CAUSATION IN INTERNATIONAL INVESTMENT LAW: PUTTING ARTICLE 23.2 OF THE INDIA MODEL BIT INTO CONTEXT

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Abstract

Causation has received little attention in international investment law even though it is an integral element of liability in investment disputes. This article uses the two dimensions of the causal inquiry, factual and legal causation as a framework for analysis, and explores how investment treaties and tribunals have addressed causation. Article 23.2 of the new India Model Bilateral Investment Treaty, which exhibits a novel approach to causation in treaty practice, must be seen in this context. As relationships among States and private investors grow more complex, other investment treaties may follow and set out specific standards of causation.

I. Introduction

In 2016, the Indian government adopted a new Model Bilateral Investment Treaty ["**Model BIT**"] as part of its endeavour to review its existing bilateral investment treaties ["**BITs**"] and evaluate its stance on investor-State arbitration. The Model BIT seeks to provide "*appropriate protection*" to foreign investors in India and Indian investors abroad while maintaining *"a balance between investor's rights and the [g]overnment's obligations.*"[1] It is intended to serve as the template for all future government negotiations for BITs and investment chapters.

The Model BIT marks a clean break from the minimalistic style of previous model BITs, providing significantly more detail with respect to both the definitions of substantive protections and provisions on dispute settlement.[2] The Indian government seeks to narrow the scope of protection by imposing rather strict definitions and including express safeguards for the host State's right to regulate. For instance, a notable manifestation in this respect is the absence of a Most Favoured Nation ["**MFN**"] provision from the Model BIT, a move that has been criticized for exposing foreign investment to the risk of discriminatory treatment.[3] In addition, foreign investors have to exhaust local remedies for at least five years before commencing international arbitration.[4] However, considering the backlog of cases within the Indian judicial system, this

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1 *See* Press Information Bureau, Ministry of Finance, Government of India, Model Text for the Indian Bilateral Investment Treaty (Dec. 16, 2015), *available at* https://pib.gov.in/newsite/PrintRelease.aspx?relid=133412; Model Text for the Indian Bilateral Investment Treaty, *available at* https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf [*hereinafter* "2016 India Model BIT"].

2 Saurabh Garg et al., *The Indian Model Bilateral Investment Treaty: Continuity and Change*, *in* RETHINKING BILATERAL INVESTMENT TREATIES – CRITICAL ISSUES AND POLICY CHOICES 77 (Kavaljit Singh & Burghard Igle eds., 2016).

3 Prabhash Ranjan & Pushkar Anand, *The 2016 Indian Model Bilateral Investment Treaty: A Critical Deconstruction*, 38 (1) NW. J. INT'L L. & BUS. 1, 24 (2017).

4 2016 India Model BIT, *supra* note 1, art. 15.2.

requirement constitutes an obstacle for foreign investors in India to access international arbitration and expeditiously resolve their disputes.

A remarkable provision in the Model BIT that has been subject to relatively little scrutiny so far is Article 23.2 (sub-clauses (d) and (e)), which relates to causation and the required directness and foreseeability of the loss suffered. Article 23.2 of the Model BIT states that:

> *"The disputing investor at all times bears the burden of establishing: (a) jurisdiction; (b) the existence of an obligation under Chapter II of this Treaty, other than the obligation under Article 9 or 10; (c) a breach of such obligation; (d) that the investment, or the investor with respect to its investment, has suffered actual and non-speculative losses as a result of the breach; and (e) that those losses were foreseeable and directly caused by the breach."*[5](emphasis added)

Under the law of international State responsibility, a State is liable only for the harm caused by its wrongful acts.[6] To establish liability, a sufficient causal link between the harm and an act attributable to the State must be proven to exist. Furthermore, to be compensable, the loss suffered must not be "*too indirect, remote, and uncertain to be appraised.*"[7]

While these general principles are well-established, the specific standards and tests to be applied when assessing causation are not. The international law rules governing State responsibility provide little specific guidance on how to tackle and balance the practical and policy considerations that have long influenced the determination of causation.[8] Few investment treaties identify any distinct standard for causation,[9] making express provisions such as Article 23.2 of the Model BIT all the more remarkable. In addition, international tribunals have not devised clear and commonly accepted standards governing causation.[10] Similarly, academic

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5 2016 India Model BIT, *supra* note 1, art. 23.2.

6 Report of the International Law Commission on the work of its fifty-third session, at 91, ¶ 9, U.N. Doc. A/56/10, *reprinted in* [2001] 2 Y.B. Int'l L. Comm'n 1, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) [*hereinafter* "Commentaries to the Draft ILC Articles"] ("the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act.").

7 Commentaries to the Draft ILC Articles, *supra* note 6, ¶ 10 ("[C]ausality in fact is a necessary but not a sufficient condition for reparation. There is a further element, associated with the exclusion of injury that is too "remote" or "consequential" to be the subject of reparation. In some cases, the criterion of "directness" may be used, in others "foreseeability" or "proximity"").

8 Patrick Pearsall & J. Benton Heath, *Causation and Injury in Investor-State Arbitration*, *in* CONTEMPORARY AND EMERGING ISSUES ON THE LAW OF DAMAGES AND VALUATION IN INTERNATIONAL INVESTMENT ARBITRATION 1, 4 (Christina L. Beharry ed., 2018) [*hereinafter* "Pearsall & Health"]; *see also* IAN BROWNLIE, PRINCIPLES OF INTERNATIONAL LAW 446 (2003).

