

Causation and Injury in Investor-State Arbitration

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The concept of causation in international dispute resolution poses tricky theoretical and practical problems. As a theoretical matter, international tribunals are no better equipped than domestic courts to address central philosophical problems that have long attended the determination of whether a causal link exists between the legal wrong alleged and the injury sustained.¹ Two centuries later, international investment arbitration tribunals are in many ways at a loss to do better than Hume, who noted that causation “belongs entirely to the soul.”²

The practical problems of arguing causation in investment disputes can be equally vexing. For the claimant, failing to establish an injury caused by the alleged breach of an investment treaty can lead to a finding of liability but no damage.³ Likewise, for the respondent, causation is key to enforcing what it perceives to be the limits on investment treaty obligations, ensuring that States are not held liable for the attenuated economic ripple effects of a generally applicable regulation, or for the independent actions of the claimant or third parties.⁴

Despite the high stakes associated with issues of causation, investment tribunals and litigants often treat the question in a cursory manner, and have only recently begun to give the issue more focused

*The opinions expressed in this Chapter are the authors' own and do not necessarily reflect those of the U.S. Government, Jenner & Block LLP, or its clients.

¹ For a helpful discussion of the philosophical problems of causation, and the ways in which they intersect with and diverge from the problems of legal theory and practice, see H.L.A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* 9–61 (2nd ed. 1985).

² DAVID HUME, *A TREATISE OF HUMAN NATURE* 216 (Penguin Classics, 1985) (1739–1740). Hume's skepticism, which dispensed with the notion that causation inheres in objects or events, has made its way into international legal discourse. See Eduardo Valencia-Ospina (Special Rapporteur), *Second Report on the protection of persons in the event of disasters*, n. 59, U.N. Doc. A/CN.4/615 (May 7, 2009); René Urueña, *Risk and Randomness in International Legal Argumentation*, 21(4) *LEIDEN J. INT'L L.* 787, 795–800 (2008) (surveying problems of causation identified by Hume, Mill, and Kelsen).

³ See, e.g., *Urbaser S.A. & Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award (Dec. 8, 2016); *Victor Pey Casado & Foundation “Presidente Allende” v. Republic of Chile*, ICSID Case No. ARB/98/2 (Resubmission Proceeding), Award (Sept. 13, 2016); *MNSS BV & Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award (May 4, 2016); *Romp petrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award (May 6, 2013); *Luigiterzo Bosca v. Republic of Lithuania*, PCA Case No. 2011-05, Award (May 17, 2013); *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V (064/2008), Final Award (June 8, 2010); *Nordzucker A.G. v. Republic of Poland*, UNCITRAL Arbitration Proceeding, Third Partial and Final Award (Nov. 23, 2009).

⁴ See, e.g., *Methanex Corp. v. United States of America*, UNCITRAL Arbitration Proceeding, Amended Statement of Defense of the United States, ¶ 220 (Dec. 5, 2003) (arguing that “[a]bandoning the proximate cause standard would not serve these NAFTA purposes well, but, instead, could lead to uncertainty, defensive actions by States that would discourage foreign investment and a disproportionate and unintended burden upon States as insurers against all forms of investment risk.”).

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attention.⁵ The structure of argument in international investment cases risks perpetuating confusion, as the division of investment pleadings between “merits” and “quantum” phases does not explicitly leave a place for the causation inquiry.⁶ And leading works on damages in international arbitration, while acknowledging the importance of causation, seldom present causal analysis as separate and distinct from the issue of quantum.⁷

In this Chapter, our aim is to situate the causation inquiry within international investment law. In short, causation plays a critical role in the adjudication of investment claims, as a necessary bridge between the finding of breach and the quantification of damage. Some recent decisions have recognized the important function of the causation inquiry, and have started to treat causation as a distinct “step,” which is separate from both “liability” and “quantum.”⁸

This developing analytical framework brings some degree of order and clarity to the causation inquiry. It makes clear that causation should be treated as a separate concept in the analysis of investment claims, which can be assimilated neither to the determination of liability nor to the calculation of quantum. In this sense, as one writer puts it, the causation analysis is one of a series of increasingly fine-grained filters, separating compensable from non-compensable loss.⁹ In other words, the tribunal’s findings on breach will determine the scope of the causation inquiry, but not necessarily its outcome; the

⁵ The manner in which international courts and tribunals have dealt with causation has not escaped notice or criticism. *See, e.g.*, Ilias Plakokefalos, *Causation in the Law of State Responsibility and the Problem of Overdetermination*, 26(2) EUR. J. INT’L L. 471, 486 (2015) (finding that, in the decisions of courts and tribunals, “there is no clarity as to the steps of the reasoning that are being employed in order to establish causation”); Thomas W. Wälde & Borzu Sabahi, *Compensation, Damages, and Valuation*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 1051, 1094 (Peter T. Muchlinski *et al.* eds., 2008) (noting that awards “[b]y and large . . . do not discuss the effect of causation on damages in any detail”); Michael Straus, *Causation as an Element of State Responsibility*, 16 L. & POL’Y INT’L BUS. 893 (1984) (surveying and critiquing decisions of the postwar Mixed Claims Commission and the Iran-U.S. Claims Tribunal).

⁶ This risk is ably noted by Wolfgang Alschner, *Aligning Loss and Liability – Toward an Integrated Assessment of Damages in Investment Arbitration*, in THE USE OF ECONOMICS IN INTERNATIONAL TRADE AND INVESTMENT DISPUTES 283 (Marion Jansen *et al.* eds., 2017). For the present purposes, we leave aside any causation questions that may arise in the context of a jurisdictional inquiry.

⁷ Instead, writers frequently treat causation as one of several potential “limitations” on compensation, rather than focusing on it as a distinct element of State responsibility. *See, e.g.*, BORZU SABAHI, COMPENSATION AND RESTITUTION IN INVESTOR-STATE ARBITRATION: PRINCIPLES AND PRACTICE 170 (2011) (treating causation among other possible “limitations on compensation”); MARK KANTOR, VALUATION FOR ARBITRATION: COMPENSATION STANDARDS, VALUATION METHODS AND EXPERT EVIDENCE 105 (2008) (addressing “lack of causation” as one of many “limitations on compensation”); SERGEY RIPINSKY WITH KEVIN WILLIAMS, DAMAGES IN INTERNATIONAL INVESTMENT LAW 135 (2008) (addressing causation as one of several “cross-cutting issues”).

⁸ *See, e.g.*, *Pey Casado v. Chile*, *supra* note 3, ¶ 217 (“[T]he assessment of reparation due under international law for the breach of an international obligation consists of three steps – [i] the establishment of the breach, followed by [ii] the ascertainment of the injury caused by the breach, followed by [iii] the determination of the appropriate compensation for that injury.”).

⁹ Alschner, *supra* note 6, at 292 *et seq.*

findings on causation will, in turn, determine the scope, but not necessarily the outcome, of arguments on quantum.

Nevertheless, the “three-step” framework outlined above has proven difficult to apply in practice. Parties and arbitrators sometimes struggle to define the boundaries of the causation inquiry, and the attempt to do so may open new and protracted areas of dispute as the parties struggle to separate causation from arguments going to breach and to valuation. It can also be difficult to manage internal divisions within the causal analysis between legal argumentation and factual evidence, and consequently between the appropriate roles for counsel and expert witnesses. These struggles can fracture tribunals, determine outcomes in cases, and, in some instances, leave arbitrators unable to complete their analysis or award damages.

This Chapter proceeds in four parts. Section 1 focuses on the law of State responsibility, which establishes causation as the middle part of a three-step framework, setting external boundaries between causation and the determination of breach, on the one hand, and the calculation of quantum, on the other. Section 2 turns to the internal divisions between the “factual” and “legal” elements of the causation analysis. In Section 3, we address two cases—*Lemire v. Ukraine* and *Rompetrol v. Romania*—in which contestation over these external and internal dimensions emerged as a key issue. Section 4 concludes.

1. Causation in the Framework of State Responsibility

The three-part structure to international legal remedies—*i.e.*, the assessment of liability, identification of injury, and quantification of damage—is established in the first instance by the general international law of State responsibility. In public international law, “State responsibility” refers to the regime of secondary rules that deal with the consequences of a State’s breach of its international legal obligations.¹⁰ An analysis of the structure of these secondary rules, as reflected in the International Law Commission’s

¹⁰ The distinction between “primary” and “secondary” rules is explained by James Crawford, who acted as the International Law Commission’s final special rapporteur for its project on State responsibility:

[T]he rules on State responsibility may be described as “*secondary rules*”. Whereas the law relating to the content and the duration of substantive State obligations is determined by *primary rules* contained in a multitude of different instruments and in customary law, the Articles provide an overarching, general framework which sets the consequences of a breach of an applicable primary obligation. Otherwise the Articles would constantly risk trying to do too much, telling States what kinds of obligations they can have.

