:

48 *Dan Cake (Portugal) S.A. v Hungary*, ICSID Case No. ARB/12/9.

49 *Sistem Mühendislik Inşaat Sanayi ve Ticaret A.Ş. v Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1.

> That abrogation was effected by an organ of the Kyrgyz State, for which the Kyrgyz Republic is responsible. It is well established that the abrogation of contractual rights by a State, in the circumstances which obtained in this case, is tantamount to an expropriation of property by that State. The Court decision deprived the Claimant of its property rights in the hotel just as surely as if the State had expropriated it by decree.[50]

43. The tribunal in *Infinito Gold Ltd. v Costa Rica,*[51] which concerned Costa Rica's revocation through court and executive measures of Infinito's concession for a gold mining project in northern Costa Rica, agreed with the approach taken in *Sistem v Kyrgyz Republic*. The *Infinito* tribunal concluded that domestic courts' decisions are not 'immune from scrutiny at the international level', finding that 'judicial decisions that are arbitrary, unfair or contradict an investor's legitimate expectations may also breach the FET standard'.[52]

44. Consequently, while 'core' insolvency matters are frequently deemed not to be arbitrable as a matter of national law, investment tribunals may have jurisdiction to determine whether decisions taken by the authorities of a host State as regards insolvency matters are compatible with a State's obligations under a treaty.

E. Jurisdiction ratione temporis

45. Jurisdiction *ratione temporis* refers to the temporal scope of an investment tribunal's powers under a treaty. Generally, for a tribunal to have jurisdiction the measures which are the subject of the dispute must have been taken by the host State and their effects on the investment must have been felt when the investment instrument was in force (and thus applicable to qualifying investments).[53]

46. Although investment cases involving the insolvency of a claimant or underlying investment entity do not necessarily deal with unique issues of jurisdiction *ratione temporis* vis-à-vis the insolvent entity, they highlight that the timing of a national insolvency decision may, in certain circumstances, impact a tribunal's finding on jurisdiction.

47. In *Phoenix Action v Czech Republic*.[54] Phoenix was an investment vehicle set up by an individual under criminal investigation by the Czech authorities after the investigation had commenced. Phoenix in turn invested into a company, BP, whose corporate subsidiary invested into separate companies, two of which went insolvent as a result of the measures taken by the Czech government in the course of the criminal

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50 *Sistem Mühendislik Inşaat Sanayi ve Ticaret A.Ş. v Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award, 9 September 2009, at para. 118.

51 *Infinito Gold Ltd. v Costa Rica*, ICSID Case No. ARB/14/5.

52 *Id.* Award, 3 June 2021, at para. 359.

53 An investment made before an investment instrument enters into force may be protected by the instrument depending on its terms. *See*, *eg*, Treaty between the Federal Republic of Germany and Ukraine on the Promotion and Mutual Protection of Capital Investments, signed 15 February 1993, Article 9 (specifying that the BIT applies to investments made prior to its entry into force).

54 *Phoenix Action Ltd v Czech Republic*, ICSID Case No. ARB/06/5.

investigation. Consequently, Phoenix filed a request for arbitration under the Czech Republic-Israel BIT 1997. The tribunal held that it had no jurisdiction *ratione temporis* in relation to Phoenix's claims that arose before the date of its investment, as the BIT did not apply to measures taken by the Czech Republic before then. Similarly, the tribunal did not have jurisdiction in relation to measures taken by the Czech Republic after the date when Phoenix sold its investments. In other words, jurisdiction *ratione temporis* was limited to the period during which Phoenix actually controlled the investments.

48. Jurisdiction *ratione temporis* also concerns the status of the investment at the time that a host State's alleged violation of an investment instrument occurs. *Peter Franz Vöcklinghaus v Czech Republic*[55] involved a claimant who had an interest in receivables from a Czech company in connection with loans made by the claimant's German companies. The Czech company ran into financial difficulties and declared insolvency, leading the claimant to bring a claim under the Czech Republic-Germany BIT 1990, alleging that the insolvency proceedings constituted a breach of the BIT. The tribunal held, *inter alia*, that it did not have jurisdiction *ratione temporis* as by the time the alleged breaches took place, the claimant no longer had any legal or beneficial interest in the loans used to finance the purchase.

49. It is well established that a treaty will not, in the absence of clear wording to the contrary, apply retroactively to measures or acts that occurred before the treaty came into force. In *Inmaris Perestroika v Ukraine*,[56] Ukrainian governmental intervention prevented various Inmaris companies from using a windjammer sail training ship, despite previous agreements to the contrary. These actions caused significant financial damage to the Inmaris companies and the insolvency of some of them. Inmaris attempted to commence arbitration under the Germany-Ukraine BIT 1993. The actions taken by the Ukrainian government had taken place before the BIT came into force and the tribunal found that it lacked jurisdiction *ratione temporis*.

50. Actions of a host State constituting a continuous or composite act beginning before the entry into force of a treaty and extending thereafter can engage the temporal scope of a treaty. According to the ILC Articles on Responsibility of States for Internationally Wrongful Acts 2001 ('ILC Articles'), '[t]he breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation'.[57] The ILC Articles define a composite act as 'a series of actions or omissions defined in aggregate as wrongful'.[58]

51. The case of *PACC v Mexico*,[59] for instance, concerned a Singaporean claimant that had acquired a Mexican company via a Mexican intermediary which in turn had gone insolvent as a result of actions by the Mexican courts. The Mexico-Singapore BIT 2009 required that a notice of intent be delivered within three years of the events relied on, which the respondent argued had not taken place. Considering whether it lacked jurisdiction *ratione temporis*, the tribunal found that the relevant Mexican court order

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55 *Peter Franz Vöcklinghaus v Czech Republic*, UNCITRAL, Final Award, 19 September 2011.

56 *Inmaris Perestroika Sailing Maritime Services GmbH and others v Ukraine*, ICSID Case No. ARB/08/8.

57 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 2001 Yearbook ILC II(2) ('ILC Articles'), Article 14(2).

58 *Id.* Article 15(1).

59 *PACC Offshore Services Holdings Ltd v United Mexican States*, ICSID Case No. UNCT/18/5.

was the only measure to have occurred before the (undisputed) three-year cut-off date. The tribunal considered the order to be an act of continuing character, bringing it within the qualifying period, and there was jurisdiction *ratione temporis* as a result.

52. These types of time limits within which claims must be brought, and which may be referred to as limitation periods, are found in various treaties. For example, Articles 1116(2) and 1117(2) of NAFTA provide that claims must be brought within three years of the investor first acquiring knowledge of the breach and the fact that it has incurred a loss.[60]

F. Jurisdiction *ratione loci*

53. Finally, to establish jurisdiction *ratione loci,* the qualifying investment must have been made in the territory of the host State. In practice, 'jurisdiction *ratione materiae* is often analysed in conjunction with jurisdiction ratione loci'.[61]

54. Most tribunals and commentators take a relatively liberal or 'functional' view to determine whether an investment has an impact in the host State, focusing more on the end result as opposed to assessing the nature of the actual investment itself. In *Fedax N.V. v Republic of Venezuela* ('*Fedax*'),[62] Venezuela made a *ratione loci* objection to the tribunal's jurisdiction in respect of financial instruments claimed to constitute the claimant's investment. The claimant had never expended financial resources in Venezuela for a commercial undertaking, and it provided no service whose point of delivery was in the territory of the purported host State. However, in dismissing Venezuela's argument, the tribunal took a wide view and stated that it 'is a standard feature of many international financial transactions that the funds involved are not physically transferred to the territory of the beneficiary, but put at its disposal elsewhere'.[63] The tribunal substituted a territorial requirement with a much broader functional analysis of whether 'the funds made available are utilized by the beneficiary of the credit, as in the case of the Republic of Venezuela, so as to finance its various governmental needs'.[64]

55. Similarly, the tribunal in *Abaclat v Argentina,* when considering the territorial requirement in relation to sovereign bonds purchased on the secondary market, focused on the end result rather than the actual investment.[65] The majority highlighted that the relevant criteria for investments of a purely financial nature should be 'where and/or for the benefit of whom the funds are ultimately used, and

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60 North American Free Trade Agreement (1994) ('NAFTA'), Articles 1116(2) and 1117(2).

61 *See* Y. Mersch, et al., *The New Challenges Raised by Investment Arbitration for the EU Legal Order, in* European Central Bank, Legal Working Papers Series No. 19 (2019), at 32; M. Waibel, *Subject Matter Jurisdiction: The Notion of Investment,* 19 ICSID Reports 25 (2021), at paras. 77-84.

62 *Fedax N.V. v Republic of Venezuela*, ICSID Case No. ARB/96/3.

63 *Fedax N.V. v Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, 11 July 1997, at para. 41.

64 *Id. See also SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, ICSID Case No. ARB/ 02/6, Decision on Objections to Jurisdiction, 29 January 2004, at para. 57 (finding that pre-shipment inspection services conducted in a port outside the host State did not preclude qualification as an investment, since the contract's main purpose was the delivery of inspection certificates in the Philippines).

65 *Abaclat and others (formerly Giovanna A. Beccara and others) v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011.

not the place where the funds were paid out or transferred'.[66] A similar approach has been adopted by subsequent tribunals, including in *Ambiente Ufficio v Argentina,* where the majority held that 'to assess where an investment was made, the criterion must be to whose economic development an investment contributed'.[67]

56. In certain contexts, 'territory' may be interpreted to include those areas where a State exerts significant extraterritorial conduct and/or has 'effective control', so as to deem areas outside of its *de jure* boundaries within its territory.[68] In the investment treaty context, several tribunals have found that Russia's annexation and *de facto* control of the Crimean Peninsula extended Russia's 'territory' for purposes of the Russia-Ukraine bilateral investment treaty (Russia-Ukraine BIT).[69] For example, the *Oschadbank* tribunal concluded that, according to the Russia-Ukraine BIT, the term 'territory' means 'a geographical area over which a Party exercises jurisdiction or control'.[70] In reviewing investment tribunals' jurisdiction, domestic courts have adopted similar reasoning and espoused the view that the territory of a Contracting State should include any area over which it exercises jurisdiction and effective control.[71]

57. In the insolvency context, if a host State caused the insolvency of the claimant or the claimant's subsidiary, then it naturally follows that a territorial link is more likely to be found because either the State took action within its own territory (which caused damage to the investor/investment) or it took extraterritorial action outside of its territory (where it may be deemed to have effective control). There may be factual scenarios where the actions of a State may cause the insolvency of the investment in another State, which could potentially be protected by a broadly-worded investment treaty and be sufficient to provide jurisdiction to a tribunal.

58. The more complex, intangible or distant an alleged investment is (which may, for example, be the case when it is in the hands of an insolvency administrator or trustee of an insolvent entity or the conduct results from a chain of events related to an insolvency event), the greater the likelihood that it will be challenged on the basis of a lack of jurisdiction *ratione loci*, as was seen in *Fedax.*

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66 *Id.* at para. 374.

67 *Ambiente Ufficio S.p.A. and others (formerly Giordano Alpi and others) v Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, at para. 499.

68 *See, eg, Loizidou v Turkey* (preliminary objections) (GC), no.15318/89, ECtHR, 23 March 1995.

69 *See SC CB PrivatBank and Finance Company Finilon LLC v The Russian Federation*, PCA Case No. 2015-21; *Limited Liability Company Lugzor et al. v The Russian Federation*, PCA Case No. 2015-29; *PJSC Ukrnafta v The Russian Federation*, PCA Case No. 2015-34; *Stabil LLC et al. v The Russian Federation*, PCA Case No. 2015-35; *Everest Estate LLC et al. v The Russian Federation*, PCA Case No. 2015-36; *Oschadbank v The Russian Federation*, PCA Case No. 2016-14 (set aside by the Paris Court of Appeal for other reasons); *Aeroport Belbek LLC and Igor Valerievich Kolomoisky v The Russian Federation*, PCA Case No. 2017-07.

70 J. Braun, *Uncovered: Tribunal in previously-unseen award against Russia upheld jurisdiction over Crimea-related claims, and awarded over 1.3 billion USD in compensation*, Investment Arbitration Reporter (2021).

71 *See NJSC Naftogaz of Ukraine, et. al. v The Russian Federation*, Hague Court of Appeal, 19 July 2022, ECLI:NL:GHDHA:2022:1295, at para. 5.5.20.

G. Conclusion

59. As the above demonstrates, there are complex jurisdictional issues which can arise in an insolvency context in investment arbitration. In particular, questions of jurisdiction *ratione personae* and *ratione materiae* will often arise requiring an in-depth analysis of (1) who is the appropriate party holding an investment and is capable of pursuing an investment claim (which will depend on the complex interplay of domestic rules with the applicable bilateral and/or multilateral frameworks); and (2) whether the subject matter in question falls within the tribunal's jurisdiction, such as being able to determine issues concerning State insolvency proceedings, the appointment and decisions of trustees and distribution of assets.

III. Shareholder standing for reflective loss claims

Calum Agnew

A. Introduction

60. Most foreign investors invest through corporations. The corporate form coordinates capital from diverse contributors and limits investors' liability, without limiting their ability to profit. But these advantages come at a cost. In exchange for coordination, shareholders lose some agency. And in exchange for limited liability, shareholders' equity is at increased risk. They are the last to recover if a company winds down or becomes insolvent, with priority going to the company's creditors.

61. Under domestic law, a system of priority rules ensures the bargain inherent to the corporate form works effectively. One of these is the rule against shareholders' claims for 'reflective loss'. In essence, this rule deprives a shareholder of standing to claim for harm suffered because of an injury to the company in which she owns shares. As the Court of Appeal for England and Wales explained in *Prudential v Newman*:

> But what [the shareholder] cannot do is to recover damages merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in dividend, because <u>such a "loss" is merely a reflection of the loss suffered by the company</u>. The shareholder does not suffer any personal loss. His only 'loss' is through the company, in the diminution in the value of the net assets of the company, in which he has (say) a 3 per cent, shareholding. The plaintiff's shares are merely a right of participation in the company on the terms of the articles of association. The shares themselves, his right of participation, are not directly affected by the wrongdoing. The plaintiff still holds all the shares as his own absolutely unencumbered property.[72]

The rule against reflective loss is itself an application of a much older principle, known to common lawyers as the rule in *Foss v Harbottle*: the proper claimant for a harm to a company is the company itself.[73] These rules—and their analogues under other legal systems—place the authority to direct a claim in the corporation (and not its shareholders) and ensure that any recovery flows to the corporation (and not its shareholders). While potentially inconvenient to shareholders, the rules preserve the centrality of the corporate form and, in doing so, protect the interest of all corporate stakeholders (including non-claimant shareholders and creditors).

62. Customary international law likewise regulates shareholder standing. The law on diplomatic protection distinguishes between a shareholder's direct rights (for example, to vote at a meeting of shareholders

72 *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)*, [1982] 1 All ER 354, 366-367 (emphasis added). The UK Supreme Court's most recent comments on the doctrine are found in *Johnson v Gorewood*, [2000] UKHL 65, [2002] AC 1 and *Sevilleja v Marex Financial Ltd.*, [2020] UKSC 31.

73 *Foss v Harbottle* (1843), 67 ER 189.

or receive a declared dividend) and a shareholder's economic interests in a company.[74] A State cannot elevate the latter to the international plane through diplomatic protection.[75] The classic statement of the distinction comes from the International Court of Justice's judgment in *Barcelona Traction*:

> Not a mere interest affected, but solely a right infringed involves responsibility, so that an act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected.[76]

The Court explained that 'the interests of the shareholders are both separable and indeed separated from those of the company' and echoed the rationale for the prohibition on reflective loss:

> [W]henever a shareholder's interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action; for although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed.[77]

Thus, in *Barcelona Traction*, Belgium could not espouse against Spain the claims of certain Belgium shareholders in an insolvent Canadian company. The rights at issue belonged to the Canadian company, not its Belgian shareholders, and only Canada could assert those rights through diplomatic protection.

63. As alluded to in *Barcelona Traction* itself, the situation is markedly different under international investment law.[78] Foreign investors often assert standing because of (or through) their interest in some other, legally separate, company incorporated in the host State. Moreover, investors often premise their claims not on some direct injury to their rights *qua* shareholder but rather their economic interest in their shareholding.

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74 The ILC's Draft Articles on Diplomatic Protection refer to shareholder claims at Articles 11 and 12. Article 11 provides the general rule that diplomatic protection cannot be exercised over shareholders in relation to an alleged injury of a corporation: '[a] State of nationality of shareholders in a corporation shall not be entitled to exercise diplomatic protection in respect of such shareholders in the case of an injury to the corporation unless: (a) the corporation has ceased to exist according to the law of the State of incorporation for a reason unrelated to the injury; or (b) the corporation had, at the date of injury, the nationality of the State alleged to be responsible for causing the injury, and incorporation in that State was required by it as a precondition for doing business there'. By contrast, Article 12 provides that 'an international wrongful act of a State caus[ing] direct injury to the rights of shareholders as such, as distinct from those of the corporation' may be elevated to the international plane via diplomatic protection. *See* International Law Commission, *Draft Articles on Diplomatic Protection with Commentaries*, 2 Yearbook of the International Law Commission 26 (2006).

75 By contrast, in *ELSI v Italy*, the ICJ allowed the United States to assert diplomatic protection over two corporate shareholders when Italy allegedly harmed those shareholders' direct rights, including the 'direct right to liquidate [the company's] assets in an orderly fashion'. *Elettronica Sicula S.p.A. (ELSI) (United States of America v Italy)*, Judgment, 1989 ICJ Rep. 15, at para. 65 (quoting counsel for the Applicant).

76 *Case Concerning Barcelona Traction, Light, and Power Co., Ltd (Belgium v Spain)*, Judgment, 1970 ICJ Rep. 3, at para. 46.

77 *Case Concerning Barcelona Traction, Light, and Power Co., Ltd (Belgium v Spain)*, Judgment 1970 ICJ Rep. 3, at paras. 44-45.

78 *See Case Concerning Barcelona Traction, Light, and Power Co., Ltd (Belgium v Spain)*, Judgment 1970 ICJ Rep. 3, at paras. 89-90 ('[I] n the present state of the law, the protection of shareholders requires that recourse be had to treaty stipulations or special agreements directly concluded between the private investor and the State in which the investment is placed. States ever more frequently provide for such protection, in both bilateral and multilateral relations, either by means of special instruments or within the framework of wider economic arrangements [...]').

64. It may surprise an outsider to learn that the typical investor-State dispute looks much like a claim that many other systems of law would bar.[79] Features unique to international investment law go some way to explaining the difference. To paint with a broad brush, two 'structural' features explain the frequency of such shareholder claims in international investment law:

- The first reason is practical and arises from the structure of foreign investments themselves. Investors seldom carry out business abroad in their own right. Instead, investors own shares (or another form of participation) in another company incorporated under the laws of the host State. The investor's local company carries out the real economic activity of the investment.[80] A corporate structure of this sort has many benefits for the foreign investor, of course, but it is often a practical necessity. In fact, the operation of a local company is often a precondition for investment and sometimes a background requirement for doing business under the host State's laws.[81]

- The second concerns the structure of international investment law. International investment law protects *foreign* investments. The general rule—with notable exceptions, discussed later in this Chapter—is that a claimant in an investor-State proceeding must have nationality other than that of the host State. Accordingly, locally incorporated enterprises generally lack standing to claim against the host State, no matter whether their shareholders are themselves beneficiaries of investment treaties.

The combination of these two factors makes shareholder standing an important—arguably indispensable—feature of the international investment system.

65. Yet, despite the preponderance of shareholder claims in investment-treaty jurisprudence, the concerns animating domestic legal system's reticence over shareholders standing (illustrated by the rule against reflective loss) apply with continued force in the investor-State context. Shareholder standing, and particularly reflective claims, thus requires policymakers and tribunals to strike a delicate balance between the rights and interests of foreign investors, on one hand, and those of creditors and local stakeholders within the host State, on the other. This balance is particularly important where insolvency is concerned.

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79 Indeed, the very first ICSID case was a case of this sort. In *AAPL v Sri Lanka*, the investment was framed as the Hong Kong claimant's shareholding in a Sri Lankan public company and the loss complained of was to the property of the Sri Lankan company. *See Asian Agricultural Products Ltd. (AAPL) v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990.

80 *See*, *eg*, C. H. Schreuer, *Shareholder Protection in International Investment Law*, Transnational Dispute Management 3 (2005), at 4-5 ('Investments are frequently carried out through companies incorporated in the host State. In fact, many States require the establishment of a local company as a precondition for foreign investment. The local company may have been established by the foreign investor especially for the purpose of carrying out a particular investment. Alternatively, the foreign investor may have acquired shares in an existing company').

81 *See*, *eg*, *Sergei Paushok et al. v Mongolia,* UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, at para. 202 ('Claimants' investment are the shares of GEM, a company incorporated under Mongolian law as required by that country in order to engage into the mining business and, through ownership of those shares, Claimants are entitled to make claims concerning alleged Treaty breaches resulting from actions affecting the assets of GEM [...] To argue that Claimants could not make such Treaty claims would render it practically meaningless in many instances; a large number of countries require foreign investors to incorporate a local company in order to engage into activities in sectors which are considered of strategic importance (mining, oil and gas, communications etc.). In such situations, a BIT would be rendered practically without effect if it were right to argue that any action taken by a State against such local companies or their assets would not be subject to Treaty claims by a foreign investor because its investment is merely constituted of shares in that local company').

B. Standing for Shareholder Claims

66. Standing refers to a claimant's ability to advance (or defend against) a particular claim. A claimant's standing is a condition for advancing a claim, on top and independent of jurisdictional conditions (*egeg*, consent to arbitration). The essential question is whether the claimant has a legitimate interest in advancing their claim.

67. International investment law has typically found that shareholders have standing to claim for reflective loss, no matter whether it is asserted directly or indirectly.

1) Shareholder standing for direct injuries

68. The most straightforward basis for shareholder standing is a direct injury to a shareholder's rights *qua* shareholder. Many, if not all, investment treaties include 'shares' among the treaty's protected investments.[82] If a shareholder can point to a discrete harm to her rights as a shareholder, there is generally no question of her standing to claim for that loss. The clearest example might be a direct expropriation of equity, which may occur when a State simply seizes shares or orders their disposal.[83] Other examples of direct injury include the frustration of an investor's right to receive a declared dividend or vote at a general meeting of shareholders.[84] In the insolvency context, forcing a company into an insolvency process without justification—thereby removing the investor from management—

82 *See*, *eg*, Canada Model Foreign Investment and Promotion Agreement (2021), Article 1 (defining investment to include 'a share, stock or other form of equity participation in an enterprise'); Agreement between the Government of the Kingdom of Norway and the Government of the Republic of Indonesia on the Mutual Promotion and Protection of Investments (1991), Article 1 (defining 'investment' to mean 'any kind of asset invested by an investor,' including 'shares, stocks, debentures or any other forms of participation in companies'); Treaty between the United States of America and the Arab Republic of Egypt Concerning the Reciprocal Encouragement and Protection of Investments (1986), Article 1 (defining 'investment' to mean 'every kind of asset owned or controlled,' including 'a company or shares, stock, or other interests in a company or interests in the assets thereof'); Agreement between Japan and the Sultanate of Oman for the Reciprocal Promotion and Protection of Investment (2015), Article 1 (defining 'investment' to mean 'every kind of asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment,' including 'shares, stocks or other forms of equity participation in an enterprise, including rights derived therefrom').

83 Some have proposed that the expropriation of assets held by a local company is a direct injury to the shareholders of the local company. Zachary Douglas, for example, argues that '[t]he shareholder's right to the enjoyment of its property in its shares is devoid of content if those shares are in an empty corporate shell' and that therefore 'the direct expropriation of the company's assets is capable of constituting the indirect expropriation of the shareholding as well'. Z. Douglas, The International Law of Investment Claims (2009), at 426. *See also* Article 5(2) of the UK-USSR BIT of 1989 (providing protection from expropriation to 'the assets of a company or enterprise which is incorporated under the law in force in any part of its own territory, and in which the investors of the other Contracting Party have a shareholding'). This approach was taken recently by the Tribunal in *Lopez-Goyne v Nicaragua*. *See The Lopez-Goyne Family Trust and others v Republic of Nicaragua*, ICSID Case No. ARB/17/44, Award, 1 March 2023, at paras. 385-386 ('Since the Contract was ION's only asset, its termination wiped out any present or future potential value of ION's shares. Therefore, the effect of the termination of the Concession, that is the object of the Claim, is not a mere reduction in the value of ION's shares, but a complete elimination of their value. It follows that, despite Claimants' hurried answer to the Tribunal's question and contrary to Respondent's characterisation, the Claim is not for reflective loss, for a decrease in the value of their shareholding caused by injury to ION, but rather for direct loss').

84 *Daniel W. Kappes and Kappes, Cassidy & Associates v Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections, 13 March 2020, at para. 137 ('[T]here is no dispute, for example, that a claimant could invoke [...] a direct injury to its shareholder rights, such as interference with dividend distribution or voting rights, or where the enterprise's assets have been expropriated, which would leave the shareholder with bare title to a stripped entity').

would also seem to be a potential violation of a shareholders' rights *qua* shareholder, particularly the shareholder's right to manage the company's affairs.

2) Shareholder standing for indirect injuries

69. Shareholder <u>indirect</u> claims are both more common and more difficult. Put broadly, an indirect shareholder claim refers to any time when the investor's loss is not to her own rights as a shareholder—she continues to enjoy the rights associated with the ownership of shares—but suffered through her economic interest in 'her' company and its assets. So, for example, an investor may claim the indirect expropriation of a concession held by a local company, or unfair and inequitable treatment making the local company's operations less profitable.[85] In these examples, the shareholder has suffered no injury to her own rights. Her injury is suffered through her economic interest in the local company. In this sense, her loss is merely reflective of the harm suffered more directly by 'her' company.

70. Although these claims would likely face standing-related hurdles if advanced under other bodies of law in other forums, investment-treaty tribunals have generally permitted them. When respondent States have objected to standing, tribunals have almost uniformly found that the inclusion of 'shares' among a treaty's covered investment implies shareholder standing not just for direct injuries (discussed above) but also for these kinds of indirect, consequential losses, where the shareholder's injury is expressed as a diminution in her share's value.[86] This approach arises from the very expansive definition of a covered investment under most investment treaties. As one commentator explains:

> Given the wide definition of investment contained in most bilateral investment treaties, if an 'investment' can include shares in a company there is no conceptual

85 *See*, *eg*, *LG&E Energy Corp.*, *LG&E Capital Corp. and LG&E International Inc. v Argentine Republic*, ICSID Case No. ARB/02/1, Decision of the Arbitral Tribunal on Objections to Jurisdiction, 30 April 2004 (dismissing Argentina's objection to the indirect shareholder claim); *Id.* Decision on Liability, 3 October 2006 (finding Argentina responsible for unfair and inequitable treatment through its redenomination of certain contracts held by the claimants' subsidiaries in pesos rather than US dollars); *Id.* Award, 25 July 2007 (awarding damages based on dividends that the claimants might have received but for Argentina's wrongful conduct).

86 *See*, *eg*, *Impregilo S.p.A. v Argentine Republic (I)*, ICSID Case No. ARB/07/17, Award, 21 June 2011, at para. 138 ('It follows from Article l(1)(b) [defining an investment to include 'shares of stock, interests or any other form of participation, including minority or indirect interest, in a company incorporated in the territory of either Contracting Party'] of the Argentina-Italy BIT that Impregilo's shares in AGBA were protected under the BIT. If AGBA was subjected to expropriation or unfair treatment with respect to its concession - an issue to be determined on the merits of the case - such action must also be considered to have affected Impregilo's rights as an investor, rights that were protected under the BIT'); *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16 May 2006, at para. 49 ('Accordingly, under the plain language of these BITs, the Tribunal finds that Suez's as well as AGBAR's and InterAguas' shares in APSF are 'investments' under the Argentina-France and Argentina-Spain BITs. These shareholders thus benefit from the treatment promised by Argentina to investments made by French and Spanish nationals in its territory. Consequently, under Article 8 of the French treaty and Article X of the Spanish treaty, these shareholder Claimants are entitled to have recourse to ICSID arbitration to enforce their treaty rights. Neither the Argentina-France BIT, the Argentina-Spain BIT, nor the ICSID Convention limit the rights of shareholders to bring actions for direct, as opposed to derivative claims. This distinction, present in domestic corporate law of many countries, does not exist in any of the treaties applicable to this case'). *See also RosInvestCo UK Ltd. v The Russian Federation*, SCC Case No. 079/2005, Final Award, 12 September 2010, at para. 608 (observing that 'modem investment treaty arbitration does not require that a shareholder can only claim protection in respect of measures that directly affect shares in their own right, but that the investor can also claim protection for the effect on its shares by measures of the host state taken against the company').

reason to prevent an investor recovering for damage caused to those shares which has resulted in a diminution in their value.[87]

Thus, when asked whether a shareholder may assert a claim 'through' its shares, tribunals have generally answered positively.[88]

71. Not every indirect shareholder claim is a claim for diminishment in value, however. Many investment treaties expressly include assets 'indirectly' controlled—for example, real property—among a treaty's protected investments.[89] If the treaty does so, a shareholder may assert standing another way, by formulating her claim not over her interest in her shareholding but over assets held through shares. The shareholder, in other words, has not just an interest but a concrete right, despite the absence of legal title.[90] This too is a basis for standing. So, for example, in *Azurix (I)*, the claimant formulated their investment to include both its shares in subsidiaries and those subsidiaries' interest in a concession.[91] The tribunal had little difficulty finding an investment on either ground:

> A company, shares held in a company or rights under a contract, any contract, qualify as an investment. Provided the direct or indirect ownership or control is established, rights under a contract held by a local company constitute an investment protected by the BIT.[92]

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87 C. McLachlan et al., International Investment Arbitration: Substantive Principles (2017), at para. 6.123.