9 Pearsall & Health, *supra* note 8, at 11.

10 Ilias Plakokefalos, *Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity*, 26(2) EUR. J. INT'L L. 471, 476 (2015). For a more detailed discussion, *see* § II.

commentary relating to causation is far from unanimous with respect to such standards to be applied and, in any event, tends to focus on questions of quantum.[11]

This article analyses in **Part II** the two dimensions of causal inquiry, i.e., factual and legal causation, as conducted by investment tribunals and the impact of intervening acts on causation. **Part III** examines the role that investment treaties play in defining the test to be applied with respect to causation, with a particular emphasis on the Model BIT. **Part IV** offers concluding thoughts.

II. The Dimensions of Causation

Article 31(1) of the Articles on the Responsibility of States for International Wrongful Acts ["**ILC Articles**"] sets out the principle that a State is "*under an obligation to make full reparation for the injury caused by the internationally wrongful act.*"[12] Article 31(2) defines "*injury*" as "*any damage, whether material or moral, caused by the internationally wrongful act of a State.*"[13] These provisions codify the "*customary requirement of a sufficient causal link between conduct and harm*"[14] in the context of the law of State responsibility.

The causation inquiry in international law, like in many national legal systems, has two dimensions.[15] First, the loss suffered must be a natural consequence of the wrongful act (cause-in-fact or *factual causation*). Second, the wrongful act and the loss must be sufficiently proximate to allow compensation (cause-in-law or *legal causation*). Yet, there is no neat division between these two prongs of the inquiry.[16] Concepts such as contributory negligence show how intertwined they tend to be.[17]

A. Factual Causation

To establish factual causation, the damage must be shown to be a necessary consequence of the wrongful acts or omissions.[18] Different tests have been applied for this purpose.

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11 BORZU SABAHI, COMPENSATION AND RESTITUTION IN INVESTOR-STATE ARBITRATION: PRINCIPLES AND PRACTICE 170 (2011) [*hereinafter* "SABAHI"]; MARK KANTOR, VALUATION FOR ARBITRATION: COMPENSATION STANDARDS, VALUATION METHODS AND EXPERT EVIDENCE 105 (2008); SERGEY RIPINSKY & KEVIN WILLIAMS, DAMAGES IN INTERNATIONAL INVESTMENT LAW 135 (2008) [*hereinafter* "Ripinsky & Williams"]; BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 241 (1987).

12 G.A. Res. 56/83, annex, Articles on the Responsibility of States for International Wrongful Acts, art. 31(1) (Dec. 12, 2001) [*hereinafter* "ILC Articles"].

13 *Id.* art. 31(2).

14 *Report of the International Law Commission on the work of its fifty-second session*, 32 ¶ 97, U.N. Doc. No. A/55/10 30-34 (2000) *reprinted in* [2000] 2 Y. B. Int'l L. Comm'n 13, A/CN.4/SER.A/2000/Add.1 (Part 2)/Rev.1.

15 Plakokefalos, *supra* note 10, at 475*; see also* Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Award, ¶ 382 (Sept. 16, 2015); Biwater Gauff (Tanzania) Ltd. v. Tanzania, ICSID Case No. ARB/05/22, Award, ¶ 785 (July 24, 2008) [*hereinafter* "Biwater"]; Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, ¶ 333 (Feb. 7, 2017).

16 Pearsall & Heath, *supra* note 8, at 11.

17 *See* § C(ii) *infra.*

18 MARTIN JARETT, CONTRIBUTORY FAULT AND INVESTOR MISCONDUCT IN INVESTMENT ARBITRATION 44 (2019).

The most widely applied test for factual causation is the "*but for*" test, which poses the question of whether the damage would have occurred but for the wrongful act.[19] In other words, the respondent will be liable only if the damage would not have been caused without its act or omission that is being examined. It thus serves as an exclusionary test, eliminating factually irrelevant causes from consideration.[20]

International courts and tribunals have frequently applied this test, whether implicitly or explicitly.[21] In *Micula* v. *Romania*, the tribunal rejected, *inter alia*, the claim for lost profits because the claimants failed to prove "*with sufficient certainty that, but for [Romania's breach of the BIT], they would have earned profits they were allegedly deprived of.*"[22] According to the tribunal, the principle of full reparation under international law required that the victim of a tort be put in the same position it would have been in 'but for' the breach.[23] In *Chevron* v. *Ecuador*, the tribunal held that "*[i]n essence, the Claimants must prove the element of causation – i.e., that they would have received judgments in their favour as they allege 'but for' the breach by the Respondent.*"[24] The tribunal in *Suez* v. *Argentina* also adopted the hypothetical and counter-factual inquiry of the 'but for' test, albeit implicitly.[25]

More recently, the tribunal in *Bilcon* v. *Canada*[26] conducted its causation inquiry applying the 'but for' test. Relying on the *Bosnian Genocide*[27] case decided by the International Court of Justice ["**ICJ**"], the tribunal articulated the 'but-for' test as follows:

> "*In this regard, the test is whether the Tribunal is 'able to conclude from the case as a whole and with a sufficient degree of certainty' that the damage or losses of the Investors 'would in fact have been averted if the Respondent had acted in compliance with its legal obligations' under NAFTA.*"[28]

Despite its intuitive appeal, the 'but for' test has been subject to criticism for being simplistic and lacking nuance.[29] For some, it focuses unduly on speculation of what *might have* happened as

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19 Tory A. Weigand, *Tort Law – the Wrongful Demise of But For Causation*, 41(1) W. NEW ENG. L. REV. 75, 78 (2019).

