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# Shareholder Claim for Reflective Loss Status and ISDS: Between North American Free Trade Agreement and Central America-Dominican Republic Free Trade Agreement Practices

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**Abstract**
Consistency and the certainty of law have always been expected to be preserved. However, a disparate decision may still occur, especially regarding interpretation. Investor-State Dispute Settlement Arbitration tribunal faces the same issues, especially when interpreting the derivative claim provision to determine whether losses or damage requirements limit SRL claims under the International Investment Agreement. This article will analyze the disparate decision relating interpretation of derivative claims between NAFTA ISDS cases and DR-CAFTA ISDS cases and the interpretation of derivative claim provisions under IIA to determine the limitation of a claim for SRL in ISDS Arbitration. The objective of this article is to find out how the derivative claim provision under IIA correctly to be interpreted by the law of interpretation. NAFTA tribunal's ISDS Arbitration has interpreted Articles 1116 and 1117 by considering the following correlated articles to find the context of the treaty, which limits a claim for SRL to be submitted in ISDS Arbitration. However, this interpretation is not found by the Tribunal in DR-CAFTA cases where it held that the other following correlated provision did not lead to limit SRL in ISDS Arbitration. Considering interpretation in NAFTA and DR-CAFTA cases, interpretation of derivative claim provisions shall be conducted carefully and aligned with the rule of interpretation. The treaty text manifests state parties' intention towards the applicable legal rule under IIA. As such, the existence of derivative claim provision and waiver as preconditional to submission and awarding shall be deemed to limit the claim for SRL in ISDS Arbitration to be submitted directly by the shareholder and prevent the risk of multiple simultaneous proceedings, double recovery and jeopardizing the creditor's right.
**Keywords:** Investor-State Dispute Settlement, Foreign Direct Investment, International Investment Agreement, Shareholder Claim for Reflective Loss
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## 1. Introduction

### *1.1. Background*

Investor-State Dispute Settlement is an offered mechanism of dispute settlement between investors and the State relating to the investment activities under IIA, one of the forums usually offered is the ISDS mechanism through arbitration (hereinafter "**ISDS Arbitration**").[1] The element of granting access to ISDS Arbitration may vary but is commonly associated with the subject matter and scope of dispute (*ratione materiae limitations*), a specific period (*ratione temporis*), and to claimant's *jus standi* or identity (*ratione personae*).[2] These elements will be regulated depending on how the applicable International Investment Agreement ("**IIA**") regulates them. For the focus of the research, subject matter and scope of dispute or *ratione materiae limitations* questions of whether the dispute is within the realm of the alleged breach of an obligation under IIA which cause loss or damage to the investor or its investment.[3] Therefore the definition of investment under applicable IIA will determine

[1] Pandu Rizky Putra Pratama & Prita Amalia, "The ISDS Mechanism and Standards of Protection in the Investment Treaty" (2020) 7:2 J Lentera Huk 137–154.
[2] Joachim Pohl, *Dispute Settlement Provisions in International Investment Agreements* (OECD, 2012).
[3] Alex Grabowski, "The Definition of Investment under the ICSID Convention: A Defense of Salini" (2014) 15:1 Chic J Int Law 287–309; *Salini Construttori SPA, et.al v Kingdom of Morocco ICSID Case No ARB/00/4*, 2001 International Centre for Settlement of Investment Disputes; *Mera Investment v Serbia (Decision on Jurisdiction) ICSID Case No ARB/17/2*, 2018 ICSID Arbitration; *Siemens v Argentina (Decision on Jurisdiction) ICSID Case No ARb/05/18*, 2004 ICSID Arbitration; *Cemex v Venezuela (Decision on Jurisdiction) ICSID Case*

 

whether such investment falls within the protection of IIA that is entitled to gain protection through the ISDS Arbitration mechanism whenever a dispute arises and cause a loss to the investment.

