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SHAREHOLDERS' CLAIMS FOR REFLECTIVE LOSS IN INTERNATIONAL INVESTMENT LAW

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ACRONYMS

ACHR	American Convention on Human Rights
ADP	Articles on Diplomatic Protection
ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
BIT/s	Bilateral Investment Treaty/ies
CETA	Canada-EU Comprehensive Economic and Trade Agreement
CIDS	Geneva Center for International Dispute Settlement
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
IACtHR	Inter-American Court of Human Rights
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965
IDI	*Institut de Droit International*
IIA/s	International Investment Agreement/s
ILA	International Law Association
ILC	International Law Commission
ISDS	Investor-State Dispute Settlement
LCIA	London Court of International Arbitration
MFN	Most-Favoured-Nation
MIT	Multilateral Investment Treaty
MNEs	Multinational Enterprises
NAFTA	North American Free Trade Agreement
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards
NGO	Non-Governmental Organization
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
SCC	Stockholm Chamber of Commerce
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Rules	United Nations Commission on International Trade Law Arbitration Rules
UNCITRAL Rules 2010	United Nations Commission on International Trade Law Arbitration Rules (as revised in 2010)
UNCTAD	United Nations Conference on Trade and Development
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNSG	United Nations Secretary-General
US	Unites States of America
VCLT	Vienna Convention on the Law of Treaties 1969
VCLT 1986	Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations
WTO	World Trade Organization

LIST OF ABBREVIATIONS

AI	Arbitration International
AJIL	American Journal of International Law
AYIA	Austrian Yearbook of International Arbitration
BJIL	Brooklyn Journal of International Law
BLR	Business Law Review
BYIL	British Yearbook of International Law
Chicago JIL	Chicago Journal of International Law
Chinese JIL	Chinese Journal of International Law
CJCR	Cardozo Journal of Conflict Resolution
CJTL	Columbia Journal of Transnational Law
CLJ	Cambridge Law Journal
DCI	Diritto del Commercio Internazionale
DJCIL	Duke Journal of Comparative and International Law
DLR	Deakin Law Review
EBOLR	European Business Organization Law Review
EJIL	European Journal of International Law
EJIL: Talk!	Blog of the European Journal of International Law
ELR	Erasmus Law Review
ESIL Reflection	European Society of International Law Reflection
FILJ	Fordham International Law Journal
FLR	Fordham Law Review
GJIL	Groningen Journal of International Law
GLJ	German Law Journal
HILJ	Harvard International Law Journal
HLR	Harvard Law Review
ICLQ	International and Comparative Law Quarterly
ICLR	International Community Law Review
ICSID Review	ICSID Review – Foreign Investment Law Journal
ITN	Investment Treaty News
JAPP	Journal of Appellate Practice and Process
JDI	Journal du Droit International
JIA	Journal of International Arbitration
JIEL	Journal of International Economic Law
JIDS	Journal of International Dispute Settlement
JWIT	Journal of World Investment and Trade
KA Blog	Kluwer Arbitration Blog
LEHR	Law and Ethics of Human Rights
LJIL	Leiden Journal of International Law
LPICT	The Law & Practice of International Courts and Tribunals
MLR	Modern Law Review
MPEPIL	Max Planck Encyclopedia of Public International Law
MPUNYB	Max Planck Yearbook of United Nations Law
MSJIL	Michigan State Journal of International Law
NPE	New Political Economy
NYIL	Netherlands Yearbook of International Law
NYULR	New York University Law Review
OJLS	Oxford Journal of Legal Studies
ONULR	Ohio Northern University Law Review
RCADI	Recueil des Cours de l'Académie de Droit International de la Haye
RDI	Rivista di Diritto Internazionale
SJIL	Stanford Journal of International Law
TDM Journal	Transnational Dispute Management Journal
VJIL	Virginia Journal of International Law
YIILP	Yearbook of International Investment Law and Policy
YICL	Yearbook of the International Law Commission
YJIL	Yale Journal of International Law
ZaoRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

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1. Introduction

1.1. The Roots of the Problem: The Dual Nature of Shareholders

The issue as to whether and, if so, to what extent shareholders are entitled to receive protection on the international plane can well be deemed to be a pivotal yet unsettled question in international law.[1] As early as 1931, William Beckett – in his speech before the Grotius Society – pointed out that:

> The subject of my Paper, 'Diplomatic Claims in Respect of Injuries to Companies,' may sound, I fear, a somewhat dull and technical subject. My excuses for offering this subject to the Society are two. First of all, in the conduct of the ordinary routine of international affairs this question comes up with great frequency […]. Secondly, there is involved in this matter an important legal question, which has never been definitely solved, and which, in my opinion, fully merits a scientific study.[2]

Among the different issues which had never been solved and thus were worthy of scientific study, Beckett identified that of the protection granted to shareholders together with, but also independently from, the one enjoyed by their company. Similarly, in the course given at The Hague Academy of International Law, Paul de Visscher wondered about the approach of international law as to the relationship between a company and its shareholders whenever they are, directly or indirectly, damaged by the course of action of a State, be it their national or a third one.[3] Again, in his work on the protection of companies, Lucius Caflisch questioned whether and the extent to which, under international law, foreign shareholders of a company were entitled to the protection of the home State whenever their legal position was affected by measures taken by a third State.[4]

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1 DE HOCHEPIED, *La protection diplomatique des sociétés et des actionnaires*, Paris, Pedone, 1965, pp. 1-274; DIEZ DE VELASCO, 'La protection diplomatique des sociétés et des actionnaires', in *Recueil de cours de l'Académie de droit international de la Haye*, vol. 141, 1974, pp. 87-186; MÜLLER, *La protection de l'actionnaire en droit international*, Paris, Pedone, 2015, pp. 1-517.

2 BECKETT, 'Diplomatic Claims in Respect of Injuries to Companies', in *Transactions of the Grotius Society*, vol. 17, 1931, pp. 175-194, at 175.

3 DE VISSCHER, 'La protection diplomatique des personnes morales', in *Recueil de cours de l'Académie de droit international de la Haye*, vol. 102, 1961, pp. 395-513

4 CAFLISCH, *La Protection de Sociétés Commerciales et des Intérêts Indirects en Droit International Public*, The Hague, Martinus Nijhoff, 1969, pp. 1-287.

The uncertainties surrounding the protection of shareholders before international courts and tribunals can be understood only if one considers their apparent dual nature: on the one hand, shareholders stand out as holders of an intangible economic asset, that is to say as owners of equity security; on the other hand, they emerge as holders of an economic and financial interest into the assets of another entity – *viz.* their company. The existence of such an interest is strictly intertwined with the very notion of share as a fraction of the capital of the company.[5] Indeed, if a share is a fraction of the capital, whenever the latter suffers a damage, this reflects upon the shareholder, thus causing a prejudice to his or her own patrimony: the so-called 'reflective loss'. Accordingly, any matter that influences the legal position of the company will also affect the value of the investment made by the shareholder. There is, therefore, an interdependence between the company and its shareholders, which confers the latter an 'interest' in the legal position of the former. The relationship between shareholders and their company, however, is not to be confused with an overlap of their positions. As pointed out by Zachary Douglas,

> Every legal system that recognises a limited liability company as an independent legal entity insists upon a distinction between the company and its shareholders. A shareholder cannot, for instance, seize a physical asset of the company in return for relinquishing its share with an equivalent value. That would amount to conversion or theft, because the shareholder has no rights *in rem* over the assets of the company. The company, as a legal entity separate from its shareholders, holds the assets for its own account and in its own name. A company does not hold assets as an agent or trustee of its shareholders. Likewise, if a third party seizes an asset of the company unlawfully, the it is not the shareholder who is the victim of conversion or a theft; it is the company.[6]

The precondition for all this being true is one: companies are to be entrusted with a separate and autonomous legal personality under municipal law.[7] They shall thus be

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[5] For a in-depth analysis of shares, see VISENTINI, 'Azioni di società', in *Enciclopedia del diritto*, vol. IV, 1959, pp. 967-1003.

[6] DOUGLAS, *The International Law of Investment Claims*, Cambridge, Cambridge University Press, 2009, pp. 1-666, para. 749.

[7] VANDEKERCKHOVE, *Piercing the Corporate Veil*, Alphen aan den Rijn, Kluwer Law International, 2007, pp. 1-765, at 3-4: «Legal personality refers to the general and abstract capacity of a certain entity to operate as a legal subject. The corporation is such an autonomous legal subject. Traditional corporation law is based on the idea that a corporation and its shareholders are separate juridical entities, the corporation having its own patrimonial structure and its own rights and liabilities distinct from the rights and liabilities of its shareholders. This is often referred to as 'entity law'. Before business enterprises were granted the right to acquire an independent legal personality, it was the business's owner who carried on the business and who was exposed to all risks resulting from the business».

recognized as autonomous centres of imputation of legal relationships: the so-called juridical persons or *personnes morales*.[8] Such juridical construction that separates the personality of a corporation from the personalities of its shareholders is also known as 'corporate veil'.[9] As a consequence of the conferral of a separate legal personality, a clear distinction is then to be drawn between the rights of the company and those pertaining to its shareholders.

With regard to the latter, it is worth recalling that individuals *qua* shareholders possess an intangible economic asset. In this sense, they enjoy the typical rights deriving from ownership.[10] Furthermore, because of their possession, national corporate law provides them with a bundle of rights which are strictly related to the company itself. They generally include the right to vote on matters of corporate policy, such as the appointment or dismissal of directors or approving and distributing dividends, the right to take part to general meetings, the right to any declared dividend, the right to take part in a final distribution of the company's assets in case of liquidation. In other words, domestic law directly bestows on shareholders all the rights in order to participate in the management and enjoyment of the results of their creation, the company. For the purposes of this dissertation, the exclusive entitlement of shareholders to all these rights – ownership and participation rights – makes it easy to ascertain the regime concerning their protection in case of violation: shareholders will be entitled to bring a lawsuit against the wrongdoer. Be the wrongdoer a third party, a State or a person who is directly involved in the management of the company, the shareholder will have the possibility to start proceedings against the offender in order to vindicate his or her rights and – eventually, whenever a violation is found – recover for the loss suffered.

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8 BASILE, FALZEA, 'Persona giuridica (dir. priv.)', in *Enciclopedia del diritto*, vol. XXXIII, 1983, pp. 234-276.

9 GAERTNER, 'Reverse Piercing the Corporate Veil: Should Corporation Owners Have It Both Ways?', in *William and Mary Law Review*, vol. 30, 1989, pp. 667-704, at 667: «Traditional corporate entity doctrine draws a line between the owner and the corporation. No matter how fuzzy that line becomes, the line separating the two entities always exists. The existence of this indelible line establishes the artificial personality of a corporation, a personality distinct from its owners, and the foundation of traditional corporate entity doctrine».

10 For the purposes of this dissertation, as regards the qualification of the relationship between between shareholders and shares under municipal law, see Section 1.7. In this respect, the High Court of Australia in *Peters' American Delicacy Co Ltd v Heath* [1939] HCA 2; (1939) 61 CLR 457 (9 February 1939) argued that: «Primarily a share in a company is a piece of property conferring rights in relation to distributions of income and of capital. In many respects the proprietary rights are defined by the articles of association, and it is easy to see that a power of alteration might be used for the aggrandisement of a majority at the expense of a minority. […] They vote in respect of their shares, which are property, and the right to vote is attached to the share itself as an incident of property to be enjoyed and exercised for the owner's personal advantage».

Far more complex, instead, is the legal regime of the rights of the company and – even more – the relationship between such rights and shareholders. Bestowed with an autonomous domestic legal personality, companies own their assets, they might be creditors and debtors, they might enter into a contract as well as breach it, they might cause damage to thirds and suffer it from them. Any of the mentioned activities will, positively or negatively, affect the value of the company itself; thus, inasmuch as the value of the company will fluctuate, so it will the value of the shares. In all these relationships, nevertheless, the company (as a general rule and without prejudice to a different agreement) will be the *exclusive right holder or duty bearer*. Shareholders will thus be 'hidden' behind the corporate veil, the shield of the company.[11]

This is, without any doubt, one of the most important feature of limited liability companies in all domestic legal orders. A corollary of the distinction between the rights of the company and those of the shareholders is, indeed, the separation between the assets of the former and the patrimony of the latter.[12] From this perspective, the corporate veil – *i.e.*, the separation between the personality of the company and that of its *associés* – assures that shareholders' liability does not extend beyond the value of their shares. In other words, whenever an individual decides to invest his or her money in a company by buying or, otherwise, acquiring its shares, s/he will know at the outset the economic risk s/he may get into. Indeed, to the extent that a company is a separate entity enjoying its own rights and having its own assets, if it gets sued, defaults on a loan, or declares

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[11] KRAAKMAN, ARMOUR, DAVIES, ENRIQUES, HANSMANN, HERTIG, HOPT, KANDA, PARGENDLER, RINGE, ROCK, *The Anatomy of Corporate Law. A Comparative and Functional Approach*, Oxford, Oxford University Press, 2017[3], pp. 1-304, p. 9: «Limited liability shields the firm's owners – the shareholders – from creditors' claims. Importantly, this facilitates diversification. With unlimited liability, the downside risk borne by shareholders depends on the way the business is carried on. Shareholders will therefore generally prefer to be actively involved in the running of the business, to keep this risk under control. This need to be "hands-on" makes investing in multiple businesses difficult. Limited liability, by contrast, imposes a finite cap on downside losses, making it feasible for shareholders to diversify their holdings. It lowers the aggregate risk of shareholders' portfolios, reducing the risk premium they will demand, and so lowers the firm's cost of equity capital».

[12] *Ibid.*, at 5: «The core element of the firm as a nexus for contracts is what civil lawyers refer to as "separate patrimony." This involves the demarcation of a pool of assets that are distinct from other assets owned, singly or jointly, by the firm's owners (the shareholders), and of which the firm itself, acting through its designated managers, is viewed in law as being the owner. The firm's entitlements of ownership over its designated assets include the rights to use the assets, to sell them, and – of particular importance – to make them available for attachment by its creditors. Conversely, because these assets are conceived as belonging to the firm, rather than the firm's owners, they are unavailable for attachment by the owners' personal creditors. The core function of this separate patrimony has been termed "entity shielding," to emphasize that it involves shielding the assets of the entity – the corporation – from the creditors of the entity's owners».

bankruptcy, creditors are, as a general rule,[13] not entitled to bring a claim against the shareholders and their personal wealth.[14]

The legal autonomy of juridical persons vis-à-vis its shareholders has also another relevant effect, which is connected to the protection of the rights of the company. Under municipal law, whenever a company is injured by an unlawful conduct, it is up to the juridical person itself – and solely to that – to bring a lawsuit in order to be awarded compensation. That is because the rights violated by the wrongful course of action only and exclusively pertain to the company as such. This is simply the 'other side of the coin': the patrimony of the shareholders cannot be attacked by a third party for any relationship concerning the company. However, shareholders cannot claim for the rights of the company in case of their violation. Different subjects, different legal relationships, different entitlements.

The fact that the company which suffered a damage is the only subject whose rights have been violated does not exclude, as already mentioned above, that the interests of shareholders will be similarly affected. If shares are nothing else than a fraction of the capital of the company, a wrong to the company – which will arguably decrease its assets – will also cause a decrease in value of the shares; this being known as 'reflective loss' since the share-drop reflects the damage suffered by the company. In such a case, one might wonder how the shareholder will recover from the loss endured. In light of what has been said until now, the answer would seem quite straightforward: the company will sue the wrongdoer in order to recover the damage suffered. If this happens, the same shareholder will indirectly recover the loss suffered: as the owner of a percentage of the capital, the recovery made by the company will ultimately raise up the value of his or her shareholding. This can be considered the physiological course of action.

However, one has to question what happens if this is not the case. Put it another way, it is necessary to delve into the issue of the remedies a shareholder might resort to whenever the company whose rights have been infringed upon does not vindicate them. At a first glance, this hypothesis might sound weird. One would probably be surprised to hear that

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[13] BIGIAVI, 'Responsabilità illimitata del socio tiranno', in *Foro italiano*, vol. 83, 1960, I, pp. 1180-1213; GILLESPIE, 'The Thin Corporate Line: Loss of Limited Liability Protection', in *North Dakota Law Review*, vol. 45, 1968, pp. 363-406; SCHIESSL, 'The Liability of Corporations and Shareholders for the Capitalization and Obligations of Subsidiaries under German Law', in *Northwestern Journal of International Law & Business*, vol. 7, 1986, pp. 480-506; ZORZI, *L'abuso della personalità giuridica. Tecniche sanzionatorie a confronto*, Padova, Cedam, 2002, pp. 1-294.

[14] KRAAKMAN, ARMOUR, DAVIES, ENRIQUES, HANSMANN, HERTIG, HOPT, KANDA, PARGENDLER, RINGE, ROCK, *The Anatomy of Corporate Law. A Comparative and Functional Approach*, p. 8: «The corporate form effectively provides a default term in contracts between a firm and its creditors whereby the creditors are limited to making claims against assets that are held in the name of (or "owned by") the firm itself, and have no claim against assets that the firm's shareholders hold in their own names».

a juridical person which has suffered a damage does not start proceedings in order to be awarded compensation. However, there could be different circumstances which *de iure* or *de facto* hinder the company from claiming its own rights: a conflict of interests between the legal representative and the company itself, an impossibility to bring a claim if the company has been stripped off of its legal personality, or even a policy-driven free choice of the directors. In such circumstances, the problematic nature of the legal construction of a separate and autonomous personality conferred to juridical persons comes out with all its force. It is true that the injured rights pertain to the company. Nonetheless, it is behind the corporate veil that those who have an effective economic interest in the business are to be looked for. Indeed, shareholders can be seen as the ultimate beneficiaries of the operations carried out by the company as well as those who bear the consequences if the business fails. Accordingly, whenever companies are hindered from vindicating their rights, national legal orders *might* put at the disposal of the shareholder some instruments in order to (try to) recover the loss incurred, bypassing the corporation or forcing the *personne morale* to vindicate its rights.

1.2. The Original Sin: *Barcelona Traction* and the Transposition of the Domestic Rule on the International Plane

If it is true that most of (where not all) domestic corporate systems do recognize the institution of the company with all its characteristics as outlined above, one cannot but wonder what happens whenever juridical persons appear on the stage of the international legal system. In particular, one has to question what happens when the rights of a company – be them property, contractual or even human rights – are infringed upon by the actions of a sovereign State. If the company itself is hindered to the extent that it might not be able to vindicate its own rights or if the applicable substantive or procedural rules forbid to do so, are shareholders entitled to start proceedings on the international plane in order to recover for the reflective damage (their shares) suffered? In other words, are they entitled to any remedy before international jurisdictions? This is not different from the problem addressed by domestic courts but it requires considering other factors related to the structure of international law, the relevance of domestic law institutions, the economic realities of conducting business internationally as well as policy considerations. In order to answer the questions raised, it is necessary to briefly look at how international law looks at companies.

From this standpoint, it is relevant to understand how international law approaches to the separate legal personality conferred under municipal law upon companies, to the distinction (if any) between the rights of the company and those of its shareholders, to the relationship between the rights of the company and the interests of the shareholders, and to their protection. In this respect, Daniel Müller pointed out that:

> Face à cette institution du droit interne qui volontairement éclipse les actionnaires derrière le voile social, bien qu'ils soient sans doute les principaux intéressés et les bénéficiaires ultimes de droit de la société, le droit international se trouve confronté à un dilemme: faut-il ignorer les véritables intéressés et privilégier le formalisme juridique, ou faut-il prendre en compte les actionnaires pour favoriser la réalité masquée par l'institution juridique de droit interne?[15]

A choice between the «véritables intéressés» and the «formalisme juridique» was made by the International Court of Justice in 1970, when it rendered its decision in the case of *Barcelona Traction, Light and Power Ltd.*,[16] which is still considered the seminal case and the starting point for any analysis concerning the protection of shareholders in the international legal order.[17] The case, which will be further discussed in Chapter 2, arose out of an application filed by the Belgian government against Spain in order to obtain reparations for the damage allegedly suffered by its national – natural and juridical – persons, who were the controlling shareholders of the Barcelona Traction company. According to the applicant State, the fact that the company was incorporated in Canada was irrelevant inasmuch as the course of action entertained by Spain against the company had also infringed upon the rights of its Belgian shareholders. Thus, Belgium was acting on behalf of its nationals in order to recover the loss in value of their shares, loss allegedly caused by the measures taken by the respondent State against the company. Contrariwise, Spain argued that the claim was to be deemed as inadmissible inasmuch the applicant State lacked *ius standi* to intervene on behalf of its nationals.[18] In order to analyse the objection raised by the respondent government, the Court moved from the need to

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15 MÜLLER, *La protection de l'actionnaire en droit international*, op. cit., p. 3.

16 *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application:1962)*, Preliminary Objections, Judgment, 5 February 1970, ICJ Reports 1970.

17 *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, para. 54; SCHREUER, 'Shareholder Protection in International Investment Law', in *Transnational Dispute Management*, vol. 2, 2005, pp. 1-21, at 3; MÜLLER, *La protection de l'actionnaire en droit international*, op. cit., at 6;

18 DEL VECCHIO, 'International Courts and Tribunals, Standing', in *Max Planck Encyclopedia of Public International Law*, 2010, para. 1: «The term 'standing' has been defined in many ways by writers on domestic legal procedure and is essentially synonymous with being a party to a proceeding»; GAJA, 'Standing: International Court of Justice', in *Max Planck Encyclopedia of International Procedural Law*, 2018, para. 2: «[The term *ius standi* or standing] refers to the entitlement of an entity to be a party to judicial proceedings concerning contentious cases. Issues of standing before the *International Court of Justice* (ICJ) ('Court') may concern either the possibility in general for an entity to be a party to contentious proceedings or the entity's entitlement to submit a claim relating to a certain subject matter».

> establish whether the losses allegedly suffered by Belgian shareholders in Barcelona Traction were the consequence of the violation of obligations of which they were the beneficiaries. In other words: has a right of Belgium been violated on account of its nationals' having suffered infringement of their rights as shareholders in a Company not of Belgian nationality?[19]

Put it otherwise, the Court was confronted with the issue of identifying or, *recte*, making a rule concerning the relationship between the separate legal personality of the company and its shareholders in the international legal order. Against this background, the Court concluded that «international law [had] to recognize the corporate entity as an institution created by States in a domain […] within their domestic jurisdiction».[20] From this point of view, the Court emphasised that, inasmuch as corporate entities have their legal personality distinct from that of shareholders, a separation between the property rights of ones and the others was to be maintained. Accordingly, the judges sitting in The Hague found the mere fact that a wrong done to the company (in the case at hand, the Barcelona Traction) also causes a prejudice to its shareholders (*i.e.*, the Belgian natural and juridical persons) as insufficient to allow both to institute appropriate action. In the context of the customary international law of diplomatic protection,[21] this actually meant that Belgium was not entitled to start proceedings on behalf of its national inasmuch as only their interests had been aggrieved, not their rights. In this sense, only the national State of the company had *ius standi* to bring a claim in order to recover for the damage that Barcelona Traction suffered. On the other hand, the Court confirmed what was already clear:

> Personal rights of shareholders, such as the right to share in the company's surplus assets after liquidation, the right to declared dividends, the right to participate in shareholders' meetings, etc., are rights of the shareholders under municipal law and thus constitute vested rights under international law; consequently, the shareholders' national States have a valid claim if such rights are wrongfully interfered with by another State.[22]

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19 *Ibid.*, para. 35.

20 *Ibid.*, para. 38.

21 According to the Article 1 of International Law Commission, 'Draft Articles on Diplomatic Protection with commentaries', UN Doc. A/61/10, YICL, vol. II, 2006, «diplomatic protection consists of the invocation by a state, through diplomatic action or other means of peaceful settlement, of the responsibility of another state for an injury caused by an internationally wrongful act of that state to a natural or legal person that is a national of the former state with a view to the implementation of such responsibility». See DUGARD, 'Diplomatic Protection', in *Max Planck Encyclopedia of Public International Law,* 2009.

22 CAFLISCH, 'The Protection of Corporate Investments Abroad in the Light of the Barcelona Traction Case', in *ZaoRV*, vol. 31, 1971, pp. 162-196, at 181.

The International Court of Justice, thus, provided an apparently clear-cut answer to our questions: international law recognizes «the legal separateness of the corporation and its shareholders and the distinct set of rights that each enjoys».[23] In doing so, as a general rule, customary international law prohibits shareholders – or those acting on behalf of them, as it is the case with the State of nationality in the context of diplomatic protection – to start proceedings in order to have reparation for an injury suffered by their company. As convincingly pointed out by Abby Cohen Smutny, the case concerning the *Barcelona Traction* is significant inasmuch as it indicates that «the same limitations that exist […] under municipal law governing the company and its shareholders will [also] apply on the international level».[24]

This statement offers us the possibility to further develop the reasoning and to highlight some points which will be of the utmost importance over the course of this whole dissertation.

First of all, as pointed out by Christoph Schreuer, «one might [hastily] reach the conclusion that [the] Barcelona Traction [judgment] is authority for the general proposition that shareholders as such enjoy no protection under international law».[25] However, it is worth recalling that the *Barcelona Traction* case was decided under the customary international law of diplomatic protection.[26] This means that, in accordance with the hierarchy of the sources of international law,[27] States are always free to derogate from these rules and provide shareholders with wider protection. The Court was obviously well-aware of the availability of such an avenue in stating that:

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[23] COHEN SMUTNY, 'Claims of Shareholders in International Investment Law', in BINDER, KRIEBAUM, REINISCH, WITTICH (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, Oxford, Oxford University Press, 2009, pp. 363-376, at 364.

[24] *Ibid.* See, CAFLISCH, *La Protection de Sociétés Commerciales et des Intérêts Indirects en Droit International Public*, op. cit., p. 20, footnote 33: «les intérêts que peuvent posséder les membres ou les créanciers d'une société dans les biens et les droits de celle-ci, intérêts que n'ont pas en principe le caractère de droits acquis en droit interne».

[25] SCHREUER, 'Shareholder Protection in International Investment Law', in *Transnational Dispute Management*, vol. 2, 2005, pp. 1-21, at 3.

[26] DINSTEIN, 'Diplomatic Protection of Companies under International Law', in WELLENS (ed.), *International Law: Theory and Practice. Essays in Honour of Eric Suy*, The Hague, Nijhoff, 1998, pp. 505-517, *passim*.

[27] THIRLWAY, *The Sources of International Law*, Oxford, Oxford University Press, 2019[2], pp. 1-272, at p. 152 ff.; FOCARELLI, *Diritto internazionale*, Padova, Cedam, 2019[5], pp. 1-785, at 230 ff.; CANNIZZARO, *Diritto internazionale*, Torino, Giappichelli, 2020[5], pp. 1-555, at 223 ff.; CONFORTI, IOVANE, *Diritto internazionale*, Napoli, Editoriale Scientifica, 2021[12], pp. 1-534, at 193 ff.

> Thus, in the present state of the law, *the protection of shareholders requires that recourse be had to treaty stipulations or special agreements* directly concluded between the private investor and the State in which the investment is placed. *States ever more frequently provide for such protection, in both bilateral and multilateral relations, either by means of special instruments or within the framework of wider economic arrangements*. Indeed, whether in the form of multilateral or bilateral treaties between States, or in that of agreements between States and companies, there has since the Second World War been considerable development in the protection of foreign investments. The instruments in question contain provisions as to jurisdiction and procedure in case of disputes concerning the treatment of investing companies by the States in which they invest capital. Sometimes companies are themselves vested with a direct right to defend their interests against States through prescribed procedures. No such instrument is in force between the Parties to the present case.[28]

Second, as stressed by the International Court of Justice itself, the case was decided in accordance with the rules of customary international law at the relevant time, *i.e.*, 1970. In this regard, what might have been the general rule identified and developed by the judges in the *Barcelona Traction* judgment could well not be the law to date.[29] Accordingly, one has to question whether there has been any change in the practice which might have influenced the rules concerning the protection of companies and their shareholders on the international legal plane.[30]

Finally, when laying down the general rule according to which a State is not entitled to bring proceedings on the international plane in order to recover for the reflective loss suffered by its shareholders in a foreign corporation, the judges in The Hague were well aware of the fact that, in accordance with domestic law of many States, some exceptions are allowed.[31] Accordingly, the Court identified some special circumstances in which the

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28 *Barcelona Traction*, Judgment, *supra* note 16, para. 90 (*emphasis added*).

29 ORREGO VICUÑA, 'Changing Approaches to the Nationality of Claims in the Context of Diplomatic Protection and International Dispute Settlement', *ICSID Review*, vol. 15, 2000, pp. 340-361; ACCONCI, 'Determining the Internationally Relevant Link between a State and a Corporate Investor, Recent Trends concerning the Application of the "Genuine Link" Test', in *JWIT*, vol. 5, 2004, pp. 139-175; LAIRD, 'A Community of Destiny – The *Barcelona Traction* case and the Development of Shareholder Rights to Bring Investment Claims', in WEILER (ed.), *International Investment Law and Arbitration. Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, London, Cameron May, 2005, pp. 77-96; DUMBERRY, 'The Legal Standing of Shareholders Before Arbitral Tribunals: Has Any Rule of Customary International Law Crystallised?', in *MSJIL*, vol. 18, 2010, pp. 353-374.

30 PERRINI, *La protezione diplomatica delle società*, Napoli, Editoriale Scientifica, 2013, pp. 1-162; TOURNIER, *La protection diplomatique des personnes morales*, Paris, Pedone, 2013, pp. 1-645.

31 See *infra* Chapter 2 and, notably, Section 2.2.

State of nationality is entitled to do so. In doing so, the Court – following *mutatis mutandis* the approach of municipal law – carved out some hypotheses from the general prohibition.

In light of all these considerations, the question arises as to whether, following the decision of the World Court and in accordance with what the judges pointed out in *Barcelona Traction*, international law has actually changed in order to grant shareholders with a wider and possibly more effective protection of their rights and interests on the international plane.

1.3. The Emergence of International Investment Law: Key Developments in the Protection of Shareholders

More than fifty years have passed since the International Court of Justice rendered its judgment in the *Barcelona Traction* case. Fifty years during which the world has greatly changed, followed by the law. This is particularly true with regard to the international community and, accordingly, international law.

As far as the international community, the last few decades have experienced the emergence of a new, central, actor in economic relations: the so-called multinational or transnational enterprises (MNEs).[32] Nowadays, indeed, companies and, in particular, MNEs play a fundamental role within the globalized economy.[33] Within the context of a global economy and the emergence of such a new actor, the very issue of the protection of shareholders has likewise changed. As pointed out by Daniel Müller, indeed,

> La complexification et l'internationalisation croissantes des structures sociétales ont cependant largement réduit le rôle et la visibilité des actionnaires. Le jeu de sociétés holdings, de filiales locales ou des participations importantes dans des sociétés locales rend aujourd'hui l'identification des actionnaires et des bénéficiaires ultimes de plus en plus laborieuse, voire impossible. Ils ne sont plus seulement masqués par le voile de la société locale, mais par une multitude d'écrans sociaux.[34]

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[32] IJALAYE, *The Extension of Corporate Personality in International Law*, Dobbs Ferry/Leiden, Oceana Publications/Sijthoff, 1978, pp. 1-354; SEIDL-HOHENVELDERN, *Corporations in and under international law*, Cambridge, Grotius Publications, 1987, pp. 1-138; VAGTS, 'The Multinational Enterprise: A New Challenge for International Law', in *Harvard Law Review*, vol. 83, pp.739–792; WOUTERS, CHANÉ, 'Multinational Corporations in International Law', *KU Leuven Working Papers*, Working Paper No. 129, 2013, pp. 1-20; MUCHLINSKI, 'Corporations in International Law', in *Max Planck Encyclopedia of Public International Law*, 2014; MUCHLINSKI, *Multinational Enterprises and the Law*, Oxford, Oxford University Press, 2021[3], pp. 1-912.

[33] VANHONNAEKER, *Shareholders' Claims for Reflective Loss in International Investment Law*, Cambridge, Cambridge University Press, 2020, pp. 1-391, at 14 ff.

[34] MÜLLER, *La protection de l'actionnaire en droit international*, op. cit., p. 10.

The emergence of MNEs had, therefore, a profound impact on the subject matter of this dissertation, increasing the difficulty of identifying the individuals who are the ultimate beneficiaries of the business activities carried out by companies. Indeed, the very notion of individuals *qua* shareholders has been gradually superseded by corporations *qua* shareholders. Put it another way, it is increasingly common that a company holds some shares in another company, which, in turn, might hold shares in a third company and so forth. The outcome is an often-inextricable web of shareholders and company layers.

On a par with the international community and the global economy, international law has also gone through several changes in the last 50 years. To consider them all is obviously out of the scope of this dissertation. What matters for the purposes of our analysis is the emergence and evolution of a new field of international law: international investment law. The emergence and evolution of international investment law is strictly intertwined with the rise of MNEs as main actors in economic relations, to the extent that it might be difficult to identify a proper cause-and-effect relationship: indeed, international investment law has fostered the success of MNEs in the world trade and, in turn, the challenges posed by MNEs have played a fundamental role in guiding the development of international (investment) law.

The emergence of international investment law, whose main features will be considered in greater detail in Chapter 3, has had a disruptive effect on the protection of shareholders. Private entities have indeed become emancipated from the protection of their national States. That is because diplomatic protection has been replaced by the Investor-State Dispute Settlement (ISDS), that is to say a procedural mechanism that allows a foreign investor to bring, *inter alia,* arbitral proceedings directly against the country in which it has invested, in the event s/he alleges that such State committed a wrongful act: the so-called investor-State arbitration (ISA).[35] At a first glance, it is apparent that such a possibility for investors to directly seek remedies and to vindicate their rights vis-à-vis the host-State cannot but represent a historical turning point compared to the former diplomatic protection regime which required the investor's national State to 'espouse' his claim. Accordingly, if a State decides to expropriate the shares held by a foreign investor in a local enterprise, the latter will be entitled – if there is any applicable investment agreement between his or her State of nationality and the host-State expropriating the shares – to start proceedings before an arbitral tribunal in order to claim for compensation.[36] The same holds true if his or her rights to properly manage the company

[35] SABAHI, RUBINS, WALLACE JR., *Investor-State Arbitration*, Oxford, Oxford University Press, 2019², pp. 1-992, at 47-74.

[36] SHIHATA, 'Towards a Greater Depoliticization of Investment Disputes: the Roles of ICSID and MIGA', in *ICSID Review*, vol. 1, 1986, pp. 1-25; DOLZER, SCHREUER, *Principles of International Investment Law*, Oxford, Oxford University Press, 2012², pp. 1-417, at 232 ff.

or to attend general meetings have been interfered with. In other words, shareholders have been entrusted with a remedy directly actionable against the wrongdoing State whenever their rights (as provided for under municipal law) are infringed upon.

The provision of a mechanism to settle investment disputes between the investor and the host-State, however, is not the only remarkable novelty with regard to the protection of shareholders brought by international investment law. As argued by Gabriel Bottini, «[i]nvestment arbitration has witnessed the consolidation of the idea that shareholders are entitled to bring claims under IIIa for measures affecting the company in which they hold shares».[37] From the jurisdictional decision in *CMS* onwards,[38] indeed, international investment tribunals have given birth to a settled jurisprudence with regard to the admissibility of shareholders' claims for reflective loss, which goes straight in the opposite direction vis-à-vis domestic corporate law and the decision of the International Court of Justice in the *Barcelona Traction* case.[39] In other words, under the umbrella of international investment agreements (IIAs), foreign investors are not only allowed to start proceedings in order to be awarded compensation if their own rights have been violated by a course of action of the host-State, but they are also entitled to bring a claim in order to recover for the loss in value of their shares as a consequence of a wrongful act against the company of which they own them.

1.4. The Main Concerns in Allowing Shareholders' Claims for Reflective Loss

Following the emergence of international investment law and the establishment of the ISDS mechanism, shareholders' claims for reflective loss have become increasingly common in international law. By looking at the massive case law produced by investment tribunals, it is well possible to argue that – to a certain extent – reflective loss has become the rule, at least as far as the protection of foreign investments is concerned.

According to Lukas Vanhonnaeker, this is the consequence of the fact that «international law must cope with and adapt to the complexities of the multi-layered and geographically dispersed nature of the modern corporate structure and the consequent multiplicity of real parties of interest: shareholders».[40] If it is undeniable that reflective

[37] BOTTINI, *Admissibility of Shareholder Claims under Investment Treaties*, Cambridge, Cambridge University Press, 2020, pp. 1-335, at 12-14, p. 154.

[38] *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003.

[39] ALEXANDROV, 'The "Baby Boom" of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as "Investors" and Jurisdiction *Ratione Temporis*', in *LPICT*, vol. 4, 2005, pp. 19-59, at 19-21.

[40] VANHONNAEKER, *Shareholders' Claims for Reflective Loss in International Investment Law*, op. cit., p. 16.

loss claims are generally allowed in investment arbitration, one cannot but point out that they create «numerous risks and perverse incentives».[41]

In greater detail, the possibility for shareholders to bring multiple claims forces the host-State to defend itself repeatedly with regard to essentially the same course of action. Any victory, from this point of view, might be seen as a pyrrhic one, inasmuch as shareholders will have 'another shot' against the respondent State. Moreover, multiple proceedings expose the host-State to a risk of paying overlapping damages if the investor is able to win multiple times. Again, a blank permission to reflective loss claims puts at risk the rights of those stakeholders who are third vis-à-vis the investment claim: (often) the company itself, creditors, employees and other shareholders who are not entitled to rely on ISDS. Last, but not least, the generalized admissibility of reflective loss claims distorts the corporate form by altering the physiological management of the company.

1.4.1. Parallel and Multiple Proceedings

The first risk posed by a generalized authorization for shareholders in pursuing reflective loss claims is that of parallel or multiple proceedings being brought against the host State for the very same course of action.[42] Shareholders' claims for reflective loss, indeed, derive from an original harm caused to a single economic entity (a company) by a wrongful conduct of the host State. Reflective loss as a 'consequence' of the original harm takes the form of a diminution of the share value, the so-called secondary harm. However, such a loss may be further reflected in a diminution of the shares of the shareholders' shareholder, a tertiary harm. In multinational companies, it is almost possible to endlessly proceed in identifying an injured company by going back up the corporate chain.

This is possible because of the multi-layered structure of modern corporations as well as since «[t]ribunals tend to recognize claims by the entity, its shareholders, and indirect owners as independent».[43] In other words, the fact that the consequences of a specific course of action taken by the host State have been already litigated between the company or its shareholders and the government does not impede other shareholders to start

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[41] ARATO, CLAUSSEN, LEE, ZARRA, 'Reforming Shareholder Claims in ISDS', *Academic Forum on ISDS Concept Paper 2019/9*, 17 September 2019, pp. 1-12, at 4.

[42] YANNACA-SMALL, 'Parallel Proceedings', in MUCHLINSKI, ORTINO, SCHREUER (eds), *The Oxford Handbook of International Investment Law*, Oxford, Oxford University Press, 2008, pp. 1008-1049;WEHLAND, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration*, Cambridge, Cambridge University Press, 2013, pp. 1-304, *passim*; ZARRA, *Parallel Proceedings in Investment Arbitration*, Torino/The Hague, Giappichelli/Eleven International Publishing, 2017, pp. 1-253, *passim*; GAILLARD, 'Parallel Proceedings: Investment Arbitration', in *Max Planck Encyclopedia of International Procedural Law*, 2019.

[43] ARATO, CLAUSSEN, LEE, ZARRA, 'Reforming Shareholder Claims in ISDS', op. cit., at 4.

proceedings for the same (set of) measures. As a consequence of such an interpretation, States are thus subjected to concurrent and successive claims by all the entities of the corporate chain, which are entitled to claim compensation for the same alleged injury to the same primary entity. From this perspective, any victory of the State might be considered a 'pyrrhic victory', since shareholders will arguably have 'another shot' – and then another, and so on – against the respondent State. [44]

Parallel and multiple proceedings do not represent a threat to the legitimacy of investment arbitration only because they expose States to a possible endlessly litigation of the same claim, but also because they carry the risk of inconsistency in the final outcome of the litigated case: the more the same measures are litigated before different arbitral tribunals, the more the chance that final awards will conflict as far as the application of the same rule, the legality of the State's conduct or the *quantum* of damages to be paid by the respondent (if due).[45]

1.4.2. Multiple Recovery Risks

The second concern in a blank permission for shareholders to bring claims for reflective loss is strictly related to the first. Multiple overlapping claims brought by the company and its shareholders or by different entities of the corporate chain *qua* shareholders «can allow shareholder-investors to secure double (or more) recovery, either at the expense of the State or at the expense of other corporate constituencies».[46]

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[44] This risk has materialized in numerous high-profile cases. See, *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001; *CME Czech Republic B.V. (The Netherlands) v. Czech Republic*, UNCITRAL, Final Award, 14 March 2003. For a recent example, see *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Final Award, 27 December 2016 and *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Award, 4 September 2020.

[45] REINISCH, 'The Challenge of Fostering Greater Coherence in International Investment Law', in ECHANDI, SAUVÉ (eds), *Prospects in International Investment Law and Policy*, Cambridge, Cambridge University Press, 2013, pp. 236-240; SCHREUER, 'Coherence and Consistency in International Investment Law', in ECHANDI, SAUVÉ (eds), *Prospects in International Investment Law and Policy*, Cambridge, Cambridge University Press, 2013, pp. 391-402; ZARRA, 'Orderliness and Coherence in International Investment Law and Arbitration: An Analysis Through the Lens of State of Necessity', in *Journal of International Arbitration*, vol. 34, 2017, pp. 653-678; ZARRA, 'The Issue of Incoherence in Investment Arbitration: Is There Need for a Systemic Reform?', *Chinese Journal of International Law*, vol. 17, 2018, pp. 137-185;

[46] ARATO, CLAUSSEN, LEE, ZARRA, 'Reforming Shareholder Claims in ISDS', op. cit., at 4-5. See also BOTTINI, *Admissibility of Shareholder Claims under Investment Treaties*, op. cit., at 12-14; *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, 19 December 2012, para. 253: «The Tribunal is aware of the risk that the proceeding in the instant

As a general assumption, it is well-known that international law does not allow more than one (full) recovery for the same damage suffered.[47] Such a principle was at the heart of the discussion in the famous *Chorzów Factory* case, decided by the Permanent Court of International Justice in 1928. In establishing the often-cited principle of full reparation, according to which «reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed»,[48] the PCIJ asserted the need to avoid «running the risk of the same damage being compensated twice over»[49] as well as «awarding double damages».[50]

The principles established by the PCIJ in *Chorzów Factory* are put in danger by the attitude of international investment tribunals towards shareholders' claims for reflective loss. There is, indeed, an apparent risk of double (or even multiple) compensation to be awarded. Such a hypothesis would occur, as an instance, if one tribunal awarded recovery to the company while another awarded recovery to a shareholder. This might happen because both the company and its shareholders are entitled to claim for the losses suffered by the company's assets. As of today, as argued by a group of scholars, «this problem has not tended to materialize in practice».[51] That is because in those cases where a company and its shareholders brought separate claims they did not result in separate successful

case and the parallel proceedings initiated by AGBA before domestic courts in the Republic of Argentina could lead to a recovery for damages in both proceedings, which could ultimately, at least theoretically, raise an issue of double recovery in favour of Claimants as investors and shareholders of AGBA»; *Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on the Respondent's Preliminary Objection, 13 March 2020.

47 See *Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Jurisdiction, 27 July 2006, para. 219; WITTICH, 'Compensation', in *Max Planck Encyclopedia of Public International Law*, 2008, paras 15-16: « In the first place, the amount of compensation is limited by the principle of full reparation as provided for in Art. 31 ILC Articles […]. This limitation of full reparation operates in two ways. On the one hand, it is a minimum limit which should guarantee that compensation wipes out all the consequences of the illegal act and re-establishes the situation that would have existed if that act had not been committed […]. It is this aspect of full reparation that may, for example, warrant an award of interest […]. On the other hand, full reparation means that the amount of compensation must not be more than the loss actually incurred by the injured party. In other words, the injured party must not be over compensated. The problem of double recovery is especially delicate in the context of loss of profits».

48 *Factory at Chorzów (Germany v. Poland)*, Merits, Judgment, 13 September 1928, PCIJ Series A, No. 17, p. 47.

49 *Ibid.*, p. 48.

50 *Ibid.*, p. 49.

51 ARATO, CLAUSSEN, LEE, ZARRA, 'Reforming Shareholder Claims in ISDS', op. cit., p. 5.

awards.[52] Furthermore, some investment arbitral tribunals have shown to be aware of this risk; thus, taking proactive steps in order to avoid double compensation.[53]

Nevertheless, double recovery remains a serious concern for international investment arbitration inasmuch as, if both the claims brought by the company and its shareholders succeed, the latter cannot be actually blocked from participating proportionately in any company recovery.

1.4.3. Prejudice to Third Parties

Another issue related to the generalized admissibility of reflective loss claims by investment arbitral tribunals concerns the possible prejudice to the interests of third parties that might arise whenever compensation for a damage suffered by the company is – in whole or in part, this depending on the percentage of shares the claimant(s) own(s) – awarded to shareholders. In this regard, it is first necessary to try to define who is a third party with regard to a reflective loss claim. Unless the company and the shareholders have jointly brought the claim, the former is generally a third party vis-à-vis reflective loss claims. Yet, it is not the only one. As pointed out by the arbitral tribunal in *Pan American Energy v. Argentina*, shareholders' claims for reflective loss might endanger the rights of other stakeholders, such as creditors of the company, employees or other shareholders not

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52 See *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001; *CME Czech Republic B.V. (The Netherlands) v. Czech Republic*, UNCITRAL, Final Award, 14 March 2003.

53 *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction, 11 May 2005 and *Camuzzi International S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Objection to Jurisdiction, 11 May 2005. In this respect, see ZARRA, *Parallel Proceedings in Investment Arbitration*, op. cit., at 39: «It must be mentioned that the outcome of parallel proceedings is not necessari- ly so dramatic. In the disputes started by Yukos's majority shareholders, the same Tribunal heard the three cases and issued – on the same day – three almost identical awards. In this case, as well as in the other disputes related to the Yukos saga (i.e. the cases started by minority shareholders), it is possible to say that – in substance – Tribunals have tried to give a reasonable practical solution to the issue of parallel proceedings, at least taking into account the facts and the out- comes of the related disputes. A similar coordination may be found in the abovementioned Sempra and Camuzzi decisions, where – even though the two minority shareholders brought two separate claims – the claimants, in accordance with Argentina, decided that the same Tribunal would hear both disputes. On the contrary, in the similar circumstances (i.e. two autonomous claims started by minority shareholders) regarding the already mentioned CMS and Total claims, such coordination was not present. The Total Tribunal […] made reference to the CMS decision but reached opposite conclusions on the alleged violation of fair and equitable treatment».

involved in the dispute.[54] Similarly, the *Urbaser* tribunal acknowledged that «the proceeding in the instant case and the parallel proceedings initiated by AGBA before domestic courts in the Republic of Argentina could lead to […] a conflict in interest with AGBA's other creditors who are not parties, at least, to any of the referenced proceedings».[55] Nevertheless, they both dismissed the objection raised by the respondent State concluding that such a circumstance – albeit alarming – did not affect the jurisdiction of the tribunal in accordance with the relevant IIA.[56]

As far as potential prejudice to the company, it is apparent that a reflective loss claim might disrupt its activities. Indeed, whenever a shareholder is successful in his or her claim, s/he will recover at the expenses of the company, whose position will be negatively affected inasmuch as its assets are reduced.[57] This reduction is also likely to affect the legal position of other non-claiming shareholders.[58] Notably, this could easily happen

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[54] *Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Jurisdiction, 27 July 2006, para. 220: «Another point raised by the Respondent in its Memorial on Jurisdiction […] in connexion with foreign shareholders' claims is that the latter, in recovering their investment, do so to the prejudice of other domestic or foreign shareholders, creditors and employees. This may be true; but it does not empower this Tribunal to stray from the path traced by the Contracting Parties in their BIT, which unquestionably protects shareholdings.».

[55] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, 19 December 2012.

[56] In this sense, see also *W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on the Respondent's Preliminary Objection, 13 March 2020, para. 154: «Ultimately, all of these points are valuable observations from a system design perspective, and no doubt are ones that States can (and should) take into account in considering which avenues of relief they wish to offer investors, and which preconditions to relief they wish to impose. But weighing these competing policy concerns is for States, not arbitrators. In the absence of articulated references to these concerns by the State Parties in a form that the VCLT accepts as probative evidence for treaty interpretation – such as contemporaneous statements in the official travaux préparatoires or a subsequent agreement or practice regarding treaty interpretation – it would not be appropriate for arbitrators to use their own views of desirable policy to help guide them (one way or the other) to an interpretation either of the existing text, or of the object and purpose of the DR-CAFTA Parties in agreeing to that text».

[57] ARATO, CLAUSSEN, LEE, ZARRA, 'Reforming Shareholder Claims in ISDS', op. cit., p. 6: «The pro-SRL interpretation inefficiently distorts the very features of the corporate form that make corporations appealing investment vehicles. In particular, it undermines the firm's separate legal personality by enabling treaty-covered shareholders to gain access to funds rightly belonging to the firm. By suing the host State directly, a shareholder can recover on corporate monies that would normally be shielded from liquidation by shareholders, on which various creditors may have priority, and on which other shareholders expect parity».

[58] WEHLAND, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration*, op. cit., at 8-9. ARATO, CLAUSSEN, LEE, ZARRA, 'Reforming Shareholder Claims in ISDS', op. cit., p. 7: «Most importantly, SRL claims create conflicts between shareholders and creditors by upending typical creditor-priority rules. This creates significant risks for creditors which,

whenever the share-capital is held by both national and foreign shareholders: in such a circumstance, while national shareholders will not be able to pursue their claim through investment arbitration, foreign shareholders will be entitled to do so.[59] Therefore, national shareholders will have to rely on the good-faith of foreign shareholders for the re-investment of the money awarded to them for damages suffered by the company. Such a sum of money will represent only a percentage of the loss, yet it could be the only one to be recovered if other remedies are not available or are doomed to fail before domestic courts of the host-State.

Employees or creditors,[60] on their parts, may see the prospect of any successful claims against the company in order to recover their wage or credits «diminished or even wiped out, depending on how important the claim not pursued was for the company's wherewithal».[61] Indeed, in accordance with domestic corporate law of most States, they will not be able to pursue any claim against those shareholders who might have succeeded in their reflective loss claims. That is because of the already mentioned corporate veil, which generally shields shareholders from being sued for those legal relationship concerning the company. Such considerations could even encourage shareholders in

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if adequately understood and accounted for, would tend to drive up the costs of credit. SRL also creates conflicts among shareholders: including conflicts between treaty-covered shareholders and uncovered shareholders who may be left out of any eventual recovery; as well as first-mover conflicts among treaty covered shareholders».

[59] OECD, 'The impact of investment treaties on companies, shareholders and creditors', in *OECD Business and Finance Outlook 2016*, 2016, pp. 223-253, at 237: «[T]reaties create rights only for a subset of shareholders – those foreign shareholders who are covered by treaties. Assuming no change in the well-established general corporate law rule barring reflective loss claims, the policy question for investment treaties is thus whether reflective loss claims should be allowed for covered shareholders but not others. This adds an additional element to the analysis and invites consideration of the impact on different shareholders».

[60] The issue of creditor protection was long discussed in the Micula saga. See, notably, *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, Final Award, 11 December 2013, paras 1203-1206; LEE SUET LIN, 'Barring Recovery for Diminution in Value of Shares on the Reflective Loss Principle', in *CLJ*, vol. 66, 2007, pp. 537-558, at 556: «The final policy concern […] is protection of the company's […] creditors. When a company becomes insolvent as result of wrongdoing, the creditors would benefit from the corporate action because recovery would enlarge the pool of assets avaiable for distribution to the creditors. If the shareholder were allowed to recover reflective loss in a personal action, and the company's claim were subsequently affected, it would upset the ranking of claims by creditors and shareholders in insolvency».

[61] BOTTINI, *Admissibility of Shareholder Claims under Investment Treaties*, p. 15; VANHONNAEKER, *Shareholders' Claims for Reflective Loss in International Investment Law*, op. cit., p. 28. This argument was also advanced by both the United States of America and the United Mexican States in the case *GAMI Investments Inc. v. Mexico*, UNCITRAL (NAFTA), Final Award, 15 November 2004.

pursuing reflective loss claims in order to maximize their profit in case of envisaged liquidation or bankruptcy of the juridical person.

1.4.4. Distortion of Corporate Governance

Finally, one has to consider that the possibility for shareholders to always pursue reflective loss claims has the further effect of altering the regular governance of the company whose shares they own. While it is true that, from the outside, a company appears as a monolithic juridical person, it is worth recalling that the corporation might be actually composed of dozens, whether not hundreds, of shareholders. This means that, in order to grant the operativity of the company, decisions must be taken by one or more people entrusted with such a function. These are known as directors or members of the board: they manage the day-by-day activities of the company, they are the legal representatives entitled to sign contracts and bring proceedings before the court, they are called to take the appropriate strategies in order for the business to be profitable.[62] Put it simpler: they manage the company independently from but always in the interests of the company itself and the shareholders.[63]

From this perspective, it is apparent that allowing shareholders to bring reflective loss claims actually «undermines centralized management by giving treaty-covered shareholders the ability to second-guess management on questions of when to litigate, when to settle, and how much to settle for».[64] The directors are thus deprived of one of their main functions,[65] inasmuch as they cannot control anymore the litigation of the

62 HOPT, 'Comparative corporate governance: the state of the art and international regulation', in FLECKNER, HOPT, *Comparative Corporate Governance. A Functional and International Analysis*, Cambridge, Cambridge University Press, 2013, pp. 1-101, at 28-63, notably pp. 28-29: «The most prominent actor in corporate governance is the board, which is regulated in the corporation laws of virtually all countries. In addition, there is a vast literature in law, economics, and more recently also in other fields that deals with the board».

63 *Ibid.*, pp. 40-42. See also OECD, 'The impact of investment treaties on companies, shareholders and creditors', op. cit., pp. 243-244: «Centralised management is a core characteristic of the business corporation. Shareholder invetsors who form a company or invest in one know that absent special agreement to the contraty, almost all business decisions will be taken by the board of directors […] rather than shareholders directly. […] Investors choose the corporation with centralised management because it can promote both efficiency and fairness. It streamlines corporate decision-making because [… and] can also help protect vulnerable corporate constituencies – and thus encourage their investment and participation in corporate enterprises».