20 Chisholm v. Liberty Mutual Group, [2002] 60 O.R. 3d 776, 217 (Can. Ont. C.A.).

21 *See, e.g.,* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 140, ¶ 462 (Feb. 26) [*hereinafter* "Bosnian Genocide"]; LG&E Energy Corp., LG&E Capital Corp. and LG&E Int'l Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Award, ¶ 48 (July 25, 2007).

22 Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I], ICSID Case No. ARB/05/20, Award, ¶ 1117 (Dec. 11, 2013).

23 *Id.* ¶ 917.

24 Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. Republic of Ecuador, Case No. 34877, Partial Award on the Merits, ¶ 374 (Perm. Ct. Arb. 2010).

25 Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Award, ¶ 53 (Apr. 9, 2015).

26 Bilcon of Delaware et al. v. Government of Canada, Case No. 2009-04, Award on Damages (Perm. Ct. Arb. 2019) [*hereinafter* "Bilcon"].

27 Bosnian Genocide, Judgment, 2007 I.C.J. Rep. 140 (Feb. 26).

28 Bilcon, Case No. 2009-04, Award on Damages (Perm. Ct. Arb. 2019), ¶ 114 (The Bilcon tribunal rejected the claim for more than USD 440 million due to lack of certainty and awarded only the sunk costs to the investors, amounting to about USD 7 million plus interest).

29 Hillel David et al., *Proving Causation Where the But For Test is Unworkable*, 30 THE ADVOC. Q 216, 219 (2005); Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735, 1775 (1985).

opposed to what *actually* happened.[30] For others, the test is unworkable in circumstances where multiple, concurrent causes contribute to the harm, or in cases of omissions.[31]

The 'Necessary Element of a Sufficient Set' ["**NESS**"] test offers a somewhat more nuanced approach. It posits that "[a] *particular condition is a cause of (contributed to) a specific result if and only if it was a necessary element of a set of antecedent actual conditions that was sufficient for the occurrence of the result*."[32] The test focuses not on whether the wrongful act was 'the' cause of the damage but on whether it was 'a' cause of the damage.[33] Unlike the 'but for' test, the NESS test captures different types of conduct as a cause of the damage. For this reason, some find it more appropriate for the complex factual scenarios that often arise in international law including in investment disputes.[34]

Yet, important authority advocates against the position that it could be sufficient for a claimant seeking to establish factual causation to show that a breach was one among several causes of the loss suffered. Namely, the ICJ in the *ELSI* case ruled that even though the breach at issue "*[n]o doubt (…) might have been one of the factors*" that had led to the loss, "*there were several causes acting together that led to the disaster to ELSI*."[35] It went on to apply an 'underlying cause test' to find that the "*underlying cause*" was not the breach, but rather the other causes that it had identified, in particular, the claimant's mismanagement of the business.[36]

Several investor-State tribunals have similarly focused on whether the conduct of the host State was the **dominant** or **primary cause** of the damage, especially where the factual matrix was complex and involved multiple causes. For instance, the tribunal in *Karkey Kardeniz* v. *Pakistan* concluded that the behaviour of the host State, which was in violation of an order of the tribunal, was the "*main cause*" of the claimed damages.[37] The tribunal in *Blusun* v. *Italy* found that the claimant had not discharged the burden of proof that "*the Italian State's measures were the operative cause of the Puglia Project's failure*".[38]

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30 Leon Green, *The Causal Relation Issue in Negligence Law*, 60(5) MICH. L. REV. 543, 556-557 (1962); David W. Robertson, *The Common Sense of Cause in Fact*, 75(7) TEX. L. REV. 1765, 1769 (1997).

31 Ernest J. Weinrib, *A Step Forward in Factual Causation*, 38 MOD. L. REV. 518, 522-523 (1975); *see also*, Plakokefalos, *supra* note 10, at 477.

32 Richard W. Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 IOWA L. REV. 1001, 1019 (1988).

33 Plakokefalos, *supra* note 10, at 478.

34 *Id.*

35 Case Concerning Elettronica Sicula S.p.A. (U.S. v. It.), Judgment, 1989 15 I.C.J Rep. 15, ¶ 101 (July 20) [*hereinafter* "ELSI Case"].

36 *Id.* at 35.

37 Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pak., ICSID Case No. ARB/13/1, Award, ¶¶ 784–785, (Aug. 22, 2017).

38 Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic, ICSID Case No. ARB/14/3, Award, ¶ 394 (Dec. 27, 2016).

B. Legal Causation

The second prong of the causation inquiry – the test of legal causation – operates as a legal limit on liability by excluding indirect or remote harm; furthermore, it apportions liability in situations of an 'intervening cause', with the aim of ensuring fairness.[39]

Legal causation is a somewhat nebulous concept with no defined 'single verbal formula'.[40] Courts and tribunals have rather applied various criteria, such as 'foreseeability', 'remoteness', 'proximity', 'directness' or 'certainty'.[41] Two main standards are, however, commonly applied when assessing legal causation, i.e., directness of harm and reasonable foreseeability, both of which afford considerable discretion to tribunals.

