4th Annual Conference on Investment Treaties

Treaty shopping and tools for treaty reform

Agenda and Conference material

12 March 2018
OECD Conference Centre, CC12
Paris, France

A Conference hosted by the Freedom of Investment Roundtable

About the Annual Investment Treaty Conference

This annual conference brings together senior policy makers and investment treaty negotiators from around the world for exchanges with leading representatives of business, civil society, academia and international organisations. www.oecd.org/investment/conference-investment-treaties.htm

About the Freedom of Investment (FOI) Roundtable

The FOI Roundtable, an intergovernmental forum hosted since 2006 by the OECD, brings together over 55 governments from around the world to exchange information and experiences on investment policies. Since 2011, governments have been evaluating key aspects of investment treaties at the Roundtable. The following economies are invited to participate: Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, People's Republic of China, Colombia, Costa Rica, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Korea, Latvia, Lithuania, Luxembourg, Malaysia, Mexico, Morocco, Netherlands, New Zealand, Norway, Paraguay, Peru, Poland, Portugal, Romania, Russian Federation, Saudi Arabia, Singapore, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Tunisia, Turkey, Ukraine, United Kingdom, United States and the European Union. Participation may vary depending on the issues being discussed. www.oecd.org/investment/foi.htm

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The fourth annual OECD Investment Treaty Conference will address **treaty shopping** in international investment law. Treaty shopping is a core characteristic of the current investment treaty system, but one that is controversial. The Conference will also present the innovative **Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting** (**Multilateral Instrument** or **MLI**) to the investment policy community. The MLI was developed by an *ad hoc* group of over 100 countries to facilitate the swift and consistent implementation of internationally agreed measures to prevent tax base erosion and profit shifting by multinational enterprises. Since its adoption on 24 November 2016 and an initial signing ceremony in June 2017, the MLI already has 78 signatories from all continents and all levels of development. The MLI has broad potential relevance as a tool for investment treaty reform for interested governments. The Conference will thus address a current investment treaty issue of policy interest for many governments, investors and stakeholders, and explore tools to help interested governments improve their treaty policies. Summary background information on treaty shopping is included in an annex hereto.

Treaty shopping in ISDS

A policy-oriented approach to treaty shopping will be adopted. The focus is on access by beneficial owners or persons from one jurisdiction to investment treaty provisions not applicable to that jurisdiction. From a legal perspective, two principal mechanisms can be used to treaty shop in this manner under widely-applied interpretations in Investor-State dispute settlement (ISDS) today:

- the use of a most-favoured nation (MFN) clause to allow claimants to import other investment treaty provisions into the basic treaty; and
- the power of beneficial owners to attribute investment treaty claims for reflective loss to entities of different nationalities, with access to different treaties and to recovery of reflective loss.

Treaty shopping through MFN-shopping or attribution of reflective loss claims can currently allow access to more claimant-favourable treaty rules of various types in ISDS:

- investment treaty protection where none would otherwise be available;
- stronger substantive protections;
- different fora for dispute settlement which may appear more advantageous; or

- more advantageous procedural or other aspects for dispute settlement.

Different treaties and different arbitral interpretations make a greater or lesser number of these possibilities available.

Claimants find treaty shopping most powerful and attractive when there are many treaties with varying characteristics. The network of over 3000 investment treaties and differences between older and newer treaties make the practice particularly attractive.

A number of policy issues can be identified for discussion including:

- the value of increasing treaty-covered investor protection, specifically through treaty shopping, in possibly attracting certain forms of investment or achieving other benefits sought through investment treaties;
- the desirability of harmonisation of protection of covered investors as a class, and, if desirable, the relative merits of harmonisation of treatment of that class at maximum levels through treaty shopping vs. other methods and levels of harmonisation;
- the impact of increased covered investor protection and complexity through treaty shopping on the right to regulate, government budgets, non-investor constituencies, competitive neutrality with non-covered investors or off-shoring;
- incentives for governments including for example with regard to entry into or exit from investment treaties; or "free-riding" on third-country treaties;
- the impact of treaty shopping on investor-state arbitration; and
- the impact of treaty shopping in ISDS on the legitimacy of the investment treaty system and on public support, including in light of reforms to curtail treaty shopping in other fields of law.

Recent government action to address treaty shopping under investment treaties will be examined. CETA, for example, clarifies that "substantive obligations in other international investment treaties do not in themselves constitute 'treatment', and thus cannot give rise to a breach of [the MFN provision], absent measures adopted or maintained by a Party pursuant to those obligations"; it also clarifies that treaty shopping for provisions on ISDS is excluded. See CETA, art. 8.7(4). These treaty clauses follow earlier government interpretations in ISDS cases. Other governments, like the United States, have taken action against interpretations allowing claims for reflective loss and treaty shopping.

Existing and potential government approaches will be compared with the recent evolution of some ISDS arbitration interpretations, such as the development and use of "abuse of rights" or similar doctrines. For those governments that wish to allow or encourage treaty shopping to some degree, comparisons of legal techniques will be also of interest.

Tools for treaty reform – the MLI in context

In the case of the MLI, an ad hoc group of governments from around the world rapidly developed a multilateral treaty at the OECD to address tax treaty shopping and additional issues. This successful experience allows the incorporation of a substantial range of agreed changes into existing treaties and the application of agreed standards to many diverse countries. It merits attention from governments exploring or evaluating possible multilateral treaty making in other areas of international economic law.

The Conference will provide an introduction to the MLI in particular and its role in incorporating agreed changes from the Base Erosion and Profit Shifting (BEPS) work into many existing treaties. The MLI is of particular interest because it:

- addresses changes both to substantive law and to procedures;

- provides for both a high degree of coherence and flexibility to address different situations; and
- already covers 78 jurisdictions, thereby providing for modification of almost half of the over 3,000 bilateral tax treaties in force today, and is thus suitable for application to many treaties as well as to smaller groups of treaties.

Important differences as well as similarities between the tax and investment contexts will be explored.

Recent UNCITRAL work in achieving reform of existing investment treaties through a multilateral treaty will also be considered. In order to encourage application of new agreed Rules on Transparency for ISDS to existing investment treaties, UNCITRAL prepared the Convention on Transparency in Treaty-based Investor-State Arbitration (the Mauritius Convention), in force since October 2017. The Convention is an efficient and flexible mechanism to apply the Rules on Transparency to already concluded investment treaties and is the first successful attempt to reform ISDS on a multilateral basis.

An understanding of the genesis and nature of the MLI and other reforms will allow a more informed discussion about reform options among investment specialists.

Next Steps

The closing session will consider potential tools for reform based on the discussion and prior Roundtable work, including but not limited to addressing aspects of treaty shopping. It will also discuss steps that can be taken to further explore the identified options.