88 *See*, *eg*, S.A. Alexandrov, *The Baby Boom of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as Investors and Jurisdiction Ratione Temporis*, 4 Law & Practice of International Courts & Tribunals 19 (2005), at 45 (reviewing arbitral tribunals' decisions and observing that these decisions have given 'little if any credence to the argument that when a shareholder invokes a dispute relating to assets of the local company (eg, rights under a license, or contractual rights), such a dispute does not arise directly out of an investment in the stock of the company. Tribunals disposed of this argument in a rather summary fashion. It is clear that they all considered it to be beyond doubt that a shareholder's interest in a company includes an interest in the assets of that company, including its licenses, contractual rights, rights under law, claims to money or economic performance, etc., and that in finding jurisdiction they based that reasoning on the broad definition of investment in the applicable BITs').

89 For example, Article 2 of the Netherlands' Model BIT (2019) covers investments 'directly or indirectly owned or controlled by an investor of the other Contracting Party'.

90 *See*, *eg*, *Azurix Corp. v The Argentine Republic (I)*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, 1 September 2009, at paras. 91-94 (observing that, under the BIT at issue, an investor's protected investments included a broad range of assets 'owned or controlled directly or indirectly,' and that the shareholder could assert standing over both (i) its shares in a locally incorporated subsidiary and (ii) that subsidiary's assets). Some have argued that this sort of claim is just another a species of 'reflective' loss. For example, in a recent discussion paper, the OECD considered a 'reflective loss' claim to be any shareholder claim that is not for a direct loss – in other words, a reflective loss claim is any claim that is not (i) incurred by the investor in its capacity as a shareholder and (ii) distinct from any alleged injury to the company in which they hold shares. *See* OECD, *Shareholder Claims for Reflective Loss in Investment state Dispute Settlement: A 'Component-by-Component' Approach to Reform Proposals*, Informal Discussion Paper (2021), at 17. But there are important differences between a pure reflective loss claim and a claim brought for an indirect investment: First, as a matter of treaty interpretation, an investor's claim for indirectly held assets does not arise out of an investment in 'shares' and thus the basis of standing can be distinguished. Second, the investor's loss is distinct from a reflective loss (as that term is generally understood) in that the investor's injury is not in the diminishment in the value of its shares but the investor's rights, under the treaty, in investments held through those shares.

91 *See Azurix Corp. v The Argentine Republic (I)*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003, at paras. 59-66.

92 *Id.* at para. 63.

An open question is whether standing asserted on this basis, as distinct from an economic loss suffered through an interest in shares, has 'downstream' consequences for the shareholder's claim. In principle, a theory of enterprise valuation would seem inapt for losses of discrete assets under the investor's control.

3) *Circumstances precluding shareholder standing*

72. The comparatively 'permissive' approach to shareholder standing departs from the approach in both municipal law and the law of diplomatic protection. Yet no matter how ubiquitous these claims may be, the standing of investors to claim losses incurred 'through' shareholdings still is much debated. Several commentators, for example, have expressed doubt over whether States intended investment treaties to allow indirect shareholder claims in the expansive manner reflected in the jurisprudence.[93] For these critics, the inclusion of 'shares' among a treaty's covered investments does not imply that shareholders have a right to claim purely reflective losses. Likewise, a chorus of States has argued that restrictions on indirect shareholder standing found in customary international law apply with no less force in the investment-treaty context. The United States, Canada, Argentina, India, the Republic of Korea, Morocco and Peru have all interpreted investment treaties to preclude indirect shareholder claims in some way.[94]

73. These arguments have, to date, gained little traction. But this does not mean indirect shareholder standing is available in every case. In fact, several circumstances may lead to a lack of standing. Among these are (a) an exclusion of reflective loss claims in the relevant treaty, (b) abuse of rights, and (c) failure to articulate an injury to the shareholder.

(a) Express or implied exclusion of indirect claims in the treaty

74. As the tribunal in *HICEE v Slovakia* put it, the availability of shareholder standing for indirect claims is always 'controlled by the treaty' at issue.[95] If a treaty expressly precludes indirect shareholder claims,

93 *See*, *eg*, M. A. Clodfelter, J. D. Klingler, *Reflective Loss and Its Limits under International Investment Law*, *in* C.L. Beharry (ed.), Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration (2018), at 70-71 ('[T]ribunals have frequently failed to conduct sufficiently rigorous analyses of the issue, often instead relying on questionable premises or reasoning, or ignoring pertinent principles of [treaty] interpretation which arguably call their conclusions into question' of whether reflective loss is available); M. Waibel, *Coordinating Adjudication Processes*, Cambridge University Faculty of Law Legal Studies Paper Series No. 6/2014, at 23 (arguing that 'the limitations on derivative claims and reflective loss have thus far been improperly overlooked in [international investment law]' and that those limitations 'apply in [international investment law] as part of the applicable law (typically some form of domestic corporate law)').

94 OECD, *Shareholder Claims for Reflective Loss in Investment state Dispute Settlement: A 'Component-by-Component' Approach to Reform Proposals*, Informal Discussion Paper (2021), at 11-12.

95 *See HICEE B.V. v The Slovak Republic*, PCA Case No. 2009-11, Partial Award, 23 May 2011, at para. 147 ('When the Claimant says that 'investment treaty jurisprudence' gives a shareholder standing to pursue claims for damage to the assets of a company in which it holds shares, that is not a proposition that can be upheld by the Tribunal in so sweeping a form, given the default position in international law that the corporate form is recognized as legally distinct from the shareholders, and confers on the corporate entity the capacity to assert claims for damage suffered to it or its property. The true position, as the Tribunal understands it, is that the admissibility of shareholder claims depends upon the provisions of the investment protection treaty in question, and that investment protection treaties very frequently make provision to allow for shareholder claims, either explicitly or by necessary implication. The position, in other words, is controlled by the treaty, and the Tribunal can see no justification for calling into play a supposed proposition of general law in order to change or override what the treaty itself provides').

there is little doubt that—despite the inclusion of shares among a covered investment—standing should be refused.

75. Treaties expressly excluding indirect claims are, however, rare. One example is the recent Australia-China Free Trade Agreement. Article 9.12 of the China-Australia FTA ('ChAFTA') provides a mechanism for a so-called derivative or representative claim: a claimant may submit a dispute to arbitration either on its own behalf or on behalf of 'a juridical person that the claimant owns or controls directly or indirectly'.[96]

76. Derivative claim mechanisms allow a controlling shareholder—an important limitation—to claim in the name of its subsidiary, even though the subsidiary has the nationality of the host State, and thus serves as an important exception to the general rule precluding claims by nationals against their own States. Article 25(2)(b) of the ICSID Convention provides ICSID with jurisdiction over some such cases,[97] and a mechanism authorising claims of this sort can be found in NAFTA, CPTPP, DR-CAFTA, and many other treaties.[98] The ChAFTA differs from these other treaties in one important respect. If the claimant submits a dispute on its own behalf (an indirect shareholder claim) no reflective loss can be recovered:

> For greater certainty, the loss or damage incurred by the claimant that forms the subject matter of a claim […] shall not include loss or damage suffered by the claimant which is a result of loss or damage caused to an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly by reason of, or arising out of, the alleged breach by the respondent.[99]

96 ChAFTA, Article 9.12(2).

97 Article 25 of the ICSID Convention grants the Centre jurisdiction over 'any legal dispute arising directly out of an investment, between a Contracting State […] and a national of another Contracting State'. Sub-article 2(b) defines 'National of another Contracting State' to include 'any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention'. In other words, when the parties agree (generally, in the instrument of consent), a locally incorporated subsidiary under foreign control may be treated as foreign national – granting ICSID jurisdiction over the disputes between the local company and the host State.

98 NAFTA, Articles 1116 and 1117 provide two means by which a shareholder-investor may commence a claim. Article 1116 allows an investor to claim on its own behalf. Article 1117 allows an investor to bring a claim 'on behalf of an enterprise […] that the investor owns or controls directly or indirectly'. Similar wording is found in many other treaties, including the DR-CAFTA. *See also* Comprehensive and Progressive Agreement for Trans-Pacific Partnership (2018), Article 9.19(a) and (b); Dominican Republic-Central America FTA, article 10.16.1(a) and (b). In each of these examples, the article under which a claim is brought has procedural consequences. For example, under NAFTA Article 1121, a foreign investor brining a claim on its own behalf (under Article 1116) must provide a written waiver of its right to assert certain claims in other forums. If a foreign investor brings a claim on behalf of a locally incorporated enterprise (under Article 1117), however, Article 1121 requires that the investor and the enterprise submit such a waiver. Some treaties take a different approach. One common approach is to provide that foreign controlled, locally incorporated companies can be treated as a foreign national for the purposes of Article 25(2)(b) of the ICSID Convention. *See*, *eg*, UK-Indonesia BIT, Article 7(2). This allows foreign controlled, locally incorporated companies to claim under the BIT without additional conditions on the host State's consent to arbitration (such as the waivers required by NAFTA and similar treaties). In result, a foreign controlling shareholder can sometimes claim both on their own behalf and on behalf of the local enterprise simultaneously.

99 ChAFTA (2015), Article 9.12, n. 6. *See also* Article 9.12(2) ('In the event that an investment dispute cannot be settled by consultations under Article 9.11 within 120 days after the date of receipt of the request for consultations (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim: […] that the claimant has incurred loss or damage by reason of, or arising out of, that breach').

77. The possibility of a derivative claim gives shareholder-investors a route to advance a claim without recourse to theories of indirect standing or reflective loss. Compensation arising from a claim advanced in the locally incorporated subsidiary's name would be paid to the subsidiary (not the parent) and so shared among the corporate stakeholders following the usual rules of corporate governance (and, as relevant here, insolvency). The possibility of these claims arguably goes some way to neutralising the assertion that shareholder standing is, in a sense, indispensable for the efficacy of such treaties,[100] yet only rarely will it be in shareholders' interest to pursue a representative claim when the option to assert standing for a reflective loss claim is readily available. This is particularly true in the context of insolvency, given that the payment into the subsidiary's estate might not result in any dividend towards the shareholder; rather, the funds will probably be destined to pay outstanding debts.

78. Several States—including all the NAFTA contracting parties—have argued that the choice between a derivative claim and a reflective loss claim is illusory. In essence, the argument is that the availability of derivative claims (though provisions such as Article 1117 of NAFTA) effectively implies a prohibition on shareholder's reflective loss claims (under provisions like Article 1116 of NAFTA), even in the absence of explicit language like that found in the Australia-China FTA. Tribunals have been largely unmoved by the argument. The *UPS v Canada* tribunal, for example, characterised the distinction between an indirect shareholder claim (under Article 1116) and a claim on behalf of a company (under Article 1117) as 'almost entirely formal' in practice.[101] Just one tribunal, in *Bilcon v Canada*, found indirect shareholder claims impermissible under Article 1116.[102] Yet the *Bilcon* tribunal ultimately determined the investor had standing as a shareholder under Article 1116 on the theory that the shareholder suffered a direct injury (in the form of a lost opportunity) that appears to be a reflective loss by another name.[103] In another recent case, *Kappes v Guatemala,* two arbitrators found indirect shareholder claims permissible under the DR-CAFTA, observing that the DR-CAFTA 'contains no limitations on the nature or proximity of 'losses' a claimant can pursue' as a shareholder claiming on its own behalf.[104]

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100 *See* J. Arato, *The Elastic Corporate Form in International Law*, 62 Virginia Journal of International Law 2 (2022), at 27 ('Some treaties [ensure the availability of company claims even in cases of local incorporation] by deeming local companies foreign for the purpose of ISDS by dint of foreign control. Others, like the NAFTA, provide for derivative suits, allowing covered shareholders to claim in the local company's name, with all recovery going to the firm. Either model ensures investors in local companies access to SDS, while avoiding the fairness and efficiency costs' associated with indirect shareholder standing).

101 *United Parcel Service of America, Inc. (UPS) v Government of Canada*, ICSID Case No. UNCT/02/1, Award, 24 May 2007, at para. 35 (dismissing Canada's objection that the tribunal lacked jurisdiction because UPS brought its claim under Article 1117 rather than Article 1116 because 'the distinction between claiming under article 1116 or article 1117, in the context of this dispute at least, is an almost entirely formal one, without any significant implication for the substance of the claims or the rights of the parties. UPS is the sole owner of UPS Canada. As such, it is entitled to file a claim for its losses, including losses incurred by UPS Canada').

102 *See William Ralph Clayton, William Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc.* v *Government of Canada*, PCA Case No. 2009-04, Award on Damages, 10 January 2019, at para. 389 ('Articles 1116 and 1117 are to be interpreted to prevent claims for reflective loss from being brought under Article 1116').

103 *See id.* at paras. 390-397 (awarding 'compensation in an amount equivalent to the value of the opportunity lost by the Investors').

104 *Daniel W. Kappes and Kappes, Cassidy & Associates v Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections dated 13 March 2020, at para. 157. By contrast, in the dissenting arbitrator's view, the inclusion of a mechanism to advance representative claims (and related procedural conditions) reflected the State parties' intention to prohibit shareholder claims for reflective loss. *See id.* Partial Dissenting Opinion of Prof. Zachary Douglas QC, 13 March 2020, at paras. 14-15 ('The assumption [in the majority's award] is that the idea animating the State Parties in drafting Article 10.16.1 [permitting shareholders to bring claims on their own behalf] was to confer the broadest possible flexibility to controlling shareholders in advancing their claims against the respondent States. There is no basis for that assumption in the treaty itself.

(b) Indirect shareholder claims as abuse of rights

79. A second circumstance that may prevent shareholder standing arises where the claim amounts to an abuse of process or an abuse of rights. One common concern with indirect shareholder standing is the risk of a 'multiplicity of proceedings', referring to the possibility that several shareholders—or even multiple entities within the same 'chain' of ownership—may advance substantially identical reflective-loss claims in separate proceedings.

80. When a claimant in fact advances multiple related proceedings, tribunals may consider the claims abusive. Perhaps the best-known example is *Orascom v Algeria*.[105] The claimant (a Luxembourg company) was a member of a corporate group (comprised of an Italian company and an Egyptian company, among others) which owned an Algerian subsidiary holding a telecoms license. To significantly simplify the dispute, the corporate group notified Algeria of three separate arbitrations, each brought by a different group member, all relating to the same investment (the locally incorporated Algerian company and its telecoms license) and the same disputed measures. The *Orascom* tribunal declined jurisdiction over one of these arbitrations, finding it to be an abuse of the claimant's rights. In a much-quoted passage, the tribunal observed that 'an investor who controls several entities in a vertical chain of companies may commit an abuse if it seeks to impugn the same host State measures and claims for the same harm at various levels of the chain in reliance on several investment treaties concluded by the host state'.[106]

81. The *Orascom* tribunal's decision does not suggest a rule against indirect shareholder claims per se. After all, the possibility that an indirect claim *might* amount to an abuse of process presupposes that at least some such claims are admissible in the first place. What *Orascom* suggests is that 'the purpose of investment treaties' may limit indirect shareholder claims, particularly where the multiplicity of claims is not just a theoretical possibility, but a strategy pursued by one corporate group.[107]

(c) Failure to plead a breach of a duty owed by the State towards the shareholder as distinct from the company

82. A third circumstance precluding indirect shareholder claims is when an investor's claim is based entirely on wrongful conduct directed not towards the investor but the subsidiary. The tribunal in *GAMI v Mexico* first identified this possibility.[108] There, the tribunal permitted an indirect shareholder claim but

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To the contrary, what <u>is expressed</u> in the treaty is that the State Parties were motivated to ensure that controlling shareholders could not bring a claim in their own right and at the same time direct their company to pursue other remedies in different fora (Article 10.18). What <u>is also expressed</u> in the treaty is that the State Parties were motivated to ensure that there would be no risk of double recovery and that the rights of creditors of the company would not be undermined or extinguished as result of paying damages directly to shareholders rather than through the company (Article 10.26) [...] If that context is taken into account, then Article 10.16.1 must be interpreted as directing controlling shareholders to channel claims relating to prejudice to companies through the bespoke mechanism of Article 10.16.1(b)') (emphasis in original). *See also The Lopez-Goyne Family Trust and others v Republic of Nicaragua*, ICSID Case No. ARB/17/44, Award, 1 March 2023, at paras. 367-389.

105 *Orascom TMT Investments S.à r.l. v People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award, 31 May 2017.

106 *Id.* at para. 542.

107 *Id.* at para. 543.

108 *GAMI Investments, Inc. v United Mexican States*, Final Award, 15 November 2004. A similar result was reached in *Enkev Beheer v Poland*, where the tribunal observed that the Netherlands-Poland BIT 'cannot claim directly for any harm suffered directly' by its subsidiary but 'can claim in its own right under the Treaty for harm suffered by itself, *eg*, from the diminution or total loss of rights derived from its shares'. *Enkev Beheer B.V. v The Republic of Poland*, PCA Case No. 2013-01, First Partial Award, 29 April

cautioned '[a] serious jurisdictional impediment would loom' if a claim brought by a foreign investor only identified wrongful conduct directed towards the local enterprise.[109]

83. That situation arose in *Lotus Holdings v Turkmenistan*. The claimant was a Turkish holding company owning all the shares in an insolvent Turkmenistan company called Lotus Enerji.[110] The insolvent subsidiary was, in turn, a party to several contracts with Turkmenistan government bodies and State-owned enterprises. After the Turkish claimant launched a claim under the Energy Charter Treaty ('ECT'), Turkmenistan submitted that Lotus Holding's claims were manifestly without merit because, among other things, (i) Lotus Energy was 'pursuing a strategy to avoid the scrutiny of the Turkish Bankruptcy Directorate supervising Lotus Enerji's liquidation proceeding, and to avoid Lotus Enerji's creditors' and, similarly, (ii) Lotus Energy lacked standing to plead for the losses suffered by its subsidiary:

> Claimant does not have legal standing to make claims for the contracts and assets of Lotus Enerji, in which it is a shareholder. According to the Respondent "[i]t is a fundamental principle universally recognised by international authorities that a shareholder does not have legal standing to make claims for the contracts and assets of the company in which it is a shareholder."
>
> The Respondent makes a distinction between "shareholders' property" and the "company's property," and cites Prof. Zachary Douglas to support its position that an international tribunal cannot "wholly discard the basic distinction between the shareholder's property and the company's property merely because the cause of action arises in international law" and that a shareholder that "benefits from the separate legal personality and limited liability must accept the inconveniences as well as the advantages." The Respondent argues that the assets belong to the company, not to the shareholders.[111]

While the tribunal did not put the objection in these terms, the substance of Turkmenistan's position appears to have been that the claimant could not assert standing solely for a loss suffered 'through' the claimant's interest in the subsidiary. In other words, the parent company could not claim for purely reflective loss.

84. The tribunal accepted the argument. Lotus Holding, the parent company, could not assert standing under the treaty just because it expected—and Turkmenistan denied—some flow of economic value from

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2014, at para. 313. Left unclear is what constitutes a 'diminution' in a right or, more specifically, whether ownership in shares amounts to a right to value associated with those shares.

109 *GAMI Investments, Inc. v United Mexican States*, Final Award, 15 November 2004, at para. 42 ('A serious jurisdictional impediment would loom if GAMI's claim for breach of Article 1105 had been based solely on the allegedly 'arbitrary and discriminatory expropriation of GAM's sugar mills.' GAMI cannot plead for GAM'). In reaching this conclusion the tribunal dismissed the US' written observation that 'Article 1116 does not reflect an intent to derogate from the rule that shareholders may assert claims only for injuries to their interests and not for injuries to the corporation'. *Id.* at paras. 29-30.

110 *Lotus Holding Anonim Şirketi v Turkmenistan*, ICSID Case No. ARB/17/30, Award, 6 April 2020.

111 *Id.* at para. 117 (alleging that 'Claimant was pursuing a strategy to avoid the scrutiny of the Turkish Bankruptcy Directorate') and 110-111 (quoting Zachary Douglas, The International Law of Investment Claims (2009) Chapter 11, paras. 749-751).

the wellspring of its shareholding in Lotus Enerji.[112] As the tribunal explained, the principle of separate corporate personalities cuts both ways:

> Lotus Holding is a corporate entity whose legal separateness from Lotus Enerji is undisputed. In the same way that Lotus Holding can point to its legal independence of Lotus Enerji when questions of responsibility for the debts of Lotus Enerji are in question, it must accept the consequences of that independence when the enforcement of Lotus Enerji's rights is in question.[113]

85. The decision in *Lotus Holding* is unusual. It is one of the only examples where a tribunal appears to have denied standing to a parent company for losses suffered through a claimant's shareholding in a subsidiary. There are two potential explanations for this rather exceptional holding. For one thing, while not clearly dispositive, the tribunal appeared attentive to the potential distortive effects of Lotus Holding's claim given that Lotus Enerji was in insolvency, characterising any interest Lotus Holding may have in its subsidiaries as a 'contingent interest, now dependent upon there being assets remaining for distribution once all of Lotus Enerji's creditors have been satisfied'.[114] What is more, the tribunal considered that, while Lotus Holding's interest in Lotus Enerji may have been controlling before that company entered insolvency, control alone would not 'transform wrongs done to Lotus Enerji into wrongs done to the Claimant itself' and, in any event, Lotus Enerji was now 'under the control of the Turkish Bankruptcy Directorate'.[115]

86. For another, Lotus Holding appears to have pled its case deficiently. The tribunal was careful to note that claimant had pleaded only contract claims and that its 'Request for Arbitration does not articulate any claims that do not derive exclusively from—and are not wholly overlapping with—contract claims belonging to [the subsidiary]'.[116] The claimant, in other words, failed to articulate its 'own' claims. The tribunal recognised that such claims may have been possible—a breach of a contract can be discriminatory or expropriatory, or a violation of an investor's entitlement to fair and equitable treatment—but 'the argument must be properly pleaded out' and the claimant failed to do so.[117] Strikingly, the tribunal then denied leave for Lotus Holding to amend its proceedings because, in the tribunal's view, any amendment sufficient to cure the deficiency was impermissible under the ICSID Arbitration Rules.[118]

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112 *Id.* at para. 172 ('The difficulties facing Lotus Holding, as the only Claimant in this case, are that it is not a party to any of the contracts in question here, and that it has not articulated in its Request for Arbitration a claim that the Respondent's dealings with Lotus Enerji have violated rights held by Lotus Holding under the BIT and/or the ECT. All the contracts were concluded by Lotus Enerji. The 'monies due to Lotus Holding' are, under those contracts, monies due to Lotus Enerji. Lotus Holding had no more than the expectation or hope of receiving some benefits, in its capacity as shareholder of Lotus Enerji, from any monies received under those contracts by Lotus Enerji, *eg*, in the form of dividends').

113 *Id.* at para. 175.

114 *Id.* at para. 178 and 198 ('If monies are due to Lotus Enerji, whether under the contracts or otherwise (for example, under the BIT or the ECT), those monies would form part of the assets of Lotus Enerji and would fall for distribution under the control of the Turkish bankruptcy process. Lotus Holding is a shareholder in Lotus Enerji; but it has no right to receive any part of those assets outside of the bankruptcy process').

115 *Id.* at para.179.

116 *Id.* at para. 187.

117 *Id.* at para. 171.

118 *Id.* at para. 193.

87. One can extract several lessons from *Lotus Holding*. At one level, it echoes *GAMI v Mexico*'s caution that a claimant must plead treaty violations affecting it (and not its subsidiary) specifically.[119] But on another level, the award suggests that a claimant cannot assert a loss suffered through a subsidiary where the investor's loss is only cognizable as a contingent future interest in economic value. The question is then, 'When is a shareholder's loss the loss of an interest so contingent that standing should be denied?' The answer offered by *Lotus Holding* is when the subsidiary is in insolvency. If other tribunals follow the latter of these two explanations, *Lotus Holding* would mark a substantial development in the jurisprudence.

C. Insolvency and Reflective Loss

88. Unlike the investor-State system, domestic legal systems restrict shareholder claims for reflective loss. First, reflective loss claims give rise to a range of 'externalities' that most visibly affect potential defendants.[120] Second, reflective loss undermines central features of the corporate form to the detriment of other stakeholders in the corporation (including its creditors).

1) Distortive effects of reflective loss claims

89. The externalities arising from shareholder standing for reflective loss claims are well known. Shareholder standing, as noted opens the door to potential for multiple proceedings over the same dispute, both up and down the corporate chain and as between multiple shareholders in the same enterprise.[121] The risk of several closely related proceedings also leads to possible double recovery and the vexing problem of investors seeking 'multiple bites at the apple'.[122] These concerns have featured prominently in the recent work of UNCITRAL Working Group III, which has been tasked with proposing reforms to the ISDS system.[123]

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119 *See GAMI Investments, Inc. v United Mexican States*, Final Award, 15 November 2004, at para. 42.

120 J. Arato, *The Elastic Corporate Form in International Law*, 62 Virginia Journal of International Law 2 (2022), at 23 ('Courts typically draw this bright line [between shareholder's direct claims and reflective-loss claims] to avoid significant harms to internal corporate governance and a range of externalities. The central policy concern is that direct shareholder recovery for reflective loss undermines entity shielding, and thus separate legal personality. It enables shareholders to siphon off recovery rightly belonging to the injured company (eroding liquidation protection) and thereby jump ahead of creditors and other shareholders (circumventing creditor priority)').

121 *See* J. Arato, K. Claussen, J. Lee, G. Zarra, *Reforming Shareholder Claims in Investor-State Dispute Settlement*, 14 (2) Journal of International Dispute Settlement 242 (2023), at paras. 9-15 (describing harmful effects of reflective loss claims, including multiple bites at the apple, double recovery, and corporate governance distortions).

122 *See* C.H. Schreuer, *Shareholder Protection in International Investment Law*, Transnational Dispute Management 3 (2005), at 20-21 ('Practical problems may arise where claims are pursued in parallel, especially by different shareholders. In addition, the affected company itself may pursue certain remedies while a group of its shareholders may pursue different ones. The situation becomes even more complex where indirect shareholding through intermediaries is combined with minority shareholding. In such a case shareholders and companies at different levels may pursue conflicting or competing litigation strategies that may be difficult to reconcile and coordinate. These procedural difficulties alone are not a sufficient reason to deny legal protection to certain groups of shareholders. But they will require careful and innovative efforts to coordinate the different proceedings. These will include consolidation, pro rata awards, a flexible application of lis pendens and res judicata as well as other methods').

123 UNCITRAL's Working Group III (on ISDS reform) has a mandate to address the issue of reflective loss in the context of possible reforms to investor-State dispute settlement. *See generally* UNCITRAL Working Group III, Possible Reform of Investor-State Dispute Settlement (ISDS) Shareholder Claims and Reflective Loss, Note by the Secretariat, A/CN.9/WG.IIII/WP.170, 9 August 2019.

90. The second justification for prohibiting reflective loss in domestic and public international law, concerning the coherence of the corporate form, is more elusive. In essence, this line of critique focuses on inconsistency between reflective loss claims and fundamental features of the corporation, including 'entity shielding'—the division of the corporation and the shareholder's assets—and the independence of the corporation's management. Reflective loss claims are, in the traditional view, an appropriation of an asset (*ie*, the *chose in action* underlying the claim and any corresponding recovery) and a choice (over the resolution of a dispute) that belongs to the company. Generally, the risk of 'appropriation' may seem trivial, for example where the shareholder dominates the local company. Any distinction between the rights and interests of the investor and those of 'his' company may seem 'almost entirely formal', as the *UPS v Canada* tribunal put it.[124]

91. That scenario is likely closer to the exception than the rule, however. Many investments will have multiple stakeholders, including creditors and non-controlling shareholders. Conflicts of interest between covered foreign investors and non-covered stakeholders are not just possible but highly likely; this is because corporate stakeholders will rarely, if ever, stand to benefit from a shareholder's investment treaty claim. Indeed, they may be prejudiced by such a claim. For example, an investment claim may undermine the possibility of a settlement or the viability of a domestic proceeding from which creditors might benefit.