James Crawford, *Articles on State Responsibility for Internationally Wrongful Acts* 3, U.N. Audiovisual Library of International Law (2012), http://legal.un.org/avl/pdf/ha/rsiwa/rsiwa_e.pdf (emphasis added).

(“ILC”) work on State responsibility,¹¹ is helpful to understanding the role of causation and injury. The ILC’s Draft Articles merit close study because, while not themselves a primary source of international law, they have shown themselves to be influential in the work of courts and tribunals.¹²

1.1. Causation in the Law of State Responsibility

The law of State responsibility treats causation as a distinct element of the analysis, which is separate from the question of breach (or “liability” for a wrongful act) and the assessment of damages (or “quantum”). While this division may seem intuitive, it does not necessarily track the treatment of causation in some areas of domestic law, and this asymmetry may give rise to some difficulties in practice. For example, in the common law of negligence, causation and harm are treated as elements of the claim, and thus as part of the inquiry regarding liability.¹³ But international law as a general matter accepts the possibility that, depending on the applicable rule, conduct may be internationally wrongful even in the absence of any damage to the wronged party. The question of causation is thus analytically distinct from the question of whether a breach has occurred in the first place.¹⁴

Although the law of State responsibility does not give extensive treatment to causation, the concept stands as a bridge between the separate issues of breach and damages. As reflected in the Draft Articles,

¹¹ *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* [hereinafter ILC Draft Articles] (2001), 2 Y.B. INT’L L. COMM’N 31 U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2); G.A. Res. 56/83, annex, *Responsibility of States for internationally wrongful acts* (Jan. 28, 2002).

¹² See, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Serbia & Montenegro)*, 2007 I.C.J. 43, ¶ 460 (Feb. 26); *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, ¶ 147 & n. 142 (Mar. 28, 2011); *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Case No. 17, Advisory Opinion, ¶ 169 (ITLOS, Feb. 1, 2011). For perspectives on the relationship between the Draft Articles and international law, see David D. Caron, *The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority*, 96 AM. J. INT’L L. 857 (2002) (warning that arbitrators may give “too much authority” to the Draft Articles); Fernando Lusa Bordin, *Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law*, 63 INT’L & COMP. L.Q. 535 (2014) (investigating the basis and authority of ILC Draft Articles); Santiago Villalpando, *Codification Light: A New Trend in the Codification of International Law at the United Nations*, 8 ANUARIO BRASILEIRO DE DEREITO INTERNACIONAL 117 (2013) (exploring the tension between the Draft Articles’ apparent authority and their lack of formal validity as a source of international law).

¹³ This may also be the case with respect to certain particular rules of international law.

¹⁴ This aspect of the Draft Articles has been subject to some criticism. Brigitte Stern, for instance, has contended that matters would be greatly simplified if the Draft Articles had acknowledged the concept of a “legal injury”—that is, the injury that arises, *ipso facto*, from the breach of an international legal obligation. Brigitte Stern, *The Elements of an Internationally Wrongful Act*, in THE LAW OF INTERNATIONAL RESPONSIBILITY 193, 199 (James Crawford *et al.* eds., 2010); see also SABAH, *supra* note 7, at 137, 175 (discussing the concept of “legal damage” suffered “ipso facto” by the invasion of a legal right). This approach, however, would not eliminate the need for a causation inquiry that is separate from the question of breach.

the regime of State responsibility encompasses rules for determining the *existence* of a wrongful act,¹⁵ as well as rules addressing the *consequences* of a wrongful act, such as the obligation to make reparation.¹⁶ These two sets of principles align, more or less, with the “liability” and “quantum” phases of an international arbitral proceeding. Causation sits at the inflection point between these two inquiries.

The key reference is Article 31, which provides:

Article 31. Reparation

1. The responsible State is under an obligation to make full reparation for the injury *caused by* the internationally wrongful act.
2. Injury includes any damage, whether material or moral, *caused by* the internationally wrongful act of a State.¹⁷

Article 31, while saying little about the *content* of the causation inquiry, illuminates two key points about the place of causation in the overall *structure* of an international claim. First, the causal inquiry is, in principle, separate from the question of breach. This is a key feature of the Draft Articles on State Responsibility, which the ILC determined early on would not require actual harm as an element of every internationally wrongful act, unless it was required by the applicable primary rules.¹⁸ This distinction between breach and harm is suggested in the text of Article 31, which presupposes a “responsible State”—that is, a State whose conduct has breached an international obligation.¹⁹ Thus, although certain international legal obligations may require harm as an element of the breach, this is not true of international law as a general matter.

Second, in light of the separation between breach and harm, the assignment of damages will depend on a further finding of “injury,” in which causation will play a determinative role.²⁰ The requirement to

¹⁵ See ILC Draft Articles, arts. 1–27 (addressing principles of attribution, breach, and circumstances precluding wrongfulness, among others).

¹⁶ See *id.*, arts. 28–41 (dealing with cessation, non-repetition, and reparation). The Articles also address in depth a third subject—the rules for invoking a State’s responsibility for wrongful acts—which is outside the scope of this discussion. See *id.*, arts. 42–54 (dealing with invocation and countermeasures).

¹⁷ *Id.*, art. 31 (emphasis added); see also *id.*, arts. 34, 36(1), 37(1) (addressing causation in the provisions on reparation, compensation, and satisfaction).

¹⁸ See *id.*, art. 2, commentary 9 (“It is sometimes said that international responsibility is not engaged by conduct of a State in disregard of its obligations unless some further element exists, in particular, ‘damage’ to another State. But whether such elements are required depends on the content of the primary obligation, and there is no general rule in this respect.”).

¹⁹ See *id.*, arts. 1–2 (defining the conditions under which State responsibility arises for the purposes of the Draft Articles).

²⁰ See, e.g., Andrea K. Bjorklund, *Causation, Morality, and Quantum*, 32(2) SUFFOLK TRANSNAT’L L. REV. 435, 440–1 (2008).

make reparation does not arise automatically upon a simple finding of breach.²¹ Rather, Article 31 makes clear that a causal link is a definitional element of an “injury” as understood in international law. As such, it must be established that the damages sought in connection with an internationally wrongful act form part of the “injury caused by” that act. If an “injury” is established, then, pursuant to Article 31, the responsible State is required to make reparation.²²

1.2. Causation under Investment Treaties

It is necessary to be cautious about inferring broad lessons from the regime of State responsibility in the context of investment treaties. First, as with any specialized regime, the general principles reflected in the Draft Articles will give way, in the event of conflict, to more specific rules governing the legal regime or relationship at issue.²³ Moreover, the provisions of the Draft Articles are underdetermined, and often leave substantial room for the regime of primary rules to elaborate or fill in gaps.²⁴ In addition—and perhaps most importantly—the section of the Draft Articles in which causation is addressed is expressly “without prejudice” to rights that may accrue directly to individuals under investment treaties.²⁵ There is nothing in the Draft Articles that restricts the ability of States to conclude investment treaties that, for

²¹ Compare with ILC Draft Articles, art. 30 (concerning cessation and non-repetition). The commentary to the Draft Articles is not entirely consistent in its description of this scheme. See, e.g., *id.*, art. 31, commentary 4 (stating, in response to the question of whether reparation is an obligation or a right, that “the general obligation of reparation arises automatically upon commission of an internationally wrongful act and is not, as such, contingent upon a demand or protest by any State . . .”). This comment is best understood in the context in which it was made (*i.e.*, in relation to the question whether a requirement to make reparation is contingent upon a demand by the injured party).

²² *Id.*, art. 31(1); cf. *Trail Smelter Arbitration (U.S. v. Canada)*, Decision, 3 U.N. R.I.A.A. 1905, 1920 (1941) (“The first question . . . which the Tribunal is required to decide is as follows: (1) Whether damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January 1932, and, if so, what indemnity should be paid therefor. In the determination of the first part of the question, the Tribunal has been obliged to consider three points, *viz.*, the existence of the injury, the cause of the injury, and the damage due to the injury.”).