However, arbitrators in ISDS Arbitration decisions have disparate interpretations on whether the loss suffered by the investment or the investor shall only be limited to a direct loss or it may extend to an indirect loss.[1] This led to the Shareholder Reflective Loss ("SRL"), considering shares are commonly included as protected investments under IIA. SRL is defined as a loss suffered indirectly by the shareholder through a chain of investment ownership, for instance, enterprise damages.[2] Such losses occur since the Host State has enacted specific measures that considerably an alleged breach of IIA and cause direct damage to the shareholder's enterprise and further injure the investor (shareholder). It may be described through the schematic below.[3]

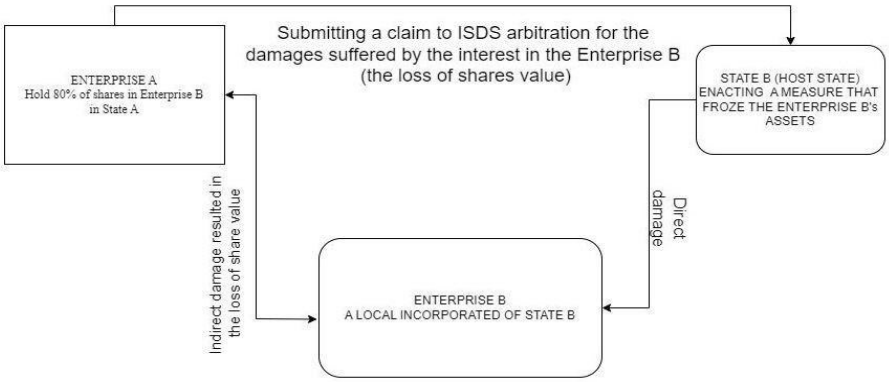


Figure 1. Scheme of SRL

Several national laws of states typically prohibit the claim for SRL to be submitted in a national court.[4] Similar to Public International Law, the rule of no SRL has also applied. Such principles are purposed to avoid the risk of complicated abnormal legal events, such as parallel proceedings, disparate decisions, violation of creditor's rights, and dissonance to corporate law and management.[5] The following table will show the comparison between the rule applied in the national law of a state, Public International Law, and Foreign Direct Investment ("**FDI**") regimes:

*No ARB/0815*, 2010 ICSID Arbitration; *Ioannis Kardassopoulos v Georgia (Decision on Jurisdiction) ICSID Case No ARB/05/18*, 2007 ICSID Arbitration; Pohl, *supra* note 2.

[1] *Daniel W Kappes, et.al v Republic of Guatemala (Decision on Respondent's Preliminary Objections) No ARB/18/43*, 2020 ICSID Arbitration; *Daniel W Kappes, Et.al v Republic of Guatemala (Partial Dissenting Opinion of Prof Zachary Douglas QC) No ARB/18/43*, 2020 ICSID Arbitration; *United Parcel Service of America Inc v Government of Canada (Award on the Merits)*, 2007 UNCITRAL Arbitration; *William Richard Clayton, et al v The Government of Canada (Award on Damages)*, 2019 Permanent Court of Arbitration; *Mondev International Ldt v United State of America No ARB(AF)/99/2*, 2002 ICSID Arbitration.

[2] Giora Shapira, "Shareholder Personal Action in Respect of a Loss Suffered by the Company: The Problem of Overlapping Claims and 'Reflective Loss' in English Company Law" (2003) 37:1 Int Lawyer 137–152.

[3] Lukas Vanhonnaeker, *Shareholders' Claims for Reflective Loss in International Investment Law* (Cambridge: Cambridge University Press, 2020).

[4] David Gaukrodger, *Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency"* (OECD Working Papers on International Investment, 2013).

[5] Jae Sung Lee, "Shareholder Claims for Reflective Loss in Investor-State Dispute and Reform Options" 通商法律, 55–91

 