64 ARATO, CLAUSSEN, LEE, ZARRA, 'Reforming Shareholder Claims in ISDS', op. cit., pp. 6-7.

65 See GEVURTZ, 'Who represents the corporation? In search of a better method for determining the corporate interest in derivative suits', in *University of Pittsburgh Law Review*, vol. 46, 1985, pp. 265-309.

company.[66] It is true that shareholders do not actually act on behalf of the company but, as we have shown above, a successful reflective loss claim might prejudice its activities. Furthermore, a settlement might be almost impossible to be concluded if a formidable Sword of Damocles hangs upon the State. Indeed, the undermining of centralized management is also problematic from the standpoint of the host State. The latter will find many difficulties in identifying who 'speaks for the company' when carrying out settlement negotiations and, more generally, in relying on settlement.[67]

1.5. The Purpose of this Thesis

The purpose of this dissertation is threefold: first, it aims at confirming – through a comparative analysis of civil and common law jurisdictions – that a common approach to the institution of the company with regard to the protection of shareholders does actually exist in municipal law. Second, it aims at identifying the approach that international courts and tribunals have adopted towards shareholders' protection in those fields of international law where the issue earlier emerged, namely the customary law of diplomatic protection and the international protection of human rights. Third, the dissertation focuses on the field of international investment law and arbitration, trying to identify and analyse the rationale(s) on the basis of which arbitral tribunals have – as opposed to domestic legal systems and other fields of international law – allowed, as a general rule, shareholders to bring reflective loss claims. To this end, it critically approaches the rationales with the aim of ascertaining whether the exceptionality of international investment arbitration is based upon firm grounds or, if the answer is in the

[66] *In Re Dein Host, Inc., Debtor. Joseph D. Pignato v. Dein Host, Inc.*, 835 F.2d 402 (1st Cir. 1987), para. 26: «The rule [prohibiting reflective loss claims] is a salutary one: if a shareholder, dissatisfied with the dealings entered into between his corporation and a third party, automatically possessed a personal right of action against the third party, then corporations would be paralyzed. They could rarely act except upon unanimous consent. Business affairs would slow to a crawl, and the courts, confronted with a bewildering myriad of shareholder claims, would be as busy as a colony of centipedes with athlete's foot. Not surprisingly, the law is to the contrary».

[67] PÀEZ-SALGADO, 'Settlements in Investor–State Arbitration: Are Minority Shareholders Precluded from Having its Treaty Claims Adjudicated?', in *JIDS*, vol. 8, 2017, pp. 101-124; OECD, 'The impact of investment treaties on companies, shareholders and creditors', op. cit., pp. 244: «The new rules can also hinder the ability of the corporation to take decisions about settlement of a claim and reduce the value of settlement. Under the usual corporate law rules, the injured company's board or senior management can decide about settlement with a party that has injured the company. In contrast, under the unique combination of rules under many treaties, a settlement […] is both less attractive and more complicated. It is less attractive because the company is unable to [really settle the dispute]; one or more covered shareholders can still bring claims. The settlement value to the government, and thus to the company, will be lower».

negative, whether a more coherent theoretical construction can be provided in order to explain such an approach towards reflective loss claims. Having done so, and in light of the concerns in allowing reflective loss claims as identified in Section 1.4, this work will conclude by briefly sketching out some solutions in order to deal with and regulate shareholders' claims for reflective loss in international investment arbitration.

1.6. Structure of the Work

The first issue this dissertation deals with, in Chapter 2, is to try to confirm through a comparative analysis of domestic legal orders that a common approach to the protection of shareholders in municipal law does actually exist. In this Introduction, indeed, it has been pointed out that domestic corporate law – in light of the clear-cut distinction between the rights of the companies and those of its shareholders – only allows companies to start proceedings in order to recover from damages it suffered. Contrariwise, individual shareholders cannot bring a claim to redress this misconduct, even though their interests may also have been affected by the action of the wrongdoer. In order to ascertain the existence of such a common rule and with the aim of offering a comprehensive overview, the laws of both civil law (France, Germany, Italy, and the Netherlands) and common law (Hong Kong, the United Kingdom, and the United States of America) jurisdictions will be taken into account.

Having done so, Chapter 3 is aimed at analysing the decisions rendered by other international courts and tribunals in order to draw insights as to their approach towards the institution of the company and its legal personality. In this regard, Section 3.1 looks at the case law of the International Court of Justice on the standing of the national States of shareholders in the specific context of customary international law of diplomatic protection. Through the analysis of its judgments, we will try to identify the main principles concerning the protection of shareholders under general international law. This Chapter then considers the protection shareholders are entitled to under international human rights law by examining the conventional regimes of the European Convention on Human Rights (Section 3.2) and the American Convention on Human Rights (Section 3.3), with the aim of ascertaining whether and to what extent shareholders can start proceedings before the monitoring bodies of the two systems in order to seek redress for damages suffered. Finally, Section 3.4 offers some interim conclusions as for the protection of shareholders on both the national and international legal plane.

The starting point for Chapter 4 is a factual observation: in the field of international investment law and arbitration, reflective loss claims brought by shareholders against a wrongdoer State are generally deemed to be admissible. Even more, one might say that reflective loss claims are the most common kind of lawsuit. What is generally prohibited in domestic corporate law and – as it will be demonstrated in Chapter 3 – in other fields of international law is thus the general rule in this field. This should not *per se* come as a surprise. The fact that a certain course of action might be ruled out under customary international law does not mean that the same conduct cannot be allowed if States so agree in a specific context, may it be a specific field of international law, a treaty regime or an *ad hoc* agreement. According to the hierarchy of the sources of international law, indeed, States are free to derogate a custom unless this pertains to the category of *jus cogens*. If this is not the case, treaty law may well provide for a different solution. However, it is fundamental not to jump to conclusions: the fact that States may derogate to one or more rule(s) of customary international law does not mean that they have done so. In light of the foregoing, Chapter 4 tries to provide a clear overview of the protection shareholders are entitled to under international investment agreements. To this end, it starts by examining the notion of shareholder *qua* 'investor' and ownership of shares *qua* 'investment' in IIAs (Section 4.2). Having done so, Section 4.3 is devoted to the analysis of investment agreements and case law with regard to the specific issue of 'reflective loss claims'. In greater detail, sub-Section 4.3.1 offers a brief overview of the treaty language concerning reflective loss claims, coming to the conclusion that only very few IIAs directly or indirectly address them. Since IIAs are generally silent on reflective loss claims, Sub-Section 4.3.2 analyses the reasoning on the basis of which arbitral tribunals have generally found them to be admissible. Afterwards, Sub-Section 4.3.3 offers a critical appraisal of the approach held by investment tribunals, arguing in favour of a sounder theoretical construction of IIAs as far as the protection of shareholders. Finally, building on the analysis carried out, Section 4.4 addresses the ungovernability of shareholders' claims in international investment arbitration by identifying different cases in which the blanket permission to start proceedings to recover reflective losses has actually exposed the limitations of the current regime: parallel and multiple proceedings, double recovery, prejudice to third parties, and distortion of corporate governance.

As a way of conclusion, Chapter 5 briefly suggests some possible ways to deal with and regulate shareholders' claims for reflective loss in international investment arbitration.

1.7. Key Terminology

Before delving into the substance matter of the dissertation, it is necessary to provide some clarifications regarding the terminology used over the course of this work.

The first clarification concerns the very pivotal issue of this dissertation, that is to say 'reflective loss'. What does it mean in the context of corporate law? The term reflective loss is generally used to identify the loss incurred by shareholders as a consequence of the wrongdoing suffered by the company, whose shares they hold. In such a circumstance, the loss suffered by the shareholders is considered to be reflective or – according to some authors – indirect inasmuch as it (merely) reflects the loss incurred by the company, which accordingly would be identified as the only subject to have incurred in a direct loss. Generally, both scholarship and jurisprudence use the expression 'reflective loss' so as to describe the reduction in the value of the shares as a consequence of the decrease in the value of the company's patrimony because of the wrongdoing the latter suffered. Accordingly, in this dissertation, the wording reflective loss will be consistently used in order to identify such a legal situation.

Following the definition provided, one has to question the meaning of 'reflective loss claim'. As it is easy to say, a reflective loss claim is a judicial complaint: a lawsuit brought before a domestic or international judge through which shareholders aim at recovering *their own* loss, inflicted upon *their assets* (*viz.* their shares) as a consequence of the wrong *done to the company*. Their own loss, their assets and a wrong done to the company: it is relevant to stress these three elements in order to be able to distinguish a reflective loss claim from other kinds of lawsuits that are well-known in domestic corporate law. Whenever a shareholder brings a reflective loss claim, he is requiring the judge to ascertain that his or her legal position was damaged (although indirectly) by the conduct of a third party (may it be a private or public entity) as a consequence of an unlawful course of action taken against the company whose shares s/he owns. In other words, the plaintiff is acting in order to be awarded compensation because of the fall in the value of his/her shares following the unlawful conduct *against the company*. Contrariwise, the shareholder is *not* acting in order to see awarded compensation to the company for the direct loss incurred by the latter (so-called derivative claim)[68] or to vindicate a rights s/he is the holder thereof in accordance with municipal law (so-called direct claim).

Having ascertained the meaning of reflective loss in the context of corporate matters, it is necessary to dwell upon the main character of this dissertation, namely the shareholder. It is tautological to say that a shareholder is whoever owns, possesses or holds one or more shares in a company.[69] Depending on the domestic legal order taken into consideration, however, the relationship between the 'holder' and his or her shares might be qualified in a different way. This qualification under domestic laws falls outside the

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[68] 'Derivative Claim', in *Oxford Dictionary of Accounting*, Oxford, Oxford University Press, 2010[5]: «A legal action brought by a shareholder on behalf of a company for a wrong done to it. A company will usually sue in its own name but if those against whom it has a cause of action are in control of the company (i.e.directors or majority shareholders) a shareholder may bring a derivative action. The company will appear as defendant so that it will be bound by, and able to benefit from, the decision. The need to bring such an action must be proved to the court before it can proceed». In greater detail, see *infra* Section 2.3.

[69] This is the definition that can be found in the *Oxford Dictionary of Finance and Banking*, Oxford, Oxford University Press, 2018[6] on in the *Oxford Dictionary of Economics*, Oxford, Oxford University Press, 2017[5].

scope of the present work and, thus, we will be indiscriminately referring to such a relationship as ownership, possession or holding, generally following the relevant case law or the legal system considered. Another issue which has to be considered for the purposes of this dissertation is to identify the subjects that can be qualified as shareholders. This is particularly relevant – as it will be shown in Chapter 4 – in the context of international investment law to the extent that, as pointed out above, most of the investment arbitration cases are actually brought by plaintiffs *qua* shareholders. Within this field of international law, indeed, the category of shareholders allowed to pursue a claim is, for reasons to be analysed, wider. As for the current stage of the analysis, suffice it to mention that a shareholder is any natural or juridical person who legally holds, at any title and in accordance with domestic law, one or more shares in a company.

Another clarification which must be provided concerns the other character of this dissertation: the company. In Section 1.1 and 1.2, we have made several references to the institution of the company under municipal law, trying to highlight the main characteristics companies have in domestic legal orders. To say or to think that there is only one kind of company all around the world would be misleading. Each domestic legal system has its own kinds of companies, generally distinguished in two macro-categories: partnership and limited liability companies or corporations. However, these words are sometimes used in a different meaning. From this point of view, therefore, it is necessary to provide the reader with a definition of what is a company for the purposes of this dissertation. In this respect, we will interchangeably use the words company, limited liability company and corporation to mean a *company with the following characteristics*: *i*) possessing its own legal personality; *ii*) providing for limited liability of shareholders; *iii*) constituted of transferable shares; *iv*) centralized management under a board structure; *v*) shared ownership by contributors of equity capital.[70]

A final terminological clarification concerns the often-used expressions of ‘piercing the corporate veil’ or ‘lifting the corporate veil’. References to them – which are generally considered to be interchangeable –, indeed, are very common in the case-law of the

[70] See KRAAKMAN, ARMOUR, DAVIES, ENRIQUES, HANSMANN, HERTIG, HOPT, KANDA, PARGENDLER, RINGE, ROCK, *The Anatomy of Corporate Law. A Comparative and Functional Approach*, op. cit., p. 3. As for the different companies possessing such characteristics in accordance with their own domestic law, see MÜLLER, *La protection de l’actionnaire en droit international*, op. cit., p. 3: «Le phénomène ne saurait néanmoins être limite aux seules sociétés anonymes et à leurs actionnaires, ou à des formes de sociétés comparable créés dans différents ordres juridiques étatiques, comme par exemple l’*Aktiengesellschaft* (*AG*) de droit allemand, la société anonyme (*Aktiengesellschaft*, *società anonima*) de droit suisse, et certainement aussi à la *public limited company* (*plc*) au Royaume-Uni. Certes, dans la société anonyme ou ses équivalent la séparation entre l’actionnaire et la société es particulièrement développée».

European Court of Human Rights as well as in investment arbitration, when judges or arbitrators deal with claims brought by shareholders.[71] Likewise, references might be found also in municipal law, in particular in the domestic jurisprudence of common law jurisdictions. Whatever the context, the core meaning actually remains the same, that is to say the disregarding of the separate legal personality bestowed upon the company and the consequent identification – although to a different extent, depending on the situation considered – of its rights and duties with those of its shareholder(s). This is true both on the domestic and international plane. What might be different, and thus deserves to be briefly pointed out, is the aim of such an operation. In domestic legal orders, the doctrine of piercing the corporate veil is generally resorted to *in order to hold shareholders liable*, under certain circumstances, «for the debts of the corporation when there is some kind of 'abuse' of the corporate structure».[72] In other words, the piercing or lifting the corporate veil is employed to identify «the situation where a shareholder is held liable for its corporation's debts despite the rules of limited liability and/or separate personality».[73] Accordingly, in such circumstances, shareholders will not be able to shield their patrimony behind the limited liability of the company and, therefore, will be required to personally cover the debts of the company. From this point of view, the piercing of corporate veil is thus used in order to *make shareholders accountable* for possible frauds or malfeasance in the management of their business vehicle. In the context of international human rights or investment law, instead, references to such a doctrine are made with regard to: *i*) the criteria to establish corporate nationality;[74] *ii*) the possible misuse or

[71] See, *infra*, Section 3.2 and Chapter 4 respectively.

[72] VENTORUZZO, CONAC, GOTO, MOCK, NOTARI, REISBERG, *Comparative Corporate Law*, Saint Paul, West Academic, 2015, pp. 1-664, at 151.

[73] VANDEKERCKHOVE, *Piercing the Corporate Veil*, op. cit., p. 11; KRYVOI, 'Piercing the Corporate Veil in International Arbitration', in *Global Business Law Review*, vol. 1, 2011, pp. 169-186, at 173: «A typical corporate veil piercing case involves a controlling shareholder who sets up an undercapitalized corporation to incur obligations to a third party. When the debt is due, the corporation does not have enough assets to repay it, and the controlling shareholder relies on the concept of limited liability to avoid personal liability. The result is that the third party ends up bearing the risk of the non-payment of the debt. In such situations, the court or tribunal may intervene to prevent such injustice and pierce the corporate veil by holding the controlling shareholder liable».

[74] MUCHLINSKI, 'Corporations in International Law', op. cit., para. 18: «Determining the nationality of a company is not always easy. Usually, nationality is determined by reference to the place of incorporation. Domicile usually follows incorporation. However, nationality can also be determined by reference to the principal place of business (the seat), or to the *nationality of the controlling interest*. The application of these latter two tests in international law has been rejected by the ICJ in the two leading cases dealing with the admissibility of shareholder claims brought by their national State, namely, the *Barcelona Traction Case* […] and the *Diallo Case*» (*emphasis added*).

abuse of corporate form by shareholders;[75] and *iii*) the identification of the rights and duties of the company with those of its shareholders so that the latter might start proceedings with the aim of recovering the damage suffered by the company for measures taken against it.[76] As it is apparent, the latter hypothesis is of particular relevance for the purposes of this dissertation since it represents an hypothesis in which shareholders are entitled to directly claim in their own name for injuries done to the company. Put it otherwise, whenever the corporate veil is pierced *in the interests of shareholders*, they might be able to claim as if the affected rights of the company were their own. Therefore, in such a circumstance, the lifting of the corporate veil is used in order to *allow shareholders to protect their economic interests* in the company: the antithesis of what happens in domestic legal systems.

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[75] In this respect, see the whole discussion in *Tokios Tokelés v. Ukraine*, Decision on Jurisdiction, *supra* note 17 and, notably, the dissenting opinion appended by Prosper Weil. See also MISTELIS, BALTAG, 'Denial of Benefits Clause', in *Max Planck Encyclopedia of International Procedural Law*, 2019, para. 4: «Dolzer and Schreuer consider the 'denial of benefits' clause as a 'method to counteract strategies that seek the protection of particular treaties by acquiring a favourable nationality' […]. On the other hand, Salacuse explains that allowing the benefits of the IIA to nationals of third countries or to those 'primarily associated' with those countries and with which the denying country has no relationship, would be to abandon the 'right to negotiate corresponding privileges and obligations from those countries' […]. As such, the 'denial of benefits' clause *is not only a guarantee against the abuse of rights*, but also a 'safety measure for safeguarding the principle of reciprocity embodied in investment treaties'» (*emphasis added*).

[76] ORREGO VICUÑA, 'Claims, International', in *Max Planck Encyclopedia of Public International Law*, 2010, para. 35: «As a consequence, the rights of shareholders have also been increasingly recognized as an entitlement to bring an international claim against the offending State. This progression is evidenced by a variety of legal developments. The first is found in the realm of domestic corporate law, which is gradually permeating international law. Issues such as the piercing of the corporate veil and, above all, the admission of class action derivative suits by shareholders and investors against a variety of defendants who affect the company's rights and the interest of those shareholders, evidence the need to protect the real interests involved and not merely observe a corporate formality»; TZEVELEKOS, 'Standing: European Court of Human Rights (ECtHR)', in *Max Planck Encyclopedia of International Procedural Law*, 2019: «A further key question is whether the term 'legal person' includes shareholders […]. In principle, within the ECtHR system, the corporate veil can only be pierced in exceptional circumstances. Whilst there have been instances in which the ECommHR has recognized the standing of majority shareholders […], the ECtHR has been unwilling to grant standing to individuals acting in their capacity as shareholders in an autonomous manner in relation to their corporation».

2. The Protection of Shareholders in Domestic Law: A Comparative Overview

2.1. Municipal Law: An Introduction

In the *Barcelona Traction* case, as mentioned in Chapter 1 and more in-depth discussed below, the «municipal law of corporations […] became the basis for the [International Court of Justice's] fabrication of its international law rule governing shareholder claims».[77] Indeed, in finding that, under general international law, a State was not entitled to act in diplomatic protection of its national shareholders in a foreign company whenever the lamented acts were directed against the company rather than against shareholders' own rights, the Court – convincingly or unconvincingly, this is an issue to be analysed in the next section – resorted to the general principles of the domestic law of the corporations.

Accordingly, the Court adopted a distinction between the rights of the company and those of the shareholders as such, arguing that only when and to the extent that the own rights of the latter are injured their State of nationality is entitled to act in diplomatic protection.

The relevance of such a rule for international law – both general and conventional – calls for, therefore, a comparative survey of domestic legal systems in order to ascertain which are, nowadays, the principles of corporate law applicable to the protection of shareholders. That is because, as it will be shown throughout the following sections and chapters of the dissertation, municipal law has a pivotal role to play within international (investment) law as the substantive law applicable to a certain dispute, as a benchmark in the interpretation of international rules or, in some cases, as a source (or one of the sources) of international law. In other words, an ascertainment of the protection granted to shareholders on the international plane cannot be carried out irrespective of the rules applicable to them in municipal law.

In this regard, it is necessary to point out some staples. First, as pointed out in Chapter 1, the 'company' is a common legal institution under almost all domestic legal systems. Its typical features include, *inter alia*: the attribution of a separate legal personality and thus its nature as an autonomous center of imputation of legal relationships; as a consequence of its autonomous personality, the clear distinction between the assets of the corporation and the wealth of its shareholders (the so-called 'corporate veil'); again, as a general rule, the impossibility for creditors to garnish the wealth of the shareholders if the

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[77] LILLICH, 'The Rigidity of the Barcelona Traction Case', in *American Journal of International Law*, vol. 65, 1971, pp. 522-532, at 524.

company is not capable of paying off its debts; finally, the administration is entrusted with one or more directors, who have the legal representation of the company.

Second, in recognizing that companies are autonomous centers of imputation and thus holders of their rights and obligations, domestic corporate law nevertheless assigns shareholders a bundle of rights – exclusively owned by them – which are strictly related to, despite being different from, the life of the company. They include, *inter alia*: *i*) the voting right on matters of corporate policy, such as the appointment or dismissal of directors, issuing new securities, initiating corporate actions like mergers or acquisitions, approving and distributing dividends, and making substantial changes in the structure or operations of the company; *ii*) the right to attend general meetings; *iii*) the right to any declared dividend, following a deliberation by the company to this effect and on equal conditions with the other shareholders; *iv*) the right to take part in a final distribution of the company's assets if the company is wound up and all the creditors are entirely paid.[78] Furthermore, it is relevant to stress that a share – regardless its different qualification under national law – is itself *an item of property*, which can be generally transferred by sale or gift as well as expropriated by authorities.[79] All these rights are not only commonly recognized by domestic law but are also directly enforceable by shareholders as such. Accordingly, in all the cases in which shareholders saw one of their own rights violated, they are entitled to bring a claim before a judge in order to obtain a relief.

Far more complex is the relationship between the rights of the company and the shareholders, who – as already recalled – have interests in it. On the one hand, indeed, there is the formal distinction between two subjects of the legal system, each provided with its own legal relationships; on the other hand, nevertheless, it cannot be denied that the position of shareholders is strictly intertwined with that of the company inasmuch as the profitability of their investment is dependent upon the smooth running of its operations.

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78 VISENTINI, 'Azioni di società', op. cit., paras 13-20; CAMPOBASSO, *Manuale di diritto commerciale*, Torino, Utet, 2017[7] (edited by CAMPOBASSO), pp. 1-672, at 182 ff.

79 STERLING, 'The Theory and Policy of Shareholder Actions in Tort' in *MLR*, vol. 50, 1987, pp. 468-491, at 470-471: «The fact that a share is valuable because it is a right of participation in a company does not preclude one as a matter of logic from regarding it as a piece of property. It also seems anomalous that a shareholder can vote to ratify his own breach of duty as a director precisely because in theory his share is a piece of property yet he cannot sue in tort either to protect that property or to recover damages for injury to it»; DOUGLAS, *The International Law of Investment Claims*, op. cit., p. 417; KRIEBAUM, REINISCH, 'Property, Right to, International Protection', in *Max Planck Encyclopedia of Internationa Law*, 2019. *Johnson v. Gore, Wood & Co.*, [2000] UKHL 65; [2001] 1 All ER 481; [2001] 2 WLR 72: «On the other hand, […] a share is an identifiable piece of property which belongs to the shareholder and has an ascertainable value, it also represents a proportionate part of the Company's net assets, and if these are depleted the diminution in its assets will be reflected in the diminution in the value of the shares».

From this perspective, therefore, it is necessary to look at how domestic corporate law regulates such a relationship, in particular when, following a conduct of those who are involved in the management of the corporation or of a third party, the rights of the company are injured and, thus, the interests of shareholders are likewise affected.

2.2. The Well-Established 'No Reflective Loss' Principle

It is generally said that, in domestic regimes, corporate law «establish[es] a general bar to shareholders' claims for reflective loss with only very limited exceptions».[80] Starting from this assumption, it is then necessary to carry out a comparative analysis, taking into account both common and civil law jurisdictions, in order to ascertain whether, and to what extent, national corporate law regimes actually exclude that a shareholder may sue to recover a reduction in the value of his shares stemming from a harm to the company.

In the United Kingdom, the 'no reflective loss' principle can be deemed to be firmly rooted,[81] despite some uncertainties related to its extension and possible exceptions.[82] The rule, sketched out in the famous *Foss v. Harbottle* judgment,[83] was fully formulated in *Prudential Assurance v. Newman Industries and Others*,[84] where the Court of Appeal said:

> What [a shareholder] cannot do is to recover damages merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in

80 VANHONNAEKER, *Shareholders' Claims for Reflective Loss in International Investment Law*, op. cit., p. 54.

81 DE JONG, 'Shareholders' Claims for Reflective Loss: A Comparative Legal Analysis', in *EBOLR*, vol. 14, 2013, pp. 97-118, at 105 ff.; CHARMAN, DU TOIT, *Shareholder Actions*, London, Bloomsbury, 2017^{2}, pp. 1-549, at 187 ff.; VANHONNAEKER, *Shareholders' Claims for Reflective Loss in International Investment Law*, op. cit., p. 56 ff.; ARATO, CLAUSSEN, LEE, ZARRA, 'Reforming Shareholder Claims in ISDS', op. cit., at 1.

82 See SHAPIRA, 'Shareholder Personal Action in Respect of a Loss Suffered by the Company: The Problem of Overlapping Claims and Reflective Loss in English Company Law', in *International Lawyer*, vol. 37, 2003, pp. 137-152, *passim*; SEALY, WORTHINGTON, *Sealy's Cases and Materials in Company Law,* Oxford, Oxford University Press, 2013^{10}, pp. 1-904, at 638 ff. See also *Stein v. Blake*, [1998] 1 All ER 724 (CA), [1998] BCC 316 and the analysis of the case provided in DAVIES, *Gower and Davies' Principles of Modern Company Law*, London, Sweet & Maxwell, 2008^{8}, pp. 1-1108, at 626.

83 *Foss v. Harbottle*, 2 Hare 461 (1843). For an overview of the case see SEALY, WORTHINGTON, *Sealy's Cases and Materials in Company Law,* op. cit., at 640-641. See also SPOTORNO, 'Why Is the Rule in *Foss v. Harbottle* Such an Important One?', in *BLR*, vol. 39, 2018, pp. 190-197.

84 *Prudential Assurance Co. Ltd. v Newman Industries Ltd. and Others (No 2),* [1982] 1 Ch 204. For a comment to the case, see STERLING, 'The Theory and Policy of Shareholder Actions in Tort', op. cit..

> dividend, because such a 'loss' is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. His only 'loss' is through the company, in the diminution in the value of the net assets of the company, in which he has (say) a 3 percent shareholding. The plaintiff's shares are merely a right of participation in the company on the terms of the articles of association. The shares themselves, his right of participation, are not directly affected by the wrongdoing. The plaintiff still holds all the shares as his own absolutely unencumbered property. The deceit practised upon the plaintiff does not affect the shares; it merely enables the defendant to rob the company.[85]

Such a rule was then endorsed by the House of Lords in the leading case on this matter, *Johnson v. Goore, Wood & Co.*,[86] in which it was confirmed that a shareholder is not allowed to claim a reflective loss. In this case, Lord Millet clearly highlighted the policy behind the principle by pointing out that:

> the shareholder's loss, insofar as this is measured by the diminution in value of his shareholding or the loss of dividends, merely reflects the loss suffered by the company in respect of which the company has its own cause of action. If the shareholder is allowed to recover in respect of such loss, then either there will be double recovery at the expense of the defendant or the shareholder will recover at the expense of the company and its creditors and other shareholders. Neither course can be permitted. This is a matter of principle; there is no discretion involved. Justice to the defendant requires the exclusion of one claim or the other; protection of the interests of the company's creditors requires that it is the company which is allowed to recover to the exclusion of the shareholder. These principles have been established in a number of cases, though they have not always been faithfully observed.[87]

However, the same rule has been found to be inapplicable in some subsequent – highly debated – case. In *Giles v. Rhind*,[88] for example, the Court «allowed a shareholder's claim for reflective loss [… because of] the inability of the company itself to claim for the loss

[85] *Ibid*.
[86] *Johnson v. Gore, Wood & Co.*, Judgment, *supra* note 79.
[87] *Ibid*.
[88] *Giles v. Rhind*, [2003] Ch 618 (CA).

partly as the result of the defendant's actions».[89] Similarly, in *Perry v Day,*[90] the Court ordered the defendant – who was also shareholder and director of the company – to directly pay damages to the shareholders since his conduct during the purchasing of a piece of land and a subsequent settlement agreement entered in order to solve the dispute arising from the transaction were found to be «a breach of his contractual obligations under a shareholders' agreement with the claiming shareholders (and a breach of fiduciary duties against the company)».[91]

A similar position with regard to reflective loss is adopted in the United States of America.[92] In *Sutter v. General Petroleum Corporation*, the California Supreme Court found that:

> Generally, a stockholder may not maintain an action in his own behalf for a wrong done by a third person to the corporation on the theory that such wrong devalued his stock and the stock of the other shareholders, for such an action would authorize multitudinous litigation and ignore the corporate entity. Under proper circumstances a stockholder may bring a representative action or derivative action on behalf of the corporation.[93]

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[89] VANHONNAEKER, *Shareholders' Claims for Reflective Loss in International Investment Law*, op. cit., p. 57. The finding of the Court was criticized by Lord Millet who, deciding the case *Waddington Ltd. v. Chan Chun Hoo*, [2008] HKCU 1381, argued that «Some way needed to be found in *Giles v. Rhind* which would allow the company to recover damages despite the discontinuance of its own proceedings. If the company had not been in administrative receivership, the simplest course would have been to allow the shareholder to bring a derivative action. As it was, this course would not have been open, for the company was no longer under the control of the wrongdoer. But the court could have given the shareholder leave to apply to direct the administrative receiver to bring the action if the shareholder was willing to fund it. The discontinuance should not have been an obstacle to either course. There is no logic in allowing such an action where the wrongdoers are in a position to stifle any proceedings by the company, and disallowing it where they have succeeded in doing so».

[90] *Perry v Day*, [2005] BCC 375.

[91] DE JONG, 'Shareholders' Claims for Reflective Loss: A Comparative Legal Analysis', op.cit., at 105.

[92] GAUKRODGER, 'Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law', *OECD Working Papers on International Investment 2014/02*, 2014, pp. 1-33, at 7; KORZUN, 'Shareholder Claims for Reflective Loss: How International Investment Law Changes Corporate Law and Governance', in *University of Pennsylvania Journal of International Law*, vol. 40, 2018, pp. 189-254, *passim*; VANHONNAEKER, *Shareholders' Claims for Reflective Loss in International Investment Law*, op. cit., p. 55.

[93] *Sutter v. General Petroleum Corp.* , 28 Cal.2d 525 (1946).

A clear reasoning on the prohibition of reflective loss suit by shareholders was provided in *Alford v. Frontier Enterprises* by the 1st Circuit of the United States Court of Appeals, according to which

> [the shareholder] is attempting to use the corporate form both as shield and sword at his will. On the one hand, the corporate form […] effectively shielded Alford from liability; on the other hand, he now asserts that he operated the seven service stations through his vehicle, Prime. It is his position that, as the principal stockholder of [the corporation] and lessor of the service stations it operated, he can disregard the corporate entity and recover damages for himself. Of course, this is impermissible.[94]

Put in another way, a shareholder cannot take advantage of the autonomous and separate legal personality of its corporation in order to safeguard his or her own wealth while, at the same time, requiring domestic courts to pierce the corporate veil for the purpose of directly recovering the damages suffered by the corporation. Indeed, such a course of action would basically allow the shareholder to benefit from or disregard the corporate veil to his or her own liking. In *Gaubert v. The United States*, the 5th Circuit of the United States Court of Appeals likewise concluded that, as a general rule, «[…] individual shareholders have no separate right to sue for damages suffered by the corporation which result solely in the diminution of the value of the corporation's shares».[95] The Court identified two main rationales behind such prohibition:

> One rationale […] rests on […] judicial economy. A corporation can protect its shareholder's interest by suing in the corporate name, and if the suit is successful the proceeds will inure to the benefit of the corporation; this increases the value of the individual shares in proportion to the amount of the recovery. Compare this to a situation where all shareholders sue in their individual capacities, which achieves the same resultant recovery, but requires our legal system to process hundreds or thousands of suits, rather than one suit in the name of the corporation. […] Another rationale for the prohibition is fairness to creditors of the corporation. Common shareholders are usually at or near the bottom of the corporate financial pecking order. First come the secured then unsecured creditors, then the bondholders in order of preference, then the preferred shareholders, and lastly the common shareholders. Any recovery for injuries to the corporation is paid into the corporation, and the various creditors, bondholders, and equity-holders are 'paid' in that order. Were common shareholders allowed to sue directly and individually for damages to the value of their shares, we would be allowing them to bypass the corporate structure

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[94] *Alford v. Frontier Enter., Inc.*, 599 F.2d 483, 484 (1st. Cir. 1979).
[95] *Gaubert v. U.S.*, 885 F.2d 1284 (5th Cir. 1989).

> and effectively preference themselves at the expense of the other persons with a superior financial interest in the corporation.[96]

The same approach is also adopted in Hong Kong,[97] where the courts have consistently disallowed the recovery of reflective loss by shareholders. In *Landune International v. Cheung Chung Leung*, the High Court of the Hong Kong Special Administrative Region was asked to decide on «whether [the Judge of first instance] was right to hold that the Company did not have a bona fide substantial cross-claim against the Petitioner because the Company's loss was a reflective loss».[98] In coming to the conclusion that the claimant could not sue the defendant in order to directly recovered the damages sustained by the company, the Court elaborated on the 'no reflective loss' principle stating that:

> [such a rule] originated in *Prudential Assurance Co. Ltd v Newman Industries* […] and was authoritatively discussed by the House of Lords in *Johnson v Gore Wood & Co.* […]. Put at its simplest, the rule debars a shareholder from suing to recover a loss which is merely a reflection of the loss suffered by the company of which he is shareholder. This rule has been extended to include not only claims brought by a shareholder in his capacity as such, but also claims in his capacity as an employee or director, as well as in his capacity as a creditor.[99]

In *Waddington v. Chan Chun Hoo*,[100] the Court of Final Appeal, in rejecting the request of a parent company to recover damages incurred by the subsidiary, stated that:

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96 *Ibid.* See also *FDIC v. Howse*, 802 F. Supp. 1554 (S.D. Tex. 1992): «As a matter of law, a cause of action for injury to the property of a corporation or for destruction of its business is vested in the corporation, not a shareholder, even though the harm may result in loss of earnings to the shareholder. A corporate shareholder has no individual cause of action for personal damages caused solely by wrong done to the corporation. […] Only a corporation, not its shareholders, can complain of injuries sustained by a corporation».

97 GOO, 'Multiple Derivative Action and Common Law Derivative Action Revisited: A Tale of Two Jurisdictions', in *Journal of Corporate Law Studies*, vol. 10, 2010, pp. 255-264, *passim*; GAUKRODGER, 'Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law', op. cit., at 7; CHAISSE, ZHUOYUE LI, 'Shareholder Protection Reloaded: Redesigning the Matrix of Shareholder Claims for Reflective Loss', in *SJIL*, vol. 52, 2016, pp. 51-94, at 57-58; KORZUN, 'Shareholder Claims for Reflective Loss: How International Investment Law Changes Corporate Law and Governance', op. cit., at 199; VANHONNAEKER, *Shareholders' Claims for Reflective Loss in International Investment Law*, op. cit., p. 59, footnote 20.

98 *Landune International Ltd v. Cheung Chung Leung Richard* [2006] HKCA 5; [2006] 1 HKLRD 39; [2006] 1 HKC 517; CACV 225/2005, para. 18.

99 *Ibid.*, para. 19.

100 *Waddington Ltd. v. Chan Chun Hoo*.

> Any depletion of a subsidiary's assets causes indirect loss to its parent company and its shareholders. In either case the loss is merely reflective loss mirroring the loss directly sustained by the subsidiary and as such it is not recoverable by the parent company or its shareholders for the reasons stated in *Johnson v. Gore Wood* […]. But this is a matter of legal policy. It is not because the law does not recognise the loss as a real loss; it is because if creditors are not to be prejudiced the loss must be recouped by the subsidiary and not recovered by its shareholders.[101]

Moving to civil law jurisdiction, prior works have clearly shown that the general prohibition of reflective loss claims has also been recognized – *inter alia* – in Belgium, Czech Republic,[102] France, Germany, Italy, Japan, and the Netherlands.[103]

In France, for example, the Court of Cassation ruled out – in different cases – the possibility for a shareholder to claim a reflective loss stating that:

> la dépréciation des titres d'une société découlant des agissement délictueux de ses dirigeants constitue non pas un dommage propre à chaque associé mais un préjudice subi par la société elle-même.[104]

> [le dommage] n'était que le corollaire de celui causé a la société, [et] n'avait aucun caractère personnel.[105]

Against this background, it has been argued that:

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[101] *Ibid.*, para. 74. Such a prohibition was recently clinched in *Power Securities Company Limited v. Sin Kwok Lam and others*, [2019] HKCFI.

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[103] DE WULF, 'Direct shareholder suits for damages based on reflective loss', in GRUNDMANN, HAAR, MERKT, MULBERT, WELLENHOFER (eds), *Festschrift für Klaus J. Hopt zum 70. Geburstag am 24. August 2010*, Berlin/New York, De Gruyter, 2010, pp. 1537-1564, at 1543-1545; GAUKRODGER, 'Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law', op. cit., at 7; DE JONG, 'Shareholders' Claims for Reflective Loss: A Comparative Legal Analysis', op.cit., at 105; CHAISSE, ZHUOYUE LI, 'Shareholder Protection Reloaded: Redesigning the Matrix of Shareholder Claims for Reflective Loss', op. cit., at 55-56; KORZUN, 'Shareholder Claims for Reflective Loss: How International Investment Law Changes Corporate Law and Governance', op. cit., at 206; VANHONNAEKER, *Shareholders' Claims for Reflective Loss in International Investment Law*, op. cit., p. 59; ARATO, CLAUSSEN, LEE, ZARRA, 'Reforming Shareholder Claims in ISDS', *Academic Forum on ISDS Concept Paper 2019/*9, 17 September 2019, pp. 1-12, at 1.

[104] *Cour de Cassation (Chambre Criminelle)*, Judgment No. 97-80.664, 13 December 2000.

[105] *Cour de Cassation (Chambre commerciale, financière et économique)*, Judgment No. 97-10.886, 15 January 2002.

> Ainsi, s'agissant de la dépréciation de la valeur des droits sociaux, la Cour de cassation considère que le préjudice qui en résulte pour l'associé n'est que le corollaire du préjudice social, il n'est que la conséquence de l'amoindrissement du patrimoine de la société, de sorte qu'il est insuffisamment distinct pour fonder la recevabilité de l'action individuelle. Plus généralement, lorsqu'il est question des droits patrimoniaux de l'associé, la jurisprudence n'admet que difficilement l'existence d'un préjudice propre à celui-ci, le dommage dont il a souffert n'est très souvent que la conséquence ou le corollaire de celui-ci subi par la personne morale elle-même.[106]

Accordingly, shareholders are allowed to bring a claim only if – and to the limited extent that – they are able to prove to have suffered a personal injury, independent from the one suffered by the company.[107] This interpretation is confirmed by Article 1843-5 of the French Civil Code, which – in regulating the action brough by shareholders against the directors of the company – provides that: «[o]utre l'action en réparation du préjudice subi personnellement, un ou plusieurs associés peuvent intenter l'action sociale en responsabilité contre les gérants».[108]

A similar position is adopted under German corporate law: Articles 117(1)[109] and 317(1)[110] of the German Stock Corporation Act have been convincingly interpreted as

[106] TEFFO, 'Réflexions sur le fondement de la reconnaissance du préjudice individuel de l'associé', in *Revue des sociétés*, 2019, pp. 237-245, para. 4.

[107] BELOT, 'Le préjudice économique de l'associé victime de la dépréciation de ses titres', in *Petites affiches*, vol. 83, 2006, pp. 6-12; DANOS, 'La réparation du préjudice individuel de l'actionnaire', in *Revue de jurisprudence de droit des affaires*, vol. 13, 2008, p. 471 ff.; LIKILLIMBA, 'Le préjudice individuel et/ou collectif en droit des groupements', in *Revue trimestrielle de droit commercial et de droit économique*, vol. 20, 2009, pp. 1-59, *passim*.

[108] (*emphasis added*).

[109] Article 117(1): «Any person who, by exerting his influence on the company, induces a member of the management board or the supervisory board, a registered authorised officer (*Prokurist*) or an authorised signatory to act to the disadvantage of the company or its shareholders shall be liable to the company for any resulting damage. *Such person shall also be liable to the shareholders for any resulting damage insofar as they have suffered damage in addition to any loss incurred as a result of the damage to the company*» (*emphasis added*).

[110] Article 317(1): «If a controlling enterprise causes a controlled company with which a control agreement does not exist to enter into a transaction or to undertake or refrain from undertaking any act which is disadvantageous for such controlled company, without compensating such disadvantage by the end of the fiscal year or granting to the controlled company an entitlement to any measures serving as compensation for this, such controlling enterprise shall be liable for any resulting damage to such controlled company. *Such controlling enterprise shall also be liable to the shareholders of the controlled company for any resulting damage to the shareholders insofar as they have suffered damage in addition to any loss incurred as a result of the damage to the company*» (*emphasis added*).

excluding direct claims for reflective loss by shareholders.[111] If one looks at the two provisions, indeed, they provide for liability towards the company of any person or controlling enterprise causing an injury to it. At the same time, however, both the provisions establish that the wrongdoer will also be liable to the shareholders if – and only to the extent that – his, her or its action have caused them an additional damage, which is resulting but independent from the damage caused to the company itself. In other words, the two provisions identify the corporation as the only subject which can sue the wrongdoer in order to recover the damages suffered; that is because, *ex* Articles 117 and 317, the offender «shall be liable to the company» or «to [the] controlled company». Alongside this 'general' liability towards the corporation, the Corporation Act thus also enshrines a more discrete provision concerning the compensation of additional damages (directly) caused to the shareholders.

The prohibition of claims for reflective loss has been also recognized by the Federal Supreme Court in different judgments. In a decision dated 10 November 1986,[112] the Court identified Article 177 as the provision disallowing shareholders to sue a wrongdoer for a reflective damage, pointing out that:

> In all these cases, according to the plaintiff's submission, the damage directly incurred by IMS could at most have led to an indirect damage for the plaintiff because the value of its participation in this company has decreased accordingly. However, if German law were to be applied, this would not show that the plaintiff had suffered any recovelerab damage; the loss in value of the shares would only reflect the damage to IMS. The question arises here as to the possibility to compensate the so-called double damage, *i.e.* the compensation for damage to the company's assets, which at the same time devalues the shares of the shareholder. The legislator perceived the conflict that could arise between the claim of the shareholder and that of the society when it regulated the obligation to pay compensation for those who use their influence to the detriment of society; he solved it in such a way that he limited the shareholder's claim to compensation for direct damage in Section 117 (1) sentence 2 *AktG* and excluded indirect damage (*our translation*).[113]

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[111] An English version of the German Stock Corporation Acts is available at https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/german-stock-corporation-act.pdf.

[112] *Bundesgerichtshof*, Judgment of 10 November 1986, Az.: II ZR 140/85, available at https://research.wolterskluwer-online.de/document/dd10dcb7-3309-4222-a84d-6bff35051ebc. For a brief analysis of the case, see DE WULF, 'Direct shareholder suits for damages based on reflective loss', op. cit., at 1544.

[113] Original text of the judgment: «Der in all diesen Fällen nach dem Vortrag der Klägerin somit unmittelbar bei der IMS entstandene Schaden kann bei der Klägerin allenfalls zu einem mittelbaren Schaden dadurch geführt haben, daß sich der Wert ihrer Beteiligung an diesem

Similarly, in *Girmes*,[114] the Court stated that:

> As for this part of the alleged damage, indirect damage affecting the class is seen in the literature, which only appears as a "reflex" of the damage that occurred at the stock corporation. For this reason, the claimant is not entitled to claim damages for himself in this respect [...] These considerations apply in the starting point: If damage is inflicted on a stock corporation, the result is that the intrinsic value of the shares can be reduced by the amount of the damage. If the individual shareholder suffers damage in this way, this is only a "reflex" of the damage that has occurred at the stock corporation. […] It is irrelevant whether the company is entitled to its own claim for damages against the injuring party or not. The principle of capital preservation and the earmarking of the company's assets means that the partner can only claim compensation for damage to the company's assets by making payments to the company (*our translation*).[115]

Moving to Italy, despite the lack of an explicit provision in this sense, a prohibition for shareholders to sue a wrongdoer in order to recover a reflective loss can be *a contrario* deduced from some specific rules concerning the protection of the rights of companies.

Unternehmen entsprechend verringert hat. Damit wäre aber - bei Anwendung deutschen Rechts - ein ersetzbarer Schaden der Klägerin nicht dargetan; in dem Wertverlust der Aktien würde sich nur die Schädigung der IMS wiederspiegeln. Es stellt sich hier die Frage nach der Ersatzfähigkeit sogenannter Doppelschäden, also des Ausgleichs von Schäden des Gesellschaftsvermögens, die zugleich die Aktien des Gesellschafters entwerten. Der Gesetzgeber hat den Konflikt, der sich zwischen den Ansprüchen des Aktionärs und der Gesellschaft ergeben kann, gesehen, als er die Ersatzpflicht derjenigen regelte, die ihren Einfluß zum Nachteil der Gesellschaft benutzen; er hat ihn in der Weise gelöst, daß er in § 117 Abs. 1 Satz 2 AktG den Anspruch des Aktionärs auf den Ersatz unmittelbarer Schäden beschränkt und die mittelbaren ausgeklammert hat».

[114] *Bundesgerichtshof*, Judgment of 20 March 1995, II ZR 205/94, available at https://opinioiuris.de/entscheidung/3202.

[115] Original text of the judgment: «In diesem Teil des geltend gemachten Schadens wird im Schrifttum ein den Kl. treffender mittelbarer Schaden gesehen, der sich nur als "Reflex" des bei der Aktiengesellschaft eingetretenen Schadens darstelle. Aus diesem Grunde sei der Kl. nicht berechtigt, insoweit die Leistung von Schadenersatz für sich in Anspruch zu nehmen [...] Diese Überlegungen treffen im Ausgangspunkt zu: Wird einer Aktiengesellschaft ein Schaden zugefügt, hat das zur Folge, daß dadurch der innere Wert der Aktien um den Schadenbetrag gemindert werden kann. Erleidet der einzelne Aktionär auf diese Weise einen Schaden, stellt sich dieser lediglich als "Reflex" des bei der Aktiengesellschaft eingetretenen Schadens dar. Der Aktionär hat insoweit grundsätzlich keinen Anspruch darauf, einen Ausgleich durch Leistung in sein Privatvermögen geltend zu machen [...] Dabei ist es unerheblich, ob der Gesellschaft gegen den Schädiger ein eigener Schadenersatzanspruch zusteht oder nicht. Der Grundsatz der Kapitalerhaltung und der Zweckbindung des Gesellschaftsvermögens hat zur Folge, daß der Gesellschafter den Ausgleich eines an dem Gesellschaftsvermögen entstandenen Schadens nur durch Leistung an die Gesellschaft beanspruchen kann».

Such a prohibition, which can be considered firmly established in Italian corporate law,[116] has also been the subject of a recent and vigorous doctrinal debate because of the reforms – as well as doctrinal and jurisprudential trends – that have affected the regime of joint stock companies in Italy.[117] The starting point of the analysis cannot but be identified in Articles 2393 and 2395 of the Italian Civil Code. According to paragraph 1 of the former, «the action for liability against directors [of the company] can be brought following a deliberation of the shareholders assembly, even if the company is in liquidation» (*our translation*).[118] As for the latter, it provides that «previous provisions [– *i.e.*, those concerning the liability of directors towards the company –] do not affect the right to compensation due to the individual shareholder or third party which have been *directly harmed* by intentional or negligent acts committed by the directors» (*our translation*).[119] By reading the two Articles in conjunction, it is possible to outline the rule concerning

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[116] PINTO, 'La responsabilità degli amministratori per "danno diretto" agli azionisti', in ABBADESSA, PORTALE, *Il nuovo diritto delle società: Liber amicorum Gian Franco Campobasso*, Torino, Utet giuridica, 2006, pp. 893-940; SUDIERO, *La tutela risarcitoria del socio tra danno diretto e danno riflesso*, Torino, Giappichelli, 2020, pp. 1-368, at 26;

[117] PINTO, *La tutela risarcitoria dell'azionista fra danno diretto e danno riflesso*, Pisa, Pisa University Press, 2012, pp. 1-158, at 1-2: «La persistente, e sempre crescente, compressione dei tradizionali rimedi demolitori nell'impresa azionaria è il dato che, più di ogni altro, impone di volgere lo sguardo al problema della c.d. tutela risarcitoria dell'azionista, allo scopo di verificare entro quali limiti quest'ultimo possa ritenersi legittimato a pretendere *in proprio* il risarcimento del pregiudizio subìto dalla partecipazione sociale per effetto di un illecito consumatosi nell'agire collettivo. Invero, la sottrazione al singolo dei rimedi corporativi con rilievo collettivo, culminata nella soppressione (o comunque nella rilevante limitazione) del potere individuale di impugnare le deliberazione asseambleari non conformi alla legge o allo statuto […], legittima l'interprete a interrogarsi sui limiti entro cui il diritto comune della responsabilità civile […] possa essere chiamato a svolgere un ruolo integrativo delle forme di tutela che il diritto azionario riconosce all'azionista in relazione alla partecipazione sociale»; SUDIERO, *La tutela risarcitoria del socio tra danno diretto e danno riflesso*, op. cit., at 14-15: «Come anticipato il presente lavoro si pone l'obiettivo di cogliere, esaminare, sistematizzare e ricostruire gli strumenti che consentono al socio, in questa sua peculiare posizione, di tutelare, in via risarcitoria, il proprio investiemnto e segnatamente, anzitutto, il poc'anzi illustrato valore "*in senso lato*" della partecipazione sociale […]. Intento che si ritiene tanto più utile quanto più si consideri, da un lato, la sempre maggiore tendenza a comprimere, da parte del legislatore, i rimedi caducatori a favore di quelli obbligatori e, dall'altro, il depotenziamento (nonostante il contrario spirito della riforma del diritto societario), spesso rinvenibile in alcune posizioni dottrinali e pronunce giurisprudenziali, del diritto del socio ad abbandonare la compagine nel caso di cambiamento […] della sua posizione nella società».

[118] Original text of Article 2393(1): «L'azione di responsabilità contro gli amministratori è promossa in seguito a deliberazione dell'assemblea, anche se la società è in liquidazione». For an analysis of this provision, see the following sub-section devoted to the so-called derivative actions.

[119] Original text of Article 2395 (1): « Le disposizioni dei precedenti articoli non pregiudicano il diritto al risarcimento del danno spettante al singolo socio o al terzo che sono stati direttamente danneggiati da atti colposi o dolosi degli amministratori» (*emphasis added*).

the liability of directors vis-à-vis the corporation and its shareholders: in all the cases in which their negligent or intentional acts harms the rights of the company, it is the very company that – after a deliberation of the shareholders assembly – shall sue them in order to seek for compensation.[120] Therefore, any eventual compensation will be due to the company itself. However, if the conduct of the directors directly harms shareholders or third parties, they can claim reparation for the damages suffered. In such a case, any payment will be due to the shareholders or third parties. This rule, which only concerns the liability of directors, has been traditionally identified as an expression of a more general rule concerning the protection of shareholders, thus extending its scope of application to damages caused by third parties (namely, all the subjects which do not fall within the organization of the company).[121] Indeed,

> è […] opinione diffusa quella secondo cui l'irrisarcibilità del "danno riflesso" in favore del socio *uti singulus*, e la corrispondente limitazione del diritto al risarcimento a quest'ultimo spettante al solo danno "direttamente" arrecato, siano da considerarsi regole di portata generale nella disciplina organizzativa dell'impresa azionaria: ciò sino al punto di esprimere un principio, il cui àmbito non può certo ritenersi circoscritto alla sola ipotesi – l'unica espressamente contemplata dall'art. 2395 c.c. – dell'illecito derivante da "atti dolosi o colposi degli *amministratori*".[122]

In this respect, the Italian Court of Cassation has repeatedly confirmed that Article 2395 is a specific expression of a more general rule.[123] In greater detail, the Court has recognized:

> [l'] esclusiva legittimazione della società all'azione diretta al conseguimento del risarcimento nei confronti del terzo che con la propria condotta illecita abbia prodotto effetti negativi sullo svolgimento dell'attività dell'ente e sul suo patrimonio. Una siffatta lesione tenderà a ripercuotersi, in qualche misura, sugli interessi economici del socio, derivanti dalla sua partecipazione sociale, anche come possibile diminuzione del valore della sua quota e compromissione della redditività.

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[120] MINERVINI *SR.*, 'Note in tema di responsabilità degli amministratori di società per azioni (art. 2394 e 2395 Cod. Civ.)', in *Rivista del diritto commerciale*, 1954, p. 210 ff., *passim*; MINERVINI *SR.*, *Gli amministratori di società per azioni*, Milano, Giuffrè, 1956, pp. 1-500, *passim*.

[121] LIBERTINI, SCOGNAMIGLIO, 'Illecito del terzo e legittimazione del socio all'azione risarcitoria', in *Rivista di diritto private*, 2002, pp. 405-416.

[122] PINTO, *La tutela risarcitoria dell'azionista fra danno diretto e danno riflesso*, op. cit., at 10. The only exception to the general prohibition of reflective loss claims by shareholders would be enshrined in Article 2497 of the Italian Civil Code.

[123] *Cassazione Civile*, Judgment No. 16416 of 25 July 2007; *Cassazione Civile*, Judgment No. 14778 of 30 May 2019; *Cassazione Civile*, Judgment No. 16963 of 24 July 2014.

