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DIRITTO INTERNAZIONALE DELL'ECONOMIA

Collana diretta da

G. ADINOLFI - S.M. CARBONE - F. MUNARI - G. SACERDOTI - M. VELLANO - G. VENTURINI

Gustavo Minervini

SHAREHOLDER CLAIMS IN INTERNATIONAL LAW

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Centro interuniversitario
sul diritto delle organizzazioni internazionali economiche

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32

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Gustavo Minervini

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A nonna Giovanna,
a mamma e papà,
a Veronica
per il loro amore e sostegno

Table of Contents

pag.

ACKNOWLEDGMENTS XI

LIST OF ABBREVIATIONS XIII

INTRODUCTION

1. Shareholder Claims in International Law 1
2. The Deep Roots of the Problem: The Legal Position of the Shareholders and the Protection of Their Capital 4
3. The *Barcelona Traction* Case and the Transposition of Domestic Rules to the International Legal System 10
4. The Emergence of Treaty Regimes Affording Protection to Shareholders: International Human Rights and Investment Law 16
5. The Purpose and Scope of this Book 21

Chapter One

SETTING THE SCENE:
SHAREHOLDER CLAIMS IN DOMESTIC LAW

1. The Need to Look at Municipal Law: An Introduction 27
2. First Things First: Corporations in Municipal Legal Orders 29
3. The Protection of Shareholders *vis-à-vis* Measures Affecting Their Own Rights 32
4. The Protection of Shareholders *vis-à-vis* Measures Infringing Upon the Corporation 37
   4.1. The 'No Reflective Loss' Principle: A Rather Coherent Approach in Municipal Law 38
      4.1.1. A Survey of Civil Law Countries 38
      4.1.2. A Survey of Common Law Countries 44
      4.1.3. Making Order of the Arguments: Why Are Reflective Loss Claims Barred? A Critical Appraisal 49

pag.

4.1.4. Confirming the Policy Approach to Reflective Loss Claims: Some Exceptions in Municipal Law 55
4.2. Derivative Actions in Municipal Law: A Corporate-Oriented Solution 59
4.2.1. A Survey of Civil Law Countries 61
4.2.2. A Survey of Common Law Countries 63
4.2.3. Assessment: The Inexistence of a General Model and the Limited Scope of Derivative Actions 66
5. Brief Comparative Remarks on the Protection of Shareholders in Municipal Legal Systems 66

Chapter Two

SHAREHOLDER CLAIMS UNDER GENERAL INTERNATIONAL LAW: THE RELEVANCE OF DOMESTIC LAW

1. Introduction 69
2. The Early Case Law on Shareholder Claims in the International Legal Order 74
3. The *Barcelona Traction* Case: Establishing the Rule under General International Law 85
3.1. … and its Exceptions 87
3.2. The Transposition of Domestic Rules to the International Legal System 90
3.3. The Distinction between Direct Rights and Interests of the Shareholders: A Reasoned Approach? 98
4. The *Elettronica Sicula S.p.A.* Case: Anything More Than a Treaty Issue? 103
4.1. Against the Narrative which Excludes the Relevance of the *ELSI* Judgment for the Determination of General International Law 106
4.2. Some Insights on What States Can and Cannot Do *vis-à-vis* Shareholder Protection 108
5. The 2006 ILC Articles on Diplomatic Protection: Between Codification and Progressive Development of International Law 109
6. The *Diallo* Case: Confirming the *Barcelona Traction* Rule 115
6.1. The Treatment of Investment Arbitration Case Law before the International Court of Justice 117
6.2. A Critical Appraisal of the Rule Restatement by the International Court of Justice in Light of the Articles on Diplomatic Protection 119
7. Shareholder Claims under General International Law: Some Conclusive Remarks 121

pag.