Table 1. Comparison Rule of SRL in Several Legal Regimes and National State Law

| National Law of a State (English, United States, and Indonesia) | Public International Law | Foreign Direct Investment |
|---|---|---|
| **English Law**<br>In English law, the rule of "*no reflective loss*" was applied with respect to the shareholder's action to pursue recovery for its loss of shares' values, the enterprise's payouts which might have been obtained if the enterprise had not damaged its funds.[4] The law underlines the "*duty owed to,*" which gives rise to a cause of action of a particular subject, in this context, the enterprise or shareholder. Suppose B has an obligation to the enterprise, and it appears B failed to fulfill it. In that case, the shareholder could not pursue any recovery of the loss in their shares' value.[5] In the case where the shareholder's cause of action is based on the breach of the obligation to the shareholders individually and overlaps with the obligation to the company, the shareholder still cannot submit a claim to pursue recovery for the loss of shares value.[6] | As well as the norms applied in Public International Law, the "*no reflective loss*" principle is also reflected in Customary International Law. International Law distinguishes between the losses suffered directly by the shareholder and financial losses suffered through particular financial conditions from the enterprise. [1] Likewise, through International Law Commission (**"ILC")** Draft Article on Diplomatic Protection 2006 also distinguish such losses that a State may only conduct diplomatic protection to the extent it correlates with the international obligation of other States that causes a direct loss to the shareholder. | Slightly contrasting with the norms and the law applied in Public International Law or national law of a State. In the FDI regime, a claim for SRL tends to be biased. IIA has been considered a *lex specialis* provision applied in the FDI regime. [2] *Lex specialis* characteristics in FDI regimes appear through IIA because the disputing parties in ISDS Arbitration are bound to the IIA. The binding force between the parties is considered a commitment to enforcing the provision under IIA, including whenever a dispute arises.[3] Therefore, a claim for SRL in ISDS arbitration tends to be allowed, yet also possible to be not through the IIA. |
| **United State**<br>Similar to English Law, in the US, it is recorded through *Durham v. Durham* case, where the New Hampshire Court held that a possible way to recover from any SRL due to misconduct to the company is through a derivative claim by the company itself.[7] | | |
| **Indonesia**<br>In Indonesia as a country with civil law system, it was expressly stated under Law of Republic Indonesia Number 40/2007 regarding Limited Liability Company ( "**Law No. 40/2007**"), in particular, Article 1 (5) *juncto* Article 61 (1) asserting that the Board of Directors has their right of authority to represent the company whether inside or outside the court for the sake of the company's interest. Furthermore, Article 61 (1) gives a right to the shareholder to submit a claim against the company in a national court to the extent they suffer a loss or damage through the company's misconduct, which is considered unfair, unreasonable, and unlawful.[8] | | |

Relating to claims for SRL, some IIA has adopted derivative claims as a way to submit a claim to ISDS Arbitration, for instance, North American Free Trade Agreement ("**NAFTA**") through articles 1116 and 1117, also Central America-Dominican Republic Free Trade Agreement ("**DR-CAFTA**") through articles 10.16.1 as quoted below.

"**Article 1116: Claim by an Investor of a Party on Its Own Behalf**

1. *An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:*

[1] *Case Concerning Barcelona Traction, Light and Power Company Limited (Belgium V Spain), Second Phase Judgement*, 1970 International Court of Justice.
[2] *AAPL v Sri Lanka (Award) No ARB/87/3*, 1990 ICSID Arbitration; *Azuric Corp V The Argentine Republic (Decision on Jurisdiction) No ARB/01/12*, 2003 ICSID Arbitration; *LG&E Energy Corp, Et al v Argentine Republic (Decision on Liability) No ARB/02/1*, 2006 ICSID Arbitration; *AAPL v. Sri Lanka (Award) No. ARB/87/3*, *supra* note.
[3] *LG&E Energy Corp., Et. al v. Argentine Republic (Decision on Liability) No. ARB/02/1*, *supra* note 9.
[4] Shapira, *supra* note 5.
[5] *Johnson v Gore Wood & co*, 1999 Court of Appeal, UK.
[6] Shapira, *supra* note 5.
[7] Parlie KOH, "The Shareholder's Personal Claim: Allowing Recovery for Reflective Loss" (2011) 23 Singap Acad Law J 863–889.
[8] *Oey Wan Nio, Et Al v Liquidator Team of Bankruptcy Case of PT Mimi Kids Garmindo, Et Al*, 2020 Bandung District Court.

 

*(a)Section A or Article 1503 (2) (State Enterprises), or*
*(b)Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A*

*And that the investor has incurred loss or damage by reason of, or arising out of, that breach."*

"***Article 1117: Claim by an Investor of a Party on Behalf of an Enterprise***

1. *An investor of a Party, on behalf of an enterprise of another Party that is juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under:*
   *(a) Section A or Article 1503(2) (State Enterprise), or*
   *(b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach"*