> Ma tale effetto costituisce un mero riflesso del danno subito dalla società, non configurandosi come conseguenza diretta ed immediata dell'illecito, bensì come conseguenza di fatto, non rilevante sul piano giuridico. Il risarcimento ottenuto dalla società, infatti, elimina automaticamente ogni danno per il socio. Il che pone in evidenza che questo non è direttamente danneggiato dall'illecito subito dalla società, mentre può esserlo dal comportamento degli organi di questa, ove non si attivino per ottenere il risarcimento ad essa dovuto.[124]

Finally, the 'no reflective loss' principle is also firmly rooted in the Dutch legal order.[125] In the seminal case *Poot v. APB*,[126] «the […] Supreme Court first firmly endorse[d] the 'no reflective loss' principle» but then «acknowledge[d] that a shareholder may have a claim for damages if the wrongdoer violates a specific duty of care […] towards the shareholder in private».[127] According to an author, this is because the managing director(s) «only ha[ve] a contractual relationship with the company and not with the shareholders».[128] Therefore, a shareholder will be entitled to claim for damages – in tort – only to the extent that a duty which is held by the directors vis-à-vis the *associés* has been allegedly violated. In this respect, the onus to prove the violation of a specific duty lies with the applicant, *i.e.*, the shareholder. The hypotheses falling within this exception have been clarified in subsequent case law: as an example, the Supreme Court in *Willemsen v. NOM* found that a specific duty had been infringed by the director of the company since he violated a rule of the articles of association explicitly provided in order to protect the interests of the shareholders.[129]

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[124] *Cassazione Civile Ss. Uu.*, Judgment No. 27346 of 24 December 2009. For a comment to the judgment, see FOTTICCHIA, 'Osservazioni in tema di illecito del terzo e danno riflesso nelle società di capitali', in Giurisprudenza commerciale, vol. 38, 2011, pp. 359-372; PINTO, 'Illecito del terzo, danno riflesso e legittimazione dell'azionista', in *Banca borsa e titoli di credito*, vol. 64, 2011, pp. 138-159.

[125] DE JONG, 'Shareholders' Claims for Reflective Loss: A Comparative Legal Analysis', op. cit., at 107-111; MULLER (ed.), *Corporate Law in the Netherlands*, Den Haag, Kluwer Law International, 2013[3], pp. 1-232, at 145: «A second unanswered question is whether, once liability has been established, a shareholder can claim compensation for the damage assessed (usually a reduction in the value of his shares, which as a 'derivative [*sic*!] loss'). Case law seems to indicate that the latter is not the case, if and in so far as the company itself has sustained damage as a result of the same acts and can institute legal proceedings itself»; VANHONNAEKER, *Shareholders' Claims for Reflective Loss in International Investment Law*, op. cit., p. 62; ARATO, CLAUSSEN, LEE, ZARRA, 'Reforming Shareholder Claims in ISDS', *Academic Forum on ISDS Concept Paper 2019/9*, 17 September 2019, pp. 1-12, at 1.

[126] *Poot v. ABP*, Hoge Raad, 2 December 1994, NJ 1995/288, available at https://www.rechtspraak.nl/.

[127] DE JONG, 'Shareholders' Claims for Reflective Loss: A Comparative Legal Analysis', op. cit., at 107.

[128] MULLER (ed.), *Corporate Law in the Netherlands*, op. cit., p. 145.

[129] *Willemsen v. NOM*, Hoge Raad, 20 June 2008, NJ 2009/21.

Contrariwise, Dutch courts did not allow the shareholder to bring a claim for reflective loss, since they found that no violation of a specific duty of care was at stake: *i*) insolvency of the company resulting from an unlawful sit-in strike;[130] *ii*) the claimant was the only shareholder;[131] *iii*) the claimant, a shareholder, was the only member of the board;[132] and *iv*) the company itself could not claim damages since it has already settled the dispute.[133]

2.3. Derivative Actions in Municipal Corporate Law

In the previous section, a 'general' prohibition of shareholders' claims for reflective loss in domestic corporate law has been identified on the basis of a comparative analysis. Apart from those cases in which there is a personal and/or direct prejudice to the rights of shareholders, the latter will thus have no recourse to recover the reduction in the value of their shares. That is because the harm suffered by shareholders is only considered as a reflection of the loss caused to the company. In such a hypothesis, therefore, the company – through its legal representative – is the only subject entitled to sue the wrongdoer and, indirectly, allow the shareholder to recover the damage suffered by bringing back its patrimony to the size it had before the tort.

Nevertheless, there might well be cases in which, because of a corporate governance malfunction, the governing organ of the injured company is unable or unwilling to start proceedings aimed at recovering from the damages suffered. It is precisely in order to answer such situations that corporate law of many national systems provide for so-called derivative actions, *viz.* a suit brought by one or more shareholders on behalf of the corporation with the aim of asserting a cause of action usually against an officer which the corporation has itself failed to assert for its injuries.[134] Such a claim can be initiated, for example, if it is the conduct of a member of the board of directors to be at issue. In this situation, the board of directors could be subject to a conflict of interests inasmuch

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[130] *Ventaz v. FNV*, Hoge Raad, 12 December 1997, NJ 1998/348.
[131] *Poot v. ABP*.
[132] *Ibid*.
[133] *Chipshol*, Hoge Raad, 15 June 2001, NJ 573/2001. For a more in-depth analysis of the Dutch case law concerning reflective loss claims, see DE JONG, 'Shareholders' Claims for Reflective Loss: A Comparative Legal Analysis', op. cit., at 107-111.
[134] GAUKRODGER, 'Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency', *OECD Working Papers on International Investment 2013/03*, 2013, pp. 1-62, at 19 ff.; VANHONNAEKER, *Shareholders' Claims for Reflective Loss in International Investment Law*, op. cit., p. 63-64. For an overview of derivative actions in corporate law, see JOFFE, DRAKE, RICHARDSON, LIGHTMAN, COLLINGWOOD, *Minority Shareholders*, Oxford, Oxford University Press, 2019[6], pp. 1-720, at 37 ff.

as it would be required to bring a lawsuit against one of its members.[135] Thus, shareholders are probably in a better position to decide about the litigation.

However, it is apparent that such an action has a limited scope: as pointed out by an author, indeed, the regime of derivative actions is «essentially circumscribed to claims against corporate 'insiders'» and «[i]t is not available for claims against outside third parties such as a government».[136] Therefore, in all the cases where who injures the company is not involved in its governance, the company is the only one entitled to start proceedings against the wrongdoer. Moreover, even when derivative actions can be resorted to, they are generally subject to a strictly regulated regime designed to avoid that the shareholders unduly use them to alter the governance structure of the company, to recover at the expense of the creditors and other share/stakeholders of the company, or to pursue claims running against the interests of the company.[137]

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[135] DAVIS, 'The Forgotten Derivative Suit', in *Vanderbilt Law Review*, vol. 61, 2008, pp. 387-451, at 397: «Obviously, different sensitivities arise when the issue is whether thecorporation should sue a competitor on antitrust grounds or challengethe constitutionality of a tax, rather than when the directors are askedto sue themselves or their colleagues on the board». As for a distinction between direct and derivative suits, see J.B., 'Distinguishing between Direct and Derivative Shareholder Suits'. *University of Pennsylvania Law Review*, vol. 110, 1962, pp. 1147-1157, *passim*.

[136] GAUKRODGER, 'Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency', op. cit., at 20. See also GELTER, 'Why Do Shareholder Derivative Suits Remain Rare in Continental Europe?', in *Brooklyn Journal of International Law*, vol. 37, 2012, pp. 843-892; GELTER, 'Mapping Types of Shareholder Lawsuits Across Jurisdictions', *ECGI Working Paper Series in Law*, Working Paper N° 363/2017, 2017, pp. 1-43. For an overview of the recent case law concerning derivative actions in common law jurisdictions see AITKEN, 'Recent Developments in the Shareholder's Derivative Action: Hong Kong and Australian Perspectives', in *Hong Kong Law Journal*, vol. 39, 2009, pp. 129-146.

[137] In this respect, see the complex regime provided for in German corporate law. GAUKRODGER, 'Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency', op. cit., at 20: «Shareholder derivative actions are governed by specific rules to address the policy concerns relating to consistency raised by reflective loss. For example, Germany introduced a shareholder derivative action into its Company Law in 2005. For the first time, the law allows shareholders to personally enforce a claim for reflective loss. The company recovers the damages, not the shareholder. The policy concerns raised by shareholder claims for reflective loss are addressed in detail by the law. The law ensures that there is practically no risk of multiple claims: (i) shareholders must obtain leave from the court to bring the action; (ii) all shareholder claims must be consolidated in a single action; and (iii) the judgment or settlement in a shareholder derivative suit binds all shareholders and the company. Creditor and non-claiming shareholder interests are also protected because, as noted, recovery goes to the company rather than the claiming shareholder. The company's pre-eminent role in deciding on the litigation is preserved: shareholders must first demand that the company bring the suit before seeking court authorisation to file their suit and the company is a party to the request for authorisation; even if the court authorises the claim and the shareholders file suit, the company can take over the suit at any time, the shareholder is joined to the company claim, and the shareholder suit is discontinued».

If one looks at the Italian legal order, Article 2393-*bis* of the Civil Code provides that shareholders who represent at least 20% of the corporate capital can sue directors in order to make them accountable for any wrongdoing against the corporation.[138] By reading Article 2393-*bis* in conjunction with Article 2393 – which regulates the action brought by the company against its own directors –,[139] it is possible to ascertain that, if the claim is successful, compensation is to be paid to the company and not to shareholders, since the latter have exercised a cause of action which pertained to the juridical person. Similarly, it is therein established that the group of shareholders who have started proceedings against the directors may waive them or enter into a settlement; however, any consideration related to the waiver or settlement must be paid to the corporation.

A similar regime is also enshrined in Article 225-252 of the French Code of Commerce, according to which: «[o]utre l'action en réparation du préjudice subi personnellement» – of which we have discussed above with regard to the exceptions to the general prohibition for reflective loss claims – «les actionnaires peuvent […] intenter l'action sociale en responsabilité contre les administrateurs ou le directeur général». If such an action is brought, «[l]es demandeurs sont habilités à poursuivre la réparation de l'entier préjudice subi par la société, à laquelle, le cas échéant, les dommages-intérêts sont alloués».[140]

Moving to common law jurisdictions, Section 260 of the English Companies Act 2006 provides that a derivative claim is proceedings by a «a member of the company […] (a) in respect of a cause of action vested in the company, and (b) seeking relief on behalf of

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[138] Article 2393-*bis*: «L'azione sociale di responsabilità può essere esercitata anche dai soci che rappresentino almeno un quinto del capitale sociale o la diversa misura prevista nello statuto, comunque non superiore al terzo. […] La società deve essere chiamata in giudizio e l'atto di citazione è ad essa notificato anche in persona del presidente del collegio sindacale. […] In caso di accoglimento della domanda, la società rimborsa agli attori le spese del giudizio e quelle sopportate nell'accertamento dei fatti che il giudice non abbia posto a carico dei soccombenti o che non sia possibile recuperare a seguito della loro escussione. I soci che hanno agito possono rinunciare all'azione o transigerla; ogni corrispettivo per la rinuncia o transazione deve andare a vantaggio della società.».

[139] Article 2393: «L'azione di responsabilità contro gli amministratori è promossa in seguito a deliberazione dell'assemblea, anche se la società è in liquidazione. […] L'azione può essere esercitata entro cinque anni dalla cessazione dell'amministratore dalla carica. La deliberazione dell'azione di responsabilità importa la revoca dall'ufficio degli amministratori contro cui è proposta, purché sia presa col voto favorevole di almeno un quinto del capitale sociale. In questo caso, l'assemblea stessa provvede alla sostituzione degli amministratori. La società può rinunziare all'esercizio dell'azione di responsabilità e può transigere, purché la rinunzia e la transazione siano approvate con espressa deliberazione dell'assemblea, e purché non vi sia il voto contrario di una minoranza di soci che rappresenti almeno il quinto del capitale sociale o, nelle società che fanno ricorso al mercato del capitale di rischio, almeno un ventesimo del capitale sociale, ovvero la misura prevista nello statuto per l'esercizio dell'azione sociale di responsabilità ai sensi dei commi primo e secondo dell'articolo 2393 bis.»

[140] For an overview of the French regime see GELTER, 'Why Do Shareholder Derivative Suits Remain Rare in Continental Europe?', op. cit., p. 854.

the company». According to the same provision, a member of a company (including a shareholder)[141] is entitled to bring a derivative claim under the Companies Act «only in respect of action arising from […] an act of omission involving negligence, default, breach of duty or breach of trust by *a director of the company*»; thus, confirming that, as a general rule of English Law,[142] derivative claims can only be resorted to against those who are, *de iure* or *de facto*,[143] involved in the governance of the company.[144]

Similarly, in the United States legal system,[145] the derivative suit is considered as a fundamental tool for shareholders in order to «push the corporation into litigation» whenever the board of directors may face a conflict of interest in bringing a claim against one of its members or an officer appointed by board itself.[146] Nevertheless, at odds with what has been said concerning other systems, such action has a far broader scope of application. Indeed, in accordance with Rule 23.1(a) of the Federal Rules of Civil Procedure, a derivative suit may be pursued by «one or more shareholders or members of a corporation […] to enforce a right that the corporation or association may properly assert but has failed to enforce».[147] This does not mean, nonetheless, that the regulation is not very strict. Quite the opposite, the Rules of Civil Procedure enshrine a series of

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[141] According to Section 260(5)(c) of the English Companies Act: «references to a member of a company include a person who is not a member but to whom shares in the company have been transferred or transmitted by operation of law».

[142] It is relevant to point out that, in accordance with Section 260(3), second part: «The cause of action may be against the director or another person (or both)». Accordingly, under English Law, a derivative claim may be brought also against a person who is not directly involved in the management of the company. Nevertheless, as explained in the *Explanatory Notes to Companies Act* (available at https://www.legislation.gov.uk/ukpga/2006/46/notes/contents), «Derivative claims against third parties would be permitted only in very narrow circumstances, where the damage suffered by the company arose from an act involving a breach of duty etc on the part of the director». This rule would thus apply, for instance, if the third party knowingly receives money or property transferred in breach of trust or knowingly assists the director in a breach of trust.

[143] According to Section 260(5)(b) of the English Companies Act: «a shadow director is treated as a director».

[144] For an overview of the English regulation concerning derivative actions by shareholders, see JOFFE, DRAKE, RICHARDSON, LIGHTMAN, COLLINGWOOD, *Minority Shareholders*, op. cit., 47-56.

[145] DEMOTT, 'Shareholder Litigation in Australia and the United States', in *Sydney Law Review*, vol. 11, 1987, pp. 259-305; ROMANO, 'The Shareholder Suit: Litigation without Foundation?', in *Journal of Law, Economics, & Organization*, vol. 7, 1991, pp. 55-87; OQUENDO, 'Six Degrees of Separation: From Derivative Suits to Shareholder Class Actions', in *Wake Forest Law Review*, vol. 48, 2013, pp. 643-672.

[146] GELTER, 'Why Do Shareholder Derivative Suits Remain Rare in Continental Europe?', op. cit., p. 847.

[147] Federal Rules of Civil Procedure, last amended in 2020, available at https://www.uscourts.gov/rules-policies/current-rules-practice-procedure/federal-rules-civil-procedure.

requirements that must be met in order for a shareholder to bring a derivative suit. Firstly, the Rules prescribes that the action cannot be pursued «if it appears that the plaintiff does not fairly and adequately represent the interests of shareholders or members who are similarly situated in enforcing the right of the corporation or association».[148] Furthermore, *ex* Rule 23.1(b), such an action requires the applicant to submit an affidavit stating that, *inter alia*, s/he made an effort in order «to obtain the desired action from the directors or comparable authority» as well as the reasons which eventually prevented him to obtain the action or to make the very effort.[149]

2.4. Brief Comparative Remarks

In the present Chapter, the question as to whether, how, and to what extent shareholders are protected in national legal orders has been briefly analysed. To this end, the laws of France, Germany, Hong Kong, Italy, the Netherlands, the United Kingdom, and the United States of America have been taken into account so as to offer an overview of both common and civil law jurisdictions. Against this background, three relevant findings can be drawn.

First, the widely recognized general rule forbids shareholders from personally recover a loss that is reflective – *i.e.*, a mere consequence – of the damages suffered by the company. Such a prohibition is generally upheld relying upon the existence of an autonomous and separate legal personality of the corporation and the need to safeguard the rights of all the stakeholders: preventing double recovery by shareholders or double jeopardy for the wrongdoer, the protection of the interest of the creditors of the company and other third parties, avoiding chaotic procedures in which thousands of shareholders claim for damages, ensuring the legitimate interest of the company, the respect of the governance structure of the society.[150]

Second, almost all – if not all – national legal systems do recognize some exceptions to the basic rule, if some (often highly debated and controversial) requirements are deemed

[148] Rule 23.1(a).

[149] According to GELTER, 'Mapping Types of Shareholder Lawsuits Across Jurisdictions', op. cit., p. 7: the so-called 'demand requirement', *i.e.* the need to compel the board to bring the claim before being able to pursue a derivative claim on behalf of the company, «is only waived if the board is conflicted in a way that would render demand futile».

[150] FERRAN, 'Litigation by Shareholders and Reflective Loss', in *CLJ*, vol. 60, 2001, pp. 245-247; KOH, 'The Shareholder's Personal Claim: Allowing Recovery for Reflective Loss', in *Singapore Academy of Law Journal*, vol. 23, 2011, pp. 863-889, at 865-873; DE JONG, 'Shareholders' Claims for Reflective Loss: A Comparative Legal Analysis', op. cit., at 99-102; MCLAUGHLIN, *Unlocking Company Law*, London/New York, Routledge, 2013^{2}, pp. 1-430, at 322.

to be met. While, in this regard, some differences are identifiable among the analysed jurisdictions, a common feature is that an additional, separate, or autonomous damage to shareholders is caused together with, or in addition to, the injury suffered by the company. In the French, German and Italian legal orders, such a requirement finds its concretization in the provisions according to which the directors or third parties are liable for additional or personal damages caused to shareholders. Under English and Dutch law, this requirement is expressed through the notion that the wrongdoer violates a separate legal duty towards the shareholder. What matters, despite the different wording adopted, is that the *ius standi* of shareholders is connected to their own autonomous (legal) position in respect of the damages claimed.

Finally, most of national legal systems – to cope with hypotheses of a corporate governance malfunction – provide for so-called derivative actions through which shareholders can bring a claim on behalf of the corporation in order to assert a cause of action that it has failed to assert for an injury suffered by itself. In such a way, shareholders are granted the possibility of asserting the interests of the company, while indirectly protecting their own. Nevertheless, it has been pointed out that, generally, domestic corporate law only allows shareholders to resort to derivative actions against corporate officers, board members or directors: in other words, a derivative suit can only be brought against those who are directly involved in the governance of the company. Contrariwise, as a rule,[151] a derivative action cannot be resorted to with the aim of asserting a claim of the company vis-à-vis third parties, such as the government, state-owned entities, other companies or private individuals who might have injured it. In all these cases, therefore, domestic corporate law identifies the company as the only subject entitled to start proceedings against the wrongdoer.

In light of the foregoing, it seems possible to identify a common approach by national legal systems towards the relationship between shareholders and their company. Such a relationship has its pillar in the separate legal personality of the company. Indeed, without it, the function of the company as an attractive instrument for carrying out business would be arguably undermined. The autonomous legal personality conferred by domestic corporate law upon companies, indeed, allows shareholders to invest their money foreseeing which will be the financial consequences if the business fails and, thus, to protect their own wealth. From a different perspective, creditors benefit from the corporate veil too, inasmuch as the assets of the company are owned by the latter and, as such, are not in the availability of shareholders. Therefore, the corporate veil as the primary feature of a company must be safeguarded. To this end, municipal law distinguishes the rights of the company from those of its shareholders.

[151] In this respect, see *supra* the analysis concerning the US legal system.

However, as already pointed out, the interests of shareholders are strictly linked with the legal position of the company. In this respect, the analysis carried out has proved that domestic legal systems are well aware of – what we have defined as – the dual nature of shareholders and of the need to ensure them with proper forms of protection, taking into account their unique economic and financial interests within the company. Such protection is generally granted through the company itself, in accordance with the assumption that whenever damage to the interests of shareholders is reflectively caused by an injury to the company, a subsequent reparation granted to the latter will also wipe out any consequence for the former. Nonetheless, it clearly emerges that all the very systems are also aware of the fact that this is not always possible. In some circumstances, either because shareholders' own rights – besides those of the society – are further aggrieved or because of a malfunction in the management of the company, shareholders are given the right to 'shine through' the veil of the company in order to personally pursue a claim. Shine through the veil, not step out of it. Indeed, even in those cases where shareholders are allowed to pursue a claim, national legal systems generally try to keep the corporate veil 'unpierced' as much as they can: derivative actions, from this perspective, allow shareholders to bring a claim while granting that the corporate veil is not – at least permanently – pierced. Shareholders will be able to sue a director or an officer of the company and, in very limited circumstances, even a third party, but any compensation to be paid will be collected by the company. In other words, shareholders are only temporarily allowed to emerge from behind the veil, which will come to shield the company (as well as its shareholders, creditors and other stakeholders) as soon as the physiological situation is restored. Similarly, an exception to the general prohibition of reflective loss claims, if any, is linked to the ascertainment of a personal and additional prejudice suffered by shareholder or to the violation of a specific duty or obligations owed towards shareholders as such. This withstands our contention that domestic legal systems, with the aim of ensuring the well-functioning and the attractiveness of corporations as an important economic instrument through which carrying out business enterprise.

In other words, the general prohibition for shareholders to bring a claim for reduction in the value of their shares following harm caused to the company does represent an important policy choice aimed at protecting certain economic values and interests, which – in elaborating any exceptions – must be taken into account and carefully balanced with other alleged relevant interests.

3. The Protection of Shareholders in Other Branches of International Law

3.1. Investment Disputes at the Time of Diplomatic Protection: The International Court of Justice on the Standing of Shareholders

As of its establishment in 1945, the International Court of Justice has had the chance to consider the scope of shareholders' rights, their relationship with the rights of the companies as well as the protection they enjoy in the international legal order in three different occasions. Despite the cases being all decided outside the modern treaty-based regime of international investment arbitration, it is nevertheless relevant to analyse the reasoning offered by the main judicial organ of the United Nations. There are good reasons to do so.

First, even if only two of the three cases were decided under customary international law, they all contributed – although to a different extent – to the development and clarification of the general international law concerning the protection of shareholders. Indeed, the decisions of the International Court of Justice on the matter have effectively shaped the existing customary regime, as confirmed by the very fact that the International Law Commission – in codifying the rules concerning diplomatic protection in its Draft Articles on Diplomatic Protection – mainly adhered to the principles identified by the Court. The relevance of customary international law for the purposes of our analysis cannot be underestimated. As clarified in Chapter 1, the fact that international investment arbitration is based upon (bilateral or multilateral) treaties does not deprive general international law of its usefulness, at the very least from the perspective of treaty interpretation and systemic integration.

Second, international investment arbitral tribunals have often – although hastily – dealt with the jurisprudence of the International Court of Justice. As pointed out in the Chapter 1, indeed, the judgment of the Court in *Barcelona Traction* is still considered the seminal case and the starting point for any analysis concerning the protection of shareholders in the international legal order. Despite the relevance of its case law has been questioned or even denied by arbitral tribunals, a dialogue with the Court rather than a confrontation is deemed to be necessary in order to grant the coherence of the international legal system.

Finally, all these cases are also relevant inasmuch as, at the outset, foreign investments and investors were only protected through diplomatic channels, including diplomatic protection before international courts and tribunals; from this perspective, therefore, the customary international law of diplomatic protection can well be considered as the precursor of international investment law and arbitration.[152]

3.1.1. *Barcelona Traction*: Establishing the Rule under Customary International Law

The first opportunity for the International Court of Justice to deal with the protection of shareholders in international law, as pointed out in Section 1.2, arose out of an application filed by Belgium against Spain «seeking reparation for damage allegedly caused to the Barcelona Traction, Light and Power Company, Limited, on account of acts said to be contrary to international law committed by organs of the Spanish State».[153]

The facts of the case are known to everyone: the Barcelona Traction was established in 1911 as a holding company incorporated and headquartered in Toronto, Canada. The company, through a group of subsidiaries, operated an electric power production and distribution system in the Spanish region of Catalonia. In the aftermath of World War I, however, most of the shares of the company were transferred to Belgian individuals or juridical persons. Afterward, Barcelona Traction issued several series of bonds, most of which in sterling.[154] However, in the '40s, Spanish authorities denied the required authorization to transfer the foreign currency which was necessary for servicing the bonds; therefore, the company was incapable of paying its engagements. Despite all the negotiations with the authorities, a solution was not found and the company was declared bankrupt by Spanish judges: as a consequence, all its assets and shares in subsidiaries were seized and later sold. Following this, Belgium started proceedings before the International Court of Justice against Spain in order to be ascertained that

> the measures, acts, decisions and omissions of the organs of the Spanish State [… were] contrary to international law and that the Spanish State [was] under an obligation towards Belgium to make reparation for the consequential damage suffered by Belgian nationals, natural and juristic persons, shareholders in Barcelona Traction.[155]

In its judgment, nevertheless, the International Court of Justice refused to hear the dispute finding that the Belgian State had no *ius standi* to bring a claim in favour of its

[152] VANHONNAEKER, *Shareholders' Claims for Reflective Loss in International Investment Law*, op. cit., pp. 65-66.
[153] *Barcelona Traction*, Judgment, *supra* note 16, para. 1.
[154] FONTANELLI, BIANCO, 'Barcelona Traction Share', in HOHMANN, JOYCE., *International Law's Objects*, Oxford, Oxford University Press, 2018, pp. 141-150.
[155] *Barcelona Traction*, Judgment, *supra* note 16, para. 25.

national shareholders. In coming to such conclusion, the Court denied the existence of any rule conferring a State the right to act in diplomatic protection of national shareholders in a foreign company in all the cases in which the lamented acts were directed by a third State against the company itself rather than against any legal rights of the shareholders as such.[156] Indeed, the Court argued that it could not simply ignore the legal personality of the corporation and allow Belgium to vindicate the rights of those who, in carrying out their business, take advantage of the corporate veil.[157] Notably, the Court pointed out that:

> In this field international law is called upon to recognize institutions of municipal law that have an important and extensive role in the international field. This does not necessarily imply drawing any analogy between its own institutions and those of municipal law, nor does it amount to making rules of international law dependent upon categories of municipal law. All it means is that international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. This in turn requires that, whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law. Consequently, in view of the relevance to the present case of the rights of the corporate entity and its shareholders under municipal law, the Court must devote attention to the nature and interrelation of those rights.[158]

Moving from these considerations, the Court adopted the municipal law clear-cut distinction between, on the one hand, the own rights of the shareholders and, on the other

[156] BRIGGS, 'Barcelona Traction: The *Jus Standi* of Belgium', in *American Journal of International Law*, vol. 65, 1971, pp. 327-345.

[157] A similar argument was already advanced by DE VISSCHER, 'La protection diplomatique des personnes morales', op. cit., p. 465: «La question revêt un aspect tout différent lorsque l'acte illicite atteint les droits propres de la société et ne frappe l'actionnaire que par ricochet, c'est-à-dire par la diminution de la valeur de sa part dans l'actif de la société. Tel est le cas, par exemple, lorsqu'un Etat confisque un immeuble ou un navire appartenant en propriété à une société ou lorsqu'un Etat met irrégulièrement fin à une concession accordée à une société. Dans pareil cas, l'actionnaire doit en principe suivre le sort de la société. Celle-ci, en tant que personne juridique autonome, a été atteinte dans ses droits propres et elle dispose, en propre, des moyens de procédure pour obtenir réparation du dommage qu'elle a subi. Après épuisement des voies de recours internes, la société lésée peut bénéficier de la protection diplomatique de l'Etat dont elle possède la nationalité, et cette protection est exclusive de toute autre. L'actionnaire qui profite de la distinction des patrimoines et des personnalités doit en accepter les inconvénients comme les avantages».

[158] *Barcelona Traction*, Judgment, *supra* note 16, para. 38.

one, the rights of a company.[159] As for the relationship between the rights of the company and its shareholders, the Court reasoned in the terms of economic 'interests', which might be well impaired by a wrongful act against the company without this meaning that they have a right to claim compensation.

According to the Court, indeed, such a distinction impacts upon the law of state responsibility and diplomatic protection. In greater detail, only when a wrongful act is directed against shareholders' own rights, their State of nationality will be entitled to invoke the international responsibility of the injuring State. That is because only an infringement upon rights involves responsibility and, thus, an obligation to make reparation.[160] Contrariwise, if the conduct of the State only indirectly affects the interests of the shareholders (inasmuch as the wrongful act is directed against the rights of the company), their State of nationality will not be entitled to act in diplomatic protection since such a course of action will not involve the responsibility of the acting State vis-à-vis the shareholders.[161] Therefore, whenever a wrongdoing against the company affects the interests of a shareholder, «it is to the latter that he must look to institute appropriate action; for although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed».[162]

Having said that, the Court then moved to consider whether the 'no reflective loss' rule might entail some exceptions to allow the 'lifting of the corporate veil' or, in other words, the 'disregard of the legal entity'. In this respect, the judges sitting in The Hague found that such a course of action «[is] justified and equitable in certain circumstances or for

[159] CAFLISCH, 'The Protection of Corporate Investments Abroad in the Light of the Barcelona Traction Case', op. cit., p. 170: «According to [the rules generally applied in municipal legal systems], limited liability companies such as Barcelona Traction are endowed with a distinct legal personality, and thus their rights cannot be identified with those of their shareholders, the latter owning a separate set of rights. If, according to the aforementioned rules, a company as such possesses a right, and if that right is alleged to have been the object of an international wrong, the State to which the company is allocated may present a claim on its behalf».

[160] *Barcelona Traction,* Judgment, *supra* note 16, para. 46.

[161] *Ibid.*: «It has also been contended that the measures complained of, although taken with respect to Barcelona Traction and causing it direct damage, constituted an unlawful act vis-à-vis Belgium, because they also, though indirectly, caused damage to the Belgian shareholders in Barcelona Traction. This again is merely a different way of presenting the distinction between injury in respect of a right and injury to a simple interest. But, as the Court has indicated, evidence that damage was suffered does not ipso facto justify a diplomatic claim. Persons suffer damage or harm in most varied circumstances. This in itself does not involve the obligation to make reparation. Not a mere interest affected, but solely a right infringed involves responsibility, so that an act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected».

[162] *Ibid.,* para. 44.

certain purposes».[163] Notably, the ICJ identified various situations in which this might take place.

The first two hypotheses respectively concerned «the treatment of enemy property during and after the two World Wars where the lifting of the veil was regarded as justified ex necessitate. The corresponding provisions of peace treaties were aimed at seizing and pooling enemy property with a view to covering reparation claims»[164] and the «various arrangements made in respect of compensation for the nationalization of foreign property».[165] According to the Court, nonetheless, the two exceptions concerned two specific areas, thus «containing *leges speciales* providing no guidance in the […] case».[166] Moreover, the judges dismissed the relevance of the arbitral case law invoked by the parties, pointing out that the exceptions therein recognized were actually based upon the specific terms of the instruments establishing the jurisdiction of the concerned tribunals or claims commissions.[167] Therefore, such a jurisprudence could not be used in order to generalize these exceptions beyond the circumstances of the specific cases.

The Court then «consider[ed] whether there might not be, in the present case, other special circumstances for which the general rule might not take effect».[168] In this respect, the Court pointed out that the piercing of the corporate veil is justified and, thus, a reflective loss claim might be brought before it whenever: *i*) the injured company ceased to exist; and *ii*) the State of nationality of the company did not have the capacity to act on behalf of the company itself. In the case at hand, nevertheless, the World Court excluded that the shareholders and their company actually fell in one of the two situations. While it was true that, from the economic standpoint, the Barcelona Traction had been entirely paralysed, the relevant fact to be considered was that the company still existed as an autonomous and separate legal entity.[169] Put another way, to the extent that the company

[163] *Ibid.*, para. 56.

[164] WITTICH, 'Barcelona Traction Case', in *Max Planck Encyclopedia of Public International Law*, 2007, para. 12.

[165] *Barcelona Traction,* Judgment, *supra* note 16, para. 61.

[166] WITTICH, 'Barcelona Traction Case', op. cit., para. 12.

[167] *Barcelona Traction,* Judgment, *supra* note 16, para. 63.

[168] *Ibid.*, para. 64.

[169] *Ibid.*, para. 66: «It cannot however, be contended that the corporate entity of the company has ceased to exist, or that it has lost its capacity to take corporate action. It was free to exercise such capacity in the Spanish courts and did in fact do so. It has not become incapable in law of defending its own rights and the interests of the shareholders. In particular, a precarious financial situation cannot be equated with the demise of the corporate entity, which is the hypothesis under consideration: the company's status in law is alone relevant, and not its economic condition, nor even the possibility of its being 'practically defunct' – a description on which argument has been based but which lacks all legal precision. Only in the event of the legal demise of the company are the shareholders deprived of the possibility of a remedy available through the company; it is only if they became deprived of all such possibility that an independent right of action for them and their government could arise».

is still *de iure* capable of vindicating its own rights vis-à-vis the wrongdoing State, shareholders are not entitled to bring a claim 'by substituting' to the company itself. As for the second circumstance, *i.e.*, the lack of capacity of the company's home State to act in diplomatic protection on its behalf, the Court concluded that – being the Barcelona Traction incorporated in Canada and thus, as recognized by several governments including the Belgium one, possessing the Canadian nationality – the only State entitled to act were to be identified in the Canadian one. According to the Court, the fact that Canada had ceased to act on behalf of the company, could not justify the lifting of the corporate veil. That is because the right to act in diplomatic protection rests within the discretionary power of the State.

Finally, the Court engaged with the argument of the Belgian government according to which the disregard of the legal personality of the company was justified on the basis of equitable considerations. In this regard, the judges of The Hague referred to the theory allowing the shareholders' national State to act in diplomatic protection whenever the allegedly wrongdoing State is the national State of the company. Nevertheless, since the case at hand did not involve such a situation, the Court «did not examine the validity of that theory».[170] Similarly, the ICJ considered the chance to allow the national State of shareholders to bring a claim by identifying a quantitative threshold of share-capital. However, it argued that such an approach would hardly be justifiable since «the owner of 1 per cent. and the owner of 90 per cent. of the share-capital should have the same possibility of enjoying the benefit of diplomatic protection».[171] On the other hand, the only available option would be that of allowing a State to bring a claim for the protection of their shareholders irrespective of any quantitative criteria. In this respect, the Court (convincingly)

> consider[ed] that the adoption of the theory of diplomatic protection of shareholders as such, by opening the door to competing diplomatic claims, *could create an atmosphere of confusion and insecurity in international economic relations*. The danger would be all the greater inasmuch as the shares of companies whose activity is international are widely scattered and frequently change hands.[172]

In light of the foregoing, the Court, by 15 votes to one, rejected the Belgian claim due to the lack of *ius standi* on behalf of its national shareholders.

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[170] WITTICH, 'Barcelona Traction Case', op. cit., para. 17.
[171] *Barcelona Traction*, Judgment, *supra* note 28, para. 94.
[172] *Ibid.*, para. 96 (*emphasis added*).

3.1.2. *Elettronica Sicula S.p.A.*: A Treaty Issue

Nineteen years after the judgment rendered in *Barcelona Traction,* a Chamber of the International Court of Justice was called to decide another dispute concerning the protection of shareholders under international law. In the case concerning *Elettronica Sicula S.p.A.*,[173] the United States of America contented that Italy, «through [its] actions with respect to an Italian company wholly owned by two United States corporations»,[174] had violated its international obligations under the Treaty of Friendship, Commerce and Navigation (FCN) between Italy and the United States,[175] as well as the Supplementary Agreement concluded on 26 September 1951.[176] The dispute arose over the requisition by the Italian government of the plant and its related assets of Elettronica Sicula S.p.A., an Italian joint stock company whose shares were entirely owned by the American corporations. In greater detail, the US contended that the requisition carried out by the respondent State «was intended go, and did in fact, prevent [the two corporations] from proceeding with their decision to conduct an orderly liquidation of ELSI».[177]Accordingly, the US requested full compensation for the damages suffered by its companies following the requisition as well as other actions and omissions of Italy.

As opposed to Spain in *Barcelona Traction*, the respondent State did not rise any objections to the Court's jurisdiction; quite the opposite, Italy «fully recognize[d] it […] in so far as it relate[d] to the interpretation and application of the 1948 Treaty and the 1951 Supplementary Agreement».[178] Rather, the Italian government argued that the claim brought by the US was inadmissible since the two corporations had not exhausted – prior to the beginning of the proceedings before the Court – local remedies as required under international law. Moreover, as for the merits, Italy denied any violation of the FCN. The

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[173] For an analysis of the case, see KUBIATOWSKI, 'The Case of Elettronica Sicula S.p.A: Toward Greater Protection of Shareholders' Rights in Foreign Investments', in *CJTL*, vol. 29, 1991, pp. 215-244; VANHONNAEKER, *Shareholders' Claims for Reflective Loss in International Investment Law*, op. cit., p. 70 ff.; BOTTINI, *Admissibility of Shareholder Claims under Investment Treaties*, op. cit. pp. 138-140.

[174] *Case concerning Elettronica Sicula S.p.A. (United States of America v. Italy)*, Application instituting proceedings of the United States, 6 February 1987, in *ICJ Pleadings, Oral Arguments, Documents*, vol. I, p. 3.

[175] Treaty of Friendship, Commerce and Navigation between the United States of America and the Italian Republic, signed 2 February 1948, entered into force 26 July 1949.

[176] Agreement Supplementing the Treaty of Friendship, Commerce and Navigation between the United States of America and the Italian Republic, signed 26 September 1951, entered into force 2 March 1961.

[177] *Elettronica Sicula S.p.A.*, Application instituting proceedings of the United States, *supra* note 174, p. 4.

[178] *Elettronica Sicula S.p.A.*, Counter-Memorial of Italy, in *ICJ Pleadings, Oral Arguments, Documents*, vol. II, p. 44.

objection as to the admissibility of the case was rejected by the Chamber, according to which:

> It is never easy to decide, in a case where there has in fact been much resort to the municipal courts, whether local remedies have truly been 'exhausted'. But in this case Italy has not been able to satisfy the Chamber that there clearly remained some remedy which Raytheon and Machlett, independently of ELSI, and of ELSI's trustee in bankruptcy, ought to have pursued and exhausted.[179]

Having said that, the Chamber of the Court «proceeded to consider the merits of a claim invoking damages to the shareholders due to measures taken vis-à-vis the company».[180] In doing so, however, the judges did not dwell upon the possibility for the applicant State to start proceedings on behalf of shareholders and «took for granted that the United States was entitled to protect the US shareholders in the Italian corporation».[181]

Against this background, one has to question whether such a decision might be read as an overrule of the principles established in *Barcelona Traction*.[182] The answer seems to

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[179] *Elettronica Sicula S.p.A.*, Judgment, 20 July 1989, ICJ Reports 1989, p. 15, at 63.

[180] BOTTINI, *Admissibility of Shareholder Claims under Investment Treaties*, op. cit., p. 139.

[181] VANHONNAEKER, *Shareholders' Claims for Reflective Loss in International Investment Law*, op. cit., p. 71.

[182] In this sense, see ALEXANDROV, 'The "Baby Boom" of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as "Investors" and Jurisdiction *Ratione Temporis*', op. cit., at 28: «Moreover, subsequent to *Barcelona Traction*, in *Elettronica Sicula*, the International Court of Justice clearly accepted the concept of the protection of shareholders of a corporation idnependently from the protection of the corporation, even though in that case the corporation had the nationality of the host state»; SCHLEMMER, 'Investment, Investor, Nationality and Shareholder', in MUCHLINSKI, ORTINO, SCHREUER (eds), *The Oxford Handbook of International Investment Law*, Oxford, Oxford University Press, 2008, pp. 49-88, at pp. 81-82: «It has been accepted in international law that shareholders have a right to seek protection independent from the corporation. The decision by the ICJ in the Barcelona Traction case which in the past has been held to indicate that shareholders did not have an action for compensation in international law except in two specific cases, namely when the shareholder's direct rights were infringed, or if there is a treaty in international law-making provision for such an instance has since been dispelled by ICSID tribunals and the ICJ itself. Barcelona Traction dealt with the diplomatic protection of a company and not with the issue of the protection of shareholders in investment-related cases; it did not examine whether international law provided an independent source of rights for shareholders or for their protection. The only matter considered by the ICJ was whether a state could protect its shareholders in a foreign corporation affected by measures of a third state. In the subsequent decision in Elettronica Sicula SpA (ELSI) the ICJ accepted the protection of foreign shareholders by the state of their nationality against the state of incorporation. This was found even though, in this case, the corporation had the nationality of the host state». See also *CMS Gas Transmission Company v. The Republic of Argentina*, Decision of the Tribunal on Objections to Jurisdiction, *supra* note 38, para. 44: «Barcelona Traction is therefore not directly relevant to the present dispute, although it marks the beginning of a fundamental change of the applicable concepts under international law and State practice. In point of fact,

be in the negative for different reasons. First, as we will see in the next sub-section, the ICJ in the *Diallo* case firmly confirmed the principles laid down in *Barcelona Traction*, thus providing a strong argument that the judgment in *ELSI* cannot be read as an overruling. At the most, it could be seen as a wobble. However, moving to the second consideration, a different explanation – which would be capable of reconciling the decisions in *Barcelona Traction* and *ELSI* – could be identified: «the claim in *ELSI* involved shareholder rights under *Barcelona Traction*'s exposition of the law».[183] Such an argument seems to find an echo in the separate opinion rendered by Judge Oda in the case under consideration. According to him, indeed:

> The very concept of a joint-stock company embodies a distinction between the corporate entity and the assemblage of shareholders. The fundamental character of the company, particularly with regard to the shareholders' status, was so clearly expounded in the Court's Judgment in the case concerning the *Barcelona Traction, Light and Power Company, Limited (New Application)* that it is relevant to quote certain passages from that decision.[184]

Therefore,

> Raytheon and Machlett certainly could, in Italy, 'organize, control and manage' corporations in which they held 100 per cent of the shares – as in the case of ELSI – but this cannot be taken to mean that those United States corporations, as shareholders of ELSI, can lay claim to any rights other than those rights of shareholders guaranteed to them under Italian law as well as under the general principles of law concerning companies. The rights of Raytheon and Machlett as shareholders of ELSI remained the same and were not augmented by the FCN Treaty. Those rights which Raytheon and Machlett could have enjoyed under the FCN Treaty were not breached by the requisition order, because that order did not affect the 'direct rights' of those United States corporations, as shareholders of an Italian company, but was directed at the Italian company of which they remained shareholders.[185]

In other words, according to Judge Oda, the admissibility of the claim brought by the United States should be as a confirmation of the principles laid down in the *Barcelona*

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the Elettronica Sicula decision evidences that the International Court of Justice itself accepted, some years later, the protection of shareholders of a corporation by the State of their nationality in spite of the fact that the affected corporation had a corporate personality under the defendant State's legislation».

[183] BOTTINI, *Admissibility of Shareholder Claims under Investment Treaties*, op. cit., p. 139.

[184] *Elettronica Sicula S.p.A.*, Judgment, *supra* note 179, Separate Opinion by Judge Oda, p. 83.

[185] *Ibid.*, p. 88.

Traction inasmuch as the applicant State was not seeking for compensation of the damages suffered by shareholders because of the fall in the value of their shares (as a reflection of the damages suffered by ELSI S.p.A.), but rather as a direct infringement upon their own rights to manage and control the company.[186] From this perspective, therefore, the decision of the Chamber strengthened rather than weakened that rendered in *Barcelona Traction*.[187]

Lastly, as pointed out by some authors, even if the approach of the Chamber in *ELSI* could be read as opposed to the one taken in *Barcelona Traction*, it is not straightforward how the case might be read as reflecting a change in the general international law principles governing shareholders' claims. The case, indeed, did not address a claim arising under customary international law; contrariwise «[t]he ELSI case […] can be seen as limited to the particular treaty provisions at issue, and as providing little, if any, departure from the principles set forth in the *Barcelona Traction* case».[188]

3.1.3. *Ahmadou Sadio Diallo*: Confirming the Rule

Forty years after the decision in the case of *Barcelona Traction*, the International Court of Justice had to deal for a second time with the protection of shareholders under customary international law and, thus, had the chance to confirm or overrule the principles laid down in the seminal decision. In the meantime, indeed, thousands of international investment agreements had been signed and consistently interpreted as allowing shareholders to bring reflective loss claims. The case concerning *Ahmadou Sadio Diallo* arose out of the alleged arbitrary arrest, expulsion and other degrading

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[186] In this sense, see MURPHY, 'The ELSI Case: An Investment Dispute at the International Court of Justice', in *YJIL*, vol. 16, 1991, pp. 391-452, at 418: «Most importantly, the United States contended that even customary international law, in light of the *Barcelona Traction* decision, provides protection for foreign shareholders who are deprived of their rights as shareholders. Although the United States did not rely on customary international law in *ELSI*, it did frame its case in terms of a deprivation of shareholders' rights. Therefore, application of *Barcelona Traction* would not block the United States claims in *ELSI*».

[187] This does not mean that the case is not problematic at all. Indeed, as argued by COHEN SMUTNY, 'Claims of Shareholders in International Investment Law', op. cit., p. 370: « While the court's decision leaves somewhat unclear what rights to 'control and manage' a shareholder actually might have that are distinguishable from the company's own rights to manage its affairs, that may be because the court did not have reason to elaborate the point, as it concluded that, at the time of the requisition, neither the shareholders nor the company had any relevant rights to control and manage. Thus, the court found that the acts at issue, including the requisition, did not deprive the US shareholders of management or control over ELSI because once ELSI was legally insolvent, the shareholders did not have rights of management and control of it».

[188] COHEN SMUTNY, 'Claims of Shareholders in International Investment Law', op. cit., p. 372.

treatment of a Guinean national, Mr Diallo, by the Democratic Republic of Congo (DRC).[189] Mr Diallo resided in the territory of the DRC, where he had established two Zairean limited liability companies: Africom-Zaire and Africontainers-Zaire, through which he was carrying out his business. According to the DRC, the economic activities carried out by Mr Diallo «breached public order in Zaire, especially in the economic, financial and monetary areas».[190] In this respect, Guinea argued that:

> in arbitrarily arresting and expelling its national, Mr. Ahmadou Sadio Diallo; in not at that time respecting his right to the benefit of the provisions of the [1963] Vienna Convention on Consular Relations; in subjecting him to humiliating and degrading treatment; in depriving him of the exercise of his rights of ownership and management in respect of the companies founded by him in the DRC; in preventing him from pursuing recovery of the numerous debts owed to him – to himself personally and to the said companies – both by the DRC itself and by other contractual partners; in not paying its own debts to him and to his companies, the Democratic Republic of the Congo has committed internationally wrongful acts which engage its responsibility to the Republic of Guinea.[191]

The respondent State challenged the admissibility of the case, arguing that: *i*) neither Mr Diallo nor his two companies had exhausted, prior to the beginning of the proceedings before the Court, the available Zairean local remedies in accordance with international law; and *ii*) Guinea did not have standing to act in diplomatic protection since the application was aimed at «secur[ing] reparation for injury suffered on account of the alleged violation of rights of companies not possessing its nationality».[192]

As for the first objection, the Court rejected the contention of the DRC finding that the respondent State had not proved the existence, within its own domestic legal system, of any available and effective remedy to which Mr Diallo could resort in order to vindicate his rights.

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[189] For an analysis of the case, see DORIGO, ‘Sulla protezione diplomatica degli azionisti: il caso *Diallo* di fronte alla Corte Internazionale di Giustizia’, in *Rivista di diritto internazionale*, vol. 90, 2007, pp. 705-737; KNIGHT, O’BRIEN, ‘Ahmadou Sadio Diallo – Republic of Guinea v. Democratic Republic of the Congo – Clarifying the Scope of Diplomatic Protection of Corporate and Shareholder Rights’, in *Melbourne Journal of International Law*, vol. 9, 2008, pp. 151-170; VERMEER-KÜNZLI, ‘The Subject Matters: The ICJ and Human Rights, Rights of Shareholders, and the *Diallo* case’, in *Leiden Journal of International Law*, vol. 24, 2011, pp. 607-625; SCHMALENBACK, ‘Ahmadou Sadio Diallo Case (Republic of Guinea v Democratic Republic of the Congo)’, in *Max Planck Encyclopedia of Public International Law*, 2019.

[190] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment, 30 November 2010, ICJ Reports 2007, p. 582, para. 15.

[191] *Ibid.*, para. 11.

[192] *Ibid.*, para. 11.

With regard to the second objection, the Court drew a distinction among: *i*) the individual (human) rights of Mr Diallo; *ii*) his own direct rights as *associé* (*i.e.*, as a shareholder) in Africom-Zaire and Africontainers-Zaire; and *iii*) the very «rights of those companies, by substitution» (*i.e.*, a reflective loss claim).[193] As for the first category, no doubts could be raised as to the entitlement of Guinea to act in diplomatic protection; therefore, there is no need to further analyse the issue. Far more complex, instead, is the analysis of the second and third categories.

Regarding Mr Diallo's direct rights as shareholder of the two companies, the Court recalled the findings of *Barcelona Traction,* pointing out that the existence of an independent corporate legal personality implies a need to distinguish between the rights of the company and those of its shareholders. While the company is the only entitled to bring a claim in order to vindicate its own rights (*e.g.,* the right to property of its own assets), «what amounts to the internationally wrongful act, in the case of *associés* or shareholders, is the violation by the respondent State of their direct rights in relation to a legal person, direct rights that are defined by the domestic law of that State».[194] Therefore, as far as the direct rights of Mr Diallo as shareholder, the Court rejected the objection of inadmissibility raised by the DRC.

Finally, the Court moved to consider the admissibility of the exercise of diplomatic protection 'by substitution', which «essentially consisted of an objection to the admissibility of a shareholder's claim for reflective loss in the context of customary international law of diplomatic protection».[195] Against this background, the Court

> having carefully examined State practice and decisions of international courts and tribunals in respect of diplomatic protection of *associés* and shareholders, [found] that these do not reveal – at least at the present time – an exception in customary international law allowing for protection by substitution [(*recte*, shareholder's claim for reflective loss)], such as is relied on by Guinea.[196]

More importantly, the Court (albeit superficially) took into account international investment agreements as well as investment arbitration jurisprudence in order to ascertain whether the rules concerning shareholders' claims for reflective loss had actually changed. Sadly enough, the Court merely ruled out the relevance of such agreements by stating that:

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[193] *Ibid.*, para. 31.
[194] *Ibid.*, para. 64.
[195] VANHONNAEKER, *Shareholders' Claims for Reflective Loss in International Investment Law*, op. cit., p. 75.
[196] *Ahmadou Sadio Diallo*, Judgment, *supra* note 190, para. 89.

> The fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established *special legal régimes governing investment protection*, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary. *The arbitrations relied on by Guinea are also special cases*, whether based on specific international agreements between two or more States, including the one responsible for the allegedly unlawful acts regarding the companies concerned […] or based on agreements concluded directly between a company and the State allegedly responsible for the prejudice to it […].[197]

Put it another way, the Court confirmed that «the position in general international law on shareholder rights had not changed forty years after *Barcelona Traction*».[198] From this point of view, therefore, the Court confirmed that – under customary international law – shareholders have no standing to bring a claim against measures affecting the rights of the company unless a specific instrument provides otherwise.

3.1.4. The International Court of Justice's Jurisprudence on Shareholder's Claims under International Law: A Critical Appraisal

There is nothing more difficult than providing a critical appraisal of a case, *i.e.*, *Barcelona Traction*, and a strand of jurisprudence upon which hundreds of pages have been written, either praising the approach of the Court for having taken into account and respected a creation of domestic law, or criticizing the judges sitting in The Hague for their formalism and lack of flexibility.[199] Against this background, this sub-section is not

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[197] *Ibid.*, para. 90 (*emphasis added*). For a critical analysis of this argument and its effects on the system, see PALOMBINO, MINERVINI, 'Apropos of the External Precedent: Judicial Cross-Pollination Between Investment Tribunals and International Courts', in GOURGOURINIS (ed.), *Transnational Actors in International Investment Law*, Cham, Springer, 2021, pp. 133-150, *passim*.

[198] BOTTINI, *Admissibility of Shareholder Claims under Investment Treaties*, op. cit., p. 140.

[199] LUTZ, 'Diplomatic Protection of Corporation and Shareholders – Capacity of Governement to Espouse Claims of Shareholders of a Foreign Corporation', in *California Western International Law Journal*, vol. 1, 1970, pp. 141-150; HIGGINS, 'Aspects of the Case Concerning the Barcelona Traction, Light and Power Company, Ltd.', in *Virginia Journal of International Law*, vol. 11, 1971, pp. 327-343; BRIGGS, 'Barcelona Traction: The *Jus Standi* of Belgium', in *American Journal of International Law*, op. cit.; SACERDOTI, 'Barcelona Traction Revisited: Foreign-Owned and Controlled Companies in International Law', in DINSTEIN, TABORY, *International Law at a Time of Perplexity. Essays in Honour of Shabtai Rosenne*, Dordrecht/Boston/London, Martinus Nijhoff, 1989, pp. 699-716; WITTICH,

aimed at 're-judging' the *Barcelona Traction* or its epigones, but rather it tries to shed some light on certain issues which might be relevant for the analysis.

First, it is relevant to point out that the International Court of Justice in *Barcelona Traction*, when asked to shape the rule concerning the protection of shareholders by their State of nationality, was fully aware of the risks inherently intertwined with blank permission to bring reflective loss claims. In this respect, indeed, the Court stressed that such an approach «could create an atmosphere of confusion and insecurity in international economic relations».[200] Reading between the lines, this is because the interrelated web of individuals damaged by the measures taken against a company, their respective causes of action, and circulation of shares would actually expose the wrongdoing State to a nebulous bulk of overlapping proceedings. From this perspective, therefore, the current situation of parallel and multiple proceedings in international investment arbitration might not come as a surprise. Quite the opposite, one might say that the ICJ had clearly foreseen the difficulties the system is currently facing.

Second, one cannot but agree with those authors who have identified as a weakness of the reasoning of the Court its choice to simply disregard «the existing and unsettled international case law which recognized in some instances the right of shareholders to benefit from the diplomatic protection of their home State»[201] as well as – in the *Diallo* case – the jurisprudence of international investment arbitral tribunals. In other words, the

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'Barcelona Traction Case', op. cit.; STERN, 'La protection diplomatique des investissements internationaux: de Barcelona Traction à Elettronica Sicula ou les glissements progressifs de l'analyse', in Journal du droit international, vol. 117, 1990, pp. 897-948; VAN HOUTTE, 'Protection of Shareholders in Investment Disputes – 45 Years after Barcelona Traction "Observations sur le Fondement de la Protection Diplomatiques des Actionnaires de Sociétés Anonymes" by Charles de Visscher', in *Reviue belge de droit international / Belgian Review of International Law*, vol. 48, 2015, pp. 514-520.