Chapter Three

SHAREHOLDER CLAIMS IN INTERNATIONAL HUMAN RIGHTS LAW: DOMESTIC LAW IS STILL THERE

1. Introduction 125
2. The Protection of Shareholders under the European Convention on Human Rights 126
   2.1. The Relevant Framework: Article 34 of the European Convention on Human Rights and Article 1 of Protocol No. 1 126
   2.2. The Protection of Shareholders against Measures Affecting Their Direct Rights 130
   2.3. The Protection of Shareholders against Measures Infringing Upon Their Corporations 132
      2.3.1. The *Agrotexim* Case: The Making of the Rule concerning Reflective Loss 133
      2.3.2. Piercing the Corporate Veil before the Strasbourg Court: Carving out the Exceptions 135
      2.3.3. The Rule and its Exceptions: A Clash of Rationales 140
3. The Protection of Shareholders under the American Convention on Human Rights 147
   3.1. The Relevant Framework: Articles 1 and 21 of the American Convention on Human Rights 147
   3.2. The Protection of Shareholders against Measures Affecting Their Direct Rights 149
   3.3. The Protection of Shareholders against Measures Infringing Upon Their Corporations 151
      3.3.1. A Critical Appraisal of the Case Law of Inter-American Monitoring Bodies: Establishing the General Rule 151
      3.3.2. … and its Exceptions: A Rather Cherry-Picking Approach? 154
      3.3.3. *Granier v. Venezuela*: Testing the Rule and its Exceptions 158
      3.3.4. The Lack of Any Consistent Test to Allow Identification Claims: Some Remarks on the Inter-American System 161
4. The Protection of Shareholders under the International Covenant on Civil and Political Rights 163
   4.1. A Complex Legal Framework: Juridical Persons as non-Right Holders and the Lack of Any Entitlement to the Protection of Private Property 163
   4.2. The Protection of Shareholders in Matters of Other Rights: Some Possible Insights as to the Relationship with Their Corporations 165
   4.3. The Admissibility of Identification Claims in the Practice of the Human Rights Committee 168
5. The Protection of Shareholders in International Human Rights Law: Conclusive Remarks 171

pag.

Chapter Four

SHAREHOLDER CLAIMS IN INTERNATIONAL INVESTMENT LAW: THE LOSS OF RELEVANCE OF DOMESTIC LAW

1. Introduction 175
2. The Loose Structure of International Investment Law: Brief Remarks 177
3. The Legal Standing of Shareholders in International Investment Law 180
 3.1. Shares as Protected Investments under International Investment Agreements 180
 3.2. Indirect Investments under International Investment Agreements 187
 3.3. Shareholders *qua* Protected Investors under International Investment Agreements 198
4. Shareholder Claims for Reflective Loss as the General Rule in International Investment Arbitration 202
 4.1. International Investment Agreements on Reflective Loss Claims 203
 4.2. The Case Law of Investment Tribunals on Reflective Loss Claims 206
 4.3. Shareholder Claims for Reflective Loss in Investment Jurisprudence: A Critical Appraisal 213
5. The Current Ungovernability of Shareholder Claims for Reflective Loss in International Investment Arbitration 216
 5.1. The *CME/Lauder*, *CMS/Total* and *Blusun/Eskosol* Sagas: Parallel Proceedings and Conflicting Outcomes 217
 5.2. *Kappes and Kappes v. Guatemala*: Derivative or Reflective Loss Claims? The Choice Is Up to the Investors 219
 5.3. Indirect Investments and the Exponential Multiplication of Claims 221
6. The International Law Tools to Address the Conundrum of Shareholder Claims for Reflective Loss: An Attempt to Leave the System Unchanged 222
7. Treaty-Drafting Solutions to Reshape Shareholder Claims in Investment Arbitration: A Possible Way Forward 227
8. Rethinking the Protection of Shareholders in International Investment Law: Conclusive Remarks 231

GENERAL CONCLUSIONS 233

BIBLIOGRAPHY 239

TABLE OF CASES 261

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In the Summer of 2021, I deepened my knowledge of the subject matter of this book carrying out research at the Peace Palace Library, The Hague.

During the Winter of 2023-2024, I had the chance to focus on this study as Visiting Research Fellow at the World Trade Institute, Bern. I am very grateful for such a great opportunity.