The dominant approach applied in international law focuses on the directness of the harm[42] and on its reasonable foreseeability as a natural consequence of the wrongful act. The breaching party is, in principle, liable for such direct harm that it was in a position to reasonably anticipate as a consequence of its acts. Under this '**direct cause test**', only those acts that lead directly to the damage in question are held to have caused that damage. A loss qualifies as "direct" if it is the immediate consequence of the wrongful act.[43] By contrast, where intervening, concurrent forces have either extended the harm or caused the harm in combination with the original act, the loss suffered is an indirect consequence of that original act.

The second prevailing approach – the **proximate cause test** – assesses whether the damage was proximately caused by acts of the State.[44] A more flexible test, it distinguishes between "*proximate*" and "*remote*" causes of the loss, finding that no causation is given if the alleged cause is too remote.

While the direct cause test is the more traditional one,[45] international tribunals tend to allow themselves a larger degree of discretion by adding the application of the more fluid 'proximate cause test', effectively applying both tests in conjunction. For instance, the United Nations Compensation Commission, while expressly holding to compensate only "*direct losses*" within the meaning of Security Council Resolution 687 (1991), broadened this standard by applying a

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39 Stanimir Alexandrov & Joshua Robbins, *Proximate Causation in International Investment Disputes*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2008-2009 318 (Karl P. Sauvant ed., 2009).

40 Commentaries to the Draft ILC Articles, *supra* note 6, at ¶ 10.

41 *Id.*

42 *See* S.C. Res. 687, ¶ 16 (Apr. 3, 1991); Commentaries to the Draft ILC Articles, *supra* note 6, at ¶ 10.

43 *See* JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURKSY, THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS 104–05 (2010).

44 Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18, Award, ¶ 169 (Mar. 28, 2011) ("If it can be proven that in the normal cause of events a certain cause will produce a certain effect, it can be safely assumed that a (rebuttable) presumption of causality between both events exists, and that the first is the proximate cause of the other") [*hereinafter* "Lemire"]; *see also* Alexandrov & Robbins, *supra* note 39, at 321.

45 The directness standard can be traced back up to the famous Alabama Claims arbitration. *See* J. B. MOORE, HISTORY AND DIGEST OF INTERNATIONAL ARBITRATIONS 646 (1898) (classifying certain losses as "indirect", the arbitral tribunal concluded that these losses "do not constitute upon the principles of international law applicable to such cases a good foundation for an award of compensation").

proximate cause test in a considerable number of cases.[46] Other tribunals have followed a similar reasoning. As the United States-German Mixed Claims Commission expressed in one case:

> "*The use of the term [indirect damage] to describe a particular class of claim is inapt, inaccurate and ambiguous. The distinction sought to be made between damages which are direct and those which are indirect is frequently illusory and fanciful and should have no place in international law. The legal concept of the term 'indirect' when applied to an act proximately causing a loss is quite distinct from that of the term 'remote'. The distinction is important.*"[47]

The Commentary on Article 31 of the ILC Articles illustrates the mix of tests that is applied in determining causation, but it equally confirms the overriding importance of the so-called "remoteness test":

> "*Various terms are used to describe the link which must exist between the wrongful act and the injury in order for the obligation of reparation to arise. For example, reference may be made to losses 'attributable [to the wrongful act] as a proximate cause', or to damage which is 'too indirect, remote, and uncertain to be appraised', or to 'any direct loss, damage, […] or injury to foreign Governments, nationals and corporations as a result of' the wrongful act. Thus, causality in fact is a necessary but not a sufficient condition for reparation. There is a further element associated with the exclusion of injury that is too 'remote' or 'consequential' to be the subject of reparation. In some cases, the criterion of 'directness' may be used, in others 'foreseeability' or 'proximity'.*"[48]

Several tribunals have – when assessing legal causation – focused simply on whether there was a "*sufficient causal link*" between the breach of the treaty and the damage suffered by the investor.[49] Others realised that this test might not be sufficient. In *S.D. Myers* v. *Canada*, the tribunal used the sufficient link test in its First Partial Award only to elaborate in its Second Partial Award of October 21, 2002, as follows:

> "*In its First Partial Award, the Tribunal determined that damages may only be awarded to the extent that there is a sufficient link between the breach of a specific NAFTA provision and the loss sustained by the investor. Other ways of expressing the same concept might be*

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46 *See* Veijo Heiskanen, *The United Nations Compensation Commission*, *in* RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE [COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW] 257, 334 (2002).

47 United States Steel Products Company, Costa Rica Union Mining Company, South Porto Rico Sugar Company v. Germany, 7 R.I.A.A. 62-63 (US-Ger. Mixed Cl. Comm'n 1923).

48 JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 204-205 (2002).

49 S.D. Myers, Inc. v. Gov't of Can., Partial Award, Nov. 13, 2000, UNCITRAL Tribunal constituted under the North American Free Trade Agreement, ¶ 316; El Paso Energy International Company v. Argentine Republic, ICSID Case No. ARB/03/15, Award, ¶ 468 (Oct. 31, 2001); Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award, ¶ 468 (Aug. 18, 2008); Biwater, ICSID Case No. ARB/05/22, Award, ¶ 779 (July 24, 2008); Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2, Award, ¶ 860 (Apr. 4, 2016).