200 *Barcelona Traction*, Judgment, *supra* note 16, para. 96.

201 VANHONNAEKER, *Shareholders' Claims for Reflective Loss in International Investment Law*, op. cit., p. 76. In this respect, see the analysis by JONES, 'Claims on Behalf of Nationals Who are Shareholders in Foreign Companies', in *BYIL*, vol. 26, 1949, pp. 225-258; JIMENEZ DE ARECHAGA, 'Diplomatic Protection of Shareholders in International Law', in *Philippine International Law Journal*, vol. 4, 1965, pp. 71-98. See also BOTTINI, *Admissibility of Shareholder Claims under Investment Treaties*, op. cit., pp. 79-124 according to whom «Despite their international character and even though treaties created the causes of action, the Venezuelan and Mexican [Claims] Commissions *recognized the reality of an underlying private interest in the claims that the states presented to them*. […] Further, and unlike investment tribunals, the commissions did not develop the idea of the 'independence' of claims under international law. […] Both the [Commissions] asserted their power to examine standing and cause of action after having affirmed their jurisdiction and in analysing the merits of the claims. […] The [Claims] Commissions were less inclined to accept claims by shareholders for damages suffered by the company than modern investment tribunals. Although this may be partly because of the effect of certain IIA provisions, the commissions' decisions are still instructive».

Court seems to have ignored that «[a] series or a recurrence of treaties laying down a similar rule may produce a principle of customary international law to the same effect. Such treaties are thus a step in the process whereby a rule of international custom emerges».[202] Even more, the very choice to dismiss the rules and practice of international investment law and arbitration as the mere product of *special legal regimes* might well have encouraged investment tribunals to deem the jurisprudence of the Court as irrelevant in such field. In other words, the Court should have seized the opportunity to try and further a fruitful judicial dialogue and bring some coherence between the regime of diplomatic protection under customary international law and the treaty-based regime of investment arbitration, rather than nourished the sense of fragmentation.[203]

Finally, it is interest to stress that in both *Barcelona Traction* and *Diallo* the Court put very much emphasis on «the consistency of its findings with the approach adopted in municipal law ascertained by a comparative approach of the same issue».[204] This is particularly apparent with regard to the 'lifting of the corporate veil'. On a par with municipal law which, «confronted with economic realities, has had to provide protective measures and remedies in the interests of those within the corporate entity as well as of those outside who have dealings with it»,[205] the Court was called to identify whether the same was possible under international law. Faced with the same issue in a different context – *i.e.*, the international legal plane – the Court concluded that «being an exceptional [course of action] admitted by municipal law in respect of an institution of its own making, [it] is equally admissible to play a similar role in international law».[206] In other words, not only the Court felt the need to (fully) transplant into the international legal order the autonomous legal personality of corporations as well as the distinction between their rights and those of the shareholders, but also decided to approach such an institution in the same way of domestic corporate law.

By way of conclusion, the analysis carried out in this section has provided us with a clear overview of the approach adopted by the International Court of Justice in those cases concerning the protection of shareholders for a reflective loss. By recognizing, in accordance with municipal law, the separate legal personality of the companies, the Court

[202] STARKE, 'Treaties as a 'Source' of Interantional Law', in *BYIL*, vol. 23, 1946, pp. 341-346, at 344. See also D'AMATO, 'Treaties As a Source of General Rules of International Law', in *HILJ*, vol. 3, 1962, pp. 1-43; MCLACHLAN, 'Investment Treaties and General International Law', in *ICLQ*, vol. 57, 2008, pp. 361-401.

[203] PAUWELYN J., 'Fragmentation of International Law', in *Max Planck Encyclopedia of International Law*, 2006; WEBB P., *International Judicial Integration and Fragmentation*, Oxford, Oxford University Press, 2013.

[204] VANHONNAEKER, *Shareholders' Claims for Reflective Loss in International Investment Law*, op. cit., pp. 81-82.

[205] *Barcelona Traction*, Judgment, *supra* note 16, para. 56.

[206] *Ibid.*, para. 58.

has aligned its jurisprudence and the rules of international law to that of domestic corporate systems. Therefore, the municipal law distinction between rights and interests is, as such, therefore valid on the international legal plane. In doing so, the Court, however, has not limited its reasoning to a mere transplant. In a paragraph which has been often overlooked by a critical part of the scholarship, the judges convincingly pointed out the risks that an unconditional open to reflective loss would have brought within the institution of diplomatic protection and, more generally, in the international legal order. It is precisely in order to grant the orderliness and coherence of the system that the World Court adopted the same approach of domestic law. The same holds true with regard to the exceptions carved out in *Barcelona Traction* and *Diallo*: despite being different from those recognized in national legal systems, they seem to answer the same need, *viz*. to provide shareholders with a remedy when there is no other available.

In this respect, therefore, the jurisprudence of the International Court of Justice has identified, as a general rule, a prohibition for States to act in diplomatic protection on behalf of their national shareholder whenever damage is caused to the company. The piercing of the corporate veil to allow reflective loss claims, instead, stands out as an exception whenever a shareholder would be otherwise deprived of any protection on the international plane.

3.2. The Protection of Shareholders under the European Convention on Human Rights

In order to understand and assess the extent to which shareholders are entitled to protection of their rights on the international legal plane, it is also necessary to take into account the conventional regimes of international human rights law.

Generally speaking, the establishment of regional human rights systems is the result of States' efforts to find a compromise solution for the question of cultural relativism vis-à-vis universalism of human rights. To this end, each regime creates an *espace juridique* in which common minimum standards in the field of human rights and fundamental freedoms are applied under the supervision of monitoring bodies – which differ on a number of features, such as the binding nature of their pronouncements.[207] For the purpose of the present thesis, the two main regional systems for the protection of human rights will be analysed: the one established pursuant to the European Convention on Human Rights and the one created by the American Convention on Human Rights.

[207] CASSESE, *I diritti umani oggi*, Bari, Laterza, 2008, pp. 1-264, at 50; MARCHESI, *La protezione internazionale dei diritti umani*, Torino, Giappichelli, 2021, pp. 1-288, at 21.

As already mentioned in the Introduction, the choice of the two systems is not left to chance: indeed, the treaty bodies pertaining to the universal system of human rights protection – including the International Covenant on Civil and Political Rights (ICCPR),[208] and the International Covenant on Social, Economic and Cultural Rights (ICESCR) – and those monitoring State compliance with other main regional human rights treaties – including the African Charter on Human and Peoples' Rights,[209] and the

[208] The Human Rights Committee has clearly stated that the rights of a company are not protected under the ICCPR. Therefore, it rejected all the claims brought by individuals alleging the violation of the rights of their companies. See *Sharif Mohamed v. Barbados*, Communication No. 502/1992, U.N. Doc. A/49/40, 31 March 1994, para. 392: «Under article 1 of the Optional Protocol, individuals who claim to be victims of violations by a State party of any of the rights set forth in the Covenant may submit communications to the Committee. In case No. 502/1992 […], the owner and sole shareholder of a company claimed that he was a victim of a violation of article 14, paragraph 1, of the Covenant, because of alleged procedural irregularities in a lawsuit law to which his company was a party. The Committee considered that the author was essentially claiming violations of the rights of his company, which had its own legal personality, and concluded that the author had no standing under article 1 of the Optional Protocol»; *Michelle Lamagna v. Australia*, Communication No. 737/1997, U.N. Doc. CCPR/C/65/D/737/1997, 30 April 1999, para. 6.2: «The Committee considers that the author, by claiming violations of her company's rights, which are not protected by the Covenant has no standing within the meaning of article 1, of the Optional Protocol, in respect of the complaint related to her company and that no claim related to the author personally has been substantiated for purposes of article 2 of the Optional Protocol»; *Eduardo Mariategui et al. v. Argentine*, Communication No. 1371/2005, U.N. Doc. CCPR/C/84/D/1371/2005, para. 4.3: «4.3 The Committee notes that the authors have submitted the communication claiming to be victims of violations of their rights under articles 2, 14 an 26, because of the alleged failure of the State Party to redress the damages caused to them as owners of the company Mariategui S.A.C.I.M.A.C, arising from the alleged violation of four contracts for the construction of public works in which the company acted either as the main creditor or as cessionary of the creditor. However, the Committee considers that the authors are essentially claiming rights that allegedly belong to a private company with an entirely separate legal personality, and not to them as individuals. It recalls its jurisprudence […] that in regard to a claim such as that at issue in the present case, the authors have no standing under article 1 of the Optional Protocol. It concludes that communication is inadmissible *ratione personae* under that provision».

[209] The situation in the framework of the African Charter on Human and Peoples' Rights, signed 27 June 1981, entered into force 21 October 1986, is more ambiguous. The African Commission has implied that the guarantees enshrined in the Charter also cover juridical persons (*Media Rights Agenda and Constitutional Rights Project v. Nigeria*, Communication Nos 105/93, 128/94 and 152/96, Merits, Judgment, 31 October 1998, para. 71, available at www.globalhealthrights.org). However, according to Article 5(3) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, signed 10 June 1998, entered into force 25 January 2004, the Court can be seized only by NGOs or individuals. This seems to exclude that juridical persons might be entitled to directly claim their own rights before the Court. For a case concerning the protection of shareholders and their relationship with the company, see the majority decision and the dissenting opinion by Judges Kioko and Matusse in *Jean-Claude Roger Gombert v. Republic of Côte d'Ivoire*, App. No. 038/2016, Decision, 22 March 2018.

Arab Charter on Human Rights – have produced very few case law which might be deemed to be relevant for our analysis.

3.2.1. The Relevant Framework: Article 34 ECHR and Article 1 of Protocol No. 1

In order to understand the approach of Strasbourg institutions to corporate legal personality and assess the protection shareholders are granted in accordance with the European Convention on Human Rights, it is first necessary to identify the relevant treaty provisions.

As with any application brought before the conventional institutions, individuals *qua* shareholders must satisfy the requirements enshrined in Article 34 of the Convention, according to which: «the Court may receive application from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention of the protocols therein». In this regard, the Court has consistently held that «in order to avail of article 34 of the Convention, two conditions must be met: the applicant must be a 'person, non-governmental organisation or group of individuals' and must 'make out a case that he or she is the victim of a violation of the Convention'».[210]

As for the first requirement, suffice it to mention that while shareholders fulfil it as persons, corporations are ascribed within the category of non-governmental organisations. As such, no doubts can be cast as to their entitlement to bring a claim and – by reading, *ex* Article 31 VCLT, Article 34 in conjunction with Article 1– to be right bearers under the Convention.[211]

Far more complex with regard to shareholders is the second requirement, the so-called 'victim status'. The notion of victim *ex* Article 34 «has an autonomous and independent meaning that does not depend upon concepts of national law such as the legal interest and the *locus standi*». For the purposes of our discussion, therefore,

> solutions adopted in municipal law concerning shareholders' ability to protest against measures that directly concern their company rather than themselves, or, for

[210] SCHABAS, *The European Convention on Human Rights: A Commentary*, Oxford, Oxford University Press, 2015, pp. 1-1434, at 736.

[211] *Ibid.*, p. 92: «The word 'everyone' in article 1 should be read in conjunction with article 34, where a right of petition to the Court is recognized to 'any person, non- governmental organisation or group of individuals'. It applies to corporate bodies or moral persons, which are viewed as non-governmental organizations for the purposes of article 34. For some rights, however, the context makes it clear that only physical persons are contemplated. Article 34 concerns admissibility criteria. However, it would make no sense that article 34 could have a broader scope than article 1».

> that matter, the very construct of separate legal personality, which is inherently municipal, do not necessarily control the Court's perception of 'victimhood'.

According to the well-established case law of the Court, to be a victim the applicant must be directly affected by the act or omission impugned.[212] As a general rule, therefore, an applicant is not entitled to start proceedings at Strasbourg for injuries affecting other persons.[213] From this perspective, it becomes evident that – if recognized by the Court – the municipal concept of a separate and autonomous legal personality conferred upon companies would arguably represent an almost insurmountable hurdle for shareholders to bring a reflective loss claim. Indeed, proceedings brought by shareholders for a fall in the value of their shares resulting from a measure directed against the company would hardly satisfy the directedness test.

The relevant substantive provision as far as the protection of shareholders' rights and interests within the conventional system is Article 1 of Protocol No. 1 of the European Convention on Human Rights, enshrining the right to property:

> 1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> 2. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

This provision has been interpreted on many occasions by both the former European Commission on Human Rights and the European Court of Human Rights. In this respect, as efficaciously pointed out by an author, individuals *qua* shareholders may appear before the Court in two different situations: *i*) «they claim protection for matters that concern

[212] *Vallianatos and Others v. Greece* [GC], App. Nos 29381/09 and 32684/09, Judgment, 7 November 2013, para. 47; *Micallef v. Malta* [GC], App. No. 17056/06, Judgment, 15 October 2009, para. 44; *Burden v. the United Kingdom* [GC], App. No. 13378/05, Judgment, 29 April 2008, para. 33; *Gorraiz Lizarraga and Others v. Spain*, App. No. 62543/00, Judgment, 27 April 2004, para. 35; *SARL du Parc d'Activités de Blotzheim v. France*, App. No. 72377/01, Judgment, 11 July 2006, para. 20.

[213] For a clear overview of the case law concerning the matter see SCHABAS, *The European Convention on Human Rights: A Commentary*, op. cit., p. 737 ff.

their rights as shareholders directly», or *ii*) «they claim protection for matters that merely concern their interests in the company in which they own shares».[214]

As regards to the first hypotheses, this is by far the less contentious.[215] Notably, the Court has never had any difficulty in finding that shares – in light of their economic value – constitute a possession for the purposes of Article 1 of Protocol No. 1, and thus deserve protection against deprivation and (certain forms of) governmental control and interference. In such circumstances, shareholders will have no trouble in making out a case that they are the victims of a violation of the Convention: they are the ones who are entitled to peaceful enjoyment of shares, not the company. Therefore, there are no doubts that measures aimed at expropriating the shares or interfering with the rights attached to them will directly affect shareholders. In greater detail, in *Bramelid and Malmström v. Sweden,*[216] the former European Commission found that:

> A company share is a complex thing: *certifying that the holder possesses a share in the company, together with the corresponding rights (especially voting rights), it also constitutes, as it were, an indirect claim on company assets*. In the present case, there is no doubt that the NK shared had an economic value. The Commission is therefore of the opinion that, *with respect to Art. 1 of the First Protocol, the NK shares held by the applicants were indeed "possessions" giving rise to a right of ownership* (*emphasis added*).[217]

This finding was then confirmed by the Court in the case of *Olczak v. Poland*, wherein it ruled that a decision of the board of a bank to increase the share capital of the limited liability company, and the consequent reduction of the applicant's shareholding percentage from 45 to 0,4 percent, did amount to a deprivation of property within the meaning of the Article 1 of Protocol No. 1.[218]

Furthermore, the Court has proved itself to be aware that «municipal law recognizes a host of other legal positions that emanate from the share in addition to the property

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[214] EMBERLAND, *The Human Rights of Companies. Exploring the Structure of ECHR Protection*, Oxford, Oxford University Press, 2006, pp. 1-272, at 69.

[215] WILDHABER, WILDHABER, 'Recent Case Law on the Protection of Property in the European Convention on Human Rights', in BINDER, KRIEBAUM, REINISCH, WITTICH (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, Oxford, Oxford University Press, 2009, pp. 657-677; TOMUSCHAT, 'The European Court of Human Rights and Investment Protection', in BINDER, KRIEBAUM, REINISCH, WITTICH (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, Oxford, Oxford University Press, 2009, pp. 636-656.

[216] *Bramelid and Malmström v. Sweden*, App. Nos 8588/79 & 8589/79, Decision on Admissibility, 12 October 1982, in *DR*, vol. 29, pp. 64-86.

[217] *Ibid.*, p. 81 (*emphasis added*).

[218] *Tadeusz Olczak v. Poland*, App. No. 30417/96, Decision on Admissibility, 7 November 2002.

right».[219] In this respect, the Court has unvaryingly recognized that, despite these rights are *per se* linked with the corporate entity inasmuch as they would not exist without it, they still belong to shareholders and not to their company. Therefore, shareholders are the only ones entitled to start proceedings in Strasbourg if these rights are affected.[220] In *Pafitis and Others v. Greece*, as a way of example, the Court ruled that the undue delay of the Greek judiciary to settle a dispute concerning the shareholders' right to vote at the general meeting of a bank, which had decided to increase the capital stock, did constitute a violation of the rights enshrined in the Convention.[221]

3.2.2. The *Agrotexim Case*: The Making of the Rule concerning Reflective Loss

Moving to the second and most problematic hypotheses, in which shareholders claim protection for matters that concern their interests in the company whose shares they own, the European Court has adopted a «restrictive approach».[222] In line with the decision of

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[219] EMBERLAND, *The Human Rights of Companies. Exploring the Structure of ECHR Protection*, op. cit., p. 71.

[220] See *Sovtransavto Holding v. Ukraine*, App. No. 48553/99, Judgment, 25 July 2002.

[221] *Pafitis and Others v. Greece*, App. No. 20323/92, Judgment, 26 February 1998, para. 87: «The Court notes that, when they applied to the Supreme Administrative Court, the applicants were seeking annulment of the decisions of the Governor of the Bank of Greece and the Prefect of Athens approving the first increase in the capital of the Bank of Central Greece ("the BCG"). In addition, in their eight actions in the Athens District Court, they challenged the lawfulness under Greek and European Community law of the six increases in the BCG's capital – on the ground that they had not been ordered by a duly constituted general meeting of shareholders – or requested the court to refer to the Court of Justice of the European Communities for a preliminary ruling a question connected to the reference for a preliminary ruling of 3 August 1993. Like the Commission, the Court considers that the purpose of the proceedings in question was to settle a dispute […] over the applicants' "civil rights and obligations", since, *as BCG shareholders, they could arguably claim under Greek and European Community legislation the right to vote on the increase in the bank's capital and thus participate in decisions concerning the value of their share*» (*emphasis added*). See also *Company S-S., I. AB and B.T. v. Sweden*, App. No. 11189/84, Decision on the Admissibility, 11 December 1986.

[222] KRIEBAUM, SCHREUER, 'The Concept of Property in Human Rights Law and International Investment Law', in BREITENMOSER, EHRENZELLER, SASSOLI, STOFFEL, WAGNER PFEIFER (eds), *Human Rights, Democracy and the Rule of Law. Liber Amicorum Luzius Wildhaber*, pp. 743-762, at 753. As pointed out by DE SENA, 'Economic and Non-Economic Values in the Case Law of the European Court of Human Rights', in DUPUY, PETERSMANN, FRANCIONI (eds), *Human Rights in International Investment Law and Arbitration*, Oxford, Oxford University Press, 2009, pp. 208-218, at 217: «On the other hand, it must not be forgotten that the traditional principles of international economic law are firmly enshrined in the 'legal culture' of the ECtHR, if one considers the way in which they were applied – still with regard to the right of property– in the *Agrotexim v Greece* case. It is well known, in fact, that in this decision, the Court stated that a shareholder cannot be identified with its company for the

the ICJ in the case of *Barcelona Traction*, indeed, the Court has upheld the municipal distinction between the rights of the company – an autonomous center of imputation of legal relationships, provided with a separate legal personality – and those of its shareholders, who also, but only, have a financial interest in the company's legal position. Therefore, whenever a measure directed against the company harms the interests of the shareholders, it is the former which can make out a case to be the victim and, thus, is entitled to act. That is because an act which only infringes upon the rights of a company does not involve the international responsibility of the wrongdoing State vis-à-vis the shareholders, even if their interests are – as a consequence – affected. By contrast, a responsibility of the State towards the shareholders will arise if, and to the extent that, the contested measures infringe upon their own rights.[223]

The seminal case in this respect is to be identified with the Court's decision in the case of *Agrotexim and Others v. Greece*. The facts can be summarized as follows: the applicants were six companies, jointly holding almost 52 percent of the shares of Karolos Fix Brewery. Since the company was heavily indebted to the Greek National Bank, in 1982 the Greek government ordered its liquidation pursuant to a special procedure, which allowed the appointment of two liquidators: one on behalf of the government, one in representation of the company's directors. In the course of the procedure, the company tried to sell its two factory plants in Athens to a development venture; however, according to the claimants, such an operation failed since the council of the city of Athens publicly declared its intention to use the areas in which the two plants were located for public purposes. Following these events, the shareholders brought a claim before the Court lamenting that such a course of action did amount to a *de facto* expropriation of Fix's property.[224]

Eventually, by a majority of eight out of nine votes, the Court dismissed the claim, finding that the complaint submitted by the applicants did not concern the infringements of their own (shareholding) rights, but rather the alleged violation of the company's right to the peaceful enjoyment of its possessions. In doing so, the Strasbourg judges endorsed the municipal law distinction between shareholder rights and those of the company, by stating that:

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purpose of the 'victim requirement' […], referring expressly to the 'corporate veil' principle affirmed by the International Court of Justice in the *Barcelona Traction* case, even though contemporary treaty law on foreign investments tends to give an 'independent standing to shareholders'».

[223] TISHLER, 'A New Approach to Shareholder Standing before the European Court of Human Rights', in *Duke Journal of Comparative and International Law*, vol. 25, 2014, pp. 259-288; SCHABAS, *The European Convention on Human Rights: A Commentary*, op. cit., p. 741.

[224] *Agrotexim Hellas S.A. and Others v. Greece*, App. No. 14807/89, Judgment, 24 October 1995, paras 6-38.

> the applicant companies did not complain of a violation of the rights vested in them as shareholders of Fix Brewery, such as the right to attend the general meeting and to vote. Their complaint was *based exclusively on the proposition that the alleged violation of the Brewery's right to the peaceful enjoyment of its possessions had adversely affected their own financial interests because of the resulting fall in the value of their shares*. They considered that the financial losses sustained by the company and the latter's rights were to be regarded as their own, and that they were therefore victims, albeit indirectly, of the alleged violation. In sum, they sought to have the company's corporate veil pierced in their favour.[225]

According to the Court, to allow such claim would be tantamount to «accept that where a violation of a company's rights protected by Article 1 of Protocol 1 […] results in a fall in the value of its shares, there is *automatically* an infringement of the shareholders' right under that Article».[226] Such a criterion – which the Court deemed to be an «unacceptable one» – would determine a general admissibility of corporate veil piercing; thus, overthrowing the general rule recognized in domestic law. From this perspective, instead, the Court clearly stressed that the disregarding of the company's legal personality is to be allowed only in exceptional circumstances, on which we will dwell upon in sub-section 2.3.3.

The rule laid down by the Court in *Agrotexim* has been consistently reiterated in subsequent Strasbourg jurisprudence.[227] In *Tommi Tapani Anttila v. Finland*, for instance, the Court found that:

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225 *Ibid.*, para. 62 (*emphasis added*).

226 See the decision of the European Commission on Human Rights in the (first phase of the) same case (*Agrotexim Hellas S.A., Biotex S.A., Hymofix Hellas S.A., Kykladiki S.A., Mepex S.A. and Texema S.A. v. Greece*, App. No. 14807/89, Decision as to the Admissibility of the Case, 12 February 1992). In this respect, see the analysis by EMBERLAND, 'The Corporate Veil in the Case Law of the European Court of Human Rights', in *ZaoRV*, vol. 63, 2003, pp. 945-969, at 948-949: «In its report, the Commission […] held that the shareholders were indeed 'victims' of the measures taken against Fix. The Commission emphasised that the shareholders had 'an interest in the subject matter of the application' and that Fix because of its situations as debtor and its special liquidation scheme had been 'under effective State control' since its liquidation». The Court rejected such an argument at para. 64, finding that the approach of the Commission «seems to accept that where a violation of a company's rights protected by Article 1 of Protocol 1 […] results in a fall in the value of its shares, there is automatically an infigement of the shareholders' rights under that Article».

227 See the references in MINERVINI, 'La Corte europea torna a pronunciarsi sulla tutela degli azionisti ex art. 1 del Protocollo n. 1 CEDU', in *Giurisprudenza italiana*, vol. 172, 2020, pp. 2383-2385, *passim*. As for the applicability of the 'Agrotexim principle' with regard to complaints brought before the Court under different Articles of the Convention, see EMBERLAND, 'The Corporate Veil in the Case Law of the European Court of Human Rights', op. cit., pp. 950-951 and the references therein contained.

> the term "victim" used in Article 34 of the Convention denotes the person directly affected by the act or omission which is at issue […]. As the Court explained […], a person cannot complain of a violation of his or her rights in proceedings to which he or she was not a party, *even if he or she was a shareholder and/or director of a company which was party to the proceedings* […]. Furthermore, while in certain circumstances the sole owner of a company can claim to be a "victim" within the meaning of Article 34 of the Convention where the impugned measures were taken in respect of his or her company […], *when that is not the case the disregarding of a company's legal personality can be justified only in exceptional circumstances*, in particular where it is clearly established that it is impossible for the company to apply to the Convention institutions through the organs set up under its articles of incorporation or – in the event of liquidation – through its liquidators.[228]

Similarly, in the recent case of *Albert and Others v. Hungary* the Grand Chamber of the European Court of Human Rights found it crucial – in all the cases brought before it by shareholders – to draw a distinction between complaints that concern measures affecting their rights *qua* shareholders and those concerning acts directed against companies whose shares they hold. That is because, «in order to be able to lodge an application in accordance with Article 34, an individual must be able to show that he was 'directly affected' by the measure complained of».[229] As for the first category, the Court stressed that

> shareholders themselves may be considered victims within the meaning of Article 34 of the Convention. In such cases the difference between the rights of the company and the rights of the shareholders is maintained and the company's legal personality remains intact, as the complaints and the Court's substantive analysis concern the rights and the situation of the company's shareholders and not those of the company.[230]

Contrariwise, as for the second, the Court found the general principle to be that shareholders cannot be considered as victims pursuant to Article 34 of the Convention of those acts and measures affecting their companies.[231] Indeed, in accordance with the directedness test, they cannot be deemed to qualify as such. Accordingly, it is safe to conclude that, on a general stance, the Court will not entertain a claim brought by

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[228] *Tommi Tapani Anttila v. Finland*, App. No. 16248/10, Decision on the Admissibility, 19 November 2013, para. 24 (*emphasis added*).
[229] *Albert and Others v. Hungary* [GC], App. No. 5294/14, Judgment, 7 July 2020, para. 121.
[230] *Ibid.*, para. 123.
[231] *Ibid.*, para. 124.

shareholders for damages arising from an adverse action by State against a company, which reflectively and accordingly diminished the value of the shares they own.

3.2.3. Piercing the Corporate Veil before the Strasbourg Court: Carving out the Exceptions

In *Agrotexim*, the Court laid down the general rule according to which shareholders are not entitled to protection against those measures taken against their company and, as such, indirectly affecting their interests. Nevertheless, while doing so, the Court itself was aware that a blanket exclusion of any entitlement for shareholders to be protected against measures formally addressed at companies would have resulted in an undesirable deprivation of conventional protection also in those cases where they might deserve it. That is the main reason why – once again, in accordance with the decision of the ICJ in *Barcelona Traction* – the European Court conceded that so-called 'identification claims'[232] are permitted in «exceptional circumstances».[233] The subsequent jurisprudence of the Court has then identified and developed two main hypotheses that may allow shareholders to claim for reflective loss: *i*) the impossibility for the company to apply to the Convention institutions through its legitimate representative(s); and *ii*) the case in which the company is so closely identifiable with its shareholders that any distinction between them would be artificial.[234]

As for the first hypothesis, this was already recognized by the Court in *Agrotexim*, according to which:

> the piercing of the 'corporate veil' or the disregarding of a company's legal personality will be justified […] where *it is clearly established that it is impossible for the company to apply to the Convention institutions through the organs set up under its articles of incorporation or – in the event of liquidation – through its liquidators*. The Supreme Courts of certain member States of the Council of Europe

[232] DAVIS, 'Corporate Personality and the Collective Humanity of Legal Persons: Aggregating the Rights of Stakeholders and Redefining Nationality in International Adjudication', 6 January 2014, available at https://ssrn.com/abstract=2375395, at 17: «When shareholders bring suit against a state for violations of their property rights arising out of injuries suffered by the corporation, the Court refers to the case as an 'identification claim' because the shareholders are seeking to identify the rights of the corporation and the resulting injury with their own».

[233] *Agrotexim*, Judgment, *supra* note 224, para. 66 (*emphasis added*).

[234] DOUGLAS, *The International Law of Investment Claims*, op. cit., 444-445; DE JONG, 'Shareholders' Claims for Reflective Loss: A Comparative Legal Analysis', op.cit., pp. 102-105; MÜLLER, *La protection de l'actionnaire en droit international*, op. cit., p. 137 ff. and 270 ff.; VANHONNAEKER, *Shareholders' Claims for Reflective Loss in International Investment Law*, op. cit., pp. 86-91.

> have taken the same line. This principle has also been confirmed with regard to the diplomatic protection of companies by the International Court of Justice.[235]

In other words, a shareholder is entitled to bring an action before the Court for a measure taken against its company whenever there is a *de iure* or *de facto* impossibility for the injured company to seek relief by itself. As recognized by an author, «this is one form of legitimate identification which had been applied for a long time in Commission practice».[236] In *GJ v. Luxembourg*, for instance, the applicant shareholder brought a claim before the Court lamenting that the way in which liquidators of the company carried out the liquidation proceedings did represent a violation of his conventional rights.[237] Even if the Court agreed with the government as to the fact that the concerned proceedings concerned the company rather than the shareholder, it nevertheless recognized him as a 'victim' inasmuch as

> the complaint brought before the Court relates to the activities of the liquidators, ie the official receiver and the Commercial Court. In these circumstances the Court considers that *it was not possible for the company, as a legal personality, at the time, to bring the case before the Commission*.[238]

On closer inspection, one can argue that the impossibility to which the Court is referring consisted in a *de facto* impossibility: indeed, there was nothing at the time formally preventing the legal representative to bring the case before the Commission. Nevertheless, inasmuch as the claim should have been brought by a state-appointed liquidator (the «official receiver») and a State organ (the Commercial Court) against the respondent State, the Court considered that the company was not realistically able to bring a case before the Commission. That is because the liquidators of the company *qua* legal representative should have acted against the very State which, respectively, appointed them or of which they represented an organ. Similarly, in the recent case *International Bank for Commerce and Development AD and Others v. Bulgaria*, the Court found that a series of measures taken by the Bulgarian authorities with respect to the management of the bank, the freezing of its assets and the consequent insolvency did amount to a violation of its conventional rights. In such a hypothesis, the Court allowed a group of shareholders to bring the claim (also) on behalf of the bank concluding that the

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[235] *Agrotexim*, Judgment, *supra* note 224, para. 66.
[236] EMBERLAND, *The Human Rights of Companies. Exploring the Structure of ECHR Protection*, op. cit., p. 95.
[237] *GJ v. Luxembourg*, App. No. 21156/93, Judgment, 26 October 2000.
[238] *Ibid.*, para. 24 (*emphasis added*).

authorities, by appointing special administrators, had made it impossible for the bank to directly bring a claim before the Court.

Alongside the *de facto* impossibility for the company to lodge a complaint because of a conflict of interests, the Strasbourg judges have also heard reflective loss claims introduced by shareholders whenever the juridical person ceased to exist and was thus *de iure* precluded from starting proceedings by itself. In *Capital Bank AD v. Bulgaria*, when rejecting the objection as to the admissibility raised by the respondent State, the Court pointed out the need to allow the claim since an opposite determination in this context

> would undermine the very essence of the right of individual applications by legal persons, as it would encourage governments to deprive such entities of the possibility to pursue an application lodged at a time when they enjoyed legal personality […] It would also render nugatory the Court's reasoning in its admissibility decision in the present case […]. This issue in itself transcends the interests of the applicant bank and therefore the Court rejects the Government's request for the application to be struck out of its list.[239]

Moving to the second hypothesis – *i.e.*, the impossibility to genuinely draw a distinction between the company and the shareholders – the seminal case is to be identified in *Pine Valley and Others v. Ireland*, in which the Court endorsed the well-established case law of the Commission to this effect.[240] The complaint concerned allegations of unjustified control by the government over the assets of Pine Valley, a corporation almost entirely owned by Mr Healy and his Healy Holding. Even if the contested measures did not directly affect either Mr Healy or his Healy Holding, the Court nevertheless accepted the three (juridical and natural) persons as victims by pointing out that:

> Pine Valley and Healy Holdings were no more than vehicles through which Mr Healy proposed to implement the development for which outline planning

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[239] *Capital Bank AD v. Bulgaria*, App. No. 49429/99, Judgment, 24 November 2005, para. 80. See also *OAO Neftyanaya Kompaniya Yukos v. Russia*, App. No. 14902/04, Admissibility Decision, 29 January 2009, para. 443; *Süzer et Eksen Holding A.Ş. v. Turkey*, App. No. 6334/05, Judgment, 23 October 2012, para. 92: «La Cour marque également son désaccord avec le second argument du Gouvernement, selon lequel les requérants ne seraient pas en droit d'agir en tant qu'anciens actionnaires d'une banque qui a cessé d'exister sur le plan juridique. […] Accepter que les requérants n'aient pas qualité pour agir dans de telles circonstances saperait la substance même du droit de recours individuel des personnes morales ou de leurs sociétaires, dans la mesure où cela serait de nature à encourager les gouvernements à dépouiller de leur personnalité juridique celles qui pourraient déposer une requête devant la Cour […] pour ensuite dénier aux ex-sociétaires le droit de saisir la Cour en leur propre nom».

[240] *Pine Valley Developments Ltd and Others v. Ireland*, App. No. 12742/87, Judgment, 29 November 1991.

> permission had been granted. On this ground alone it would be artificial to draw distinctions between the three applicants as regards their entitlement to claim to be 'victims' of a violation.[241]

In other words, «the Court accepts a disregard of corporate personality for 'victim' purposes when the company whose rights have been interfered with is the vehicle for the applicant shareholders' business ventures».[242] From this perspective, one can argue that the 'vehicle' approach uses the applicant's control of the corporate entity as a reason for piercing the corporate veil, thus authorizing the shareholder to pursue a reflective loss claim.

Against this background, it is interesting to point out that the rule laid down in *Agrotexim* did not affect the validity of such an exception. As mentioned above, in *Agrotexim*, the Court maintained that the piercing of corporate veil was to be allowed only in exceptional circumstances and specifically mentioned the case in which a company would be unable to bring a claim before it. No explicit reference was made to this second exception, even if the Commission had already decided some cases in this sense. That a shareholder is allowed to bring a claim whenever the company is the mere vehicle for his or her investment is confirmed by subsequent decisions of the Court. In *Vujovic and Lipa D.O.O. v. Montenegro*, for example, the Court – having ascertained that the first applicant (individual) was the sole shareholder of the second (the company) – concluded that

> [they] are so closely identified with each other that it would be artificial to distinguish between them, and that even though the party to the domestic proceedings was the second applicant only, the first applicant can also reasonably claim to be a victim [*ex*] Article 34 of the Convention.[243]

Finally, it is relevant to point out that, on several occasions, the Court has relied on a combination of both the exceptions to allow shareholders' claims for reflective loss. In the already mentioned *GJ v. Luxembourg*, as an instance, the judges came to their conclusion as to the admissibility of the application not only relying upon the *de facto* impossibility for the company to personally bring the claim, but also considering that the

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241 *Ibid.*, para. 42.

242 EMBERLAND, *The Human Rights of Companies. Exploring the Structure of ECHR Protection*, op. cit., p. 100.

243 *Vujović and Lipa D.O.O. v. Montenegro*, App. No. 18912/15, Judgment, 20 February 2018, para. 30. In the case at hand, the Court, having held that there was a violation of Article 6 of the Convention, found that there was no need to examine the complaint under Article 1 of Protocol No. 1. Nevertheless, as confirmed by the case law, the same approach would have been applied also with respect to the right to property.

shareholder «held a substantial shareholding of 90 per cent in the company. He was in effect carrying out his business through the company and has, *therefore, a direct personal interest in the subject-matter of the dispute*».[244] The same holds true if one looks at the decision in *Camberrow v. Bulgaria*. There, the Strasbourg judges – after having observed the impossibility of the affected bank to bring a claim before the Court by itself because of the conflict of interests with its special administrators and trustees – further pointed out that the shareholder entirely held the corporation. Thus, the applicant could «claim to be a victim of the alleged violations of the Convention affecting the rights of [the bank]».[245]

3.2.4. The Rule and its Exceptions: A Clash of Rationales?

When confronted with claims brought by shareholders, the judges in Strasbourg have consistently upheld – in the wake of national legal systems and the decisions rendered by the International Court of Justice with regard to diplomatic protection under customary international law – the distinction between, on the one hand, the rights of the company and, on the other hand, shareholders' own rights and the economic interests they have in the legal position of their company. In doing so, the Court has developed a case law which, in dealing with reflective loss claims, echoes that of domestic courts and the International Court of Justice: a prohibition to sue the wrongdoer for damage caused to the company, as a general rule; the piercing of corporate veil to bring an identification claim, as an exception. If it is true that the judges sitting in Strasbourg have followed the same path of other (international) courts and tribunals, it is then interesting to look at the reasons given by them to justify such approach, in order to understand whether the monitoring bodies of the Convention have identified similar rationales and concerns with regard to reflective loss claims.

Starting with the prohibition set in *Agrotexim* and developed onwards, it is possible to argue that three groups of justifications have led the Court to deny shareholders' claims for reflective loss as a general rule, namely: *i*) the perceived difficulties in determining who is entitled to represent the interests of the company in Strasbourg; *ii*) the application of the rule imposing the applicant to exhaust local remedies before bringing a claim before Strasbourg institutions; *iii*) a reference to the available national and international

[244] *GJ v. Luxembourg*, Judgment, *supra* note 237, para. 147.

[245] *Camberrow MM5 AD v. Bulgaria*, App. No. 50357/99, Decision on the Admissibility, 1 April 2004, para. 2.

sources.[246] The first two justifications both concern procedural matters. In *Agrotexim*, the Court clearly spelled them out as it, respectively, follows:

> [*i.*] It is a perfectly normal occurrence in the life of a limited liability company for there to be differences of opinion among its shareholders or between its shareholders and its board of directors as to the reality of an infringement of the right to the peaceful enjoyment of the company's possessions or concerning the most appropriate way of reacting to such an infringement. Such differences of opinion may, however, be more serious where the company is in the process of liquidation because the realisation of its assets and the discharging of its liability are intended primarily to meet the claims of the creditors of the company whose survival is rendered impossible by its financial situation, and only a secondary aim to satisfy the claims of the shareholders, among whom any remaining assets are divided up. To adopt the Commission's position would be to run the risk of creating – in view of these competing interests – difficulties in determining who is entitled to apply to Strasbourg institutions.[247]
>
> [*ii.*] [The position of the Commission] would also endanger considerable problems concerning the requirement of exhaustion of [local] remedies. It may be assumed that in the majority of national legal systems shareholders do not normally have the right to bring an action for damages in respect of an act or an omission that is prejudicial to 'their' company. It would accordingly be unreasonable to require them to do so before complaining of such an act or omission before the Convention institutions. Nor could, conversely, a company be required to exhaust domestic institutions itself, because the shareholders are of course not empowered to take such proceedings on behalf of 'their' company.[248]

In short, the Court was – and still is – worried by, on the one hand, a possible «unwanted disintegration of the right of application in corporate matters», following the impossibility to exclusively allocate to a specific subject the right to sue on behalf of the company.[249] On the other hand, the Court feared that, in cases of reflective loss claim, the rule of previous exhaustion of local remedies would have resulted in either an overburden on the applicant – inasmuch as s/he should have personally done so in spite of the fact that, under domestic corporate law, shareholders do not have the right to bring such a claim – or, if

[246] EMBERLAND, 'The Corporate Veil in the Case Law of the European Court of Human Rights', op. cit., pp. 956-966; EMBERLAND, *The Human Rights of Companies. Exploring the Structure of ECHR Protection*, op. cit., pp. 80-89;
[247] *Agrotexim*, Judgment, *supra* note 224, para. 65.
[248] *Ibid.*
[249] EMBERLAND, *The Human Rights of Companies. Exploring the Structure of ECHR Protection*, op. cit., p. 957.

the burden is on the company itself, in a *de facto* impossibility to comply with it since shareholders arguably resort to identification claims only if their companies are unable or unwilling to act. As for the third rationale, the Court briefly mentioned that such a prohibition is «in line with the practice of Supreme Courts of certain member States of the Council of Europe» as well as with the principles of diplomatic protection set out by the ICJ in the case of *Barcelona Traction*.[250] Put it another way, the Strasbourg judges took into account the practice of domestic courts and the rules confirmed by the ICJ in a different field of international law, finding in them support to their construction.

Turning to the exceptions, it is easy to see that the two hypotheses recognized in the case law of the Court are inherently different from one another. Indeed, while the 'impossibility exception' is aimed at granting the shareholders with a remedy on the international plan when they would not have any other one viable – thus satisfying a demand for material justice –, the 'vehicle exception' can be, and is generally, accepted even if the company could act by itself, thus taking into account the economic realities of the operation. In light of this difference, one may wonder whether the rationale(s) according to which Strasbourg institutions have allowed identification claims convey a common approach to the problem. The case law of the Court is insightful – albeit not conclusive – in this respect.

Regarding the 'impossibility exception', as convincingly argued by Marius Emberland, it is reasonable to identify two main reasons which have led the Court to allow identification claims whenever the company is *de iure* or *de facto* precluded from personally applying. First, the absence of «difficulties in determining who is entitled to apply to the Strasbourg institutions»,[251] and thus no risk of competing (parallel or subsequent) claims being brought before the Court.[252] Indeed, to the extent that the legal representative is unable or unwilling to bring a claim against the State (*de facto* impossibility) or the company itself ceased to exist as a legal person (*de iure* impossibility), there is no risk of breaking down the united corporate front since no parallel or subsequent proceedings in Strasbourg will concern the company. From this perspective, taking into account that the normal functioning of a company is altered – inasmuch as corporate governing bodies are not capable of or willing to vindicate its rights or the same company cannot do it anymore – one could argue that the very purpose

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[250] *Agrotexim*, Judgment, *supra* note 224, para. 66.

[251] *Ibid.*, para. 65.

[252] EMBERLAND, *The Human Rights of Companies. Exploring the Structure of ECHR Protection*, op. cit., p. 97, pointing out that «When the company entity and its internal processes for handling disputes and decision-making fail to function as intended, some of the underlying purpose of paying respect to the separateness of corporate personality is eroded». See also VAJIĆ, PAK, 'Avoiding Plurality of International Proceedings in the European Court of Human Rights', in WOLFRUM, SERSIĆ, SOSIĆ (eds), *Contemporary Developments in International Law. Essays in Honour of Budislav Vukas*, Leiden/Boston, Brill Nijhoff, 2016, pp. 614-635.

of respecting the corporate personality falls short. Second, the need to ensure the effectiveness of the rights and the procedural protection granted by the Convention stands out, implicitly or explicitly,[253] in the Court's reasoning. This is self-evident in cases of *de iure* impossibility: in these circumstances, as clearly pointed out by judges, to deny shareholders the right to bring a claim would be tantamount to «encourage authorities to liquidate companies in order to avoid international responsibility for violation of their rights».[254] Indeed, it would suffice for governmental authorities to strip off the company of its legal personality in order to take shelter from any lawsuit before the conventional monitoring bodies; thus depriving the Convention of its effectiveness vis-à-vis legal persons.

As for the 'vehicle exception', the consistent jurisprudence of Strasbourg organs has highlighted that a sole shareholder can claim to be the victim of damages suffered by his or her company since «there is no risk of differences of opinion among shareholders or between shareholders and a board of directors as to the reality of infringements of the Convention rights or the most appropriate way of reacting to such infringements».[255] Put it another way, there is no risk of interfering with the physiological functioning of the company administration inasmuch as there is a complete overlap between the figure of shareholder and that of the administrator. Such a rationale was clearly spelled out by the Court in the case of *Ankarcrona v. Sweden*:

> [c]ontrary to […] the situation in […] Agrotexim […], where the applicant companies […] owned only half of the shares in the company in question, there is no risk of differences of opinion among shareholders or between shareholders and a board of directors as to the reality of infringements of the rights protected under the Convention […] or concerning the most appropriate way of reacting to such infringements.[256]

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[253] EMBERLAND, *The Human Rights of Companies. Exploring the Structure of ECHR Protection*, op. cit., p. 98, claiming that «As in the case with the rationale for preserving the corporate veil, the Court's motivation for accepting an 'impossibility' exception is not known to us in its entirety, though one might surmise that wider considerations may, on occasion, outweigh reasons for upholding separate corporate personality».

[254] DE LONDRAS, DZEHTSIAROU, *Great Debates on the European Convention on Human Rights*, London, Palgrave, 2018, pp. 1-193, at 58.

[255] *Groppera Radio AG and Others v. Switzerland,* App. No. 10890/84, Judgment, 28 March 1990, para. 49; *Ankarcrona v. Sweden*, App. No. 35178/97, Decision on Admissibility, 27 June 2000; *Dyrwold v. Sweden*, App. No. 12259/86, Decision as to the Admissibility of the Case, 7 September 1990; *Glas Nadezhda EOOD and Anatoliy Elenkov v. Bulgaria,* App. No. 14134/02, Judgment, 11 October 2007, para. 40; *Nosov v. Russia*, App. No. 30877/02, Decision on Admissibility, 20 October 2005. See also SCHABAS, *The European Convention on Human Rights: A Commentary*, Oxford, op. cit., p. 741.

[256] *Ankarcrona*, Decision, *supra* note 255, para. 1.

Furthermore, it is relevant to stress that in *Pine Valley* the Court allowed Mr Haley and its holding to bring a claim, *together with* the injured company, by arguing that a distinction among them would have been artificial since the «pleas all turn, directly or indirectly, on the financial status of Healy Holdings and Mr Healy».[257] In other words, the Strasbourg judges concluded that a dominant or full control or ownership of a company would suffice to justify the piercing of the corporate veil. This rationale clearly rests upon the willingness of the Court to disregard the formality of the company's separate legal personality in order to accommodate the economic realities of the operations. In *Camberrow v. Bulgaria*, as an instance, the judges stressed that the «applicant held a substantial shareholding of 98% in the bank. *It was in effect carrying out part its business through the bank* and has, therefore, a direct personal interest in the subject-matter of the application».[258]

The jurisprudence resulting from the applications of the general rule and its exceptions is however far from being crystal clear. Quite the opposite, some authors have accurately highlighted the «Court's inconsistencies in applying the test».[259] Although the inconsistency of some decisions or the alleged shifting approach adopted by conventional institutions can be problematic, what most interests us for the purpose of this dissertation is the possible clashing among the different rationales invoked by the Strasbourg institutions in laying down the prohibition and carving out its exceptions.

Notably, the 'vehicle exception' may appear problematic, at least whether one agrees that the corporate veil does represent a pillar of domestic corporate law with the aim of ensuring the attractiveness of the institution of corporation as an instrument for carrying out business. Indeed, the fact that a company is mainly owned or controlled by a sole shareholder does not seem enough to justify the disregard of the corporate veil. Even more, one could argue that it does not seem necessary since the shareholder would be able to bring a claim through the society s/he controls. Whether this is not possible because of governmental interference – as it were in *GJ v. Luxembourg* – it is then the 'impossibility exception' which is at stake. This is confirmed by municipal law, according to which dominant ownership or control does entail identification to the benefit of the shareholder, but rather the uphold of the corporate veil by reference to the inevitable risk and related advantages that follow from this form of investment.[260] Yet it is true that, in

[257] *Pine Valley*, *supra* note 240, para. 42.

[258] *Camberrow*, *supra* note 245, para. 1 (*emphasis added*).

[259] TISHLER, 'A New Approach to Shareholder Standing before the European Court of Human Rights', op. cit., p. 276. For a less critical view, see EMBERLAND, *The Human Rights of Companies. Exploring the Structure of ECHR Protection*, op. cit., pp. 104-108.

[260] EMBERLAND, *The Human Rights of Companies. Exploring the Structure of ECHR Protection*, op. cit., p. 103.

such cases, there is scarce – if any – risk of competing claims, and the interests of creditors as well as of other stakeholders are often granted by the joint participation of the company to the proceedings (e.g., *Pine Valley* case). Furthermore, the European Court is not used to granting massive compensation in case a violation is found; thus, the risk of a shareholder resorting to an identification claim in order to recover at the expenses of creditors is limited (yet existing). Overall, it is arguable that all the interests at stake are well-balanced, although a careful case-by-case approach is required.

The same holds true with regard to the 'impossibility exception', in particular in those cases where the company would be *de iure* precluded to vindicate its rights. If, on the one hand, it has been claimed that «the logic of corporate legal personality retains […] validity when the company has no possibility to go to the Court»,[261] this would arguably undermine the very effectiveness of the rights of juridical persons. In such circumstances, to simply dismiss any claim would offer State parties an easy way out from their international responsibility.

At the same time, one has to question the very making of the general prohibition to bring identification claims. In *Agrotexim*, the Court stressed that allowing them would not only entail some procedural difficulties as far as the exhaustion of local remedies, but would (mainly) alter the normal functioning of corporate government. This is a relevant concern, inasmuch as litigation management is certainly one of the directors' main prerogatives.[262]

Furthermore, the judges sitting in Strasbourg, on more than an occasion, have pointed out that the distinction between the rights of the company and those of shareholders, with all the already mentioned consequences, is firmly grounded in municipal law. This gives us the opportunity to briefly highlight that the use of comparative reasoning by the Court, despite being a recurrent feature of its jurisprudence, entails quite a few challenges for the purposes of treaty interpretation.[263] Be that as it may, what is relevant for our analysis is that conventional institutions have relied upon municipal law in the shaping of the rule.

Similarly, the Court has recalled that a general prohibition to bring reflective loss has been also stated by the ICJ with respect to the rules of diplomatic protection. While the legal basis to take into account these sources has not been explicated by the Court, the relevance of the customary rules concerning diplomatic protection in interpreting the European Convention on Human Rights vis-à-vis the standing of shareholders can be

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[261] *Ibid.*, p. 97.

[262] *Supra*, sub-Section 1.4.4.

[263] See MAHONEY, 'The Comparative Method in Judgments of the European Court of Human Rights: Reference back to National Law', in CANIVET, ANDENAS, FAIRGRIEVE, *Comparative Law before the Courts*, London, British Institute of International and Comparative Law, 2004, pp. 135-150; PEAT, *Comparative Reasoning in International Courts and Tribunals*, Cambridge, Cambridge University Press, 2019, pp. 1-258.

founded on Article 31(3)(c) of the Vienna Convention on the Law of Treaties.[264] Such an approach is nonetheless not without its critics: while giving due considerations to the jurisprudence of the International Court of Justice, the Court contrariwise has generally omitted any reference to the case law of investment tribunals. To this effect, Judge Pinto de Albuquerque – in his dissenting opinion attached to the Chamber's judgment in the *Albert and Others v. Hungary* case – criticized the decision of the majority by pointing out that «[i]nternational standards on the protection of shareholders' interests would also support a finding that the present applicants have victim status».[265] In greater detail, the dissenting Judge stressed that a recognition of a shareholder independent right to bring a claim before the Court would not only have been in accordance with the jurisprudence of the Court itself but would have found support in the case law of ICSID and UNCITRAL tribunals, which have consistently found that «shareholders' rights give rise to independent claims».[266] While the position of Judge Pinto de Albuquerque is debatable inasmuch as his references to investment cases concerning 'reflective loss claims' is used for the purposes of supporting that shareholders may start proceedings in order to vindicate their *direct rights* – something that no court or tribunal has challenged –, the willingness to refer to investment case law is instead to be praised. The scarce, if any, consideration that the Court has paid to investment arbitration is all the more puzzling if one considers that international investment law and international human rights law have a fundamental common feature: the right of the individual to directly bring a claim against the alleged wrongdoer State. From this perspective, therefore, one would expect the Court to, at least, take into account investment jurisprudence and address the relevance of the reasoning therein enshrined.[267]

By way of conclusion, the analysis carried out in this section has provided us with a clear overview of the approach adopted by Strasbourg institutions when facing shareholders' claims for reflective loss. Despite certain peculiarities, it seems reasonable to argue that, all in all, the European Court stands with domestic courts and the International Court of Justice with regard to the admissibility of reflective loss claims. This is true not only in respect of the established rule and its exceptions, but also in light of the rationales adopted to this end.

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[264] Vienna Convention on the Law of Treaties, signed 23 May 1969, entered into force 27 January 1980.

[265] *Albert and Others v. Hungary*, App. No. 5294/14, Judgment, 29 January 2019, para. 21.

[266] *Ibid.*, para. 23.

[267] On the relationship between the European Court of Human Rights and Investor-State Arbitration, see KRIEBAUM U., 'Is the European Court of Human Rights an Alternative to Investor-State Arbitration?', in DUPUY P-M., PETERSMANN E-U., FRANCIONI F. (eds), *Human Rights in International Investment Law and Arbitration*, Oxford, Oxford University Press, 2009, pp. 219-245, at 222-228; TOMUSCHAT, 'The European Court of Human Rights and Investment Protection', op. cit., *passim*.

3.3. The Protection of Shareholders under the American Convention on Human Rights

Moving to the Inter-American system for the protection of human rights,[268] the situation is quite different and the case law of both the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights appears to be of little – if any – relevance to the analysis carried out. The starting point under the American Convention on Human Rights is represented by Article 21, according to which

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.

2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.

3. Usury and any other form of exploitation of man by man shall be prohibited by law.

As one can easily notice, in contrast with the abovementioned Article 1 of Protocol No. 1 of the European Convention, there is no reference to the property of juridical persons. This should not come as a surprise inasmuch as the very issue as to whether juridical persons can be rightsholder under the American Convention and, thus, can access to the human rights system of protection has been debated at great length. Indeed, Article 1 of the Convention, in affirming that «States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms», clarifies that «[f]or the purposes of this Convention, 'person' means every human being».[269] Precisely by starting from the wording of Article 1, the established practice of the Inter-American Commission and Court has excluded that juridical persons might claim to be the victims before the two organs since they do not hold human rights under the American

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[268] DAVIDSON, *The Inter-American Human Rights System*, Aldershot, Dartmourth, 1997, pp. 1-381; HARRIS, LIVINGSTONE (eds), *The Inter-American System of Human Rights*, Oxford/New York, Clarendon/Oxford University Press, 1998, pp. 1-616; MEDINA QUIROGA C., *The American Convention on Human Rights. Crucial Rights and their Theory and Practice*, 2016^2, pp. 1-373.