92. The likely conflicts of interest are most stark where the local company is insolvent.[125] As one set of authors puts it, '[b]ankruptcy effects a shift in the ownership of the firm from one group of investors to another—from shareholders to creditors'.[126] In this context, a shareholder's claim premised on loss appropriates an asset (and a decision) that properly belongs to the company. It also represents a claim to value that would ultimately flow to creditors (for example, through domestic proceeding or a settlement).[127] This bypass of ordinary priority rules is itself a potentially sufficient reason for a

124 *United Parcel Service of America, Inc. (UPS) v Government of Canada*, ICSID Case No. UNCT/02/1, Award, 24 May 2007, at para. 35 (dismissing Canada's objection that the tribunal lacked jurisdiction because UPS brought its claim under Article 1117 rather than Article 1116 because 'the distinction between claiming under article 1116 or article 1117, in the context of this dispute at least, is an almost entirely formal one, without any significant implication for the substance of the claims or the rights of the parties. UPS is the sole owner of UPS Canada. As such, it is entitled to file a claim for its losses, including losses incurred by UPS Canada').

125 J. Arato, *The Elastic Corporate Form in International Law*, 62 Virginia Journal of International Law 2 (2022), at 25 ('The economic consequences of reflective loss are most apparent where the firm is in distress–in the zone of bankruptcy or in actual bankruptcy proceedings'). *See also* D. Gaukrodger, *Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law*, OECD Working Papers on International Investment (2014), at 20 (observing that claims for reflective loss often occur 'at a moment when the company is already weakened. What is at issue is the company's capacity to reconstitute its assets and expectations about that capacity,' and that reflective loss claims may create 'priority risk' for a company's creditors and non-claimant shareholders).

126 R. Kraakman, et al., The Anatomy of Corporate Law: A Comparative and Functional Approach (2017), at 17.

127 D. Gaukrodger, *Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law*, OECD Working Papers on International Investment (2014), at p. 20 (observing that the availability of claims for reflective loss adversely affects third-party creditors because it 'may mean that regulatory risk may be compounded by (i) liquidation risk because SRL may prevent the company from reconstituting its assets following the government injury; and (ii) priority risk because it is unclear whether ISDS arbitrators will be interested in creditor claims or able to prioritise them adequately (*see* below the section on reliance on ISDS arbitrators taking account of creditor interests'); J. Arato, *The Private Law Critique of International Investment Law*, 113 (1) American Journal of International Law (2019), at 38-39 (stating that '[t]he extent to which ISDS distorts national law on entity shielding is especially stark where the firm is in distress—in the zone of bankruptcy, or in actual bankruptcy proceedings,' where reflective loss may invert the usual priority of creditors over equity holders); J. Arato, *The Elastic Corporate*

shareholder to commence an investor-State arbitration instead of a local proceeding or out-of-court resolution. Equally, they might be problematic from the point of view of domestic insolvency law and might impact the viability of these claims in investment arbitration.

93. Conflicts of interest of this sort are not purely speculative. Take the recent case of *Alicia Grace and others v Mexico*. The claimants are a consortium of American investors holding 43 percent of Oro Negro, a Mexico-incorporated company that leased offshore drilling platforms to a Mexican State organ. The claimants say, in broad strokes, that the State organ terminated leases for the oil platforms after Oro Negro refused to pay a bribe.[128] They argue this amounted to an expropriation under NAFTA and a violation of Mexico's commitment to fair and equitable treatment, and seek at least USD 700 million in compensation. Oro Negro's creditors see things differently. The American investors launched their NAFTA claim after Oro Negro secured a favourable judgment in Mexico and, in parallel with the NAFTA arbitration, the American investors advanced substantial claims against Oro Negro's assets in insolvency. Against this backdrop, the creditors accused Oro Negro's American shareholders of (in the tribunal's words) 'attempting to obtain compensation to which the [the bondholders] are first entitled as first-priority secured creditors in [Oro Negro's] bankruptcy proceedings'.[129] By making an indirect shareholder claim, the American investors may secure compensation that—had it instead been secured by the insolvent company—would flow to the disappointed creditors.

94. A comparable situation arose in *Blusun S.A. v Italy* and *Eskosol v Italy*.[130] Both arbitrations concern the same dispute, over the then-insolvent Italian-incorporated solar company Eskosol and changes to Italian law that allegedly rendered it unprofitable. Eskosol's 80 per cent shareholder, Blusun, and its two individual shareholders launched an arbitration under the ECT. Soon after, Eskosol, under the control of a receiver, itself launched a second ECT arbitration against Italy where it alleged that the majority shareholders were trying to 'usurp Eskosol's claims and seek compensation for its direct losses'.[131] Simultaneously, Eskosol tried to make submissions as a non-disputing party in the *Blusun* arbitration to the same effect and without success.[132] As one commentator put it, these duelling claims illustrate that:

Form in International Law, 62 Virginia Journal of International Law 2 (2022), at 25 ('The economic consequences of reflective loss are most apparent where the firm is in distress in the zone of bankruptcy or in actual bankruptcy proceedings as is often the case in the context of ISDS, given the financial and reputational costs of litigation in this system'); V. Korzun, *Shareholder Claims for Reflective Loss: How International Investment Law Changes Corporate Law and Governance*, 40 University of Pennsylvania Journal of International Law 189 (2018), at 192 ('Unbeknownst to most creditors and shareholders, international investment law distorts this legal framework of corporate and bankruptcy law by allowing shareholders to bring claims for reflective loss in investment arbitration'); *See also* Arato et al. 'Reforming Shareholder Claims in ISDS', Academic Forum on ISDS Concept Paper 2019/9.

128 *See Alicia Grace and others v United Mexican States*, ICSID Case No. UNCT/18/4, Notice of Arbitration, 19 June 2018, para. 4.

129 *Alicia Grace and others v United Mexican States*, ICSID Case No. UNCT/18/4, Procedural Order No. 4 (Decision on the Ad Hoc Group of Bondholders' Application for Leave to Intervene), 24 June 2019, at para. 18.

130 *Eskosol S.p.A. in liquidazione v Italian Republic*, ICSID Case No. ARB/15/50; *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v Italian Republic*, ICSID Case No. ARB/14/3.

131 *See Eskosol S.p.A. in liquidazione v Italian Republic*, ICSID Case No. ARB/15/50, Decision on Respondent's Application under Rule 41(5), 20 March 2017, at para. 151.

132 *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016, at para. 42 (Eskosol argued that the Blusun tribunal 'lacks jurisdiction and/or the Blusun claim is inadmissible because the Claimants are 'seeking damages to which only Eskosol is entitled, which will cause prejudice to Eskosol, its creditors and the Non-Party Shareholders'); at para. 43 (refusing Eskosol's request, and noting Italy's objection that 'for international investment law, Blusun and Eskosol are the same entity' and, so, Eskosol was not in fact a 'non-disputing party').

> Instead of just being a theoretical concern and a possible cause of tension at the shareholder meetings, reflective loss claims allow shareholders to directly oppose the company and its management. They give shareholders a right to bypass corporate governance choices and benefit directly by collecting damages for losses suffered by the corporation due to a breach of investor protection obligations. Moreover, even if a treaty-protected shareholder loses in its arbitration, it can destroy the company's ability to seek damages for breaches of investor protection obligations through res judicata.[133]

95. *Alicia Grace* and the *Eskosol* cases are unusual in that disappointed creditors took the extraordinary step of intervening in the shareholders' investment claim. In the more typical case, adversely affected corporate stakeholder—including not just co-shareholders and sophisticated creditors, but even employees and trade counterparties—may not realise that a shareholder's investment-treaty claim threatens their interests. Even where they are aware of the threat, creditors may lack the resources to raise their views with the tribunal.

96. Beyond potential unfairness in the individual case, the priority-rule-bypassing effect of shareholder reflective loss claims may affect investors at large. Eventually, sophisticated creditors may offset increased credit risk by increasing the price of credit or taking other steps to compensate for their relative lack of protection in bankruptcy.[134] For this reason, some question whether the interests of claimants align with the interests of foreign investors at large, almost none of whom will bring an investment-treaty dispute.[135]

2) Mitigating distortive effects

97. The risks outlined above should be taken in context. As noted, most foreign investment occurs through locally incorporated companies—often out of practical or legal necessity. If the system of international investment protection is more than an empty promise, then foreign shareholders must have some recourse to make claims through or on behalf of the locally incorporated companies carrying out the real economic activity of investment.[136]

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133 V. Korzun, *Shareholder Claims for Reflective Loss: How International Investment Law Changes Corporate Law and Governance*, 40 U. Pa. J. Int'l L. 189 (2018), at 233.

134 J. Arato, *The Elastic Corporate Form in International Law*, 62 Virginia Journal of International Law 2 (2022), at 27 ('Creditors, in particular, have to account for the frailty of priority rules in the context of foreign investment. The weakened entity shield pushes creditors to either reduce the availability of credit or increase its price affecting the overall cost of capital either way'); D. Gaukrodger, *Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law*, OECD Working Papers on International Investment (2014), at 20 ('The uncertainties caused by [the availability of shareholder reflective loss in investment disputes] with regard to company assets may also affect other advantages of entity shielding outlined above, including the ability of the firm to serve as a single contracting party and make credible commitments, and its ability to use its assets to obtain credit. Its cost of credit and thus its overall cost of capital may be affected'); OECD, *The Impact of Investment Treaties on Companies, Shareholders and Creditors*, OECD Business and Finance Outlook 223 (2016), at 242 ('In the absence of legal rules creating entity shielding [for foreign investment], creditors may seek to take other actions to protect their investments' including 'changing the terms on which they make credit available to the company,' expanding the use of secured credit, and lending at a different level of the corporate chain).

135 *See generally* J. Arato, *The Elastic Corporate Form in International Law*, 62 Virginia Journal of International Law 2 (2022).

136 Subject, of course, to any limitations imposed in the relevant treaties.

98. This does not mean that the distortive effects of reflective loss claims should be ignored. To some extent, tribunals can and do control the most harmful effects of reflective loss claims on an *ad hoc* basis. For example, tribunals can guard against double recovery and overcompensation through careful determination of quantum.[137] Likewise, doctrines such as abuse of rights, *res judicata*, and *lis pendens*, may help manage the possibility of investors taking 'multiple bites at the apple'.[138]

99. Yet experience suggests this *ad hoc* approach has not been effective.[139] Instead, some have argued for a paradigm shift. Recently, for example, UNCITRAL Working Group III published 'Draft provisions on procedural and cross-cutting issues', intended to inform future investment agreements.[140] These provisions propose a near blanket exclusion of reflective loss claims:

> A shareholder may submit a claim pursuant to [the treaty's investor-State dispute resolution procedure] on its own behalf only for direct loss or damage incurred as the result of a breach of the Agreement, which means that the alleged loss or damage is separate and distinct from any alleged loss or damage to the enterprise in which the shareholder holds shares. Direct loss or damage does not include diminution in the value of the shareholding or in the distribution of dividends to the shareholder as a result of loss or damage incurred by the enterprise.[141]

The Working Group's proposed reform, if widely adopted, would have a dramatic effect on the kind of claims that investors may advance.[142] Whether reforms of this nature gain traction with States remains to

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137 On quantum, *see* Chapter VI.E below.

138 *See*, *eg*, C.H. Schreuer, *Shareholder Protection in International Investment Law*, 2 Transnational Dispute Management 3, at 20-21 ('Practical problems may arise where claims are pursued in parallel, especially by different shareholders. In addition, the affected company itself may pursue certain remedies while a group of its shareholders may pursue different ones. The situation becomes even more complex where indirect shareholding through intermediaries is combined with minority shareholding. In such a case shareholders and companies at different levels may pursue conflicting or competing litigation strategies that may be difficult to reconcile and coordinate. These procedural difficulties alone are not a sufficient reason to deny legal protection to certain groups of shareholders. But they will require careful and innovative efforts to coordinate the different proceedings. These will include consolidation, pro rata awards, a flexible application of *lis pendens* and *res judicata* as well as other methods'); Z. Douglas, The International Law of Investment Claims (2009), at 455 (suggesting that, if an indirect shareholder claim is admissible, the tribunal ought to be satisfied that the claim will not (i) unfairly expose the host state or the company to a multiplicity of actions, (ii) materially prejudice the interests of the creditors of the company, or (iii) interfere with a fair distribution of the recovery among all interested parties, and observing that '[a] remarkable and disquieting feature of the investment treaty jurisprudence is that tribunals have so readily abdicated their responsibility to give proper consideration to [these] factors').

139 Doctrinal tools like abuse of rights, *res judicata*, and *lis pendens* are not always good fits for the problem for reflective loss. *Res judicata* and *lis pendens*, for instance, generally requires an identity of parties, definitionally absent from shareholder reflective claims. Complicating these well-settled principles of law with Ptolemaic epicycles, calculated to address the potential abuses of reflective loss claims, has its own downsides.

140 *See* UNCITRAL, Working Group III, Possible Reform of Investor-State Dispute Settlement, Draft Provisions on Procedural and Cross-Cutting Issues, A/CN.9/WG.III/WP.231, 26 July 2023.

141 UNCITRAL, Working Group III, Possible Reform of Investor-State Dispute Settlement, Draft Provisions on Procedural and Cross-Cutting Issues, A/CN.9/WG.III/WP.231, 26 July 2023, Draft provision 10(1). The draft provisions contain several exceptions, including where the local enterprise is directly and wholly expropriated or where the local enterprise experiences treatment 'akin to denial of justice,' yet even where these exceptions apply 'the Tribunal shall award monetary damages and any applicable interest or restitutions of property' to the local enterprise, not the foreign investor.

142 Others have proposed more modest reforms, such as the inclusion of derivative claims procedures combined with an explicit prohibition on reflective loss claims where the investor claims on its own behalf. *See*, *eg*, A. Suraweera, *Shareholder Claims for Reflective Loss in Investor-State Dispute Settlement: Proposing Reform Options for States*, ICSID Review (2023), at 28 ('In light of arbitral

be seen. In the meantime, achieving the right balance between the interest of foreign investors, on one hand, and other stakeholders, including creditors, falls to tribunals.

D. Conclusion

100. International investment law takes a uniquely permissive approach to shareholder standing, allowing claimants to recover harm suffered through their shareholding in other companies. This marked departure from municipal law is explained, in part, by features unique to investment arbitration. Shareholders will not usually be refused standing unless the treaty explicitly prohibits reflective loss claims, the claim amounts to an abuse of process in the circumstance, or, more rarely, the investor does not allege any wrongful conduct apart from that directed towards the local company.

101. The permissive approach to reflective loss claims creates several challenges. For one thing, shareholder standing opens the door to potential abuse and double recovery by shareholders. For another, the permissive approach to reflective loss claims undermines central features of the corporate form to the potential detriment of creditors, especially where the foreign investor's local company is at or near the brink of insolvency.

102. Managing the risks associated with reflective loss claims is a difficult and fact-sensitive task. The area is ripe for potential reform but, in the meantime, stakeholders in the international investment context should be mindful of the interests at stake, which often stretch far beyond those of the claimant and respondent.

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practice which appears to misapply the derivative claims provisions, it is suggested that States should incorporate treaty provisions which unequivocally bar [shareholders' reflective loss] claims and offer derivative claims as the exclusive option for a shareholder seeking to claim for loss to a separate entity. Derivative claims provisions are unlikely to be effective otherwise, with inconsistent arbitral outcomes permitting SRL claims in conjunction with derivative claims creating the risk of rendering these provisions redundant').

IV. Attribution

Sarah Schröder and Tomas Vail

A. Introduction

103. Distressed investors often find themselves in insolvency proceedings and tribunals who address their claims must decide whether initiation and/or the conduct of the insolvency proceeding is attributable to the State so as to engage State responsibility. Investors have the burden of proof to show attribution and, failing that, the tribunal will either lack jurisdiction or will rule against the investor on the merits.

104. Typically, arbitral tribunals considering issues of attribution in insolvency will consider:

    i. whether the *initiation* of insolvency proceedings itself may be attributable to the State;

    ii. whether the conduct of an insolvency representative (whether the administrator/trustee), the insolvency court, or creditors during the insolvency proceeding, may be attributable to the State; and

    iii. whether measures allegedly *causing* the insolvency may be attributable to the State.

105. Categories (i) and (iii) differ little, if at all, from standard issues of attribution in investment arbitrations, addressing garden-variety questions of the cause and trigger of business failure, including in cases where parties start non-insolvency litigation against investors. Category (ii) is specific to insolvency-related arbitrations. Tribunals dating back to *Venable v Mexico* in 1927 have struggled to address whether insolvency representatives can, truly, be considered representatives of the State.[143]

106. Although occasionally raising some novel questions about the hand of the State in the failure of an investment, insolvency-related cases are subject to familiar rules of State responsibility. Unfortunately, there is a dearth of public case law directly addressing this fact-intensive issue. This chapter gives an overview of the field.[144]

B. Attribution of Conduct Under International Investment Law

1) *The meaning of attribution*

107. In order to hold a State responsible for unlawful conduct, a tribunal must find that that unlawful conduct can be 'attributed' to a State.[145] Attribution, in public international law, is 'the operation of

143 *HG Venable (USA) v United Mexican States*, *Reports of International Arbitral Awards*, Vol IV, 8 July 1927, 228.

144 The authors recognise the important contributions to this field by Professor Zdeněk Nový's article, *State Responsibility for Breaches of Standards of Investment Protection Committed by Bankruptcy Courts and Trustees*, Transnational Dispute Management 2 (2019).

145 C. de Stefano, Attribution in International Law and Arbitration (2020), at 3.

attaching a given action or omission to a State'.[146] The International Law Commission ('ILC') conducted a years-long exercise under the stewardship of Judge James Crawford to codify these rules in its Draft Articles on the ILC Articles. The ILC Articles assess the responsibility of a State towards another State, but tribunals regularly apply these in the context of investor-State disputes (as discussed below).

108. Investment arbitration tribunals deal with attribution at the jurisdictional and/or the merits stage. Respondent States typically argue that the unlawful conduct alleged by the investor—even if found to have occurred—cannot be attributed to them. In such cases, States argue, the investment arbitral tribunal does not have jurisdiction and, even if there is jurisdiction, the State is not internationally liable for the conduct in question. Conversely, respondents may argue that claims brought *by* State-owned enterprises of another State are not properly investor-State claims, but are rather State-State disputes falling outside the investment arbitration framework.[147]

2) The relevant rules of attribution

109. The ILC Articles on State Responsibility are widely regarded as reflecting customary international law on State responsibility, including attribution, and the ILC commentary that accompanies the Articles are a useful source to understand the scope of these rules.[148] Articles 4, 5 and 8 are particularly relevant in appraising the attribution to a State of the conduct of an insolvency representative, insolvency court or creditors:

(a) Article 4

110. Article 4(1) of the ILC Articles states:

> The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

111. Article 4 concerns the most 'direct' form of attribution under the ILC Rules, since it addresses the actions of 'organs' of the State. The first part of this definition is specific: it covers organs that exercise legislative, executive or judicial functions – government departments, courts, etc.[149] The second part of

146 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, II (2) Yearbook of the International Law Commission 31 (2001) ('ILC Articles with Commentaries'), at 36, at para. 12.

147 Whilst the term attribution can also be used in other contexts, such as determining whether a State is the real party bringing a claim, this chapter is focused on State attribution of wrongful conduct.

148 ILC Articles with Commentaries.

149 Note that, even though the acts of the judiciary are automatically considered the acts of organs of the State and thus attributable to the State, the substantive standards of conduct for courts may differ from the standards imposed on other organs and may lead to meaningful differences in the outcome of a claim. *See* J. Crawford, State Responsibility: The General Part (2013), at 122-22; J. Egerton-Vernon, A.V. Burra, *Is Denial of Justice the Only Substantive Standard Theory of Liability for Judicial Measures*?, Transnational Dispute Management 2 (2019).

the definition is more general, in that it covers 'any other functions [...] of the central Government or of a territorial unit of the State'.

112. 'Organs' for the purpose of Article 4 attribution must be parts or instrumentalities of the State *de jure*. While domestic and international law traditionally operate on separate planes, the evaluation of Article 4 attribution begins from domestic law, to see if the State itself treats the entity as a part of the State. Pursuant to Article 4 paragraph 2: '[a]n organ includes any person or entity which has that status in accordance with the internal law of the State'. 'Where the law of a State characterizes an entity as an organ, no difficulty will arise'.[150] On the other hand, referring to a State's domestic laws to determine whether a particular entity qualifies as a State organ may not be sufficient, since '[i]n some systems the status and functions of various entities are determined not only by law but also by practice, and reference exclusively to internal law would be misleading'.[151] This analysis can involve examining the nature of the powers exercised by the entity, how it is described under domestic law, and whether it has succeeded to a role previously occupied by State organs. In no event is a State allowed to avoid international responsibility simply by denying an entity the status of a State organ under its domestic laws.[152] A tribunal will accordingly consider the status of the entity under its national laws, as one element amongst other factors to determine attribution.[153]

113. In some jurisdictions, trustees may expressly be identified as public officials.[154] In such cases, the context in which a trustee is defined as a public official may affect the analysis.[155] For instance, attribution arguments based on limited-purpose statutory definitions were rejected in *Plama v Bulgaria*[156] and *MNSS B.V. and Recupero Credito Acciaio N.V. v Montenegro*.[157]

(b) Article 5

114. Article 5 states:

> The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

115. Article 5 applies where Article 4 does not, and adopts a different approach: whereas Article 4 focuses on the *status* of an entity (ie whether it is an organ of the State or not), Article 5 is concerned with the

150 ILC Articles with Commentaries, at 42, at para. 11.

151 *Id.*

152 *Id.*

153 *See, eg, A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG v Czech Republic*, PCA Case No. 2017-15, Award, 11 May 2020, at paras. 532, 533 (relying on a Czech Constitutional Court judgment on the status of insolvency trustees under Czech law).

154 *See* Z. Nový, *State Responsibility for Breaches of Standards of Investment Protection Committed by Bankruptcy Courts and Trustees*, Transnational Dispute Management 2 (2019), at 4-5 (describing the laws of Italy and Canada).

155 *See* Chapter IV.C.2)(b) below for a detailed analysis of this issue.

156 *Plama v Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, at para. 253.

157 *MNSS B.V. and Recupero Credito Acciaio N.V v Montenegro*, ICSID Case No. ARB(AF)/12/8, at para. 313.

conduct of an entity in a particular circumstance.[158] The actions of an entity that is found to be an 'organ of the State' for the purposes of Article 4 will always be attributable to a State, while only *some* actions or omissions of an entity may be attributable to a State for the purposes of Article 5, depending on the specific circumstances in question.

116. For the actions of an entity to be attributable to a State under Article 5, two conditions must be met: (i) the entity must be empowered by the law of the State to exercise elements of governmental authority *and* (ii) the entity must have been acting in a governmental capacity in the instance in question. Article 5 is usually construed broadly such that it may apply to many 'entities', and as long as the requirements of Article 5 are met, there are typically no restrictions on the kind of entity whose conduct can be attributed to a State.[159]

117. Court-appointed administrators are typically authorised by law to exercise their functions, but whether the actual exercise of that authority may arguably give rise to attribution may depend on the specific powers used by the administrator and the facts of each insolvency proceeding. In specialised regimes, for instance when an insolvent bank is placed under State administration in order to avoid a systemic financial crisis, administrators may be concerned with wider systemic issues, such as the financial stability of the country. The administrator that manages the insolvent bank in such circumstances will typically do so while acting in the public interest. In other circumstances, a routine insolvency trustee may simply be interested in maximising the liquidation value of the company for the benefit of its creditors. Different considerations would apply to those two examples in assessing whether administrators are exercising governmental powers in circumstances that entail the State's international responsibility.[160] Relevant factors might include the source of the authority of the administrators and insolvency practitioners, the process for their appointment, their accountability towards national courts, and whether they owe a general duty to the whole body of creditors and to the general public. The fact that the company subject to insolvency is a private enterprise is not conclusive in impeding the attribution of the conduct of the administrators and insolvency practitioners to the State.

(c) Article 8

118. Article 8 states:

> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

119. Under the general principles of international law, the conduct of private persons or entities is not attributable to the State. Circumstances may arise, however, where such conduct is nevertheless

158 ILC Articles with Commentaries, at 42-43.

159 *Id.* at 42-43.

160 *See also* Z. Nový, *State Responsibility for Breaches of Standards of Investment Protection Committed by Bankruptcy Courts and Trustees*, Transnational Dispute Management 2 (2019), at 4-5, at 5-6 (describing the range of 'public functions' trustees may play in different jurisdictions).

attributable to the State due to a specific factual relationship between the person or entity engaging in the conduct and the State. Article 8 deals with two such circumstances: (i) where private persons act on the instructions of the State in carrying out the wrongful conduct, and (ii) where private persons act under the State's direction or control.[161]

120. The degree of control which must be exercised by the State for the conduct to be attributable to it was a key issue in the *Military and Paramilitary Activities in and against Nicaragua* case.[162] The Court analysed the notion of 'control' where the United States provided support to the *contras*,[163] finding that a general situation of dependence and support would be insufficient to justify attribution of the conduct to the State.

121. Thus, to determine whether a private person or entity may be equated with a State organ, it is not necessary to show that the relationship between the persons who performed the acts and the State was of complete dependence. It has to be proved, however, that the persons acted in accordance with that State's instructions or under its 'effective control'. It must be shown that this 'effective control' was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred.[164]

122. The tribunal in *Hamester v Ghana* confirmed that a State can be responsible for the act of a private or public person if the State has a significant involvement, before the commission of the act in question, such that the act can be considered as controlled by, and thus performed by the State.[165] The *Hamester* tribunal held that a 'very demanding threshold' must be met for the purposes of attribution under ILC Article 8, requiring both: (i) general control of the State over the entity, and (ii) specific control of the State over the particular act in question.[166]

123. Applying this high threshold, the tribunal in *Tulip Real Estate v Turkey* found that the actions of Emlak, a Turkish real estate investment trust controlled by a Turkish government body, were not attributable to Turkey. Referring to ILC Article 8, the tribunal held that while Emlak was State-owned, that fact in and of itself did not create a 'presumption of statehood' in its favour.[167] The key question was whether Emlak was exercising 'sovereign power' in the context of the alleged wrongful conduct.[168] The *Tulip Real Estate* tribunal held that attribution was vital to both the tribunal's jurisdiction and to the merits of the dispute, but considered that these issues are best dealt with at the merits stage 'in order to allow for an in-depth analysis of all the parameters of the complex relationship between certain acts and the State'.[169]

161 UN Legislative Series, Materials on the Responsibility of States for Internationally Wrongful Acts (2012), Book 25, at 70-71.

162 *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, 1986 ICJ Rep. 14.

163 *Id.*

164 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, 2007 ICJ Rep. 43, at 399-400.

165 *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No. ARB/07/24, at para. 178.

166 *Id.* at para. 179.

167 *Tulip Real Estate v Republic of Turkey*, ICSID Case No. ARB/11/28, Award (Mar. 10, 2014), Award, June 18, 2010, at para. 289.

168 *Id.*

169 *Id.* at para. 144.

The tribunal's focus on 'sovereign power' is a through line in examining whether conduct may properly be attributed to a State.[170]

124. The conduct of a bank owned by the State and/or put under State administration and as a corollary, the question of whether the acts of that bank were attributable to the State under Article 8, was considered in *Marfin v Cyprus*.[171] In this case, which was brought by former Greek shareholders of Cyprus' second largest bank, Cyprus Popular Bank, after the bank was nationalised, then dissolved and its legacy assets managed by a Special Administrator, the tribunal had to determine whether the acts and omissions of the bank itself were attributable to the Cypriot State. In keeping with *Hamester*, the *Marfin* tribunal did not find that the degree of interference from the respondent State in the management of the bank established attribution under Article 8.[172] Nor did the *Marfin* tribunal find that the Cypriot State directed and controlled the conduct of the bank even after it was recapitalised and the Cypriot Government became its largest shareholder.[173] Therefore, mere ownership of shares by the Cypriot Government, along with the powers that this ownership entailed, did not establish attribution under Article 8.[174]

125. After finding that the State of Cyprus did not breach its treaty obligations through its conduct in the various proceedings initiated against the claimant bank, the tribunal did not find it necessary to analyse the possible attribution to Cyprus of the acts and omissions by the bank's Special Administrator.[175]

3) Other rules of attribution

126. Customary international law rules of attribution, as reflected in the ILC Articles, may be displaced by another set of rules.[176] States can, by agreement, establish their own attribution rules, as reflected in ILC Article 55 on *lex specialis*,[177] and recognised by investor-State tribunals. For example, in *Al Tamimi v Oman*, the tribunal referred to the express limitations of Article 10.1.2 of the US–Oman Free Trade Agreement, which set out 'a relatively narrow test for the circumstances under which the actions of a State enterprise may be attributed to the State'.[178] The *Al Tamimi* tribunal accordingly found that, under the treaty, the conduct of the relevant State enterprise must occur in the exercise of 'regulatory, administrative, or other governmental authority delegated to it' by Oman in order to be attributable to the respondent.[179] The tribunal acknowledged that this test 'may be narrower' than the test for State responsibility under

170 *See also* James Crawford, State Responsibility: The General Part (2013), at. 129-30.