*"**Article 10.16.1: Submission of a Claim to Arbitration***

1. *In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation*
   *(a) The claimant, on its own behalf, may submit to arbitration under this Section a claim that:*
      *(i) That the respondent has breached:*
         *(A) An Obligation under Section A*
         *(B) An Investment authorization, or*
         *(C) An investment agreement*
      *(ii) That the claimant has incurred loss or damage by reason of, or arising out of, that breach*
   *(b) The claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this section a claim*
      *(i) That the respondent has breached:*
         *(A) An Obligation under Section A*
         *(B) An Investment authorization, or*
         *(C) An investment agreement*
      *(ii) That the Enterprise has incurred loss or damage by reason of, or arising out of, that breach"*

Both IIA has a similar formulation of text to regulate derivative claim provision. However, there are significant distinctions in the arbitrator's interpretation outputs on the articles, which further affects the requirement of losses or damage as the scope of investment disputes.[1] Disparate outputs through ISDS Arbitration decisions will cause uncertainty of law which is not expected to be preserved. Although the ISDS Arbitration decision is not bound to the party outside of the dispute, still, the rule of interpretation and arbitration consideration may become a precedent for other ISDS Arbitration tribunals in deciding the issue.

This article will analyze the ISDS Arbitration decision, especially on its interpretation of Articles 1116 and 1117 of NAFTA and Article 10.16.1 of DR-CAFTA relating to derivative claim provision in order to find how derivative claim provision under IIA correctly to be interpreted by the law of interpretation set through Article 31 of the Vienna Convention on the Law of Treaties 1969 ("**VCLT**") and lead to limit claim for SRL in ISDS Arbitration. First, the author will analyze the tribunal's interpretation of the derivative claim provision under NAFTA and DR-CAFTA cases that lead to limiting the requirement of losses or damage as the scope of investment disputes. Secondly, the authors will analyze the interpretation aspects of the derivative claim provision under IIA, which aligns with the rule of interpretation set in VCLT to avoid misapplication outputs of losses or damage requirements under IIA.

### *1.2. Methodology*

To support the research, the author will use a juridical normative and comparative methodology complemented by a descriptive-analytical aspect. The substance of the article will be aligned and put by the statute and case approach.[2] Moreover, the comparative study will be utilized to analyze the consistency of applicable legal rules

[1] *United Parcel Service of America Inc. v. Government of Canada (Award on the Merits)*, *supra* note 4; *William Richard Clayton, et. al. v. The Government of Canada (Award on Damages)*, *supra* note 4; Vanhonnaeker, *supra* note 6; *Gami Investment, Inc v The Government of The United Mexican States (Final Award)*, 2004 UNCITRAL; *Daniel W. Kappes, et.al. v. Republic of Guatemala (Decision on Respondent's Preliminary Objections) No. ARB/18/43*, *supra* note 4; *Daniel W. Kappes, Et.al v. Republic of Guatemala (Partial Dissenting Opinion of Prof. Zachary Douglas QC) No. ARB/18/43*, *supra* note 4.
[2] Bachtiar, *Metode Penelitian Hukum* (Tangerang: UNPAM Press, 2019).

 

relating to claims for SRL in NAFTA state parties, particularly the United States, through the national court and legal rules applied in public international law regimes. The research will refer to secondary data gathered through primary legal resources, *e.g., the* ISDS Arbitration decision, State's national court decision, and secondary legal resources, *e.g.,* books, journal articles, and working group discussion papers.

## 2. Result and Analysis

### *2.1. The Tribunal's Interpretation in NAFTA and DR-CAFTA Cases*

Despite the interpretation of Articles 1116 and 1117 of NAFTA did not come directly to a conclusion of limiting SRL to be submitted in ISDS Arbitration, the tribunal in the *Bilcon* case concluded that the requirement of losses or damage is only limited to a direct loss as reflected through derivative claim provision.[1] Therefore, SRL cannot be submitted directly by the shareholder. NAFTA state party in the ISDS Arbitration case have consistently argued that the adoption of articles 1116 and 1117 NAFTA is purposed to reflect the rule of customary international law that in a matter of shareholder, they may only bring a claim regarding their own losses suffered directly.[2] Instead, NAFTA has reserved the right for the investor (shareholder) to bring a claim through a derivative claim under Article 1117 of NAFTA that allows the investor to submit a claim on behalf of the enterprise's damage. In addition, the adoption of such a rule also aligned with the precedent under United States national law through *Durham v. Durham* case that the claim for SRL may only be submitted through a mechanism of derivative claim without altering the merits of the case that should only a matter of the enterprise's direct loss.[3] Therefore, the mechanism offered through Article 1117 shall not be considered a right to a direct claim for SRL.