[269] American Convention on Human Rights, signed 22 November 1969, entered into force 18 July 1978.

Convention.[270] Such a conclusion has been recently reaffirmed by the Inter-American Court in its advisory opinion OC-22/16, in which it stated that:

> Having simultaneously and jointly applied the different hermeneutical criteria provided for in Articles 31 and 32 of the Vienna Convention [on the Law of Treaties], the Court concludes that from a good faith interpretation of Article 1.2 of the American Convention, in accordance with the ordinary meaning of the terms used in the Convention […], and taking into account the context […] as well as its object and purpose […], it clearly emerges that juridical persons are not holders of conventional rights, to the extent that they cannot be considered as alleged victims in the context of contentious proceedings before the Inter-American system.[271]

Therefore, the Inter-American Commission and Court have repeatedly denied their «jurisdiction for applications alleging violations of property rights of juridical persons».[272] The lack of any entitlement to human rights under the treaty by juridical persons has relevant consequences for the protection of the rights of shareholders bearing in mind that the Inter-American Court and Commission have – just like the International Court of Justice and the European Court of Human Rights – traditionally made a distinction between the possible violations of the rights of individuals *qua* shareholders and those of companies in which they own shares.[273]

[270] *Cantos v. Argentina*, Preliminary Objections, Judgment, 7 September 2001, para. 29*; Usón Ramírez v. Venezuela*, Preliminary Objections, Merits, Reparation and Costs, Judgment, 20 November 2009, para. 45; *Granier et al. (Radio Caracas Televisión) v. Venezuela*, Preliminary Objections, Merits, Reparation and Costs, Judgment, 22 June 2015, para. 19.

[271] Advisory Opinion OC-22/16, 26 February 2016, Requested by the Republic of Panama, para. 70. For a comment to the advisory opinion, see DABROWSKI, 'Entitlement of Legal Entities to Hold Rights under the Inter-American Human Rights Protection System', in *ICLR*, vol. 21, 2019, pp. 449-462. Original text: «Habiendo empleado en forma simultánea y conjunta los distintos criterios hermenéuticos establecidos en los artículos 31 y 32 de la Convención de Viena, la Corte concluye que de una interpretación del artículo 1.2 de la Convención Americana, de buena fe, acorde con el sentido natural de los términos empleados en la Convención […] y teniendo en cuenta el contexto […] y el objeto y fin de la misma […], se desprende con claridad que las personas jurídicas no son titulares de derechos convencionales, por lo que no pueden ser consideradas como presuntas víctimas en el marco de los procesos contenciosos ante el sistema interamericano».

[272] KRIEBAUM, SCHREUER, 'The Concept of Property in Human Rights Law and International Investment Law', op. cit., at 754; VANHONNAEKER, *Shareholders' Claims for Reflective Loss in International Investment Law*, op. cit., p. 91.

[273] *Perozo et al. v. Venezuela*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, 28 January 2009, para. 400: «However, it is worth making a distinction in order to identify which situations could be examined by this Court within the framework of the American Convention. In this respect, this Court has already examined the possible violation of the rights of individuals when they are shareholders. In such cases, the Court has made a distinction between the rights of a company's shareholders from those of the company itself, indicating

On the one hand, the Inter-American Court has repeatedly recognised that shares qualify as property pursuant to the Convention. In *Ivcher Bronstein v. Peru*,[274] for instance, the applicant was deprived of his nationality for the purpose of depriving him of the control of the TV channel whose shares he owned. Against this background, the Court said that:

> 'Property' may be defined as those material objects that may be appropriated, and also any right that may form part of a person's patrimony; this concept includes all movable and immovable property, corporal and incorporeal elements, and any other intangible object of any value. From Mr. Ivcher's testimony, it may be concluded that […] he owned shares in the Company and that, […] his participation amounted to 53,95% […]. Obviously, this participation in the share capital could be evaluated and formed part of its owner's patrimony from the moment of its acquisition; as such, that participation constituted a property over which Mr. Ivcher had the right to use and enjoyment.[275]

Therefore, a shareholder claim may well be brought before the Commission or the Court if the government infringes upon his or her right to property,[276] *e.g.*, in case of expropriation of the shares held by an individual.[277] Similarly, the Court recognized that a claim can be brought by shareholders if the alleged violation concerns their «specific direct rights, such as receiving the agreed dividends, attending and voting at general meetings and receiving part of the assets of the company when selling their shares, among others».[278]

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that domestic legislation grants shareholders specific direct rights, such as receiving the agreed dividends, attending and voting at general meetings and receiving part of the assets of the company when selling their shares, among others».

274 *Ivcher Bronstein v. Peru,* Merits, Reparations and Costs, Judgment, 6 February 2001.

275 *Ibid.*, paras 122-123.

276 A definition of property for the purposes of the American Convention was provided by the Court in *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment, 31 August 2001, para. 144: «Property can be defined as those material things which can be possessed, as well as any right which may be part of a person's patrimony; that concept includes all movables and immovables, corporal and incorporal elements and any other intangible object capable of having value».

277 *Carlos Martinez Riguero v. Nicaragua*, Case 7788, Inter-Am. C.H.R. 89, OEA/ser. L/V/II.71, doe. 9 rev. 1, 1987. In this case, the Commission found that the Government of Nicaragua had violated Article 21 of the Convention since it confiscated dividends earned on shares owned by Martinez Riguero in the CERSA company, and nationalized his quarry without honouring pecuniary obligations arising out of those measures.

278 *Perozo et al. v. Venezuela*, *supra* note 273, para. 400. See also BURGORGUE-LARSEN, ÚBEDA DE TORRES, *The Inter-American Court of Human Rights: Case Law and Commentary*, Oxford, Oxford University Press, 2011, pp. 1-952, at 111-112; ANTKOWIAK, GONZA, *The American Convention on Human Rights. Essential Rights*, Oxford, Oxford University Press, 2017, pp. 1-416, at 268. In this respect, see *Cantos v. Argentina*, para. 29: «This Court considers that,

On the other hand, the two organs – precisely relying upon the distinction between the entitlement to conventional rights by individuals and the lack thereof as for the company – have generally denied jurisdiction to hear those claims which, despite being brought by individuals as shareholders, rather concerned the protection of the company's rights.[279] That is because of «the close connection between the individual and the company, […] the fact that the impugned acts had been directed against the company rather than against the individual and […] the exhaustion of local remedies by the company rather than by the individual».[280] In other words, «what may not be admitted are claims that have their basis in the juridical situation or rights of [a company], including those addressed in the series of legal actions instituted on behalf of the [company] before the [State party's] judiciary».[281]

This approach is well exemplified by the decision of the Commission in *Bendeck-COHDINSA v. Honduras*:

> This clarification [– *i.e.*, the one between shareholders' own rights and those of the company –] is particularly relevant in the case […] since the proof offered by the petitioner and the facts described by him in his complaint reveal a *substantial connection between the alleged violations and COHDINSA*, the company in which the petitioner is the majority shareholder. In fact, these alleged violations refer to *acts or omissions* on the part of [… the] member state, which are *directly linked with the corporate entity COHDINSA and not with the petitioner*. This is clearly reflected in the documents submitted by the petitioner and in the fact that the *domestic legal*

although the figure of legal entities has not been expressly recognized by the American Convention, as it is in Protocol No. 1 to the European Convention on Human Rights, this does not mean that, in specific circumstances, an individual may not resort to the inter-American system for the protection of human rights to enforce his fundamental rights, even when they are encompassed in a legal figure or fiction created by the same system of law. However, it is worth making a distinction in order to identify which situations could be examined by this Court within the framework of the American Convention. In this respect, this Court has already examined the possible violation of the rights of individuals when they are shareholders».

[279] In *Banco de Lima Shareholders v. Perù*, OEA/Ser.L/V/II.79.rev.1, Doc. 12, 22 February 1991, the Commission failed to properly apply such a distinction finding that the expropriation of the shares could not be heard before it since the alleged violation concerned the rights of the company rather than those of shareholders. In this regard, see the analysis by MARROQUIN-MERINO, 'The Protection of Property Rights in the Inter-American System: *Banco de Lima Shareholders v. Perù*', in *University of Miami International and Comparative Law Review*, vol. 1, 1991, pp. 218-265.

[280] KRIEBAUM, SCHREUER, 'The Concept of Property in Human Rights Law and International Investment Law', op. cit., p. 754.

[281] *Carvallo Quintana v. Argentina*, Decision, 14 June 2001, para. 61.

remedies were sought and exhausted by COHDINSA, in its capacity as a legal person» (*emphasis added*).[282]

In light of the foregoing, the few scholars who have taken into considerations the stance of the American monitoring bodies vis-à-vis shareholders' claim for reflective loss have generally concluded that they are not admitted.[283]

The issue is, however, more complex than it may appear at a first glance. This is well represented by the statement of the Commission in the case of *Carvallo Quintana v. Argentina*, according to which «in principle, shareholders cannot claim to be victims of interference with the rights of a company *absent a showing of direct effect on their rights*».[284] The wording of this phrase, indeed, seems to keep the door open for reflective loss claims whether shareholders are capable of demonstrating that the injury caused to the company produced a direct effect on their own rights. From this perspective, one might argue that, on a par with the European Court, the Inter-American Court and the Commission have carved out an exception from the 'general rule', allowing reflective loss claims whenever there is an interpenetration between the rights of the company and those of its shareholders.[285]

Yet the case law of the Inter-American monitoring bodies is far less-developed and, at the current stage, it is hard to carry out a systemic analysis of such an exception. What can be done, instead, is to point out the reasoning adopted in order to come to this conclusion.

In *Alvarez and Iñiguez v. Ecuador*, as a way of example, the Court – which was called to review the proceedings against the 50% owner of a plant producing containers that were used to smuggle narcotics from Ecuador to the United States – came to the conclusion that the seizure of his company, its subsequent mismanagement and the failure of the government to return several movables belonging to the company itself, constituted a violation of the rights of the shareholders.[286] Notably, as far as the «failure to return

[282] *Bendeck-COHDINSA v. Honduras*, Decision, 27 September 1999, para. 18.
[283] KRIEBAUM, SCHREUER, 'The Concept of Property in Human Rights Law and International Investment Law', op. cit., at 754; VANHONNAEKER, *Shareholders' Claims for Reflective Loss in International Investment Law*, op. cit., p. 91
[284] *Carvallo Quintana v Argentina*, *supra* note 281, para. 54 (*emphasis added*). See also *Carlos Arturo Betancourt Estrada and Others v. Colombia*, Decision on Admissibility, 23 October 2010, paras 28-29; *Families Beloning to the Balquicet Agricultural Workers Cooperative (COTRAGROBLAN) v. Colombia*, Decision on Admissibility, 2 November 2011, paras 43-45.
[285] ANTKOWIAK, GONZA, *The American Convention on Human Rights. Essential Rights*, op. cit., p. 268: «Corporations possess property rights in the Inter-American System, but these rights are only relevant for the Court to the extent that they 'encompass' human rights, such as a shareholder's right to property».
[286] *Chaparro Álvarez and Lapo Iñiguez v. Ecuador*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, 21 November 2007, para. 209.

property belonging to the company», the Court stated that «[such course of action] had an impact on its value and productivity, which, *in turn, prejudiced its shareholders*. This prejudice must be understood as an arbitrary interference in the 'enjoyment' of the property under the provisions of Article 21(1) of the Convention».[287] The Court, however, did not enter into a clear reasoning as to the requirements in order to find that a damage to the company (directly) prejudices shareholders' enjoyment of their property. Apart from the excerpt already reported, some conclusions could be drawn from the assessment of compensation due to the applicant; there it was stated that:

> The Court has established in this judgment that Mr. Chaparro's shares in the Plumavit factory had a financial value that formed part of his patrimony […]. This financial value was directly related to the value of the company itself. The State's actions, namely the unsatisfactory administration of the property, the delay in the return of the factory, the return of property in a deteriorated condition, and the misplacement of certain property, entailed an impediment to the use and enjoyment of those shares, because the value of the company decreased considerably, and this had an impact on Mr. Chaparro's patrimony.[288]

These lines provide scarce clues likewise. Quite the opposite, in saying that the conduct of the State entailed an impediment to the enjoyment of the property because the value of the company considerably decreased, one could even argue that the Court is implicitly admitting all reflective loss claims. Nevertheless, the more plausible explanation, in the author's own view, is that the Court considered the magnitude of the effects upon the shares as an indicator of a direct infringement of shareholders' own rights. Put it differently, the measures adopted against the company had such an impact on the enjoyment of the shares that the shareholder could be considered directly damaged by them. From this point of view, the argument could resemble the (*de iure*) 'impossibility' argument developed by the Court. Indeed, considering the lack of entitlement of juridical persons to conventional human rights, a shareholder might be completely deprived of the value of shares without being able to vindicate his/her rights.

In conclusion, the analysis carried out with regard to the American system of human rights protection has demonstrated that both the Inter-American Commission and the Court have adopted – despite following a different reasoning – a stance similar to that of the ICJ and the European Court when dealing with shareholders' claims for reflective loss. As a general rule, indeed, shareholders are not entitled to start proceedings before the American monitoring bodies if their complaint concerns measures adopted against the

[287] *Ibid.*, para. 209 (*emphasis added*).
[288] *Ibid.*, para. 228.

company. According to the Court and the Commission, that is mainly because companies do not enjoy human rights under the American Convention.

Nevertheless, in very few occasions, the Inter-American Court has proved to be willing to allow reflective loss claims whenever there is an interpenetration between the rights of the company and those of its shareholders.[289] In this respect, however, because of the lack of a body of case law sufficiently comprehensive, no further conclusions can be drawn.

[289] *Chaparro Álvarez and Lapo Iñiguez v. Ecuador*, *supra* note 286.

Interim Conclusions

In the last two Chapters the existence of a common approach to the protection of shareholders, both on the national and international legal plane, has been highlighted. Starting from the recognition of a separate and autonomous legal personality to companies, indeed, domestic corporate law and (general) international law have consistently upheld a distinction between the rights of the company and those of its shareholders. Accordingly, whenever damages are inflicted upon the company, it is for the latter to bring a claim in order to recover the loss suffered. In this respect, the International Court of Justice, the European Commission and Court of Human Rights, as well as the Inter-American Commission and Court of Human Rights have made clear that, as a general rule, the separate legal personality of companies is to be upheld.

Nevertheless, there are some specific circumstances in which the piercing of the corporate veil is allowed. In this regard, a common feature can be identified in the reasoning of domestic and international courts and tribunals, despite the concrete hypotheses differ from one another. Be it a conflict of interest between the directors and the shareholders; be it a *de iure* impossibility for the company to start proceedings in Strasbourg because it ceased to exist following the measures taken by the respondent State; be it the impossibility for the company to saw its rights vindicated before the ICJ since the State of nationality and the wrongdoer are actually the same; be it the impossibility for the company to directly bring a claim inasmuch as juridical persons are not conferred human rights under the American Convention or the ICCPR; there is *one fundamental concern* behind all these exceptions: to grant shareholders a form of protection when, otherwise, their position would be damaged without any other remedy to be resorted to. Although the exceptions carved out by the different courts might sometimes lack a clear theoretical elaboration, it is apparent the purpose they serve.

If it is true that domestic and international courts and tribunals have adopted a similar stance vis-à-vis reflective loss claims brought by shareholders, one might question what is or are the rationale(s) upon the basis of which they have done so. Notably, one might wonder whether there is, again, a common feature in the reasoning of the different judges called to review these applications. From this point of view, the present Chapter has pointed out that, despite the relevant (inter)national courts and tribunals have offered different rationales for not allowing reflective loss claims, such a common feature is detectable through a more in-depth analysis. Indeed, almost all of the considered courts and tribunals have manifested their worry that such a course of action would endanger the proper functioning of the system. Be it the corporate governance or the need to ensure the interests of third stakeholders; be it the risk of confusion and insecurity in international economic relations; be it the difficulties in determining who is entitled to apply to Strasbourg institutions; there is *one fundamental concern* behind the establishment of a general prohibition to bring reflective loss claims: to avoid that a generalized admissibility of reflective loss claims might actually put at risk the viability of the system itself. Depending on the system considered, this might be true from a legal or economic point of view, or both. To allow, as a general rule, shareholders to bring reflective loss claims in domestic legal systems would arguably undermine the very attractiveness of limited liability/joint-stock companies while also exposing the wrongdoer to an undetermined number of proceedings. Similarly, to allow the national States of all shareholders to resort to the ICJ in order to claim on behalf of their nationals would arguably expose the respondent State to several proceedings and, thus, the likely risk of paying double compensation. This is particularly true if one considers that the company and the shareholders could start proceedings at the same time.

Altogether, it seems reasonable to argue that national and international legal systems offer, at a closer examination, a coherent and consistent approach to the issue at stake. Similarly, the different arguments advanced by the relevant courts in identifying the admissibility of reflective loss claims as an exception to the general prohibition to do so appear to be firmly based on convincing legal and policy arguments. This conclusion will be the starting point of our analysis in the next Chapter, when the 'exceptionality' of the international investment law and arbitration regime will be analysed. Drawing from the insights gained throughout this Chapter, indeed, we will critically approach such a regime with the aim of ascertaining whether the general admissibility of reflective loss claims is based upon firm grounds or, if the answer is in the negative, whether a more coherent theoretical construction can be provided. This will be the task that will be carried out in Chapter 4.

4. The Protection of Shareholders in International Investment Law and Arbitration

4.1. Brief Remarks on the Loose Structure of International Investment Law

The existing international investment law system is made up of around 3.000 International Investment Agreements (IIAs) – either Bilateral Investment Treaties (BITs) or Multilateral Investment Treaties (MITs) – concluded since 1959, when Germany and Pakistan adopted the first modern BIT.[290] These treaties aim at promoting foreign direct investments (FDI) by «address[ing] the typical risks of a long-term investment project, and thereby […] provid[ing] stability and predictability in the sense of an investment-friendly climate».[291] In this sense, it is worthy of support the statement by the *Saluka* tribunal pointing out that «the protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties' economic relations».[292]

Amongst the IIAs, BITs «are the most important source of contemporary international investment law».[293] Although some minor differences in scope and content, they generally share a standard structure consisting of three parts: (i) definitions of investment and investor; (ii) substantive standards; and (iii) dispute settlement provision(s).[294] Amongst them, the provisions concerning dispute settlement are of the utmost importance: indeed, they allow foreign investors to directly bring a claim against the State hosting the investment, in the event that such State has allegedly breached one or more standards contained in the treaty. Additionally, on the basis of what Jan Paulsson defined as 'arbitration without privity',[295] any investor who qualifies as such under an international investment agreement can bring his claim before an arbitral tribunal «even in the absence of an *ad hoc* contractual commitment to arbitrate between the investor and

[290] DOLZER, SCHREUER, *Principles of International Investment Law*, op. cit., p. 6. Concerning the sources of international investment law see SCHREUER, 'Investments, International Protection', in *Max Planck Encyclopedia of Public International Law*, 2013. See also SORNARAJAH, *The International Law on Foreign Investment*, Cambridge, Cambridge University Press, 2017[4], pp. 1-604.

[291] DOLZER, SCHREUER, *Principles of International Investment Law*, op. cit., p. 22.

[292] *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 300.

[293] DOLZER, SCHREUER, *Principles of International Investment Law*, op. cit., p. 13.

[294] *Ibid.*, pp. 13-14. See also MCLACHLAN, SHORE, WEINIGER, *International Investment Arbitration. Substantive Principles*, Oxford, Oxford University Press, 2017[2], pp. 1-630, paras 2.09-2.38;

[295] PAULSSON, 'Arbitration Without Privity', *ICSID Review*, vol. 10, 1995, pp. 232-257, at 233.

the host state».[296] The possibility for any investor to directly seek remedies and to vindicate their rights vis-à-vis the host-State has represented, as pointed out in Chapter 1, an historical turning point compared to the former diplomatic protection regime which required investor's national State to 'espouse' his claim in order to solve the dispute between the investor and the host-State.[297] This system, indeed, carried out several disadvantages both for investors and the involved States: as for the former, they suffered for the discretionary nature of diplomatic protection which means that an investor has no right to it and «[u]nder international law the investor's State of nationality [could] refuse to pursue the claim or [could] abandon it at any stage»;[298] as for the latter, the exercise of diplomatic protection «can constitute a serious strain on their relations» with developing countries greatly «resent[ing] pressure from capital exporting countries whether it is exercised bilaterally or in multilateral forums».[299] Therefore, it has been convincingly contended that one of the main reasons which led to the development of the current ISDS regime was the willingness of States to depoliticize investments disputes.[300]

Looking in greater detail at the provisions concerning the resolution of investor-state disputes, some further features must be highlighted. Most BITs allow investors to bring their claims in one of several *fora* including ICSID, the Permanent Court of Arbitration (PCA), the International Chamber of Commerce (ICC), and the Stockholm Chamber of Commerce (SCC). However, the claim is always decided by an arbitral tribunal which is constituted *ad hoc* for the dispute: the tribunal usually consists of three arbitrators, and both the investor and the host-State can each appoint one arbitrator while the president is generally appointed by agreement of the parties or by the two party-appointed arbitrators.[301] The award rendered by the *ad hoc* tribunal is final and binding except for a very limited number of reasons.[302] Indeed, the ISDS system does not provide an appellate instance. However, ICSID awards can be challenged through the ICSID annulment procedure,[303] while non-ICSID awards can be set aside by domestic courts of the seat of arbitration as well as non-enforced according to the grounds established by the New York Convention.[304]

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[296] ZARRA, 'The Issue of Incoherence in Investment Arbitration', op. cit., p. 138.
[297] DUGARD, 'Diplomatic Protection', op. cit.
[298] SCHREUER, 'Investment Disputes', op. cit., para. 3.
[299] *Ibidem*.
[300] KRIEBAUM, 'Evaluating Social Benefits and Costs of Investment Treaties: Depoliticization of Investment Disputes', in *ICSID Review*, vol. 33, 2017, pp. 14-28, at 17-18.
[301] DOLZER, SCHREUER, *Principles of International Investment Law*, op. cit., p. 279.
[302] *Ibid.*, p. 286.
[303] BISHOP, MARCHILI, *Annulment under the ICSID Convention*, Oxford, Oxford University Press, 2012.
[304] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed 10 June 1958, entered into force 7 June 1959.

4.2. International Investment Agreements on 'Investments' and 'Investors'

In the previous section, the (a)systemic nature and the loose structure of international investment law have been briefly pointed out with the aim of providing an overview of the sources and the peculiar features of this field of international law. Moving now to the subject-matter of the present Chapter – *i.e.*, the protection of shareholders in international investment law and arbitration –, the analysis cannot but focus on international investment agreements, whose scope of application is *inter alia* delimited both *ratione materiae* and *ratione personarum*. In other words, investment agreements, be they bilateral or multilateral, identify which kind of economic transactions (*ratione materiae*) as well as which natural or juridical persons (*ratione personarum*) are covered by the substantive provisions therein enshrined.[305]

The analysis of these provisions is pivotal for the purposes of understanding whether and how shareholders enjoy the protection of IIAs. As pointed out by Lukas Vanhonnaeker, indeed, «it is only if one qualifies as an 'investor' under the applicable treaty and has an 'investment', also as understood under the applicable treaty, that the former will benefit from the protection of the latter».[306] Looking at the relationship between investor and investment, they are intertwined in a way that makes it difficult to deal with them separately. In this respect, Arnaud de Nanteuil powerfully argued that «both are inseparable […], there can be no investor without an investment, but no investment can be protected by international law before an arbitral tribunal without an investor».[307] Nevertheless, at a closer look, it is apparent that the two concepts are not only different, but they also pose distinctive problems. A separate analysis is thus required.

Accordingly, the following sub-sections aim at ascertaining whether shares qualify as protected investments and whether shareholders qualify as protected investors for the purposes of international investment agreements.

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305 For an in-depth analysis of the scope of application of international investment agreements, see DOUGLAS, *The International Law of Investment Claims*, op. cit., p. 161 ff.; DOLZER, SCHREUER, *Principles of International Investment Law*, op. cit., at 44 ff.; SORNARAJAH, *The International Law on Foreign Investment*, op. cit., p. 226 ff. and 358 ff.; MCLACHLAN, SHORE, WEINIGER, *International Investment Arbitration. Substantive Principles*, op. cit., para. 5.01 ff. and 6.01 ff. See also SCHREUER, 'Investments, International Protection', op. cit.; REED, SCANLON, ATANASOVA, 'Protected Investment', in *Max Planck Encyclopedia of International Procedural* Law, 2018.

306 VANHONNAEKER, *Shareholders' Claims for Reflective Loss in International Investment Law*, op. cit., p. 93.

307 DE NANTEUIL, *International Investment Law*, Cheltenham, Edward Elgar, 2020, pp. 1-464, para. 5.062.

4.2.1. Shares as Protected Investments under IIAs

Whether an economic operation or transaction is a 'protected investment' for the purposes of a bilateral or multilateral investment treaty is «a foundational concept of international investment […] law».[308] That is because such notion circumscribes the scope of application of the relevant agreement, while also being a threshold question of jurisdiction *ratione materiae* in investment-treaty arbitration.

Despite it being a foundational concept, the very meaning of the term investment is far from clear. Scholars and arbitral tribunals grappling with the issue have mainly adopted two different and opposite approaches: the objective and the subjective approach. The former premises on the idea that the term 'investment' must be understood as having an intrinsic meaning independent of States' disposition in their IIAs and was mainly developed by ICSID tribunals. Indeed, Art. 25 of the ICSID Convention provides that a tribunal only has jurisdiction on disputes arising directly out of an investment.[309] Thus, under this approach,

> «[…] an agreement of the parties describing their transaction as an investment is not, as such, conclusive in resolving the question whether the dispute involves an investment under Article 25(1) of the Convention. The concept of an investment as spelled out in that provision is objective in nature in that the parties may agree on a more precise or restrictive definition of their acceptance of the Centre's jurisdiction, but they may not choose to submit disputes to the Centre that are not related to an investment. A two-fold test must therefore be applied in determining whether this Tribunal has the competence to consider the merits of the claim: whether the dispute arises out of an investment within the meaning of the Convention and, if so, whether the dispute relates to an investment as defined in the Parties' consent to ICSID arbitration, in their reference to the BIT and the pertinent definitions contained in Article 1 of the BIT».[310]

[308] REED, SCANLON, ATANASOVA, 'Protected Investment', op. cit., para. 86.

[309] Convention on the Settlement of Investment Disputes between States and Nationals of other States, signed 18 March 1965, entered into force 16 October 1966.

[310] *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, para. 68. On the concept of investment in general see DOLZER, SCHREUER, *Principles of International Investment Law*, op. cit., p. 60 ff.; MCLACHLAN, SHORE, WEINIGER, *International Investment Arbitration. Substantive Principles*, op. cit., p. 217 ff. For an overveiw of cases adopting an objective approach to the issue of the definition of investments see SCHREUER, MALINTOPPI, REINISCH, SINCLAIR, 'The ICSID Convention. A Commentary', Cambridge, Cambridge University Press, 2009, p. 114 ff.

Contrariwise, under the subjective approach States are allowed to freely determine the definition of an investment for the purposes of their IIAs on a case-by-case basis.[311]

The prevailing approach among investment tribunals – at least among ICSID tribunals – is the objective one. However, it can be said that there is no such thing as an objective approach. Rather, different tribunals have formulated different tests to ascertain the existence of an investment. To this day, the most important and used one is the so-called Salini test, developed by the arbitral tribunal sitting in the case of *Salini Costruttori v. Morocco*, requiring: *i*) a substantial commitment by the investor; *ii*) a certain duration of performance; *iii*) the assumption of a risk by the investor; and *iv*) the contribution to the development of the host State.[312]

In addition to the above, an investment, to be considered protected by an IIA, must usually satisfy other conditions: indeed, covered investments «are generally circumscribed by the following dimensions: (a) personal (i.e., a required link to a qualifying investor); (b) spatial (i.e., a link to the territory of the host state); and (c) temporal (i.e., a link to the temporal scope of application of the controlling instrument)».[313]

It emerges from the foregoing that, whatever the approach one might follow, an investment – in order to be considered as a protected one and one on which an arbitral tribunal has jurisdiction – must satisfy a number of different requirements. Furthermore, notwithstanding the differences between the proposed approaches, the starting point of any analysis aimed at ascertaining the existence of a protected investment is whether the economic transaction at the very heart of the dispute is included in the scope of application of the relevant IIA.

As far as the concept of investment, two types of definitions can be found in investment treaties: *i*) the enterprise-based definition, and *ii*) the asset-based definition.[314] With regard to the first, it generally comprises the establishment or acquisition of a business enterprise, as well as shares that provide the investor with control over an enterprise.[315]

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[311] For an example of subjective approach see *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008.

[312] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 31 July 2001.

[313] REED, SCANLON, ATANASOVA, 'Protected Investment', op. cit., para. 49.

[314] *Ibid.*, para. 3. However, according to VANHONNAEKER, *Shareholders' Claims for Reflective Loss in International Investment Law*, op. cit., p. 94: «Two types of definitions of "investment" can generally be found in IIAs. First, such definitions can be "asset-based" and define the term "investment" as "every kind of asset" by reference to a non-exhaustive list of examples. […] The second type of definition of "investment" in IIAs is a more restrictive closed-list definition that lists in an exhaustive manner the assets that qualify as investments and those that do not».

[315] See Article 1 of the Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, signed 3 December 2016, not in force; Article 2 of the Investment Cooperation and

The second, which is by far the most commonly employed, defines an investment by using the formula «every kind of assets», generally followed by an illustrative list of examples,[316] and sometimes by the identification of certain characteristics that the assets must possess.[317] As an instance, the 2012 US Model BIT enshrines the following definition in Article 1:

Facilitation Treaty between the Federative Republic of Brazil and the Republic of India, signed 25 January 2020, not in force. An enterprise-based definition was also enshrined in Article 1 of the 2004 Canada Model BIT, according to which: «investment means: (I) an enterprise; (II) an equity security of an enterprise; (III) a debt security of an enterprise […]; (IV) a loan to an enterprise […]; […] (VI) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise; (VII) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraphs (III) (IV) or (V); (VIII) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and (IX) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise». However, the new 2021 Canada Model BIT has moved to an asset-based definition.

[316] In this sense, see SCHEFER, *International Investment Law: Text, Cases and Materials*, Northampton, Edward Elgar, 2013, pp. 1-744, at 60; *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria,* ICSID Case No. ARB/12/35, Award, 31 May 2017, para. 372: «As is customary in definitions of investment contained in bilateral investment treaties, the BLEU-Algeria BIT then provides for a non-exhaustive list of "investments" protected under the Treaty».

[317] The provision of such characteristics an investment must possess can be considered as an emerging trend in international investment law. In this respect, MCLACHLAN, SHORE, WEINIGER, *International Investment Arbitration. Substantive Principles*, op. cit., para. 6.45 point out that: «It is noteworthy that the preamble to this definition [of the US Model BIT] takes up the *Fedax* criteria, albeit without referring to the cases directly. This more specific definition is likely to lead to more certainty by crystallising issues that have been developed in the case law into the wording of BITs». *Contra*, see DE NANTEUIL, *International Investment Law*, op. cit., paras 5.025-5.026: «Some treaties provide for a concise definition of investment, which, in theory, is a great idea, but in practice does not fully solve the problem. This is also why this trend is a marginal one. In these treaties, investment is defined through a set of criteria or characteristics. However, these definitions are usually accompanied by a list of examples, which could indicate that a concise definition might not be the best approach. […] In practice, this (rare) trend is largely consistent with case-law. Arbitral tribunals have drawn up a set of criteria to define the notion of investment from case-law itself and academic works».

See, *ex multis*, Article 1 of the Treaty between the United States of America and the Oriental Republic of Uruguay concerning the Encouragement and Reciprocal Protection of Investment, signed 4 Novembe 2005, entered into force 31 October 2006; Article 1 of the Agreement between the Government of the Republic of Belarus and the Government of Georgia on the Promotion and Reciprocal Protection of Investments, signed 1 March 2017, entered into force 1 December 2017; Article 1 of the Agreement between the Government of the Republic of Singapore and the Government of the Republic of the Union of Myanmar on the Promotion and Protection of Investments, signed 24 September 2019, not yet into force; Section A of the

> ‘investment’ means every asset […] that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:
>
> (a) an enterprise; (b) shares, stock, and other forms of equity participation in an enterprise; (c) bonds, debentures, other debt instruments, and loans; (d) futures, options, and other derivatives; (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts; (f) intellectual property rights; (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.[318]

Similarly, Article 1 of the 2019 the Netherlands Model BIT provides that:

> ‘investment’ means every kind of asset that has the characteristics of an investment, which includes a certain duration, the commitment of capital or other resources, the expectation of gain or profit, and the assumption of risk. Forms that an investment may take include:
>
> (i) movable and immovable property as well as any other property rights in rem in respect of every kind of asset, such as mortgages, liens and pledges; (ii) rights

Agreement between the Government of the State of Israel and The Government of the United Arab Emirates on Promotion and Protection of Investments, signed 20 October 2020, not yet into force; Article 1 of the Agreement between Japan and Georgia for the Liberalisation, Promotion and Protection of Investment, signed 29 January 2021, not yet into force.

For an example of IIAs whose provision on ‘protected investment’ does not provide for the characteristics an investment must possess, see Article 1 of the 2008 UK Model BIT, according to which: «‘investment’ means every kind of asset, owned or controlled directly or indirectly, and in particular, though not exclusively, includes: (i) movable and immovable property and any other property rights such as mortgages, liens or pledges; (ii) shares in and stock and debentures of a company and any other form of participation in a company; (iii) claims to money or to any performance under contract having a financial value; (iv) intellectual property rights, goodwill, technical processes and know-how; (v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources»; Article 1 of the Agreement between the Government of Japan and the Government of the Republic of Côte D’Ivoire for the Reciprocal Promotion and Protection of Investment, signed 13 January 2020, not yet into force; Article 1 of Agreement between the Government of Hungary and the Government of the Kyrgyz Republic for the Promotion and Reciprocal Protection of Investments, signed 29 September 2020, not yet into force.

318 2012 US Model BIT, available at investmentpolicy.unctad.org. A similar definition has been recently provided in the Comprehensive Economic and Trade Agreement between the EU and Canada, signed 30 October 2016, not yet into force.

> derived from shares, bonds and other kinds of interests in companies and joint ventures; (iii) claims to money, to other assets or to any contractual performance having an economic value; (iv) rights in the field of intellectual property, technical processes, goodwill and know-how; (v) rights granted under public law or under contract, including rights to prospect, explore, extract and exploit natural resources.[319]

The very choice to provide an open-ended list of assets that, as long as they comply with certain characteristics, might be considered as an investment is not by chance. As argued by Jeswald Salacuse, such an approach recognizes «that investment forms are constantly evolving in response to the creativity of investors and the rapidly changing world of international finance, so a broad definition is necessary to cover the wide and potentially expanding spectrum of investments».[320] As a consequence, «this approach [provides] an expanding umbrella of protection to investors and investments».[321]

However, some investment treaties have (increasingly) adopted a comparatively narrower definition of investment by either excluding some specific types of assets from

[319] 2019 the Netherlands Model BIT, available at investmentpolicy.unctad.org.

[320] SALACUSE, *The Law of Investment Treaties*, Oxford, Oxford University Press, 2015[2], pp. 1-479, at 177. To this effect, YANNACA-SMALL, KATSIKIS, ‘The Meaning of ‘Investment’ in Investment Treaty Arbitration’, in YANNACA-SMALL K. (ed.), *Arbitration Under International Investment Agreements. A Guide to the Key Issues*, Oxford, Oxford University Press, 2018[2], pp. 266-301, para. 11.06: «Their approach is to give the term ‘investment’ a broad, non-exclusive definition, in recognition of the constantly evolving forms of investment».

[321] *Ibid.*

the broad definition provided,[322] or by providing a closed list of assets qualifying as investments.[323]

Having laid down the approach generally taken by IIAs with regard to the concept of investment, it is relevant to briefly focus on shares in order to understand to what extent there is a general agreement as for their inclusion in the list of assets *qua* investments. In this respect, it is easy to ascertain that «shares […] are generally expressly included within the definition, which means that shareholders hold an […] investment».[324] This is true

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[322] See, *ex multis*, Article 1 of the Agreement between the Republic of Turkey and the Kyrgyz Republic concerning the Reciprocal Promotion and Protection of Investments, signed 9 April 2018, entered into force 18 March 2020: «The term 'investment' means every kind of asset, connected with business activities, made or acquired for the purpose of establishing lasting economic relations in the territory of a Contracting Party in conformity with its laws and regulations, and shall include in particular, but not exclusively: (a) movable and immovable property […]; (b) reinvested returns […]; (c) shares […]; […]. For greater clarity, the term 'investment' *shall not include portfolio investments which are made or acquired through stock exchanges*» (*emphasis added*); Article 1 of the Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the United Arab Emirates for the Promotion and Reciprocal Protection of Investments, signed 16 June 2019, entered into force 6 March 2020: «(d) 'investment' means every kind of asset invested directly or indirectly by investors […] *but 'investment' shall not include*: […]» (*emphasis added*); Article 14.1 of the Agreement between the United States of America, the United Mexican States, and Canada, signed 10 December 2019, entered into force 1 July 2020: «investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. An investment may include: (a) an enterprise; (b) shares, stock and other forms of equity participation in an enterprise; […]. […] *but investment does not mean:* (i) an order or judgment entered in a judicial or administrative action; (j) claims to money that arise solely from: (i) commercial contracts for the sale of goods or services by a natural person or enterprise in the territory of a Party to an enterprise in the territory of another Party, or (ii) the extension of credit in connection with a commercial contract referred to in subparagraph (j)(i)» (*emphasis added*).

[323] Article 1 of the Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the United Mexican States for the Promotion and Reciprocal Protection of Investments, signed 23 January 2020, entered into force 16 June 2021: «'investment' *means the following assets* owned or controlled by investors of a Contracting Party and established or acquired in accordance with the laws and regulations of the other Contracting Party in whose area the investment is made: (a) an enterprise; (b) shares, stocks and other forms of equity participation in an enterprise; […] (e) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; (f) interests arising from the commitment of capital or other resources in the area of a Contracting Party to economic activity in such area […]» (*emphasis added*).

[324] BOTTINI, *Admissibility of Shareholder Claims under Investment Treaties*, op. cit., p. 161. Similarly, BAUMGARTNER, *Treaty Shopping in International Investment Law*, Oxford, Oxford University Press, 2016, pp. 1-400, at 141: «This being said, it seems safe to say that

irrespective of the enterprise-based or asset-based definition adopted by the relevant treaty. As shown above, both the US and the Netherlands Model BITs include shares within their exemplificatory list of forms of investment. Likewise, Article 1 of the 2020 Italy Model BIT provides that the notion of investment encompasses «[…] *shares*, debentures, equity holdings and any other instruments of credit».[325] French investment treaties generally refer to «*les actions*, primes d'émission et autres formes de participation, même minoritaires ou indirectes, dans des sociétés constituées sur le territoire de l'une des Parties contractantes»,[326] while UK BITs usually provide that «*shares* in, and stocks and debentures of, a company and any other kind of economic participation in a company» fall within the definition of investment.[327] The same holds true if one looks at the investment agreements concluded by Azerbaijan,[328] Brazil,[329]

shareholding qualifies in virtually any investment treaty as protected investment, resolving, as it does, the a.m. Barcelona Traction problematic».

325 2020 Italy Model BIT, available at edit.wti.org (*emphasis added*).

326 See Article 1 of the *Accord entre le Gouvernement de la République française et le Gouvernement de la République de Colombie sur l'encouragement et la protection réciproques des investissements*, signed 10 July 2016, entered into force 14 October 2020; *Accord entre le Gouvernement de la République française et le Gouvernement de la République d'Irak sur l'encouragement et la protection réciproques des investissements*, signed 31 October 2010, entered into force 24 August 2016 (*emphasis added*).

327 See Article 1 of the Bilateral Agreement for the Promotion and Protection of Investments between the Government of the United Kingdom of Great Britain and Northern Ireland and Republic of Colombia, signed 17 March 2010, entered into force 10 October 2014 (*emphasis added*). For other references, see VANHONNAEKER, *Shareholders' Claims for Reflective Loss in International Investment Law*, op. cit., pp. 95-97.

328 See Article 1 of the Agreement between the Government of the Republic of Turkey and the Government of the Republic of Azerbaijan on the Reciprocal Protection and Promotion of Investments, signed 25 October 2011, entered into force 2 May 2013; Article 1 of the Agreement between the Government of the Republic of San Marino and the Government of the Republic of Azerbaijan on the Promotion and Reciprocal Protection of Investments, signed 25 September 2015, entered into force 25 February 2016.

329 See Article 1 of the *Acuerdo de cooperación y de facilitación de las inversiones entre la República Federativa del Brasil y los Estados Unidos Mexicanos*, signed 26 May 2015, entered into force 7 October 2018; Article 3 of the *Acuerdo de cooperación y de facilitación de inversiones entre la República Federativa del Brasil y la República del Ecuador*, signed 26 September 2018, not yet into force; Article 2 of the Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Republic of India, *supra* note 315.

Canada,[330] Mali,[331] Russia,[332] and Switzerland.[333] As far as multilateral investment agreements, Article I of the Energy Charter Treaty reads that investment «means every kind of asset, […] and includes: […] (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise».[334] Similarly, the USMCA provides that «shares, stock and other forms of equity participation in an enterprise» are encompassed under the definition of investment.[335] Also the agreements recently concluded by the European Union include share as investments.[336]

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[330] Article 1 of the Agreement between the Government of Canada and the Government of the Republic of Ecuador for the Promotion and Reciprocal Protection of Investments, signed 29 April 1996, entered into force 6 June 1997, terminated 19 May 2018; Article 1 of the Agreement between Canada and Mongolia for the Promotion and Protection of Investments, signed 8 September 2016, entered into force 24 February 2017; Article 1 of the Agreement between the Government of Canada and the Government of the Republic of Moldova for the Promotion and Protection of Investments, signed 12 June 2018, entered into force 23 August 2019.

[331] See Article 1 of the *Accord entre le Gouvernement du Royaume du Maroc et le Gouvernement de la Republique du Mali concernant l'encouragement et la protection reciproques des investissements*, signed 21 February 2014, entered into force 2 March 2016; Article 1 of the *Accord relatif à la promotion et la protection reciproques des investissements entre le Gouvernement de la Republique du Mali et le Gouvernement des Emirats Arabes Unis*, signed 6 March 2018, not yet into force.

[332] See Article 1 of the Agreement between the Government of the Russian Federation and the Government of the Kingdom of Cambodia on the Promotion and Reciprocal Protection of Investments, signed 3 March 2015, entered into force 7 March 2016; Article 1 of the Agreement between the Government of the Russian Federation and the Government of the Islamic Republic of Iran on Promotion and Reciprocal Protection of Investments, signed 23 December 2015, entered into force 6 April 2017.

[333] See Article 1 of the Agreement between the Swiss Federal Council and the Government of the Republic of Tunisia on Reciprocal Promotion and Protection of Investments, signed 16 October 2012, entered into force 8 July 2014; Article 1 of the Agreement between the Swiss Confederation and Georgia on the Promotion and Reciprocal Protection of Investments, signed 3 June 2014, entered into force 17 April 2015.

[334] Energy Charter Treaty, signed 17 December 1994, entered into force 16 April 1998.

[335] Article 1.2 of the Investment Protection Agreement between the European Union and its Member States, of the one part, and the Republic of Singapore, of the other part, signed 15 October 2018, not yet into force; Article 14.1 of the Agreement between the United States of America, the United Mexican States, and Canada, *supra* note 322; Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam of the other part, signed 30 June 2019, not yet into force.

[336] Article 8.1 of the Comprehensive Economic and Trade Agreement between the EU and Canada;

4.2.2. (*follows*) Indirect Investments under IIAs

As pointed out in the last sub-section, in order for a particular investment to fall within the scope of protection granted by an IIA, there must be, *inter alia*, a link between the investment and an investor. In other words, to qualify for protection, the investment shall come from an investor who in turn qualifies for the protection under the relevant treaty – that is to say, a protected investor of whom an analysis will be provided in sub-section 4.2.3 –. The criterion to ascertain whether the investment comes from a protected investor is embodied in the notions of 'ownership'[337] and 'control'[338] of an investment. From this perspective, therefore, one cannot but agree with those authors who concluded that «[t]he way in which the investor *holds* a putative investment is determinative».[339] In analysing such a link, what has been argued in Section 4.2 is particularly apparent: the notions of investor and investment are interlaced to the extent that their distinction and separate analysis might seem a bit artificial. Of course, the question as to how an investor holds the investment can be looked at from either the perspective of the former or that of the latter. An investor, indeed, cannot be deemed to be a protected one if s/he does not *hold* an investment. Similarly, an investment cannot be deemed to be a protected one if there is no *personal link* with the investor. For the purposes of our dissertation, we will look at the link from the perspective of the investment: far from being a random choice, this aims at putting under the spotlight one of the main issues related to the link, that means the protection of indirect investments.

Before delving into the discussion concerning indirect investments and their protection under international investment law, it is necessary to clarify what is meant by indirect investment. Such a wording can be indeed used to indicate different legal concepts that are relevant in the context of international investment law and arbitration. In this respect, the Tribunal in *Siemens v. Argentina* pointed out that:

> The arguments of the Respondent against protection of indirect investments are based on the extraordinary nature of such protection requiring specific coverage in the Treaty, on the fact that there is such specific reference only in Article 4 and on the criterion defining the nationality of a company by its seat. *The arguments on*

[337] United Nations Conference on Trade and Development, 'World Investment Report 2016 Investor Nationality: Policy Challenges', 2016, pp. 1-215, p. 175: «Ownership. Some treaties refer to the share of legal ownership rights and define ownership of an enterprise as requiring 'more than 50 per cent of the equity interest'».

[338] *Ibid.*: «Control. Some treaties leave open or are ambiguous as to whether control can be legal (e.g. legal capacity to exercise control over the company) or must be effective, resulting in diverging arbitral interpretations. Other treaties provide clear guidance, noting that control must be effective».

[339] REED, SCANLON, ATANASOVA, 'Protected Investment', op. cit., para. 50.

indirect investments revolve around two different meanings of indirect: indirect meaning that the shareholder of the local company controls it through another company, and indirect meaning that a shareholder may claim damage suffered by a company in which it holds shares.[340]

The Tribunal is remarkably clear. According to its view, indirect investment can be used to mean: *i*) the case in which an investor is considered to hold an investment through another company; *ii*) the case in which a shareholder starts proceedings to recover a loss in value of its shares because of a wrongful act against the company in which it holds shares. The second hypothesis is nothing but the subject-matter of this dissertation, meaning shareholders' claims for reflective loss. In order to avoid any confusion, no further references to reflective loss as implying an indirect investment will be made. As we will argue, there is indeed a strong relationship between indirect investments and reflective loss claims. However, the two concepts must be distinguished so as to avoid any undue overlap. The first hypothesis, instead, concerns the theme of this sub-section: indirect meaning that a shareholder of a local company controls such a legal entity through another company. That is to say, a corporate chain.

Investment arbitral tribunals have generally come to the conclusion that indirect investments do fall within the scope of protection of investment treaties. That is because different IIAs contain express language to this effect. As an instance, the 2008 UK Model BIT, the 2008 Germany Model BIT, the 2012 US Model BIT, the 2016 Czech Republic BIT, the 2017 Colombia Model BIT, the 2019 BLEU Model BIT and the 2019 Slovakia Model BIT all provide – through a similar language – that an investment is a tangible or intangible asset *owned or controlled, directly or indirectly*, by an investor of the other Contracting Party. Similar provisions can be also be found in multilateral agreements such as Article 1 of the ECT,[341] Article 1139 of the former NAFTA,[342] Article 14(1) of the USMCA,[343] Article 9(1) of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP),[344] and Article 9.29 of the 2018 Central America – Republic

[340] *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004.

[341] Energy Charter Treaty, *supra* note 334.

[342] North American Free Trade Agreement, signed 17 December 1992, entered into force 1 January 1994, terminated 1 July 2020.

[343] Agreement between the United States of America, the United Mexican States, and Canada, *supra* note 322.

[344] Comprehensive and Progressive Agreement for Trans-Pacific Partnership, signed 8 March 2018, 30 December 2018.

of Korea FTA.[345] Whenever the relevant bilateral or multilateral investment treaty provides so, there are no doubts that indirect investments are granted protection.

This is well represented by one of the first cases in which the problem of indirect investments was discussed, *Azurix v. Argentina*.[346] The facts can be summarized as it follows: in 1999, two Argentinean subsidiaries of the Azurix Corp., a US company, won the bid for privatization of water services in the Province of Buenos Aires. Following the adjudication, the two subsidiaries incorporated Azurix Buenos Aires S.A (ABA) in Argentina. The establishment of such local company was aimed at using it as a concessionaire. Soon after the granting of the concession to distribute potable water and manage the sewerage in exchange of a canon amounting to several millions of Argentinean pesos, however, the relationship between the local companies and the authorities started to deteriorate. On 19 September 2001, Azurix, as parent company, filed a request for arbitration with ICSID alleging the violation of several articles of the Argentina–US BIT.[347] Argentina challenged the jurisdiction of the Tribunal arguing that, *inter alia*, the claimant did not possess an investment. However, the respondent State acknowledged that «the local companies that AZURIX used to take part in the bidding process, and even ABA […] qualify as investment according to the Treaty and could be party to an ICSID procedure».[348] In other words, the Argentinean government recognized that – in accordance with Article 1(1)(a) of the Argentina–US BIT[349] – an investment may be hold by a foreign investor, thus qualifying as a 'protected' one, through one or more additional layers of companies, be they national or foreign corporations.

In the decision on Jurisdiction, the arbitral tribunal came to the following conclusion as far as the scope of the Argentina – US BIT:

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[345] Free Trade Agreement between the Republic of Korea and the Republics of Central America, signed 21 February 2018, entered into force 1 November 2019.

[346] For an analysis of this case, see SABAHI, 'Azurix Corp v Argentina, Decision on Jurisdiction, ICSID Case No ARB/01/12, (2004) 43 ILM 262, IIC 23 (2003), despatched 8th December 2003, United Nations [UN]; World Bank; International Centre for Settlement of Investment Disputes [ICSID]', in *Investment Claims*, 2007; SABAHI, 'Azurix Corporation v Argentina, Award, ICSID Case No ARB/01/12, IIC 24 (2006), 23rd June 2006, despatched 14th July 2006, United Nations [UN]; World Bank; International Centre for Settlement of Investment Disputes [ICSID]', in *Investment Claims*, 2007.

[347] Treaty between the United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment, signed 14 November 1991, entered into force 20 October 1994.

[348] *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003, para. 60.

[349] Treaty between the United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment, *supra* note 347: «(a) 'investment' means every kind of investment in the territory of one Party *owned or controlled directly or indirectly* by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes without limitation […]» (*emphasis added*).

> Provided the direct or indirect ownership or control is established, *rights under a contract held by a local company constitute an investment protected by the BIT*. The definition in Article I.1(a) simply lists examples of what an investment is, the list is not exhaustive and each item is independent from each other. *The only condition is that, whatever the form an investment may take, it must be directly or indirectly owned or controlled by nationals or companies of the other party to the BIT*.[350]

Accordingly, the Tribunal was satisfied that

> the investment described by Claimant in its Rejoinder on Jurisdiction is an investment protected under the terms of the BIT and the Convention[, since]: (a) Azurix indirectly owns 90% of the shareholding in ABA, (b) Azurix indirectly controls ABA, and (c) ABA is party to the Concession Agreement and was established for the specific purpose of signing the Concession Agreement as required by the Bidding Terms.[351]

More problematic, instead, is to understand whether protection of indirect investments is to be granted when, as it often happens, the treaty is silent on the required link. In this respect, arbitral tribunals have generally found that «the protection of indirect investment to be implied in the *broad asset-based* definition of investment».[352]

One of the first cases in which the arbitral tribunal came to the conclusion that a silent BIT was to be interpreted as protecting indirect investments is *Sedelmayer v. Russia*.[353] In such case, the claimant – a natural person who invested in Russia through a vehicle incorporated in the US, wholly owned by him – started proceedings against the respondent State on the basis of the 1989 Germany-Russia BIT.[354] According to Article 1(1)(a) of the BIT, «[t]he term 'investment' shall apply to all types of assets which an investor of one Contracting Party invests in the territory of the other Contracting Party in accordance with its legislation». Facing the claim brought by Mr Sedelmayer *qua*

[350] *Azurix Corp. v. The Argentine Republic*, Decision on Jurisdiction, *supra* note 348, para. 63 (*emphasis added*).
[351] *Azurix Corp. v. The Argentine Republic*, Decision on Jurisdiction, *supra* note 348, para. 65.
[352] REED, SCANLON, ATANASOVA, 'Protected Investment', op. cit., para. 54 (*emphasis added*). In favour of such a solution BISCHOFF, HAPP, 'Ratione Materiae', in BUGENBERG, GRIEBEL, HOBE, REINISCH (eds), *International Investment Law. A Handbook*, München/Oxford/Baden-Baden, Beck/Hart/Nomos, 2015, pp. 495-544, at 531. *Contra*, DOUGLAS, *The International Law of Investment Claims*, Cambridge, Cambridge University Press, op. cit., p. 311.
[353] *Franz Sedelmayer v. Russian Federation*, SCC, Award, 7 July 1998.
[354] Agreement between the Federal Republic of Germany and the Union of Soviet Socialist Republics concerning the Promotion and Reciprocal Protection of Investments, signed 13 June 1989, entered into force 5 August 1991.

shareholder of the US-incorporated entity (SGC International) that had in turn invested in Russia through the setting up a local joint-stock company together with a Soviet shareholder,[355] the respondent State contested that the claimant could qualify as 'investor' inasmuch as the investment had been made by the US corporation. The tribunal rejected the objection, holding that Mr Sedelmayer was not only:

> in full control of SGC International but also that SGC International was entirely dependent on financial contributions from him. These circumstances [thus] support[ing] Mr. Sedelmayer's allegation that SGC International was only a vehicle through which he transferred his own personal capital into Russia.[356]

The arbitrators then wondered «whether an individual who makes his investments through a company might be regarded as an investor – an de facto investor – under the Treaty. This question concerns the general issue to what extent the 'theory of control' may be applied».[357] To solve the issue, the Tribunal engaged in the interpretation of the relevant provision, finding that:

> […] when deciding whether the control theory might be applied or not, guidance should in the first place be sought in the text of the Treaty. It is a fact that the Treaty does not contain any specific clause providing such application. On the other hand, there is nothing in the Treaty which excludes the applicability of the said theory. In the Tribunal's opinion, the mere fact that the Treaty is silent on the point now discussed should not be interpreted so that Mr. Sedelmayer cannot be regarded as a de facto investor. In this context, not only the Treaty itself but also the protocol attached to the Treaty is of interest. The Protocol contains a statement according to which an investor shall be entitled to compensation if the other Contracting Party interferes with the economic activities of an enterprise in which he is participating. This statement can be seen as an acknowledgement of the rights of a de facto investor. It should also be kept in mind that, as can be concluded from the text of the Treaty, the main aim of the Treaty is to promote, as far as possible, investments in the two countries concerned. Granting protection under the Treaty to the investments now discussed would be in line with the said purpose.[358]

In light of the foregoing, the Tribunal concluded that:

[355] *Franz Sedelmayer v. Russian Federation,* Award, *supra* note 353, Section I.
[356] *Ibid.*, p. 57.
[357] *Ibid*.
[358] *Ibid.*, pp. 57-58.