Agenda

8:30 – 9:30 *Registration of participants*

9:30 – 10:00 Opening remarks

Pierre Poret, Deputy Director, Directorate for Financial and Enterprise Affairs, OECD

10:00 – 13:00 Treaty shopping in ISDS

(coffee break 11:15 - 11:30)

Experiences with treaty shopping under investment treaties

- Interpretation of MFN clauses to allow access to other treaty clauses
- Treaty shopping using the attribution of reflective loss claims to different entities

Policy issues and legitimacy

- Rationale to allow or encourage treaty shopping under investment treaties
- Rationale to exclude or limit treaty shopping
- Impact on treaty termination policies and incremental reform
- Treaty shopping and ISDS
- Legitimacy and impact of treaty shopping on public support for investment treaties.

Recent reforms by individual governments and regional treaties

- Reforms to clarify intent to exclude or limit the use of MFN to treaty shop
- Recent reforms and arguments on reflective loss and treaty shopping
- Treaty shopping using shell companies and other companies
- Possible impact of Investment Court System

Comparison of existing and possible government action with arbitral decisions relating to treaty shopping

Chair

David Gaukrodger, Head of Unit and Senior Legal Adviser, Investment Division, OECD

Speakers

Stephan Schill, Professor of International and Economic Law and Governance, Amsterdam Center for International Law, Faculty of Law, University of Amsterdam, Netherlands

Simon N. Batifort, Counsel, Curtis, Mallet-Prevost, Colt & Mosle LLP, United States

Rob Howse, Professor of International Law, New York University Law School, United States

Jorun Baumgartner, International Investment Agreements Section, UNCTAD

Shane Spelliscy, Senior Counsel and Deputy Director of Trade Law Bureau, Global Affairs Canada; Chair of UNCITRAL Working Group III

Felix Steffek, University Lecturer, Faculty of Law, University of Cambridge; Co-Director of the Centre for Corporate and Commercial Law

13:00 – 14:30 *Lunch break*

14:30 – 16:30 The MLI in context

BEPS and the MLI

- Presentation of BEPS and MLI
- Jurisdictions and treaties covered by MLI
- Work of Group of Experts on public international law
- Thematic coverage of MLI
- Flexibility and coherence
- Inclusive nature of BEPS/MLI process and Ad hoc group
- Earlier and continuing role of OECD/G20
- Inclusive Framework on BEPS implementation

Potential relevance for investment treaty reform

- Potential relevance to investment treaties – similarities and differences in contexts
- Comparison with other reform tools such as joint interpretations

Chair

Colin Brown, Deputy Head of Unit, Dispute Settlement/Legal Affairs, DG Trade, European Commission

Speakers

Jefferson VanderWolk, Head of the Tax Treaty, Transfer Pricing, and Financial Transactions Division, Centre for Tax Policy and Administration, OECD

Maikel Evers, Advisor, BEPS Project, Centre for Tax Policy and Administration, OECD

Martin Klam, Deputy Director for Indirect Taxation, Tax Legislation Directorate, Ministry of Economy and Finance, France

Corinne Montineri, Secretary of Working Group II, UNCITRAL

David Gaukrodger, Head of Unit and Senior Legal Adviser, Investment Division, OECD

Céline Folsché, Legal Directorate, OECD

16:30 – 17:00 Coffee break

17:00 – 18:00 Conclusion and next steps

The concluding session will consider future steps in light of the discussion of treaty shopping and the MLI and other tools for investment treaty reform. Steps that could be pursued to further explore the options that have been identified will also be discussed.

Chair

Ana Novik, Head of Investment Division, OECD

Speakers

Shaun Donnelly, United States Council for International Business (USCIB)

Pierre Habbard, Trade Union Advisory Committee (TUAC)

James Zhan, Director of Investment and Enterprise, UNCTAD

John Drummond, Head, Trade in Services Division, OECD

Brooke Skartvedt Güven, Columbia Center on Sustainable Investment (CCSI)

Background information on treaty shopping

This annex to the agenda for the fourth annual OECD Investment Treaty Conference provides some basic background information for the treaty shopping panel.[1]

Treaty shopping in ISDS Using MFN Clauses

There has been a significant amount of ISDS litigation over attempts to use MFN clauses to treaty shop. However, the FOI Roundtable has not yet examined MFN issues under investment treaties. It has briefly considered government responses to claimant attempts to use the MFN clause in NAFTA to avoid the effect of the 2001 joint NAFTA treaty party interpretation of the NAFTA fair and equitable treatment (FET) clause after the Roundtable expressed interest in the issue.[2] However, the issue is undoubtedly topical because there has been significant government action to exclude or limit MFN treaty shopping in recent cases, treaties and proposed joint interpretations.

Notwithstanding the absence of analysis of MFN issues to date, a few general aspects may be sketched out for discussion purposes at the Conference. The landscape with regard to the importation of substantive standards using MFN clauses is contrasting. Under NAFTA, the three NAFTA governments, generally represented by in-house counsel, have vigorously rejected such imports both as respondents and in non-disputing party submissions. As exemplified by respondent and non-disputing party submissions by the United States, a core view has been that the MFN clause addresses the actual treatment accorded with respect to an investment of another Party as compared to that accorded to other foreign-owned investments, and that it is not a choice-of-law clause:

> [The claimant] fundamentally misconstrues the nature of Article 1103's provision for most-favored-nation treatment in any event. Contrary to [claimant's suggestion, Article 1103 addresses not the law applicable in investor-state disputes, but the actual "treatment" accorded with respect to an investment of another Party as compared to that accorded to other foreign-owned investments. Article 1103 is not a choice-of-law clause.[3]

The NAFTA governments have repeatedly restated this interpretation. See, e.g., Chemtura v. Canada, Canada Counter-Memorial § 906; ADF v. US, Rejoinder of Respondent United States of America on Competence and Liability (29 Mar. 2002), p. 44 n.69 (rejecting claimant investor contention that NAFTA

1 This summary annex has been prepared by the Secretariat. It does not necessarily reflect the views of the OECD or of the governments that participate in the FOI Roundtable, and it should not be construed as prejudging ongoing or future negotiations or disputes pertaining to investment treaties.

2 See David Gaukrodger, "Addressing the balance of interests in investment treaties: The limitation of fair and equitable treatment provisions to the minimum standard of treatment under customary international law", OECD Working Paper on International Investment 2017/03, pp. 51-52 & n.173 (reporting on numerous NAFTA government interpretations stating that the substance of the NAFTA MST-FET provision is not altered by the MFN provision in NAFTA).

3 Methanex Corporation v. United States of America, UNCITRAL, Response of Respondent United States of America to Methanex's Submission Concerning the NAFTA Free Trade Commission's July 31, 2001 Interpretation, at pp. 9, 11 (26 Oct. 2001). The same interpretation was submitted by the United States as part of its non-disputing party submission on the MFN clause in another case. See Pope & Talbot v. *Canada*, UNCITRAL, Eighth Submission of the United States (Dec. 3, 2001), para. 2 (incorporating attached submission from Methanex).