171 *Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v Republic of Cyprus*, ICSID Case No. ARB/13/27, at paras. 670-676.

172 *Id.* at para. 686.

173 *Id.* at para. 690.

174 *Id.* at para. 694.

175 *Id.* at paras. 692-694.

176 C. Kovács, Attribution in International Investment Law (2018), at 51.

177 Article 55 states: 'These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law'.

178 *Adel A Hamadi Al Tamimi v Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015, at para. 318.

179 *Id.* at para. 319.

customary international law or as represented in the ILC Articles, and that these broader principles of State responsibility 'cannot be directly relevant' due to the limiting effect of *lex specialis*.[180]

127. Most investment treaties do not reflect special rules on the question of attribution, although some have provisions with similar effect. For example, Article 1(7) of the France-Uganda BIT expressly provides that its Contracting Parties are 'responsible for the actions or omission of their sub-sovereign entities' over which the Contracting Party exercises control, representation or responsibility of its international affairs or its sovereignty. Some US BITs also require the State to ensure that its State enterprises comply with investment treaty obligations. After dispensing with an ILC Article 5 attribution argument, the tribunal in *Bosh v Ukraine* assessed whether the conduct of a State-funded university was attributable to the State by virtue of Article II(2)(b) of the Ukraine-US BIT, which provides:

> Each Party shall ensure that any State enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Party's obligations under this Treaty wherever such enterprise exercises any regulatory, administrative or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees or other charges.

128. The tribunal rejected the claimants' argument that the effect of the provision was to render the conduct of the university attributable to Ukraine, finding instead that 'it imposes a positive obligation on Ukraine to ensure that any 'State enterprise' that exercises governmental authority acts in a manner that is consistent with Ukraine's obligations under the BIT'.[181] Breach of that obligation by Ukraine would give rise to a claim for breach of the BIT by Ukraine. But it does not have the effect of making the conduct of that State enterprise attributable to Ukraine under the law of State responsibility'.[182] Tribunals have similarly found that Article 22 of the Energy Charter Treaty does not impose liability on the State in the event that a State-owned legal entity does not discharge its contractual obligations in relation to an investment, but instead requires the State to ensure that State-owned entities conduct activities which, in general terms of governance, management and organisation, make them capable of observing the obligations specified under Part III of the ECT.[183]

129. Tribunals often address attribution issues with regard to the actions of State-owned enterprises. In *Maffezini v Spain*,[184] for instance, the tribunal was concerned with an investment by the claimant (an Argentine national) in a Spanish corporation (EAMSA). A part of EAMSA's shares were owned by a Spanish State-owned enterprise, SODIGA. The claims arose out of this State-owned enterprise's conduct,

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180 *Id*. at paras. 320-321.

181 *Bosh International, Inc. and B&P, LTD Foreign Investments Enterprise v Ukraine*, ICSID Case No. ARB/08/11, Award, 25 October 2012 at para. 183.

182 *Id*.

183 *Limited Liability Company Amto v Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, at paras. 112-114; *Mohammad Ammar Al-Bahloul v Republic of Tajikistan*, SCC Case No. V064/2008, Partial Award on Jurisdiction and Liability, 2 September 2009, at paras. 170-173.

184 *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000.

which the claimant contended was attributable—under international law—to the Kingdom of Spain.[185] Although 88 per cent of SODIGA's shareholding was government owned,[186] Spain claimed that SODIGA – which was incorporated as a private commercial corporation – was only a private company whose actions were not attributable to Spain.[187]

130. The tribunal found that because State enterprises may take on many forms, a structural test alone may not be sufficient, and thus applied a functional test, which looks to the functions of or role to be performed by the entity.[188] This was focused on 'a determination as to the character of State-owned enterprises in the context of whether it is a 'national of a Contracting State'' in order to assess 'whether a State enterprise may be subsumed within the definition of the term 'Contracting Party''.[189] The *Maffezini* tribunal noted that the functional test had been applied in the case of *Ceskoslovenska Obchodni Banka, A. S. v the Slovak Republic* to determine that 'the fact of State ownership of the shares of the corporate entity was not enough to decide the crucial issue of whether the Claimant had standing under the Convention as a national of a Contracting State as long as the activities themselves were 'are essentially commercial rather than governmental in nature or, conversely, whether their nature is essentially governmental rather than commercial'.[190] In the words of the tribunal, '[c]ommercial acts cannot be attributed to the Spanish State, while governmental acts should be so attributed'.[191] In the event, the tribunal found that certain of SODIGA's conduct (providing mistaken advice as to the cost of the project) was not governmental in nature and therefore not attributable to Spain,[192] while other conduct (unauthorised transfer of funds from the claimant's personal account to EAMSA) was governmental in nature and therefore so attributable.[193]

131. Another attribution test arises in respect of claims brought by State enterprises. A State-owned entity can bring a claim under the ICSID Convention, if it meets the jurisdictional standard of the 'Broches test'. The test was postulated by Aaron Broches, the first secretary-general of ICSID and one of the principal drafters of the Convention. The *Broches test* advances that under the ICSID Convention, a mixed economy company or government-owned corporation should not be disqualified as a 'national of another Contracting State' under Article 25 to bring a claim unless it is acting as an agent for the government or is discharging an essentially governmental function.

132. The first ICSID tribunal to apply the *Broches test* was *CSOB v Slovakia*.[194] The tribunal found it had jurisdiction because the bank's actions (a State entity) were commercial in nature. The *CSOB* tribunal

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185 *Id.* at para. 47.

186 *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000, at para. 83.

187 *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000, at para. 45.

188 *Id.* at para. 78.

189 *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000, at para. 79.

190 *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000, at para. 52.

191 *Id.* at para. 52.

192 *Id.* at paras. 61-63.

193 *Id.* at paras. 78, 83.

194 *Ceskoslovenska Obchodni Banka (CSOB), AS v The Slovak Republic* (ICSID Case No ARB/97/4), Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, at para. 20.

went on to reason that the standing of a State-owned entity under Article 25 of the ICSID Convention should be reviewed on the basis of its acts and function in connection with the actual dispute under review. Subsequently, the tribunal in *BUCG v Yemen* also upheld the application of the *Broches test*.[195] The tribunal noted that the *Broches test* is the 'mirror image' of the test for attribution of responsibility to States under international law, specifically ILC Articles 5 and 8.[196]

133. In the context of insolvency claims, the test arose in *Rumeli v Kazakhstan*,[197] where the tribunal ultimately compared the role of the Turkish Savings Deposit Insurance Fund (TSDIF) to that of a receiver or liquidator.[198] The TSDIF, a Turkish State agency, was empowered by the Turkish Parliament to take over the control of the claimant companies- Rumeli and Telsim. On that basis, the TSDIF appointed managers to the claimant companies.

134. The respondent, Kazakhstan, argued that the claimants did not have standing to bring claims since the Turkish State was the real party in interest through the control exerted over the claimant companies by TSDIF. Kazakhstan also alleged that the claimants did not satisfy the conditions of Article 25 of the ICSID Convention to the extent that they are controlled by the Turkish State and its agencies for their sole benefit.

135. The tribunal dismissed these arguments and found that the TSDIF's appointment of managers for Telsim and Rumeli did not in any way put an end to the claimant companies' right to claim as investors against Kazakhstan. In any case, the tribunal noted, TSDIF was not the claimant. The tribunal likened the role of the TSDIF to the role of a receiver or liquidator or judicial manager of the claimant companies.[199] The amount received by TSDIF would be used to pay all the claimants' creditors, in accordance with Turkish law. The mere presence of TSDIF as manager of the company did not preclude the jurisdiction of the ICSID tribunal. Moreover, the *Broches test* did not apply to the dispute in question as TSDIF was not a claimant to the dispute.

136. *Landesbank v Spain* also provides an example of the unusual case where the question of attribution (albeit not in relation to internationally wrongful acts) raised was that of the relationship between the *claimant* and its home State. There, the State-owned claimants operated as both 'Landesbanks' (*ie* government banks for particular German provinces) and commercial banks, and were governed by public law. Spain argued that the claimants were nothing more than their home State (Germany) for the purposes of the arbitration.[200] Since Germany was responsible for the claimants' actions, the dispute was an inter-State dispute rather than a claim brought by German investors against Spain. The *Landesbank* tribunal disagreed: it found that the claimants possessed legal personality separate from that of the German State, and thus qualified as investors from Germany, rather than being the State itself. The tribunal

195 *Beijing Urban Construction Group Co. Ltd. v Republic of Yemen*, ICSID Case No ARB/14/30, Decision on Jurisdiction, 31 May 2017.

196 *Id.*

197 *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, at para. 327.

198 *Id.*

199 *Id.*

200 This issue is different from the issues famously raised in the International Court of Justice in *Barcelona Traction* and *ELSI*.

considered that Spain was not able to show on the basis of which principles of international law, as laid down in the ILC Articles, the acts of the claimants would be attributable to Germany.[201]

C. Attributing The Conduct of Insolvency Organs to the State

1) The issues: jurisdiction of the tribunal or merits of the claim

(a) Whether the arbitral tribunal has jurisdiction

137. Questions of whether the actions of an insolvency organ or practitioner are attributable to the State whose judiciary appointed it or in which it operates may be relevant for jurisdictional purposes in one of two ways.

138. First, actions taken by an insolvency organ may harm a foreign investor (who may, for instance, be a creditor of a company). Such investor may attempt to commence investment arbitration against the *host State*, arguing that the actions of the insolvency administrator are attributable to the host State. *Vöcklinghaus*, discussed below, is an excellent example of this scenario. There, the question of whether the insolvency court and trustees' actions could be attributed to the State was relevant for jurisdiction because, if the conduct of the entity in question is not attributable to a State, the investor's claim is not against the State. International investment treaty disputes only concern claims against actions by host States. Without being able to attribute the respondent's actions to the State, an investor's claims are merely disputes between two private entities, to be resolved between them under domestic law and in front of a different forum. These are arguments that the conduct of the 'wrong person' is before a tribunal and are objections to a tribunal's jurisdiction *ratione personae*.

139. Second, claims under investment treaties may be brought by insolvency organs or practitioners, either on their behalf or on behalf of the entity that they are administering. In such cases, the respondent State may argue that the claimant is to be assimilated to its *home* State for purposes of the arbitration, such that the dispute is actually a State-to-State dispute. This may be of particular relevance in the context of an ICSID arbitration, since State-to-State disputes are typically excluded from the scope of the ICSID Convention.[202]

(b) Whether the State is liable for acts taken in insolvency

140. If a tribunal finds that the conduct of an insolvency administrator or trustee violated the relevant investor protections and that the failures were attributable to the State, the State will be responsible.

201 *Landesbank Baden-Württemberg and others v Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the Intra-EU Jurisdictional Objection, 25 February 2019, at para. 98.

202 *See* Article 25(1), ICSID Convention, which provides that: 'The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State [...] and a national of another Contracting State'. This makes clear that disputes between two Contracting States (ie inter-State disputes) do not fall within the scope of the ICSID Convention.

Attribution is an absolute requirement for finding the State financially or otherwise responsible for breaches of these obligations.

141. In cases where a dispute over attribution would not be outcome determinative on jurisdiction (for instance, where the acts of multiple State organs are involved), or where the tribunal believes the issues of attribution are too closely linked to the facts of the dispute to be disposed of at an early stage, attribution is addressed at the merits stage.[203] Although this may prolong a dispute that could otherwise be dismissed following a preliminary objection, tribunals may be inclined to leave attribution (especially Articles 5 and 8 attribution) to the merits, since attribution in many cases is a fact- and context-intensive investigation. In particular, since Article 5 attribution requires a showing that the entity in question 'act[ed] in th[e] capacity' of a governmental authority 'in the particular instance', it would be difficult for tribunals to answer an attribution question definitively without diving into the 'particular instance' at issue. In those cases, the tribunal at the jurisdictional stage might be satisfied to conduct a *prima facie* examination to ascertain whether the entity involved has a link with the State.[204]

142. If the tribunal finds at the merits stage that the acts of an entity involved in insolvency are not attributable to the State, that could lead to a variety of outcomes, from outright dismissal due to lack of State liability, to a change in the legal test applicable, to a reduction/set off/sharing of liability. For instance, if a tribunal found that a court overseeing the insolvency was a State organ (as it self-evidently is under Article 4) but that the acts of the insolvency representative were not attributable to the State, it may apply the more stringent 'denial of justice' standard to find liability.[205] Alternatively, it could dismiss the claim for a failure to show causation due to the intervention of a non-State actor in the causal chain that led to the investment's loss.

2) *The outcomes: key findings of investment tribunals*

143. Arbitral tribunals that have issued publicly-available awards[206] and have confronted issues of attribution in the context of insolvency have so far either (a) found that they did not need to address the arguments of attribution raised; or (b) gone on to address the attribution arguments and rejected them or, more rarely, found that the conduct of insolvency organs was attributable to the respondent State.

(a) Tribunals that did not address attribution

144. In a few cases, tribunals have found ways to avoid talking about attribution at all. As already noted, attribution can be a fact- and context-heavy investigation, allowing tribunals to avoid the issue if there are other straightforward paths towards resolving the dispute.

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203 *See Gustav F W Hamester GmbH & Co KG v Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, at para. 144 ('as a practical matter, this question [of attribution] is usually best dealt with at the merits stage, in order to allow for an in-depth analysis of all the parameters of the complex relationship between certain acts and the State').

204 *Id*. at paras. 143-144; *Jan de Nul N.V and Dredging International N.V. v Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 28 June 2006, at para. 85.

205 *See, eg*, *Limited Liability Company AMTO v Ukraine*, SCC Arbitration No 080/2005, Final Award, 26 March 2008, at paras. 77-84.

206 The authors are aware of a number of confidential awards that have also addressed attribution issues with insolvency aspects.

145. In *Frontier Petroleum Services v Czech Republic*,[207] the claimant argued that the Czech Republic's failure to recognise and enforce an international arbitral award held by the investor amounted to a violation of the Canada-Czech Republic BIT. One of its claims concerned the treatment of the claimant's arbitral award by a Czech insolvency trustee. The parties disagreed about the extent to which this entity's actions were attributable to the Czech Republic in this case: the claimant argued that the State had delegated legislative authority to admit or reject insolvency claims to the trustee or, alternatively, that the trustee acted on the directions of the Czech State.[208] The Czech Republic argued that the insolvency trustee was not a *de jure* or *de facto* public organ and did not act under the direction of the Czech State, such that its actions were not attributable to it.[209] Avoiding ruling on this dispute, the *Frontier Petroleum Services* tribunal held that since it was clear that the actions of the insolvency trustee were not contrary to Czech law and would not have amounted to a violation of the BIT *even if* all the actions in question were attributable to the Czech Republic, there was no need to determine the question of attribution.[210]

146. *Dan Cake v Hungary* is similar.[211] The claimant argued that the actions of a Hungarian insolvency court and a liquidator appointed in the course of the insolvency process were attributable to the State. The tribunal held that the insolvency court's actions were attributable to Hungary as it was an organ of the State within the meaning of Article 4 of the ILC Rules, but the position of the liquidator was more complicated.

147. The tribunal noted that the liquidator did not need the court's authority to take the action complained of. The questions of attribution arose because (a) the liquidator seemed to be acting on the basis of the implicit 'order' contained in the insolvency Court's judgment and (b) it was empowered to take the relevant actions by a Hungarian statute. The tribunal did not answer the question of attribution, however.[212] Instead, as in *Frontier Petroleum*, the tribunal held that the liquidator's actions clearly did not amount to a violation of the BIT, such that there was no need to resolve the question of attribution.[213]

148. A similar approach was adopted in the *Manchester Securities v Poland* award,[214] in which the tribunal simply did not address questions of attribution of acts of an insolvency trustee to the host State, as they were not material to its conclusions. In *Marfin v Cyrprus*, the tribunal conducted a detailed exposition of the standards for attribution under Article 8, but then decided not to apply these standards to the attribution of a special insolvency administrator's conduct because of its finding of no substantive liability.[215]

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207 *Frontier Petroleum Services Ltd. v Czech Republic*, UNCITRAL, Final Award, 12 November 2010.

208 *Id.* at para. 350.

209 *Id.* at para. 361.

210 *Id.* at para. 416.

211 *Dan Cake S.A. v Hungary*, ICSID Case No ARB/12/9, Decision on Jurisdiction and Liability, 24 August 2015.

212 The tribunal, instead, posed a rhetorical question about whether or not 'any private person, even representing creditors, could accomplish [...] an act which deprives, under constraint, the debtor of the ownership of its assets', suggesting that a bankruptcy administrator appeared to exercise at least some 'element of governmental authority'. *Id.* at para. 159 (emphasis in original). The parties had not briefed this issue and the tribunal did not make a finding on it.

213 *Frontier Petroleum Services Ltd. v Czech Republic*, UNCITRAL, Final Award, 12 November 2010, at para. 416.

214 *Manchester Securities Corp. v The Republic of Poland*, Award, 7 December 2018, at para. 391.

215 *Marfin Investment Group Holdings S.A. v Republic of Cyrpus*, ICSID Case No. ARB/13/28, Award, 26 July 2018, at para. 693.

(b) Tribunals that addressed attribution

149. In the majority of insolvency cases in which tribunals have addressed attribution, they have found that the acts of insolvency representatives are *not* attributable to the State. The answer is not always easy, however. The 1927 award in *Venable v Mexico* first demonstrated the split in opinion: the presiding commissioner held that insolvency trustees under Mexican law were merely of a species with other private trustees of assets who are empowered to act in the best interests of the estate, while the dissenting commissioner would have found such trustees to be imbued by Mexican law with the power of the insolvency court.[216]

150. The first tribunal to address attribution in insolvency matters in modern times addressed the issue only summarily. In *Plama v Bulgaria*,[217] the tribunal was faced with a claim premised on a Bulgarian State entity initiating insolvency proceedings against an investor's assets and the allegedly illegal acts of the court-appointed 'syndics' in managing the debtor in insolvency. The claimant alleged failures in the appointment and conduct of these syndics, all of which the claimant claimed were attributable to the State. The tribunal first dismissed the suggestion that the appointment of the syndics was illegal[218]—an area where attribution might have been more straightforward as they had been appointed by a court, an Article 4 'organ'—and then summarily determined that the conduct of the syndics themselves was not attributable to the State under Article 8.[219] It held that the conduct of the Bulgarian courts in overseeing the insolvency was attributable to Bulgaria, but the tribunal found that there was no failure by Bulgaria to provide access to its courts or to provide fair court proceedings.[220]

151. *Jan Oostergetel v Slovak Republic*[221] followed *Plama* in its analysis. There, various non-State creditors of the claimant's investment, joined by a tax authority and a municipality, initiated and pressed insolvency proceedings in Slovak courts, which appointed a preliminary and then full trustee to identify the debtor's assets.[222] The tribunal found that the judiciary, tax authorities, and finance minister were all obviously State organs (which was uncontested), but that the claimant had not sufficiently shown that the trustees' acts were attributable to the State under Article 4, citing *Plama* as the sole authority.[223] The tribunal further held that attribution was not established under Articles 5 or 8 either.[224] Courts only oversaw appointment, fees, and removal 'in exceptional circumstance', and the fact that trustees are personally liable under Slovak law for damages in the insolvency proceedings supported their independence from the State.[225]

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216 *HG Venable (USA) v United Mexican States*, IV RIAA, 8 July 1927, at 228 (at para. 22), 244.
217 *Plama v Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008.
218 *Id.* at para. 250.
219 *Id.* at para. 253.
220 *Id.* at para. 254.
221 *Jan Oostergetel v Slovak Republic,* UNCITRAL, Award, 23 April 2012.
222 *Id.* at paras. 18-40.
223 *Id.* at paras. 152, 155.
224 *Id.* at para. 157.
225 *Id.* at paras. 157-58.

152. Continuing this trend, the tribunal in *MNSS v Montenegro*[226] held that decisions by an insolvency administrator could not be attributed to the State because, under Montenegrin law, 'the bankruptcy [administrator] manages and represents the bankruptcy debtor, unless differently stipulated by the law'.[227] The tribunal did not address the specific facts of the case, citing for authority *Oostergetel* and *Plama*.[228] The *MNSS* tribunal appears to have sidestepped the question of Article 5 or 8 attribution altogether.

153. Attribution in insolvency proceedings emerged most recently in the long-running battles in the *Yukos* saga. The 2021 final award in *Yukos Capital v Russia* cited a decision of the European Court of Human Rights Grand Chamber to find that liquidators under Russian law are 'substantially autonomous from the state authorities' and thus, tersely, declined to attribute their actions to the State.[229] Earlier, in 2014, Yukos shareholders appeared not to have argued that the actions of the insolvency administrator were properly attributable to Russia.[230] That *Yukos* tribunal found the acts of the judiciary and of State-owned Rosneft to be attributable to the State, but not the actions of the administrator, again citing *Plama* and *Oostergetel*.[231]

154. In light of this overwhelming case law, it may be tempting to see a uniform international law standard that insolvency administrators' acts are not attributable to the State. Two duelling cases involving the Czech Republic, *Vöcklinghaus v Czech Republic* and *AMF v Czech Republic*, illustrate why that would be a mistake. In *Vöcklinghaus v Czech Republic*, the claimant argued that the actions of a Czech insolvency court and insolvency trustees were either (i) acts of a government agency directly attributable to the Czech Republic or, alternatively, (ii) acts carried out by a person (partly) exercising State power, such that those actions were attributable to the Czech Republic pursuant to Articles 4 and 5 of the ILC Articles respectively.[232] Thus, the claimant argued that the responsibility of the Czech Republic had been engaged, because the State was responsible both for the court's conduct and for the court-reviewed acts of the insolvency trustees. Specifically, the claimant argued that the Czech court's decision (to put an entity it had a stake in, set up to design a golf course in the Czech Republic, into insolvency), as well as the trustees' decision (to sell the entity's assets in a public auction at what it claimed was a material undervalue), constituted breaches of the Germany-Czech Republic BIT.[233]

155. The tribunal held in summary that while the actions of the insolvency court were attributable to the Czech Republic, the actions of the insolvency trustees were not.[234] It cited the status and powers of insolvency trustees under Czech law, according to which trustees act independently and are personally liable for their actions,[235] and are remunerated from the assets realised through the insolvency process

226 *MNSS v Montenegro*, ICSID Case No. ARB(AF)/12/8, Award, 4 May 2016.

227 *Id.* at para. 313 (modification in original).

228 *Id.* at para. 314. The tribunal also held that similar laws applied in 'most European civil law systems,' suggesting that its holding might apply generally.

229 *Yukos Capital SARL v The Russian Federation*, PCA Case No. 2013-31, Final Award (July 23, 2021), at para. 437 (citing *Kotov Russia (Grand Chamber)*, Appl No 54522/00, Judgment, 2 April 2012.

230 *Yukos Universal Limited (Isle of Man) v The Russian Federation*, PCA Case No. AA 227, Final Award 18 July 2014, at paras. 1476-77.

231 *Id.* at para. 1480.

232 *Peter Franz Vöcklinghaus v Czech Republic*, Award (Sept. 19, 2011), at para. 38.

233 *Id.* at para. 175.

234 *Id.* at paras. 186-187.

235 *Id.* at paras. 186-187.

and not paid by the State/Court.[236] Thus, since the court's—and thus the State's—involvement stopped at the appointment stage, the trustees' actions were not attributed to the State.[237]

156. The *AMF v Czech Republic* tribunal held the opposite.[238] There, the claimant relied on Article 5 of the ILC Articles to argue that an insolvency trustee exercised public functions, such that its actions were attributable to the State. The tribunal relied heavily on a decision of the Czech Constitutional Court, which had described the trustee as being a 'distinctive person' or an individual with a 'special position' of a 'distinctive nature' that involves public functions, to hold that the trustee's actions are indeed attributable to the Czech Republic.[239] Although the parties had disagreed on the weight to be given to the *Vöcklinghaus* tribunal's holding,[240] the *AMF* tribunal practically ignored that prior decision.

157. *Vöcklinghaus* and *AMF*, which involve the same respondent State and similar facts, demonstrate how different arbitral tribunals may evaluate the same domestic statutes and reach different conclusions from them about attribution.

158. The operation and remuneration of insolvency practitioners also works differently under different domestic laws. The legal status and powers of these entities vary; in some jurisdictions, insolvency practitioners are subjected to heavy court supervision instead of acting independently. Articles 5 and 8 of the ILC Articles require tribunals to examine both the domestic legal status of entities as a matter of law, as well as the specific factual circumstances in which specific acts by such entities are being evaluated.

159. It is notable that few of the tribunals who have examined the attributability of the conduct of insolvency representatives have carried out a detailed Article 8 review, which would undercut an easy reference to domestic laws in deciding attribution. The very fact that few tribunals are willing to dismiss claims at the jurisdictional stage—despite the fact that a negative attribution finding can destroy jurisdiction—is evidence of the need in most cases to dive into the factual matrix of the merits before making this determination.

D. Conclusion

160. So far, arguments relating to the attribution of the conduct of insolvency organs to the State have mostly been ignored or rejected by investment tribunals. However, most findings were very fact-specific: the investment tribunals rejecting these attribution arguments usually did so after a careful analysis of the factual and legal circumstances of the insolvency in question. It is therefore not to be excluded that future tribunals could attribute the conduct of an insolvency organ to the State.

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236 *Id.* at paras. 186-187.

237 Professor Nový, surveying Czech insolvency law, disagreed with the tribunal's holding. *See* Z. Nový, *State Responsibility for Breaches of Standards of Investment Protection Committed by Bankruptcy Courts and Trustees*, Transnational Dispute Management 2 (2019), at 4-5, at 12-13.

238 *A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG v Czech Republic*, PCA Case No. 2017-15, Award, 11 May 2020, at paras. 547, 548.

239 *Id.* at paras. 542-545.

240 *Id.* at paras. 518, 524, 526.

V. Merits

Justin Jacinto and Charlotte Fromont

A. Introduction

161. This chapter reviews the main ways that investors have sought to hold States liable for breaching their investment treaty obligations in arbitrations relating to insolvency proceedings. More specifically, it examines:

i claims that the State's wrongful conduct caused the investor's company to become insolvent, focusing in particular on allegations that the State deliberately sought to force the company into insolvency proceedings;

ii claims that the decision by the relevant authorities to place a company into insolvency proceedings was improper, which are particularly common in cases involving bank failures as many States have distinct legal regimes that provide for banks and other financial institutions to be placed into 'resolution' proceedings if they are likely to become insolvent; and

iii claims that the conduct of insolvency proceedings in the host State was improper, including challenges to how administering courts, trustees and liquidators, or their equivalents, performed their functions.

162. Before reviewing those claims, it is helpful to briefly discuss the general manner in which investors seek to establish the State's liability under investment treaties.

163. While the specific terms of individual investment treaties vary in important ways, the substantive protections they provide are generally similar. Most treaties include variations of certain 'standards of treatment' or 'standards of protection' that have been set forth in other treaties. The most significant standards, in terms of how often they are relied on by investors, are:

i the fair and equitable treatment ('FET') standard, which is often paired with provisions precluding the impairment of investments by arbitrary, unreasonable or discriminatory measures;

ii the expropriation standard, which typically provides that any expropriation, nationalisation or measure equivalent to expropriation or nationalisation is permissible only if it is done for a public purpose, in a non-discriminatory manner, in accordance with due process of law, and against payment of prompt, adequate, and effective compensation;[241] and

241 *See, eg*, 2012 U.S. Model Bilateral Investment Treaty, Article 6 (Expropriation and Compensation) ('1. Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ('expropriation'), except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation; and (d) in accordance with due process of law and Article 5 [Minimum Standard of Treatment](1) through (3) [...].').

iii the national treatment and most-favoured nation ('MFN') treatment standards, which are sometimes referred to as the non-discriminatory treatment standards,242 and generally require that the investment be accorded treatment no less favourable than that accorded to investments in like circumstances of nationals of the host State (national treatment) or nationals of a third State (MFN treatment).[243]

164. In any individual arbitration, other standards of treatment—which include, *inter alia*, the denial of justice or 'effective means' standard, the full protection and security standard, the observance of undertakings or 'umbrella clause' standard, the transfer of funds or 'free transfer' standard, the performance requirements standard, and the compensation for losses standard[244]—can also be significant.

165. As investment treaties generally allow investors to make the same conduct the basis of claims under multiple standards of treatment, investors normally allege breaches of all the standards that are arguably applicable. Thus, a measure that is alleged to be, for example, a violation of the FET standard may also be cited as the basis of an uncompensated expropriation.

166. Another way that investors try to maximise their chances of establishing a breach is alleging that the State's acts and omissions constituted breaches of its treaty obligations both individually and in the aggregate. That approach allows the investor to challenge a wide range of conduct without being tied to a precise theory of liability that must be accepted by the tribunal.