> *that the harm must not be too remote, or that the breach of the specific NAFTA provision must be the proximate cause of the harm.*
>
> *[…] The focus is on causation, not foreseeability in the sense used in the law of contract. In contract law, foreseeability may limit the range of recoverability. That is not the case in the law of tort or delict. Remoteness is the key.*
>
> *Similarly, a debate as to whether damages are direct or indirect is not appropriate. If they were caused by the event, engage Chapter 11 and are not too remote, there is nothing in the language of Article 1139 that limits their recoverability*."[50]

The emphasis on directness and proximity of the alleged harm that was made by the tribunal in *S.D. Myers* v. *Canada* has also received praise in legal commentary.[51]

C. The Impact of Intervening Acts on Causation

An independent act that intervenes between the wrongful conduct and the damage, thus breaking the chain of causation, may absolve the author of the wrongful act of liability.[52] To do so, the intervening act must be sufficient to cause the damage by itself, and it must have been unforeseeable for the author of the original act.[53]

Intervening acts are critical to the direct cause test, as discussed in Section B. At the point where an intervening act enters the sequence of events to become a superseding cause, the liability may shift from the author of the original wrongful act to the intervening force. As recalled by the tribunal in *Lauder* v. *Czech Republic*:

> "*[e]ven if the breach* (…) *constitutes one of several 'sine qua non' acts, this alone is not sufficient. In order to come to a finding of a compensable damage it is also necessary that there existed no intervening cause for the damage. In our case the Claimant therefore has to show that the last, direct act, the immediate cause* (…) *did not become the superseding cause and thereby the proximate cause.*"[54]

Two principal factors are usually referred to as being prone to break the chain of causation: the conduct of a third party, and the claimant's contributory negligence.[55]

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50 S.D. Myers, Inc. v. Canada, Second Partial Award, Oct. 21, 2002, UNCITRAL Tribunal constituted under the North American Free Trade Agreement, ¶ 159.

51 Pearsall & Heath, *supra* note 9, at 11; Preliminary decisions, Decision No. 7, 26 R.I.A.A. 11-1210 (Eri.-Eth. Cl. Comm'n July 27, 2007) (considering various formulations, including "reasonableness," "proximate cause," "directness," and "foreseeability," and ultimately settling on a "proximate cause" standard that gives "weight to whether particular damage reasonably should have been foreseeable").

52 John Sherman Myers, *Causation and Common Sense*, 5 U. MIAMI L. REV. 238, 249 (1951).

53 *Id.*

54 Ronald S. Lauder v. Czech Republic, Final Award, Sept. 3, 2001, UNCITRAL Tribunal constituted under the Czech-U.S. BIT, ¶ 234 [*hereinafter* "Lauder"].

55 These two factors are recognized in general tort law of both common law and civil law systems. For common law examples, *see* McKew v. Holland & Hannen & Cubitts (Scotland) Ltd [1969] 3 All ER 162 (Eng.); Knightley v. Johns

i. The Conduct of a Third Party as an Intervening Cause

The impact of the conduct of a third party as an intervening cause is best demonstrated by oft-quoted twin cases of *CME* v. *Czech Republic* ["**CME**"] and *Lauder* v. *Czech Republic* ["**Lauder**"]. These are notorious for several reasons,[56] including that despite being based on the same factual matrix, the tribunals arrived at starkly different outcomes.[57] The cases are also illustrative of the decisive impact that different approaches to causation can have on liability and compensation, especially where the conduct of a third party is involved as a concurrent cause.[58]

CME, a Dutch company, had invested in the Czech Republic in the form of its majority shareholding in a locally established company, CNTS. CME had entered into an agreement with CET 21, a Czech company, which granted CNTS the exclusive right to use the TV broadcasting licence that had been granted by the Czech Media Council. Thereafter, the Czech Media Council adopted a series of measures in collaboration with Dr. Železný, the General Director of CNTS and Executive Director of CET 21 at the time, due to which CNTS lost its exclusive rights to the licence and CME, its investment. Based on these facts, two sets of arbitration proceedings were initiated; the first one by CME under the Netherlands-Czech Republic BIT and the second one by Mr Lauder, the ultimate American shareholder of CME, under the US-Czech Republic BIT. In both cases, the Czech Republic argued that it was not liable because "*no harm would have come to CME's investment without the actions of Dr. Železný.*"[59]

In *Lauder*, the tribunal accepted the Czech Republic's contention and found that the "*real cause for the damage*" was the conduct of Dr. Železný and CET 21, which was not attributable to the Czech Republic.[60] Further, it concluded that even though the Czech Republic had violated the BIT in 1993, the harm that was inflicted six years later through the intervening acts of Dr Železný was "*too remote*" to be sufficiently connected to the breach.[61]

The *CME* tribunal, on the other hand, rejected the Czech Republic's contention. Referring to the ILC Articles and their commentary,[62] the tribunal held that international law did not "*support the*

[1982] 1 WLR 349 (Eng.). For civil law, *see Introduction to French Tort Law*, BRIT. INST. OF INT'L & COMP. L., *available at* https://www.biicl.org/files/730_introduction_to_french_tort_law.pdf.