List of Abbreviations

ACHR	American Convention on Human Rights
ADP	Articles on Diplomatic Protection
BIT/s	Bilateral Investment Treaty/ies
ECHR	European Convention on Human Rights
ECommHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
ECT	Energy Charter Treaty
EU	European Union
FTA/s	Free Trade Agreement/s
HRC	Human Rights Committee
IACHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
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
IDI	Institut de Droit International
IIA/s	International Investment Agreement/s
ILA	International Law Association
ILC	International Law Commission
ISDS	Investor-State Dispute Settlement
NAFTA	North American Free Trade Agreement
OECD	Organisation for Economic Cooperation and Development
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
VCLT	Vienna Convention on the Law of Treaties 1969

Introduction

SUMMARY: 1. Shareholder Claims in International Law. – 2. The Deep Roots of the Problem: The Legal Position of the Shareholders and the Protection of Their Capital. – 3. The *Barcelona Traction* Case and the Transposition of Domestic Rules to the International Legal System. – 4. The Emergence of Treaty Regimes Affording Protection to Shareholders: International Human Rights and Investment Law. – 5. The Purpose and Scope of this Book.

1. Shareholder Claims in International Law

Consider the following scenario: in the wake of an unexpected change of government, a State proceeds to revoke – without any respect of the due process of law – all the exploration and exploitation licenses of the largest national, yet foreign-controlled, oil corporation, leaving the entity as an empty shell with scarce, if any, value or profitable business to be carried out. Shareholders, that is to say, any natural or legal person owning a percentage of the capital of the entity,[1] are thus left empty-handed, despite retaining the ownership of their shares.

This is only one of the possible governmental maneuvers that might affect an enterprise and its *associés*. In the same vein, a State – relying upon its own domestic law,[2] according to which certain kinds of business must be carried out by

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[1] In this book, the terms 'shareholder(s)' and the French '*associé(s)*' are used interchangeably to identify the owner(s) of (one of the equal parts of the) share capital. To avoid confusion, despite being often used as synonyms, the terms 'stockholder(s)' and the French '*actionnaire(s)*' are not used, as they appear to refer to a more specific category of shareholders/*associés*.

[2] In this book, the terms 'domestic law', 'national law' and 'municipal law' are used as synonyms to refer to "all provisions of the internal legal order, whether written or unwritten and whether they take the form of constitutional or legislative rules, administrative decrees or judicial decisions" (ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries', in *Yearbook of the International Law Commission*, 2001, pp. 31-143, at 38, para. 9). For a similar solution, see A. PELLET, D. MÜLLER, 'Article 38', in A. ZIMMERMANN, C.J. TAMS, K. OELLERS-FRAHM, C. TOMUSCHAT (eds), *The Statute of the International Court of Justice. A Commentary*, 3rd edition, Oxford/New York, 2019, pp. 819-962, at 866, footnote 313; J. CRAWFORD, *Brownlie's Principles of Public International Law*, 9th edition, Oxford, 2019, p. 44, footnote 1; A. AUST, *Modern Treaty Law and Practice*, 3rd edition, Cambridge, 2013, p. 159.

nationals – could fraudulently deprive a shareholder of his nationality to seize full control of the commercial business. On the other hand, a government might attract huge private investments by promising and enacting a scheme of tax incentives, just to revoke them a few years later, thus winding up the profitability of the activity undertaken in the meanwhile by the corporation.

In all these hypotheses, one cannot but wonder about the possible remedies provided by the international legal order to ensure redress of the damage suffered. While the legal standing of corporations to seek vindication of the rights conferred under international law does not pose major problems,[3] the most pressing issue concerns the extent to which shareholders are granted protection independently from the one enjoyed by the entity in which they own shares.[4]

In a nutshell, it is a matter of assessing whether it is up to the corporation, and solely to the latter, to bring a claim before international courts and tribunals to vindicate any unlawful interference with its own business. In the abovementioned scenarios, "common sense seems to dictate that […] a shareholder ought