²³ ILC Draft Articles, art. 55 (“These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.”).

²⁴ See, e.g., *infra* Section 2 (discussion on principles of causation).

²⁵ ILC Draft Articles, art. 33 & commentary 4; see also James Crawford, *Investment Arbitration and the ILC Articles on State Responsibility*, 25(1) ICSID REV.—FILJ 127, 130 (2010) (“[T]he ILC Articles make no attempt to regulate questions of breach between a state and a private party such as a foreign investor. Those rules must be found elsewhere in the corpus of international law, to the extent that they exist at all.”).

example, limit the ability of investors to recover moral damages,²⁶ or restrict the power of tribunals to award certain remedies.²⁷

Most treaties contain no express statements on causation. Treaties that do contain relevant language tend to confirm that the damages claimed must be causally linked to the breach of the investment treaty.²⁸ For instance, the 2004 and 2012 U.S. Model BITs, as well as the investment chapters of recent U.S. FTAs, require a claimant to show “loss or damage by reason of, or arising out of,” the alleged treaty breach.²⁹ In the absence of further guidance from the treaty text, some tribunals have looked to the structure of causation and injury in the Draft Articles.³⁰

Consider how this framework plays out in the context of a typical investment dispute. Claimants in investment cases have argued that the respondent State’s actions have caused any number of harms, including, for example, sunk costs, lost future profits, loss of business opportunities, increased cost of doing business, reputational damage, lower share prices, or the total destruction of their businesses.³¹ Once a wrongful act is established, the tribunal’s task would be to sort out which, if any, of these injuries are traceable to the treaty breach, rather than to the actions of third parties, to other lawful actions of the respondent State, or to the actions of the claimant itself.

This structure may clarify the role of causation in the overall framework of international claims, and it helps to separate causation and other concepts, such as breach and quantum. But this inquiry can also become problematic in the context of a particular dispute, leading to extensive argument and conceptual confusion. One potential flashpoint, as reflected in the *Biwater Gauff v. Tanzania* case, is the boundary

²⁶ See, e.g., *Lillian Byrdine Grimm v. Gov’t of the Islamic Republic of Iran*, Award, 2 Iran-U.S. Cl. Trib. Rep. 78 (Feb. 18, 1983) (determining, by majority, that the jurisdiction afforded in the Algiers Accords for claims arising out of measures “affecting property rights” does not encompass claims seeking “compensation for mental anguish, grief and suffering”).

²⁷ See, e.g., Free Trade Agreement between the United States of America and the Republic of Korea, art. 11.26(1) (June 30, 2007) (permitting the tribunal to award only monetary damages and any applicable interest, or restitution, in which case the respondent must be given the opportunity to pay monetary damages and interest instead); Southern African Development Community Model Bilateral Investment Treaty Template, art. 29.19(a) (July 2012) (similar).

²⁸ See, e.g., Canada Model Agreement for the Promotion and Protection of Investments, art. 22(1) (2004); Mexico Model Agreement on the Promotion and Reciprocal Protection of Investments, art. 11(1) (2008); Model Text for the Indian Bilateral Investment Treaty, art. 23(2) (2015).

²⁹ See, e.g., United States Model Bilateral Investment Treaty, art. 24(1) (2004); United States Model Bilateral Investment Treaty, art. 24(1) (2012); North American Free Trade Agreement, art. 1116(1) (1993).

³⁰ See, e.g., RIPINSKY & WILLIAMS, *supra* note 7, at 138.

³¹ See *infra* Section 3 (setting out examples).

between causation and the other elements of the State responsibility analysis.³² In *Biwater*, the structure of the causation analysis emerged at the forefront of a disagreement between the majority (Bernard Hanotiau and Toby Landau) and dissenting arbitrator (Gary Born), and the case is therefore illustrative of the conceptual difficulties that arbitrators and counsel may encounter when navigating the causation inquiry.³³

In *Biwater*, the tribunal was unanimous in finding that, although Tanzania had breached the relevant BIT, the claimant was not entitled to monetary damages as a result of those breaches. The claimant in this case, *Biwater Gauff Tanzania* (“BGT”), held contract rights to supply sewer and water services in Tanzania. Various actions, including some attributable to BGT itself, resulted in the total loss of value of the investment *prior to* the acts taken by Tanzania that were in violation of the BIT. In other words, BGT’s investment “was the subject of an expropriation by the Republic,” but “by the time that this expropriation took place, . . . the losses and damage for which BGT claims in [the arbitral] proceedings had already been (separately) caused.”³⁴

The majority treated this as a failure of causation, which thus precluded any inquiry into quantum. Because this case culminated in an expropriation of property, the measure of compensation would ordinarily be pegged to the value of the investment as at the date of the taking.³⁵ The majority reasoned that, “in order to succeed in its claims for compensation, BGT has to prove that the value of its investment was diminished or eliminated, and that the actions BGT complains of were the actual and proximate cause of such diminution in, or elimination of, value.”³⁶ Applying the facts and evidence before it, the tribunal determined that the investment was worthless as of the date of the taking, and that it had been worthless for some time before.³⁷ It awarded no damages to BGT, reasoning that:

in all the circumstances that the actual, proximate or direct causes of the loss and damage for which BGT now seeks compensation were acts and omissions that had already occurred by 12 May 2005. In other words, none of the Republic’s violations of the BIT between 13 May 2005 and 1 June 2005 in fact caused the loss and damage in question, or broke the chain of causation that was already in place.³⁸

³² See *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (July 24, 2008); *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Concurring and Dissenting Opinion of Gary Born (July 18, 2008).

³³ For a study of this aspect of the decision, see Bjorklund, *supra* note 20.

³⁴ *Biwater v. Tanzania*, *supra* note 32 (Award), ¶ 485.

³⁵ See *id.*, ¶ 792.

³⁶ *Id.*, ¶ 787.

³⁷ *Id.*, ¶ 792.

³⁸ *Id.*, ¶ 798.

The majority viewed this analysis as sounding in causation, not in principles of quantum.³⁹ Turning to the text and structure of the ILC’s Draft Articles, the majority stressed its conclusion that the Republic’s wrongful acts had not “in fact ‘caused injury’ to” BGT’s investment.⁴⁰ In this regard, the Tribunal reasoned, the phrase “injury caused by the wrongful act” in Article 31, quoted above, “must mean more than simply the wrongful act itself . . . , otherwise the element of causation would have to be taken as present in every case, rather than being a separate enquiry.”⁴¹ For the majority, in other words, “injury” is akin to a particular “head of claim” in the claimant’s damages claim, and the claimant has the burden at the causation stage to establish a causal link between the relevant treaty breach and each head of claim asserted.⁴² This sets up a relatively neat division between the three “steps” we identified: the liability stage concerns whether a treaty is breached; causation concerns the link between that breach and the individual heads of claim; and quantum concerns the value of each head of claim that has been linked to the breach.

The dissenting arbitrator took issue with this framework, agreeing that no damages were due, but finding this to be an issue of quantum, not causation.⁴³ The dissent’s key point of contention, for our purposes, was the notion of “injury” reflected in the Draft Articles. Whereas the majority assimilated injury to the claimant’s heads of claim, the dissent considered an injury to encompass any impairment of a legal right.⁴⁴ In particular, the dissent argued that “a state’s expropriation or denial of fair and equitable treatment causes injury to the investor by depriving it of property or procedural or legal rights,” even if it does not cause monetary damage.⁴⁵ This reasoning, by shifting the conception of “injury,” moves the

³⁹ *Id.*, ¶¶ 801–6 (emphasis in original).

⁴⁰ *Id.*, ¶ 803.

⁴¹ *Id.*

⁴² *See id.*, ¶ 805 (“As set out earlier, the conclusions on causation reached by the majority of the Tribunal are based on the lack of linkage between each of the wrongful acts of the Republic, and each of the actual, specific heads of loss and damage for which BGT has articulated a claim for compensation. In other words, the actual loss and damage for which BGT has claimed – however it is quantified – is attributable to other factors.”).

⁴³ *See Biwater v. Tanzania, supra* note 32 (Dissenting Opinion), ¶¶ 15–31.