The tribunal in the *Bilcon* case found the consistency of the NAFTA state parties in the ISDS Arbitration tribunal case, Canada's submission, and the United States' submission for Article 1128 of NAFTA. Furthermore, the Tribunal relied on the rule of interpretation set under Article 31 of VCLT and did not find any explicit language that excluded SRL from being submitted. However, the existence of other provisions set through Articles 1117 (3), 1121, 1135 (5) shall be regarded when interpreting Articles 1116 and 1117.[4] As such, with the existence of a consolidation mechanism, pre-conditional submitting a claim, and payment award requirement, the tribunal held that NAFTA did not allow a claim for SRL to be submitted directly in ISDS Arbitration as what the state party intended to apply the principle of no SRL.[5]

The other IIA, such as DR-CAFTA, are also adopting the model of derivative claim provision set through Articles 1116 and 1117. However, in practice, interpreting such a rule by the ISDS Arbitration tribunals appears to be misapplied and caused disparate decisions. This is reflected in the *Kappes* case, where the Respondent is the Republic of Guatemala. In that case, the tribunal faces an issue of whether article 10.16.1 sets a limitation of losses or damage that could be pursued for the recovery through ISDS Arbitration. Firstly the tribunal tried to interpret the Article in accordance with the mean outlined in Articles 31 and 32 of the VCLT.[6] Through its ordinary meaning, the tribunal found the critical phrase "*incurred loss or damage*" did not shows any limitations for an investor to show injury through multi-chain casualty analysis since the text formulation did not qualify specific "*loss or damage*" that must be incurred. Furthermore, through the context of the Agreement, although *Guatemala* has submitted three other provisions to understand the context of Article 10.16.1 (waivers and payment of awards), the tribunal still did not find any provision that will alter the reading of Article 10.16.1.[7] The tribunal further addressed that DR-CAFTA could not be regarded as pursuing the same approach as what NAFTA state parties and cases have held regarding derivative claim provision to limiting SRL in ISDS Arbitration under the basis of an absence of double waiver requirement under DR-CAFTA.[8]

The majority of the tribunal in the *Kappes* case even emphasize that they may only determine what the Contracting State Parties have agreed through IIA since it is outside their capacity to address policy concerns. This is ironically true as what the rule has applied in ISDS Arbitration since IIA has always been regarded as *lex specialis* legal instrument in settling issues of investment protection and promotion, causing the tribunal role in interpreting IIA to be more likely favored to the investor and may give a cold-shoulder impression to what exactly State Party's intention is.[9] However, one of the members of the tribunal had his dissenting opinion on the

[1] *Pope & Talbot Inc v Government of Canada*, 2002 UNCITRAL Arbitration; *Gami Investment, Inc. v. The Government of The United Mexican States (Final Award)*, *supra* note 16; *William Richard Clayton, et. al. v. The Government of Canada (Award on Damages)*, *supra* note 4.
[2] *Case Concerning Barcelona Traction, Light and Power Company Limited (Belgium V. Spain), Second Phase Judgement*, *supra* note 8; Anuki Suraweera, "Shareholder Claims for Reflective Loss in Investor-State Dispute Settlement: Proposing Reform Options for States" 00:00 ICSID Rev 1–30.
[3] Vanhonnaeker, *supra* note 6; *William Richard Clayton, et. al. v. The Government of Canada (Award on Damages)*, *supra* note 4.
[4] *William Richard Clayton, et. al. v. The Government of Canada (Award on Damages)*, *supra* note 4. p.117
[5] *Ibid*.
[6] *Daniel W. Kappes, et.al. v. Republic of Guatemala (Decision on Respondent's Preliminary Objections) No. ARB/18/43*, *supra* note 4.
[7] *Ibid*.
[8] *Ibid*.
[9] *Noble Venture, Inc v Romania (Award) ICSID Case No ARB/01/11*, 2005 ICSID Arbitration; Michael Waibel, "International Investment

 

interpretation of Article 10.16.1 of DR-CAFTA, which that following other provisions exist through Article 10.18.2 and 10.26 under DR-CAFTA shows the context of Article 10.16.1 to prevent a claim for SRL to be submitted directly in ISDS Arbitration.[1] Conclusively, the dissenting opinion is aligned with the interpretation of the Tribunal in the *Bilcon* case.