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[3] In saying so, it is meant neither that corporations enjoy formal international personality, thus being considered as subjects of the international legal order, nor that they necessarily possess any right under international law as such. Among the general works concerning the protection of corporations under international law, see: W. BECKETT, 'Diplomatic Claims in Respect of Injuries to Companies', in *Transactions of the Grotius Society*, 1931, pp. 175-194; G. BATTAGLINI, *La protezione diplomatica delle società*, Padova, 1957; P. DE VISSCHER, 'La protection diplomatique des personnes morales', in *Collected Courses of The Hague Academy of International Law*, vol. 102, 1961, pp. 395-513; J.-P. DE HOCHEPIED, *La protection diplomatique des sociétés et des actionnaires*, Paris, 1965; L. CAFLISCH, *La Protection de Sociétés Commerciales et des Intérêts Indirects en Droit International Public*, The Hague, 1969; M. DIEZ DE VELASCO, 'La protection diplomatique des sociétés et des actionnaires', in *Collected Courses of The Hague Academy of International Law*, vol. 141, 1974, pp. 87-186; F. FRANCIONI, *Imprese multinazionali, protezione diplomatica e responsabilità internazionale*, Milano, 1979; A. GIANELLI, 'La protezione diplomatica di società dopo la sentenza concernente la Barcelona Traction', in *Rivista di diritto internazionale*, 1986, pp. 762-798; C. STAKER, 'Diplomatic Protection of Private Business Companies: Determining Corporate Personality for International Law Purposes', in *British Yearbook of International Law*, 1990, pp. 155-174; Y. DINSTEIN, 'Diplomatic Protection of Companies under International Law', in K. WELLENS (ed.), *International Law: Theory and Practice. Essays in Honour of Eric Suy*, The Hague, 1998, pp. 505-517; F. PERRINI, *La protezione diplomatica delle società*, Napoli, 2013; A. TOURNIER, *La protection diplomatique des personnes morales*, Paris, 2013; P.T. MUCHLINSKI, 'Corporations in International Law', in *Max Planck Encyclopedia of Public International Law*, 2014.

[4] G. SACERDOTI, 'Bilateral Treaties and Multilateral Instruments on Investment Protection', in *Collected Courses of The Hague Academy of International Law*, vol. 269, 1997, pp. 251-460, at 311: "The question is open in general international law as to what kind of deprivation of rights or discrimination against a foreign-owned company affects the shareholders in such a way as to prejudice their rights (as opposed to their economic interests)"; P. OKOWA, 'Issues of Admissibility and the Law on International Responsibility', in M.D. EVANS (ed.), *International Law*, 5th edition, Oxford, 2018, pp. 450-483, at 468: "a number of problems remain, in particular with regard to the precise circumstances when shareholders may be entitled to protection, the range of interests capable of protection, and the modalities of reconciling competing claims"; B. CONFORTI, M. IOVANE, *Diritto internazionale*, 12th edition, Napoli, 2023, p. 272: "la protezione dei singoli soci […] non è scomparsa, anche se l'identificazione di tali fattispecie costituisce oggetto di dibattito".

to be allowed to bring a claim for damages"[5] against the allegedly responsible government. After all, why should the shareholder stand idly by in the face of such conducts against the business in which they have invested money? In order to answer such a question, the legal relationship between the corporation and its shareholders on the international legal plane shall be ascertained. This represents a pivotal, yet far from settled, issue.[6]

As early as 1931, William Beckett, in his speech before the Grotius Society, pointed out that the issue had never been solved and, thus, was worthy of scientific study.[7] Similarly, in his course given at The Hague Academy of International Law, Paul de Visscher wondered about the approach of international law to the relationship between a corporation and its shareholders whenever they are, directly or indirectly, damaged by the conduct of a State, be it the State of nationality or a third one.[8] In the same vein, in his work on the protection of corporations, Lucius Caflisch questioned the rules of international law concerning the legal standing of the national State of the shareholders facing unlawful measures taken by a third State.[9]

Understanding the admissibility of shareholder claims in international law is a matter of increasing importance if one considers the emergence of multinational corporations as the leading vehicle for international economic activities.[10]

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[5] H. DE WULF, 'Direct shareholder suits for damages based on reflective losses', in S. GRUNDMANN ET AL. (eds), *Festschrift fur Klaus J. Hopt zum 70. Geburtstag am 24. August 2010: Unternehmen, Markt und Verantwortung*, Berlin, 2010, pp. 1537-1564, at 1537.