⁴⁴ *See id.*, ¶ 17 (“Preliminarily, it should be clear that the Republic’s expropriatory, unfair and inequitable and other wrongful acts caused injury to BGT. Specifically, it is beyond debate that the Republic wrongfully seized City Water’s business, premises and assets at a point in time (1 June 2005) at which the Republic had no right – under either international law or the Lease Contract – to do so. That wrongful seizure clearly caused injury to City Water by depriving it prematurely of the use and enjoyment of its property: whether measured in weeks (to 24 June 2005, as the Tribunal concludes) or months (some longer period which would have obtained in reasonable dealings between contracting parties conducting themselves in good faith) or years (the remaining lease term under the Lease Contract), City Water was wrongfully evicted from its leased premises, and wrongfully denied the use of its assets, its management and its staff, for some ascertainable period of time.”).

⁴⁵ *Id.*, ¶ 26.

causation inquiry much closer to the issue of breach.⁴⁶ Indeed, while the dissent purported to agree that the notion of “injury” must mean more than the wrongful act itself,⁴⁷ it is hard to see how the dissent could have imagined anything other than an ephemeral distinction: if any impairment of a legal right (*i.e.*, a breach of an international legal obligation) is an injury, then injury will accompany any internationally wrongful act.

In the debate between the majority and the dissent in *Biwater*, the boundaries between breach, causation, and quantum are significant and deeply contested. The very real stakes of this debate, such as potential impacts on claims for moral damages or recovery of costs, are discussed extensively elsewhere.⁴⁸ Our point is simply that the *Biwater* case illustrates the ways in which the three-step framework highlighted at the outset of this Chapter, while elegant, intuitive, and potentially illuminating, can also generate serious conceptual difficulties in practice.

2. Law and Fact in the Causation Analysis

Even within the causation “step,” there can be difficulty in separating factual from legal analysis. In many cases, the widely cited distinction between the doctrines of “factual causation” and “legal causation” make this exercise even more complicated. Without attempting to resolve all of the difficult theoretical problems associated with these doctrines, we suggest here that these labels can be misleading insofar as they associate “fact” with one strand of the analysis and “law” with another. This is a critical issue, as a tribunal may find itself faulted for failing to apply the applicable law if it effectively outsources a question of law to a non-legal expert.⁴⁹

Depending on the factual circumstances and the treaty at issue, identifying the legal standard to be applied to questions of causation may not always be straightforward. In investment cases, the tribunal will often have to conduct the causation analysis by reference to a mix of specific treaty provisions and relevant general principles. The signs may sometimes point in opposite directions. For instance, the ILC observed that the applicable standard of causation may vary among different primary rules of conduct,

⁴⁶ Indeed, it appears to invoke the notion of “legal injury,” which Brigitte Stern had faulted the ILC for failing to account for in the Draft Articles. *See* Stern, *supra* note 14.

⁴⁷ *See Biwater v. Tanzania, supra* note 32 (Dissenting Opinion), ¶ 28.

⁴⁸ *See, e.g., Bjorklund, supra* note 20, at 444–50.

⁴⁹ *See Enron Creditors Recovery Corp. (formerly Enron Corp.) & Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, ¶¶ 361–78 (July 30, 2010) (faulting the *Enron v. Argentina* tribunal for doing so in connection with its analysis of the customary international law “necessity” requirement).

and it declined to specify the required causal link as a general matter.⁵⁰ But investment treaties, which establish the primary rules of conduct in investor-State cases, often do not specify a particular legal standard for causation,⁵¹ and some treaties have been interpreted to refer to generally applicable principles of causation in international law.⁵²

In general, tribunals have determined that the twin doctrines of “factual” and “legal” causation, which are common to many legal systems, apply in cases arising under investment treaties.⁵³ The former element is generally focused on whether the claimant would have sustained the alleged injury “but for” the respondent’s breach.⁵⁴ The latter element operates to filter out harms that were “too remote” from the alleged breach, were “not proximate” to the wrongful act, or, in the formulations of some tribunals, were not “foreseeable.”⁵⁵ There is significant dispute as to which of these competing formulations should apply under investment treaties, and whether there is any material difference between them.⁵⁶

The distinction between factual and legal causation may helpfully tease out two aspects of the causation inquiry, but it may be misleading insofar as it suggests a clean division between “factual” and “legal” argument on causation. As Professor Michael Moore notes in his critical review of causation

⁵⁰ ILC Draft Articles, art. 31, commentary 10. For a critique, see Brigitte Stern, *The Obligation to Make Reparation*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 563, 569–70 (James Crawford *et al.* eds., 2010).

⁵¹ *But see* India Model BIT, *supra* note 28, art. 23(2) (requiring the claimant to show that damage is foreseeable).

⁵² *See, e.g., Methanex Corp. v. United States of America*, UNCITRAL Arbitration Proceeding, Memorial on Jurisdiction and Admissibility of Respondent United States, 19–20 (Nov. 13, 2000) (arguing that the causation language in NAFTA article 1116(1) refers to the well-established principle of proximate cause in customary international law).

⁵³ *See, e.g., Biwater v. Tanzania*, *supra* note 32 (Award), ¶¶ 784–5; RIPINSKY & WILLIAMS, *supra* note 7, at 135–40. *See, generally*, ILC Draft Articles, art. 31, commentary 10 (“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.”); James Crawford (Special Rapporteur), *Third report on State responsibility*, ¶ 27, U.N. Doc. A/CN.4/507 (Mar. 15, 2000).

⁵⁴ *See, e.g., LG&E Energy Corp. et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, ¶ 48 (July 25, 2007).

⁵⁵ *See, e.g.,* ILC Draft Articles, art. 31, commentary 10 (noting the various formulations in different contexts); *S.D. Myers Inc. v. Gov’t of Canada*, UNCITRAL Arbitration Proceeding, Second Partial Award, ¶ 140 (Oct. 21, 2002) (stating 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”); *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, ¶ 115 (Aug. 30, 2000); *Ronald S. Lauder v. Czech Republic*, UNCITRAL Arbitration Proceeding, Final Award, ¶ 235 (Sept. 3, 2001); Administrative Decision No. 2, 7 R.I.A.A. 23, 29–30 (U.S.-Ger. Mixed Claims Comm’n 1923); *Dix Case*, 9 R.I.A.A. 119, 121 (Am.-Venez. Claims Comm’n 1903).

⁵⁶ *See, e.g.,* Decision No. 7, Guidance Regarding *Jus ad Bellum* Liability, ¶¶ 7–14, 26 R.I.A.A. 1, at 10 (Eri.-Eth. Claims 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”); Stanimir A. Alexandrov & Joshua M. Robbins, *Proximate Causation in International Investment Law*, in *YEARBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY: 2008–2009*, at 317 (Karl Sauvant ed., 2009).

doctrine, legal doctrine frequently reflects the association of the former element with fact and the latter with legal policy:

The first requirement is that of ‘cause-in-fact’. This is said to be the truly *causal* component of the law’s two requirements . . . , because this doctrine adopts what is thought of as the ‘scientific’ notion of causation. Whether cigarette smoking causes cancer, or whether the presence of hydrogen or helium caused an explosion, are factual questions to be resolved by the best science the courts can muster. By contrast, the second requirement, that of ‘proximate’ or ‘legal’ cause, is said to be an evaluative issue, to be resolved by arguments of policy and not arguments of scientific fact.⁵⁷

Professor Moore’s discussion of the conventional wisdom reveals a trap that may await unwary counsel and adjudicators when dealing with complex matters of causation. While it is no doubt true that “the best science” or expert economic analysis⁵⁸ may clarify the inquiry into historical causation, questions of legal principle cannot be entirely removed. The common division of causation into “factual” and “legal” elements thus, if oversimplified, could be read as an invitation to delegate to non-legal experts matters that should be resolved by recourse to legal principles.

A few examples serve to illustrate the trap.⁵⁹ The so-called “overdetermination” cases pose one well-known problem—that is, where a particular effect can be attributed to multiple causes.⁶⁰ Certain problems of overdetermination can cause the widely applied “but for” test to break down, as in the well-known example in which a victim is shot simultaneously by two hunters acting independently of each other.⁶¹ In such cases, it becomes necessary to grapple with the potential application of other tests, such as the notion of a “substantial factor” or a “necessary element of a sufficient set.”⁶² We take no position on these various competitors for the “cause-in-fact” test; we note only that the very existence of this contest over the appropriate standard indicates that science and expert analysis cannot necessarily

⁵⁷ MICHAEL S. MOORE, CAUSATION AND RESPONSIBILITY 83 (2009) (emphasis in original).

⁵⁸ See Alschner, *supra* note 6, at 301 (arguing that “factual causation is one of the areas where the cooperation between lawyers and economists can be most fruitful in investment arbitration”).