MFN clause would allow reliance on provisions of US treaties with Albania and Estonia); Mesa Power Group LLC v. Canada, Mexico art. 1128 Submission, § 13 (non-disputing party submission stating that "Mexico disagrees with the suggestion in ... Claimant's Reply Memorial that [the NAFTA MFN provision] can be used to import language into the NAFTA from the Canada-Czech investment Treaty"). This aligns MFN with national treatment provisions, which are based on how nationals are treated under domestic law.

No NAFTA case has permitted the import of a substantive clause from another treaty under its MFN clause. However, arbitrators in NAFTA cases have never expressly resolved the issue of whether claimants can import substantive clauses. Despite repeated efforts by claimants, they have never allowed a claimant to import a FET clause to override the 2001 joint NAFTA Treaty Party Interpretation of the FET clause. But despite repeated and lengthy responses by governments rejecting such efforts, NAFTA arbitrators have never expressly found that such imports are precluded. Rather, in a series of cases, they have consistently resolved the issue on other grounds, such as finding that the claimant or government would win or lose regardless of whether the provision can be imported.

These arbitral outcomes in NAFTA, while inconclusive, contrast with arbitral cases in ISDS outside NAFTA. Some recent commentators surveying such cases have suggested that, at least until recently, it has often been assumed that claimants can import substantive provisions from other treaties.[4]

While ISDS decisions have either skirted the issue in NAFTA or apparently frequently permitted the importation of substantive standards under other treaties, treaty practice has evolved on the issues. Some governments have clarified that MFN provisions cannot be used to treaty shop in major recent treaties. They have limited the application of MFN clauses to cases where government measures have been adopted or maintained under the third country treaty. The CETA between Canada, the EU and EU Member States, for example, clarifies that “substantive obligations in other international investment treaties do not in themselves constitute ‘treatment’, and thus cannot give rise to a breach of [the MFN provision], absent measures adopted or maintained by a Party pursuant to those obligations”. CETA, art. 8.7(4). This approach resembles earlier NAFTA government interpretations in ISDS cases noted above.

The recent India Model treaty excludes MFN entirely. The EU-Singapore FTA also omits MFN treatment except in connection with compensation for losses owing to armed conflict, insurrection, revolution and similar circumstances. EU-Singapore Free Trade Agreement, art. 9.5.[5]

Beyond seeking to import substantive standards, claimants in ISDS cases have sought to use MFN for treaty shopping into a range of other types of provisions. These include efforts to expand jurisdiction or to obtain procedural advantages in ISDS. For example, in Garanti Koza v Turkmenistan, a majority tribunal decision permitted a claimant to use an MFN clause to access ICSID arbitration in another treaty, which the claimant preferred to the UNCITRAL arbitration available under the basic treaty; a vigorous dissent rejected that use of MFN.[6] These uses and attempted uses have given rise to apparently contrasting results in a number of cases and uncertainty. One commentator examining cases involving efforts to import jurisdictional clauses in detail found inconsistent outcomes, with results driven by arbitral views about MFN rather than treaty language.[7] The issue of whether MFN can allow importation of dispute resolution clauses have also given rise to a range of outcomes.[8]

4 See Simon Batifort and J. Benton Heath, The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization, 111 AJIL 873, 882 (2017).

5 The available text dates from May 2015; parts of the agreement are under renegotiation.

6 Garanti Koza LLP v. Turkmenistan, ICSID, Decision on the Objection to Jurisdiction for Lack of Consent and Dissenting Opinion of the Decision on the Objection to Jurisdiction for Lack of Consent (3 July 2013).

7 See Julie A. Maupin, MFN-Based Jurisdiction in Investor-State Arbitration: Is There Any Hope for a Consistent Approach?, 14 Journal of Int’l Econ. Law 157 (2011).

8 See Batifort & Heath, p. 888 (noting that outside NAFTA, some tribunals have relied on the perceived permissibility of imports of substantive provisions to find that imports of dispute resolution

Some governments have addressed these particular issues in their recent treaties as well. For example, in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) signed on 7 March 2018 by 11 countries, art. 9.5(3) (of the underlying TPP incorporated by reference) clarifies that the treatment referred to in the MFN clause does not encompass international dispute resolution procedures or mechanisms. In addition to the clarification addressed above relating to substantive standards, CETA also clarifies that the MFN provision cannot be used to import treaty provisions relating to dispute resolution. CETA, art. 8.7(4).

Research would be required to provide a better sense of treaty practice. Many older investment treaties contain MFN clauses without clarifications or express limits relating to treaty shopping. The International Law Commission (ILC) Study Group review of MFN clauses notes six different types of MFN obligations in investment treaties generally. In addition to variations among the six types identified, there are also similarities; for example, all six refer to treatment.[9]

Previous Roundtable statistical textual analysis of treaties in other areas has found very high levels of minor variations, such as over 1000 different rule sets for ISDS. It seems implausible that such differences reflect policy differences particularly given evidence about the negotiating conditions for many older investment treaties. While some governments have paid close attention to their treaty language, others may have considerable amounts of "noise" that does not reflect policy choices. Inadvertent differences in language can give rise to expensive interpretive disputes and unwelcome outcomes with regard to MFN as elsewhere

This tableau of important clarifications of intent by governments in major treaties, many older unspecified treaties and a range of divergent case outcomes appears to be a study in contrasts. It offers an interesting context for governments, stakeholders and experts to consider the policy issues raised by investment treaty shopping as outlined in the agenda.

Speakers at the Conference include advocates for different approaches to MFN clauses and treaty shopping. Practice with MFN in other contexts, such as trade law, can provide additional points of comparison. Clarity about policy benefits and costs, and about policy goals, can lead to clarifications of intent or other action, and reduced litigation over MFN clauses.

Summary Overview of Treaty Shopping Using the Attribution of Reflective Loss Claims

Recent OECD analysis has identified a unique combination of interpretations generally applied under many investment treaties that are of particular importance to the company.[10] First, investor-state dispute settlement (ISDS) arbitral tribunals have found that treaty-covered shareholders are entitled to recover for reflective loss under many first-generation investment treaties. (Shareholders' reflective loss is incurred as a result of injury to "their" company, typically a loss in share value.) In contrast, courts in advanced systems of national corporate law generally reject shareholder claims for reflective loss – largely for explicit policy reasons. Shareholders are permitted to bring cases for direct injury – for example to their voting rights as

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provisions are also allowed, while, at the other end of the spectrum, others find that while imports of substantive standards are perceived as uncontroversial, imports of dispute resolution provisions are different in nature and impermissible; citing multiple cases).

9 See ILC, Final Report of the Study Group on the Most-Favored-Nation Clause, paras. 59-65, UN Doc. A/70/10, Annex (2015).