167. In nearly every case in which the applicable treaty includes an FET standard, the investor will allege breaches of that standard. While some States have sought to limit the scope of the FET standard in their newer treaties, including by expressly affirming that it refers to the customary international law minimum standard of treatment or specifying the type of conduct that can violate the standard,[245] many

242 The 'non-discriminatory standards' description can sometimes lead to confusion as the standards are usually drafted in a manner that could be interpreted as allowing the State to be found liable simply for treating the investor's investment less favourably than an investment in like circumstances without requiring the investor to show that the State had a discriminatory intent. Further, the investor can sometimes show a discriminatory intent but cannot identify a comparator investment subject to more favourable treatment. In those cases, the investor might instead attempt to make an FET claim on the basis that the discriminatory intent was arbitrary and unreasonable.

243 *See*, *eg*, Netherlands Model Investment Agreement, dated 22 March 2019, Article 8(1) (national treatment) ('Each Contracting Party shall accord to an investor of the other Contracting Party and to an investment of an investor of the other Contracting Party, treatment no less favorable than the treatment it accords, in like situations, to its own investors and to their investments with respect to conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory.), Article 8(2) (MFN treatment) ('Each Contracting Party shall accord to an investor of the other Contracting Party and/or to an investment of an investor of the other Contracting Party, treatment no less favorable than the treatment it accords in like situations, to investors of a third country and to their investments with respect to the conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory').

244 *See*, *eg*, Energy Charter Treaty, Article 10(12) ('Each Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to Investments, investment agreements, and investment authorisations'); Netherlands Model Investment Agreement, dated 22 March 2019, Article 9(5) (Treatment of investors and of covered investments) ('When a Contracting Party has entered into a written commitment with investors of the other Contracting Party regarding a specific investment, that Contracting Party shall not, either itself or through an entity exercising governmental authority, breach the said commitment through the exercise of governmental authority in a way that causes loss or damage to the investor or its investment'); *id*. Article 11 (Treatment related to free transfer) ('The Contracting Parties shall guarantee that payments relating to an investment may be transferred. The transfers shall be made in a freely convertible currency, without restriction or delay, and at the market rate of exchange applicable on the date of transfer. [...]').

245 *See*, *eg*, Netherlands Model Investment Agreement, dated 22 Mar. 2019, Article 9(2) (Treatment of investors and of covered

treaties set forth the standard in broad terms, *egeg*, as simply requiring the host State to 'accord [...] investments fair and equitable treatment'.[246] As such, the FET standard tends to serve as a 'catch-all' protection that is heavily relied on by investors.

168. As noted above, most investment treaties include a similarly worded expropriation standard that recognises the State's right to expropriate or nationalise property while imposing a compensation requirement and other conditions on any expropriation or measure equivalent to expropriation.[247] In many cases, the key issue is not whether the State complied with the conditions of an expropriation but whether an expropriation or a measure equivalent to expropriation occurred such that the State was required to meet the conditions. While direct expropriations are generally easy to identify as they involve an actual seizure of the property or legal transfer of title, measures equivalent to expropriation, or 'indirect expropriations', can be more difficult to identify as the determination can turn on subjective views on whether particular types of State conduct equate to takings that require compensation. The prevailing view is that a tribunal making such a determination should consider the effect of the State measure on the investor's investment, requiring that the investor show that the measure caused a complete or nearly complete deprivation, while also considering the character and purpose of the measure to assess whether it is of a type that should require compensation as opposed to being a non-compensable regulatory measure.[248]

169. While frequently cited by investors, the national treatment and MFN treatment standards are more fact-specific as they require the investor to identify a 'comparator' investment of either a national of the host State (national treatment) or of a third-party State (MFN treatment) that was in like circumstances to the investor's investment and received more favourable treatment. In some cases, there are no comparators either because the investor made a unique type of investment or because the otherwise similar investments were not in like circumstances. When comparators exist, the standards can provide important additional protections to the investor as the failure to provide the equally favourable treatment arguably gives rise to liability without the investor needing to show that the State's conduct was otherwise wrongful, in terms of being, *eg*, arbitrary, unreasonable or abusive.

170. The relevance of the other standards of treatment is likewise dependent on the particular facts of the dispute. As discussed below, in cases involving challenges to the conduct of insolvency proceedings, it is relatively common for the investor to make a claim that the State committed a denial of justice, either by not providing the investor with access to the courts or another legal remedy or by conducting the legal proceeding in a severely defective manner.[249] Treaties occasionally include 'effective means' standards, which generally provide the investor with a similar, but arguably more limited, right to an effective means of asserting claims and enforcing rights with respect to investments.[250]

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investments).

246 German Model Bilateral Investment Treaty (2008), Article 2(2).

247 *See, eg*, 2012 U.S. Model Bilateral Investment Treaty, Article 6 (Expropriation and Compensation).

248 C. McLachlan, L. Shore, M. Weiniger, International Investment Arbitration Substantive Principles (2017), at paras. 8.87-93

249 *See* Chapter V.D below.

250 *See* J. Wirth, '*Effective Means' Means? The Legacy of Chevron v Ecuador*, 25 Columbia Journal of Transnational Law 325 (2013). *See also, eg*, Energy Charter Treaty, Article 10(12) ('Each Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to Investments, investment agreements, and

B. Claims that the State's conduct caused the insolvency

171. In cases in which an investor's company is placed in insolvency proceedings, the investor frequently argues that the State's wrongful conduct caused the insolvency. The adjudication of the merits of these disputes is often little different than any other case in which the State is alleged to have caused harm to the investor's investment in that the tribunal's focus will be on the measures that harmed the company and led to the insolvency, with the insolvency being relevant primarily as evidence of the magnitude of harm caused to the investment. In such cases, the investor will generally seek to hold the State liable for as much of the decline in value of the investment as possible, including by basing its claims on conduct occurring over a long period of time, sometimes going back many years as investment treaties typically do not specify prescription periods.[251]

172. If an insolvency has occurred, the investor can be expected to also allege that the State breached the expropriation standard, which is included in a fairly standard form in most treaties.[252] The scenario of a State causing harm to a company that leads to its insolvency might not provide a basis for the investor to make a claim for a direct expropriation as such an expropriation involves an outright seizure of the investor's assets, either through a physical taking or legal transfer of title to the assets.[253] The claim would be that the wrongful acts and/or omissions constituted an indirect expropriation,[254] often a 'creeping' one,[255] by causing the collapse of the company.[256] An allegation that the insolvency proceeding itself was

investment authorisations').

251 Subject to considerations on jurisdiction *ratione temporis* discussed in Chapter II.E above, the only clear temporal limitation under most treaties concerns the time at which the investment was made as the State's investment protection obligations are not applicable prior to the investment being made.

252 *See, eg*, *Renée Rose Levy v Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014, at paras. 319 et s.; *Marco Gavazzi and Stefano Gavazzi v Romania*, ICSID Case No. ARB/12/25, Decision on Jurisdiction, Admissibility and Liability dated April 21, 2015, at paras. 201-207, 236-240; *Inmaris Perestroika Sailing Maritime Services GmbH and others v Ukraine*, ICSID Case No. ARB/08/8, Award, 1 March 2012, at para. 275.

253 *See* C. McLachlan, L. Shore, M. Weiniger, International Investment Arbitration Substantive Principles (2017), at para. 8.01; *Inmaris Perestroika Sailing Maritime Services GmbH and others v Ukraine*, ICSID Case No. ARB/08/8, Award, 1 March 2012, at para. 382 (discussing the possibility that a travel ban of the claimants' primary asset, a sailing ship, might be considered a 'seizure' of the right to use that asset and holding that the ban 'amounted to an indirect expropriation in that it destroyed the value of Claimants' contractual rights and such diminution in value (due to the lasting damage to Claimants' business) was, for all intents and purposes, permanent').

254 Most investment treaties allow for such claims as their expropriation standards typically provide that compensation is required if the States expropriates the investment 'indirectly through measures equivalent to expropriation'. *See, eg*, U.S. Model Bilateral Investment Treaty (2004), Article 6.

255 *Renée Rose Levy v Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014, at para. 445.

256 In *Binder v Czech Republic*, the investor alleged an indirect expropriation on the basis that the negligent conduct of the State's customs authorities caused his company to incur large losses that resulted in its insolvency. In rejecting that claim, the tribunal made the point that the insolvency proceedings themselves, which were not alleged to be unlawful or irregular, would not be considered expropriatory. *Rupert Joseph Binder v Czech Republic*, UNCITRAL, Final Award 15 July 2011, at para. 480 ('The Claimant alleges that the failure to investigate the role of the customs authorities in the tax fraud together-with the pursuance of guarantee claims against CARGO are acts having the effect of expropriation. The Arbitral Tribunal cannot find that such omissions or acts could be assimilated to a deprivation of property under Article 4(2) of the BIT. It is true that CARGO went bankrupt as a result of its indebtedness and that a considerable part of its debts were based on the surety bonds. However, bankruptcy is not tantamount to expropriation, and there is no indication that the bankruptcy in this case was unlawful or irregular or that it pursued an expropriatory purpose').

expropriatory (*eg.*, by unnecessarily destroying the value of the investor's investment that existed just prior to the initiation of the insolvency proceeding) is a distinct claim that is discussed further below.[257]

173. It is well established that the investor making an expropriation claim must show that the State's measures caused a complete or nearly complete deprivation of the value of the investment.[258] The fact that an insolvency proceeding occurred can provide support for the claim if it indicates that the company is no longer a going concern and has significantly diminished in value. The occurrence of an insolvency does not, however, necessarily establish that such a complete or nearly complete deprivation occurred because the impugned State measures may not have been a primary cause of the insolvency, or because the investor may recover significant value through the insolvency proceeding.[259]

174. Investors sometimes allege that the State is liable for causing an insolvency not merely because its acts or omissions harmed the company's financial performance such that an insolvency happened to result, but because the State deliberately forced the company into an insolvency proceeding, either for the simple purpose of destroying the company or to use the insolvency proceeding as a mechanism for seizing the company's assets. In some such cases, the investor is able to substantiate particularised allegations of such a scheme. In others, the investor advances relatively vague or speculative allegations of conspiratorial conduct, sometimes in the hope of persuading the tribunal to view conduct that would not otherwise be violative of the treaty as bad faith acts that justify compensation.

175. A notable set of cases in which the tribunals found that the State orchestrated the insolvency of a company are those relating to Yukos Oil Company ('Yukos'). Several treaty arbitrations were initiated by Yukos investors against Russia, including three arbitrations brought by controlling shareholders that were effectively heard in parallel by the same tribunal.[260] In those three cases, the shareholders argued that Russia expropriated their investments in Yukos while also breaching other standards of the relevant treaties. They claimed that Russia harmed the company through a series of politically motivated actions including criminal prosecutions, harassment of Yukos and its personnel, large tax reassessments and fines, asset freezes, and the forced sale of Yukos' core oil production assets.[261] They further claimed that Russia, after causing such harm to the company, announced that it 'intended to push Yukos into bankruptcy in order to redistribute its remaining assets', and proceeded to unnecessarily cause the insolvency of Yukos and arrange unfair insolvency proceedings that benefitted the State and State-owned companies at the expense of the claimants and other creditors.[262]

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257 *See* Chapter V.C below.

258 *See* C. McLachlan, L. Shore, M. Weiniger, International Investment Arbitration Substantive Principles (2017), at paras. 8.100 et s.

259 *GAMI Investments, Inc. v United Mexican States*, UNCITRAL, Final Award, November 15, 2004, at paras. 125-133.

260 The three awards are essentially identical. *Yukos Universal Limited (Isle of Man) v The Russian Federation*, PCA Case No. 2005-04/AA227, Final Award, 18 July 2014, at paras. 1-2 (discussing the coordination of the three arbitrations); *Hulley Enterprises Limited (Cyprus) v The Russian Federation*, UNCITRAL, PCA Case No. 2005-03/AA226, at paras. 1-2 (same); *Veteran Petroleum Limited (Cyprus) v The Russian Federation*, UNCITRAL, PCA Case No. 2005-05/AA228, at paras. 1-2 (same).

261 *Yukos Universal Limited (Isle of Man) v The Russian Federation*, PCA Case No. 2005-04/AA227, Final Award, 18 July 2014, at para. 63.

262 *Id.* at para. 101. *See also id.* at paras. 1045 et s.

176. The tribunal largely accepted the Yukos investors' allegations. It agreed that several of the impugned measures were unjustified and were the primary cause of the company becoming insolvent. Particularly notable to the tribunal was the 'more than suspect' seizure and auction of Yukos' primary oil producing asset,[263] because, had that not occurred, Yukos would not have had problems repaying its loans and would have been able to pay the tax claims of Russia, whether justified or not, and 'would not have been bankrupted and liquidated'.[264] Having made those findings, the tribunal accepted the investors' allegation of a bad faith scheme to force the company into insolvency, stating that '[t]he only rational explanation for the highly unusual manner in which the bankruptcy proceedings against Yukos were initiated was to act as a cover for the Russian Federation's involvement', allowing the State to maintain 'the appearance that it was commercial parties—not the State—that sought Yukos' bankruptcy', while achieving 'its desired end'.[265]

177. While claims relating to the conduct of insolvency proceedings are addressed further elsewhere in this report,[266] it bears noting here that the peculiarities the tribunal identified in the conduct of the proceedings for Yukos, such as, *eg*, the fact that '[a]ll claims filed by Rosneft and the Federal Taxation Service, valued in the billions, were peremptorily accepted by the Court, while the many claims filed by Yukos' affiliated companies were rejected by the Court in a very summary way', provided support to its overall finding of an improper scheme.[267] In the context, 'the totality of the bankruptcy proceedings [...] were not part of a process for the collection of taxes but rather, as submitted by Claimants, indeed the 'final act of the destruction of the Company by the Russian Federation and the expropriation of its assets''.[268]

178. As noted, investors sometimes allege that the insolvency of the company is the result of an improper scheme by the State despite having little ability to substantiate such a claim. In some cases, the allegation of a politically motivated or conspiratorial scheme is the primary, if not sole, basis for holding the State liable, while in other cases the allegation supplements claims that do not depend on a finding of bad faith.

179. In *Voecklinghaus v Czech Republic* ('*Voecklinghaus*'), the claimant, Mr. Voecklinghaus, alleged that individuals related to one of the creditors, the trustee and the insolvency judge were parties to a criminal conspiracy to deprive him of an investment company named KOMFORT,[269] and faulted the Czech police and State attorneys for not pursuing criminal proceedings against those individuals.[270] The tribunal engaged in a detailed review of the facts relating to his allegations, explaining that it had 'sought to

263 *Id.* at para. 986.

264 *Id.* at paras. 1143, 1579.

265 *Id.* at para. 1149. *See also id.* at para. 1148 ('[I]t appears undeniable to the Tribunal that initiating bankruptcy was not a goal of the Western Banks, but rather the objective of Rosneft, in the interests of its owner, the Russian Federation. The Tribunal concludes that in the end the bankruptcy was initiated by the Russian Federation').

266 *See* Chapter V.D below.

267 *Yukos Universal Limited (Isle of Man) v The Russian Federation*, PCA Case No. 2005-04/AA227, Final Award, 18 July 2014, at paras. 1179-1183.

268 *Id.* at para. 1180.

269 *Peter Franz Voecklinghaus v Czech Republic*, UNCITRAL, Final Award, 19 September 2011, at para. 28.

270 *Id.* at paras. 29, 37.

reflect the chronological record revealed by contemporaneous documents with some care'.[271] It found that the investor's company had been in 'substantial difficulty' for its own business reasons,[272] while repeatedly observing that the investor had been unable to substantiate his allegation of a conspiracy.[273] As a result, the tribunal rejected the conspiracy allegations, for which it found there was 'no evidence' in the available record.[274]

180. In *Antonio del Valle Ruiz and others v Spain* ('*del Valle*'), the claimants were major shareholders and bondholders of a large Spanish bank, Banco Popular. As the bank faced imminent collapse, it was placed in resolution—which, as noted above, is a special regulatory regime used in many jurisdictions as an alternative to conventional insolvency proceedings for banks and other credit institutions.[275] The resolution resulted in Banco Popular's shares and bonds being written down to essentially nil value and the bank being sold to another Spanish bank, Santander, for €1.[276] The claimants blamed the bank's failure on a number of acts and omissions by the Spanish authorities. Most of the claims challenged the sufficiency of legitimate regulatory conduct, such as whether the authorities were wrong not to have imposed a short sale ban or to have made public statements assuring depositors of the health of the bank.[277] The claimants also advanced the more conspiratorial allegation that Spain 'engineered' the resolution and arranged a 'sham auction' that was the result of 'backchannelling' between the Spanish authorities and Santander.[278] As in *Voecklinghaus*, the tribunal reviewed all the facts relating to the alleged scheme, including the evidence submitted by Spain demonstrating the legitimate reasons for its conduct, and concluded that the claimants had failed to meet their burden of proving the allegation.[279]

181. In *Renée Rose Levy v Republic of Peru*, the claimant, who was an investor in a Peruvian bank named Banco Nuevo Mundo ('BNM') that was liquidated, similarly advanced a conspiracy allegation as an overarching supplement to her more discrete challenges to the acts of the relevant regulatory authority. The tribunal rejected the allegation and concluded that 'it is illogical that the Government of Peru (or any government) would decide to take action to trigger or aggravate a financial crisis' and that '[t]hese alleged intentions by the Peruvian Government are even more unlikely in times of a financial crisis such as the one that existed in Peru when BNM faced its most severe problems'.[280] The tribunal's blunt rejection of the allegation highlights how a tribunal can, in addition to enforcing the burden of proof on the claimant, assess the merit of a conspiracy allegation by testing its logical coherence.

182. As noted above, investors may claim that the State breached the national treatment and MFN treatment standards by alleging differential treatment of the investor's investment and the investment of a national

271 *Id.* at para. 122.
272 *Id.* at para. 129.
273 *Id.* at paras. 132-133.
274 *Id.* at para. 133.
275 *Antonio del Valle Ruiz and others v Spain*, PCA case no. 2019-17, Final Award, dated March 13, 2023, at paras. 763-764. One of the authors, Mr. Jacinto, was counsel to Spain in the arbitration.
276 *Id.* at para. 683.
277 *Id.* at para. 288.
278 *Id.* at paras. 661, 679, 687.
279 *Id.* at para. 687.
280 *Renée Rose Levy v Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014, at para. 484.

of the host State or a third State. In cases in which the investor's company has become insolvent, the investor often invokes these comparative standards to argue that the State is liable because it failed to provide assistance that would have avoided the investment's insolvency and that was provided to other companies in similar circumstances. Thus, even though the State otherwise had no obligation to provide assistance to a failing company, it could be liable under the treaty if it provided assistance to other companies in similar circumstances and did not provide the same assistance to the investor's company.

183. In *Saluka v Czech Republic*, the tribunal accepted an argument along those lines, finding that the State had failed to explain why it had not provided the same financial assistance to the bank owned by the claimant that it had provided in the same time period to the 'Big Four' domestically owned banks that were in a comparable position in facing bad debt problems.[281] In the *del Valle* case, the tribunal rejected the argument, finding that while Spain had provided capital injections and other forms of support to certain other Spanish banks that were not provided to Banco Popular, the other banks were not in like circumstances because they had received the support years earlier under a different legal regime and had different financial problems.[282]

C. Claims that the State's decision to place a company into insolvency or resolution proceedings was improper

184. In a number of cases, the investor has challenged the State's decision to place a company into insolvency proceedings. Such claims have become relatively common in recent years in connection with bank failures. Many States, including EU Member States, have a special 'resolution' regime for banks and other credit institutions that functions as an alternative to conventional insolvency proceedings.[283] In these regimes, the regulator can intervene based on a determination that the bank is 'failing or likely to fail' ('FOLTF') rather than waiting for the bank's management or its creditors to initiate insolvency proceedings. Upon making such a finding, the regulator can apply a range of powers, including a write-down of the bank's liabilities or a sale of parts or all of its business, while also initiating insolvency proceedings in conjunction with such measures.[284] The regulator generally is only able to apply resolution measures if it serves the public interest and respects the 'no creditor worse off' principle in ensuring that resolution does not leave creditors in a worse position than would be the case if the

281 *Saluka Investments B.V. v The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, at para. 498. The tribunal made that finding as a breach of the FET standard but did so after finding that the relevant treaty somewhat unusually indicated that the national treatment and MFN treatment obligations were aspects of the treaty's FET obligation. *Id.* at paras. 280-283.

282 *Antonio del Valle Ruiz and others v Spain*, PCA case no. 2019-17, Final Award, 13 March 2013, at paras. 739-743. The tribunal made that finding after first noting that it did not consider the analysis necessary because the proper comparators were other investors in Banco Popular and not investors of the other Spanish banks that had allegedly received more favourable treatment. *Id.* at para. 737.

283 *See, eg*, Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council Text with EEA relevance.

284 *See, eg, id.* Article 44.

bank was placed in a conventional insolvency proceeding.[285] The policy rationale for intervening ahead of a bank's collapse is clear: it can mitigate the contagion effect of a bank failure while also giving the regulator a better chance of resolving the bank through a sale or restructuring.[286] However, as the regime makes the regulator responsible for making a critical FOLTF determination based on its assessment of how circumstances will develop in conditions of high uncertainty, it also invites investment treaty claims from investors in the bank who have access to a treaty.

185. In the *Levy v Peru* case discussed above, the claimant alleged that the relevant regulatory authority, the Superintendency of Banking, Insurance, and Pension Fund Administration ('SBS'), had been wrong to intervene in her bank, BNM, and then order its liquidation and dissolution because the bank had only been facing a 'temporary liquidity problem' that was solvable and the SBS had relied on changing and arbitrary regulatory and accounting standards to find that the bank had negative equity.[287] While the claimant was able to point to financial statements of the bank and reports of the SBS that indicated that its situation was not so dire,[288] the tribunal nonetheless rejected the claim as it recognised that the bank had long-running problems with its accounting practices, including failing to identify significant losses.[289]

186. In the *del Valle Ruiz* case, the investors could not directly challenge the FOLTF decision that led to Banco Popular being placed in resolution because the authorities responsible for the FOLTF and resolution decisions were the European Central Bank (the 'ECB') and the Single Resolution Board as the bank was a 'significant institution' subject to supervision at the EU level.[290] They nonetheless blamed the Spanish authorities, asserting that they were responsible for pressuring or influencing the EU authorities and had failed to account for viable alternative actions, including the bank's own efforts to arrange a private sale and several measures it was implementing to improve its liquidity ratio.[291] The tribunal appeared to be disinclined to second-guess legitimate regulatory determinations and explained that, regardless of whether and how the Spanish authorities influenced the EU authorities,[292] it was satisfied that the authorities had considered the available alternatives (including private sector solutions) and had not acted in an arbitrary manner.[293]

187. The case of *Ayoub-Farid Saab and Fadi Saab v Cyprus* involved a challenge by the owners of FBME Bank Ltd. ('FBME') to the decision of the Central Bank of Cyprus ('CBC') to place the Cyprus branch of FBME in resolution after determining that it was FOLTF.[294] In its capacity as the resolution authority of Cyprus, the CBC determined that the branch had become FOLTF after its correspondent banks and other

285 *See, eg, id.* Article 74.
286 *See, eg, id.* at para. 53.
287 *Renée Rose Levy v Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014, at paras. 452-453.
288 *See, eg, id.* at paras. 466-469.
289 *Id.* at paras. 455-474.
290 *Antonio del Valle Ruiz and others v Spain*, PCA case no. 2019-17, Final Award, 13 March 2013, at para. 670.
291 *Id.* at para. 660 (summarising the claimants' argument that '[t]he Spanish authorities failed to take these initiatives into account and instead decided to put Banco Popular into resolution'').
292 *Id.* at para. 678.
293 *Id.* at para. 677.
294 *Ayoub-Farid Saab and Fadi Saab v Cyprus*, ICC Case No. 20588/ZF. One of the authors, Mr. Jacinto, was counsel to Cyprus in the arbitration.

counterparties ceased doing business with it after the financial intelligence unit of the US Government designated FBME a 'primary money-laundering concern'.[295] In the arbitration, the claimants argued that the CBC's decision was improper because, *inter alia*, the bank could have continued meeting its obligations had the CBC provided the appropriate assistance to it.[296] While the award is not public, the tribunal rejected the allegation, accepting as valid the CBC's reliance on the circumstances created by the US Government's action.[297]

188. It is also possible that an investor will challenge a State action that interferes with the initiation of an insolvency proceeding. While the *Elettronica Sicula S.p.A. (ELSI) (United States of America v Italy)* case was heard before the International Court of Justice, it concerned an investor's claims that its investment was expropriated by the host State. In short, it was argued, *inter alia*, that Italy had effected an unlawful requisition of the ELSI plant that drove ELSI into insolvency and thus deprived the shareholders of their right to proceed to the liquidation of the company's assets under normal conditions.[298] The Court rejected the argument, finding that 'ELSI, if not already insolvent in Italian law before the requisition, was in so precarious a state that bankruptcy was inevitable' and thus the 'the requisition was an act of supererogation'.[299] These allegations were brought under the expropriation standard of the applicable FCN treaty. Had the allegations been made under an investment treaty with an FET clause, the tribunal might have adjudicated whether the requisition and alleged interference with the bankruptcy proceedings occurred and constituted a breach of the treaty.

D. Improper conduct of the insolvency proceedings

189. The third type of claims brought by investors affected by insolvency proceedings relate to the conduct of the insolvency proceedings.

190. Insolvency proceedings are often supervised by national courts. Investors sometimes attempt to challenge decisions of the courts under treaty standards such as the FET standard generally and as a denial of justice, in particular.[300] As noted above, the denial of justice protection is part of customary international law and can generally be applied through the FET standard whether or not the treaty includes an express reference to denial of justice.[301]

191. Denial of justice is a procedural standard that concerns access to the courts and the administration of justice.[302] In the words of one commentator, a 'denial of justice covers all situations where a foreigner

295 *See id.* Request for Arbitration, 28 October 2014, at paras. 25-27; Central Bank of Cyprus, 'Statement by the Resolution Authority as regards press reports on FBME Bank Ltd branch in Cyprus', press release, 10 July 2015.

296 *Id.* at paras.25-26.

297 *See Ayoub-Farid Saab and Fadi Saab v Cyprus*, ICC Case No. 20588/ZF, Paris Court of Appeal, International Commercial Chamber, Judgment, 22 March 2022, at paras. 28-33.

298 *Elettronica Sicula S.p.A. (ELSI) (United States of America v Italy)*, International Court of Justice, Judgment of July 20, 1989, at paras 69, 115-116.

299 *Id.* at para 119.

300 *See generally* C. McLachlan, L. Shore, M. Weiniger, International Investment Arbitration Substantive Principles (2017), at paras. 7.103-7.152.

301 *Id.* at para. 7.105.

302 *See Id.* at para. 7.109 ('The concept of denial of justice is above all a procedural standard').

has been deprived of a proper judicial process, whether he is seeking to establish or to preserve legal interests'.[303] As explained by commentators, denial of justice is concerned with the quality of the legal procedure and cannot involve a determination of the correctness of the national courts' decision:

> [I]nternational law is not concerned to adjudicate the correctness of the judgment per se. It protects the institution of adjudication and only intervenes when the process itself fails to afford the basic qualities that justify its existence. In this way, the protection from denial of justice is linked to the underlying concept of the rule of law, which it was submitted at the outset best explains the overall rationale for the fair and equitable treatment standard.[304]

192. The denial of justice protection, or the similar 'effective means' standard, can thus enable an investor to make claims regarding its access to insolvency proceedings or the manner in which such proceedings were conducted.

193. The *Dan Cake v Hungary* case provides an illustration of the requirement of access to courts in the context of insolvency proceedings. In that case, the investment company, Danesita, was subject to liquidation proceedings following an application from its creditors to liquidate. In those proceedings, Danesita applied for a composition hearing with its creditors. Danesita was entitled to such a hearing under the law, provided that its request was accompanied by the required documents, which it was.[305] In the absence of a composition hearing the liquidator was under an obligation to start the sale of Danesita's assets.[306] The hearing was thus 'the only way for the debtor company to avoid the sale of its assets'.[307] The court denied such a hearing, requiring additional documents with no appeal available.[308] The decision, which included a reminder of the liquidator's obligation to proceed with the sale, was served on the liquidator.[309] The tribunal found that a denial of justice had occurred because the court 'deprived Danesita of the chance – whether great or small – to avoid the sale of its assets and its disappearance as a legal person'.[310]

194. In *Amto v Ukraine*, the claimant alleged that it was prevented from participating in three insolvency proceedings due to the court's failure to order the initiating creditors to publicly announce the opening of the bankruptcy proceedings.[311] In that case, the treaty expressly included an 'effective means' clause. The tribunal accepted that the protection against a denial of justice generally included the investor's right of access to the courts and that the effective means clause in particular encompassed the investor's rights to ascertain its claims and enforce its rights.[312] However, the tribunal did not find that a lack of

303 J. Paulsson, Denial of Justice in International Law (2005), at 63. *See also id.* at 7 ('In international law, denial of justice is about due process, nothing else – and that is plenty').