⁵⁹ We exclude here certain problems of principle that arise in connection with determinations of “proximity,” “remoteness,” or “foreseeability.” As noted above, these concepts are generally regarded as the province of “legal causation,” and thus the need to grapple with issues of principle is ordinarily assumed.

⁶⁰ *Summers v. Tice*, 33 Cal. 2d 80 (1948); see also Plakokefalos, *supra* note 5, at 472–3 (relying on BRIGITTE BOLLECKER-STERN, LA PREJUDICE DANS LA THEORIE DE LA RESPONSABILITE INTERNATIONALE (1973)).

⁶¹ See Plakokefalos, *supra* note 5, at 476–7 & n. 55.

⁶² See generally Leon Castellanos-Jankiewicz, *Causation and International State Responsibility* 9–10 (ACIL Research Paper No. 2012-07 (SHARES Series), Apr. 3, 2012), <http://www.sharesproject.nl/wp-content/uploads/2012/01/Castellanos-Causation-and-International-State-Responsibility1.pdf> (referring to various theories).

eliminate the need to grapple with questions of legal principle, even in the context of “historical” causation.

A second set of problems may arise when the “but for” scenario is marked by a substantial degree of uncertainty. For example, a claimant alleging lost profits or other future damages generally has the burden to establish such damages.⁶³ Although establishing future damages can be difficult, given the uncertainty in the but-for scenario, some tribunals have required that lost profits be established to a degree of certainty.⁶⁴ As the ILC observed, this inquiry blends elements of causation and remoteness with other concerns, such as “evidentiary requirements and accounting principles,” all of which “seek to discount speculative elements from projective figures.”⁶⁵ The uncertainty associated with claims for lost profits is thus sometimes dealt with as part of a general inquiry into causation, and other times as an element of a more fine-grained inquiry into quantum and valuation.⁶⁶

Other, perhaps more *sui generis*, issues of uncertainty in the but-for scenario also may arise. This was the case, for instance, in the *Micula v. Romania* and *Chevron v. Ecuador* cases. In each of these cases, removal of the respondent’s breach of the investment treaty would have produced a series of consequences that would have impacted the investor’s bottom line in ways that were not easy for the tribunal to sort through. Resolution of the “but for” scenario thus required the tribunal to consider how it would handle this uncertainty, which in each case stretched across different legal orders.

The question in *Micula* concerned, in part, the economic effects of a delayed accession by Romania to the European Union. The tribunal had found that Romania had breached its treaty obligations by rescinding certain investment incentives,⁶⁷ which was a necessary step to Romania’s EU accession.⁶⁸ The

⁶³ See, e.g., ILC Draft Articles, art. 36(2) (“The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.”).

⁶⁴ See, e.g., *Mobil Inv. Canada Inc. & Murphy Oil Corp. v. Gov’t of Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, ¶¶ 437–8 (May 22, 2012) (deciding that future damages must be proved with “reasonable certainty”); *S.D. Myers, Inc. v. Gov’t of Canada*, UNCITRAL Arbitration Proceeding, Second Partial Award, ¶ 173 (Oct. 21, 2002) (“The quantification of loss of future profits claims can present special challenges. On the one hand, a claimant who has succeeded on liability must establish the quantum of his claims to the relevant standard of proof; and, to be awarded, the sums in question must be neither speculative nor too remote. On the other hand, fairness to the claimant require that the court or tribunal should approach the task both realistically and rationally.”); RIPINSKY & WILLIAMS, *supra* note 7, at 164–5.

⁶⁵ ILC Draft Articles, art. 36(2), commentary 32.

⁶⁶ For instance, as discussed in *infra* Section 3, the *Lemire v. Ukraine* tribunal considered in detail questions of causation at an initial stage of the inquiry, but then ruled out certain “speculative” damages later, in its discussion of quantum.

⁶⁷ *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, ¶ 872 (Dec. 11, 2013).

⁶⁸ See *id.*, ¶¶ 777–9, 788–96.

respondent thus argued that, if Romania had maintained the incentives, then its accession to the European Union would have been delayed or would not have happened at all.⁶⁹ Romania instructed its expert to calculate the economic disadvantages to the claimant if accession had been delayed or had never taken place, which would then be factored into the claimant's recovery.⁷⁰

The tribunal, although it agreed that its task was to “reestablish the situation which would, in all probability, have existed” but for the breach,⁷¹ rejected this argument, citing both concerns of principle and issues of uncertainty. As a matter of legal principle, the tribunal wondered whether acts “of general application,” such as accession to the European Union, should be understood as “having specific effect with respect to specific persons, such as the mitigation of damage.”⁷² As to the facts of Romania's allegation, the tribunal considered that the specific benefits of EU accession to the claimant's investment had not been proven.⁷³ The tribunal did note that this issue raised particular problems of proof with respect to the “but for” scenario, stating:

The Tribunal thus finds that the Respondent has failed to prove the extent, if any, of the benefits of EU accession to the Claimants. This does not mean that the Tribunal is oblivious to the fact that EU accession may have had an effect (whether positive or negative) on the Claimants' investments. *This raises a procedural question, namely which party must bear the consequences of this uncertainty.* It is the Claimants' burden to prove their damage and the Tribunal has found to what extent such damage has been proved. The Respondent has argued that the Claimants' experts have failed to take into consideration the effects of EU accession, and has endeavored to quantify such effects, but – in the Tribunal's view – unsuccessfully. First, the effects of EU accession appear to be mixed, both potentially increasing or decreasing the value of the investment. Second, it is legally difficult to see why an alleged advantage, from which the Claimants should have benefitted in any circumstances and which is available to their competitors, including those who are not located in the distressed zones, should be taken into consideration to their detriment.⁷⁴

The causation problems in the *Chevron v. Ecuador* case arose in a different context, but arguably have a similar structure to the problems posed in *Micula* insofar as they deal with the uncertainty of a chain of events in the but-for scenario. In *Chevron*, the tribunal found that the Ecuadorian courts had

⁶⁹ *Id.*, ¶ 1163. In particular, Romania's expert argued that EU accession brought “price stability, increased trade, FDI, reduced risk premia, strong institutions and a marked acceleration in economic growth,” leading to increased sales domestically and abroad, as well as access to duty-free imports through the EU customs union. *Id.*, ¶ 1157.

⁷⁰ *Id.*, ¶ 1160.

⁷¹ *Id.*, ¶ 917.

⁷² *Id.*, ¶ 1167.

⁷³ *Id.*, ¶¶ 1168–73.

⁷⁴ *Id.*, ¶ 1173 (emphasis added).

breached the investment treaty through their undue delay in adjudicating the claimant's court cases.⁷⁵ The question in the "but for" scenario, then, was what would have happened to the claimant's court cases had they been adjudicated in a manner that the tribunal considered would accord with the treaty.⁷⁶ The respondent argued that because removal of the delay would not have assured the claimant's success on the merits of their claims, the claimant consequently had the burden of showing that it would have prevailed in the court cases, and the tribunal in assessing these arguments could not substitute its own judgments for applicable Ecuadorian law and practice.⁷⁷ The claimant argued that the tribunal had the authority to decide the cases *de novo* by reference to the relevant laws and contract provisions, and that "it need not engage in the exercise of determining how an Ecuadorian court might have decided those cases."⁷⁸

The tribunal agreed with the respondent on this particular point.⁷⁹ It stated:

Applying the above principle, and in keeping with the fact that the Claimants' alleged primary "loss" in this case is the chance for a judgment by the Ecuadorian courts, the Tribunal must ask itself how a competent, fair, and impartial Ecuadorian court would have resolved TexPet's claims. The Tribunal must step into the shoes and mindset of an Ecuadorian judge and come to a conclusion about what the proper outcome of the cases should have been; that is, the Tribunal must determine what an Ecuadorian court, applying Ecuadorian law, would have done in these cases, rather than directly apply its own interpretation of the agreements.⁸⁰

These two cases thus illustrate the ways in which considerations of principle—such as questions of procedural fairness, burden of proof, and potentially even the competence of the tribunal—may enter the analysis of the "but for" scenario when deciding questions of causation. In the *Micula* case, the tribunal was reluctant to enter into an independent analysis of what the economic effects of delayed or foregone EU accession would have been on the claimant's business, and was content to have the respondent "bear the consequences" of this uncertainty.⁸¹ But, in the *Chevron* case, where damages turned on the uncertain

⁷⁵ *Chevron Corp. (USA) & Texaco Petroleum Co. (USA) v. Republic of Ecuador*, PCA Case No. 34877, Partial Award on the Merits, ¶ 275 (Mar. 30, 2010).