10 This summary analysis is based a typical older investment treaty without clauses limiting or conditioning certain forms of reflective loss claims; reflective loss treaty shopping itself can frequently allow claimants to access such older treaties. The Roundtable has engaged in more intensive analysis of reflective loss, as reflected in a series of Secretariat working papers on international investment (nos. 2013/03, 2014/02, 2014/03) and Roundtable discussions (Roundtables 18 and 19) available on the OECD website. See also chapter 8 of the 2016 OECD Business and Finance Outlook.

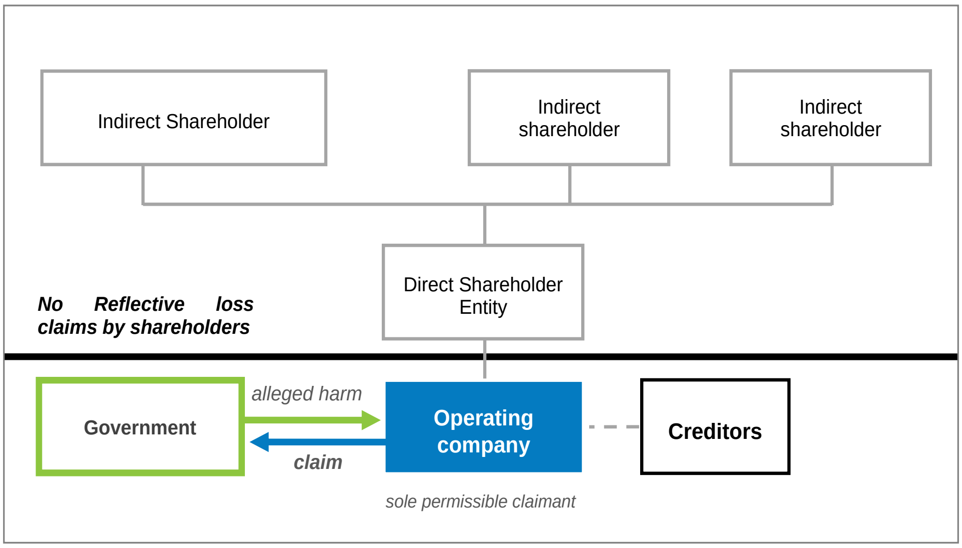
shareholders – but not where they suffer reflective loss due to an injury to the company. Only the directly-injured company can bring the claim.

Second, investment treaties make money damages generally available as redress against government breaches of investment treaties. Subject to appropriate proof, treaty claimants can generally recover past and future lost profits as well as interest. In contrast, only non-monetary remedies (such as annulment of improper government action) are generally available for investors against governments under domestic law in advanced economies, except for expropriation or contract claims. Unlike non-pecuniary relief, damages are divisible.

These principles change how claims are brought following an injury to a company. If an operating company suffers an injury, it suffers a direct loss. Stakeholders in the company (its shareholders and creditors) will suffer reflective loss. The value of shares in the company will generally fall. The company's debt will become more risky because the company has fewer assets as a result of the injury. The distribution of these reflective losses between various shareholders and various creditors (bondholders, banks, trade creditors, employees, etc.) can be very difficult to determine – it depends notably on the financial condition of the company. Creditors generally suffer relatively more reflective loss as the company approaches insolvency; in contrast, if the company is financially strong even after the injury, shareholders generally suffer most of the reflective loss.

Under normal corporate law principles, the injured operating company owns the claim for recovery of its direct loss. As the owner of the claim, it is generally the only entity that can bring it. Reflective loss claims are generally barred. (Figure 1) If the company recovers its loss, the recovered assets restore the company's value and eliminates the reflective loss suffered by the company's stakeholders. The company's recovery of its loss makes its stakeholders whole without the need to try to evaluate the precise reflective loss suffered by each stakeholder. Reflective loss claims are barred in part to give primacy to the company claim.

Figure 1: Domestic Law: "No Reflective Loss" principle bars shareholder claims



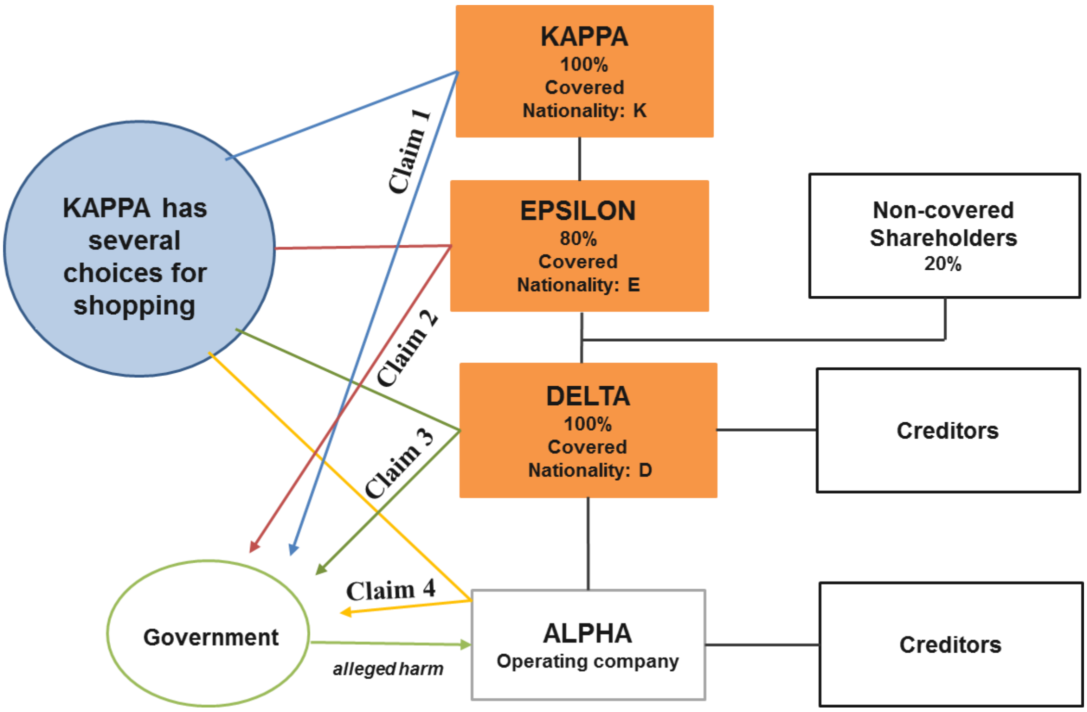
The result is that as a general matter, nothing that happens to the shareholder structure of a company – above the bold horizontal line in figure 1 – affects the company claim. Multiplying the number of shareholders or creating them in particular jurisdictions has no impact. This disconnect between shareholder structure and the company claim is of fundamental importance to a range of issues, including the protection of company creditors, the free transferability of shares, and ensuring the effective control of the litigation by the board of directors of the directly-injured company.