304 C. McLachlan, L. Shore, M. Weiniger, International Investment Arbitration Substantive Principles (2017), at para. 7.109.

305 *Dan Cake v Hungary*, ICSID Case No ARB/12/9, Decision on Jurisdiction and Liability, 24 August 2015, at paras. 94, 98.

306 *Id.* at para. 92(b).

307 *See Id.* at paras. 45-46. *See also id.* at para. 92.

308 *Id.* at paras. 54-55.

309 *Id.* at paras. 101-107.

310 *Id.* at para. 145.

311 *Limited Liability Company Amto v Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, at para. 77.

312 *Id.* at para. 75.

publicity breached such standards. Given that the duty to publicise the insolvency proceedings rested with the applicant and not with the court itself, the tribunal did not find that the failure to publicise the proceedings were imputable to the courts.[313] It also considered that this 'loss of opportunity to participate in these bankruptcy proceedings was remediable by the Claimant commencing its own bankruptcy proceedings', which the claimant did in three other proceedings.[314]

195. In relation to the proceedings it initiated, the claimant also made allegations of breach of the 'effective means' clause. The judgment that recognised the creditors, ordered the administration of the debtor's property and appointed a liquidator, was quashed on appeal. The claimant complained that the decision of the court of appeal was influenced by a government resolution clarifying the list of highly hazardous enterprises on which the debtor was mentioned.[315] The tribunal did not find any 'evidence, either within these decisions or otherwise adduced by the Claimant, that the courts were improperly influenced by' the impugned resolution.[316]

196. Conversely, in *Petrobart v Kyrgyz Republic*, the tribunal found that the court's decision staying a judgment in favour of the creditor was influenced by the government and therefore amounted to a treaty breach. The claimant had obtained a judgment which entitled it to recover a large amount of money in payment of debt owned by KGM, the State-owned gas company.[317] Yet, following a letter sent by the government to the court, the court stayed execution and before the period of stay ended, KGM was declared insolvent, thereby rendering enforcement impossible.[318] Because the decision to stay the execution referred expressly to the government's letter, the tribunal considered it a breach of the effective means clause in the Energy Charter Treaty ('ECT').[319]

197. Tribunals can also take into account the investor's diligence in following proper procedures during insolvency proceedings in determining whether a denial of justice occurred. For instance, dismissing a denial of justice claim, the *Voecklinghaus* tribunal observed that the claimant 'was afforded very wide access to the Czech civil and criminal judicial system. However, it is equally clear from the record in this Arbitration that he did not avail himself of all available local remedies'.[320]

198. Protections against denial of justice also cover claims of fundamental failure in due process in the litigation procedure itself.[321] The *Loewen v United States* tribunal defined lack of due process as a 'manifest injustice' which 'offends a sense of judicial propriety'.[322]

313 *Id.* at para. 78.
314 *Id.*
315 *Id.* at paras. 22, 79.
316 *Id.* at para.80.
317 *Petrobart Limited v Kyrgyz Republic*, ARB No. 126/2003, Arbitral Award, 29 March 2005, at 75.
318 *Id.*
319 *Id.*
320 *Peter Franz Voecklinghaus v Czech Republic*, UNCITRAL, Final Award, 19 September 2011, at para. 207.
321 *See* C. McLachlan, L. Shore, M. Weiniger, International Investment Arbitration Substantive Principles (2017), at para. 7.128.
322 *Loewen Group Incorporated and Loewen v United States*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, at para. 132.

199. As one commentator observes, in claiming a denial of justice in relation to insolvency proceedings, investors 'would have to prove that the conduct of the bankruptcy courts clearly deviates from 'standard' judicial practice shared by states in the field of bankruptcy'.[323]

200. Insolvency proceedings are often strictly regulated procedures involving competing interests that must be conciliated. In reviewing FET and denial of justice claims, arbitral tribunals are sensitive to such specificities.

201. For instance, in *Amto v Ukraine*, the claimant alleged that irregularities in the insolvency proceedings it initiated amounted to a denial of justice. The tribunal concluded that the claimant failed to 'prove any legal error, abuse, undue delay or interference in the process by the Ukrainian courts'.[324] In particular, the tribunal noted the specific nature of insolvency proceedings involving 'many interests and competing rights' and being a 'technical subject-matter', and found that the claimant's frustration 'that over a period of years it was unable to enforce its judgment debts against' a debtor did not establish a denial of justice in circumstances where 'there were many other judgment creditors, and the debtor was a large and strategic state enterprise'.[325]

202. In the context of insolvency proceedings, it would appear that denial of justice by insolvency courts 'would normally require more than a minor error [or] excessive formalism'.[326]

203. For instance, in *Voecklinghaus*, the tribunal – referring to the test set in the *Mondev* case[327] - dismissed a denial of justice claim because 'none of the decisions of Czech tribunals or the Czech criminal investigation authorities reviewed in the course of this Award could be described as 'clearly improper''.[328]

204. Moreover, the specific circumstances motivating and surrounding insolvency proceedings may require that they be conducted as a matter of emergency and with more limited due process protections than would otherwise be available. However, the emergency nature of insolvency proceedings is not in itself a denial of justice.

205. For instance, in *Voecklinghaus*, the claimant alleged that the declaration of insolvency of the investment company amounted to a denial of justice because it took only two days for the judge to make the

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323 Z. Nový, *State Responsibility for Breaches of Standards of Investment Protection Committed by Bankruptcy Courts and Trustees*, Transnational Dispute Management 2 (2019), at 16.

324 *Limited Liability Company Amto v Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, at para. 84.

325 *Id.*

326 Z. Nový, *State Responsibility for Breaches of Standards of Investment Protection Committed by Bankruptcy Courts and Trustees*, Transnational Dispute Management 2 (2019), at 16.

327 *See Mondev International Ltd v United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, at para. 127: The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal [...]. In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment.

328 *Peter Franz Voecklinghaus v Czech Republic*, UNCITRAL, Final Award, 19 September 2011, at para. 209.

ruling.[329] The tribunal did not accept this criticism. It observed that from the date of the insolvency petition, the court had by law ten working days to certify the petition and declare the investment company insolvent.[330] The tribunal observed that the court complied with this legal requirement and found that 'the fact that it [the court] acted quickly is not of itself indicative of a denial of justice'.[331]

206. In sum, tribunals appear to be reluctant to interfere with the findings of domestic courts administering insolvency proceedings unless there is a clear situation of denial of justice.[332]

207. Claimants have also attempted to base the State's liability on the conduct of other entities involved in liquidation proceedings, including trustees, administrators, and liquidators. Issues of whether this conduct may be attributed to States have been addressed above.[333] Besides issues of attribution, tribunals have also engaged in a substantive review of the conduct of such entities or actors.

208. In the *del Valle* case, the claimants sought to hold Spain liable for the manner in which the Spanish resolution authority, FROB, conducted the resolution sale procedure. After the ECB and SRB had decided that Banco Popular was FOLTF and should be sold, if possible, to another bank, FROB conducted an auction process that resulted in the bank being sold to Santander, a Spanish bank, for €1. The claimants alleged that the auction process violated the FET standard as it was not sufficiently competitive, involved 'backchannel' discussions between the Spanish authorities and Santander, and resulted in an unduly low sale price.[334] In response, Spain 'dispute[d] that the resolution of Banco Popular was procedurally deficient [as]: (i) the SRB and the FROB considered 35 potential buyers and approached five Spanish banks; (ii) the auction was carried out overnight to ensure the continuous operation of Banco Popular; (iii) the € 1 sale price was appropriate, because Banco Popular had a negative value. In any event, if a bidder believed that Banco Popular was worth more, it could have bid more than € 1'.[335] The tribunal accepted Spain's defence. It explained that as the auction was 'blind', another bidder could have offered more if it considered the bank more valuable, and then discussed the reasons for the auction being conducted as it was:

> [T]he urgency with which the auction was carried out appears unsurprising. To start with, the relevant text of the SRM recommends a time frame to complete a resolution no longer than 32 hours. Moreover, a speedy action was necessary in the circumstances in light of the precipitating events linked to Banco Popular's liquidity crisis. Further, given the significant amount of information about Banco Popular that potential bidders would have needed to process, it was understandable that only Santander—which had already conducted a due diligence in early May 2017—decided to participate in the auction.

329 *Id.* at paras. 174-177.
330 *Id.* at paras. 178-180.
331 *Id.* at para. 180.
332 *See* A. Rajput, *Cross-Border Insolvency and International Investment Law*, 16 Manchester Journal of International Economic Law 341 (2019), at 344.
333 *See* Chapter IV.C above.
334 *Antonio del Valle Ruiz and others v Spain*, PCA case no. 2019-17, Final Award, 13 March 2013, at paras. 660-663, 670, 679.
335 *Id.* at para. 668.

> In addition, in light of the urgency caused by the liquidity crisis and the need to avoid further money outflows, an operation such as the resolution of a bank must by nature be subject to confidentiality. Indeed, pursuant to the Bank Resolution and Recovery Directive (the 'BRRD'), resolution authorities are required to take steps to ensure confidentiality before the relevant decision is taken. Hence, one understands that the Claimants were not notified of the forthcoming resolution decision.[336]

E. Conclusion

209. In sum, it is not uncommon for investors to bring investment treaty claims when their investment is adversely affected by insolvency proceedings. Rather than providing an alternative forum for the conduct of such proceedings, the investment arbitration can allow the investor to seek relief based on the State's actions or omissions relating to the insolvency. These claims generally fall into three categories: (i) the State improperly caused the insolvency; (ii) the State's decision to place the company into insolvency was improper; and (iii) the insolvency proceedings were conducted in an improper manner. In assessing these claims, arbitral tribunals do not purport to 'step into the shoes' of the relevant authorities to 'second guess' their decisions, but will closely scrutinise their conduct against the treaty's standards of protection.

336 *Id.* at para. 664-665.

VI. Damages and causation

Christina Beharry and Eva Paloma Treves

A. Introduction

210. There has been a rise in recent years of investment arbitration proceedings brought by insolvent investors, oftentimes claiming that the insolvency can be traced to the disputed measures of the host State. The timing for examination of this phenomenon is particularly ripe today. The COVID-19 pandemic coupled with high inflation and rising commodity prices arising in part from the war in Ukraine are all factors contributing to the decline in the financial performance of businesses with investments abroad.

211. The insolvency of an investor and/or its investment has led to specific issues when assessing causation and damages in investment arbitration. To this end, this chapter examines five key aspects. First, it begins by explaining the overarching principle and the analytical framework governing the assessment of damages in investment arbitration (B). Second, the chapter will address the prerequisite that the injured party must sustain a loss, which may be complicated where the business was failing even before the alleged bad act (C). Third, the chapter will illustrate the complexities of causation where both internal and external factors contribute to the investment's demise (D). The fourth section explains what valuation issues are raised when the investment goes insolvent (E). Finally, the fifth section will address issues pertaining to interest (F).[337] A brief section (G) concludes.

B. Preliminary issues

212. As the International Law Commission ('ILC') succinctly stated '[t]he fundamental concept of 'damages' is [...] reparation for a *loss suffered*; the remedy should be commensurate with the loss, so that *the injured party should be made whole*'.[338] In practice, the determination of damages involves a three-part test. As the *Rompetrol v Romania* tribunal set out, to receive compensation an investor must prove 'the fact of its loss or damage, its quantification in monetary terms and the necessary causal link between the loss or damage and the treaty breach'.[339]

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337 Another issue that arises when investment arbitration meets an insolvent investor/investment is security for costs. This issue is dealt with by Jean Paul Dechamps and Horacio Risso in Chapter VII on Procedure.

338 ILC Articles with Commentaries, Article 36, at para. 3, citing to United Nations, Reports of International Arbitral Awards, Vol. VII (1 Nov 1923), at 32-44, at 39 (emphasis added).

339 *Rompetrol Group N V. v Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, at para. 190. *See also Victor Pey Casado y Fundación 'Presidente Allende' v Chile*, ICSID Case No. ARB/98/2, Award, 13 September 2016, at para. 217 ('the assessment of the reparation due under international law for the breach of an international obligation consists of three steps – the establishment of the breach, followed by the ascertainment of the injury caused by the breach, followed by the determination of the appropriate compensation for that injury.'),

213. When this fundamental principle of damages meets the world of insolvency in investment arbitration, the preliminary question arises: who should this reparation 'make whole'? The company, the shareholders, or the creditors?

214. The issue is the result of the peculiar nature of insolvency. At the opening of insolvency proceedings, a representative[340] will be appointed to manage the insolvent's affairs. The objective of this individual will be to work with the insolvent party, and its creditors, to achieve a fair and equitable outcome, especially to ensure that the creditors are satisfied. However, once an insolvency is commenced, the insolvent party may no longer have the ability to direct the company and, if the company is liquidated, the company itself will cease to exist. Consequently, several questions arise. Who should bring an investment arbitration: the insolvency administrator, the shareholders, or the creditors?[341] Additionally, and most importantly for the current analysis, who should receive the reparation for the loss suffered? Damages will differ depending on the entity bringing the claim and the losses alleged to have been suffered.

215. As detailed above,[342] insolvency brings into focus a particular issue concerning the standing of shareholders to bring claims for losses suffered by the corporation in which they held shares. While the prohibition on claims for reflective loss is firmly established in municipal law and general international law,[343] shareholder claims have been allowed under investment treaties. Consequently, when claims are brought by shareholders in an insolvent corporation, there is a risk that the proceedings could be used by the shareholders to circumvent the insolvency process and secure recovery at the expense of higher-ranking creditors. It is even possible that the company and its shareholders are co-claimants, but their interests may not necessarily be aligned.

216. This was the case, for example, of *AS PNB Banka v Latvia*. In that case, the tribunal had to decide who should represent *AS PNB Banka* ('PNB'), which had entered into liquidation during the arbitral proceedings. Following the insolvency process, two alleged representatives sought to represent the Bank: the nominee of the former directors and the Latvian court-appointed insolvency administrator. The latter was supported by the State, while the former directors (supported by the shareholders who were also acting as claimants in proceedings) contended that their nominee was the appropriate representative of the Bank.[344] In its August 2021 order, the tribunal opted for an unorthodox approach. The tribunal held that, for most of the claims, PNB was to be represented by the court-appointed insolvency administrator, Vigo Krastinš. However, as for an ancillary claim lodged by the bank's

340 The name of this figure (*eg*, a trustee, an administrator, a receiver) differs according to the jurisdiction.

341 *See* Chapter II.C above.

342 *See* Chapter III above.

343 *Case Concerning Barcelona Traction, Light and Power Company, Limited, (Belgium v Spain)*, Judgment, 1970 ICJ Rep. 3, at para. 44 ('Notwithstanding the separate corporate personality, a wrong done to the company frequently causes prejudice to its shareholders. But the mere fact that damage is sustained by both company and shareholder does not imply that both are entitled to claim compensation. [...] Thus whenever a shareholder's interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action; for although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed'.).

344 *AS PNB Banka (formerly AS Norvik Banka) and others v Republic of Latvia*, ICSID Case No. ARB/17/47, Procedural Order No. 9 (Decision on Representation of AS PNB Banka), 9 August 2021, at para. 55.

shareholders and co-claimants,[345] which related to the contention that Mr. Krastinš' appointment by Latvian courts itself amounted to a treaty violation, PNB was to be represented by its directors.[346]

217. The *PNB Banka* case highlights the competing claims that may be made by multiple parties in the context of insolvency but does not clarify the issue of who should receive reparation for the loss suffered.

218. Once the preliminary matter of the relevant claimant is resolved, this opens the door to another question: what is the injury suffered?

C. The Existence of Loss

219. As set out by ILC Article 31, a State is obliged to make full reparation for the injury caused by its internationally wrongful conduct. Accordingly, the existence of a loss must be established in order to proceed with a claim for reparation.[347] When the reparation sought takes the form of compensation, as is commonly the case in investment arbitration, the alleged injury must further be shown to consist of a 'financially assessable damage'.[348] The commentary to ILC Article 36 reinforces that '[t]he fundamental concept of 'damages' is [...] reparation for *a loss suffered*'.[349]

220. This concept has been applied for decades. For example, in the 1925 *Mavrommatis* judgment, the Permanent Court of International Justice concluded that although the granting of a concession violated international law, there was no loss that justified a claim for compensation.[350] The Court therefore did not award any compensation.[351] Likewise, the arbitral tribunal in *Martini* (*Italy v Venezuela*), concluded that, although there was a violation of international law, there was no financial loss. Consequently, no damages were awarded.[352]

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345 The ancillary claim alleged that PNB's placement into liquidation was itself a BIT breach. In light of this fact, the tribunal determined that it was unrealistic to overlook the administrator's 'obvious conflict of interest' regarding the ancillary claim. *See id.* at para. 225.

346 *Id.* at paras. 210, 231.

347 *Trail Smelter Case (United States v Canada)*, U.S.-Canada Mixed Claims Commission, Award, 11 March 1941, III UNRIAA 1905, at 1920 ('The first question [...] which the Tribunal is required to decide is as follows: (1) Whether damage caused by the Trail Smelter in the State of Washington has occurred [...] and, if so, what indemnity should be paid therefor. In the determination of the first part of this question, the Tribunal has been obliged to consider three points, *viz.*, *the existence of injury*, the cause of the injury, and the damage due to the injury.') (emphasis added). *See also Case concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)*, Judgment, 2012 ICJ Rep. 324, at para. 14.

348 ILC Articles with Commentaries, Article 36.

349 *Id.* at para. 3, citing to VII UNRIAA 32, at 39 (emphasis added).

350 *Mavrommatis Jerusalem Concessions (Greece v United Kingdom)*, Judgment, 1925 PCIJ (*Ser.* A) No. 5, at 45 ('The Court therefore considers that even if the clause in Article 29 of the conditions of M. Rutenberg's concession is to be regarded as contrary to the Mandatory's international obligations, in so far as it gave M. Rutenberg the right to require the expropriation of concessions conflicting with his own, this clause has not in fact either led to the expropriation or annulment of M. Mavrommatis' concessions, or caused him any loss which might justify a claim on his behalf for compensation in the present proceedings'.).

351 *Id.* at 51 ('That the existence, for a certain space of title, of a right on the part of M. Rutenberg to require the annulment of the aforesaid concessions of M. Mavrommatis was not in conformity with the international obligations [but] no loss to Mr. Mavrommatis, resulting from this circumstance, has been proved [and] therefore the Greek Government's claim for an indemnity must be dismissed'.).

352 *Martini (Italy v Venezuela)*, Award, 3 May 1930, 2 UNRIAA 554, at 585.

221. This principle has continued to be applied by arbitral tribunals in the investment arbitration context. For example, in *Carlos Ríos v Chile*, where the companies that were being managed by the claimants had undergone severe financial troubles,[353] the tribunal concluded that the 'economic impact of the State's omissions [...] was null'.[354] Other contemporary tribunals have confirmed that the burden rests on an investor to prove a loss suffered to succeed in a claim for compensation.[355]

222. What does this mean in the context of insolvency? The question of injury naturally turns on the financial performance of the investment before the State's alleged 'bad act'. It will be necessary to investigate whether the company was profitable *before* the date of the alleged breach and thus what the value of the investment was *before* that date. Establishing the injury will be straightforward if the investment generated profits prior to the measures. However, the question of loss becomes more complicated if the company was already failing and the international wrong caused by the State simply worsened an already negative financial situation. In such circumstances, the State is likely to rely on the case law described above to argue that the alleged measures did not result in a loss. Conversely, an investor might argue that the wrongful conduct exacerbated its financial losses and propelled the investment into insolvency.

223. Thus, much of the analysis will relate to the prior performance of the investment and the cause of the insolvency. If the injury alleged is the insolvency and the cause of the insolvency is the State's acts, the State may be liable to compensate the investor if the business was operating at a profit *before* the 'bad acts' of the State. Instead, if the business was failing before the State's bad act, the causal link may be broken, implying that there is no compensable loss. The issue of the existence of loss is therefore intertwined with that of causation, which is the object of the next section.

D. Causation

224. Causation is a fundamental step in the assessment of damages in investment arbitration. In fact, customary international law requires a State to make reparation only for an 'injury *caused* by [its] wrongful act'.[356] There is both a factual and a legal element to causality which serves as a limitation on the duty to make reparation.[357] This is explained in the ILC Commentary to the Draft Articles on State Responsibility which states that 'the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act'.[358] Consequently, the law of State responsibility treats causation as a distinct element of the

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353 *Carlos Rios and Francisco Javier Rios v Chile*, ICSID Case No. ARB/17/16, Award, 11 January 2021, at paras. 72-73.

354 *Id.* at para. 623 (in the original Spanish: '*el impacto económico de las omisiones del Estado* [...] *e[ra] nulo*').

355 *See, eg, Pope & Talbot Inc. v Government of Canada*, UNCITRAL, Award in Respect of Damages, 31 May 2002, at paras. 82, 84; *Petrolane Inc. & Ors. v The Government of the Islamic Republic of Iran & Ors.* (Case No. 131), Award, 14 August 1991, Iran-United States Claims Tribunal Reports (1991), at paras. 103-104.

356 ILC Articles with Commentaries, Article 31(1).

357 *Id.* Article 31, Commentary 10 ('[C]ausality *in fact* is a necessary but not a sufficient condition for reparation. There is a further element, associated with the *exclusion of injury that is too 'remote' or 'consequential'* to be the subject of reparation.') (emphasis added).

358 *Id.* Article 31(9).

analysis, which is separate from the question of breach and the assessment of damages:[359] 'the concept stands as a bridge between the separate issues of breach and damages'.[360]

225. When the harm alleged is the insolvency, the question will be what caused this? Was it the conduct of the State? Or was it the mismanagement of the investor or poor market conditions? If the State did not cause the insolvency, which deprived the investor of its investment, then there is no causation. There are several examples in the investor-State context that address this issue.

226. In *Biwater Gauff v Tanzania*, the tribunal by majority determined that 'the key issue in this case is the factual link between the wrongful acts and the damage in question [...]'.[361] In particular, the tribunal gave substantial importance to the *ELSI* case, where the ICJ held that 'the primary cause of the claimant's difficulties lay in its own mismanagement over a period of years, and not the act of requisition imposed by the governmental authorities'.[362] Consequently, it held that the investor had to prove that the value of its investment was diminished or eliminated, and that the actions it complained of were the actual and proximate cause of such diminution in, or elimination of value.[363] On the basis of this analysis, the majority determined that although there had been an expropriation, there was no causation of loss '[a]s at the [relevant date], the only 'investment' which was the subject of the Republic's expropriation comprised contractual termination rights, which themselves were of no value'.[364]

227. The tribunal in *Hochtief v Argentina* applied the same type of reasoning and concluded that '[g]iven the Project's difficult financial straits in the deteriorating financial conditions in the months leading up to the Emergency Law's enactment [ie, the 'bad act'], the Tribunal finds that there is insufficient evidence to warrant the conclusion that the bankruptcy proceedings against PdL were caused by the pesification process or any other breach of the BIT for which Respondent was responsible [...]'.[365]

228. Similarly, in *Renée Rose Levy de Levi v Republic of Peru*, the tribunal concluded that it was the bank's own bad business decisions, which entailed taking risks in times of liquidity crisis, that led to its liquidation. The tribunal stated: 'no investment treaty is an insurance or guarantee of investment success, especially when the investor makes bad business decisions'.[366]

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359 *See* P. W. Pearsall, J. Benton Heath, *Causation and Injury in Investor-State Arbitration, in* C. Beharry (ed.), CONTEMPORARY AND EMERGING ISSUES ON THE LAW OF DAMAGES AND VALUATION IN INTERNATIONAL INVESTMENT ARBITRATION (2018), at para. 1.1.

360 *Id.*

361 *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, at para. 786. In his concurring and dissenting opinion, Mr. Gary Born, claimant's appointed arbitrator, took the view that the issue was one for damages and not causation. *See id.* Concurring and Dissenting Opinion, at paras. 16, 18 ('In my view, this analysis confuses issues of causation, on the one hand, and quantification or quantum of damages, on the other. [...] In this respect alone, in my view, the Republic's actions clearly caused injury to BGT, by prematurely taking City Water's property and resources from it, and it is mistaken therefore to conclude, as the Tribunal does, that BGT's claims fail on the grounds of causation. Rather, the proper question is what quantum of loss or monetary value to attribute to the injury that the Republic caused to BGT.').

362 *Id. See also Elettronica Sicula S.p.A. (ELSI) (United States v Italy)*, Judgment, 1989 ICJ Rep. 15, at paras. 100-101.

363 *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, at para. 787.

364 *Id.* (emphasis added).

365 *Hochtief AG v The Argentine Republic*, ICSID Case No. ARB/07/31, Award, 21 December 2016, at para. 324.

366 *Renée Rose Levy de Levi v Republic of Peru*, ICSID Case No. ARB/10/17, Award (26 February 2014), at para. 478.

229. Other cases have gone in the opposite direction. For example, in the case of *Inmaris Perestroika Sailing Maritime Service GmbH and others v Ukraine*, the tribunal awarded damages after establishing causation between the respondent's actions and the claimant's insolvency:

> the cancellation of the sailing season, which was a direct result of the telegram, led to Claimants' insolvency and the other damages discussed in further detail below. […] [I]t is clear to the Tribunal that Claimants had little choice in taking the action they did. The indefinite postponement or cancellation of the sailing season had immediate effects on Claimants' business, and they had to take urgent steps to address their outstanding debt obligations.[367]

230. The causal analysis will be particularly relevant in times of economic turbulence. Parties may conduct qualitative or quantitative analyses of causation. Qualitatively, the analysis will turn on relevant factors such as the industry's competitive environment, the capital structure of the enterprise,[368] the investor's implementation of its business plans, and the investment's historical performance. For a quantitative approach, the parties' damages experts may conduct a detailed analysis of the financial impact of the measures at issue, thus reconstructing the financial performance of the investment *but for* the measures at issue and compare that potential performance to reality. The resulting analysis should answer the question of whether the company would have avoided insolvency *but for* the impugned measures.

E. Valuation

231. Under the full reparation principle, the primary obligation of a State that has violated an investment treaty is to make restitution. The PCIJ articulated this approach in the *Chórzow Factory* case,[369] and it has since been articulated in the ILC's Draft Articles on State Responsibility.[370] However, in the investment arbitration context, where a wrongful regulation or seizure of the investment often constitutes the State's violation, restitution in the form of a State reversing its conduct and returning the investment to its initial condition will likely not be possible. This was also found to be the case when the investor was undergoing insolvency proceedings. For example, in *Teinver v Argentina*, where claimants were undergoing insolvency proceedings and the airline in question had been operated by the State for a number of years, the tribunal concluded that 'restitution in kind is neither practical nor practicable'.[371]

232. The ILC Articles on State Responsibility establish a hierarchy of remedies for when a tribunal considers restitution to be 'neither practical nor practicable' and includes 'compensation' as a form of

367 *Id.* at para. 382.

368 In assessing the reasonableness of the company's level of debt, it may be relevant to consider the debt levels of comparator firms. Indeed, more debt is typically appropriate for activities with larger and, to the extent possible, predictable cash flows. However, activities with smaller and highly volatile cash flows should generally not be as debt ridden. *See* R. Caldwell, *Financial Debt and Damages in Investor-State Arbitration*, The International Arbitration Review (2022).

369 *Factory at Chorzów (Germany v Poland)* (Merits), Judgment, 1928 PCIJ. (*Ser.* A) No. 17, at 47.

370 ILC Articles with Commentaries, Articles 34-35.

371 *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v The Argentine Republic*, ICSID Case No. ARB/09/1, Award, 21 July 2017, at para. 1098.

reparation.[372] The goal of compensation will be to ensure that the State makes full reparation and thus to 'as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed'.[373]

233. International law requires 'reasonable certainty' when proving damages.[374] This means that 'the assessment of damages cannot be based on conjecture or speculation' but rather a 'persuasive factual basis for the assessment must be shown'.[375]

234. Insolvency gives rise to certain valuation challenges to which the Report now turns.

1) Insolvency in the investment arbitration context: challenges in quantifying damages

235. Quantification of compensation owed to the investor may become particularly complicated when the investor is facing insolvency proceedings. Several factors will often come into play: high levels of debt, the role of government subsidies, and potential issues of double recovery. Each circumstance is analysed below.

(a) Accounting for debt

236. In disputes concerning insolvency, a claimant-shareholder may have burdened its investment with high levels of debt. For highly leveraged investments, several issues should be considered in the valuation process.

237. The main implication for valuation will be to properly account for the hierarchy of debt. Since debt has a priority right to payment, more debt implies that a larger share of project value must flow to debt holders before any residual value can flow to shareholders. Additionally, there will be a hierarchy even among the creditors: secured creditors followed by unsecured. Consequently, a reliable assessment of shareholder damages should consider the priority payment of debt.