> the reasons speaking in favour of the Claimant's position outweigh the Respondent's objections. Mr. Sedelmayer shall, thus, be regarded as an investor under the Treaty, even with respect to investments formally made by SGC International or the other companies.[359]

By reading the reasoning of the Tribunal, one might be a bit surprised by the references to the 'control theory' and to the unknown notion of a '*de facto* investor'. In this respect, Jorun Baumgartner argued that «the difficulties in this case did not arise from the definition of the notion of investor, which was easy to confirm»[360] inasmuch as Mr Seldmayer, being a German national, clearly fulfilled the requirement of nationality – on which, see Section 4.2.3 – in order to be considered as an investor of one of the Contracting parties. Contrariwise, «the difficulty la[id] in the fact that the [relevant] BIT […] did not specify […] whether it covered indirect investments made by an investor through [a legal entity of] another country».[361] According to the same author, moreover, such a reasoning might «be misunderstood because commonly the control theory is invoked precisely to disavow the claimed nationality of the investor, not to ground it».[362] Accordingly, in his view, the Tribunal should have approached the issue in a different way, that is to say by questioning whether the notion of investment *ex* Article 1(1)(a) could encompass indirect investments. This is partially true: as argued above, indeed, the notions of investor and investment are strictly intertwined. This is likewise true with regard to the notion of indirect investment: an investment cannot be deemed to be a protected one if it is not directly or indirectly owned or controlled by an investor, at the same time however an investor cannot be considered to fall within the scope of protection of an IIA if there is no link (direct or indirect, ownership or control) with an investment. Put it otherwise, this is just a matter of perspective. What can be deemed to be problematic, instead, is the reference to a *de facto* investor, a concept which finds no place in the current terminology of international investment law and arbitration. From our perspective, a *de facto* investor would be nothing else than an investor who *indirectly* owns or controls an investment: an indirect investor.

A more recent case in which the protection of indirect investments was discussed is the already mentioned *Siemens v. Argentina*.[363] The facts of the case can be summarized as

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[359] *Ibid.*, p. 58.
[360] BAUMGARTNER, *Treaty Shopping in International Investment Law*, op. cit., p. 145.
[361] *Ibid.*
[362] *Ibid.*
[363] For an analysis of this case, see HAPP, RUBINS, 'Siemens AG v Argentina, Decision on Jurisdiction, ICSID Case No ARB/02/8, (2005) 44 ILM 138, IIC 226 (2004), 3rd August 2004, United Nations [UN]; World Bank; International Centre for Settlement of Investment Disputes [ICSID]', in *Investment Claims*, 2007 ; EJIMS, 'Siemens AG v Argentina, Award and Separate Opinion, ICSID Case No ARB/02/8, IIC 227 (2007), 6th February 2007, United Nations [UN];

it follows: in 1996, Argentina invited bids for a contract in order to establish a system of migration control and personal identification. The terms of the call required investors to establish a local company in order to be able to take part in the process. Accordingly, Siemens established –through its wholly owned company, Siemens Nixdort Informationssysteme – a local company, Siemens IT Services (SITIS). SITIS took part in the bidding process and won the contract, which was signed in October 1998 and later approved by Decree. In order to allow SITIS to duly carry out its contractual obligations, Siemens proceeded to make the required investments through capital contributions. However, a new government came to power in Argentina: in 2000, it firstly suspended the contract alleging technical problems; then, in May 2001, it decided to terminate the contract by Decree. In 2003, Siemens, the parent company, filed a request for arbitration with ICSID alleging the violation of several articles of the Germany – Argentina BIT. Argentina challenged the jurisdiction of the Tribunal arguing that, *inter alia*, the dispute did not arise out of an investment. According to the respondent State, indeed,

> the Treaty requires a direct relationship between the investor and the investment. In the instant case, *this direct relationship does not exist because SNI and not Siemens is the holder of the shares in SITS*. It follows that only SNI could raise claims in relation to its investment and SNI is not party to these proceedings.[364]

Contrariwise, Siemens contended that such a direct relationship was not required inasmuch as: *i*) no reference to this requirement could be found in the BIT; and *ii*) the formula used in Article 1 (1) to define investment was so broad that it could only be limited by express exceptions or limitations set out in the treaty itself. Against this background, the arbitral tribunal found that:

> The Tribunal has conducted a detailed analysis of the references in the Treaty to 'investment' and 'investor'. The Tribunal observes that there is no explicit reference to direct or indirect investment as such in the Treaty. The definition of 'investment' is very broad. An investment is any kind of asset considered to be such under the law of the Contracting Party where the investment has been made. The specific categories of investment included in the definition are included as examples rather than with the purpose of excluding those not listed. The drafters were careful to use the words 'not exclusively' before listing the categories of 'particularly' included investments. One of the categories consists of 'shares, rights of participation in companies and other types of participation in companies'. The plain meaning of this

World Bank; International Centre for Settlement of Investment Disputes [ICSID]', in *Investment Claims*, 2008.

364 *Siemens A.G. v. The Argentine Republic*, Decision on Jurisdiction, *supra* note 340, para. 123.

> provision is that shares held by a German shareholder are protected under the Treaty. The Treaty does not require that there be no interposed companies between the investment and the ultimate owner of the company. Therefore, a literal reading of the Treaty does not support the allegation that the definition of investment excludes indirect investments.[365]

In other words, the Tribunal considered that the scope of the treaty shall be interpreted as encompassing both direct and indirect investments. That was because, first, the Argentina – Germany BIT did not contain an explicit reference to direct or indirect investment: indeed, the relevant treaty neither limited its own applicability only to direct investments, nor carved out of its scope indirect ones. Furthermore, the tribunal stressed that the definition of investment was very broad. Accordingly, the Tribunal concluded that indirect investments could not be excluded from the protection granted by the treaty.

This approach to indirect investments, according to which they are protected under IIAs unless an explicit treaty language to this effect is found, has been confirmed by abundant subsequent case law.[366] Indeed, «[o]n the rare occasions when tribunals have restricted jurisdiction over indirect investments, it has been the result of explicit treaty language to that effect».[367] This has been the case for in *Berschader and Berschader v. Russia*.[368] The facts can be summarized as it follows: the two claimants, nationals of Belgium, were the sole shareholders of a locally-incorporated company Berschader International S.A. (BISA), engaged in the business of construction and general contracting. Their company, following a bidding procedure, won the tender to build new court facilities in Moscow, Russia. According to the claimants, national authorities failed to pay BISA upon the completion of the construction works as established pursuant to the contract. As a

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[365] *Siemens A.G. v. The Argentine Republic*, Decision on Jurisdiction, *supra* note 340, para. 137.

[366] See *Ioannis Kardassopoulos v. Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, para. 124; *Señor Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, 19 June 2009, paras 91–111; *Mobil Corporation, Venezuela Holdings BV, Mobil Cerro Negro Holding, Ltd, Mobil Venezolana de Petróleos Holdings, Inc, Mobil Cerro Negro, Ltd, and Mobil Venezolana de Petróleos, Inc v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, para. 165; *Cemex Caracas Investments BV and Cemex Caracas II Investments BV v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/14, Decision on Jurisdiction, 30 December 2010, para. 157; *ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction, 3 September 2013, para. 285; *Guaracachi America Inc and Rurelec PLC v. Plurinational State of Bolivia*, UNCITRAL, PCA Case No 2011-17, Award, 31 January 2014, paras 352–53.

[367] REED, SCANLON, ATANASOVA, 'Protected Investment', op. cit., para. 54. See also BAUMGARTNER, *Treaty Shopping in International Investment Law*, op. cit., pp. 145-147.

[368] *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, SCC Case No. 080/2004, Award, 21 April 2006.

consequence, their Belgian company was placed in bankruptcy. Following these events, the two shareholders started proceedings under the 1989 Belgium/Luxembourg – Russia BIT.[369] The respondent State challenged the jurisdiction of the arbitral tribunal by, *inter alia*, contesting that the claimants actually hold a protected investment in accordance with the relevant treaty, whose Article 1.2.4 provides that «[l]e terme 'investissements' désigne également les investissements indirects réalisés par les investisseurs de l'une des Parties contractantes sur le territoire de l'autre Partie contractante, *par l'intermédiaire d'un investisseur d'un État tiers*». The tribunal, therefore, had to consider whether, or to what extent, the BIT offered protection to indirect investments.[370] In doing so, it is interesting to point out that the tribunal carefully distinguished – on a par with what we have argued above – between indirect investments and reflective loss claims:

> The cases relied upon by the Claimants may […] be distinguished from the instant case in a number of fundamental respects. In the majority of the cases cited by the Claimants, the investors in question invested in shares in companies incorporated in the host State. These locally incorporated companies then went on to make the particular investments allegedly interfered with by the respondent State. *The Tribunal is of the view that these cases are not in fact clear examples of indirect investments*. In each case, the Claimants were in a position to point to their shareholding in the locally incorporated companies as constituting direct investments under the terms of the relevant BIT. *The principal issue discussed in each case was to what extent the shareholders were entitled to claim damages for loss to the company as opposed to loss to the mere value of their shares.*[371]

Having clarified the matter under its analysis, the Tribunal moved to consider whether the indirect investment made by the two Belgian nationals through a company incorporated under the law of Belgium could be deemed to be protected. In this respect, the tribunal rejected the contention pointing out that the wording of the treaty was clear as to provide protection only to investment made through a third-State-incorporated entity. At the same time, however, the tribunal stressed the paradox of the situation at stake: indeed, a claim could have been brought by the Belgian company itself if only it had not bankrupted. Indeed, «it [was] clear that a Belgian or Russian company itself, in such circumstances, is a qualifying investor under Article 1.1 and may, therefore, rely on

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[369] *Accord entre les Gouvernements du Royaume de Belgique et du Grand duché de Luxembourg et le Governement de l'Union des républiques socialistes soviétiques, concernant l'encouragement et la protection réciproque des investissements*, signed 9 February 1989, entered into force 18 August 1991.

[370] *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, Award, *supra* note 368, para. 124 ff.

[371] *Ibid.*, para. 127 (*emphasis added*).

the provisions of the Treaty».[372] The wording of Article 1.2.4 had been inserted for the purposes of providing *further protection* to those national investors in the event that they decided to make an investment through third country vehicles. In other words, the Contracting Parties had inserted this provision to extend the coverage of the protection granted by the BIT. Therefore, they did not include vehicles possessing their own nationality inasmuch as they already enjoyed the protection of the treaty. Accordingly,

> based on a reasonable interpretation of the text of the Treaty in its context and in light of its object and purpose and the practice of the Contracting Parties, the Tribunal [could not] find that the Contracting Parties intended that the indirect investments relied upon by the Claimants would be encompassed by the definition of "investment" under Article 1.2. The Claimants […] accordingly failed to show that they have made qualifying investments within the meaning of the Treaty.[373]

Therefore, the tribunal found it had no jurisdiction to hear the claim. A similar reasoning was developed by the arbitral tribunal in *HICEE v. Slovakia*.[374] In this case, the claimant – a corporation instituted under the laws of the Kingdom of the Netherlands – started proceedings on the basis of the 1991 the Netherlands-Slovakia BIT,[375] arguing that the measures taken by the respondent State adversely affected its interests in two Slovakia-incorporated companies, which were controlled through a local holding. The Slovak Republic challenged the jurisdiction of the tribunal arguing that, *inter alia*, the investor did not hold a protected investment under the relevant treaty, whose Article 1(a) read: «the term 'investments' shall comprise every kind of asset *invested either directly or through an investor of a third State*».[376] According to the respondent State, indeed, the wording of Article 1(a) was meant to cover only direct investments – *i.e.*, those «made without intervening subsidiary owners»[377] – or those indirect investments «channelled through an intermediary entity in a third state».[378] Against this background, the Tribunal dwelled upon the claimant's corporate structure, pointing out that

> HICEE's investment in the Slovak health insurance market is a structured one. This is not unusual, nor is there anything in the least reprehensible about it; structured

[372] *Ibid.*, para. 143.
[373] *Ibid.*, para. 150.
[374] *HICEE B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2009-11, Partial Award, 23 May 2011.
[375] Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, signed 29 April 1991, entered into force 1 October 1992, terminated 31 March 2021.
[376] *Ibid*. (*emphasis added*).
[377] *HICEE B.V. v. The Slovak Republic*, Partial Award, *supra* note 374, para. 48.
[378] *Ibid*., para. 49.

> investments are commonplace. The purpose is to secure advantages from incorporation or operation in a particular jurisdiction; the specific motives behind the incorporation of HICEE in the Netherlands are explained in the Claimant's Statement of Claim. The advantages anticipated often include the protection of particular bilateral (or other) treaties covering foreign investment. In these proceedings, the Parties are in dispute, *inter alia*, over whether it has.[379]

In interpreting the notion of investment as enshrined in the 1991 the Netherlands-Slovakia BIT, the Tribunal found that the investor did possess a protected investment: the holding established under Slovakian law. That was because this entity qualifying as a *direct* investment made by the claimant.[380] However, the Tribunal excluded that the claimant's *indirect* investment in the two local companies through its Slovak holding company was protected inasmuch as the particular wording of the clause carved out such a hypothesis. In this respect, the three arbitrators concluded that

> Once the subsidiary/sub-subsidiary structure is found to lie outside the Agreement's field of protection, it becomes obvious that treatment meted out to [the holding's] own investments through one of its local subsidiaries does not meet this requirement, whether or not treatment of that kind might otherwise fall foul of the substantive standards under the Agreement. The health insurance business of the sub-subsidiaries […] is covered by national law, and not by the terms of the Agreement.[381]

As a way of conclusion, therefore, it is reasonable to argue that – according to the general understanding – an investment may well be structured through several layers (of subsidiaries),[382] without this resulting in a loss of protection under the relevant IIA. This is true with regard those treaties which explicitly provide for indirect investments to fall within their scope of application. The same holds for all the investment agreements which are silent in this respect: the jurisprudence of arbitral tribunals, indeed, has consistently found the protection of indirect investments to be implied in the broad definition of investment therein enshrined. As long as ownership or control is established for each

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[379] *Ibid.*, para. 103.
[380] *Ibid.*, para. 147: «The Tribunal reaches the same conclusion as the Respondent, but by a different route. As the Tribunal has interpreted the Agreement, it plainly admits a company like [the holding] as an investment in its own rights. The consequence is that a claim under the Agreement would lie […] in respect of losses sustained by [the holding]».
[381] *Ibid.*, para. 147.
[382] BAUMGARTNER, *Treaty Shopping in International Investment Law*, op. cit., pp. 142-145; MCLACHLAN, SHORE, WEINIGER, *International Investment Arbitration. Substantive Principles*, op. cit., paras 6.138-6.154; SALACUSE, *The Law of Investment Treaties*, Oxford, Oxford University Press, 2021^3, pp. 1-640, at 242-245.

layer,[383] a parent company will be thus deemed to hold an investment for the purposes of the relevant treaty if the investor actually owns or controls it through one or more sub-/subsidiaries. This generally applies irrespectively of the nationality of the subsidiaries and sub-subsidiaries: arbitral tribunals, indeed, have taken the stance that an indirect investment may be channelled through several layers of companies possessing different nationalities and still the parent company will be entitled to claim protection under the BIT insofar as it proves ownership or control of the used vehicles.

From this perspective, therefore, a general rule concerning the protection of indirect investment can be deemed to exist in international investment arbitration. As such, the exclusion of indirect investments from the scope of application of IIAs will be upheld – in light of the relevant case law considered – only to the extent that the tribunal was able to find an explicit treaty language to this effect.

4.2.3. Shareholders *qua* Protected Investors under IIAs

Having ascertained that shares, as well as indirect shareholding, generally qualify as protected investments under international investment agreements, it is now necessary to ascertain whether shareholders do qualify as protected investors. Whether a natural or legal person is a 'protected investor' for the purposes of a bilateral or multilateral investment treaty is, indeed, another fundamental concept of international investment law. This is because such notion – on a par with that of 'protected investment' – circumscribes the scope of application of the relevant treaty by identifying those who are entitled to benefit from the guarantees therein enshrined, while also being a threshold

[383] It is relevant to point out that, in *Camuzzi International S.A. v. The Argentine Republic*, Decision on Objection to Jurisdiction, *supra* note 53, paras 41-43, the Tribunal came to the conclusion that control over the investment could also be deemed established collectively: « However, if the context of the initial investment or other subsequent acquisitions results in certain foreign investors operating jointly, it is then presumable that their participation has been viewed as a whole, even though they are of different nationalities and are protected by different treaties. In such a case, it would be perfectly feasible for these participations to be combined for purposes of control or to make the whole the beneficiary. In this dispute, there are three elements that come together to demonstrate that joint participation was actually the case. […] All of this was done jointly by Sempra and Camuzzi, in such a way that when the dispute arose it was already a reality that could not be ignored for jurisdictional purposes. An important evidence to this effect, invoked by the Claimant, is that the Office of the Secretary of Defense of Competition and of Consumers of the Ministry of Economy of the Argentine Republic approved the complex share transaction carried out in 2000 by Sempra and Camuzzi, noting that said transaction meant 'the assumption of control over the enterprises whose shares are being acquired.' This was precisely a case of joint control». According to REED, SCANLON, ATANASOVA, 'Protected Investment', op. cit., para. 55: «It is woth noting that several qualifying investors, typically several shareholders, may be able to establish the necessary control over the investment collectively, subject to proof that they acted in alliance».

question of jurisdiction *ratione personarum* in investment-treaty arbitration.[384] All international investment agreements provide a definition of whom they consider to be investor. In this respect, as pointed out by Engela Schlemmer, «the decisive criterion is the nationality of the investor».[385] Most of IIAs, indeed, define 'investor' as any natural person *possessing the nationality* of a Contracting Party in accordance with its national law, as well as any legal person *constituted under the law* of a Contracting Party.[386] As it is apparent from this wording, investment agreements make a distinction between natural persons and legal persons as far as the nationality, especially regarding its determination.

With regard to the former, «the reason for this requirement is obvious. The individual's nationality accords him or her a particular position in international law […] bestow[ing] on the individual the […] right […] to refer an investment dispute to an international arbitration tribunal».[387] As far as its conferral, the general rule is still the one identified, in 1923, by the Permanent Court of International Justice in its *Nationality Decrees* advisory opinion, according to which: «questions of nationality are, in the opinion of the Court, in principle within [the] reserved domain [of States]»;[388] thus implying that, as a general rule, each State is free to determine who are its own nationals.[389] Accordingly, «the nationality of an individual [will be] determined primarily by the law of the country whose nationality is at issue».[390]

Far more complex is, instead, the question of nationality of juridical persons.[391] Indeed, «[a] corporat[ion] may have a nationality based on the place of incorporation, or the effective seat of management or principal place of business» or a combination thereof,[392]

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[384] On the notion of 'investor' in international investment law, see SCHLEMMER, 'Investment, Investor, Nationality and Shareholder', op. cit., pp. 69-86; REED, DAVIS, 'Who Is a Protected Investor', in BUGENBERG, GRIEBEL, HOBE, REINISCH (eds), *International Investment Law. A Handbook*, München/Oxford/Baden-Baden, Beck/Hart/Nomos, 2015, pp. 614-637; PERKAMS, 'Protection for Legal Persons', in BUGENBERG, GRIEBEL, HOBE, REINISCH (eds), *International Investment Law. A Handbook*, München/Oxford/Baden-Baden, Beck/Hart/Nomos, 2015, pp. 638-652; SORNARAJAH, *The International Law on Foreign Investment*, op. cit., pp. 379-388; DE NANTEUIL, *International Investment Law*, op. cit., paras 5.062-5.106.

[385] SCHLEMMER, 'Investment, Investor, Nationality and Shareholder', op. cit., p. 69.

[386] *Ibid.*

[387] *Ibid.*, p. 71.

[388] *Nationality Decrees Issued in Tunis and Morocco (French Zone)*, Advisory Opinion of 7 February 1923, PCIJ Reports, Series B – No. 4, 1923, p. 6 ff., p. 24.

[389] CRAWFORD, *Brownlie's Principles of Public International Law*, Oxford, Oxford University Press, 2019[9], pp. 1-872, at 495. On the nationality of individuals see, BAUMGARTNER, *Treaty Shopping in International Investment Law*, op. cit., pp. 93-99.

[390] DOLZER, SCHREUER, *Principles of International Investment Law*, op. cit., p. 45.

[391] See BAUMGARTNER, *Treaty Shopping in International Investment Law*, op. cit., p. 99 ff.

[392] SCHLEMMER, 'Investment, Investor, Nationality and Shareholder', op. cit., p. 75.

depending on the specific wording adopted by the relevant IIA.[393] Many treaties adopt the incorporation criterion. Article 1 of the ECT, as an instance, defines investor as «a company or other organization organized in accordance with the law applicable in that Contracting Party».[394] The Argentina – US BIT describes «an enterprise of a Party» as «an enterprise constituted or organized under the law of a Party».[395] Similarly, Article 1 of the Brazil Model BIT defines enterprise as «any entity constituted or organized under applicable law».[396] Whenever the relevant treaty provides for this criterion, Tribunals have generally refused to pierce the corporate veil in order to look at the nationality of those who own the company.[397] The issue as to whether a tribunal should do so has been vigorously, yet from a State perspective unsuccessfully, debated in so-called 'round-tripping cases' – that is to say, «when an investor national of the host State owns or controls a corporate entity incorporated in another country that has concluded an IIA with the host State»,[398] an hypothesis well represented in two famous cases: *Tokios Tokelés v. Ukraine*[399] and *Yukos Universal Ltd. v. Russia*.[400] Similarly, respondent States have tried to argue in favour of identifying the 'real investors' in those cases concerning the so-called 'mailbox' or 'shell companies' – *i.e.*, those companies with no substantial business activities in the State of incorporation, which being owned or controlled by nationals of

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393 See *Société Ouest Africaine des Bétons Industriels v. Senegal*, ICSID Case No. ARB/82/1, Decision on Jurisdiction, 1 August 1984, para. 29: «En règle générale, les Etats appliquent à cette fin ou bien le critère du siège social ou bien celui du lieu d'incorporation. Par contre, la nationalité des actionnaires ou le contrôle exercé par des étrangers autrement qu'en raison de leur participation au capital, n'est pas normalement un critère pour la nationalité d'une société, étant entendu que le légslateur peut mettre ces critères en jeu pour des cas d'exception»; *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction, 27 September 2001, para. 107: «According to international law and practice, there are different possible criteria to determine a juridical person's nationality. The most widely used is the place of incorporation or registered office. Alternatively, the place of the central administration or effective seat may also be taken into consideration».

394 Energy Charter Treaty, *supra* note 334.

395 Treaty between the United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment, *supra* note 347.

396 Cooperation and Facilitation Investment Agreement between the Federative Republic of Brazil and the Federative Republic of Brazil and [Country], 2015 Brazil Model BIT.

397 For an analysis of the most relevant cases, see DOLZER, SCHREUER, *Principles of International Investment Law*, op. cit., p. 48; BAUMGARTNER, *Treaty Shopping in International Investment Law*, op. cit., pp. 101-111.

398 BAUMGARTNER, *Treaty Shopping in International Investment Law*, op. cit., p. 102.

399 *Tokios Tokelés v. Ukraine*, Decision on Jurisdiction, *supra* note 17.

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

another State have been arguably established for taxation or treaty shopping purposes,[401] an hypothesis well represented in *ADC v. Hungary*.[402]

Other treaties, for the purposes of nationality, refer to the seat or principal seat of business of the company. As an instance, the Argentina – Germany BIT of 1991 refers to company as a legal person «having its seat in the territory of one of the Contracting Parties».[403] Similarly, Article 1 of the 2006 BIT between Italy and the Dominican Republic provides that the term legal person «shall mean any entity having its head office in the territory of one of the Contracting Parties».[404]

Recent treaties, precisely with the aim of avoiding an uncontrolled treaty shopping, «go beyond formal requirements such as incorporation or seat»,[405] or combine them with more substantial ones, requiring an economic bond «between the corporate investor and the state whose nationality it claims».[406] This bond may be represented by the exercise of effective control over the corporation by nationals of the Contracting Party or the existence of a genuine economic activity of the company in the territory of the concerned State.[407] The 2019 BLEU Model BIT, as a way of example, provides that «the term 'investor shall' mean: […] legal persons of either Contracting Party which are established under the laws of that Contracting Party and their headquarters or their real economic activities are located in [its] territory».[408] Similarly, Article 8.1 of the CETA refers to enterprise as «[a legal person] that is constituted or organised under the laws of that Party and has substantial business activities in the territory of that Party».[409] Even more, the 2019 Model BIT of the Netherlands includes within its scope of protection not only legal persons «constituted under the law of that Contracting Party and having substantial

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[401] BLYSCHAK, 'Yukos Universal v. Russia: Shell Companies and Treaty Shopping in International Energy Disputes', in *Richmond Journal of Global Law & Business*, vol. 10, 2011, pp. 179-210.

[402] *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006.

[403] *Tratado entre la Republica Federal de Alemania y la Republica Argentina sobre Promoción y Protección Reciproca de Inversiones*, signed 9 April1991, entered into force 8 November 1993.

[404] Agreement between the Government of the Italian Republic and the Government of the Dominican Republic on the Promotion and Protection of Investments, signed 12 June 2006, entered into force 25 November 2009.

[405] DOLZER, SCHREUER, *Principles of International Investment Law*, op. cit., p. 49.

[406] *Ibid.*

[407] For an intersting case in which an arbitral tribunal ascertained whether the controlling companies were more than 'mailboxes' established for the purposes of obtaining jurisdiction over the dispute, see *Aguas del Tunari*, Decision on Jurisdiction, 21 October 2005.

[408] Agreement between the Belgium-Luxembourg Economic Union, on the one hand, and the [Country], on the other hand, on the Reciprocal Promotion and Protection of Investments, 2019 BLEU Model BIT.

[409] Comprehensive Economic and Trade Agreement between the EU and Canada, *supra* note 318.

business activities», but also those companies which are incorporated and «directly or indirectly owned or controlled by» a natural or legal person possessing its nationality.[410]

Having laid down the approach generally taken by IIAs with regard to the concept of investor, it is relevant to briefly focus on shareholders in order to understand to what extent there is a general agreement as for their inclusion in the category of investors. The answer might appear quite straightforward from a theoretical point of view: whenever an individual or a company *qua* shareholder satisfies the requisite nationality for the purposes of the relevant IIA and possesses a protected investment (the shares), there are no doubts that the shareholder is to be considered as a protected investor.

However, the issue is trickier than it looks. First, the circumstance that a shareholder is a protected investor only tells us that s/he is entitled to bring a claim against the host State before an arbitral tribunal. Yet, it does not tell us what a shareholder *qua* investor is entitled to claim before the same tribunal. Put another way, it is far from being clear whether an investor is only allowed to start proceedings in order to vindicate its own direct rights – as it would be, *mutatis mutandis*, in the context of municipal law (*supra*, Chapter 2), diplomatic protection and human rights conventional systems (*supra*, Chapter 3) – or whether s/he can recover for the damages caused to the company whose share s/he owns, that is to say a reflective loss. Such an issue will be considered in-depth in the following section.

Second, one can experience difficulty in identifying all the individuals or companies that, inasmuch as shareholders, might qualify as protected investors. This is particularly apparent if one recalls the notion of indirect investment. As pointed out in the last sub-section, indeed, indirect shareholding – *viz.* the situation in which the investor is not the immediate shareholder of the company but rather s/he owns shares only indirectly through the intermediary of another company – will surely qualify as an investment whenever the treaty explicitly provides to this effect or, according to the investment jurisprudence, the treaty is silent on the issue. If to this one adds that multinational companies, with their multi-layered corporate structure, increasingly act as the main actor of the global economy, such a phenomenon cannot but exponentially increase. Against this background and, again, leaving aside what an indirect shareholder might be entitled to claim or not (direct or reflective loss claim), it is apparent that there could be a bulk of claimants and different treaties involved vis-à-vis the same measure taken by the host-State.

[410] 2019 the Netherlands Model BIT, *supra* note 319.

4.2.4. Brief Remarks

In this Section, three fundamental points for a broader comprehension of the protection shareholders are entitled to under international investment law have been ascertained. First, the vast majority of international investment agreements explicitly provide that shareholding – whether all the due requirements are fulfilled – might qualify as a protected investment, thus falling within their scope of protection. Second, shareholders can surely be considered as protected investors if, *inter* alia, they satisfy the requirement of nationality enshrined in the relevant investment treaty. Third, indirect investments are also to be considered as protected investments for the purposes of international investment law. This is true if either a treaty explicitly provides for their inclusion within the notion of investment or the relevant investment agreement is silent on the issue. Indeed, the case law of arbitral tribunals has clarified that indirect investments are excluded from the scope of protection of the relevant IIA only to the extent that an explicit provision excluding them is found.

4.3. Shareholders' Claims for Reflective Loss in International Investment Arbitration

> Perhaps the single greatest misconception that has plagued the investment treaty jurisprudence to date concerns the problem of claims by shareholders. The root of this misconception is the incorrect characterisation of the problem as one of jurisdiction rather than admissibility. There is no difficulty in confirming the tribunal's *jurisdiction ratione personae* over a shareholder with the requisite nationality. There is also no difficulty in confirming a tribunal's jurisdiction *ratione materiae* over claims by that shareholder in relation to its investment in shares in a company incorporated in the host state. A shareholding is a ubiquitous inclusion in the list of assets entitled to investment protection in the first article of investment treaties. But is that the end of the analysis?[411]

The answer is no or, at least, so it should be. To say that a shareholder *qua* foreign investor is entitled to start proceedings before an arbitral tribunal inasmuch as s/he owns a protected investment does not answer the question as to what a shareholder might be able to claim before the tribunal. Indeed, as pointed out by Mark Clodfelter and Joseph Klingler,

[411] DOUGLAS, *The International Law of Investment Claims*, op. cit., p. 398.

> the fact that a bilateral treaty 'specifically provides that shareholders are investors and as such are entitled to have recourse to international arbitration to protect their shares' simply does not answer the distinct questions of what rights adhere to share ownership and the types of harm for which shareholders have standing to claim.[412]

In this respect, the questions posed by the International Court of Justice in *Barcelona Traction* is, *mutatis mutandis*, still a relevant starting point:

> It can be asked whether international [investment] law [and arbitration] recognizes for the shareholders in a company a separate and independent right or interest in respect of damage done to the company by a foreign government; and if so to what extent and in what circumstances.[413]

By giving a quick look at the bulk of investment decisions which have dealt with the issue – or, as argued by various scholars, have failed to properly do so[414] –, the answer is manifest. As overtly pointed out by Zachary Douglas, «[t]he investment treaty regime recognises for the shareholders in the company a separate and independent right or interest in respect of damage done to the company by a foreign government to any extent and in all circumstances».[415] Put differently, the general prohibition to bring reflective loss claims that we have identified with regard to customary international law and the conventional regimes of human rights protection not only is inapplicable within the realm of international investment law and arbitration, but rather the general admissibility of them has become well established as a rule. To understand the establishment of such a blanket permission to bring reflective loss claims, this Section will first look at IIAs in order to ascertain whether an explicit or implicit treaty language to this effect can be found (sub-Section 4.3.1) and, second, it will examine the reasoning on the basis of which investment tribunals have generally allowed shareholders to bring reflective loss claims (sub-Section 4.3.2). Finally, a critical assessment will be provided.

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412 CLODFELTER, KLINGER, 'Reflective Loss and Its Limits under International Investment Law', in BEHARRY C.L. (ed.), *Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration*, Leiden/Boston, Brill Nijhoff, 2018, pp. 57-80, at 62.

413 *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application:1962)*, Preliminary Objections, Judgment, 24 July 1964, ICJ Reports 1964, p. 6, at 44.

414 CLODFELTER, KLINGER, 'Reflective Loss and Its Limits under International Investment Law', op. cit., *passim*;

415 DOUGLAS, *The International Law of Investment Claims*, op. cit., p. 402.

4.3.1. International Investment Agreements on Reflective Loss

With regard to reflective loss claims, two different kinds of international investment agreements can be identified: *i*) IIAs that explicitly address the question concerning the standing of shareholders; and *ii*) IIAs that are silent on such an issue at hand.[416]

As far as the first category is concerned, it is relevant to make a secondary distinction between those treaties that enshrine a general rule concerning shareholders and those which only address the question with regard to specific provisions. A general provision on reflective loss claim is hard to be found in investment treaties. As an instance, Article 9.12 of the Australia-China FTA on investment arbitration reads that

> 1. This Section applies where there is a dispute between a Party and an investor of the other Party relating to a covered investment made in accordance with the Party's laws, regulations and investment policies.
>
> 2. In the event that an investment dispute cannot be settled by consultations […] within 120 days after the date of receipt of the request for consultations,
> (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim:
> (i) that the respondent has breached an obligation in Article 9.3; and
> (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach;

This provision is then accompanied by a footnote, clarifying that

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

Accordingly, under the treaty between Australia and China, reflective loss claims by shareholders are generally prohibited. Similarly, Article 13(8) of the 2008 China-Mexico BIT – headed «Arbitration: Scope and Standing and Time Periods» – reads that «The Contracting Parties recognize that under this Article, minority non-controlling investors

[416] VANHONNAEKER, *Shareholders' Claims for Reflective Loss in International Investment Law*, op. cit., p. 98 ff.

have standing to submit only a claim for direct loss or damage to their own legal interest as investors».[417]

While there are few treaties containing a general provision on the (in)admissibility of reflective loss claim, many of them do actually enshrine a discrete provision limited to one or a group of standards of treatment. Several treaties, as an instance, address the protection of shareholders in their expropriation clauses. The Energy Charter Treaty falls within this group. Article 13(3) clarifies the scope of the expropriation provision providing that

> For the avoidance of doubt, Expropriation shall include situations where a Contracting Party expropriates the assets of a company or enterprise in its Area in which an Investor of any other Contracting Party has an Investment, including through the ownership of shares.[418]

Accordingly, as argued by Markus Perkams, «Article 13(3) stipulates that the expropriation of the assets of a company in which an investor has an investment through the ownership of shares […] should also be considered as being an expropriation of this investment».[419] This provision is interesting inasmuch as it offers some insights on the whole system of investment protection set up by the ECT. First, one might argue that the provision implicitly declares the admissibility of reflective claims: indeed, unless one is able to find a different and more convincing interpretation of Article 13(3), a reflective loss claim does represent the only way thought which a shareholder might be entitled to ask for compensation vis-à-vis a measure that affected the assets of a company whose shares s/he owns.

A second insight is related to the wording «for the avoidance of doubt»: this could be interpreted as recognizing a generalized admissibility of claims for reflective loss. The literal meaning of this wording, indeed, conveys the idea that the Article 13(3) is not providing for a new rule but is rather clarifying that an existing rule does apply to the case at hand. This is consistent, as we will see, with the interpretation provided by arbitral tribunals.

A similar and clearer provision concerning the protection of foreign investors in case of expropriation can be found in Article 5(2) of the Russia – UK BIT, according to which

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[417] Agreement between the Government of the United Mexican States and the Government of the People's Republic of China on the Promotion and Reciprocal Protection of Investments, signed 11 July 2008, entered into force 6 June 2009.

[418] Energy Charter Treaty, signed 17 December 1994, entered into force 16 April 1998.

[419] PERKAMS, 'Piercing the Corporate Veil in International Investment Agreements', in REINISCH, KNAHR, *International Investment Law in Context*, Utrecht, Eleven International, 2007, pp. 93-114, p. 110.

> Where a Contracting Party expropriates the assets of a company or enterprise which is incorporated or constituted under the law in force in any part of its own territory, and *in which investors of the other Contracting Party have a shareholding*, the provisions of paragraph (1) [– *i.e.*, those concerning the substantive and procedural requirements for a lawful expropriation –] of this Article shall apply.[420]

Again, Article 5(2) of the UK – Cameroon BIT provides that

> Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which nationals or companies of the Other Contacting Party own shares, it shall ensure that the provisions of paragraph 1 of this Article are applied to the extent necessary to guarantee prompt, adequate and effective compensation in respect of their investment to such nationals or companies of the other Contracting Party who are owner of those shares.[421]

Other investment agreements are even more precise in clarifying the scope of application of the provision on expropriation by also referring to indirect shareholders.[422] Article 5(5) of the BLEU-Liberia BIT, in this regard, is impressive in its drafting

> Where nationals or companies of one Contracting Parry own shares in a foreign company, other than Belgian, Luxemburg or Liberian, which should be owner of shares in a company of the other Contracting Party and expropriated by this Party, this latter shall ensure that the provisions of paragraphs 1, 2 and 3 of this Article are applied to the extent necessary to guarantee prompt, adequate and effective compensation in respect of their investment to the fort-mentioned nationals or companies owners of shares in the foreign company concerned.[423]

Under Article 5(5), therefore, a Belgian, Luxembourg or Cameroonian investor would be entitled to seek compensation for an expropriatory measure taken against a company if s/he is a shareholder in a third State corporation which, in turn, is a shareholder of the

[420] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Promotion and Protection of Investments, signed 6 April 1989, entered into force 3 July 1991.

[421] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Republic of Cameroon for the Promotion and Protection of Investments, signed 4 June 1982, entered into force 7 June 1985.

[422] VANHONNAEKER, *Shareholders' Claims for Reflective Loss in International Investment Law*, op. cit., p. 101.

[423] Agreement between the Belgo-Luxemburg Economic Union and the Government of the Republic of Liberia for the Reciprocal Promotion and Protection of Investments, signed 5 June 1985, not yet into force.

damaged company. The same holds true with regard to Article 4(5) of the BLEU-Cameroon BIT.[424]

With respect to the second category of IIAs – *i.e.*, those that are silent on such an issue at hand –, this is by far the most common choice by States when negotiation investment agreements, namely not to address the issue as to whether shareholders have standing before arbitral tribunals. In such a circumstance it is therefore necessary to look at the jurisprudence of investment tribunals in order to understand their general approach towards shareholders' claims for reflective loss.

4.3.2. International Investment Tribunals on Reflective Loss

In order to understand the general admissibility of reflective loss claims in international investment law one cannot but look at the case law of arbitral tribunals. While it is well-known that, in international law, there is no rule of binding precedent, this does not exclude previous decisions of international courts and tribunals from having played, and still playing, a substantial role in shaping the rules.[425] This is particularly true with regard to reflective loss claims inasmuch as most of investment agreements are silent on their admissibility. Accordingly, to allow or not them is essentially a matter of treaty interpretation. As mentioned above, international investment law has witnessed the consolidation of the idea that shareholders are entitled to bring claims under IIAs for reflective loss: from this point of view, nowadays, one can talk about a *jurisprudence constante*. Starting from this observation, the relevant steps of the development of such jurisprudence must be retraced.

The investment tribunal in *AAPL v. Sri Lanka* was one of the first to cope with a shareholder claim for reflective loss. The claim brought by the shareholders concerned

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[424] Article 4(5) of the Convention between the Belgo-Luxembourg Economic Union and the United Republic of Cameroon concerning the Reciprocal Promotion and Protection of Investments, signed 27 March 1980, entered into force 1 November 1981: «If individuals or corporations of one Contracting Party own shares in a foreign company other than a Belgian, or Luxembourg or Cameroonian company, and that company itself owns shares in a company of the other Contracting Party, the latter Party shall apply paragraphs 1, 2 and 3 of this article to the above-mentioned individuals or corporations that are shareholders in the foreign company in question.

This provision shall apply only if the said company, and/or the State to which it belongs, is not empowered to pay the envisaged compensation and/or this State declines to claim it».

[425] BJORKLUND, 'Investment Treaty Arbitral Decisions as Jurisprudence Constante', in *TDM Journal*, vol. 7, 2010, pp. 265-280; GUILLAME, 'The Use of Precedents by International Judges and Arbitrators', 2 *JIDS* 5, vol. 2, 2011, pp. 5-23; NORTON, 'The Role of Precedent in the Development of International Investment Law', *ICSID Review*, vol. 33, 2018, pp. 280-301; TEN CATE, 'The Costs of Consistency: Precedent in Investment Treaty Arbitration', *CJTL*, vol. 51, 2013, pp. 418-478.

the destruction, at the hands of the Sri Lankan security forces, of a farm owned by a local corporation whose shares were held by the claimant.[426] The respondent State did not challenge the *ius standi* of the applicant. In this respect, the tribunal concluded that

> AAPL [was] entitled in the present arbitration case to claim compensation under the Sri Lanka/U.K. Bilateral Investment Treaty […] due to the fact that the Claimant's *"investments" in Sri Lanka "suffered losses"* owing to events falling under one or more of the circumstances enumerated by Article 4(1) of the Treary ("revolution, state of national emergence, revolt, insurrection", etc.) The *undisputed "investments" effected since 1985 by AAPL in Sri Lanka are in the form of acquiring shares in Serendib Company*, which has been incorporated in Sri Lanka under the domestic Companies Law.[427]

To the extent that the investment consistent in shares, the Tribunal clarified that

> the Treaty protection provides no direct coverage with regard to Serendib's physical assets as such ("harm structures and equipment", "shrimp stock in ponds", cost of "training the technical staff, etc.), or to intangible assets of Serendib if any […].[428]

That is because «[t]he scope of the international law protection granted to the foreign investor in the present case is limited to a single item: the value of his share-holding in the joint-venture entity».[429] Put it otherwise, the Tribunal found that the only damage that could be compensated to the shareholder was the loss in value of its shares following the wrongful act of the respondent State towards the national corporation. Nevertheless, to the extent that the shares held by the investor were not quoted in a stock market at the time the shareholder suffered the injury, the Tribunal considered the value of all the assets of the local company in order to ascertain the market price of the shares. In doing so, «therefore, the shareholder's compensation was directly based on the harm to the company's assets»,[430] following a deduction of the debts of the latter.

The first decision to explicitly deal with the admissibility of reflective loss claims was rendered by the Tribunal in *CMS v. Argentina*.[431] The facts can be summarized as it

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[426] *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990.
[427] *Ibid*. para. 95.
[428] *Ibid.*
[429] *Ibid*.
[430] BOTTINI, *Admissibility of Shareholder Claims under Investment Treaties*, op. cit., p. 156.
[431] *CMS Gas Transmission Company v. The Republic of Argentina*, Decision of the Tribunal on Objections to Jurisdiction, *supra* note 38. For an analysis of this case, see LOVE, 'CMS Gas Transmission Company v Argentina, Decision on Objections to Jurisdiction, ICSID Case No ARB/01/8, (2000) 7 ICSID Rep 492, (2003) 42 ILM 788, IIC 64 (2003), 17th July 2003,

follows: CMS Gas Transmission Company was a minority shareholder in an Argentine natural gas transportation licensee, TGN. In order to face the economic difficulties that began at the end of the ’80s, Argentina implemented a series of measures. Among them, Argentina decided to abolish the practice of PPI indexing and disconnected the value of the Argentinian peso from the value of the US dollar. This led to a devaluation of the local currency and to a deprivation of the economic value of foreign investments, which had been made on the basis of this link between the currencies. As a consequence, indeed, TGN – together with other gas transportation companies – was forced to pay gas transportation tariffs in devalued pesos, at an artificial rate of one-to-one with the US dollar. All these policies had a severe impact on the earnings of TGN. In July 2001, CMS filed a request for an ICSID, claiming that these measures constituted a breach of several standards included in the US – Argentina BIT. The respondent State denied that its actions violated the IIA, while also arguing that the Tribunal had no jurisdiction over claims brought by the US company. In greater detail, Argentina contested the admissibility of the claim inasmuch as the rights allegedly infringed upon were held by TGN, not by CMS.[432] Furthermore, the respondent State pointed out that the claimant was merely a minority shareholder in TGN, thus denying it had *jus standi* to bring the claim. In this respect, the respondent pointed out that:

> CMS cannot claim for its proportional share in TGN, as this would imply that the shareholders have a *standing different from that of the company*. […] [T]he only guarantee the Republic of Argentina gave to CMS related to the legal quality of the shares which were transferred to the Claimant by the Republic of Argentina in the context of the privatization process. Should *that legal quality be proven defective*, CMS would have *jus standi* to claim for reparation, but *this is not the case as the claim concerns the operation of the License and not the shares themselves*.[433]

Contrariwise, the claimant argued that it was not «claiming for the rights pertaining to TGN but for the rights associated with its investment in the company [(*i.e.*, the shares)]».[434] That is because CMS qualified as a foreign investor under the US – Argentina BIT and its participation as a shareholder in TGN was a foreign investment

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United Nations [UN]; World Bank; International Centre for Settlement of Investment Disputes [ICSID]’, in *Investment Claims*, 2008; LOVE, ‘CMS Gas Transmission Company v Argentina, Award, ICSID Case No ARB/01/8, IIC 65 (2005), 25th April 2005, despatched 12th May 2005, United Nations [UN]; World Bank; International Centre for Settlement of Investment Disputes [ICSID]’, in *Investment Claims*, 2009.

432 *CMS Gas Transmission Company v. The Republic of Argentina*, Decision of the Tribunal on Objections to Jurisdiction, *supra* note 38, para. 36.

433 *Ibid.*, paras 37-38.

434 *Ibid.*, para. 40.

protected under the treaty. Accordingly, «the claims being asserted under the BIT […] [were] direct and not indirect».[435] Against this background, the Tribunal carried out an analysis of the protection of shareholders under international law. As far as shareholder rights under customary international law, the arbitrators dismissed the rules established by the ICJ in *Barcelona Traction*, stating that

> this case was concerned only with the exercise of diplomatic protection in that particular triangular setting, and involved what the Court considered to be a relationship attached to municipal law, but it did not rule out the possibility of extending protection to shareholders in a corporation in different contexts. […] Barcelona Traction is therefore not directly relevant to the present dispute, although it marks the beginning of a fundamental change of the applicable concepts under international law and State practice.[436]

Even more, the Tribunal argued that recent State practice concerning the protection of shareholders – be they majority or minority, whether controlling or not – has actually shifted towards a different direction. Indeed, the arbitrators pointed out that despite such a shift was the result of *lex specialis* and treaty arrangements to this effect, «the fact is that *lex specialis* in this respect is so prevalent that it can now be considered the general rule». In other words, the Tribunal – despite not coming *expressis verbis* to such a conclusion – fell short of claiming that the very rule of customary international law, at least with regard to the protection of foreign investments, had actually changed its content: from a general prohibition to bring reflective loss claims to a general admissibility of them. Accordingly, the Tribunal found «no bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned, not even if those shareholders are minority or non-controlling shareholders».[437]

Having said that, the CMS Tribunal went on to examine shareholder rights under the ICSID Convention and the relevant BIT. As for the latter, Argentina recognized that an investment in shares did fall within the notion of protected investment; nevertheless, it contended that such an investment would only allow – in accordance with municipal law and customary international law – claims for measures taken against the shares as such and, thus, affecting the own rights of the shareholder. The nature of protected investment would not allow, instead, to start proceedings in order to recover the loss in value of the shares connected to a damage suffered by the corporate entity. In this respect, the Tribunal concluded that «jurisdiction [could] be established under the terms of the specific

[435] *Ibid.*, para. 40.
[436] *Ibid.*, paras 44-45.
[437] *Ibid.*, para. 48.

provisions of the BIT. […] [T]here is a direct right of action of shareholders. it follows that the Claimant has *jus standi* before this Tribunal under international law, the 1965 [ICSID] Convention and the [BIT]».[438] The Tribunal, therefore, conflated the issue as to whether it had jurisdiction over the claim – something that could not be denied – with the issues as to whether CMS *qua* shareholder could claim for the reflective loss, being TGN the company directly affected by the measures.[439]

The Decision on Jurisdiction rendered in *Suez v. Argentina* is a pivotal pronouncement in order to better understand how investment arbitral tribunals have, almost unanimously, came to the conclusion that the general prohibition of reflective loss established under municipal and customary international law is, as such, inapplicable under IIAs.[440] The facts of the case echo those of several other cases concerning Argentinean economic crisis: the Claimants – companies of France, Spain and the United Kingdom – were shareholders of Aguas Argentinas S.A., a locally incorporated company which held a 30-year water concession for the city of Buenos Aires. As a result of the measures taken by the respondent State to cope with the economic crisis, the concessionaire suffered significant losses.[441] Once again, the respondent State challenged the jurisdiction of the Tribunal arguing that, inasmuch as the alleged injury was caused to the corporation, its shareholders had no right to start proceedings. Only the company would be entitled to bring an action. Against this background, the Tribunal noted that the two relevant BITs – the one between France and Argentina, and the other between Spain and Argentina – expressly defined 'shares' as investments, thus entitling the shareholders «to have recourse to ICSID arbitration to enforce their treaty rights».[442] Furthermore, the arbitrators found that the scope of protection of the BITs did not only entitle a shareholder to bring an action for direct harms, but also to claim for a reflective loss caused to the shares by treatment of the company whose shares they held. That was because:

> Neither the Argentina-France BIT, the Argentina-Spain BIT, the Argentina-UK BIT, the ICSID Convention and Rules, nor the UNCITRAL Rules limit the rights of shareholders to bring actions for direct, as opposed to derivative claims. This

[438] *Ibid.*, para. 65.

[439] DOUGLAS, *The International Law of Investment Claims*, op. cit., pp. 431-435.

[440] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, 3 August 2006.

[441] See HAPP, RUBINS, 'Suez and ors v Argentina, Decision on Jurisdiction, ICSID Case No ARB/03/19, IIC 232 (2006), 3rd August 2006, United Nations [UN]; World Bank; International Centre for Settlement of Investment Disputes [ICSID]', in *Investment Claims*, 2007.

[442] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, *supra* note 440, para. 49.

> distinction, present in domestic corporate law of many countries, does not exist in any of the treaties applicable to this case.[443]

On a par with the abovementioned decision in *CMS v. Argentina*, the Tribunal dismissed in a very few words any relevance of the ICJ judgment in *Barcelona Traction*, stating that:

> *Barcelona Traction* is not controlling in the present case. That decision […] concerned diplomatic protection of its nationals by a State, an issue that is in no way relevant to the current case. Unlike the present case, *Barcelona Traction* did not involve a bilateral treaty which specifically provides that shareholders are investors and as such are entitled to have recourse to international arbitration to protect their shares from host country actions that violate the treaty. […] The applicable international law on investment […] found in the relevant BITs is much more specific and far reaching than was the case in 1970.[444]

Accordingly, the Tribunal came to the conclusion that the three claimants as shareholders of the Aguas Argentinas S.A. were entitled to start proceedings against Argentina in order to recover the loss in value of their shares following the measures taken by the host State vis-à-vis the local company.

Another relevant judgment to be considered, inasmuch as it sheds some light on what an *indirect investor* is entitled to claim with regard to the damage suffered by the company whose shares s/he owns through its subsidiaries, is *Postova Banka v. Greece*.[445] The subject of the case is an ICSID dispute submitted by Postova Banka, a Slovak bank, and its Cypriot shareholder Istrokapital pursuant to the Slovakia-Greece BIT and the Cyprus-Greece BIT. The claim concerned Greek Government Bonds owned by Postova Banka. Following the global financial crisis of 2008, Postova Banka was forced to restructure its investment by exchanging the old bonds with new ones, which had a far less nominal value. Facing the proceedings instituted by the two companies, the Greek Government argued that the ICSID tribunal could not hear the case on different grounds. Notably, as far as the purposes of our analysis, the respondent pointed out that Istrokapital, as shareholder of Postova Banka, did not have standing to assert a direct claim for an impairment of a company's assets – *i.e.*, to vindicate the rights of Postova Banka in its own name. Indeed, Istrokapital *qua* shareholder of Postova Banka argued that it possessed an *indirect investment*: «[t]o be clear, Istrokapital's protected investment is its indirect

[443] *Ibid.*, para 49.
[444] *Ibid.*, para. 50.
[445] *Poštová Banka, A.S. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015.

investment»,[446] that is to say the very ownership of Greek Bonds through Postova Banka. In other words, what the Istrokapital tried to argue in this case may be described as it follows: inasmuch as the Cyprus-Greece BIT covers both direct and indirect investment, the injury for which the company was seeking relief was not the direct ownership of the shares in Postova Banka (reflective loss damage) but the indirect ownership of the Bonds whose enjoyment was affected by the measures taken by Greece (direct loss). This might sound as a reasonable argument: if indirect investments are covered under the relevant BIT, whenever a shareholder owns the majority of a company whose – as an instance – license agreement is affected by the host State's measures, one could argue that the protected investment is not to be identified with the shares (directly owned) but rather with the license agreement (indirectly owned through the subsidiary).[447] This construction might appear to find some support in a decision rendered by an arbitral tribunal in *Cemex v. Venezuela*, according to which:

> investments as defined in Article 1 of the BIT could be direct or indirect. By definition, an indirect investment is an investment made by an indirect investor. As the BIT covers indirect investments, it necessarily entitles indirect investors to assert claims for alleged violations of the Treaty concerning the investments that they indirectly own.[448]

Nevertheless, the relevant (indirect) investment for the impairment of which Cemex was seeking relief was actually its indirect shareholding in a locally incorporated Venezuelan company that had been nationalized by the respondent State.[449] The argument advanced by Istrokapital was carefully explained by the Tribunal, pointing out that

> Istrokapital has not relied on its shareholding in Poštová banka as the basis of its claim: indeed, as stated in Claimants' Counter-Memorial on Jurisdiction, '[t]o be

[446] *Ibid*., para. 246.