The two unique ISDS interpretations profoundly change this scenario. They fragment the claim that is normally held only by the injured company. As noted, in ISDS, shareholders have been permitted to claim for their reflective loss arising out of the injury to "their" company. Companies may have many direct shareholders. Under ISDS interpretations, each treaty-covered direct shareholder can bring a claim for its reflective loss. This fragmentation of recovery of the loss generates many more potential ISDS claims including overlapping claims for the same damages.

Furthermore, ISDS cases have allowed indirect as well as direct shareholders to recover reflective loss. The extension of recovery of reflective loss to indirect shareholders amplifies the fragmentation of recovery of corporate loss. Together with the acceptance of reflective loss and damages remedy, it creates broad potential for treaty shopping as illustrated in figure 2.

A controlling indirect shareholder (beneficial owner) of an allegedly-injured operating company can treaty shop by attributing the reflective loss claim(s) to one (or more) entities in the chain of ownership between the beneficial owner and the operating company. In figure 2, Kappa is an indirect 80% shareholder of Alpha, an operating company. (Kappa owns 80% of Alpha through its 100% ownership of Epsilon, Epsilon's 80% share of Delta and Delta's 100% share of Alpha.)

Figure 2. Treaty Shopping in ISDS Using the Attribution of Reflective Loss Claim(s)



In figure 2, Kappa can attribute a reflective loss claim in ISDS to one or more of its controlled entities. It can choose its preferred treaty-covered entity. The corporate chain can have entities with different nationalities, as in figure 2 (where the shareholders have nationalities K, E and D). Kappa can select the entity with access to the most claimant-favourable treaty to bring the claim: Delta and claim 3 if it prefers the treaty between country D and the host state; Epsilon and claim 2 if it prefers the treaty between country E and the host state, etc. Consequently, it can invoke a different investment treaty for claims for reflective loss arising out of the same basic injury to the operating company.

Kappa can also choose to bring a reflective loss itself under the country K-host state treaty (claim 1). It can cause more than one controlled treaty-covered entity to bring ISDS claims, seeking to obtain two bites at the apple. Kappa can also create new entities with desirable nationalities – this lengthens the chain of ownership and creates new potential claimants with access to different treaties.

Beneficial owners like Kappa can attribute ISDS reflective loss claims to different entities for additional purposes beyond treaty selection for maximum investor protection. The reflective loss interpretation create risks of opportunistic behaviour by the beneficial owner vis a vis other investors. If a subsidiary has debt obligations (like Alpha or Delta), Kappa can attribute the claim to an entity above the debt in the corporate chain (eg. claim 2 by Epsilon or claim 1 by Kappa). Similarly, an entity with other shareholders (such as Delta) can be circumvented by a higher tier claim (1 or 2). The non-covered shareholders of Delta only benefit if the recovery is by Alpha or Delta. Thus, while the power to attribute the claim benefits beneficial owners and claimants, it raises risks for other investors and stakeholders.[11] If ex ante investor attention to investment treaties is assumed, these risks to other investors can be expected to raise the cost of their capital.

Treaty shopping is thus only one of many advantages for claimants of the reflective loss interpretation.[12] This and other claimant advantages to reflective loss attribution can make it difficult to determine the scope of treaty shopping as opposed to the attribution of reflective loss claims in ISDS for other purposes, or the relative importance of treaty shopping as opposed to other incentives. This contrasts with MFN shopping which involves a visible claim in every case.

As with MFN shopping, there is recent government action of interest with regard to reflective loss. It does not appear that any recent publicly-available government submission has addressed the treaty shopping aspect in particular, but few government submissions are available. However, Canada recently argued, in a brief that became public earlier this year, that allowing individual shareholders to claim for reflective loss under NAFTA would cause decreased investment:

> Awarding damages to shareholders for losses incurred by enterprises undermines one of the most fundamental rules of corporate law in all three NAFTA Parties. Allowing shareholders to recover reflective losses under Article 1116 will weaken the corporation's separate legal personality, create unpredictability for investors, creditors, banks, and others who participate in the foreign direct investment market, create unfair conditions of competition among these different sorts of investors, and hence, inevitably decrease the opportunities for investment in the NAFTA Parties.[13]

The government further argued that it would be "inappropriate for a shareholder to take advantage of the separate legal status of a corporation to shield itself from potential liability, but then disregard that legal status for the purpose of making claims for reflective loss". Id. para. 25 (footnotes omitted). It also underlined that "the risks of double recovery and inconsistent decisions arise, and concerns for judicial economy grow, as the number of cases brought to address the same harm increases." Id. para. 23.

The United States submitted a non-disputing party brief in Bilcon, also rejecting the availability of individual shareholder claims for reflective loss under NAFTA.[14] Both Canada and the US noted that Mexico has

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11 In theory, arbitral tribunals could identify the exact losses of each sufferer of reflective loss, and discount the claimant's damages accordingly. In practice, this is extremely difficult even if arbitral tribunals had bankruptcy court powers to evaluate claims on the company and jurisdiction over all relevant entities. See, e.g., Mid-State Fertilizer Co. v. Exchange National Bank of Chicago, 877 F.2d 1333, 1335-36 (7th Cir. 1989) ("Divvying up the recovery [between sufferers of reflective loss] would be a nightmare .... Why undertake such a heroic task when recovery by the [company] handles everything automatically? – for investors, workers, lessors, and others share any recovery according to the same rules that govern all receipts"). The additional fees and costs in ISDS legal, expert and arbitral time to seriously attempt such analysis are difficult to estimate, but would be very substantial.

12 In addition to the examples above, Kappa can also attribute the reflective loss claim to an entity in the most tax-favourable jurisdiction.

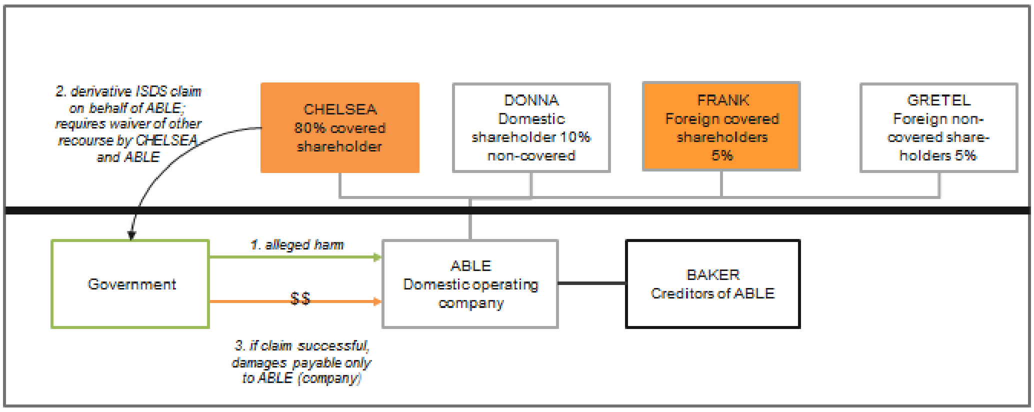
13 Bilcon of Delaware Inc. v. Canada, Canada Counter-Memorial on Damages (9 June 2017), para. 26.