56 Stephan Wittich, *Joint Tortfeasors in Investment Law*, *in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 709 (Christina Binder et al. eds., 2009).

57 CME Czech Republic B.V. v. Czech Republic, Partial Award, Sept. 13, 2001, UNCITRAL Tribunal constituted under the Czech-Neth. BIT [*hereinafter* "CME"]; Lauder, Final Award, Sept. 3, 2001, UNCITRAL Tribunal constituted under the Czech-U.S. BIT, ¶ 234.

58 SABAHI, *supra* note 11, at 173.

59 CME, Partial Award, Sept. 13, 2001, UNCITRAL Tribunal constituted under the Czech-Neth. BIT, ¶ 580.

60 Lauder, Final Award, Sept. 3, 2001, UNCITRAL Tribunal constituted under the Czech-U.S. BIT, ¶ 234.

61 *Id.* ¶ 235.

62 Commentaries to the Draft ILC Articles, *supra* note 6, Comment. to art. 31, ¶ 13 ("Unless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State, the latter is held responsible for all consequences , not being too remote, of its wrongful conduct").

reduction or attenuation of reparation of concurrent causes, except in cases of contributory fault."[63] Notably, the tribunal also relied upon general principles of domestic tort law,[64] in support of its conclusion:

> "*It is the very general rule that if a tortfeasor's behaviour is held to be a cause of the victim's harm, the tortfeasor is liable to pay for all of the harm so caused, notwithstanding that there was a concurrent cause of that harm and that another is responsible for that cause … In other words, the liability of a tortfeasor is not affected vis-à-vis the victim by the consideration that another is concurrently liable.*"[65]

Based on this analysis, the tribunal held that even though the conduct of Dr. Železný was a concurrent cause of the damage, CME was entitled to full compensation from the Czech Republic.[66]

The fundamental difference between the *Lauder* and *CME* awards lay in how the respective tribunals characterized the conduct of Dr. Železný, i.e., whether it was considered simply as a relevant cause, or whether it was an intervening cause that had broken the chain of causation between the original act and the damage caused to the claimant.

As relationships among States and private actors become more complex, tribunals in investment disputes will continue to be called upon to decide the relevance of intervening acts by third parties, hence potentially developing more fixed approaches to what is still a partly unsettled issue. This being said, the assessment to be made in this respect will inherently be fact-specific.

ii. Contributory Negligence

The principle of contributory negligence allows a judge to reduce the quantum of damages where the claimant's conduct has materially contributed to the harm suffered. As is the case in many national legal systems,[67] international law accepts contributory negligence as another manifestation of the theory of concurrent causes and hence as a factor to reduce the tortfeasor's liability in terms of the compensation owed.[68] It is embodied in ILC Article 39:

> "*In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.*"[69]

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63 CME, Partial Award, Sept. 13, 2001, UNCITRAL Tribunal constituted under the Czech-Neth. BIT, ¶ 583.

64 *Id.* ¶ 582 ("This interference with ČNTS' business and the Media Council's actions and omissions in 1999 must be characterized similar to actions in tort."). *See also* Alexandrov & Robbins, *supra* note 39, at 335.

65 CME, Partial Award, Sept. 13, 2001, UNCITRAL Tribunal constituted under the Czech-Neth., ¶ 581, *citing* J.A. Weir, *Complex Liabilities*, *in* INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 41 (A. Tunc ed., 1983).

66 CME, Partial Award, Sept. 13, 2001, UNCITRAL Tribunal constituted under the Czech-Neth., ¶¶ 582–85.

67 W.V.H Rogers, *Contributory Negligence Under English Law*, *in* UNIFICATION OF TORT LAW: CONTRIBUTORY NEGLIGENCE 57 (U. Magnus & M. Martin Casals eds., 2003).

68 Sergey Ripinsky, *Assessing Damages in Investment Disputes: Practice in Search of Perfect*, 10 J. WORLD INV. & TRADE 5, 15 (2009).

69 ILC Articles, *supra* note 12, art. 39.

Investor-State tribunals have considered the contributory negligence of the foreign investor in a number of cases. Similar to the famous quote in *Maffezini* v. *Spain* that "*Bilateral Investment Treaties are not insurance policies against bad business judgments*",[70] the tribunal in *MTD Equity* v. *Chile* ["**MTD Equity**"] distinguished between the damage suffered due to Chile's breach and that caused due to the claimants' own conduct, and found that "*[t]he BITs were not an insurance against the business risk*" and the claimants should "*bear the consequences of their own actions as experienced businessmen.*"[71] Consequently, the tribunal reduced the compensation payable by 50%.[72] The tribunal in *Azurix* v. *Argentina* adopted a similar approach, reducing the compensation payable because of the investor's negligence that resulted in overpaying for the concession.[73]

Not every contribution by the investor to the ultimate damage triggers a finding of contributory negligence. In *Occidental* v. *Ecuador* ["**Occidental**"], the tribunal emphasized that, in order to be relevant for the causation inquiry, the wrongful act of the investor must be "*material and significant.*"[74] More recently, the tribunal in *Burlington Resources* v. *Ecuador* found that two conditions must be satisfied: (i) the investor's act or omission should have been wilful or negligent; and (ii) it must have materially contributed to the damage.[75] The tribunal found that Ecuador had failed to discharge its burden of proof and therefore, dismissed its claim of contributory negligence.[76]