⁷⁶ *Id.*, ¶¶ 374–88. The tribunal rejected the respondent's argument that the claimant's claims should be considered as claims for "loss of chance," as in the loss of an opportunity to have their claims decided, and that their recovery should be discounted by the probability that they would ultimately fail in court. *See id.*, ¶¶ 378–82.

⁷⁷ *Id.*, ¶¶ 369–70.

⁷⁸ *Id.*, ¶ 359.

⁷⁹ *See id.*, ¶¶ 375, 377. The respondent further argued that, in fact, the claimant's only loss was that of an *opportunity* to have its cases adjudicated in a timely fashion, and the value of this loss of opportunity must be discounted by the likelihood that it would not prevail on the merits of the underlying cases. The tribunal rejected this "loss of chance" argument, noting that in the "but for" scenario the claimant could only win or lose; there could be no apportionment on the basis of probabilities. *Id.*, ¶¶ 378–82. On the concept of "loss of chance," *see* KANTOR, *supra* note 7, at 74 (referring to Article 7.4.3 of the UNIDROIT Principles of International Commercial Contracts).

⁸⁰ *Chevron v. Ecuador*, *supra* note 75, ¶ 375.

⁸¹ *See Micula v. Romania*, *supra* note 67, ¶ 1173.

outcomes of subsequent court proceedings, the tribunal *was* willing to eliminate the uncertainty concerning the future of the local court cases. It did so by stepping into the shoes of an Ecuadorian court and issuing decisions on Ecuadorian law as if it were exercising jurisdiction over the underlying cases, despite any awkwardness that might be associated with assuming such a role.⁸² Although it is not articulated in these terms in either case, the extent to which a tribunal is or should be willing to spin out the consequences of the but-for scenario is a question of principle, which is not adequately resolved simply by reference to scientific or expert analysis.

These problems suggest just some of the questions of principle that tribunals may encounter when confronted with complex questions of so-called “factual” causation. Even setting aside questions of remoteness and foreseeability, investment tribunals attempting to place the claimant in the position that it would have been in absent the breach will find themselves confronting difficult and complex questions of economics, regulation, and domestic law. Tribunals will not necessarily be able to resolve these questions simply by relying on the conclusions of dueling economics, regulatory, or local legal experts. They will have to rely on principles of international law and the terms of investment treaties to shape their approaches to these issues, and it is not clear that sufficient attention has yet been paid to developing such principles.

3. Causation in Action: The *Lemire* and *Rompetrol* Cases

As shown in the foregoing discussion, the issue of causation in international law presents difficult conceptual problems, which, generally speaking, fall along two dimensions. The first dimension, illustrated by the *Biwater* case, concerns the difficulty of situating the causation analysis between the conceptually distinct inquiries of breach and quantum. The second, discussed above, concerns the difficulty of disentangling factual and legal arguments over causation.

The following discussion bring both of these strands together in an extended discussion of two cases—*Lemire v. Ukraine* and *Rompetrol v. Romania*—in which issues of causation proved to be critical to the outcome. In these cases, the struggle over the scope and structure of the causation inquiry led to deep disagreement within the tribunal in one case, and to a total breakdown of analysis in the other.

The *Lemire* and *Rompetrol* awards are similar in many respects. In each case, the acts giving rise to the respondent State’s liability did not lead immediately and obviously to a clear measure of damages. It was therefore necessary, in both cases, to define clearly the “injury” that merited compensation, and to

⁸² See *Chevron v. Ecuador*, *supra* note 75, ¶¶ 375, 377.

establish the causal link between that injury and the damages claimed. And, in both cases, this inquiry would involve analysis of “historical” causation, as well as principles of “legal” or “proximate” cause.

There is also some similarity in the difficulties confronted by each tribunal, although the results diverge. In *Lemire*, the arbitrators disagreed on the boundaries of the causation inquiry, as well as the appropriate principles for resolving uncertainties in the “but for” scenario. Ultimately, a majority of the tribunal was able to find a causal link and awarded damages. The *Rompetrol* case also presented difficulties with resolving the boundaries between breach and causation, and between legal argument and expert evidence. However, in that case, the problems were so pervasive that the tribunal decided it was unable to proceed past a finding of breach, and it awarded no damages.

3.1. *Lemire v. Ukraine*

The *Lemire* case arose under the U.S.-Ukraine bilateral investment treaty, and concerned allegations that the respondent State had repeatedly denied bids by the claimant, an investor in the radio broadcasting business, for additional broadcasting frequencies within Ukraine.⁸³ In a separate Decision on Jurisdiction and Liability, the tribunal decided that the respondent had violated the treaty’s fair and equitable treatment provision with respect to several processes in which companies other than the claimant were awarded broadcasting licenses.⁸⁴ The tribunal held over the question of the “appropriate redress” for the breach, including matters of causation and quantum, for a second phase.⁸⁵

In addressing the parties’ arguments regarding causation in the second phase, the tribunal immediately faced a problem. The breaches identified by the tribunal amounted to what were essentially procedural irregularities in the process for awarding broadcasting licenses.⁸⁶ The injury alleged by the claimant, meanwhile, was that, as a result of failing to obtain the licenses, the investment’s “business plans could not be achieved, . . . its planned development was curtailed, its market position eroded, its capacity to generate profits impaired and its potential market value was never achieved.”⁸⁷ But it was not

⁸³ For a summary of the facts, see Sondra Faccio, *The Application of the Principle of Proportionality to Assess Compensation: Some Reflections Arising from the Case of Joseph Charles Lemire v. Ukraine*, 13 L. & PRAC. INT’L CTS. & TRIBS. 199, 202–3 (2014).

⁸⁴ *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, ¶¶ 421, 513 (Jan. 14, 2010).

⁸⁵ *Id.*, ¶ 514; see also *id.*, ¶ 425 (noting that “the assumptions underlying the experts’ reports do not coincide with the conclusions reached by the Tribunal in this Decision, and the quantum evidence therefore requires recalibration in accordance with the present decision”).

⁸⁶ See *Lemire v. Ukraine*, *supra* note 12, ¶¶ 158–60.

⁸⁷ *Id.*, ¶ 161.

immediately obvious that, had the irregularities in the tender process been eliminated, the claimant would have obtained the necessary licenses and fulfilled its business plans.⁸⁸

This problem led the tribunal to grapple with the kinds of difficulties identified above. With respect to the division between causation, breach, and quantum, the majority and the dissent sparred over the “injury” that would have to be defined at the causation stage. Regarding the internal structure of the causation analysis, the facts as described above entailed uncertainty in the “but for” scenario, sparking extensive argument as to the appropriate legal principles for resolving that uncertainty. We will take each of these issues in turn.

Both the majority and the dissent appeared to agree in principle that causation was a necessary middle step between a finding of breach and the calculation of damages.⁸⁹ As the majority put it, the tribunal would have to analyze and the claimant would have to prove “two links in the causal chain”:

[1] if the tenders had hypothetically been decided in a fair and equitable manner, and Claimant had participated in them, he (and not some of the other participants) would have won the disputed frequencies;

[2] with these frequencies, Mr. Lemire would have been able to grow Gala Radio into the broadcasting company he had planned: a FM national broadcaster, for music format, plus a second AM channel, for talk radio.⁹⁰

The majority ultimately determined that each of these links had been satisfied. First, relying on the investor’s record of success in radio operations in Ukraine at the relevant time, the majority considered that the investor would have been able to obtain the requisite number of FM frequencies, as well as the needed AM channel.⁹¹ Second, the tribunal determined that the claimant’s investment “was reasonably well funded . . . and it had the financial strength and the necessary know how” to develop the business into a successful nationwide operation.⁹² These conclusions, together, were in the majority’s view sufficient to establish a compensable “injury” caused by the State’s wrongful act. The tribunal then used these findings as the starting point for its quantum analysis, ultimately awarding the claimant \$8.7 million in damages.⁹³

⁸⁸ See *id.*, ¶¶ 168–72.

⁸⁹ See *id.*, ¶ 171; *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Dissenting Opinion of Jürgen Voss, ¶ 271 (Mar. 28, 2011).

⁹⁰ *Lemire v. Ukraine*, *supra* note 12, ¶ 171.