14 Bilcon of Delaware Inc. v. Canada, Submission of the United States of America (29 Dec. 2017), paras. 2-22.

taken the same position on the issue.[15] Other governments have also opposed reflective loss claims in recent ISDS cases under other investment treaties, but the government submissions are not publicly available.

NAFTA is unlike the typical investment treaties addressed above.[16] Alongside the art. 1116 claim by the investor, it provides for a form of derivative action in art. 1117. The derivative action provides the controlling foreign covered shareholder with the power to bring a claim on behalf of the company for the injury to the company. Recovery for the company protects the corporate entity and thus corporate creditors and other shareholders. See Figure 3.

Figure 3 – NAFTA-style Derivative-type action



In this derivative action, the *power to decide* on the claim moves to the controlling covered shareholder (Chelsea), above the solid horizontal black line (separating the company from its shareholders – see figure 1 above). But the *flow of money* stays below the line. Only the company (Able) recovers from the government. Able's creditors (Baker) are protected. Able's recovery also makes all of its shareholders (including Chelsea, Donna, Frank and Gretel) whole. In contrast, in figure 2 above, claims 1 and 2 make Kappa whole if they succeed but leave Delta's other shareholders with the loss.

The additional derivative action provides protection for foreign direct investment where normal corporate rules apply to bar individual shareholder claims for reflective loss including in ISDS. The additional derivative action does not change the effects of individual reflective loss claims if they are permitted.

Under treaties with derivative action mechanisms, the treaty shopping risk is addressed in part through waiver provisions. As noted in Figure 3, Chelsea can only bring a derivative claim if both Chelsea and its controlled company (Able) waive other recourse. The treaty shopping risk is reduced if individual shareholder claims for reflective loss are barred. The treaty shopping risk would appear to remain essentially unchanged if individual reflective loss claims are permitted.

15 Id. para. 5; Canada Counter-Memorial para. 28 & n.50.

16 Derivative-type actions generally similar to the NAFTA model are included in a number of major treaties, such as the CPTPP, CETA or Protocol to the Pacific Alliance.

Speaker Biographies

Simon N. Batifort

Counsel, Curtis, Mallet-Prevost, Colt & Mosle LLP, United States

Simon Batifort is counsel in the International Arbitration Group of Curtis, Mallet-Prevost, Colt & Mosle LLP in New York. His practice focuses on representing States and State-owned entities in arbitrations arising under investment treaties and transnational contracts. Among other disputes, he was part of the team that obtained the largest annulment in ICSID history in *ExxonMobil v. Venezuela*.

He is also an Adjunct Professor at Brooklyn Law School, where he teaches investment treaty arbitration. He has recently co-authored "The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization," published in the *American Journal of International Law*.

Mr. Batifort is admitted to the Paris and New York bars and holds degrees from NYU Law, Université Panthéon-Assas and Université de Montpellier. *Who's Who Legal* has recognized him as one of the "Most Highly Regarded" arbitration practitioners in its survey of Future Leaders (under 45).

Jorun Baumgartner

International Investment Agreements Section, UNCTAD

Jorun Baumgartner works in the International Investment Agreements Section, Division on Investment and Enterprise, UNCTAD. Prior to this, she worked as a research fellow at the Chair of Public International Law at the University of Lausanne, as a legal advisor for an international organization in Geneva and in the private sector in Germany. She holds a PhD from the University of Lausanne, Switzerland and is admitted to the bar in Germany. She is the author of "Treaty shopping in international investment law" (Oxford University Press, 2016).

Colin Brown

Deputy Head of Unit, Dispute Settlement/Legal Affairs, DG Trade, European Commission

Colin Brown is a lawyer and Deputy Head of Unit of Unit F.2 - Dispute Settlement and Legal Aspects of Trade Policy in the Directorate General for Trade of the European Commission. He leads the team of lawyers working on investor-state dispute settlement in the trade and investment policy of the European Union, in particular the Investment Court System and now the work on the Multilateral Investment Court project. He also leads the teams providing legal advice on the Transatlantic Trade and Partnership Agreement (TTIP) and the Comprehensive Economic and Trade Agreement (CETA) with Canada.

Before joining DG Trade in October 2006 he worked for 6 years for the Legal Service of the European Commission, where he litigated WTO and EU law cases. He has been chair of the Legal Advisory Committee of the Energy Charter Treaty since January 2004. He is visiting lecturer in WTO law at the Université Catholique de Louvain in Belgium since 2009 and at IELPO Barcelona since 2016.

He holds an LLB (first class Honours) from the Faculty of Law of the University of Edinburgh, Scotland, a Diploma in International Relations from the Bologna Center of the School of Advanced International Studies (SAIS), Johns Hopkins University, Bologna, Italy and an LLM in European Law from the College of Europe, Bruges.

Shaun Donnelly

United States Council for International Business (USCIB)

Ambassador (ret.) Shaun Donnelly is Vice President for Investment Policy at the U.S. Council for International Business (USCIB), a leading American trade association and the sole U.S. organization representing U.S. business in the OECD, the United Nations family of agencies, and the International Chamber of Commerce. Shaun is a leading business spokesman on international investment policy issues, including on behalf of BIAC at OECD Fora and in other international conferences and organizations. Shaun has been attending OECD meetings in various capacities since 1978.

Shaun joined USCIB's Washington office in 2011 following a career in the U.S. Department of State's Foreign Service, focusing on international economics and trade negotiations. He served as U.S. Ambassador in Sri Lanka, as Deputy U.S. Ambassador in Tunisia and Mali, as Assistant U.S. Trade Representative in charge of Europe and the Middle East, and five years as Principal Deputy Assistant Secretary of State for Economic and Business Affairs, the State Department's economic post. He also held senior international policy positions with the National Association of Manufacturers (NAM) and the U.S. Chamber of Commerce.

Shaun has degrees in economics from Lawrence University (BA) and Northwestern University (MA).

John Drummond

Head, Trade in Services Division, OECD

Mr. John Drummond is Head of the Trade in Services Division in the Trade and Agriculture Directorate of the OECD. He leads the work of the Trade in Services Division in providing evidence-based policy advice on issues such as services trade liberalisation, global value chains, trade and investment and trade policy-making in the digital economy. In particular, Mr. Drummond is responsible for the continued development of the OECD Services Trade Restrictiveness Index (STRI) that provides policy makers and negotiators with information and measurement tools to open up international trade in services and negotiate international trade agreements. Mr. Drummond, a Canadian national, has more than seventeen years of experience with Canada's Department of Foreign Affairs, Trade and Development. He has held a variety of positions related to bilateral, regional and multilateral trade policy and negotiations including, in particular, in the area of services trade. Mr. Drummond holds an Honours B.A. in International Relations from the University of Windsor and a Diploma of Graduate Studies in International Economics from the Institut Universitaire de Hautes Etudes Internationales.