[447] In support of this position, see CLODFELTER, KLINGER, 'Reflective Loss and Its Limits under International Investment Law', op. cit., p. 68: «However, many investment treaties allow investors in locally incorporated companies to bring claims directly on the basis of investments owned through that locally-incorporated company, such as rights under investment contracts, by extending its protection to indirect investments». See also *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015.

[448] *Cemex v. Venezuela*, Decision on Jurisdiction, *supra* note 366, para. 156.

[449] *Ibid*., para. 45: «The Claimants observe that a number of points relating to jurisdiction are uncontested by the Respondent. '[T]he sole question facing the Tribunal under the Netherlands BIT is whether Claimants' *indirect equity stake* in Cemex Venezuela S.A.C.A. is an 'investment' for purposes of Article 1(a). The answer to that question is a resounding 'yes'.' 'Furthermore, once jurisdiction is established under the Netherlands BIT, all claims in the Request for Arbitration may be heard by this Tribunal, as a violation of investment protections offered by Venezuelan Law also constitutes a BIT violation'» (*emphasis added*).

> clear, Istrokapital's protected investment is its indirect investment in the Greek Bonds, not its shareholding in Poštová Bank.' Istrokapital thus has expressly sought to base the Tribunal's jurisdiction on its alleged 'indirect investment' in the GGBs held by Poštová banka.[450]

Against this background, the Tribunal carried out a detailed review of the case law on shareholder claims. In its view, there was a well-established jurisprudence in the sense that an investor might be entitled to bring claims based on the host State's treatment of a local company's contracts and/or assets of which s/he owns shares only whether the claims «are related to the effects that the measures taken against the company's assets have on the value of the claimant's shares in such company».[451] Contrariwise, the arbitrators found that no case could be identified in support of the contention that a shareholder is entitled to start proceedings in order to vindicate the own rights of the company. Accordingly, the Tribunal denied jurisdiction over the direct claims advanced by Istrokapital coming to the conclusion that while a shareholder of a company «may assert claims based on measures takes against such company's assets that impair the value of the claimant's shares», s/he has, however, «no standing to pursue claims directly over the assets of the local company, as he or she has no legal right to such assets».[452] Indeed, «[the claimant] has failed to establish that it has any right to the assets of Poštová banka that qualifies for protection under the Cyprus-Greece BIT».[453]

4.3.3. Shareholders' Claims for Reflective Loss in Investment Jurisprudence: A Critical Appraisal

In the last sub-Section, the reasoning advanced by the majority of investment tribunals when dealing with reflective loss claims has been pointed out. In this respect, one cannot but endorse what has been said by Julien Chaisse and Lisa Zhuoyue Li:

> A number of tribunals have not explicitly discussed the nature of shareholders' rights, but have assumed that the broad meaning of 'investment' is so encompassing that it would, without difficulty, allow a shareholder to claim in its own right damage suffered by investing in an enterprise. In doing so, these tribunals have implicitly validated the hypothesis of reflective losses under investment treaties.[454]

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450 *Postova Banka v. Greece*, Decision on Jurisdiction, *supra* note 445, para. 246.
451 *Ibid.*, para. 232.
452 *Ibid.*, para. 245. See also CHAISSE, ZHUOYUE LI, 'Shareholder Protection Reloaded: Redesigning the Matrix of Shareholder Claims for Reflective Loss', op. cit., p. 74.
453 *Ibid.*, para. 246.
454 CHAISSE, ZHUOYUE LI, 'Shareholder Protection Reloaded: Redesigning the Matrix of Shareholder Claims for Reflective Loss', op. cit., p. 63.

Such a more or less implicit validation cannot but be deemed to be problematic. This is true not only in light of the concerns that the general admissibility of reflective loss claims brings within international investment law and arbitration, putting at risk the very sustainability of the system, but also because of the slippery arguments often resorted to by arbitral tribunals when addressing the issue. In this respect, some considerations shall be carried out.

A first consideration concerns the relationship between international investment law, in particular IIAs, and the principles of customary international law on diplomatic protection. Indeed, it has been ascertained that – whenever facing an objection by Respondent State based on the relevance of the *Barcelona Traction* case – arbitral tribunals have summarily dismissed the case and the whole jurisprudence of the International Court of Justice on the matter. In this respect, the already mentioned distinguishing carried out by the Tribunal in *Suez v. Argentina* is representative of the kinds of justifications tribunals have offered:

> *Barcelona Traction* is not controlling in the present case. That decision, *which has been highly criticized by scholars over the years*, concerned diplomatic protection of its nationals by a State, *an issue that is in no way relevant to the current case*. Unlike the present case, *Barcelona Traction* did not involve a bilateral treaty which specifically provides that shareholders are investors and as such are entitled to have recourse to international arbitration to protect their shares from host country actions that violate the treaty.[455]

There are, however, several problems with regard to the reasoning of the Tribunal. First, the fact that an international investment agreement qualifies, on the one hand, shares as investments and, on the other hand, shareholders as investors does not provide – as repeatedly argued – any answer as to the questions of what rights stem from shareholding and the kind of harm for which shareholders are entitled to claim. To borrow again the words of Zachary Douglas,

> The misconception that meanders through the corpus of investment treaty precedents is that the recognition by investment treaties of a shareholding as a covered investment somehow disposes of the question relating to the rights of the shareholder that can forma the object of an investment treaty claim. These are entirely distinct issues. A shareholder is entitled to resort to international arbitration against the host state because it has satisfied its side of the quid pro quo by making a covered

455 *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, *supra* note 440, para. 50 (*emphasis added*).

investment in the territory of the host state. In other words, the recognition of a shareholding as a covered investment in the investment treaty settles the question of the capacity of the investor to prosecute a claim against the host state. But this does not mean that the question of substance has been resolved in favour of the admissibility of any and every claim advanced by the shareholder.[456]

Second, to simply dismiss the rules set out in the 1970 judgment of *Barcelona Traction* because it concerned with diplomatic protection, an issue deemed to be «in no way relevant» vis-à-vis investment arbitration, overlooks the relationship between diplomatic protection and investment treaties.[457] Indeed, «[t]he customary international law mechanism is diplomatic protection by the national State of the investor invoking the responsibility of the host State of the investment».[458] In this respect it can be argued that diplomatic protection is nothing but the precursor of investor-State arbitration.[459] Moreover, as argued by Mark Clodfelter and Joseph Klingler, «the fact that *Barcelona Traction* concerned diplomatic protection does not diminish its relevance outside that context [since…] the ICJ's conclusion […] was predicated on the *substantive rights* held by the shareholders themselves».[460] Accordingly, while the decision addressed the standing of the State of nationality, the conclusions of the World Court were actually based on the fact that shareholders lack, under general international law, a substantive entitlement to those rights which were at stake. Arbitrators should be mindful of this.

Another consideration is related to the very idea that whatever is not explicitly prohibited under an international agreement is, as such, admissible. This stance seems legally shaky. According to different tribunals, indeed, an IIA should expressly limit the rights of shareholders to bring actions – by carving out reflective loss claims – in order to come to the conclusion that they have no *jus standi* as far as a wrong against the company.[461] Such an argument appears to be based on an alleged view according to

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456 DOUGLAS, *The International Law of Investment Claims*, op. cit., p. 62.

457 JURATOWITCH, 'The Relationship between Diplomatic Protection and Investment Treaties', in *ICSID Review: Foreign Investment Law Journal*, vol. 23, 2008, pp. 10-35

458 *Ibid*., p. 11.

459

460 CLODFELTER, KLINGER, 'Reflective Loss and Its Limits under International Investment Law', op. cit., p. 64.

461 See also *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012, para. 212: «It is notable that the Suez tribunals described the Treaty as not limiting the rights of shareholders to bring "derivative" claims. The tribunals explicitly rejected the notion that there is any 'default' under international investment law that restricts what kinds of claims can be brought. In this respect, the tribunals refused to take their cues from domestic corporate law. Under this logic, the fact that the Treaty does not explicitly permit "derivative" actions is irrelevant, because the very concept of a 'derivative' claim is alien to the Treaty or the ICSID Convention».

which, inasmuch as treaties can derogate from customary international law, there is a presumption as to the fact that any treaty does so. It is true that the Contracting Parties of a treaty are entitled to do so, however this does not mean that they have always done it. Quite the opposite, as convincingly argued by Monique Sasson in her monograph concerning the 'unsettled' relationship between international law and municipal law, the separate legal personality conferred to companies with all its relevant consequences should «appl[y] on the municipal level and on the international plane *unless a specific provision* of municipal or *international law* allows for corporate personalities to be disregarded and the corporate veil to be pierced».[462] Accordingly, any wrong against a corporation does not – and should not – amount to a wrong against its shareholders «unless, again, there is a specific treaty provision providing such a claim».[463] Moreover, the approach taken by arbitral tribunals seems actually overlooking that any treaty, in accordance with the general rule of interpretation set out in the VCLT, is to be interpreted by taking into account «any relevant rules of international law applicable in the relations between the parties».[464] In this respect, the customary rule against reflective loss «may well be a 'relevant' rule which accordingly must be 'taken into account' when construing the import of the term 'shares' in a BIT's definition of investment».[465]

A third consideration is to be made with regard to another argument often used by investment tribunals in order to allow reflective loss claims by shareholders, namely that a refusal to start this kind of proceedings would actually render BITs meaningless since several

> countries require foreign investors to incorporate a local company in order to engage into activities in sectors which are considered of strategic importance […]. In such situations, a BIT would be rendered practically without effect if it were right to argue that any action taken by a State against such local companies or their assets [would

[462] SASSON, *Substantive Law in Investment Treaty Arbitration. The Unsettled Relationship between International Law and Municipal Law*, Alphen aan den Rijn, Wolters Kluwer, 2017[2], pp. 1-304, at 193.
[463] *Ibid.*
[464] Vienna Convention on the Law of Treaties, *supra* note 264. With regard to systemic interpretation, see MERKOURIS, *Article 31(3)(c) VCLT and the Principle of Systemic Integration. Normative Shadows in Plato's Cave*, Leiden, Brill, 2015, pp. 1-331; VILLIGER, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Leiden, Brill, 2009, pp. 1-1057, at 413 ff.
[465] CLODFELTER, KLINGER, 'Reflective Loss and Its Limits under International Investment Law', op. cit., p. 65.

> not be] subject to Treaty claims by a foreign investor because its investment is merely constituted of shares in that local company.[466]

This is only partially true. Indeed, according to some commentators, the protection of 'shares' *qua* investments would also be «consistent with a more *limited* intent: to grant standing to shareholders to claim for *direct* infringements of the traditional rights attaching to a share, such as the right to vote or participate in shareholder meetings».[467] In such a hypothesis, shareholders would still be entitled to bring claims for violations of their *direct rights* as shareholders under general international law. Thus, such an interpretation would only reduce the effect of the inclusion of shares as investments but would not deprive shareholders of any effective redress. Furthermore, even if one were to accept a more restrictive view on what a shareholder can be generally entitled to claim on the basis of its shareholding, it is worth mentioning that other treaties allow controlling shareholders to claim *on behalf* of the company whose shares they own. Such a provision, well-known for it being enshrined in Article 1117(1) of the NAFTA,[468] can also be found in other treaties such as the DR-CAFTA[469] and the China-Mauritius FTA.[470] In these

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[466] *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, para. 202.

[467] CLODFELTER, KLINGER, 'Reflective Loss and Its Limits under International Investment Law', op. cit., p. 57.

[468] North American Free Trade Agreement, *supra* note 342: «1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under: (a) Section A or Article 1503(2) (State Enterprises), or (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach. 2. An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage. 3. Where an investor makes a claim under this Article and the investor or a non-controlling investor in the enterprise makes a claim under Article 1116 arising out of the same events that gave rise to the claim under this Article, and two or more of the claims are submitted to arbitration under Article 1120, the claims should be heard together by a Tribunal established under Article 1126, unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby. 4. An investment may not make a claim under this Section».

[469] Article 10.16 of the Free Trade Agreement between Central America, the Dominican Republic and the United States of America (CAFTA), signed 5 August 2004, entered into force 1 January 2009.

[470] Article 8.24(b) of the Free Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Mauritius, signed 17 October 2019, not yet into force: «(b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim».

cases, therefore, a shareholder qualifying as an investor for the purposes of the relevant IIA will be entitled to start proceedings on behalf of the locally incorporated company in order to recover the damage the latter suffered because of the measures taken by the host State. Similarly, according to Article 25(2)(b) of the ICSID Convention,

> any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.[471]

Therefore, for the purposes of jurisdiction *ratione personarum* under the Convention, a locally incorporated company shall be treated as a foreign investor if the relevant IIA provides to this effect.[472] From this perspective, therefore, one could argue that the system itself already provides for a solution to ensure the protection of locally incorporated companies when – but not exclusively – the relevant national legislation requires foreign investors to establish a local company in order to engage into activities in sectors deemed to be of strategic importance.

4.4. The Ungovernability of Shareholders' Claims for Reflective Loss in Investment Arbitration

If, on the one hand, one might argue that the blanket admissibility of shareholders' claims for reflective loss in international investment law had actually made the fortune of the system inasmuch as most of arbitrations involve such claims, it is likewise true that such an approach by arbitral tribunals might well put at risk the legitimacy and, thus, the viability of the ISDS mechanism. In this respect, indeed, it is not by chance that the management of reflective loss claims, and the reforms of ISDS to this effect, is one of the

[471] Convention on the Settlement of Investment Disputes between States and Nationals of other States, *supra* note 309.

[472] See Article 26(7) of the Energy Charter Treaty, *supra* note 334: «An Investor other than a natural person which has the nationality of a Contracting Party party to the dispute on the date of the consent in writing referred to in paragraph (4) and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contracting Party, shall for the purpose of article 25(2)(b) of the ICSID Convention be treated as a 'national of another Contracting State' and shall for the purpose of article 1(6) of the Additional Facility Rules be treated as a 'national of another State'».

main topics discussed in the multilateral framework of the UNCITRAL.[473] Some emblematic cases can be identified to support the contention that the general admissibility of reflective loss claims endangers the system of international investment law and arbitration.

A first example is the well-known *CME/Lauder* saga,[474] on which hundreds of pages have been written.[475] The facts can be summarized as it follows: Ronald Lauder, a national of the US, was the ultimate beneficiary of an investment in CNTS, a Czech company providing television services. The investment of Mr Lauder was performed through CME, a Dutch intermediate corporation. After the host State took certain measures against TV licenses, both CME and Mr Lauder *qua* minority shareholder of the latter started proceedings – respectively under the Netherlands-Czech Republic BIT and the US-Czech Republic BIT– complaining that the conduct of Czech Republic did amount to an expropriation of the investment. Notwithstanding that the facts at the basis of the two claims were exactly the same, the two tribunals constituted to hear the claims reached two completely opposite conclusions with regard to the evaluation of the same facts. In the *CME* case, indeed, the SCC Tribunal found a violation of several substantive standards of the BIT, while the *ad hoc* London Tribunal in the *Lauder* case stated that no violation occurred. Similarly, in the proceedings started by the minority shareholders of the Argentinean company TGN, the tribunals in the already mentioned *CMS* and in *Total* reached opposite conclusions on the alleged violation of fair and equitable treatment, despite the fact that all the claims arose from a participation of the claimants in the same company and concerned the same measures taken by the host State. That was so even if the Total Tribunal, while deciding the case, made reference to the decision already rendered by the other Tribunal in *CMS* case. These two couples of cases well testify some of the risks posed by a generalized authorization for shareholders to pursue reflective loss claims, *viz*. multiple proceedings being brough against the host State for the very same course of action, conflicting or even diametrically opposed outcomes, as well as double recovery.

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473 UNCITRAL, Working Group III, Investor-State Dispute Settlement Reform, works available at https://uncitral.un.org/en/working_groups/3/investor-state.

474 *Ronald S. Lauder v. Czech Republic*, Final Award, *supra* note 44; *CME Czech Republic B.V. (The Netherlands) v. Czech Republic*, Final Award, *supra* note 44.

475 CARVER, 'How to Avoid Conflicting Awards. The Lauder and CME Cases', in *JWIT*, vol. 5, 2004, p. 23 ff.; REINISCH, 'The Proliferation of International Dispute Settlement Mechanisms: The Threat of Fragmentation vs. the Promise of a More Effective System? Some Reflections from the Perspective of Investment Arbitration', in BUFFARD, HAFNER, CRAWFORD (eds.), *International Law Between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner*, Leiden, Brill, pp. 107-125; ZARRA, *Parallel Proceedings in Investment Arbitration*, op. cit., p. 60 ff.

Another interesting case which shall be considered to address the consequences of such a general admissibility is *Kappes and Kappes v. Guatemala*.[476] This is of particular relevance inasmuch as one could argue that the approach of the Tribunal altered the careful balance of the treaty obligations negotiated by the Contracting Parties. According to Article 10.16 of the DR-CAFTA – headed 'Submission of a Claim to Arbitration' –

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

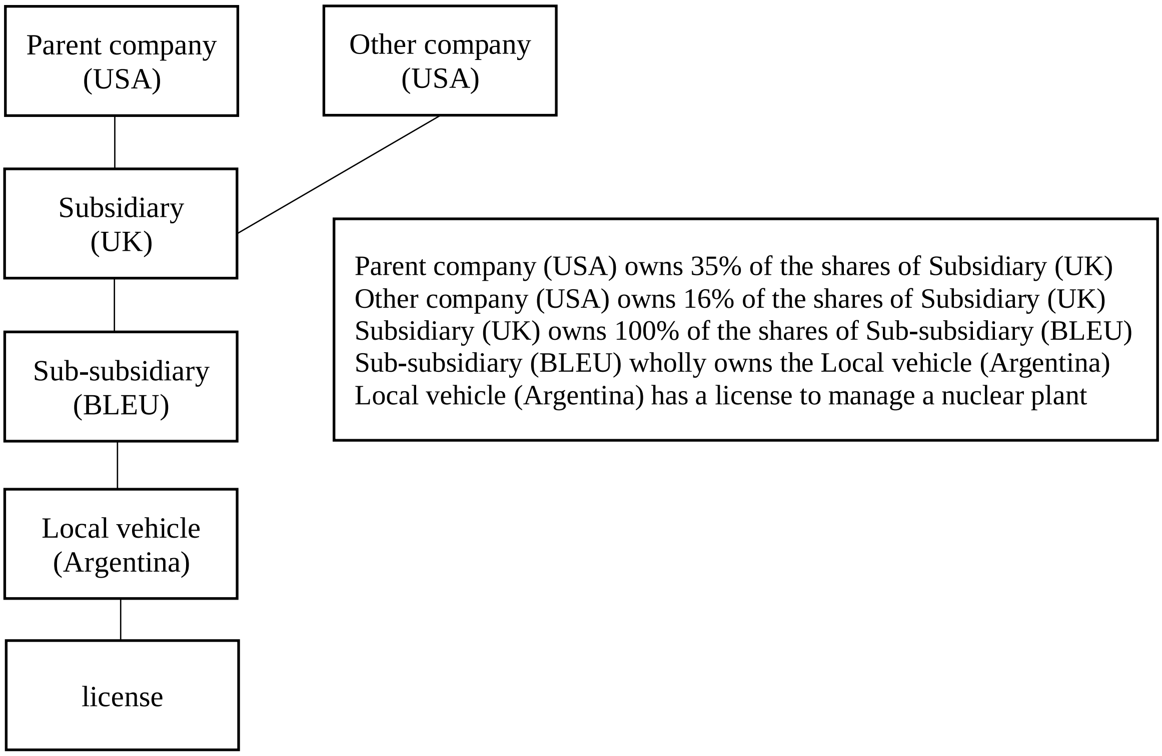
By looking at this provision, it is apparent that the DR-CAFTA provides for the investor a possibility to act in its own name or, whether s/he controls/owns a company, on behalf of the latter. In *Kappes and Kappes*, the issue concerned whether a controlling shareholder is free to choose to either bring a claim for reflective loss in its own name or to start proceedings on behalf of the company for its direct loss. The majority, relying upon the general admissibility of reflective loss claims and the treaty language («may submit»), came to the conclusion that the decision was exclusively up to the claimant. This decision was harshly criticized by one of the arbitrators, Zachary Douglas, who rendered a partial dissenting opinion, pointing out that such an interpretation would

[476] *W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on the Respondent's Preliminary Objection, 13 March 2020.

undermine the mechanisms enshrined in the treaty so as to avoid the multiplicity of proceedings and possible prejudice to third parties, including other stakeholders and creditors of the company. Indeed, the DR-CAFTA enshrines a set of instruments specifically implemented to this effect, such as an obligation by the investor to waive its rights to act in other fora and the provision of an obligation to pay any recover directly to the company. In this respect, one cannot but agree with the dissenting arbitrator inasmuch as the blanket permission to bring a reflective loss claim has the effect to allow the investor to bypass the boundaries set by the treaty in order to uphold some relevant policy considerations. [477] According to Zachary Douglas, a different approach should have been taken with regard to reflective loss claims: these could only be brought by minority shareholders since they cannot take advantage of the derivative claim mechanism to the extent that they do not directly own or control the injured company. As far as majority shareholders, they could only avail themselves of derivate claim since – if this not were the case – they would be able to bypass the guarantees enshrined in the treaty to avoid multiple proceedings and to ensure the rights of third parties having an interest in the dispute.

Everything that has been said is even more apparent if one considers the interrelationship between shareholding and indirect investment. In this respect, a figure may prove to be useful.

[477] In this respect, see the partial dissenting opinion rendered by arbitrator Zachary Douglas in *W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala,* ICSID Case No. ARB/18/43, Decision on the Respondent's Preliminary Objection, *supra* note 476, para. 6: «Article 10.26 then extends the logical consequences of this waiver requirement in Article 10.18. If a claim is brought on behalf of the company pursuant to Article 10.16.1(b), then Article 10.26.2(b) directs that any damages awarded must be paid to the company and not to the controlling shareholder. There is then no risk of double recovery because the controlling shareholder and the company would have previously waived the pursuit of any other remedy in respect of the same prejudice. Article 10.26.2(c) then states that "the award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law". This provision evidences a clear concern with the protection of the rights of any creditors of the company (secured and unsecured commercial creditors, involuntary creditors such as tort victims of the company's activities, the tax authorities, and so on)».



According to this hypothetical corporate structure – provided that: *i*) the host State has entered into IIAs with the State of incorporation of each of the subsidiaries, and *ii*) the IIAs contain a broad language concerning the relationship between the investor and the investment – many claims arising from the same measures taken by the host State could be theoretically brought by all the corporate chain. First, the Parent company (USA) and the Other company (USA) could start proceedings for an alleged breach by the host-State against the Local vehicle (Argentina). Despite the fact that, taken individually, they do not own or control the Local vehicle, they could nevertheless start proceedings together against Argentina. That is because they qualify as investors under the Argentina-US BIT and they do indirectly own/control an investment (the shares in the Local vehicle) through two different corporate layers. At the same time, however, the Subsidiary incorporated in the UK could also start parallel proceedings under the UK-Argentina BIT on the basis of the same abovementioned reasoning: the company qualifies as an investor and indirectly owns the investment through another company, even if this is incorporated in a third State. Again, the sub-Subsidiary incorporated in the Belgo-Luxembourg Economic Area could decide to wait the outcome of the two proceedings before rising another claim, once again against the same respondent State for the same course of action. This whole intricated web of proceedings – albeit improbable – would nevertheless be possible because investment tribunals have generally found *res judicata* to be inapplicable for the failure of the competing claims to meet the so-called triple identity test. Similarly, they have also rejected the respondent State contention that such a course of action by the different rings of the chain do actually entail an abuse of rights or process. Yet, this could not be the end. Indeed, in accordance with Article 25(2)(b), the Local vehicle – despite being incorporated in Argentina – could be considered as a foreign investor for the purposes of the dispute because of the control by a foreign corporation. What emerges from this hypothetical dispute is a conundrum of multiple, either parallel or subsequent, proceedings that could be brought by the different rings of the corporate chain against the host State for the same course of action of the latter against the investment.

5. Conclusions. Managing Shareholders' Claims for Reflective Loss in International Investment Law and Arbitration: The Way Forward

Throughout this dissertation, an analysis of the approach of international courts and tribunals to the protection of shareholders on the international legal plane has been carried out. In order to do so, Chapter 1 has firstly analysed the rules provided for in domestic corporate law. In this respect, it has been ascertained that there is one nearly universal rule both in civil and common law jurisdictions: a prohibition of shareholders' claims for reflective loss. Indeed, in accordance with the conferral of a separate and autonomous legal personality upon company, municipal law has consistently maintained a clear-cut distinction between the rights of the latter and those of its shareholders. As a consequence, whenever damages are inflicted upon the company, it is exclusively up to the latter starting proceedings for the purpose of recovering the loss suffered. These rules have been justified on different grounds, including the need to: prevent double recovery by shareholders or double jeopardy for the respondent, ensure the protection of the interest of the third parties such as creditors and other stakeholders, avoid chaotic procedures in which several shareholders claim for damages, respect the governing structure of the society.

Against this background, it has been pointed out that international courts and tribunals have generally followed in the footsteps of domestic regimes by prohibiting reflective loss claims. In Chapter 2, an analysis of the jurisprudence of the International Court of Justice concerning the customary international law rules of diplomatic protection has been carried out with the aim of ascertaining whether – under general international law – the distinction between the corporation and its shareholders is borrowed from municipal law. In this respect, it has been ascertained that the World Court, since the *Barcelona Traction* judgment, has maintained such a distinction arguing that in this circumstance international law is called upon to recognize institutions of municipal law that have an important and extensive role. Similarly, in Chapter 3, it has been pointed out that the European Commission and Court of Human Rights, as well as the Inter-American Commission and Court of Human Rights have made clear that the separate legal personality of companies is to be upheld. Such an approach has been justified by all the judicial organs in their worrisome that the admissibility of reflective loss claims would arguably endanger the proper functioning of the system, putting its viability at risk

In stark contrast to the approach of domestic courts as well other international courts and tribunals, Chapter 4 has pointed out that international investment law has taken a different stance against the prohibition of reflective loss claims. Such a categorical stance has determined that what is considered the exception in all the other regimes – *i.e.*, the so-called piercing of the corporate veil – is nowadays the rule in the context of international investment arbitration. This is confirmed by the practice of international investment tribunals, which have consistently allowed shareholders' claims for reflective loss. In doing so, arbitral tribunals have recognized and grounded the autonomous (treaty) rights of shareholders – be they majority or minority, direct or indirect – to bring such claims on the IIAs' wide provisions qualifying shares as investments.

This solution has been often justified in scholarship on the basis of policy considerations that would allegedly militate for the blank permission to start reflective loss claims. The main argument, in this respect, is that international investment law is aimed at the protection and promotion of foreign investors and investments. Accordingly, the widest right to claim should be recognized under investment agreements. However, the ungovernability of shareholder litigation in international investment arbitration and the risks intertwined with a generalized admissibility of shareholders' claims for reflective loss have been likewise pointed out. From this point of view, it is therefore apparent that a solution is very much needed in order to allow the proper functioning of ISDS as well as to stop critics and confer more legitimacy to such form of dispute resolution.

Against this background, some brief remarks as to the tools and instruments available to manage shareholders' claims for reflective loss are ought to be made. A first 'way forward' can be represented by a flexible approach to the doctrine of *res judicata*, according to which a «final adjudication by a court or arbitral tribunal is conclusive» and, thus, the dispute cannot be relitigated before any other judicial institution».[478] The effectiveness of this doctrine in addressing multiple proceedings on the international plane, however, has been generally hindered by the requirements in order to apply it: the so-called triple identity test.[479] The traditional approach to *res judicata* was well explained by Judge Anzilotti in his dissenting opinion attached to the judgment of the Permanent Court of International Justice in the *Chorzow Factory: Interpretation Case*:

> the decision of the Court has no binding force except between the Parties and in respect of that particular case: we have here three traditional elements for

[478] DODGE, 'Res Judicata', in *Max Planck Encyclopedia of Public International Law*, 2006; GAILLARD, 'Parallel Proceedings: Investment Arbitration', op. cit., para. 46: «according to the res judicata doctrine, if the same claim has already been decided by another court, that decision is dispositive and the claim may not be re-litigated. For a claim to be the 'same' and these doctrines to apply, it is widely accepted that there must be triple concurrence between (i) the parties, (ii) the subject matter (petitum) and (iii) the cause of action (causa petendi)».

[479] WEHLAND, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration*, op. cit., pp. 127 and 185 ff; GAILLARD, 'Parallel Proceedings: Investment Arbitration', op. cit. See *Trail Smelter Arbitration (US v. Canada)*, Award, 11 March 1941; *Biloune v. Ghana*, UNCITRAL, Award on Jurisdiction and Liability, 27 October 1989; *Guyana Boundary Arbitration (Brazil v. Great Britain)*, Award, 6 June 1904.

> identification, *persona*, *petitum*, *causa petendi*, for it is clear that the particular case covers both the object and the grounds of the claim. [480]

In other words, according to prevailing scholarship and jurisprudence, the doctrine of *res judicata* a degree of identity between claims – *petitum* and *causa petendi* – as well as parties is required. This degree of identity has been often interpreted and applied in a very rigid way to the extent, that even if «the object and the legal ground of a process are substantially identical, they are not considered able to satisfy the triple identity test if they are not *perfectly identical* also from the formal point of view».[481] A clear example of such an approach can be identified with the already mentioned Lauder/CME. In deciding the claims brought by CME under the Netherlands-Czech Republic BIT, the Tribunal excluded the applicability of *res judicata* arguing that the dispute before it differed from the *Lauder* case inasmuch as the parties in arbitration were different – Mr Lauder, on the one hand, and CME, on the other one – as well as the *causa petendi*, being the complaints pursued on the basis of two different BITs. Accordingly, the Tribunal rejected the objection of the respondent State to its jurisdiction and proceeded to decide the merits of the dispute. Such a decision sparked many critical comments in scholarship, with several authors pointing out the overly-formalistic approach of the arbitrators to the requirements of *res judicata*.[482] If interpreted as requiring a perfect match between the parties and the causes of action, it is apparent that the doctrine of claim preclusion can hardly play any useful role in managing multiple proceedings brought by different rings of corporate chain. Indeed, the parties will always be – from a formal point of view – different and so will be the causes of action, being generally the claims brought under different IIAs.

Against this background, a flexible approach is advocated for in order to make *res judicata* an efficient tool to deal with reflective loss claims in international investment law and arbitration. Put it otherwise, it is necessary to bring in a functional and realistic approach which takes into account the economic reality of operations. An example of this approach has argued by Giovanni Zarra, according to whom the three requirements of parties, cause of action and relief sought could be interpreted as meaning or encompassing: *i*) the existence of a strong interrelationship between the claimants, such as being part of the same corporate chain or group of shareholders; *ii*) similarity concerning the substantive rules to be applied in order to settle the dispute; and *iii*)

[480] *Interpretation of Judgments Nos. 7 and 8 (Germany v. Poland)*, 1927 P.C.I.J. (ser. A) No. 13 (Dec. 16).

[481] ZARRA, *Parallel Proceedings in Investment Arbitration*, op. cit., p. 140 (*emphasis added*).

[482] REINISCH, 'The Proliferation of International Dispute Settlement Mechanisms: The Threat of Fragmentation vs. the Promise of a More Effective System? Some Reflections from the Perspective of Investment Arbitration', op. cit.;

«identity of the practical results which the claimants aim to reach» rather than «from the limited perspective of the rule which is allegedly violated».[483]

Having said that, one might question which kind of multiple proceedings might be prevented through a flexible approach to *res judicata*. If we take as an example the corporate chain analysed in sub-Section 4.4, the UK Subsidiary and the BLEU sub-Subsidiary would thus be prevented from starting subsequent proceedings in order to assert the claim yet brought by the US Parent Company. That is because their claims will overlap with that of the Parent Company. As far as the hypothesis in which two shareholders start parallel proceedings for the damages caused to their company, *res judicata* might not apply. Each of them, indeed, will claim their own (part of the) damage.

Another interpretative tool to be considered in order to manage the bulk of proceedings that might stem from the general admissibility of reflective loss claims is the abuse of rights doctrine. The latter refers to the exercise of a right for an end different from that for which the right itself was created, to the detriment of others.[484] A specific sub-category of the abuse of right doctrine is the notion of abuse of process, which concerns the misuse of a specific right, *i.e.*, the right to resort to a judicial organ to have one's claims heard.[485] The status of the abuse of right doctrine under international law has long been questioned, for the possibility to sanction an otherwise legitimate exercise of a right only for its end has always been considered problematic. Nevertheless, the doctrine seems to have been recognized despite its unstable theoretical foundations,[486] also by investment arbitral tribunals.

As mentioned above, until very recently, the latter have generally found that the mere choice to start multiple proceedings before different arbitral tribunals is not *per se* abusive. Yet, since very recently, the trend has started to reverse. In this respect, one cannot but mention the two awards rendered in the *Orascom v. Algeria* and *Ampal v. Egypt* cases. In the former, the tribunal dismissed a reflective loss claim as inadmissible pointing out that

> If the protection is sought at one level of the vertical chain, and in particular at the first level of foreign shareholding, that purpose is fulfilled. The purpose is not served

483 ZARRA, *Parallel Proceedings in Investment Arbitration*, op. cit., p. 142 ff.

484 ILLUYOMADE, *Scope and Content of a Complaint of Abuse of Right in International Law*, in *Harvard International Law Journal*, 1975, I, p. 48;

485 ZARRA, *Parallel Proceedings in Investment Arbitration*, op. cit., p. 128.

486 See, for example, *Case Concerning the Arbitral Award of 31 July 1989 (Guinea Bissau v. Senegal)*, 12 November 1991, para. 27; *Case Concerning Certain Phospate Lands in Nauru (Nauru v. Australia)*, 26 June 1992, para. 38. For references in international treaties see Articles 17 and 35 of the ECtHR, Art. 3 of the Optional Protocol to the Covenant on Civil and Political Rights, Art. 22 of the UN Convention against torture and Art. 300 of the United Nations Convention on the Law of the Sea.

> by allowing other entities in the vertical chain controlled by the same shareholder to seek protection for the same harm inflicted on the investment. Quite to the contrary, such additional protection would give rise to a risk of multiple recoveries and conflicting decisions, not to speak of the waste of resources that multiple proceedings involve. The occurrence of such risks would conflict with the promotion of economic development in circumstances where the protection of the investment is already triggered. Thus, where multiple treaties offer entities in a vertical chain similar procedural rights of access to an arbitral forum and comparable substantive guarantees, the initiation of multiple proceedings to recover for essentially the same economic harm would entail the exercise of rights for purposes that are alien to those for which these rights were established.[487]

As the *Orascom* tribunal was the first to ever use the doctrine of abuse of right to manage parallel proceedings, some commentators applauded the outcome of the decision by defining it

> a break in the clouds. In a vertical chain of companies, the tribunal precluded a subsidiary from bringing a claim, its controlling entity having previously argued the very same case in a separate arbitration. Yet, grounded on the broadest of general principles, the scope of which future tribunals can be expected to stretch and squeeze, this award may not be enough to turn the heavy tables assembled by over fifty tribunals. Rather, clear treaty language is required to decidedly address the risks and externalities of reflective loss claims.[488]

The findings made in the *Ampal* case were very similar. Indeed, the tribunal pointed out that «[i]t is possible, as a jurisdictional matter, for different parties to pursue distinct claims in different fora seeking redress for loss allegedly suffered by each of them arising out of the same factual matrix».[489] That is because, the Tribunal recalled, contract claims are distinct from treaty claims. Furthermore, whenever the parties to the dispute are unable or unwilling to come to an agreement to consolidation, two investment tribunals may well consider «claims of separate investors, each of which holds distinct tranches of

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[487] *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria,* Award, *supra* note 316, para. 543. For a comment see LAMPO, 'Considerazioni sull'applicazione dell'abuso del processo nell'arbitratoin tema di investimenti: in margine ad *Orascom v. Algeria (International Centre for Settlement of Investment Disputes, ICSID Case No. ARB/12/35, 31 maggio 2017)*', in *Diritto del commercio internazionale*, vol. 18, 2018, pp. 1017-1036. See also the considerations on abuse of rights by DI BENEDETTO, 'The Double Relevance of the 'Corporate Veil' in the 'Yukos' PCA Case and the Doctrine of the Abuse of Rights', in *Diritti umani e diritto internazionale*, vol. 9, 2015, pp. 387-409.

[488] *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria, ibid.*

[489] *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction, 1 February 2016, para. 329.

the same investment».[490] However, such a situation, in the view of arbitrators, could not be a desirable one, yet it cannot be considered *per se* as abusive; in particular when it is the respondent State which has declined the offer to consolidate the different proceedings advanced by the Claimants. In deciding the specific dispute, however, the Tribunal found that parallel proceedings started by shareholders and their company could be considered abusive. That was because

> in the present arbitration, the Claimant Ampal, controlled by Mr. Yosef Maiman, advances its claims in respect of the same 12.5% indirect interest in EMG for which Ampal's 100% subsidiary, Merhav-Ampal Group Ltd (MAGL) (and its 50% subsidiary, Merhav-Ampal Energy Holdings) claim in the parallel Maiman arbitration (together the 'MAGL portion'). This is tantamount to double pursuit of the same claim in respect of the same interest. In the Tribunal's opinion, while the same party in interest might reasonably seek to protect its claim in two fora where the jurisdiction of each tribunal is unclear, once jurisdiction is otherwise confirmed, it would crystallize in an abuse of process for in substance the same claim is to be pursued on the merits before two tribunals. However, the Tribunal wishes to make it very clear that this resulting abuse of process is in no way tainted by bad faith on the part of the Claimants as alleged by the Respondent. It is merely the result of the factual situation that would arise were two claims to be pursued before different investment tribunals in respect of the same tranche of the same investment.[491]

From this point of view, therefore, the doctrine of abuse of process might be useful in preventing a parent or holding company, as well as shareholders, from subsequently try to pursue another arbitration in order to relitigate the same dispute before another tribunal.

While these interpretative tools might prove to be useful in (mainly) reducing parallel or multiple proceedings brought by investors, they appear unsuitable to address other concerns which have been pointed out in Chapter 1, namely the impairment of corporate governance and the protection of third parties. Indeed, the resort to *res judicata* is unsuitable to impede that minority shareholders can first pursuing a reflective loss claim, circumventing the will of the board not to litigate the case and, thus, altering the physiological functioning of the corporate governance. Similarly, the applicability of the doctrine of abuse of right cannot prevent that the parent company will start proceedings in order to recover the damages suffered by a subsidiary, leaving the creditors of the latter deprived of any wealth to vindicate their rights.

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[490] *Ibid.*

[491] *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, Decision on Jurisdiction, *supra* note 489, para. 331

In this respect, the recent practice in the negotiations of international investment agreements offer much insights as to the approach of States. In this respect, the option which is advocated for concerns the provision of derivative claims on behalf of the company that might be pursued by shareholders, complemented with an explicit prohibition for shareholders to bring reflective loss claim. Such a combination would be beneficial in addressing several of the problems highlighted above. Indeed, whenever a provision to pursue derivative claims is combined with an obligation for the company to waive its rights to bring any other claim, the risks of multiple proceedings against the host-State and double recovery is avoided. Similarly, inasmuch as the claim is brought on behalf of the company rather than in the interests of shareholders, the risks of prejudices for creditors and any other stakeholder are reduced, if not equal to zero. Furthermore, the inclusion of an explicit prohibition for shareholders to bring reflective loss claims would also impede them to bypass the rules enshrined as happened in the *Kappes* case.

Bibliography

Books

1. ANTKOWIAK T.M., GONZA A., *The American Convention on Human Rights. Essential Rights*, Oxford, Oxford University Press, 2017, pp. 1-416.
2. BAUMGARTNER J., *Treaty Shopping in International Investment Law*, Oxford, Oxford University Press, 2016, pp. 1-400.
3. BOTTINI G., *Admissibility of Shareholder Claims under Investment Treaties*, Cambridge, Cambridge University Press, 2020, pp. 1-335.
4. BURGORGUE-LARSEN L., ÚBEDA DE TORRES A., *The Inter-American Court of Human Rights: Case Law and Commentary*, Oxford, Oxford University Press, 2011, pp. 1-952.
5. CAFLISCH L., *La Protection de Sociétés Commerciales et des Intérêts Indirects en Droit International Public*, The Hague, Martinus Nijhoff, 1969, pp. 1-287.
6. CAMPOBASSO G.F., *Manuale di diritto commerciale*, Torino, Utet, 2017[7] (edited by CAMPOBASSO M.), pp. 1-672.
7. CANNIZZARO E., *Diritto internazionale*, Torino, Giappichelli, 2020[5], pp. 1-555.
8. CASSESE A., *I diritti umani oggi*, Bari, Laterza, 2008, pp. 1-264.
9. CHARMAN A., DU TOIT J., *Shareholder Actions*, London, Bloomsbury, 2017[2], pp. 1-549.
10. CONFORTI B., IOVANE M., *Diritto internazionale*, Napoli, Editoriale Scientifica, 2021[12], pp. 1-534.
11. CRAWFORD J., *Brownlie's Principles of Public International Law*, Oxford, Oxford University Press, 2019[9], pp. 1-872.
12. DAVIDSON S., *The Inter-American Human Rights System*, Aldershot, Dartmourth, 1997, pp. 1-381.
13. DAVIES, *Gower and Davies' Principles of Modern Company Law*, London, Sweet & Maxwell, 2008[8], pp. 1-1108.
14. DE HOCHEPIED J-P., *La protection diplomatique des sociétés et des actionnaires*, Paris, Pedone, 1965, pp. 1-274.
15. DE LONDRAS F., DZEHTSIAROU K., *Great Debates on the European Convention on Human Rights*, London, Palgrave, 2018, pp. 1-193.
16. DE NANTEUIL A., *International Investment Law*, Cheltenham, Edward Elgar, 2020, pp. 1-464.

17. DI BENEDETTO S., *International Investment Law and the Environment*, Cheltenham, Edward Elgar, 2013, pp. 1-250.

18. DOLZER R., SCHREUER C., *Principles of International Investment Law,* Oxford, Oxford University Press, 2012[2], pp. 1-417.

19. DOUGLAS Z., *The International Law of Investment Claims*, Cambridge, Cambridge University Press, 2009, pp. 1-666.

20. DOUGLAS Z., *Cinq problématiques d'actualité en droit des investissements*, Paris, Pedone, 2015, pp. 1-66.

21. EMBERLAND M., *The Human Rights of Companies. Exploring the Structure of ECHR Protection*, Oxford, Oxford University Press, 2006, pp. 1-272.

22. FOCARELLI C., *Trattato di Diritto internazionale*, Torino, UTET Giuridica, 2015, pp. 1-2542.

23. FOCARELLI C., *Diritto internazionale*, Padova, Cedam, 2019[5], pp. 1-785.

24. IJALAYE D.A., *The Extension of Corporate Personality in International Law*, Dobbs Ferry/Leiden, Oceana Publications/Sijthoff, 1978, pp. 1-354.

25. JOFFE V., DRAKE D., RICHARDSON G., LIGHTMAN D., COLLINGWOOD T., *Minority Shareholders*, Oxford, Oxford University Press, 2019[6], pp. 1-720.

26. KRAAKMAN R., ARMOUR J., DAVIES P., ENRIQUES L., HANSMANN H., HERTIG G., HOPT K., KANDA H., PARGENDLER M., RINGE W-G., ROCK E., *The Anatomy of Corporate Law. A Comparative and Functional Approach*, Oxford, Oxford University Press, 2017[3], pp. 1-304.

27. MARCHESI A., *La protezione internazionale dei diritti umani*, Torino, Giappichelli, 2021, pp. 1-288.

28. MCLACHLAN C., SHORE L., WEINIGER M., *International Investment Arbitration. Substantive Principles*, Oxford, Oxford University Press, 2017[2], pp. 1-630.

29. MCLAUGHLIN S., *Unlocking Company Law*, London/New York, Routledge, 2013[2], pp. 1-430.

30. MEDINA QUIROGA C., *The American Convention on Human Rights. Crucial Rights and their Theory and Practice*, 2016[2], pp. 1-373.

31. MINERVINI G. *SR.*, *Gli amministratori di società per azioni*, Milano, Giuffrè, 1956, pp. 1-500.

32. MERKOURIS P., *Article 31(3)(c) VCLT and the Principle of Systemic Integration. Normative Shadows in Plato's Cave*, Leiden, Brill, 2015, pp. 1-331

33. MUCHLINSKI P., *Multinational Enterprises and the Law*, Oxford, Oxford University Press, 2021[3], pp. 1-912.

34. MÜLLER D., *La protection de l'actionnaire en droit international*, Paris, Pedone, 2015, pp. 1-517.

35. MULLER M. (ed.), *Corporate Law in the Netherlands*, Den Haag, Kluwer Law International, 2013[3], pp. 1-232.

36. PALOMBINO F.M., *Il trattamento «giusto ed equo» degli investimenti stranieri*, Bologna, il Mulino, 2013, pp. 1-216.

37. PALOMBINO F.M., *Fair and Equitable Treatment and the Fabric of General Principles*, The Hague, Springer, 2018, pp. 1-189.

38. PALOMBINO F.M., *Introduzione al diritto internazionale*, Bari, Laterza, 2021[2], pp. 1-320.

39. PEAT D., *Comparative Reasoning in International Courts and Tribunals*, Cambridge, Cambridge University Press, 2019, pp. 1-258

40. PERRINI F., *La protezione diplomatica delle società*, Napoli, Editoriale Scientifica, 2013, pp. 1-162.

41. PINTO V., *La tutela risarcitoria dell'azionista fra danno diretto e danno riflesso*, Pisa, Pisa University Press, 2012, pp. 1-158.

42. REINISCH A., *Advanced Introduction to International Investment Law*, Northampton, Edward Elgar Publishing, 2020, pp. 1-160.

43. REINISCH A., SCHREUER C., *International Protection of Investments. The Substantive Standards*, Cambridge, Cambridge University Press, 2020, pp. 1-1056.

44. SABAHI B., RUBINS N., WALLACE JR. D., *Investor-State Arbitration*, Oxford, Oxford University Press, 2019[2], pp. 1-992.

45. SALACUSE J.W., *The Law of Investment Treaties*, Oxford, Oxford University Press, 2015[2], pp. 1-479.

46. SALACUSE J.W., *The Law of Investment Treaties*, Oxford, Oxford University Press, 2021[3], pp. 1-640.

47. SASSON M., *Substantive Law in Investment Treaty Arbitration. The Unsettled Relationship between International Law and Municipal Law*, Alphen aan den Rijn, Wolters Kluwer, 20172, pp. 1-304.

48. SCHEFER K.N., *International Investment Law: Text, Cases and Materials*, Northampton, Edward Elgar, 2013, pp. 1-744.

49. SEALY L., WORTHINGTON S., *Sealy's Cases and Materials in Company Law*, Oxford, Oxford University Press, 2013[10], pp. 1-904.

50. SEIDL-HOHENVELDERN I., *Corporations in and under international law*, Cambridge, Grotius Publications, 1987, pp. 1-138.

51. SCHABAS W., *The European Convention on Human Rights: A Commentary*, Oxford, Oxford University Press, 2015, pp. 1-1434.

52. SCHILL S.W., *The Multilateralization of International Investment Law*, Cambridge, Cambridge University Press, 2009, pp. 1-451.

53. SCHREUER C., MALINTOPPI L., REINISCH A., SINCLAIR A., 'The ICSID Convention. A Commentary', Cambridge, Cambridge University Press, 2009.

54. SHAW M., *International Law*, Cambridge, Cambridge University Press, 2017[8], pp. 1-1118.

55. SORNARAJAH M., *The International Law on Foreign Investment*, Cambridge, Cambridge University Press, 2017[4], pp. 1-604.

56. SUDIERO F., *La tutela risarcitoria del socio tra danno diretto e danno riflesso*, Torino, Giappichelli, 2020, pp. 1-368.

57. TANZI A., *Introduzione al diritto internazionale contemporaneo*, Padova, Cedam, 2020[6], pp. 1-635.

58. THIRLWAY H., *The Sources of International Law*, Oxford, Oxford University Press, 2019[2], pp. 1-272.

59. TOURNIER A., *La protection diplomatique des personnes morales*, Paris, Pedone, 2013, pp. 1-645.

60. VANDEKERCKHOVE K., *Piercing the Corporate Veil*, Alphen aan den Rijn, Kluwer Law International, 2007, pp. 1-765.

61. VANHONNAEKER L., *Shareholders' Claims for Reflective Loss in International Investment Law*, Cambridge, Cambridge University Press, 2020, pp. 1-391.

62. VENTORUZZO M., CONAC P-H., GOTO G., MOCK S., NOTARI M., REISBERG A., *Comparative Corporate Law*, Saint Paul, West Academic, 2015, pp. 1-664.

63. VILLIGER M., *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Leiden, Brill, 2009, pp. 1-1057

64. WEBB P., *International Judicial Integration and Fragmentation*, Oxford, Oxford University Press, 2013

65. WEHLAND H., *The Coordination of Multiple Proceedings in Investment Treaty Arbitration*, Cambridge, Cambridge University Press, 2013, pp. 1-304.

66. ZARRA G., *Parallel Proceedings in Investment Arbitration*, Torino/The Hague, Giappichelli/Eleven International Publishing, 2017, pp. 1-253.

67. ZORZI N., *L'abuso della personalità giuridica. Tecniche sanzionatorie a confronto*, Padova, Cedam, 2002, pp. 1-294.

Chapters in Volumes, Encyclopedia Entries, *Recueil des Cours*

1. BASILE M., FALZEA A., 'Persona giuridica (dir. priv.)', in *Enciclopedia del diritto*, vol. XXXIII, 1983, pp. 234-276.
2. BISCHOFF J.A., HAPP R., 'Ratione Materiae', in BUGENBERG M., GRIEBEL J., HOBE S., REINISCH A. (eds), *International Investment Law. A Handbook*, München/Oxford/Baden-Baden, Beck/Hart/Nomos, 2015, pp. 495-544.
3. CLODFELTER M.A., KLINGER J.D., 'Reflective Loss and Its Limits under International Investment Law', in BEHARRY C.L. (ed.), *Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration*, Leiden/Boston, Brill Nijhoff, 2018, pp. 57-80.
4. COHEN SMUTNY A., 'Claims of Shareholders in International Investment Law', in BINDER C., KRIEBAUM U., REINISCH A., WITTICH S. (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, Oxford, Oxford University Press, 2009, pp. 363-376.
5. DE SENA P., 'Economic and Non-Economic Values in the Case Law of the European Court of Human Rights', in DUPUY P-M., PETERSMANN E-U., FRANCIONI F. (eds), *Human Rights in International Investment Law and Arbitration*, Oxford, Oxford University Press, 2009, pp. 208-218.
6. DE VISSCHER P., 'La protection diplomatique des personnes morales', in *Recueil de cours de l'Académie de droit international de la Haye*, vol. 102, 1961, pp. 395-513.
7. DE WULF H., 'Direct shareholder suits for damages based on reflective loss', in GRUNDMANN S., HAAR B., MERKT H., MULBERT P.O., WELLENHOFER M. (eds), *Festschrift für Klaus J. Hopt zum 70. Geburstag am 24. August 2010*, Berlin/New York, De Gruyter, 2010, pp. 1537-1564.
8. DEL VECCHIO A., 'International Courts and Tribunals, Standing', in *Max Planck Encyclopedia of Public International Law*, 2010.
9. DI BENEDETTO S., 'The Double Relevance of the 'Corporate Veil' in the 'Yukos' PCA Case and the Doctrine of the Abuse of Rights', in *Diritti umani e diritto internazionale*, vol. 9, 2015, pp. 387-409.
10. DIEZ DE VELASCO M., 'La protection diplomatique des sociétés et des actionnaires', in *Recueil de cours de l'Académie de droit international de la Haye*, vol. 141, 1974, pp. 87-186.
11. DINSTEIN Y., 'Diplomatic Protection of Companies under International Law', in WELLENS K. (ed.), *International Law: Theory and Practice. Essays in Honour of Eric Suy*, The Hague, Nijhoff, 1998, pp. 505-517.
12. DODGE W.S., 'Res Judicata', in *Max Planck Encyclopedia of Public International Law*, 2006.

13. DUGARD J., ‘Diplomatic Protection’, in *Max Planck Encyclopedia of Public International Law*, 2009.

14. EJIMS O., ‘Siemens AG v Argentina, Award and Separate Opinion, ICSID Case No ARB/02/8, IIC 227 (2007), 6th February 2007, United Nations [UN]; World Bank; International Centre for Settlement of Investment Disputes [ICSID]’, in *Investment Claims*, 2008.

15. FONTANELLI F., BIANCO G., ‘Barcelona Traction Share’, in HOHMANN J., JOYCE D., *International Law’s Objects*, Oxford, Oxford University Press, 2018, pp. 141-150.

16. GAILLARD E., ‘Parallel Proceedings: Investment Arbitration’, in *Max Planck Encyclopedia of International Procedural Law*, 2019.

17. GAJA G., ‘Standing: International Court of Justice’, in *Max Planck Encyclopedia of International Procedural Law*, 2018.

18. GARCÍA J.O., ‘Nationality of Claim: Investment Arbitration’, in *Max Planck Encyclopedia of International Procedural Law*, 2019.

19. HAPP R., RUBINS N., ‘Siemens AG v Argentina, Decision on Jurisdiction, ICSID Case No ARB/02/8, (2005) 44 ILM 138, IIC 226 (2004), 3rd August 2004, United Nations [UN]; World Bank; International Centre for Settlement of Investment Disputes [ICSID]’, in *Investment Claims*, 2006.

20. HAPP R., RUBINS N., ‘Suez and ors v Argentina, Decision on Jurisdiction, ICSID Case No ARB/03/19, IIC 232 (2006), 3rd August 2006, United Nations [UN]; World Bank; International Centre for Settlement of Investment Disputes [ICSID]’, in *Investment Claims*, 2007.

21. HARRIS D.J., LIVINGSTONE S. (eds), *The Inter-American System of Human Rights*, Oxford/New York, Clarendon/Oxford University Press, 1998, pp. 1-616.

22. HO J., ‘Contract Claims: Investment Arbitration’, in *Max Planck Encyclopedia of International Procedural Law*, 2020.

23. HOPT K.J., ‘Comparative corporate governance: the state of the art and international regulation’, in FLECKNER A.M., HOPT K.J., *Comparative Corporate Governance. A Functional and International Analysis*, Cambridge, Cambridge University Press, 2013, pp. 1-101.