While the tribunal in *MTD Equity* reduced the damages by 50%, the *Occidental* tribunal held that a 25 per cent reduction was "*fair and reasonable in the circumstances.*"[77] The tribunals in *Yukos* v. *Russia* and *Copper Mesa* v. *Ecuador* reduced the compensation payable by 25% and 30% respectively.[78] None of these tribunals found it necessary to provide an objectively verifiable basis for their apportionment; nor could they have done so, rather, they based their decisions on "*the exercise of [their] wide discretion.*"[79]

III. Causation in Investment Treaties

Despite the variety of standards and approaches being applied by investor-State tribunals to the causation requirement, States rarely provide any guidance in this respect in the investment

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70 Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Award, ¶ 64 (Nov. 13, 2000).

71 MTD Equity Sdn. Bhd. and MTD Chile v. Republic of Chile, ICSID Case No. ARB/01/7, Award ¶ 178 (May 25, 2004).

72 *Id.* ¶ 243.

73 Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award, ¶ 243 (July 14, 2006).

74 Occidental Petroleum Corp. and Occidental Exploration and Production v. Republic of Ecuador, ICSID Case No. ARB/06/11, Award, ¶ 670 (Oct. 5, 2012) [*hereinafter* "Occidental"].

75 Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, ¶ 576 (Feb. 7, 2017).

76 *Id.* ¶ 585.

77 Occidental, ICSID Case No. ARB/06/11, Award, ¶ 687 (Oct. 5, 2012).

78 Yukos Universal Limited (Isle of Man) v. Russian Federation, Case No. 2005-04/AA 227, Final Award, ¶ 637 (Perm. Ct. Arb. 2014) [*hereinafter* "Yukos"]; Copper Mesa Mining Corporation v. Republic of Ecuador, Case No. 2012-2, Award, ¶ 6.102 (Perm. Ct. Arb. 2016).

79 Occidental, ICSID Case No. ARB/06/11, Award, ¶ 687 (Oct. 5, 2012); Yukos, Case No. 2005-04/AA 227, Final Award, ¶ 1637 (Perm. Ct. Arb. 2014).

treaties they enter into.[80] A notable exception is Canada, which has included references to causation, albeit very basic ones, in its investment treaties since the 1990s. For instance, Article XII(2) of the Canada-Costa Rica BIT provides that the investor bears the burden of proving that it has incurred loss "*by reason of, or arising out of, [the] breach*".[81] Many other Canadian BITs employ a similar formulation.[82]

The Canadian approach also found its way into the NAFTA Articles 1116 and 1117, which allow a foreign investor to seek compensation only for damage or losses that occur "*by reason of, or arising out of, [the] breach*".[83] Subsequent treaty practice of Mexico and the United States followed suit. In the case of Mexico, the shift quickly followed the NAFTA's entry into force in 1994, with several Mexican BITs from the late 1990s, such as the Mexico-Switzerland BIT (1995), the Mexico-Netherlands BIT (1997) and the Mexico-Austria BIT (1998) including references to causation.[84] When Mexico adopted its Model BIT in 2008, it incorporated the Canadian/NAFTA formulation in the dispute settlement provision, which states:

> "*An investor of a Contracting Party may submit to arbitration a claim that the other Contracting Party has breached an obligation set forth in Chapter II, and that the investor has incurred loss or damage by reason of, or arising out of, that breach*."[85]

This provision is identical to the dispute settlement provision in the Canadian Model BIT of 2004.[86] On the other hand, the dispute settlement provision in the 2004 United States Model BIT provides that the claim must be based on the respondent's breach and that "*the claimant has incurred loss or damage by reason of, or arising out of, that breach*".[87] Many of the BITs concluded by the United States since 2004 include an identical formulation.[88]

It appears that at least a rudimentary reference to causation such as the ones referred to above is gradually becoming more commonplace, even outside the treaty practice of the NAFTA parties.

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80 Pearsall & Heath, *supra* note 8, at 7.

81 Agreement for the Promotion and Protection of Investments, Can.-Costa Rica, art. XII(2), Mar. 18, 1998 .

82 *See, e.g.*, Agreement for the Promotion and Protection of Investments, Can.-Venez., art. XII(2), June 25, 1982; Agreement for the Promotion and Reciprocal Protection of Investments, Can.-Ecuador, art. XIII(2), Apr. 29, 1996; Agreement for the Reciprocal Promotion and Protection of Investments, Can.-Barb., art. XIII(2), May 29, 1996; Agreement for the Promotion and Protection of Investments, Can.-Croat., art. XII(2), Feb. 3, 1997; Free Trade Agreement, Can.-Colom., art. 819, Nov. 21, 2008; Agreement for the Promotion and Protection of Investments, Can.-Kuwait, art. 20(1)(b), Sept. 26, 2011; Agreement for the Promotion and Protection of Investments, Can.-Mong., art. 20(1)(2), Sept. 8, 2016.