Maikel Evers

Advisor, BEPS Project, Centre for Tax Policy and Administration, OECD

Maikel Evers is leading the work on the Multilateral Instrument in the OECD Centre for Tax Policy & Administration (CTPA). Previously, he was a counsellor to the Director of the Centre for Tax Policy and Administration and the coordinator of the BEPS project. He also worked on the engagement with developing countries in the tax work of the OECD. Before joining the OECD, Maikel was a policy advisor to the Netherlands Ministry of Finance, where he was responsible for treaty negotiations, MAPs, international tax policy and OECD matters. He was also a lecturer of international and European tax law at the Erasmus School of Law (Rotterdam). Maikel is a member of the board of the Netherlands IFA branch and a member of the IFA Permanent Scientific Committee.

Céline Folsché

Legal Directorate, OECD

Céline Folsché is a legal adviser in the OECD Directorate for Legal Affairs where she provides legal and procedural advice on substantive matters concerning the Organisation, including on external relations. Prior to this, she worked as a Legal Adviser for the Public International Law Division of the Legal Office of the French Ministry of Foreign Affairs, focusing on the law of treaties and recourse to force. She also acted as counsel in front of the International Court of Justice and Permanent Court of Arbitration. She holds a Master's degree in International Law from Strasbourg University, an LL.M. of International Legal Studies from New York University School of Law and is admitted to the New York bar.

David Gaukrodger

Head of Unit and Senior Legal Advisor, Investment Division, OECD

David Gaukrodger is Head of Unit and Senior Legal Advisor at the OECD Investment Division. He leads analysis at the OECD about investment treaties and dispute settlement under those treaties, and provides support for the work of an investment Roundtable that regularly gathers OECD, G20 and other governments. Current work is addressing among other things the balance of investor protection and the right to regulate; and arbitrators, adjudicators and appointing authorities. Other recent work has addressed joint governmental interpretations, state-to-state dispute settlement, shareholder claims for reflective loss, and investor-state dispute settlement.

Earlier David led expert teams evaluating compliance by countries with the OECD Anti-Bribery Convention. He also helped design the G20-mandated peer review system used by a Global Forum that evaluates the compliance of 120+ jurisdictions with standards for the exchange of tax-related information. Prior to joining the OECD, David was a Special Counsel with Sullivan & Cromwell LLP. David graduated from Sciences Po Paris with a "mention lauréat" and obtained law degrees with distinction from the University of Toronto and the Université de Paris I. He was a law clerk for Justice Gerard La Forest at the Supreme Court of Canada.

Brooke Skartvedt Güven

Columbia Center on Sustainable Investment (CCSI)

Brooke Guven is a researcher at the Columbia Center on Sustainable Investment, a joint center of the Columbia Law School and the Earth Institute at Columbia University. Brooke's work focuses on analysing the contracts, domestic frameworks and international legal arrangements governing cross-border investments and the impacts that these frameworks have on sustainable development objectives. Prior to joining CCSI, she was a finance lawyer specializing in cross-border transactions at an international law firm, and also worked as a legal advisor with the Liberian Ministry of Health and Social Welfare. Brooke has an LLM from New York University School of Law, a JD and MA from the University of Wisconsin and a BA from Northwestern University.

Pierre Habbard

General Secretary, Trade Union Advisory Committee to the OECD (TUAC)

Pierre Habbard is Secretary General to the Trade Union Advisory Committee to the OECD (TUAC) since December 2017. Prior to that he was a Senior Policy Advisor at the TUAC – covering responsible investment, tax, finance, pensions, corporate governance, financial regulation and public governance – and had held this position since 2003. He has served on the board of directors of Oxfam France and on the Stakeholder Council of the Global Reporting Initiative. He is a French national who graduated from the Université Paris IX Dauphine and the London School of Economics and Political Science.

Rob Howse

Professor of International Law, New York University Law School, United States

Robert Howse is the Lloyd C. Nelson Professor of International Law at NYU School of Law. Professor Howse received his B.A. in philosophy and political science with high distinction, as well as an LL.B., with honours, from the University of Toronto, where he was co-editor in chief of the Faculty of Law Review. He also holds an LL.M. from the Harvard Law School. He has been a visiting fellow at the London School of Economics and visiting professor at Harvard Law School, Tel Aviv University, Hebrew University of Jerusalem, the University of Paris 1 (Pantheon-Sorbonne), Tsinghua University, and Osgoode Hall Law School in Canada and taught in the Academy of European Law, European University Institute, Florence.

Howse is the author, co-author, or co-editor of numerous books, Trade and Transitions; Economic Union, Social Justice, and Constitutional Reform; The Regulation of International Trade; Yugoslavia the Former and Future; The World Trading System; and The Federal Vision: Legitimacy and Levels of Governance in the EU and the U.S.

Martin Klam

Deputy Director of Indirect Taxation, Tax Legislation Directorate, Ministry of Economy and Finance, France

A graduate of Sciences Po Paris and holder of a DEA in public law from the University of Assas, Martin Klam began his career as an administrative magistrate in France and then overseas in charge of tax litigation. He joined the Directorate of Tax Legislation (DLF) in 2008, in the coordination and synthesis office, and since then has held several positions at the DLF and the DGFiP. He first participated in the drafting of finance laws in the office of synthesis and coordination. Then in 2010, he joined for two years, the legal department of the DGFiP, as head of the office in charge of rescripts and litigation in registration law. As of 2012, he became the head of the office responsible for the main principles of the Community and national value added tax as well as the European negotiation on the financial transaction tax. Between 2015 and end-2017, he was responsible for the international bilateral tax negotiations office. In this capacity, he also participates in OECD tax negotiations, notably as Head of Delegation for the negotiation of the Multilateral Convention for the Implementation of Measures on Tax Conventions to prevent the erosion of the tax base, taxation and transfer of profits within the ad hoc group. Since 1 January 2018, Martin has been in charge of taxing transactions within the DLF.

Corinne Montineri

Secretary of Working Group II, UNCITRAL

Corinne Montineri is a Legal Officer in the International Trade Law Division of the United Nations Office of Legal Affairs, the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL). UNCITRAL is the core legal body of the United Nations in the field of international trade law.

Her main field of activity relates to dispute settlement, and technical assistance to law reform in the field of arbitration and mediation, which includes advising UN Member States on draft arbitration and mediation laws, and on compatibility of existing laws with UNCITRAL standards. She has been servicing the sessions of the UNCITRAL Working Group II (Arbitration and Conciliation) since October 2003 and is the Secretary of Working Group II since January 2009.