⁹¹ *Id.*, ¶¶ 179, 200–2.

⁹² *Id.*, ¶¶ 203–7.

⁹³ *Id.*, ¶¶ 253–309. Notably, the tribunal at this stage of the analysis declined to calculate any damages arising from the claimant’s failure to obtain an AM broadcasting license, deeming these calculations too speculative, notwithstanding the fact that the claimant’s injury had been understood to encompass denials with respect to both

The dissent, in a 173-page opinion, took issue with several aspects of the majority’s decision, including its framing of the causation analysis.⁹⁴ The majority’s analysis appeared to suggest that the relevant “injury,” for the purposes of assessing compensation, was the claimant’s inability to use the disputed frequencies “to grow Gala Radio into the [nationwide] broadcasting company he had planned.”⁹⁵ The dissent argued that this was an odd framing of the injury: if the claimant’s claim is for lost profits arising from the failure to obtain the disputed frequencies, then shouldn’t the tribunal require the claimant to establish the causal nexus between the additional frequencies and the alleged lost profits?⁹⁶ According to the dissent, the majority’s way of framing the inquiry, by eliding this last step, effectively deferred to the claimant’s business plans when determining the respondent’s scope of liability.⁹⁷

The disagreement between the majority and the dissent also highlights a difference in approach to the principles of causation. The majority noted that tender offers posed a particular problem for causal analysis, in light of participation of other *bona fide* third parties who may have been awarded the tender even if the process had been conducted in perfect accordance with the law.⁹⁸ This was a problem for both historical and proximate causation: it would be difficult to show both that, “but for” the breach, any particular license would have been awarded to claimant, and hence also that the breach was a proximate cause of the claimant’s business difficulties.⁹⁹

The majority resolved this problem by customizing an approach to causation to suit the case at hand. It decided that, if it can be proven that “in the normal [course] of events a certain cause will produce a certain effect, [then] it can be safely assumed that a (rebuttable) presumption of causality between both

AM and FM frequencies. *Id.*, ¶¶ 259–61. This additional filtering by the majority reflects the position that an additional limitation for overly speculative damages may apply at the quantum stage, apart from any limitations placed by the causation analysis. *See id.*, ¶¶ 245–9 (accepting that reparation will not be made for overly speculative damage, but stating that “[o]nce causation has been established, . . . less certainty is required in proof of the actual amount of damages; for this latter determination Claimant only needs to provide a basis upon which the Tribunal can, with reasonable confidence, estimate the extent of the loss.”).

⁹⁴ The dispute between the majority and the dissent spilled into the trade press, with Dr. Voss summarizing his concerns in a letter to the *Global Arbitration Review*. *See Lemire v. Ukraine dissenter answers critics*, GLOBAL ARB. REV. (May 13, 2011).

⁹⁵ *Lemire v. Ukraine*, *supra* note 12, ¶ 171.

⁹⁶ *Lemire v. Ukraine*, *supra* note 89, ¶ 329.

⁹⁷ *Id.*, ¶ 330.

⁹⁸ *Lemire v. Ukraine*, *supra* note 12, ¶ 168. Moreover, in Ukraine, the national body deciding on tender awards was not required to explain the reasons for its decisions, adding an additional layer of uncertainty. *Id.*

⁹⁹ *Cf. Nordzucker v. Poland*, *supra* note 3, ¶¶ 47–66 (finding no causal link between the respondent’s lack of transparency in the process for the sale of sugar plants and the loss of earnings that the claimant had expected to earn as the result of acquiring these plants, and noting, *inter alia*, that even if the respondent had been fully transparent in the process, it was under no obligation to sell the plants to the claimant).

events exists, and that the first is the proximate cause of the other.”¹⁰⁰ This approach appeared to give pride of place to foreseeability—ordinarily a concept that goes to “legal causation”—in the majority’s causal analysis as a whole.¹⁰¹ Applying this approach, the tribunal concluded that, of the more than 80 frequencies on which the claimant could have bid had the tender process been run in accordance with the law, the claimant would have won enough frequencies (14, or about 17%) to effect its plan to become a nationwide broadcaster.¹⁰²

The dissent faulted the majority for failing to determine whether any particular frequency would actually have been awarded to the claimant.¹⁰³ The majority’s approach, Dr. Voss argued, was particularly problematic in the context of public tenders. Allowing a tender participant to recover damages for a flawed process—particularly damages for *lost profits*—on anything less than a near certainty could lead to “liability avalanches,” in which the respondent State would be fully liable to multiple participants in a single tender process.¹⁰⁴ For this reason, Dr. Voss argued, domestic and European law sharply limited a tender participant’s ability to recover in these circumstances.¹⁰⁵ In this context, it was especially important to have a particularized assessment of each tender offer at the first link of the causal chain, which the majority had not conducted.¹⁰⁶ Essentially, the dissent’s argument was that, like the *Chevron v. Ecuador* tribunal, the majority in this case should have “re-litigated,” on a hypothetical basis, each tender offer to determine whether the claimant would have emerged the victor.

Despite the divisions that separated the majority and dissenting opinions, the tribunal’s treatment of causation as a discrete step in the analysis surely brought some degree of clarity to an otherwise divisive case. The tribunal’s approach highlighted the critical steps in its reasoning—clarifying but also subjecting them to intense criticism.¹⁰⁷ This approach to causation also enabled the majority and the

¹⁰⁰ *Lemire v. Ukraine*, *supra* note 12, ¶ 169.

¹⁰¹ *See id.*, ¶ 170 (“The chain of causation can also be seen from the opposite point of view: offenders must be deemed to have foreseen the natural consequences of their wrongful acts, and to stand responsible for the damage caused.”).

¹⁰² *Id.*, ¶¶ 174–9.

¹⁰³ *Lemire v. Ukraine*, *supra* note 89, ¶¶ 296–310.

¹⁰⁴ *Id.*, ¶ 284.

¹⁰⁵ *Id.*, ¶¶ 274–95. For example, Dr. Voss stated, under German law the claimant cannot recover lost profits unless it can show that the authority in charge of the tender “had no other lawful choice but to award the contract to claimant.” *Id.*, ¶ 283.

¹⁰⁶ *See id.*, ¶¶ 300–3.

¹⁰⁷ Indeed, this aspect of the award may have proven influential in the subsequent annulment proceedings. *See Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Ukraine’s Application for Annulment of the Award (July 8, 2013) (finding “that the causal link is clearly set out in the Award. The Tribunal’s reasoning on the question of the causal link is perfectly understandable as to how the Tribunal arrived from point A – the

dissent to focus at this stage on principles of causation and their relation to the facts, without becoming entangled in lingering controversies concerning the tribunal’s application of the “fair and equitable treatment” standard,¹⁰⁸ or, for the most part, in matters of valuation appropriately left to the quantum stage.¹⁰⁹ The analysis also clarified the role of the parties’ respective economic experts, which, at least in the instant case, spoke solely to questions of valuation, leaving causation to argument by the parties pursuant to applicable legal principles.¹¹⁰ Nevertheless, this framework by no means resolved all disputes.

3.2. *Rompetrol v. Romania*

The *Rompetrol v. Romania* case, decided two years after *Lemire*, provides a counterpoint, in which a tribunal was unable to even embark on the causal analysis outlined above. In *Rompetrol*, the claimant alleged, in the main, that Romania had breached its treaty obligations by improperly carrying out a corruption investigation that targeted individuals connected with the claimant’s local subsidiary.¹¹¹ The claimant identified a series of actions by State authorities in connection with the investigation, which it alleged reflected a “campaign of harassment” against the claimant itself.¹¹²

The tribunal found some breaches of the treaty’s fair and equitable treatment standard, but not to the same extent that the claimant had alleged. As a general matter, the tribunal rejected the claimant’s allegations that the investigation itself amounted to a campaign of harassment.¹¹³ And with respect to many of the specific acts alleged by the claimant to violate the treaty, the tribunal found no breach of the applicable standards.¹¹⁴ But the tribunal did find that certain officials displayed “animus and hostility” toward one of the individuals associated with the investor,¹¹⁵ and that this animus was confirmed by certain episodes in the long-running legal saga, such as the freezing of the claimant’s shares in its

breach of the FET standard by Ukraine – to point B – that without such breach it was probable that Claimant would have been able to have a national coverage.”).