83 North American Free Trade Agreement, Can.-Mex.-U.S., arts. 1116 and 1117, Dec. 17, 1992, 32 I.L.M. 289 (1993).

84 Agreement on the Promotion and Reciprocal Protection of Investments, Mex.-Switz., art. 2(2), July 10, 1995; Agreement on Promotion, Encouragement and Reciprocal Protection of Investments, Mex.-Neth., art. 2(2), May 13, 1998; Agreement on the Promotion and Protection of Investments, Mex.-Austria, art. 10(1), June 29, 1998.

85 *See, e.g.*, Mexican Model of Investment Promotion and Protection Agreement, art. 11(1), Dec. 2008.

86 *See, e.g.*, Canada Model Foreign Investment Protection and Promotion Agreement, art. 22(1), May 20, 2004.

87 *See, e.g.*, United States Model Bilateral Investment Treaty art. 24(1), 2004.

88 *See, e.g.*, Treaty concerning the Encouragement and Reciprocal Protection of Investment, Uru.-U.S., art. 24(1)(ii), Nov. 4, 2005; Agreement on the Establishment of a Free Trade Area, Oman-U.S., art. 10.15(ii), Jan. 19, 2006; Free Trade Agreement, Pan.-U.S., art. 10.16(ii), June 28, 2007; Free Trade Agreement, Kor.-U.S., art. 10.16(ii), June 30, 2007;); Treaty concerning the Encouragement and Reciprocal Protection of Investment, Rwanda-U.S, art. 24(1)(ii), Feb. 19, 2008.

The dispute settlement provision of the ASEAN Investment Promotion Agreement states that in addition to the breach, the claimant must show that "*the disputing investor in relation to its covered investment has incurred loss or damage by reason of or arising out of that breach.*"[89] The China-Korea BIT has yet another approach to causation; namely by including it in the definition of 'investment dispute':

> "*[A]n investment dispute is a dispute between one Contracting Party and an investor of the other Contracting Party that has incurred loss or damage by reason of, or arising out of, an alleged breach of this Agreement with respect to an investment of an investor of that other Contracting Party.*"[90]

However, none of these treaties specify the applicable standard or test for proving causation.[91] Against this background, Article 23.2 of the Indian Model BIT is all the more remarkable, in that it sets a specific standard by requiring an investor to prove:

> "*[…] (d) that the investment, or the investor with respect to its investment, has suffered actual and non-speculative losses as a result of the breach; and (e) that those losses were foreseeable and directly caused by the breach.*"[92]

Thus, not only does Article 23.2 expressly refer to causation, it also specifies:

(i) the nature of the losses that are compensable – "*actual and non-speculative losses*";

(ii) a hybrid standard for legal causation – "*directly caused by the breach*" and "*losses suffered were foreseeable*"; and

(iii) that the burden of proof lies with the investor.

Given the relevance of the standards and tests applied to causation, as well as the diversity of approaches actually adopted by investor-State tribunals as illustrated above, it is surprising that specific provisions, such as the one in Article 23.2 of the Model BIT, have not yet become more common in international treaty practice. India, for one, has already signed its first BIT that includes similar provisions on causation with Belarus in September 2018.[93] It can be expected that other jurisdictions will follow India's lead, given that precision as to standards of factual and legal causation serves the interests of the host State directly. Express provisions in the BIT can limit the scope of the liability of the host state *vis-à-vis* a foreign investor, much like the limitation of liability clauses that are commonplace in commercial contracts. Maybe even more importantly, they provide predictability to both host States and investors with respect to questions that would otherwise be the subject of diverging tests and standards.

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89 ASEAN Agreement for the Promotion and Protection of Investments art. 32, Feb. 26, 2009.
90 Agreement on the Promotion and Protection of Investments, China-Kor., art. 9(1), Sept. 7, 2007.
91 Ripinsky & Williams, *supra* note 11, at 138.
92 *See, e.g.*, 2016 India Model BIT, *supra* note 1, art. 23.2.
93 Treaty on Investments, Belr.-India, art. 23.2., Sept. 24, 2018.

IV. Concluding Remarks

Most investment tribunals conduct some form of a causation inquiry, whether implicitly or explicitly: first, a tribunal must examine the causal connection between the act and the harm on a factual level; and second, a tribunal must determine whether there are legal factors or intervening causes that limit or exclude the liability of the host State.

Tribunals employ various standards and tests for determining causation in their awards, thus confirming that the causal inquiry leaves a lot of room for interpretation and discretion. This is partly due to the absence of any specific standards of causation in investment treaties, which requires the tribunals to draw upon different sources such as the private law concepts of causation or the principles articulated in the ILC Articles, with varying results. While recent awards show more coherence in their causal analyses,[94] consensus, and the resultant predictability of legal outcomes, is yet to emerge.

One step towards more coherent and consistent reasoning in investment awards may be for host States to include legal standards for causation in their investment treaties as the Model BIT does in Article 23.2. It remains to be seen if and to what extent such specific guidance will affect the reasoning of investor-State tribunals and the outcome of claims brought based on treaties including such language. In any event, other jurisdictions may well follow India's lead and provisions like Article 23 may well gain traction in the negotiation of modern investment treaties.

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94 Biwater, ICSID Case No. ARB/06/18, Award, ¶¶ 157–208 (Mar. 28, 2011); Bilcon, Case No. 2009-04, Award on Damages, ¶¶ 168-176 (Perm. Ct. Arb. 2019).