Ana Novik

Head of Investment Division, OECD

Ana Novik as Head of the Investment Division of the Directorate for Financial and Enterprise Affairs, supports the Director in DAF's contribution to the strategic orientations of the Secretary General, with a focus on improving the international investment climate, promoting good domestic policies to support investment and Responsible Business Conduct. She establishes strategies for the OECD to secure a leadership role in the international investment debate and to advance a more structured economic analysis of investment flows and impact. She also contributes to OECD-wide initiatives, including horizontal work streams on competitive neutrality, global value chains and OECD contributions to the G20. Prior to joining the OECD, Ms. Novik was the Ambassador Director of Multilateral Economic Affairs in the Economics Directorate of Chile's Ministry of Foreign Affairs and Trade from 2011 to 2014.

Pierre Poret

Deputy Director, Directorate for Financial and Enterprise Affairs, OECD

Pierre Poret is Deputy Director of the Directorate for Financial and Enterprise Affairs of the OECD since June 2014, contributing guidance, strategy and support for the Directorate's policy and standard-setting work in the fields of anti-corruption, corporate governance, competition, financial markets, international investment, insurance, private pensions and the Directorate's contributions to OECD's horizontal projects. Mr. Poret, a French national, is also the Directorate's Coordinator for OECD Accession and the Chair of its Editorial Board.

Mr. Poret was appointed Counsellor of the Director in the Directorate in 2011. From 2001 to 2010, he was Head of the Investment Division where he managed a team of 30 policy analysts, responsible for advising governments on international investment policies, corporate responsibility, international investment agreements and investment statistics standards.

From 1998 to 2001 Mr. Poret held several positions at the OECD including Deputy Head of the Secretary-General's Office. In 1986 he joined the OECD as an Economist in the Economics Department, becoming a Senior Economist in the Directorate for Financial, Fiscal and Enterprise Affairs in 1991. In this role he was in charge of the accession of new members to OECD legal investment instruments and of the financial aspects of the 1995-98 Multilateral Agreement on Investment hosted at the OECD.

Mr. Poret has published on many subjects, including capital flow management, financial services, international agreements, private-sector productivity, economies in transition, wage and price modelling, economies' resilience.

Stephan Schill

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Stephan W. Schill is Professor of International and Economic Law and Governance at the University of Amsterdam and Principal Investigator of the European Research Council-funded project on 'Transnational Public-Private Arbitration as Global Regulatory Governance'. He is admitted to the bar in Germany and New York and is a Member of the ICSID List of Conciliators. He acts as arbitrator in investment treaty proceedings and advises governments and international organizations on international investment law and investor-state dispute settlement. He is also Editor-in-Chief of the Journal of World Investment and Trade and has published widely on international investment law, including on most-favored-nation clauses and treaty shopping in his monograph The Multilateralization of International Investment Law (Cambridge University Press, 2009).

Shane Spelliscy

Senior Counsel and Deputy Director of Trade Law Bureau, Global Affairs Canada; Chair of UNCITRAL Working Group III

Shane Spelliscy is currently the Director and General Counsel of the Investment and Services division of the Trade Law Bureau of the Government of Canada. He joined the Trade Law Bureau in 2008, and his practice since that time has focused on providing advice on Canada's obligations under its trade and investment treaties, on providing counsel in trade and investment treaty negotiations and on representing Canada in disputes under its investment treaties. He has acted as Canada's delegate at UNCITRAL since 2008, including with respect to the revision of the UNCITRAL Arbitration Rules, the development of the UNCITRAL Rules on Transparency, and the negotiation of the Mauritius Convention on Transparency in Treaty-Based Investor-State Dispute Settlement. In November 2017, he was elected by the Member States of UNCITRAL as the Chair of Working Group III, which has been tasked with considering possible reforms in the field Investor-State dispute settlement. Prior to joining the Government of Canada, Shane practiced in the international disputes group at the firm of Debevoise & Plimpton in New York, where he represented both States and investors in investment treaty disputes.

Felix Steffek

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Dr Felix Steffek is a University Lecturer at the Faculty of Law of the University of Cambridge and a Senior Member of Newnham College. At Faculty level, he serves as Deputy Director of the Cambridge LLM programme and Co-Director of the Centre for Corporate and Commercial Law. At College level, he is Director of Studies for undergraduate and graduate students.

His research interests cover corporate law, insolvency law, commercial law and dispute resolution law. Felix Steffek has published widely in his areas of interests and is a Member of the Editorial Board of the Journal of Corporate Law Studies, the Cambridge Yearbook of European Legal Studies and other academic journals.

He has acted as expert for the European Commission, the European Parliament, the World Bank, the OECD, national governments, courts, parliaments and science foundations. He received his education at Cambridge (LLM), Heidelberg (PhD, undergraduate) and Hamburg (Habilitation, court clerkship).

Jefferson VanderWolk

Head of the Tax Treaty, Transfer Pricing and Financial Transactions Division, Centre for Tax Policy and Administration, OECD

Jefferson VanderWolk has been the head of the Tax Treaty, Transfer Pricing, and Financial Transactions Division at the OECD Centre for Tax Policy and Administration since July 2016. He is a lawyer who has been engaged in international tax practice, policy development, and scholarship since 1985. He has been a partner at Baker & McKenzie and Deloitte in both London and Hong Kong, a corporate tax director at Merrill Lynch, a Special Counsel at the IRS Office of Chief Counsel, a law professor in Hong Kong, London, and Washington DC, and International Tax Counsel to the U.S. Senate Committee on Finance. Before joining the OECD, he was with Washington Council EY in Washington DC. He has published extensively on tax law subjects and participates in numerous professional organizations. He became a Fellow of the Chartered Institute of Taxation in 2004, serves on the Academic Committee for the CIOT's Advanced Diploma in International Taxation and IFA's Permanent Scientific Committee, and is a Distinguished Fellow of the Chinese University of Hong Kong's Faculty of Law. He is admitted to practice in both the U.S. and the U.K. and is a citizen of both countries.

James Zhan

Director of Investment and Enterprise, UNCTAD

James Zhan is Director of Investment and Enterprise at the United Nations Conference on Trade and Development (UNCTAD) in 2008. He is also the lead for the annual World Investment Report.

Dr. Zhan has rich experience and expertise in trade, investment, technology, entrepreneurship, corporate governance, business facilitation and national development strategies. He has directed extensive research and policies analysis on key emerging issues; facilitated the formulation of outcomes at various summits (e.g. UN, G20, ACP, APEC, BRICS); and provided technical assistance to governments and institutions (including cabinets and parliaments) in over 160 countries.

Dr. Zhan is Global Council member of the World Economic Forum, and chief strategist for the World Association of Investment Promotion Agencies. He is also chief editor of the journal Transnational Corporations. He has held a number of advisory positions with academic institutions, including Cambridge University, Columbia University, Oxford University and the University of Geneva. He has published extensively on trade and investment-related economic and legal issues. He is a regular speaker at high-level policy, academic and business forums, as well as parliamentary hearings. He appears frequently in international media outlets.

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