*2.2. Interpretation of the Derivative Claim Provision under IIA to Determine the Limitation of a Claim for SRL in ISDS Arbitration*

Interpretation is a cornerstone of the legal rule application set under a treaty. Indeed, the law is a matter of interpretation. As the method to interpret the IIA, through ISDS Arbitration practices, the tribunal always relies on the traditional rule set under Articles 31-33 of VCLT. Three important aspects of interpreting a treaty are its ordinary meaning, the context of the treaty, and the object and purpose. This method is expected to create an output of the legal rule applied through the treaty text and will be respected by the Tribunal.[2] Article 31 - 33 of the VCLT has provided the method of interpretation. However, the fundamental interpretation method is provided under Articles 31 and 32 with the quoted articles below:

> *"**Article 31 of the VCLT***
>
> 1. *A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*
> 2. *The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes*
>    a. *Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty*
>    b. *Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument to the treaty*
> 3. *There shall be taken into account, together with the context:*
>    a. *Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions*
>    b. *Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation*
>    c. *Any relevant rules of international law applicable in the relations between the parties*
> 4. *A special meaning shall be given to a term if it is established that the parties so intended.*
>
> ***Article 32 of the VCLT***
>
> *Recourse may be held to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:*
>
> a. *Leaves the meaning ambiguous or obscure; or*
> b. *Leads to a result which is manifestly absurd or unreasonable"*

The rule of interpretation set under both Articles is driven by several international law principles that should not be disregarded as a means to interpret a treaty.[3] The principle is the intention interpretation, textual interpretation, and teleological interpretation. As such, the will of the party, textual approach interpretation, and considers the object and purpose of the treaty shall always be regarded when interpreting a treaty.

The derivative claim provision interpretation must be carefully conducted and aligned with the rule of interpretation applied to determine the requirement of losses or damage as the scope of the investment dispute. Here, the authors will take examples of treaty provisions relating to derivative claims as limiting requirement losses or damage under IIA as quoted below:

> *"**Article A***
>
> ***SUBMISSION OF CLAIM***
>
> *In the event that a Disputing Party Considers that an Investment Dispute cannot be settled by consultation or negotiation:*
>
> a. *A Claimant on its own behalf, may submit to arbitration a claim that the Claimant has incurred loss or damage by reason of, or arising out of that breach*
> b. *A Claimant on behalf of an enterprise of the Respondent that is juridical person that the*

Law and Treaty Interpretation" (2011) Clin Isol Syst Integr 29–52.

[1] *Daniel W. Kappes, Et.al v. Republic of Guatemala (Partial Dissenting Opinion of Prof. Zachary Douglas QC) No. ARB/18/43*, *supra* note 4.

[2] *Nissan Motor Co Ltd (Japan) v Republic of India (Decision on Jurisdiction) No 2017-37*, 2019 Permanent Court of Arbitration; Panos Merkouris, "Interpreting the Customary Rules on Interpretation" (2017) Int Community Law Rev 126–155.

[3] Ninne Zahara Silviani, "Interpretasi Perjanjian Internasional Terkait Historical Rights Dalam UNCLOS 1982" (2019) 6:2 J Selat 154–171.

 

*Claimant owns or controls directly or indirectly, may submit to arbitration under this section a claim, that the enterprise has incurred loss or damage by reason of, or arising out of, that breach*

*…."*

*"**Article B***
***PRECONDITIONAL TO SUBMISSION OF A CLAIM***
*No Claim may be submitted to arbitration under this section unless:*

1. *A Claimant may submit a claim to arbitration under Article A (b) only if the enterprise and the Claimant have given its consent and waived their right to pursue recovery from any dispute settlement mechanism through administrative court or other dispute settlement procedure.*
2. *The Claimant consents in writing to arbitration in accordance with the procedures set out in this Agreement*
3. *A Claimant may submit a claim to arbitration under Article A (a) only if the Claimant have submitted written waiver*

*….."*

*"**Article C***
***AWARDS AND ENFORCEMENT OF AWARD***

1. *Where a claim is submitted to arbitration in accordance with Article A (b):*
   a. *An award of restitution in kind shall provide that restitution be made to the enterprise*
   b. *An award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise;and*
   c. *The award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law*

….."