238. If the company is overextended, it is entirely possible that the shareholders will come out empty handed in the insolvency proceedings. They may then seek to recoup their investment in arbitration proceedings, where, most likely, the creditors will not participate.[376] In the arbitration proceedings, the shareholder should not be compensated for the entire value of the enterprise destroyed, but solely for its residual equity value. It is also possible that shareholders may seek compensation for shareholder loans in circumstances where the firm has no equity value. In such situations, investors should take care to properly characterise the nature of the claim. Nevertheless, such loans may also be deprioritised relative to the interests of third-party creditors and so may also have limited residual value.

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372 ILC Articles with Commentaries, Articles 34, 36.

373 *Factory at Chorzów (Germany v Poland)* (Merits), Judgment, 1928 PCIJ (*Ser.* A) No. 17, at 47.

374 *Mobil Investments Canada Inc. and Murphy Oil Corporation v Government of Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012, at paras. 437-439.

375 *Mohammad Ammar Al-Bahloul v Republic of Tajikistan*, SCC Case No. V064/2008, Final Award, 8 June 2010, at para. 39.

376 It is possible that the creditors may not have standing as they can be the national bank of the Host State.

239. Finally, the reasonableness of debt levels may be relevant not only to the causation analysis but also in some cases to the quantification of damages. If an investor contributed to the downfall of the company by taking on more debt, thereby aggravating its losses, a tribunal may reduce damages by apportioning a percentage of fault to the investor. This will largely depend on whether the advantages of acquiring more debt came at the expense of the financial problems that ultimately caused the insolvency of the company.

(b) Government subsidies and incentives

240. In certain industries and in response to emergencies (such as the COVID-19 pandemic), governments may have issued incentives or subsidies to investors. These benefits may come in different forms, such as reduced production costs, tax incentives, contributions to operating costs, or even favourable tariffs.

241. If the government subsequently decides to remove these incentives, an investor may attribute any liquidity issues or the ensuing insolvency to this State act. The investor may then begin an investment claim against the State. As a liability issue, the question will potentially relate to whether those incentives were essential to the claimant's decision to make its investment. As a damages matter, the issue will be whether those incentives should be taken into account when calculating the company's future cashflow.[377]

(c) Double recovery

242. As mentioned above, it is well accepted that the general principle of full reparation requires that compensation not exceed the actual loss suffered.[378] Thus, it prohibits double recovery for the same loss, which potentially may result from proceedings in different *fora*.[379]

243. Consequently, double recovery may be an issue when insolvency proceedings are pending parallel to investment arbitration proceedings and the investor has lodged its claim as a creditor in the insolvency. This issue was specifically analysed by the tribunal in *Manchester Securities v Poland*.[380] That dispute centred on the claimant's 2006 loan to a Polish real estate developer, Leopard, and the subsequent non-completion of various planned luxury property development projects around Krakow. Manchester secured its loan to Leopard with mortgages over the properties, and it registered the mortgages. In 2007, Leopard suffered financial difficulties, and eventually went insolvent in May 2009, leaving the properties unfinished.

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377 *See, eg, Athena Investments A/S (formerly Greentech Energy Systems A/S), NovEnergia II Energy & Environment (SCA) SICAR and NovEnergia II Italian Portfolio SA v Italian Republic*, SCC Case No. V (2015/095), Final Award, 23 December 2018, at paras. 549-552.

378 B. Sabahi, K. Duggal, N. Birch, *Principles Limiting the Amount of Compensation, in* C. Beharry (ed.), Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration (2018), at 325; ILC Articles with Commentaries, Article 36, at para. 33.

379 *See* B. Sabahi, Compensation and Restitution in Investor-State Arbitration: Principles and Practice (2011), § 7.8 ('One of the established principles (and perhaps a general principle of law) in awarding compensation is the prohibition of double recovery or double counting for the same loss').

380 *Manchester Securities Corp. v The Republic of Poland*, PCA Case No. 2015-18, Award, 7 December 2018.

244. Meanwhile, a local proceeding involving 58 prospective buyers was commenced and eventually came before the Polish Supreme Court, which invalidated Manchester's mortgage under the Polish Civil Code. Although aggrieved by this finding of invalidation, Manchester relied on that judgment to argue before the Polish courts that the State-owned bank's mortgage on the same property (which ranked above Manchester in priority) should be invalidated on the same basis. However, the lower courts dismissed the claim. Meanwhile, Manchester had commenced arbitration under the BIT in March 2015.

245. The tribunal determined that the harm suffered by Manchester was a fall in its ranking among the creditors of the insolvent Leopard, from second place (below the bank's mortgage) to one of numerous unsecured creditors.[381] Although the tribunal acknowledged that there might be a risk of double recovery due to the local insolvency proceedings, it found that this did not preclude it from issuing the award.[382] To avert this risk, the tribunal ordered the claimant to withdraw its claims in the insolvency proceedings up to the amount awarded by the tribunal and actually paid by Poland.[383] The reasoning behind this approach was to avoid the risk of double recovery without leaving 'these proceedings or settlement accounts between the Parties open for an indefinite period'.[384]

246. Other tribunals have resolved the double recovery problem differently. For example, some tribunals tend to avoid the issue altogether and leave it for the court adjudicating the claim later in time, expecting that it would take any previously granted compensation 'into consideration when assessing the final damage'.[385] If the later tribunal were to ignore the previous judgment, this would shift the need for action against double recovery into subsequent enforcement proceedings.[386]

2) *Heads of loss*

247. In addition to the investment's value, a successful claimant may be entitled to compensation for different heads of loss, such as lost profits and incidental losses.

248. Lost profits correspond, in a but for scenario, to profits to which the investor would have been entitled if his investment had continued to operate normally, that is, if the host State had not committed any wrongful act. As mentioned above, the loss of profits must be probable and reasonably foreseeable: there must be a 'reasonable' degree of certainty that profits would have been earned but for the commission of the unlawful act.[387]

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381 *Manchester Securities Corp. v The Republic of Poland*, PCA Case No. 2015-18, Award, 7 December 2018, at para. 505.

382 *Id.* at para. 527.

383 *Id.*

384 *Id.*

385 *Ronald S Lauder v Czech Republic*, UNCITRAL, Final Award, 3 September 2001, at para. 172. *See also Chevron Corporation and Texaco Petroleum Company v Ecuador*, PCA Case No 2007-0234877, Partial Award on Merits, 30 March 2010, at para. 557 ('noting that in any case, international law and decisions as well as domestic court procedures offer numerous mechanisms for preventing the possibility of double recovery'); *Sempra Energy International v Argentina*, ICSID Case No ARB/02/16, Award, 28 September 2007, at para. 395; *Enron Corporation and Ponderosa Assets, LP v Argentina*, ICSID Case No ARB/01/3, Award, 22 May 2007, at para. 212.

386 *See, eg, Standard Chartered Bank (Hong Kong) Limited v Tanzania*, ICSID Case No ARB/10/12, Award, 11 October 2019, at para. 526.

387 *See, eg, Watkins Holdings S.à.r.l. and others v Kingdom of Spain*, ICSID Case No. ARB/15/44, Award, 21 January 2020, at para. 685.

249. In some cases, damages may be sought for historical lost profits between the date of the breach and the date of the award as well as the fair market value of the asset from that date forward. According to the tribunal in *Stati v Kazakhstan*, the standard of proof to establish lost profits should be high and investors must generally show that 'their project either has a track record of profitability rooted in a perennial history of operations, or has binding contractual revenue obligations in place that establish the expectation of profit at a certain level over a given number of years'.[388]

250. It follows that if lost profits are claimed, these should not be speculative; instead they should be based on the actual track record of the company. For example, the tribunal in *Saar Papier v Poland* ruled that the lost profits claimed were not speculative since they were based 'on sales onwards to a Danish purchaser of tissue paper'.[389] By contrast, based on the prior performance of an investment, the tribunal in the *Railroad v Guatemala* case concluded that 'given the past performance of FVG, the claim of lost profits [was] speculative'.[390]

251. The recoverability of indirect losses is also addressed in the ILC Articles. The commentary to Article 36 provides that: 'it is well established that incidental expenses are compensable if they were reasonably incurred to repair damage and otherwise mitigate loss arising from the breach'.[391] Several investment arbitration tribunals have considered that incidental losses are part of the full reparation due.[392] In *Siemens v Argentina*, for example, the tribunal considered that the investor should be compensated for certain winding-up expenses, including the costs of maintaining a 'skeleton operation' of a local subsidiary during a 20-month delay between the expropriation and transfer of title in certain assets to the host State.[393]

252. Incidental losses may include the actual cost of the insolvency. For example, in the case of *Inmaris v Ukraine*, the tribunal concluded that since 'Respondent's act caused Claimants' insolvency [...] Respondent is responsible for compensating Claimants for the resulting harm, including with respect to the payment of insolvency costs'.[394]

253. However, this should not be taken as a rule. In *Petrobart v Kyrgystan*, the tribunal instead concluded that: '[t]he costs relating to these previous proceedings were – or should have been – finally settled in connection with those proceedings, and the Arbitral Tribunal finds no basis for granting compensation for them in the present arbitration proceedings'.[395]

254. The next section considers the main valuation methods for quantifying the value of an asset.

388 *Anatolie Stati v The Republic of Kazakhstan*, SCC Case No. V 116/2010, Award, 19 December 2013, at para. 1688.

389 *Saar Papier v Republic of Poland*, Award, 16 October 1995, at para. 103.

390 *Railroad Development Corporation v Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012, at para. 269.

391 ILC Articles with Commentaries, Article 36, at para. 34.

392 *See, eg, Marion Unglaube and Reinhard Unglaube v Republic of Costa Rica*, ICSID Case Nos. ARB/08/1 and ARB/09/20, Award, 16 May 2012, at para. 307.

393 *Siemens A.G. v Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, at paras. 329, 386-7.

394 *Inmaris Perestroika Sailing Maritime Services GmbH and others v Ukraine*, ICSID Case No. ARB/08/8, Excerpts of Award, 1 March 2012, at para. 392.

395 *Petrobart Limited v The Kyrgyz Republic*, Award, 29 March 2005, at 87.

3) Methods for quantifying damages

255. Almost all bilateral investment treaties call for compensation to be based on the 'fair market value' ('FMV') of the investment or an equivalent.[396] Generally, the FMV is defined as 'the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm's length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts'.[397]

256. There are several methods to calculate the value of an asset. In general, there are two main approaches to quantification: (1) forward-looking methods; and (2) backward-looking methods. The former seek to establish the relevant asset's value based on its profit-making potential, while the latter seek to establish value by reference to past investment-related expenditures.

257. The discounted cash flow ('DCF') method is one of the most common forward-looking methods to calculate damages. The basic concept is that an income-producing asset's value is equal to the present value of its expected future cash flows. This method accounts for expected future revenue and expenses, risks that would have affected future revenue, and the time value of money.[398]

258. Calculating damages by using the DCF method may prove to be very difficult in the context of insolvency. In fact, usually insolvent companies do not have a track record of profitability, thereby rendering the DCF method inappropriate. As the tribunal in *Deutsche Telekom AG v India* confirmed, 'DCF is generally inappropriate if the company is not a going concern and lacks an established record of profitability'.[399] Likewise, the tribunal in *Metalclad v Mexico* concluded that 'where the enterprise [...] has failed to make a profit, future profits cannot be used to determine going concern or fair market value'.[400]

259. Another potential method to quantify damages is the multiples method. This is based on the notion that the value of an asset can be inferred from the value of publicly traded businesses or transactions with similar characteristics. Applying this method to valuing a company involves three steps: (1) identifying the comparators, ie, companies that are comparable to the subject company in terms of the nature of operations, competitive position, risk profile, etc.; (2) calculating the valuation multiple for each

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396 G. Rush, K. Sequeira, M. Shopp, *Valuation Techniques for Early-Stage Businesses in Investor-State Arbitration, in* C. Beharry (ed.), Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration (2018), at 267.

397 *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v Argentine Republic*, ICSID Case No. ARB/04/16, Award, 25 February 2016, at para. 123.

398 The World Bank Group, *Guidelines on the Treatment of Foreign Direct Investment*, 7(2) ICSID Review– Foreign Investment Law Journal (1992), Guideline IV(6).

399 *Deutsche Telekom AG v India,* PCA Case No. 2014-10, Award, 27 May 2020, at para. 200; *Merrill & Ring Forestry L.P. v Canada,* ICSID Case No. UNCT/07/1, Award, 31 March 2010, at para. 264 ('there is always some element of uncertainty involved in future scenarios, and even in often used valuation methods, such as the discounted cash flow, future estimates are based on assumptions. But these are inevitably drawn from specific information provided by a historical record of profitability, or other elements that allow for an educated estimate. In the instant case, [...] [t]here is thus no measure of profitability relating to the period before the measures were adopted. However, in these circumstances, the future scenario will be characterized more by speculation than by educated estimates').

400 *Metalclad Corporation v The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, at para. 120.

comparable company based on a value metric (*eg*, enterprise value relative to earnings before interest, taxes, depreciation or amortisation); and (3) multiplying the median multiple of the comparable companies by the relevant measure of the subject company.[401]

260. Another method to quantify damages is sunk costs. This is an example of a backward-looking valuation method. This method seeks to quantify damages on the basis of the amounts invested. There are certainly advantages to this valuation method: it generally does not involve speculation, neither concerning the amount invested, nor the future profits. This type of valuation is 'often advanced to minimize the prospect of awarding damages that are speculative or only indirectly supported by the evidentiary record'.[402]

261. In cases of insolvency, this method has drawbacks. There is a risk that sunk costs will overcompensate the investor. Indeed, one can spend millions of dollars trying to make an investment successful. However, if in the end the investment is not profitable and becomes insolvent in the period leading to insolvency proceedings, claiming for sunk costs may not be appropriate. Instead, it may be more suitable to ascertain value according to the asset's liquidation, replacement, or book value.[403]

F. Interest

262. As explained by the ILC, '[i]nterest is not an autonomous form of reparation'[404]; instead it serves as a subordinate role to the principal amount of the claim in ensuing full reparation.[405] The tribunal in *Illinois Central Railroad* succinctly defined interest as 'compensation for the loss of the use of that sum during a period within which the payment thereof continues to be withheld'.[406] During this period, it is said that the claimant would have invested or avoided some borrowing expense if the principal sum had been paid on the date owed. Interest therefore functions by bringing money forward in time.[407]

263. The choice of interest rates is a key component of the interest calculation and can significantly affect the amount claimed and thus the size of the award.[408] There is no clear guidance in international law as to what rate should apply.[409] However, two broad approaches have emerged from the investment arbitration case law: interest based on either a borrowing or an investment rate.[410] Caution should be exercised in

401 M. Shi, M. Khalil, S. Gupta, *How to Quantify Damages in Covid-19 Related Disputes*, in Global Arbitration Review, The Guide to Damages in International Arbitrations (2021).

402 N. Rubins, V. Sinha, B. Roberts, *Valuation Considerations*, in C. Beharry (ed.), Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration (2018), at 195.

403 The World Bank Group, *Guidelines on the Treatment of Foreign Direct Investment*, 7(2) ICSID Review– Foreign Investment Law Journal (1992), Guideline IV(6).

404 ILC Articles with Commentaries, Article 38, commentary 1.

405 C. Beharry, J.P. Hugues, *Article 38: The Treatment of Interest in International Investment Arbitration*, 37 ICSID Review 339 (2022), at 346.

406 *Illinois Central Railroad Co. (USA v United Mexican States)*, Award, 4 RIAA (1926), at para. 5.

407 C. Beharry, J.P. Hugues, *Article 38: The Treatment of Interest in International Investment Arbitration*, 37 ICSID Review 339 (2022), at 346. *See also* J. Dow, *Interest*, in J.A. Trenor (ed.), The Guide to Damages in International Arbitration (2018), at 301, 302.

408 Other relevant components include the duration and mode of calculation.

409 *See* ILC Articles with Commentaries, Article 38.

410 C. Beharry, J.P. Hugues, *Article 38: The Treatment of Interest in International Investment Arbitration*, 37 ICSID Review 339 (2022), at 349.

insolvency cases when resorting to the claimant's borrowing costs. That is because insolvent claimants may have had an exceptionally risky credit profile resulting in unusually high borrowing costs.[411]

264. Finally, another issue warrants care when assessing interest: is interest being sought on damages or as damages?[412] This distinction is relevant as interest *on* damages compensates for the loss of use of money. Instead, interest *as* damages, relates to the actual borrowing costs incurred by the claimant. As such, these claims constitute a separate head of damages.

G. Conclusion

265. In light of the above, it is thus clear that the interplay between insolvency and investment arbitration proceedings provides fertile ground for issues relating to damages. In light of current economic trends, it is fairly certain that tribunals will need to grapple with these issues with greater frequency. Consequently, the sections above take stock of how these issues have arisen in the past and what approaches have been adopted. In so doing, it canvases potential issues that practitioners may encounter in the future when insolvency and investment arbitration collide.

411 C. Beharry, *Prejudgment Interest Rates in International Investment Arbitration*, 38 Journal of International Dispute Settlement (2017), at 65.

412 *Id.* at 356.

VII. Procedure

Jean Paul Dechamps and Horacio Risso

A. Introduction

266. The interaction between insolvency and investment arbitration can give rise to different procedural disputes which are often the result of the competing interests involved in an insolvency scenario. In this section we review some of the most common procedural questions that have been brought before investment treaty tribunals and the guiding principles that have been applied to address them.

267. As a threshold issue, investment tribunals dealing with procedural questions related to insolvency must first determine the law that will govern these issues. Unsurprisingly, there is very limited formal guidance on this area, as investment treaties do not include insolvency-related provisions, and general international law does not regulate this area. The arbitration rules more commonly used in investment arbitrations also do not specifically deal with insolvency.[413] National law, on the other hand, may have a bearing in certain cases. While domestic arbitration laws will not usually cover these issues, insolvency laws can provide guidance, for instance, when seeking to determine the impact that local insolvency proceedings (including the different actors involved in them, such as local courts, or the administrators or creditors of an insolvent party) may have in an international arbitration.[414]

268. Nonetheless, since investment arbitration tribunals are primarily governed by rules of international law, even in circumstances where domestic law may be relevant, the general principle remains that the arbitral tribunal will retain its discretionary powers to decide on procedural matters. As the caselaw discussed below reflects, on occasion, this may result in the tribunal adopting a different or a more flexible approach than the one prescribed by domestic law, provided that such an approach is reasonable in the circumstances and respects the parties' right to due process.

B. General procedural considerations involving insolvency in investment arbitration

269. One of the common procedural problems likely to arise in an insolvency situation involves the question of party representation, often because of the diverging interests of the insolvent party depending on who may claim to represent it. For instance, the interests of a court-appointed liquidator of an insolvent party,

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413 As it will be discussed further (*see* paras 275 and 289), the ICSID and UNCITRAL arbitration rules do contain certain general provisions dealing with issues such as interim or provisional measures and the participation of third parties, which can be relevant in the context of the insolvency of a party. *See* ICSID Arbitration Rules (2022), Rules 47, 65, 67; ICSID Additional Facility Arbitration Rules (2022), Rules 37, 57, 75, 77; UNCITRAL Arbitration Rules (2021), Article 26; UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014), Article 4.

414 On the interaction between domestic insolvency law and international (commercial) arbitration, *see* the IBA Toolkit on Insolvency and Arbitration (2021). Questions 16 to 22 of the Toolkit deal with the procedural impact of insolvency on arbitration.

or its committee of creditors, may be different from the ones of its shareholders or directors. Thus, one of the immediate issues that an investment treaty tribunal may be called upon to resolve in cases involving an insolvent claimant is determining who is entitled to represent its interests in the arbitration.

270. The issue was considered by the tribunal in *Carnegie v Gambia*, where a company incorporated in Gambia and controlled by a foreign investor had initiated an ICSID arbitration against Gambia under article 25 of the ICSID Convention on the basis of its foreign control.[415] During the arbitration, the Gambian claimant was placed in liquidation by a domestic court, which appointed a liquidator.[416] In the annulment proceedings, Gambia argued that the claimant's representatives were no longer authorised to act since the Gambian liquidation proceedings had terminated their powers of attorney under Gambian law.[417] The annulment committee decided to address the issue based exclusively on international law principles. It noted that the ICSID Convention requires that the parties' counsel be authorised to represent them but 'it does not specify the form of any such authorization'.[418] The tribunal then noted that the issue of 'who is a party to proceedings before an ICSID tribunal is a matter governed by the ICSID Convention'.[419] Since in the case the insolvent claimant was considered a foreign national under article 25 of the ICSID Convention, the committee considered that this rule would not be fulfilled if the claimant were to be represented by a liquidator appointed by the respondent State (in this case, Gambia).[420] Instead, the committee found that it was sufficient that ICSID had acknowledged the authority of the claimant's representatives at the time the request for arbitration had been filed and that the claimant confirmed that the appointment continued for the purpose of the annulment proceedings, and consequently decided that they should continue to act as the proper representatives of the claimant.[421]

271. The solution adopted by the *Carnegie* committee was influenced by the particular facts of the case, but it shows that international tribunals may be willing to exercise a margin of discretion when deciding on procedural matters related to insolvency issues. Still, it is unlikely that arbitral tribunals will entirely disregard domestic law on these issues. In *Teinver v Argentina*, the respondent argued that the Spanish claimants' powers of attorney were no longer valid after the claimants had filed for insolvency proceedings before the Spanish courts.[422] The tribunal rejected the respondent's arguments, finding that under Spanish law the powers of attorney remained valid, while also noting that no dispute had arisen between the shareholders and the insolvency courts regarding party representation, as the latter

415 *See Carnegie Minerals (Gambia) Limited v Republic of the Gambia*, ICSID Case No. ARB/09/19, Decision on Representation, 7 October 2016, at paras. 1-5.

416 *See id.* at paras. 6-13.

417 *See id.* at paras. 22-24.

418 *Id.* at para. 27.

419 *Id.* at para. 43.

420 The tribunal held that 'the domestic law of the respondent state should not determine who is able to represent a claimant in cases where the claimant is deemed to be a national of a foreign state' and refused to apply Gambian law to the issue. *See Carnegie Minerals (Gambia) Limited v Republic of the Gambia*, ICSID Case No. ARB/09/19, Decision on Representation, 7 October 2016, at paras. 44-47.

421 *See Carnegie Minerals (Gambia) Limited v Republic of the Gambia*, ICSID Case No. ARB/09/19, Decision on Representation, 7 October 2016, at paras. 45-47.

422 *See Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v Argentine Republic*, ICSID Case No. ARB/09/1, Award, 21 July 2017, at paras. 209-212.

even supervised the arbitration and ratified the claimants' representatives.[423] While the tribunal in this case was willing to take guidance from relevant provisions in Spanish law, it still noted that it retained a certain margin of discretion on the issue, as it questioned whether 'the strict application of the formalities of granting powers of attorney at Spanish law [would] appropriately apply' in the context of 'an international arbitration which has been ongoing for a number of years'.[424]

272. A similar situation arose in *Energoalliance v Moldova*, where the Ukrainian insolvency court appointed an external administrator for the Ukrainian claimant. The respondent State argued that the power of attorney of the claimant's representatives was no longer valid, and that the arbitration should be terminated.[425] The tribunal rejected the request for termination but recognised the new external administrator as the legitimate representative of the claimant, who in turn appointed new legal counsel to act on behalf of the claimant.[426]

273. The case *AS PNB Banka and others v Latvia* presented a more complex problem of insolvency and party representation. One of the claimants, AS PNB Banka, was a Latvian bank facing insolvency proceedings before the Latvian courts, while the rest of the claimants were the bank's foreign shareholders.[427] During the arbitration, the Latvian courts appointed an administrator for the bank, who was provisionally recognised by the arbitral tribunal as the bank's rightful legal representative.[428] Both the shareholders and the bank's directors challenged the representation of the administrator and claimed that their representatives should be the only ones allowed to represent the bank, as they argued that the insolvency proceedings and the appointment of the administrator itself were also challenged measures of the respondent.[429] In line with the finding in the *Carnegie* case, the tribunal first noted that the matter of party representation before an ICSID tribunal is governed by the ICSID Convention and international law rather than by domestic law.[430] The tribunal then described the problem as one involving a 'conflict of interests' and held that where 'the loyalty of an agent to the corporate Claimant is potentially compromised by his or her relationship with the Respondent State', this could undermine 'the fairness, indeed the integrity, of the arbitral process'.[431] Still, the tribunal considered that in that case there were no signs that the administrator was dependent on, or controlled by, Latvia, as he had even supported the submissions made by the shareholder claimants in the arbitration.[432] The tribunal thus adopted a pragmatic solution and allowed the administrator to represent the bank except with respect to the

423 *See id.* at paras. 208, 216-221.

424 *Id.* at para. 222.

425 *See Energoalliance LLC v Republic of Moldova*, UNCITRAL, Award, 23 October 2013, at para. 46.

426 *See id.* at paras. 48-51, 55. The claimant later reached an agreement with its creditors during the course of the insolvency proceedings and its original counsel was appointed back in the arbitration. *See id.* at paras. 62-65.

427 *See AS PNB Banka (formerly AS Norvik Banka) and others v Republic of Latvia*, ICSID Case No. ARB/17/47, Procedural Order No. 9 (Decision on Representation of AS PNB Banka), 9 August 2021, at paras. 1, 5-15.

428 *See id.* at paras. 1, 3, 8-17.

429 *See id.* at paras. 1-4, 18. Although this situation had some similarities to the one in the *Carnegie* case, the difference was that the issue was not the continuation or not of the original shareholders' legal representation in the arbitration, as the shareholders themselves also replaced their counsel after the insolvency judgment that appointed the bank's administrator.

430 *See AS PNB Banka (formerly AS Norvik Banka) and others v Republic of Latvia*, ICSID Case No. ARB/17/47, Procedural Order No. 9 (Decision on Representation of AS PNB Banka), 9 August 2021, at paras. 67-71.

431 *Id.* at para. 97.

432 *Id.* at para. 97.

ancillary claim concerning the insolvency proceedings and the appointment of the administrator, for which the bank's directors were allowed to make written submissions.[433]

274. In addition to the question of the capacity to represent a party, the insolvency of a party can give rise to a number of more general procedural issues. Some can entail minor formalities; for example, an insolvent party may need to update its name in the arbitration to reflect its status as an insolvent entity.[434] Also, in circumstances where the administrator of the insolvent entity may have to assume its representation during the course of the arbitration, the tribunal may need to take additional measures to ensure that it can properly present its case, including the possibility of adjourning a hearing or staying proceedings.[435] This may also include assessing whether it may be appropriate to allow the new representatives to make additional submissions in relation to any position the insolvent party may have adopted in the past.

275. Finally, the insolvency of a party may also be a relevant feature in investment arbitration when considered in the context of the transparency of the arbitration proceedings. Modern treaty practice and arbitration rules have placed increased emphasis on transparency through the adoption of specific guidelines that include making public the existence of an arbitration, publishing arbitral decisions and parties' submissions, allowing the participation of third parties, or holding public hearings.[436] Two recent examples of investment arbitration rules that incorporate these features are the recent ICSID Arbitration Rules of 2022 and the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration of 2014.[437] Under these rules, a party or court involved in an insolvency proceeding may request and be given access to documents filed in an arbitration, provided that the parties consent. A request of this type was filed in *EuroGas v Slovakia*, conducted under the previous ICSID Arbitration Rules of 2006, where an insolvency trustee requested and was given access to documents from the arbitration.[438] In addition, the transparency or confidentiality of an investment arbitration may also

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433 *See id.* at paras. 225-230.

434 *See, eg, Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, at paras. 23, 25. In this case, it was the respondent who requested that the claimant's name be updated. Most arbitral institutions register the parties' names at the outset of the case and there are no specific rules on whether it may be necessary to update them in case a party becomes insolvent and domestic insolvency law requires that its name be changed. *See* IBA Arbitration Committee, IBA Toolkit on Insolvency and Arbitration (2021), Question 18.

435 *See, eg, Energoalliance LLC v Republic of Moldova*, UNCITRAL, Award, 23 October 2013, at paras. 51-60.

436 *See* J. Commission, R. Moloo, Procedural Issues in International Investment Arbitration (2018), at 86-89.

437 *See* ICSID Arbitration Rules (2022), Chapter X; UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014), Articles 1-4, 6. *See also* ICSID Additional Facility Arbitration Rules (2022), Chapter XII. Treaty practice of the last decades also reflects these innovations towards more transparency. *See, eg*, Central America-Dominican Republic-United States Free Trade Agreement (DR-CAFTA), 5 August 2004, Article 10.21; United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, 10 December 2014; Agreement Between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria for the Reciprocal Promotion and Protection of Investment, 3 December 2016, Article 10; Agreement on Reciprocal Promotion and Protection of Investments between the Government of the Czech Republic and the Government of the Islamic Republic of Iran, 18 December 2017, Article 11; Peru-Australia Free Trade Agreement, 12 February 2018, Article 8.25.