24. KAUFFMANN-KOHLER G., ‘Multiple Proceedings – New Challenges for the Settlement of Investment Disputes’, in ROVINE A.W., *Contemporary Issues in International Arbitration and Mediation. The Fordham Papers 2013*, Leiden/Boston, Brill Nijhoff, pp. 3-12.

25. KRIEBAUM U., ‘Is the European Court of Human Rights an Alternative to Investor-State Arbitration?’, in DUPUY P-M., PETERSMANN E-U., FRANCIONI F. (eds), *Human Rights in International Investment Law and Arbitration*, Oxford, Oxford University Press, 2009, pp. 219-245.

26. KRIEBAUM U., 'Evaluating Social Benefits and Costs of Investment Treaties: Depoliticization of Investment Disputes', in *ICSID Review*, vol. 33, 2017, pp. 14-28, at 17-18.

27. KRIEBAUM U., REINISCH A., 'Property, Right to, International Protection', in *Max Planck Encyclopedia of Internationa Law*, 2019.

28. KRIEBAUM U., SCHREUER C., 'The Concept of Property in Human Rights Law and International Investment Law', in BREITENMOSER S., EHRENZELLER B., SASSOLI M., STOFFEL W., WAGNER PFEIFER B. (eds), *Human Rights, Democracy and the Rule of Law. Liber Amicorum Luzius Wildhaber*, pp. 743-762.

29. LAIRD I.A., 'A Community of Destiny – The *Barcelona Traction* case and the Development of Shareholder Rights to Bring Investment Claims', in WEILER T. (ed.), *International Investment Law and Arbitration. Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, London, Cameron May, 2005, pp. 77-96.

30. LOVE B., 'CMS Gas Transmission Company v Argentina, Decision on Objections to Jurisdiction, ICSID Case No ARB/01/8, (2000) 7 ICSID Rep 492, (2003) 42 ILM 788, IIC 64 (2003), 17th July 2003, United Nations [UN]; World Bank; International Centre for Settlement of Investment Disputes [ICSID]', in *Investment Claims*, 2008.

31. LOVE B., 'CMS Gas Transmission Company v Argentina, Award, ICSID Case No ARB/01/8, IIC 65 (2005), 25th April 2005, despatched 12th May 2005, United Nations [UN]; World Bank; International Centre for Settlement of Investment Disputes [ICSID]', in *Investment Claims*, 2009.

32. MAHONEY P., 'The Comparative Method in Judgments of the European Court of Human Rights: Reference back to National Law', in CANIVET G., ANDENAS M., FAIRGRIEVE D., *Comparative Law before the Courts*, London, British Institute of International and Comparative Law, 2004, pp. 135-150.

33. MISTELIS L., BALTAG C., 'Denial of Benefits Clause', in *Max Planck Encyclopedia of International Procedural Law*, 2019.

34. MUCHLINSKI P.T., 'The Diplomatic Protection of Foreign Investors: A Tale of Judicial Caution', in BINDER C., KRIEBAUM U., REINISCH A., WITTICH S. (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, Oxford, Oxford University Press, 2009, pp. 341-362.

35. MUCHLINSKI P.T., 'Corporations in International Law', in *Max Planck Encyclopedia of Public International Law*, 2014.

36. ORREGO VICUÑA F., 'Claims, International', in *Max Planck Encyclopedia of Public International Law*, 2010.

37. PALOMBINO F.M., 'Judicial Economy', in *Max Planck Encyclopedia of International Procedural Law*, 2020.

38. PALOMBINO F.M., MINERVINI G., 'Apropos of the External Precedent: Judicial Cross-Pollination Between Investment Tribunals and International Courts', in GOURGOURINIS A. (ed.), *Transnational Actors in International Investment Law*, Cham, Springer, 2021, pp. 133-150.

39. PAUWELYN J., 'Fragmentation of International Law', in *Max Planck Encyclopedia of International Law*, 2006

40. PERKAMS M., 'Piercing the Corporate Veil in International Investment Agreements', in REINISCH A., KNAHR C., *International Investment Law in Context*, Utrecht, Eleven International, 2007, pp. 93-114.

41. PERKAMS M., 'Protection for Legal Persons', in BUGENBERG M., GRIEBEL J., HOBE S., REINISCH A. (eds), *International Investment Law. A Handbook*, München/Oxford/Baden-Baden, Beck/Hart/Nomos, 2015, pp. 638-652.

42. PETERS P., 'Some Serendipitous Findings in BITs: the Barcelona Traction Case and the Reach of Bilateral Investment Treaties', in DENTERS E., SCHRIJVER N., *Reflections on International Law from the Low Countries in Honour of Paul de Waart*, The Hague/Boston/London, Martinus Nijhoff, 1998, pp. 27-47.

43. PINTO V., 'La responsabilità degli amministratori per "danno diretto" agli azionisti', in ABBADESSA P., PORTALE G.B., *Il nuovo diritto delle società: Liber amicorum Gian Franco Campobasso*, Torino, Utet giuridica, 2006, pp. 893-940.

44. PROTOPSALTIS P.M., 'Shareholders' Injury and Compensation in Investor-State Arbitration', in PAZARTZIS P., MERKOURIS P. (eds), *Permutations of Responsibility in International Law*, Leiden, Brill Nijhoff, 2019, pp. 185-216.

45. REED L., DAVIS J.E., 'Who Is a Protected Investor', in BUGENBERG M., GRIEBEL J., HOBE S., REINISCH A. (eds), *International Investment Law. A Handbook*, München/Oxford/Baden-Baden, Beck/Hart/Nomos, 2015, pp. 614-637.

46. REED L., SCANLON Z., ATANASOVA D., 'Protected Investment', in *Max Planck Encyclopedia of International Procedural Law*, 2018.

47. REINISCH A., 'The Challenge of Fostering Greater Coherence in International Investment Law', in ECHANDI R., SAUVÉ P. (eds), *Prospects in International Investment Law and Policy*, Cambridge, Cambridge University Press, 2013, pp. 236-240.

48. SABAHI B., 'Azurix Corp v Argentina, Decision on Jurisdiction, ICSID Case No ARB/01/12, (2004) 43 ILM 262, IIC 23 (2003), despatched 8th December 2003, United Nations [UN]; World Bank; International Centre for Settlement of Investment Disputes [ICSID]', in *Investment Claims*, 2007.

49. SABAHI B., 'Azurix Corporation v Argentina, Award, ICSID Case No ARB/01/12, IIC 24 (2006), 23rd June 2006, despatched 14th July 2006, United Nations [UN]; World Bank; International Centre for Settlement of Investment Disputes [ICSID]', in *Investment Claims*, 2007.

50. SACERDOTI G., ‘Barcelona Traction Revisited: Foreign-Owned and Controlled Companies in International Law’, in DINSTEIN Y., TABORY M., *International Law at a Time of Perplexity. Essays in Honour of Shabtai Rosenne*, Dordrecht/Boston/London, Martinus Nijhoff, 1989, pp. 699-716.

51. SCHLEMMER E.C., ‘Investment, Investor, Nationality and Shareholder’, in MUCHLINSKI P., ORTINO F., SCHREUER C. (eds), *The Oxford Handbook of International Investment Law*, Oxford, Oxford University Press, 2008, pp. 49-88.

52. SCHMALENBACK K., ‘Ahmadou Sadio Diallo Case (Republic of Guinea v Democratic Republic of the Congo)’, in *Max Planck Encyclopedia of Public International Law*, 2019.

53. SCHREUER C., ‘Investments, International Protection’, in *Max Planck Encyclopedia of Public International Law*, 2013.

54. SCHREUER C., ‘Investment Disputes’, in *Max Planck Encyclopedia of Public International Law*, 2013.

55. SCHREUER C., ‘International Centre for Settlement of Investment Disputes (ICSID)’, in *Max Planck Encyclopedia of Public International Law*, 2013.

56. SCHREUER C., ‘Coherence and Consistency in International Investment Law’, in ECHANDI R., SAUVÉ P. (eds), *Prospects in International Investment Law and Policy*, Cambridge, Cambridge University Press, 2013, pp. 391-402

57. SCHREUER C., ‘Arbitration: International Centre for Settlement of Investment Disputes (ICSID)’, in *Max Planck Encyclopedia of International Procedural Law*, 2018.

58. TOMUSCHAT C., ‘The European Court of Human Rights and Investment Protection’, in BINDER C., KRIEBAUM U., REINISCH A., WITTICH S. (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, Oxford, Oxford University Press, 2009, pp. 636-656.

59. TREVISANUT S., ‘Nationality Cases before International Courts and Tribunals’, in *Max Planck Encyclopedia of Public International Law*, 2011.

60. TZEVELEKOS V.P., ‘Standing: European Court of Human Rights (ECtHR)’, in *Max Planck Encyclopedia of International Procedural Law*, 2019.

61. VAJIĆ N., PAK V., ‘Avoiding Plurality of International Proceedings in the European Court of Human Rights’, in WOLFRUM R., SERSIĆ M., SOSIĆ T.M. (eds), *Contemporary Developments in International Law. Essays in Honour of Budislav Vukas*, Leiden/Boston, Brill Nijhoff, 2016, pp. 614-635.

62. VISENTINI B. ‘Azioni di società’, in *Enciclopedia del diritto*, vol. IV, 1959, pp. 967-1003.

63. WEHLAND H., ‘Forum Shopping: Investment Arbitration’, in *Max Planck Encyclopedia of International Procedural Law*, 2020.

64. WILDHABER L., WILDHABER I., 'Recent Case Law on the Protection of Property in the European Convention on Human Rights', in BINDER C., KRIEBAUM U., REINISCH A., WITTICH S. (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, Oxford, Oxford University Press, 2009, pp. 657-677.

65. WITTICH S., 'Barcelona Traction Case', in *Max Planck Encyclopedia of Public International Law*, 2007.

66. WITTICH S., 'Compensation', in *Max Planck Encyclopedia of Public International Law*, 2008.

67. YANNACA-SMALL K., 'Parallel Proceedings', in MUCHLINSKI P., ORTINO F., SCHREUER C. (eds), *The Oxford Handbook of International Investment Law*, Oxford, Oxford University Press, 2008, pp. 1008-1049.

68. YANNACA-SMALL K., 'Who is Entitled to Claim? The Definition of Nationality in Investment Arbitration', in YANNACA-SMALL K. (ed.), *Arbitration Under International Investment Agreements. A Guide to the Key Issues*, Oxford, Oxford University Press, 2018^{2}, pp. 223-265.

69. YANNACA-SMALL K., KATSIKIS. D., 'The Meaning of 'Investment' in Investment Treaty Arbitration', in YANNACA-SMALL K. (ed.), *Arbitration Under International Investment Agreements. A Guide to the Key Issues*, Oxford, Oxford University Press, 2018^{2}, pp. 266-301.

Journal Articles

1. ACCONCI P., 'Determining the Internationally Relevant Link between a State and a Corporate Investor, Recent Trends concerning the Application of the "Genuine Link" Test', in *Journal of World Investment & Trade*, vol. 5, 2004, pp. 139-175.

2. AITKEN L., 'Recent Developments in the Shareholder's Derivative Action: Hong Kong and Australian Perspectives', in *Hong Kong Law Journal*, vol. 39, 2009, pp. 129-146.

3. ALEXANDROV S.A., 'The "Baby Boom" of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as "Investors" and Jurisdiction *Ratione Temporis*', in *The Law & Practice of International Courts and Tribunals*, vol. 4, 2005, pp. 19-59.

4. BECKETT W.E., 'Diplomatic Claims in Respect of Injuries to Companies', in *Transactions of the Grotius Society*, vol. 17, 1931, pp. 175-194.

5. BELOT F., 'Le préjudice économique de l'associé victime de la dépréciation de ses titres', in *Petites affiches*, vol. 83, 2006, pp. 6-12.

6. BENTOLILA D., 'Shareholders' Action to Claim for Indirect Damages in ICSID Arbitration', in *Trade, Law and Development*, vol. 2, 2010, pp. 87-144.

7. BIGIAVI W., 'Responsabilità illimitata del socio tiranno', in *Foro italiano*, vol. 83, 1960, I, pp. 1180-1213.

8. BJORKLUND A.K., 'Investment Treaty Arbitral Decisions as Jurisprudence Constante', in *Transnational Dispute Management Journal*, vol. 7, 2010, pp. 265-280.

9. BLYSCHAK P.M., 'Yukos Universal v. Russia: Shell Companies and Treaty Shopping in International Energy Disputes', in *Richmond Journal of Global Law & Business*, vol. 10, 2011, pp. 179-210.

10. BOTTINI G., 'Indirect Claims Under the ICSID Convention', in *University of Pennsylvania Journal of International Law*, vol. 29, 2008, pp. 563-639.

11. BRIGGS H.W., 'Barcelona Traction: The *Jus Standi* of Belgium', in *American Journal of International Law*, vol. 65, 1971, pp. 327-345.

12. BURGSTALLER G., 'Nationality of Corporate Investors and International Claims against the Investor's Own State', in *Journal of World Investment & Trade*, vol. 7, 2006, pp. 857-882.

13. CAFLISCH L., 'The Protection of Corporate Investments Abroad in the Light of the Barcelona Traction Case', in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 31, 1971, pp. 162-196.

14. CHAISSE J., ZHUOYUE LI L., 'Shareholder Protection Reloaded: Redesigning the Matrix of Shareholder Claims for Reflective Loss', in *Stanford Journal of International Law*, vol. 52, 2016, pp. 51-94.

15. COLDWELL R., 'The Limited Protection of Corporations and Shareholders at International Law', in *International Trade and Business Law Review*, vol. 14, 2011, pp. 358-375.

16. D'AGOSTINO J., 'Rescuing International Investment Arbitration: Introducing Derivative Actions, Class Actions, and Compulsory Joinder', in *Virginia Lar Review*, vol. 98, 2012, pp- 177-230.

17. D'ALLAIRE D., 'The Nationality Rules under the Energy Charter Treaty: Practical Considerations', in *Journal of World Investment & Trade*, vol. 10, 2009, pp. 39-68.

18. D'AMATO A., 'Treaties As a Source of General Rules of International Law', in *Harvard International Law Journal*, vol. 3, 1962.

19. DABROWSKI L.D., 'Entitlement of Legal Entities to Hold Rights under the Inter-American Human Rights Protection System', in *International Community Law Review*, vol. 21, 2019, pp. 449-462.

20. DANOS F., 'La réparation du préjudice individuel de l'actionnaire', in *Revue de jurisprudence de droit des affaires*, vol. 13, 2008, p. 471 ff.

21. DAVIS K.B., 'The Forgotten Derivative Suit', in *Vanderbilt Law Review*, vol. 61, 2008, pp. 387-451.

22. DE JONG B.J., 'Shareholders' Claims for Reflective Loss: A Comparative Legal Analysis', in *European Business Organization Law Review*, vol. 14, 2013, pp. 97-118.

23. DE VISSCHER C., 'La notion de référence (renvoi) au droit interne dans la protection diplomatique des actionnaires de sociétés anonymes', in *Revue Belge de Droit International*, vol. 7, 1971, pp. 1-6.

24. DEMIRKOL E.C., 'Admissibility of Claims for Reflective Loss Raised by the Shareholders in Local Companies in Investment Treaty Arbitration', in *ICSID Review: Foreign Investment Law Journal*, vol. 30, 2015, pp. 391-413.

25. DEMOTT D.A., 'Shareholder Litigation in Australia and the United States', in *Sydney Law Review*, vol. 11, 1987, pp. 259-305.

26. DORIGO S., 'Sulla protezione diplomatica degli azionisti: il caso *Diallo* di fronte alla Corte Internazionale di Giustizia', in *Rivista di diritto internazionale*, vol. 90, 2007, pp. 705-737.

27. DUMBERRY P., 'The Legal Standing of Shareholders Before Arbitral Tribunals: Has Any Rule of Customary International Law Crystallised?', in *Michigan State Journal of International Law*, vol. 18, 2010, pp. 353-374.

28. EMBERLAND M., 'The Corporate Veil in the Case Law of the European Court of Human Rights', in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht / Heidelberg Journal of International Law*, vol. 63, 2003, pp. 945-969.

29. FERRAN E., 'Litigation by Shareholders and Reflective Loss', in *Cambridge Law Journal*, vol. 60, 2001, pp. 245-247.

30. FOTTICCHIA A., 'Osservazioni in tema di illecito del terzo e danno riflesso nelle società di capitali', in *Giurisprudenza commerciale*, vol. 38, 2011, pp. 359-372.

31. GAERTNER M.J., 'Reverse Piercing the Corporate Veil: Should Corporation Owners Have It Both Ways?', in *William and Mary Law Review*, vol. 30, 1989, pp. 667-704.

32. GELTER M., 'Why Do Shareholder Derivative Suits Remain Rare in Continental Europe?', in *Brooklyn Journal of International Law*, vol. 37, 2012, pp. 843-892.

33. GEVURTZ F.A., 'Who represents the corporation? In search of a better method for determining the corporate interest in derivative suits', in *University of Pittsburgh Law Review*, vol. 46, 1985, pp. 265-309.

34. GILLESPIE J.R., 'The Thin Corporate Line: Loss of Limited Liability Protection', in *North Dakota Law Review*, vol. 45, 1968, pp. 363-406.

35. GOO S.H., 'Multiple Derivative Action and Common Law Derivative Action Revisited: A Tale of Two Jurisdictions', in *Journal of Corporate Law Studies*, vol. 10, 2010, pp. 255-264.

36. GUILLAME G., 'The Use of Precedents by International Judges and Arbitrators', 2 *JIDS* 5, vol. 2, 2011, pp. 5-23.

37. HIGGINS R., 'Aspects of the Case Concerning the Barcelona Traction, Light and Power Company, Ltd.', in *Virginia Journal of International Law*, vol. 11, 1971, pp. 327-343.

38. J.B., 'Distinguishing between Direct and Derivative Shareholder Suits'. *University of Pennsylvania Law Review*, vol. 110, 1962, pp. 1147-1157.

39. JIMENEZ DE ARECHAGA E., 'Diplomatic Protection of Shareholders in International Law', in *Philippine International Law Journal*, vol. 4, 1965, pp. 71-98.

40. JONES J.M., 'Claims on Behalf of Nationals Who are Shareholders in Foreign Companies', in *British Yearbook of International Law*, vol. 26, 1949, pp. 225-258.

41. JURATOWITCH B., 'The Relationship between Diplomatic Protection and Investment Treaties', in *ICSID Review: Foreign Investment Law Journal*, vol. 23, 2008, pp. 10-35.

42. JURATOWITCH B., 'Diplomatic Protection of Shareholders', in *The British Yearbook of International Law*, vol. 81, 2011, pp. 281-323.

43. KNIGHT S.J., O'BRIEN A.J., 'Ahmadou Sadio Diallo – Republic of Guinea v. Democratic Republic of the Congo – Clarifying the Scope of Diplomatic

Protection of Corporate and Shareholder Rights', in *Melbourne Journal of International Law*, vol. 9, 2008, pp. 151-170.

44. KOH P., 'The Shareholder's Personal Claim: Allowing Recovery for Reflective Loss', in *Singapore Academy of Law Journal*, vol. 23, 2011, pp. 863-889.

45. KORZUN V., 'Shareholder Claims for Reflective Loss: How International Investment Law Changes Corporate Law and Governance', in *University of Pennsylvania Journal of International Law*, vol. 40, 2018, pp. 189-254.

46. KRYVOI Y., 'Piercing the Corporate Veil in International Arbitration', in *Global Business Law Review*, vol. 1, 2011, pp. 169-186.

47. KU J.G., 'The Limits of Corporate Rights Under International Law', in *Chicago Jorunal of International Law*, vol. 12, 2012, pp. 729-754.

48. KUBIATOWSKI S.A., 'The Case of Elettronica Sicula S.p.A.: Toward Greater Protection of Shareholders' Rights in Foreign Investments', in *Columbia Journal of Transnational Law*, vol. 29, 1991, pp. 215-244.

49. KYRIAKOU P.A., 'Mitigating the Risks Entailed in Shareholders' Claims for Reflective Loss: Suggestions for Investment Treaty Reform', in *Journal of World Investment & Trade*, vol. 19, 2018, pp. 693-721.

50. LAMPO G., 'Considerazioni sull'applicazione dell'abuso del processo nell'arbitratoin tema di investimenti: in margine ad *Orascom v. Algeria (International Centre for Settlement of Investment Disputes, ICSID Case No. ARB/12/35, 31 maggio 2017)*', in *Diritto del commercio internazionale*, vol. 18, 2018, pp. 1017-1036.

51. LEE SUET LIN J., 'Barring Recovery for Diminution in Value of Shares on the Reflective Loss Principle', in *Cambridge Law Journal*, vol. 66, 2007, pp. 537-558.

52. LIBERTINI M., SCOGNAMIGLIO G., 'Illecito del terzo e legittimazione del socio all'azione risarcitoria', in *Rivista di diritto private*, 2002, pp. 405-416.

53. LIKILLIMBA G-A., 'Le préjudice individuel et/ou collectif en droit des groupements', in *Revue trimestrielle de droit commercial et de droit économique*, vol. 20, 2009, pp. 1-59.

54. LILLICH R.B., 'The Rigidity of the Barcelona Traction Case', in *American Journal of International Law*, vol. 65, 1971, pp. 522-532.

55. LUTZ P.G., 'Diplomatic Protection of Corporations and Shareholders – Capacity of Government to Espouse Claims of Shareholders of a Foreign Corporation', in *California Western International Law Journal*, vol. 1, 1970, pp. 141-150.

56. MARROQUIN-MERINO V.M., 'The Protection of Property Rights in the Inter-American System: *Banco de Lima Shareholders v. Perú*', in *University of Miami International and Comparative Law Review*, vol. 1, 1991, pp. 218-265.

57. McLachlan C., 'Investment Treaties and General International Law', in *International & Comparative Law Quarterly*, vol. 57, 2008, pp. 361-401.

58. Minervini G., 'La Corte europea torna a pronunciarsi sulla tutela degli azionisti ex art. 1 del Protocollo n. 1 CEDU', in *Giurisprudenza italiana*, vol. 172, 2020, pp. 2383-2385.

59. Minervini G. *Sr.*, 'Note in tema di responsabilità degli amministratori di società per azioni (art. 2394 e 2395 Cod. Civ.)', in *Rivista del diritto commerciale*, 1954, p. 210 ff.

60. Murphy S.D., 'The ELSI Case: An Investment Dispute at the International Court of Justice', in *Yale Journal of International Law*, vol. 16, 1991, pp. 391-452.

61. Norton P.M., 'The Role of Precedent in the Development of International Investment Law', *ICSID Review*, vol. 33, 2018, pp. 280-301.

62. Olmos Giupponi B., 'Disentangling Human Rights and Investors' Rights in International Adjudication: The Legacy of the Yukos Cases', in *Willamette Journal of International Law and Dispute Resolution*, vol. 24, 2017, pp. 127-168.

63. Oquendo A.R., 'Six Degrees of Separation: From Derivative Suits to Shareholder Class Actions', in *Wake Forest Law Review*, vol. 48, 2013, pp. 643-672.

64. Orrego Vicuña F., 'Changing Approaches to the Nationality of Claims in the Context of Diplomatic Protection and International Dispute Settlement', *ICSID Review – Foreign Investment Law Journal*, vol. 15, 2000, pp. 340-361.

65. Pàez-Salgado D., 'Settlements in Investor–State Arbitration: Are Minority Shareholders Precluded from Having its Treaty Claims Adjudicated?', in *Journal of International Dispute Settlement*, vol. 8, 2017, pp. 101-124.

66. Paulsson J., 'Arbitration Without Privity', in *ICSID Review: Foreign Investment Law Journal*, vol. 10, 1995, pp. 232-257, at 233.

67. Pellet A., '2013 Lalive Lecture: The Case Law of the ICJ in Investment Arbitration', in *ICSID Review: Foreign Investment Law Journal*, vol. 28, 2013, pp. 223-240.

68. Pinto V., 'Illecito del terzo, danno riflesso e legittimazione dell'azionista', in *Banca borsa e titoli di credito*, vol. 64, 2011, pp. 138-159.

69. Romano R., 'The Shareholder Suit: Litigation without Foundation?', in *Journal of Law, Economics, & Organization*, vol. 7, 1991, pp. 55-87.

70. Schiessl M., 'The Liability of Corporations and Shareholders for the Capitalization and Obligations of Subsidiaries under German Law', in *Northwestern Journal of International Law & Business*, vol. 7, 1986, pp. 480-506.

71. Schreuer C., 'Shareholder Protection in International Investment Law', in *Transnational Dispute Management*, vol. 2, 2005, pp. 1-21.

72. SHAPIRA G., ‘Shareholder Personal Action in Respect of a Loss Suffered by the Company: The Problem of Overlapping Claims and Reflective Loss in English Company Law’, in *International Lawyer*, vol. 37, 2003, pp. 137-152.

73. SHIHATA I., ‘Towards a Greater Depoliticization of Investment Disputes: the Roles of ICSID and MIGA’, in *ICSID Review – Foreign Investment Law Journal*, vol. 1, 1986, pp. 1-25.

74. SKJOLD HANSEN J., ‘Missing Links in Investment Arbitration: Quantification of Damages to Foreign Shareholders’, in *Journal of World Investment & Trade*, vol. 14, 2013, pp. 434-479.

75. SPOTORNO A.R., ‘Why Is the Rule in *Foss v. Harbottle* Such an Important One?’, in *Business Law Review*, vol. 39, 2018, pp. 190-197.

76. STARKE J.G., ‘Treaties as a ‘Source’ of Interantional Law’, in *British Yearbook of International Law*, vol. 23, 1946, pp. 341-346.

77. STERLING M.J., ‘The Theory and Policy of Shareholder Actions in Tort’, in *Modern Law Review*, vol. 50, 1987, pp. 468-491.

78. STERN B., ‘La protection diplomatique des investissements internationaux: de Barcelona Traction à Elettronica Sicula ou les glissements progressifs de l’analyse’, in *Journal du droit international*, vol. 117, 1990, pp. 897-948.

79. TEFFO F., ‘Réflexions sur le fondement de la reconnaissance du préjudice individuel de l’associé’, in *Revue des sociétés*, 2019, pp. 237-245.

80. TEN CATE I.M., ‘The Costs of Consistency: Precedent in Investment Treaty Arbitration’, *CJTL*, vol. 51, 2013, pp. 418-478.

81. TISHLER S.C.C., ‘A New Approach to Shareholder Standing before the European Court of Human Rights’, in *Duke Journal of Comparative and International Law*, vol. 25, 2014, pp. 259-288.

82. VAGTS D.F., ‘The Multinational Enterprise: A New Challenge for International Law’, in *Harvard Law Review*, vol. 83, pp.739–792;

83. VALASEK M.J., DUMBERRY P., ‘Developments in the Legal Standing of Shareholders and Holding Corporations in Investor-State Disputes’, in *ICSID Review: Foreign Investment Law Journal*, vol. 26, 2011, pp. 34-75.

84. VAN HOUTTE H., ‘Protection of Shareholders in Investment Disputes – 45 Years after Barcelona Traction “Observations sur le Fondement de la Protection Diplomatiques des Actionnaires de Sociétés Anonymes” by Charles de Visscher’, in *Reviue belge de droit international / Belgian Review of International Law*, vol. 48, 2015, pp. 514-520.

85. VERMEER-KÜNZLI A., ‘The Subject Matters: The ICJ and Human Rights, Rights of Shareholders, and the *Diallo* case’, in *Leiden Journal of International Law*, vol. 24, 2011, pp. 607-625.

86. VIÑUALES J.E., 'Too Many Butterflies? The Micro-Drivers of the International Investment Law System', in *Journal of International Dispute Settlement*, vol. 9, 2018, pp. 628-653.

87. WALDE T.W., HOBER K., 'The First Energy Charter Treaty Arbitral Award', in *Journal of International Arbitration*, vol. 22, 2005, pp. 83-104.

88. WU E., 'Addressing Multiplicity of Shareholder Claims in ICSID Arbitrations under Bilateral Investment Treaties: A Tiered Approach to Priritising Claims', in *Asian International Arbitration Journal*, vol. 6, 2010, pp. 134-163.

89. ZARRA G., 'Orderliness and Coherence in International Investment Law and Arbitration: An Analysis Through the Lens of State of Necessity', in *Journal of International Arbitration*, vol. 34, 2017, pp. 653-678.

90. ZARRA G., 'The Issue of Incoherence in Investment Arbitration: Is There Need for a Systemic Reform?', *Chinese Journal of International Law*, vol. 17, 2018, pp. 137-185.

Working Papers and other Documents

1. ARATO J., CLAUSSEN K., LEE J., ZARRA G., 'Reforming Shareholder Claims in ISDS', *Academic Forum on ISDS Concept Paper 2019/*9, 17 September 2019, pp. 1-12, available at https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum.

2. DAVIS E., 'Corporate Personality and the Collective Humanity of Legal Persons: Aggregating the Rights of Stakeholders and Redefining Nationality in International Adjudication', 6 January 2014, available at https://ssrn.com/abstract=2375395.

3. GAUKRODGER D., 'Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency', *OECD Working Papers on International Investment 2013/03*, 2013, pp. 1-62, available at https://www.oecd.org/investment/investment-policy/WP-2013_3.pdf.

4. GAUKRODGER D., 'Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law', *OECD Working Papers on International Investment 2014/02*, 2014, pp. 1-33, available at https://www.oecd.org/investment/investment-policy/WP-2014_02.pdf.

5. GAUKRODGER D., 'Investment Treaties and Shareholder Claims: Analysis of Treaty Practice', *OECD Working Papers on International Investment 2014/03*, 2014, pp. 1-75, available at https://uncitral.un.org/sites/uncitral.un.org/files/2014_investment_treaties_and_shareholder_claims_-_treaty_practice_-_final_website_version.pdf.

6. GELTER M., 'Mapping Types of Shareholder Lawsuits Across Jurisdictions', *ECGI Working Paper Series in Law*, Working Paper N° 363/2017, 2017, pp. 1-43, available at http://ssrn.com/abstract_id=3011444.

7. International Law Commission, 'Draft Articles on Diplomatic Protection with commentaries', UN Doc. A/61/10, Yearbook of the International Law Commission, vol. II, 2006.

8. OECD, 'The impact of investment treaties on companies, shareholders and creditors', in *OECD Business and Finance Outlook 2016*, 2016, pp. 223-253, available at https://www.oecd-ilibrary.org.

9. United Nations Conference on Trade and Development, 'World Investment Report 2016 Investor Nationality: Policy Challenges', 2016, pp. 1-215, available at https://unctad.org/system/files/official-document/wir2016_en.pdf.

10. WOUTERS J., CHANÉ A-L., 'Multinational Corporations in International Law', *KU Leuven Working Papers*, Working Paper No. 129, 2013, pp. 1-20, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2371216.

Table of Cases

International Court of Justice

1. *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment, 30 November 2010, ICJ Reports 2007, p. 582.
2. *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, 30 November 2010, ICJ Reports 2010, p. 639.
3. *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application:1962)*, Preliminary Objections, Judgment, 24 July 1964, ICJ Reports 1964, p. 6.
4. *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application:1962)*, Preliminary Objections, Judgment, 5 February 1970, ICJ Reports 1970, p. 3.
5. *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment, 20 July 1989, ICJ Reports 1989, p. 15.

Permanent Court of International Justice

1. *Factory at Chorzów (Germany v. Poland)*, Merits, Judgment, 13 September 1928, PCIJ Series A, No. 17.
2. *Nationality Decrees Issued in Tunis and Morocco (French Zone)*, Advisory Opinion of 7 February 1923, PCIJ Reports, Series B – No. 4, 1923, p. 6 ff., p. 24.

ICSID Tribunals

1. *AES Corporation v. The Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005.
2. *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001.
3. *Amco Asia Corporation and others v. Republic of Indonesia,* ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983.
4. *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990.
5. *Azurix Corp. v. The Argentine Republic,* ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003.

6. *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, 1 September 2009.

7. *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Final Award, 27 December 2016.

8. *Camuzzi International S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Objection to Jurisdiction, 11 May 2005.

9. *Cemex Caracas Investments BV and Cemex Caracas II Investments BV v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/14, Decision on Jurisdiction, 30 December 2010.

10. *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003.

11. *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007.

12. *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic,* ICSID Case No. ARB/97/3, Award, 20 August 2007.

13. *ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction, 3 September 2013.

14. *Continental Casualty Company v. The Argentine Republic,* ICSID Case No. ARB/03/9, Decision on Jurisdiction, 22 February 2006.

15. *Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on the Respondent's Preliminary Objection, 13 March 2020.

16. *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011.

17. *Enron Corporation and Ponderos Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004.

18. *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Award, 4 September 2020.

19. *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011.

20. *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Liability, 29 December 2014.

21. *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, Final Award, 11 December 2013.

22. *Ioannis Kardassopoulos v. Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007.

23. *LANCO International Inc. v. The Argentine Republic*, ICSID Case No. ARB/97/6, Jurisdiction of the Arbitral Tribunal, 8 December 1998.

24. *Michael Anthony Lee-Chin v. Dominican Republic*, ICSID Case No. UNCT/18/3, Partial Award on Jurisdiction, 15 July 2020.

25. *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002.

26. *Mobil Corporation, Venezuela Holdings BV, Mobil Cerro Negro Holding, Ltd, Mobil Venezolana de Petróleos Holdings, Inc, Mobil Cerro Negro, Ltd, and Mobil Venezolana de Petróleos, Inc v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010.

27. *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002.

28. *Noble Energy, Inc. and Machalapower Cia. Ltda. v. The Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Decision on Jurisdiction, 5 March 2008.

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

30. *Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Jurisdiction, 27 July 2006.

31. *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009.

32. *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction, 11 May 2005.

33. *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007.

34. *Señor Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, 19 June 2009.

35. *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004.

36. *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, 3 August 2006.

37. *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012.

38. *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004.

39. *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Objections to Jurisdiction, 25 August 2006.

40. *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon,* ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009.

41. *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, 19 December 2012.

42. *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Award, 2 June 2000.

43. *Waste Management, Inc. v. United Mexican States ("Number 2")*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004.

Non-ICSID Tribunals

1. *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007.

2. *CME Czech Republic B.V. (The Netherlands) v. Czech Republic*, UNCITRAL, Final Award, 14 March 2003.

3. *Franz Sedelmayer v. Russian Federation*, SCC, Award, 7 July 1998.

4. *HICEE B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2009-11, Partial Award, 23 May 2011.

5. *GAMI Investments Inc. v. Mexico*, UNCITRAL (NAFTA), Final Award, 15 November 2004.

6. *Guaracachi America Inc and Rurelec PLC v. Plurinational State of Bolivia*, UNCITRAL, PCA Case No 2011-17, Award, 31 January 2014.

7. *National Grid plc v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 20 June 2006.

8. *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, SCC Case No. 118/2001, Award, 16 December 2003.

9. *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 300

10. *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011.
11. *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001.
12. *RosInvestCo UK Ltd. v. The Russian Federation,* SCC Case No. V079/2005, Final Award, 12 September 2012.
13. *ST-AD GmbH v. Republic of Bulgaria*, UNCITRAL, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013.
14. *Vladimir Berschader and Moïse Berschader v. The Russian Federation,* SCC Case No. 080/2004, Award, 21 April 2006.
15. *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227, Final Award, 18 July 2014.

Inter-American Commission on Human Rights

1. *Carlos Martinez Riguero v. Nicaragua*, Case 7788, Inter-Am. C.H.R. 89, OEA/ser. L/V/II.71, doe. 9 rev. 1, 1987.
2. *Carvallo Quintana v. Argentina*, Decision, 14 June 2001, para. 61.
3. *Banco de Lima Shareholders v. Perù*, OEA/Ser.L/V/II.79.rev.1, Doc. 12, 22 February 1991
4. *Bendeck-COHDINSA v. Honduras*, Decision, 27 September 1999
5. *Carlos Arturo Betancourt Estrada and Others v. Colombia*, Decision on Admissibility, 23 October 2010
6. *Families Beloning to the Balquicet Agricultural Workers Cooperative (COTRAGROBLAN) v. Colombia*, Decision on Admissibility, 2 November 2011

Inter-American Court on Human Rights

1. *Chaparro Álvarez and Lapo Iñiguez v. Ecuador*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, 21 November 2007, Inter-Am. Ct. H.R. (ser. C) No. 170.
2. *Cantos v. Argentina*, Preliminary Objections, Judgment, 7 September 2001
3. *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment, 31 August 2001

4. *Usón Ramírez v. Venezuela*, Preliminary Objections, Merits, Reparation and Costs, Judgment, 20 November 2009

5. Advisory Opinion OC-22/16, 26 February 2016, Requested by the Republic of Panama

6. *Granier et al. (Radio Caracas Televisión) v. Venezuela*, Preliminary Objections, Merits, Reparation and Costs, Judgment, 22 June 2015

7. *Perozo et al. v. Venezuela*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, 28 January 2009

8. *Ivcher Bronstein v. Peru*, Merits, Reparations and Costs, Judgment, 6 February 2001.

African Court/Commission on Human and Peoples' Rights

1. *Media Rights Agenda and Constitutional Rights Project v. Nigeria*, Communication Nos 105/93, 128/94 and 152/96, Merits, Judgment, 31 October 1998, para. 71, available at www.globalhealthrights.org.

2. *Jean-Claude Roger Gombert v. Republic of Côte d'Ivoire*, App. No. 038/2016, Decision, 22 March 2018

European Commission of Human Rights

1. *Agrotexim Hellas S.A., Biotex S.A., Hymofix Hellas S.A., Kykladiki S.A., Mepex S.A. and Texema S.A. v. Greece*, App. No. 14807/89, Decision as to the Admissibility of the Case, 12 February 1992.

2. *Dyrwold v. Sweden*, App. No. 12259/86, Decision as to the Admissibility of the Case, 7 September 1990.

European Court of Human Rights

1. *Agrotexim Hellas S.A. and Others v. Greece*, App. No. 14807/89, Judgment, 24 October 1995.

2. *Albert and Others v. Hungary,* App. No. 5294/14, Judgment, 29 January 2019.

3. *Albert and Others v. Hungary* [GC], App. No. 5294/14, Judgment, 7 July 2020.

4. *Ankarcrona v. Sweden*, App. No. 35178/97, Decision on Admissibility, 27 June 2000

5. *Bramelid and Malmström v. Sweden*, App. Nos 8588/79 & 8589/79, Decision on Admissibility, 12 October 1982, in *DR*, vol. 29, pp. 64-86.

6. *Burden v. the United Kingdom* [GC], App. No. 13378/05, Judgment, 29 April 2008.

7. *Capital Bank AD v. Bulgaria*, App. No. 49429/99, Judgment, 24 November 2005

8. *Camberrow MM5 AD v. Bulgaria*, App. No. 50357/99, Decision on the Admissibility, 1 April 2004.

9. *Company S-S., I. AB and B.T. v. Sweden*, App. No. 11189/84, Decision on the Admissibility, 11 December 1986.

10. *GJ v. Luxembourg*, App. No. 21156/93, Judgment, 26 October 2000.

11. *Glas Nadezhda EOOD and Anatoliy Elenkov v. Bulgaria*, App. No. 14134/02, Judgment, 11 October 2007, para. 40

12. *Gorraiz Lizarraga and Others v. Spain,* App. No. 62543/00, Judgment, 27 April 2004.

13. *Groppera Radio AG and Others v. Switzerland*, App. No. 10890/84, Judgment, 28 March 1990

14. *Micallef v. Malta* [GC], App. No. 17056/06, Judgment, 15 October 2009.

15. *Nosov v. Russia*, App. No. 30877/02, Decision on Admissibility, 20 October 2005.

16. *OAO Neftyanaya Kompaniya Yukos v. Russia*, App. No. 14902/04, Admissibility Decision, 29 January 2009.

17. *Pafitis and Others v. Greece*, App. No. 20323/92, Judgment, 26 February 1998.

18. *Pine Valley Developments Ltd and Others v. Ireland*, App. No. 12742/87, Judgment, 29 November 1991.

19. *SARL du Parc d'Activités de Blotzheim v. France,* App. No. 72377/01, Judgment, 11 July 2006.

20. *Sovtransavto Holding v. Ukraine*, App. No. 48553/99, Judgment, 25 July 2002.

21. *Süzer et Eksen Holding A.Ş. v. Turkey*, App. No. 6334/05, Judgment, 23 October 2012.

22. *Tadeusz Olczak v. Poland*, App. No. 30417/96, Decision on Admissibility, 7 November 2002.

23. *Tommi Tapani Anttila v. Finland*, Decision on the Admissibility, 19 November 2013.

24. *Vallianatos and Others v. Greece* [GC], App. Nos 29381/09 and 32684/09, Judgment, 7 November 2013.

25. *Vujović and Lipa D.O.O. v. Montenegro*, App. No. 18912/15, Judgment, 20 February 2018.

Human Rights Committee

1. *Eduardo Mariategui et al. v. Argentine*, Communication No. 1371/2005, U.N. Doc. CCPR/C/84/D/1371/2005, para. 4.3
2. *Michelle Lamagna v. Australia*, Communication No. 737/1997, U.N. Doc. CCPR/C/65/D/737/1997, 30 April 1999, para. 6.2
3. *Sharif Mohamed v. Barbados,* Communication No. 502/1992, U.N. Doc. A/49/40, 31 March 1994.

National Courts and Tribunals

Australia

1. *Peters' American Delicacy Co Ltd v Heath* [1939] HCA 2; (1939) 61 CLR 457 (9 February 1939).

France

1. *Cour de Cassation (Chambre Criminelle)*, Judgment No. 97-80.664, 13 December 2000.
2. *Cour de Cassation (Chambre commerciale, financière et économique)*, Judgment No. 97-10.886, 15 January 2002.

Germany

1. *Bundesgerichtshof*, Judgment of 10 November 1986, II ZR 140/85.
2. *Bundesgerichtshof*, Judgment of 20 March 1995, II ZR 205/94.

Hong Kong

1. *Landune International Ltd v. Cheung Chung Leung Richard*, [2006] HKCA 5; [2006] 1 HKLRD 39; [2006] 1 HKC 517; CACV 225/2005.
2. *Waddington Ltd. v. Chan Chun Hoo*, [2008] HKCU 1381.
3. *Power Securities Company Limited v. Sin Kwok Lam and others*, [2019] HKCFI.

Italy

1. *Cassazione Civile*, Judgment No. 16416 of 25 July 2007
2. *Cassazione Civile*, Judgment No. 16963 of 24 July 2014.
3. *Cassazione Civile*, Judgment No. 14778 of 30 May 2019
4. *Cassazione Civile Ss. Uu.*, Judgment No. 27346 of 24 December 2009.

The Netherlands

1. *Poot v. ABP*, Hoge Raad, 2 December 1994, NJ 1995/288
2. *Willemsen v. NOM*, Hoge Raad, 20 June 2008, NJ 2009/21
3. *Ventaz v. FNV*, Hoge Raad, 12 December 1997, NJ 1998/348
4. *Chipshol*, Hoge Raad, 15 June 2001, NJ 573/2001

United Kingdom

1. *Stein v. Blake*, [1998] 1 All ER 724 (CA), [1998] BCC 316
2. *Foss v. Harbottle*, 2 Hare 461 (1843)
3. *Prudential Assurance Co. Ltd. v Newman Industries Ltd. and Others (No 2)*, [1982] 1 Ch 204
4. *Johnson v. Gore, Wood & Co.*, [2000] UKHL 65; [2001] 1 All ER 481; [2001] 2 WLR 72
5. *Giles v. Rhind*, [2003] Ch 618 (CA)
6. *Perry v Day*, [2005] BCC 375

United States of America

1. *Sutter v. General Petroleum Corp.*, 28 Cal.2d 525 (1946)
2. *Alford v. Frontier Enter., Inc.*, 599 F.2d 483, 484 (1st. Cir. 1979)
3. *Gaubert v. U.S.*, 885 F.2d 1284 (5th Cir. 1989)
4. *FDIC v. Howse*, 802 F. Supp. 1554 (S.D. Tex. 1992)
5. *In Re Dein Host, Inc., Debtor. Joseph D. Pignato v. Dein Host, Inc.*, 835 F.2d 402 (1st Cir. 1987)

Table of Treaties

Bilateral Investment Treaties

1. *Accord entre le Gouvernement de la République française et le Gouvernement de la République de Colombie sur l'encouragement et la protection réciproques des investissements*, signed 10 July 2016, entered into force 14 October 2020.
2. *Accord entre le Gouvernement de la République française et le Gouvernement de la République d'Irak sur l'encouragement et la protection réciproques des investissements*, signed 31 October 2010, entered into force 24 August 2016.
3. *Accord entre les Gouvernements du Royaume de Belgique et du Grand duché de Luxembourg et le Governement de l'Union des républiques socialistes soviétiques, concernant l'encouragement et la protection réciproque des investissements*, signed 9 February 1989, entered into force 18 August 1991.
4. *Accord entre le Gouvernement du Royaume du Maroc et le Gouvernement de la Republique du Mali concernant l'encouragement et la protection reciproques des investissements*, signed 21 February 2014, entered into force 2 March 2016.
5. *Accord relatif à la promotion et la protection reciproques des investissements entre le Gouvernement de la Republique du Mali et le Gouvernement des Emirats Arabes Unis*, signed 6 March 2018, not yet into force.
6. *Acuerdo de cooperación y de facilitación de las inversiones entre la República Federativa del Brasil y los Estados Unidos Mexicanos*, signed 26 May 2015, entered into force 7 October 2018.
7. *Acuerdo de cooperación y de facilitación de inversiones entre la República Federativa del Brasil y la República del Ecuador*, signed 26 September 2018, not yet into force.
8. Agreement between Canada and Mongolia for the Promotion and Protection of Investments, signed 8 September 2016, entered into force 24 February 2017.
9. Agreement between the Belgo-Luxemburg Economic Union and the Government of the Republic of Liberia for the Reciprocal Promotion and Protection of Investments, signed 5 June 1985, not yet into force.
10. Agreement between the Federal Republic of Germany and the Union of Soviet Socialist Republics concerning the Promotion and Reciprocal Protection of Investments, signed 13 June 1989, entered into force 5 August 1991.
11. Agreement between the Government of Canada and the Government of the Republic of Ecuador for the Promotion and Reciprocal Protection of Investments, signed 29 April 1996, entered into force 6 June 1997, terminated 19 May 2018.
12. Agreement between the Government of Canada and the Government of the Republic of Moldova for the Promotion and Protection of Investments, signed 12 June 2018, entered into force 23 August 2019.

13. Agreement between the Government of the French Republic and the Government of the Argentine Republic for the Encouragement and Reciprocal Protection of Investments, signed 3 July 1991, entered into force 3 March 1993.

14. Agreement between the Government of the Hellenic Republic and the Government of the Republic of Albania for the Encouragement and Reciprocal Protection of Investment, signed 1 August 1991, entered into force 4 January 1995.

15. Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the United Arab Emirates for the Promotion and Reciprocal Protection of Investments, signed 16 June 2019, entered into force 6 March 2020.

16. Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the United Mexican States for the Promotion and Reciprocal Protection of Investments, signed 23 January 2020, entered into force 16 June 2021.

17. Agreement between the Government of Hungary and the Government of the Kyrgyz Republic for the Promotion and Reciprocal Protection of Investments, signed 29 September 2020, not yet into force.

18. Agreement between the Government of the Italian Republic and the Government of the Dominican Republic on the Promotion and Protection of Investments, signed 12 June 2006, entered into force 25 November 2009.

19. Agreement between the Government of Japan and the Government of the Republic of Côte D'Ivoire for the Reciprocal Promotion and Protection of Investment, signed 13 January 2020, not yet into force.

20. Agreement between the Government of the Republic of Belarus and the Government of Georgia on the Promotion and Reciprocal Protection of Investments, signed 1 March 2017, entered into force 1 December 2017.

21. Agreement between the Government of the Republic of San Marino and the Government of the Republic of Azerbaijan on the Promotion and Reciprocal Protection of Investments, signed 25 September 2015, entered into force 25 February 2016.

22. Agreement between the Government of the Republic of Singapore and the Government of the Republic of the Union of Myanmar on the Promotion and Protection of Investments, signed 24 September 2019, not yet into force.

23. Agreement between the Government of the Republic of Turkey and the Government of the Republic of Azerbaijan on the Reciprocal Protection and Promotion of Investments, signed 25 October 2011, entered into force 2 May 2013.

24. Agreement between the Government of the Russian Federation and the Government of the Kingdom of Cambodia on the Promotion and Reciprocal Protection of Investments, signed 3 March 2015, entered into force 7 March 2016.

25. Agreement between the Government of the Russian Federation and the Government of the Islamic Republic of Iran on Promotion and Reciprocal Protection of Investments, signed 23 December 2015, entered into force 6 April 2017.

26. Agreement between the Government of the State of Israel and The Government of the United Arab Emirates on Promotion and Protection of Investments, signed 20 October 2020, not yet into force.

27. Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Republic of Cameroon for the Promotion and Protection of Investments, signed 4 June 1982, entered into force 7 June 1985.

28. Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Promotion and Protection of Investments, signed 6 April 1989, entered into force 3 July 1991.

29. Agreement between the Government of the United Mexican States and the Government of the People's Republic of China on the Promotion and Reciprocal Protection of Investments, signed 11 July 2008, entered into force 6 June 2009.

30. Agreement between Japan and Georgia for the Liberalisation, Promotion and Protection of Investment, signed 29 January 2021, not yet into force.

31. Agreement between the Republic of Turkey and the Kyrgyz Republic concerning the Reciprocal Promotion and Protection of Investments, signed 9 April 2018, entered into force 18 March 2020.

32. Agreement between the Swiss Confederation and Georgia on the Promotion and Reciprocal Protection of Investments, signed 3 June 2014, entered into force 17 April 2015.

33. Agreement between the Swiss Federal Council and the Government of the Republic of Tunisia on Reciprocal Promotion and Protection of Investments, signed 16 October 2012, entered into force 8 July 2014.

34. Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, signed 29 April 1991, entered into force 1 October 1992, terminated 31 March 2021.

35. Bilateral Agreement for the Promotion and Protection of Investments between the Government of the United Kingdom of Great Britain and Northern Ireland and Republic of Colombia, signed 17 March 2010, entered into force 10 October 2014.

36. Convention between the Belgo-Luxembourg Economic Union and the United Republic of Cameroon concerning the Reciprocal Promotion and Protection of Investments, signed 27 March 1980, entered into force 1 November 1981.
37. Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Republic of India, signed 25 January 2020, not in force.
38. Investment Protection Agreement between the European Union and its Member States, of the one part, and the Republic of Singapore, of the other part, signed 15 October 2018, not yet into force.
39. Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam of the other part, signed 30 June 2019, not yet into force.
40. Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, signed 3 December 2016, not in force.
41. *Tratado entre la Republica Federal de Alemania y la Republica Argentina sobre Promoción y Protección Reciproca de Inversiones*, signed 9 April1991, entered into force 8 November 1993.
42. Treaty between the United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment, signed 14 November 1991, entered into force 20 October 1994.
43. Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, signed 27 August 1993, entered into force 11 May 1997.

Free Trade Agreements and Multilateral Investment Treaties

1. ASEAN Framework Agreement on Services, signed 15 December 1995, entered into force 12 August 1998.
2. CARICOM-Dominican Republic Free Trade Agreement, signed 22 August 1998, entered into force 5 February 2002.
3. Comprehensive and Progressive Agreement for Trans-Pacific Partnership, signed 8 March 2018, 30 December 2018.
4. Energy Charter Treaty, signed 17 December 1994, entered into force 16 April 1998.
5. Free Trade Agreement between Central America, the Dominican Republic and the United States of America (CAFTA), signed 5 August 2004, entered into force 1 January 2009.

6. Free Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Mauritius, signed 17 October 2019, not yet into force.
7. Free Trade Agreement between the Republic of Korea and the Republics of Central America, signed 21 February 2018, entered into force 1 November 2019.
8. Comprehensive Economic and Trade Agreement between the EU and Canada, signed 30 October 2016, not yet into force.
9. North American Free Trade Agreement, signed 17 December 1992, entered into force 1 January 1994, terminated 1 July 2020.

Model Bilateral Investment Treaties

1. Agreement between the Belgium-Luxembourg Economic Union, on the one hand, and the [Country], on the other hand, on the Reciprocal Promotion and Protection of Investments, 2019 BLEU Model BIT.
2. Agreement between Canada and [Country] for the Promotion and Protection of Investments, 2004 Canada Model BIT, available at investmentpolicy.unctad.org.
3. Agreement between Canada and [Country] for the Promotion and Protection of Investments, 2021 Canada Model BIT, available at investmentpolicy.unctad.org.
4. Agreement between the Government of the Italian Republic and the Government of [Country] for the Promotion and Protection of Investments, 2020 Italy Model Bilateral Investment Treaty, available at edit.wti.org.
5. Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of [Country] for the Promotion and Protection of Investments, 2008 UK Model BIT, available at investmentpolicy.unctad.org.
6. Agreement on Reciprocal Promotion and Protection of Investments between [Country] and the Kingdom of the Netherlands, 2019 the Netherlands Model Bilateral Investment Treaty, available at investmentpolicy.unctad.org.
7. Cooperation and Facilitation Investment Agreement between the Federative Republic of Brazil and the Federative Republic of Brazil and [Country], 2015 Brazil Model BIT.
8. Treaty between the Government of the United States of America and the Government of [Country] concerning the Encouragement and Reciprocal Protection of Investment, 2012 US Model Bilateral Investment Treaty, available at investmentpolicy.unctad.org.

Other Treaties

1. African Charter on Human and Peoples' Rights, signed 27 June 1981, entered into force 21 October 1986.
2. Agreement Supplementing the Treaty of Friendship, Commerce and Navigation between the United States of America and the Italian Republic, signed 26 September 1951, entered into force 2 March 1961.
3. American Convention on Human Rights, signed 22 November 1969, entered into force 18 July 1978.
4. Charter of the United Nations and Statute of the International Court of Justice, signed 26 June 1945, entered into force 24 October 1945.
5. Convention for the Protection of Human Rights and Fundamental Freedoms ('European Convention on Human Rights'), signed 4 November 1950, entered into force 3 September 1953.
6. Convention on the Settlement of Investment Disputes between States and Nationals of other States ('ICSID Convention'), signed 18 March 1965, entered into force 16 October 1966.
7. Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, signed 10 June 1998, entered into force 25 January 2004.
8. Treaty of Friendship, Commerce and Navigation between the United States of America and the Italian Republic, signed 2 February 1948, entered into force 26 July 1949.
9. Vienna Convention on the Law of Treaties, signed 23 May 1969, entered into force 27 January 1980.