First, according to the ordinary meaning of Article A, no explicit words or text show a limitation of what kind of losses shall be incurred by the Claimant or by the Enterprise. According to Black's Law Dictionary, a loss is defined as "*the injury or damage sustained by the insured in consequence of the happening of one or more of the accidents or misfortunes against which the insurer, in consideration of the premium, has undertaken to indemnify the insured."* In addition, the damage is defined as "*a pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property, or rights, through the unlawful act or omission or negligence of another."* Through such a definition, again, there are no limitations that loss or damage is defined as an event that is incurred directly by a person, their right, or property.

Through the context of the treaty, by considering the parties' intentions as subjective elements, the other correlated provision under the IIA, which are Articles B and C thus, shall be regarded.[1] Article B has mandated that the claimant submit a claim per Article A (b) shall give written consent of the enterprise and enterprise's waiver to any dispute resolution. This shows the IIA state party's intention to limit a claim for SRL to be submitted directly by the shareholder since the risk of multiple proceedings might be faced.[2] In addition, whenever the claim is brought under Article A (b), the award shall be granted to the enterprise's interest also indicates to prevent double compensation and preserve the enterprise creditor's right.[3] Thus, the derivative claim provision under IIA shall render the loss or damage requirement only limited to a direct loss that leads to a claim for SRL are barred from being submitted directly by the shareholder, rather the submission shall be through a derivative claim with the enterprise's losses as the issue on the merits.

Conclusively, an aligned interpretation of the derivative claim provision under IIA with the rule applied in VCLT is a cornerstone to determine whether the requirement of losses or damage limits claim for SRL is to be submitted directly by the shareholder in ISDS. This also shows that interpretation is critical to reflecting the applicable policy that the State Parties' intended. Furthermore, although IIA is adopted to create a promotion and protection of investment activity shall not be deemed *per se* all the terms under IIA to favor the investor in order to heed the middle path theory, which foreign direct investment activity shall also preserve the protection right of the Host State (economic rights, legal rights, and sovereignty rights), the protection of host state also shall be

[1] International Law Comission, *Draft Articles on the Law of Treaties with Commentaries 1966* (United Nation Publication).
[2] Panagiotis A Kyriakou, "Mitigating te Risks Entailed in Shareholders' Claim for Reflective Loss: Sugesstion for Investment Treaty Reform" (2018) J World Invest Trade 19 698–721.
[3] *Daniel W. Kappes, Et.al v. Republic of Guatemala (Partial Dissenting Opinion of Prof. Zachary Douglas QC) No. ARB/18/43*, *supra* note 4; Jae Sung Lee, "Shareholder Claims for Reflective Loss in Investor-State Dispute and Reform Options" 通商法律, 55–91; *supra note 5; Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eights session (Vienna, 14-18 October 2019)*, by United Nation Comission on International Trade Law, A/CN.9/1004 (Vienna: UNCITRAL, 2019).

 

regarded as a part the objectives in IIA.[1]

## 3. Conclusion

The unique characteristic of interpretation in ISDS Arbitration without derogating the rule set under VCLT, the outputs of the tribunal's interpretation often to be favored the investor. This is also reflected through the tribunal's interpretation of the derivative claim provisions in the case of *Kappes,* which shows a cold shoulder with the parties' intention relating to the claim for SRL in ISDS Arbitration by allowing SRL to be submitted directly by the shareholder. Unlike the Tribunal in the *Kappes* case, the NAFTA tribunal's interpretation of the derivative claim provision seems to determine the derivative claim provisions are more consistent and aligned with the State Party's intentions.

To avoid the misapplication and misinterpretation of derivative claim provisions under IIA, interpretation shall be conducted carefully and aligned with the rule under VCLT. In interpreting IIA text, the tribunal shall consider several vital aspects: the textual approach, the intention approach, and the object and purpose of the treaty itself. The tribunal usually failed to interpret the treaty according to the actual context of the treaty to find the parties' intention, which is expressed through the text in IIA. However, the derivative claim provision under IIA is one of the party's manifestations to limit a claim for SRL to be submitted directly by the shareholder in ISDS Arbitration. With the model referred to in the *Bilcon* and *Kappes* case, the existence of waiver requirement and payment of award will show the context of submission of a claim relating to whose losses or damage will be pursued, *i.e.,* limiting SRL to be submitted directly by the shareholder and convey the right to dispute resolution in ISDS Arbitration through a derivative claim.

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