438 In that case, there was an insolvency proceeding in the US involving a company that was liquidated and succeeded by one of the claimants. The insolvency trustee requested the arbitral tribunal to provide documents and information discussed in the arbitration that she considered could be relevant for the insolvency proceedings. The parties did not oppose this request and the tribunal ordered that the trustee be provided with the information requested. It is unclear whether the outcome may have been the same one if one or both parties had opposed the trustee's request. *See EuroGas Inc. and Belmont Resources Inc. v Slovakia*, ICSID Case No. ARB/14/14, Award, 18 August 2017, at paras. 150-154.

be impacted by domestic law, to the extent that an insolvent party involved in an arbitration may be under the duty to inform and report to the local insolvency court on the status of the arbitration proceedings.[439] In *Teinver*, the ICSID annulment committee allowed the insolvency administrators of the claimants to attend an annulment hearing, both in person and by videoconference.[440]

C. Insolvency, third-party funding and Security for costs

276. Security for costs is a provisional measure that a party may seek from an arbitral tribunal to order its counterparty to post security to preserve that party's right to recover its costs should it ultimately prevail in the proceedings. Depending on the specific circumstances of each case, this type of measure may sometimes be relevant when dealing with an insolvent party, as it will usually be sought where a counterparty's ability to pay adverse costs is called into question.[441] For this reason, in investment treaty arbitration, requests for security for costs are predominantly made by respondent States.[442]

277. The recent 2022 ICSID and ICSID Additional Facility Arbitration Rules have been amended and, among other innovations, they now specifically address security for costs, providing guidelines for tribunals to decide on a request for security.[443] The remaining major arbitration rules, however, do not explicitly provide parties with a right to apply for a security for costs order. Therefore, parties have traditionally framed their requests for security for costs as requests for provisional measures seeking to preserve rights.[444] In turn, a large majority of tribunals in investment cases have found that granting security for costs falls within their inherent powers to conduct the arbitration and to grant provisional measures

439 *See* IBA Toolkit on Insolvency and Arbitration (2021), Question 17.

440 *See Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Argentina's Application for Annulment, 29 May 2019, at paras. 38-39.

441 *Eskosol S.p.A. in liquidazione v Italian Republic*, ICSID Case No. ARB/15/50, Procedural Order No. 3 on Respondent's Request for Provisional Measures, 12 April 2017, at para. 33.

442 *See Burimi SRL and Eagle Games SH.A. v Republic of Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 2 (Provisional Measures Concerning Security for Costs), 3 May 2012, at para. 1*; Nord Stream 2 AG v European Union*, PCA Case No. 2020-07, Procedural Order No. 9, 2 September 2022, at para. 7. Although almost unanimously States are the parties who request security for costs, there is at least one case, *Atlantic Triton v Guinea*, in which it was the investor who requested it, arguing that the State would be unwilling or unable to pay an adverse award. Simultaneously, Guinea itself requested security for costs, arguing that the investor was in the process of liquidating its assets. The tribunal held that the parties did not prove sufficiently their allegations and rejected both requests. *See* C. Schreuer, The ICSID Convention: A Commentary (2009), at 782-783

443 ICSID Arbitration Rules (2022), Rule 53(1); ICSID Additional Facility Arbitration Rules (2022), Rule 63(1) ('Upon request of a party, the Tribunal may order any party asserting a claim or counterclaim to provide security for costs'). These new rules provide that to decide on the request the tribunal shall consider 'all relevant circumstances', including the 'conduct of the parties', their 'ability' and 'willingness' to comply with an adverse decision on costs (including any third-party funding agreement it has entered), and the effect that providing the security may have in 'that party's ability to pursue its claim or counterclaim'. *See* ICSID Arbitration Rules (2022), Rule 53(3)-(4); ICSID Additional Facility Arbitration Rules (2022), Rule 63(3)-(4). The tribunal in the case *José Alejandro Hernández Contreras v Costa Rica* (II) issued the first reported decision on security for costs applying the new rules in a case that involved an insolvent claimant. The tribunal granted the security for costs requested by Costa Rica and stressed that its decision was based on the 'criteria' and what the tribunal considered to be a 'clear framework' provided by the new rules, rather than on the requirements and caselaw involving the granting of provisional measures under the previous 2006 ICSID rules. *See José Alejandro Hernández Contreras v Republic of Costa Rica*, ICSID Case No. ARB(AF)/22/5, Procedural Order No. 2, Decision on the Respondent's request for security for costs, 2 May 2024, at paras. 42-44.

444 *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v Turkmenistan*, ICSID Case No. ARB/18/35, Decision on the Respondent's Request for Security for Costs and the Claimant's Request for Security for Claim, 27 January 2020, at para. 53.

generally.[445] On that basis and similar to other provisional measures, tribunals have scrutinized requests for an order of security for costs under the strict threshold of three concurrent conditions:

i	whether the applicant has effectively proven that the counterparty is incapable of paying an eventual cost award in the event the applicant prevails in the proceeding;[446]

ii	whether the application is necessary or sufficiently urgent to impose an interim monetary measure on the counterparty;[447] and

iii	whether such an order will be proportionate and thus not unduly burdensome to the counterparty.[448]

278. Notably, only a handful of publicly available applications have been granted in investment treaty cases,[449] confirming that orders for security for costs are only to be granted in 'exceptional circumstances' where an essential interest of a party stands in danger of irreparable harm.[450] In this context, the respondent States' interest in obtaining security for costs is often balanced against the fundamental right of access to justice of claimants.[451]

279. The exceptional nature of security for costs orders was illustrated by the tribunal in *Pey Casado v Chile*, which, in the context of a request for security for costs against the insolvent claimant noted that the contracting States to the ICSID Convention 'without a doubt could and should have foreseen, before deciding to ratify the Convention, the eventual insolvency of the claimant investor' and would have assessed and assumed that risk, so ordering a security on that basis 'could not be admitted as a general and ordinary measure'.[452]

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445 *See*, *eg*, *RSM Production Corporation and others v Grenada (II)*, ICSID Case No. ARB/10/6, Tribunal's Decision on Respondent's Application for Security for Costs, 14 October 2010, at para. 5.16; *South American Silver Limited v Bolivia*, PCA Case No. 2013-15, Procedural Order No. 10, 11 January 2016, at paras. 51-52; *Interocean Oil Development Company and Interocean Oil Exploration Company v Nigeria*, ICSID Case No. ARB/13/20, Procedural Order No. 6, 1 February 2017, at para. 25; *Commerce Group Corp. & San Sebastian Gold Mines inc. v El Salvador*, ICSID Case No. ARB/09/17, Decision on El Salvador's application for security for costs, 20 September 2012, at paras. 40-45.

446 *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v Turkmenistan*, ICSID Case No. ARB/18/35, Decision on the Respondent's Request for Security for Costs and the Claimant's Request for Security for Claim, 27 January 2020, at para. 63.

447 *Nord Stream 2 AG v European Union*, PCA Case No. 2020-07, Procedural Order No. 9, 2 September 2022, at para. 11.

448 *Eskosol S.p.A. in liquidazione v Italian Republic*, ICSID Case No. ARB/15/50, Procedural Order No. 3 on Respondent's Request for Provisional Measures, 12 April 2017, at para. 38.

449 *Eugene Kazmin v Republic of Latvia*, ICSID Case No. ARB/17/5, Procedural Order No. 6, Decision on the Respondent's Application for Security for Costs, 13 April 2020, at para. 68; *Domingo García Armas, Manuel García Armas, Pedro García Armas and others v Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Orden Procesal No. 9 Decisión sobre la Solicitud de Medidas Provisionales de la Demandada, 20 June 2018, at para. 261*; RSM Production Corporation v Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, 13 August 2014, at para. 90.

450 *Id.* at para. 58.

451 *See*, *eg*, *The Estate of Julio Miguel Orlandini-Agreda and Compañía Minera Orlandini Ltda. v The Plurinational State of Bolivia*, PCA Case No. 2018-39, Decision on the Respondent's Application for Termination, Trifurcation and Security for Costs, 9 July 2019, at para. 145; *Hope Services LLC v Republic of Cameroon*, ICSID Case No. ARB/20/2, Procedural Order No. 4 (Decision on Respondent's Request for Security for Costs), 12 May 2021, at para. 86; *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v Republic of El Salvador*, ICSID Case No. ARB/09/17, Decision on El Salvador's Application for Security for Costs (Annulment Proceeding), 20 September 2012, at para. 52. *See also EuroGas Inc. and Belmont Resources Inc. v Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No. 3 (Decision on the Parties' Request for Provisional Measures), 23 June 2015, at para. 120.

452 *Victor Pey Casado y Fundación Presidente Allende v Chile*, ICSID Case No. ARB/98/2, Decision on the Adoption of Provisional

280. While most tribunals agree in principle that exceptional circumstances must be present to justify an order for security for costs, the assessment of the precise nature of these circumstances will inevitably involve a case-by-case analysis. Tribunals seem to broadly agree that circumstances such as procedural misconduct, a track record of non-payment of prior awards on costs or attempts to hide and remove assets from possible enforcement action may constitute 'exceptional circumstances' that may justify granting security for costs.[453]

281. On the other hand, the increasing use of third-party funding in the context of investment arbitration proceedings has led to a surge in security for costs applications, especially when the funded claimant has been insolvent. Respondent States involved in arbitrations with insolvent parties have sometimes sought to establish whether the claimants have entered into litigation funding agreements, and if so, have requested disclosure of certain information in relation to the funding arrangements.[454] States have usually based such requests on the perceived risk of litigating against an insolvent party. In certain cases, the absence of a clause on adverse costs payment in the funding agreement has been used by the respondent State to justify a request for security.[455]

282. Nonetheless, as a general rule, it appears that the existence of third-party funding and the involvement of an insolvent party does not, by itself, suffice to justify an order of security for costs. This was the holding of the tribunal in *EuroGas v Slovakia* which found that the fact that a party was insolvent or was being funded by a third party, even if occurring jointly, did not necessarily justify the granting of a security for costs.[456] The issue was also discussed in *Eskosol v Italy*, where the tribunal rejected the request for a security for costs on the basis that the claimant's funder was able to provide an after-the-event insurance policy in favour of the State[457] (several tribunals have rejected requests for security against claimants funded by third parties even in the absence of adverse costs insurance)[458]. Still, the tribunal in *Eskosol* carried out a proportionality assessment in which it considered the burden upon the claimant

Measures Requested by the Parties, 25 September 2001, at para. 86.

453 *See*, *eg*, *Hope Services LLC v Republic of Cameroon*, ICSID Case No. ARB/20/2, Procedural Order No. 4, 12 May 2021, at para. 71; *The Estate of Julio Miguel Orlandini-Agreda and Compañía Minera Orlandini Ltda. v Bolivia*, PCA Case No. 2018-39, Procedural Order No. 15, 12 November 2021, at para. 68; *Riverside Coffee, LLC v Republic of Nicaragua*, ICSID Case No. ARB/21/16, Procedural Order No. 7, 20 December 2023, at para. 72; *Tennant Energy, LLC v Government of Canada*, PCA Case No. 2018-54, Procedural Order No. 4, 27 February 2020, at para. 174.

454 This has often included requests that the insolvent claimant confirms whether its funding agreement provides for the payment of an eventual adverse decision on costs in favor of the State.

455 *See*, *eg*, *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v Turkmenistan*, ICSID Case No. ARB/12/6, Procedural Order No. 3, 12 June 2015, at paras. 10-13; *Tennant Energy, LLC v Canada*, PCA Case No. 2018-54, Procedural Order No. 4, 27 February 2020, at paras. 108-109.

456 *EuroGas Inc. and Belmont Resources Inc. v Slovakia*, ICSID Case No. ARB/14/14, Procedural Order No. 3 (Decision on the Parties' Request for Provisional Measures), 23 June 2015, at paras. 121-124. *See also Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v Turkmenistan* ICSID Case No. ARB/18/35, Decision on the Respondent's Request for Security for Costs and the Claimant's Request for Security for Claim, 27 January 2020, at para. 56.

457 *See Eskosol S.p.A. in liquidazione v Italy*, ICSID Case No. ARB/15/50, Procedural Order No. 3 Decision on Respondent's Request for Provisional Measures, 12 April 2017, at para. 37.

458 *See*, *eg*, *Tennant Energy, LLC v Government of Canada*, PCA Case No. 2018-54, Procedural Order No. 4 (Interim Measures), 27 February 2020, at paras. 172-183; *South American Silver Limited v The Plurinational State of Bolivia*, PCA Case No. 2013-15, Procedural Order No. 10 (Security for Costs), 11 January 2016, at paras. 83-84; *Hope Services LLP v Republic of Cameroon*, ICSID Case No. ARB/20/2, 12 May 2021, Procedural Order No. 4 (Decision on the Request for Security for Costs of the Respondent), at paras. 64-90.

to arrange a security for further amounts and the risk of impeding its right to pursue its claims.[459] The tribunal even expressed some doubts as to whether Italy had an actual right that needed to be preserved through the issuance of security for costs.[460]

283. The case of *Dirk Herzig v Turkmenistan* exemplifies some of the tensions that may arise in the context of a request for security for costs against an insolvent party. The tribunal ordered the claimant to provide security for costs in the form of a bank guarantee, with the majority of the tribunal noting that the claimant was an insolvency administrator of a company facing insolvency proceedings, that it was being funded by a third party, and that the funder was not liable to pay an adverse award on costs to Turkmenistan.[461] Under these circumstances, the tribunal concluded that 'Turkmenistan faces not a risk but [...] a certainty that it could not collect a costs award'.[462] Notably, the majority of the tribunal was also concerned about not hampering the claimant's right of access to justice and thus ordered him to provide a bank guarantee (instead of securing and escrowing the funds), while also noting that it would reconsider its decision in case the claimant was able to establish that it faced 'insurmountable obstacles' in obtaining such guarantee.[463]

284. The dissenting opinion of the minority arbitrator anticipated the difficulties that the claimant would face in securing a bank guarantee. It also noted that the claimant may be able to prove on the merits that its insolvency was caused by the respondent's actions, highlighting the importance of securing the claimant's right of access to justice.[464] Eventually, the claimant was able to show to the tribunal's satisfaction that it was unable to secure the required guarantee and the tribunal accordingly reversed its previous order.[465] The tribunal recently went on to issue an award in favor of the insolvent claimant in which, although it rejected the majority of the claims, it ended up granting damages to the claimant and rejecting the State's application for costs.[466]

285. The tribunal in *Bay View and Spalena v Rwanda* relied on the decision in *Dirk Herzig v Turkmenistan*, but ultimately took a different approach. Addressing the respondent's request for security, the tribunal first endorsed the findings in *Herzig* and in *RSM v Saint Lucia* tribunal to the effect that 'exceptional circumstances' had to be shown to grant security for costs, noting that, prior to *RSM*, no application for

459 *See id.* at paras. 36-39.

460 The tribunal first distinguished between a '*procedural* right (to preserve a path to obtain a cost award)' and 'an *outcome-related* worry about collection'. Although it considered that these two notions could be framed together under the '*right to effective relief*', the tribunal still found 'analytically curious' that, while the ICSID Convention and ICSID tribunals do not contemplate any rule for enforcing an award in favour of investors, some ICSID tribunals have intervened to protect the States' right to collect an award on costs. *See id.* at paras. 32-35.

461 *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v Turkmenistan*, ICSID Case No. ARB/18/35, Decision on the Respondent's Request for Security for Costs and the Claimant's Request for Security for Claim, 27 January 2020, at para. 57.

462 *Id.* at paras. 58-59.

463 *Id.* at para. 65.

464 *Id.* at paras. 77-82.

465 *See Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v Turkmenistan*, ICSID Case No. ARB/18/35, Procedural Order No. 5 on Claimant's Request for Reconsideration and Respondent's Request for Termination of the Proceedings, 9 June 2020.

466 *See Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v Turkmenistan*, ICSID Case No. ARB/18/35, Award, 30 November 2023.

security for costs in an ICSID proceedings had succeeded.[467] Moreover, the tribunal agreed in principle that 'where a respondent relies upon a claimant's impecuniosity as a ground for an order for security for costs, it can be seen as relevant to consider whether the respondent may be responsible for that impecuniosity'.[468]

286. Turning to the specific facts before it, the tribunal pointed out that in *Herzig*, the claimants' insolvency and the existence of third-party funding in conjunction with the existence of an express agreement that the funder would not be responsible for an adverse costs order, were factors warranting security for costs.[469] Although the respondent argued that the claimants were insolvent since they were allegedly no longer operational companies and had made no significant investments, the tribunal stressed, that unlike in the *Herzig* case, the claimants were not in formal liquidation proceedings. The tribunal likewise agreed with the claimants that they were not obligated to disclose their financial situation, observing that (as confirmed by their counsel) the claimants were themselves responsible for their legal fees, had incurred substantial legal costs up to this point, and had satisfied the costs of the ICSID Secretariat in relation to the arbitration.[470] At the same time, however, the tribunal also highlighted that the claimants had not shown that they would be able to satisfy an adverse costs order. Based on the assurances of the claimants' counsel, the tribunal discounted the possibility that the claimants' case was funded by a third-party funder or under a contingency-fee arrangement.[471]

287. Ultimately, for the tribunal, the only similarity with the *Herzig* case was thus the possibility that the claimants may not be able to satisfy an adverse costs award should their claim fail. Even under the approach of *Herzig*, the tribunal said, this was insufficient to constitute 'exceptional circumstances' justifying a security for costs order.[472] Thus, it would appear that the threshold for granting security for costs remains somewhat high even when insolvent parties are involved.

288. It should also be noted that the provision of security by an insolvent party may in certain cases conflict with domestic rules applicable to insolvency and liquidation proceedings. This is because by securing the costs of the respondent, the insolvent claimant may be placing it in a better position than its remaining creditors, who will have to recover their losses through the domestic proceedings and respecting the priority rules of the insolvency laws. Further, as pointed out by the dissenting opinion in *Herzig*, many domestic laws (such as the German insolvency law applicable in that case) give priority to the credits originated after the insolvency proceedings are instituted, as would be the case of an adverse award on costs against an already insolvent party, and therefore this could in theory reduce the recovery risk faced by the State.[473]

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467 *Bay View Group LLC and the Spalena Company LLC v Republic of Rwanda*, Procedural Order No. 6, 28 September 2020, at para. 49.

468 *Id.* at para. 52.

469 *Id.* at paras. 57-58.

470 *Id.* at para. 60.

471 While the tribunal considered it possible that the claimants had been provided with the funds for the arbitration, the arbitrators did not deem this unusual, pointing out that there had been instances in ICSID proceedings where a claimant company was supported by a parent company not participating in the arbitration. *Id.* at para. 61.

472 *Bay View Group LLC and the Spalena Company LLC v Republic of Rwanda*, Procedural Order No. 6, 28 September 2020, at para. 62.

473 *See Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v Turkmenistan*, ICSID Case No. ARB/18/35, Decision on the Respondent's Request for Security for Costs and the Claimant's Request for Security for Claim, 27

D. Interaction between arbitration and insolvency proceedings

289. A further procedural aspect of relevance in relation to investment arbitration and insolvency is the possible interaction between the arbitration and domestic insolvency proceedings. The crossover often involves the risk that parallel insolvency proceedings may be improperly used to seek to obstruct or delay the advancement of an arbitration claim. In this regard, both the ICSID and UNCITRAL arbitration rules confer arbitral tribunals the power to grant provisional or interim measures to preserve the integrity of the arbitral procedure,[474] a remedy that tribunals can exercise under the generic requirements of necessity, urgency, and proportionality.[475]

290. While the investment arbitration caselaw dealing with the interaction with domestic insolvency proceedings tends to be very fact specific, a number of broad principles can be derived from it. For example, in the case *CSOB v Slovakia*, the arbitral tribunal issued a provisional measure recommending the suspension of the insolvency proceedings of a Slovakian State-owned debt-collection company before a Slovakian court. The tribunal held that the insolvency proceedings may include determinations as to whether the Slovakian company would have 'a right to receive funds from the Slovak Republic to cover its losses' under a contract between Slovakia, the Slovakian company and the claimant.[476] Since the question of whether such a right existed was one of the main issues in dispute in the arbitration, the tribunal expressly relied on article 26 of the ICSID Convention, which provides that consent to ICSID arbitration shall be considered 'to the exclusion of any other remedy',[477] to recommend the suspension of the insolvency proceedings.[478] Other tribunals have also relied on article 26 of the ICSID Convention to justify provisional measures ordering parties to refrain from pursuing local or parallel proceedings.[479]

291. On the other hand, in the case of *Plama v Bulgaria*, the tribunal rejected a request for provisional measures where the claimant had asked for a recommendation that the Bulgarian courts discontinue the bankruptcy proceedings against its Bulgarian subsidiary. The tribunal considered that the claims in the insolvency proceedings and in the arbitration were not sufficiently closely related, and that any

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January 2020, at para. 72.

474 *See*, *eg*, ICSID Arbitration Rules (2022), Rule 47; ICSID Additional Facility Arbitration Rules (2022), Rule 57; UNCITRAL Arbitration Rules (2013), Article 26; ICC Arbitration Rules (2021), Article 28. *See also* Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, Article 47.

475 *See Tokios Tokelés v Ukraine*, ICSID Case No. ARB/02/18, Procedural Order No. 3, 18 January 2005, at para. 8; *Burlington Resources, Inc. v Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Oriente's Request for Provisional Measures, 29 June 2009, at para. 51; *Quiborax S.A., Non-Metallic Minerals S.A. v Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, at para. 113. *See also* J. Commission, R. Moloo, Procedural Issues in International Investment Arbitration (2018), at 32-36; C. Schreuer, The ICSID Convention: A Commentary (2009), at 784.

476 *See Ceskoslovenska Obchodni Banka, A.S. v Slovakia*, ICSID Case No. ARB/97/4, Procedural Order No. 4 (Provisional Measures), 11 January 1999, at para. 7.

477 The full provision reads: 'Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.'. *See* Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, Article 26.

478 *Ceskoslovenska Obchodni Banka, A.S. v Slovakia*, ICSID Case No. ARB/97/4, Procedural Order No. 4 (Provisional Measures), 11 January 1999, at para. 2.

479 *See* R. Moloo, *Arbitrators Granting Antisuit Orders: When Should They and on What Authority? Arbitrators Granting Antisuit Orders*, 26 Journal of International Arbitration 5 (2009), at 686-687.

outcome of the insolvency proceeding was unlikely to affect the tribunal's ability to decide the claims in the arbitration.[480] In reaching its conclusion, the tribunal noted that the parties in the two proceedings were different and that a recommendation to stay the local bankruptcy proceedings would have affected the rights of third parties (a reference to the creditors that had initiated the insolvency proceedings) and interfered with Bulgaria's independent judiciary.[481] The case *Hydro v Albania*, raised similar issues after the claimant requested the tribunal to issue a provisional measure ordering Albania to refrain from initiating any legal actions to collect alleged tax debts against its Albanian subsidiary, particularly by initiating insolvency proceedings.[482] The tribunal refused to grant the measure as formulated by the claimant (who requested for the respondent 'to refrain from initiating other proceedings 'directly or indirectly related to the present arbitration' and also to 'engaging in any other course of action that may aggravate the dispute'') because it considered that it had been formulated in terms that were 'too broad, vague and uncertain in scope and [was] in any event premature'.[483]

292. It is interesting to note that in both *Plama* and *Hydro*, the main issue addressed in the requests for provisional measures were the likely economic effects of a possible parallel insolvency proceeding, while in *CSOB* the arbitral tribunal appeared to focus on the legal effects of the bankruptcy proceeding and how it may have affected its exclusive jurisdiction over the dispute. This could suggest that an arbitral tribunal may be reluctant to interfere with insolvency proceedings when the main basis for such intervention is to prevent an economic loss (presumably, on the assumption that any monetary loss can be repaired through compensation through an award on damages in the arbitration). On the other hand, tribunals may be more likely to intervene in cases where the parallel proceedings may impugn their exclusive jurisdiction or critically affect procedural rights of a party.[484]

293. Another possible procedural intersection between insolvency and arbitration is through the mutual intervention of the parties in the different proceedings. For example, in *EuroGas v Slovakia* case, the claimants complained that Slovakia had sought to intervene and delay the resolution of one of the claimants' insolvency proceedings in the US courts.[485] The claimants asked the arbitral tribunal for provisional measures ordering the respondent 'to cease any and all interferences in the US bankruptcy proceedings'.[486] The tribunal noted that any provisional measure should be aimed at protecting a

480 *Plama Consortium Limited v Bulgaria*, ICSID Case No. ARB/03/24, Order on Provisional Measures, 6 September 2005, at para. 42. *See also id.* at paras. 40-47.

481 *Id.* at para. 43.

482 *See Hydro S.r.l., Costruzioni S.r.l. and others v Albania*, ICSID Case No. ARB/15/28, Order on Provisional Measures, 3 March 2016, at paras. 1.8 and 2.13-19.

483 *See id.* at paras 4.1, 4.4.

484 In fact, while the tribunal in *Hydro* rejected the requests for provisional measures regarding the insolvency proceedings, it recommended the stay of criminal proceedings against two of the claimants as it considered that the extradition and possible incarceration of them could 'affect the ability of these two claimants and indeed other claimants to adequately put their cases and participate in the arbitration'. *See Hydro S.r.l., Costruzioni S.r.l. and others v Albania*, ICSID Case No. ARB/15/28, Order on Provisional Measures, 3 March 2016, at para. 3.41.

485 *EuroGas Inc. and Belmont Resources Inc. v Slovakia*, ICSID Case No. ARB/14/14, Procedural Order No. 7, 5 September 2016, at para. 5. *See also EuroGas Inc. and Belmont Resources Inc. v Slovakia*, ICSID Case No. ARB/14/14, Award, 18 August 2017, at paras. 167-170.

486 *EuroGas Inc. and Belmont Resources Inc. v Slovakia*, ICSID Case No. ARB/14/14, Procedural Order No. 7, 5 September 2016, at para. 5.

party's right, but the only right that the claimants were able to allege was the 'right to obtain and come to the arbitration Hearing with an US court decision' ruling on the issues discussed in the insolvency proceeding.[487] The tribunal noted that this was not a right that could be 'characterized as [...] merit[ing] protection within the meaning of Article 47 of the ICSID Convention' and rejected the request.[488]

294. Conversely, in the NAFTA case *Alicia Grace and others v Mexico*, a group of creditors in the insolvency proceedings of the claimants' subsidiary sought to intervene in the arbitration, requesting permission to file a submission. The creditors argued that they had a right over any compensation that the tribunal may award to the claimants since it would have originated on the alleged harm suffered by the local subsidiary, of which they were priority secured creditors.[489] The tribunal addressed the issue based on the recommendations set forth in the Statement of the NAFTA Free Trade Commission on Non-Disputing Party Participation, and ultimately refused the creditors' submission since it considered that they did not comply with those recommendations.[490] Firstly, the tribunal considered that the submission 'would not assist in the determination of factual issues related to this arbitration', since the tribunal was already fully aware of the insolvency proceedings.[491] Secondly, the tribunal held that the creditors' application was not within the scope of the dispute since it dealt with their own financial interests and rights under Mexican insolvency law.[492] Lastly, the tribunal considered that the application could not be justified as a matter of public interest, as the creditors' interest was a particular one.[493] This decision also highlights the strict jurisdictional constrains under which investment treaty tribunals operate, which in practice will often result in a limited right of intervention and redress for non-parties.

E. Conclusion

295. The interaction between investment arbitration and insolvency raises unique procedural issues that reflect the particular characteristics of each of these fields of legal practice. Unlike the traditional claimant and respondent dynamic usually found in private commercial disputes, an investment dispute involving a situation of insolvency can result in a number of third parties seeking to intervene on the alleged basis that they hold a right worthy of protection by the tribunal. These parties can theoretically include the directors of a subsidiary of the investor subject to insolvency proceedings, its creditors, an acting insolvency court, an insolvency administrator, and even certain public interest organisations.

296. As the investment treaty arbitration practice continues to evolve, investment tribunals have been called increasingly to resolve procedural disputes in situations of insolvency which have often involved some of these external parties. The absence of a specific set of rules to deal with insolvency issues has not impaired the tribunals' ability to resolve these disputes. While national law remains a relevant point of

487 *Id.* at paras. 28-29.
488 *Id.* at para. 30.
489 *See Alicia Grace and others v United Mexican States*, ICSID Case No. UNCT/18/4, Procedural Order No. 4 (Decision on the Ad Hoc Group of Bondholders' Application for Leave to Intervene), 24 June 2019, at paras. 15-18.
490 *Id.* at paras. 44-48.
491 *Id.* at para. 50.
492 *Id.* at para. 51.
493 *Id.* at para. 53.

reference, international tribunals ultimately retain discretion to resolve any issues brought before them applying international law principles, and subject to the limits of their jurisdiction under the applicable treaty and respect for due process. In this context, it is critical that tribunals strive to protect the integrity of the arbitral proceedings and ensure that they do not become a forum for the resolution of disputes that are the domain of domestic insolvency courts applying domestic law. By the same token, investment tribunals must protect their exclusive jurisdiction to resolve the dispute under the relevant treaty that has been submitted to it, preventing attempts by parties to re-litigate the same issues in domestic forums.

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