¹⁰⁸ This is addressed extensively elsewhere. See *Lemire v. Ukraine*, *supra* note 84, ¶¶ 256–86; *Lemire v. Ukraine*, *supra* note 12, ¶¶ 40–66; *Lemire v. Ukraine*, *supra* note 89, ¶¶ 106–49, 429–78.

¹⁰⁹ The one exception is the principle that reparation not be awarded for speculative harm, which is briefly touched upon at the causation as well as quantum stage. See, e.g., *Lemire v. Ukraine*, *supra* note 12, ¶ 246; *Lemire v. Ukraine*, *supra* note 89, ¶¶ 290–2.

¹¹⁰ See *Lemire v. Ukraine*, *supra* note 12, ¶ 152.

¹¹¹ *Rompetrol v. Romania*, *supra* note 3, ¶¶ 151–2 (discussing the factual basis of the case, which the tribunal considered to be peculiar in investor-State arbitration).

¹¹² *Id.*, ¶¶ 198–279.

¹¹³ *Id.*, ¶ 276.

¹¹⁴ See *id.*, ¶¶ 232, 254, 261, 265, 269.

¹¹⁵ *Id.*, ¶ 245.

Romanian subsidiary,¹¹⁶ and the detention and repeated attempts to arrest one of the claimant’s associates.¹¹⁷ Nevertheless, the tribunal stopped short of finding that the entire investigation had been unlawful.¹¹⁸

The tribunal accordingly phrased its finding of breach in limited terms.¹¹⁹ It stated that, while the claimant’s evidence fell “well short” of what would be needed to show a “co-ordinated campaign of harassment”, the facts nonetheless demonstrated a “pattern of disregard” by State prosecutorial offices for the “likely and foreseeable effects” of its activities on the interests of the foreign investor.¹²⁰ The tribunal found that State prosecutors, for an extended period of time, knew that the interests of the investor “stood directly or indirectly in the line of fire”, and yet they took no steps “either to assess or to avoid, minimize, or mitigate that possibility of harm.”¹²¹ Accordingly, citing certain procedural irregularities in the investigation, the tribunal held Romania liable for a breach of the treaty, but only “to that limited extent.”¹²²

As the tribunal recognized, this limited finding of breach posed a problem for causal analysis. The claimant’s alleged injury concerned damage to its reputation as the result of the investigations, which further resulted in increased financing costs and loss of business opportunities, as well as the loss of property or funds (*e.g.*, legal costs) in connection with the investigation.¹²³ But as in *Lemire*, this alleged injury posed overarching problems of causation in light of the specific breach at issue. In particular, because Romania was found to have acted unlawfully only in the *manner* in which it conducted the investigation, the appropriate measure for damages would be limited to the compensation necessary to put the claimant in the position that it would have been had the investigation been carried out in a manner that was consistent with the treaty.

¹¹⁶ *See, e.g., id.*, ¶ 248 (noting that the attachment of claimant’s shares in its Romanian subsidiary, and the prosecutor’s subsequent delay of the legal proceedings to release the attachment, was “cogent confirmatory evidence of prosecutorial animus,” regardless of whether it was a treaty breach in itself).

¹¹⁷ *Id.*, ¶ 251 (“[T]he Tribunal cannot find anything wrongful in a prosecutor resorting to [a lawful pretrial detention] procedure. However, the entire chapter reflects no credit on the DIICOT prosecutors – and Ms. Cristescu in particular – when one puts together cumulatively the procedural defects in their first application, the patently thin grounds advanced by them to justify the need for pretrial detention, their persistence with a second application nine months later with no apparently stronger basis, and finally what appears plainly to be Ms. Cristescu’s defiance of the CSM investigation into the matter for which (see above) the Respondent has offered no explanation.”).

¹¹⁸ *See, e.g., id.*, ¶ 286.

¹¹⁹ *See id.*, ¶ 299(b)–(c).

¹²⁰ *Id.*, ¶ 276.

¹²¹ *Id.*, ¶ 279.

¹²² *Id.*

¹²³ *Id.*, ¶ 282.

The tribunal, however, found that it was unable to perform this kind of analysis in light of the parties' evidence and arguments on damages. The claimant presented its damages using an "event study method," the goal of which is to determine the effect of the impugned investigation and prosecution on the stock price of the claimant's investment.¹²⁴ In constructing their method, the claimant's damages experts proceeded from the starting point that "all the Romanian criminal investigations connected with Rompetrol should be regarded in principle and in their entirety as unlawful."¹²⁵ In light of the limited finding of liability, the tribunal noted, this "all-or-nothing approach . . . ends up leaving the analysis somewhat stranded."¹²⁶

Moreover, the tribunal continued, even if the event study method could be rerun on a more limited basis, it was fundamentally ill-suited to the type of breach at issue in the instant case. The basic premise of the method was to examine changes in stock prices in response to public disclosures about the corruption investigation.¹²⁷ This approach, the tribunal found, was incapable of "differentiating between the market effects of a company's coming under investigation by the authorities for a legitimate purpose and the asserted incremental effects of illegalities that happened in the course of such an investigation."¹²⁸

In other words, the tribunal found itself unable, based on the evidence presented, to link the alleged breach (*i.e.*, procedural irregularities in the investigation) with the alleged injury to the claimant's reputation and business. It stated:

[D]amages, in the legal sense, must be understood as what is required to make good in monetary terms some enduring alteration for the worse in the economic, financial or commercial position of the foreign investor which can be traced, in a sufficiently direct and proximate way, to the host State's unlawful course of action, taken as a whole. If so, then it means that the application of the event study method to the present case must be regarded as inherently questionable.

. . .

The Tribunal therefore could only accept as a valid technique for the quantification of economic damages one which, proceeding from the prior need to establish by the appropriate standard of proof a sufficient causal nexus between the claimed illegality and the asserted loss, allows a suitably objective comparison then to be made between the *status quo ante* and the Claimant's situation at the time that suit is brought. The event study method as advanced in these proceedings fails that test, and no alternative method has been advanced that would put the Tribunal in a position to determine whether any

¹²⁴ *Id.*, ¶ 283.

¹²⁵ *Id.*, ¶ 286.

¹²⁶ *Id.*

¹²⁷ *Id.*, ¶ 283.

¹²⁸ *Id.*, ¶ 286.

quantifiable economic loss to the present Claimant flowed specifically from the potentially actionable events identified . . . above.¹²⁹

The foregoing discussion demonstrates the propensity of the causation analysis to break down when there is a mismatch between the prevailing theory of liability and the data used to conduct the quantum calculation. The tribunal, working with the same broad analytical framework that was at play in the *Lemire* case, apparently felt unable to even begin the causal analysis. This was not a run-of-the-mill case where the tribunal simply rejected the claimant’s assertion that A led to B, or B to C, on the ground that the evidence was insufficient or the causal relationship too remote. Rather, the tribunal seemed to find itself in a position where it could not take up the causal chain, much less begin working through the links. The *Rompetrol* case thus cautions litigants to pay careful attention to injury and causation when crafting their theories of damages, and to consider what theories of causation can be adapted when the tribunal adopts a theory of liability other than the claimant’s primary or preferred option.

4. Conclusion

Perhaps it is best to conclude where we began, with Hume’s admonition that “we are never able, in a single instance, to discover any power or necessary connexion; any quality, which binds the effect to the cause, and renders the one an infallible consequence of the other.”¹³⁰ Nevertheless, even an optimistic skeptic, Hume understood the value that experience, over abstract reason, brings to the causation inquiry.¹³¹ After all, in uncovering causal links between acts, if “infants, nay even brute beasts, improve by experience,”¹³² then surely arbitrators and counsel can do the same.

In discussing the structures of the causation inquiry, our purpose here was not to provide a schematic for how one should approach the inquiry in any given instance. Instead, this Chapter invites a renewed focus on the inquiry itself. Causation sits within the adjudicatory process of every tribunal’s mandate and therefore necessarily stands beside every litigant seeking to prove his or her case. Its internal and external overlaps, its uncertainties, and its nuances will always fit uncomfortably within any strict structure that legal reasoning might impose. Thus, our project in approaching the causation inquiry in investor-State arbitration was necessarily a modest one. Indeed, the real work of the causation inquiry—as Hume himself knew—is often done simply by posing the question.

¹²⁹ *Id.*, ¶¶ 287–8.

¹³⁰ DAVID HUME, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING 41 (Hackett Publishing, 2d ed. 1993) (1977).

¹³¹ *See id.*, at 37.

¹³² *Id.*, at 25.