[6] Among the general works specifically devoted to the protection of shareholders under international law, in addition to those already listed, *supra*, in footnote 3, see: J.M. JONES, 'Claims on Behalf of Nationals Who are Shareholders in Foreign Companies', in *British Yearbook of International Law*, 1949, pp. 225-258; A-C. KISS, 'La protection diplomatique des actionnaires dans la jurisprudence et la pratique internationale', in S. BASTID ET AL. (eds), *La personnalité morale et ses limites: études de droit comparé et de droit international public,* Paris, 1960, pp. 179-210; A. SANTA MARIA, 'La tutela dei soci nel diritto internazionale', in *Rivista delle società*, 1961, pp. 1088-1145; E. JIMENEZ DE ARECHAGA, 'Diplomatic Protection of Shareholders in International Law', in *Philippine International Law Journal*, 1965, pp. 71-98; D. MÜLLER, *La protection de l'actionnaire en droit international*, Paris, 2015; G. BOTTINI, *Admissibility of Shareholder Claims under Investment Treaties*, Cambridge, 2020; L. VANHONNAEKER, *Shareholders' Claims for Reflective Loss in International Investment Law*, Cambridge, 2020.

[7] W. BECKETT, 'Diplomatic Claims in Respect of Injuries to Companies', cit., p. 175.

[8] P. DE VISSCHER, 'La protection diplomatique des personnes morales', cit.

[9] L. CAFLISCH, *La Protection de Sociétés Commerciales et des Intérêts Indirects en Droit International Public*, cit.

[10] This has been duly noted by several authors in the last decades: C. STAKER, 'Diplomatic Protection of Private Business Companies: Determining Corporate Personality for International Law Purposes', cit.; F. SEATZU, 'The World Bank Guidelines on the Treatment of Foreign Direct Investment. 20 Years On. Reflecting on the Past, Considering the Present and Developing a New Foreign Investment Strategy of the World Bank Group for the Future', in T. TREVES, F. SEATZU, S. TREVISANUT (eds), *Foreign Investment, International Law and Common Concerns*, Oxon/New

Before venturing any further in the analysis, an attempt has to be made so as to properly define the subject of this study. At this initial stage, suffice it to mention that all domestic legal orders enshrine rules to establish business organizations, whereby persons join together in order to carry out for-profit commercial activities. Needless to say, each national system has its own kinds of organizations. However, as a closer inspection will demonstrate, some common models exist. The one this book concerns is that of the corporation which, as an initial approximation, can be defined as a non-human entity possessing a legal personality to autonomously hold rights and duties, thus maintaining separateness from the persons of its shareholders.[11]

Such a choice is anything but casual. On the one hand, it is the very practice of international trade and investments that has experienced the establishment of corporations – notably, joint-stock and limited liability companies – as the main actors of economic relationships, be they at the national or transnational level. After all, this success is strictly related to the abovementioned characteristics, which make corporations the most appropriate legal vehicle to carry out complex economic operations. On the other hand, these very same characteristics bring in most of the issues to be addressed with regard to the protection of shareholders. In other words, it is precisely when addressing this successful, yet complex, model of business organization (*i.e.*, the corporation) that legal uncertainties and problems come out.

2. The Deep Roots of the Problem: The Legal Position of the Shareholders and the Protection of Their Capital

The uncertainties surrounding the protection of shareholders under international law can only be understood if one considers their complex legal position, which might be said 'dual' or 'twofold': on the one hand, shareholders stand out as owners of an intangible economic asset, equity security;[12] on the other hand, they emerge as holders of an economic and financial interest into the assets of another entity, the corporation. The existence of such an interest is strictly intertwined with the notion of share. Indeed, to the extent that a share is a fraction

York, 2014, pp. 113-131, at 115; P.T. MUCHLINSKI, *Multinational Enterprises and the Law*, 3rd edition, Oxford, 2021, p. 3.

[11] See, *infra*, Chapter 1, Section 2.

[12] E. SCHANZE, 'Mediated property: money, corporate shares, and property analogues', in E. NORDTVEIT (ed.), *The Changing Role of Property Law Rights, Values and Concepts*, Cheltenham, 2023, pp. 103-114, at 110: "It is clear that the shareholder does not receive an individually defined property slice in the corporate assets; nor does she receive a contingent claim for repayment. But she receives a tradable item, mainly a set of apportioned rights and claims for dividends".

of the capital of a corporation,[13] whenever the latter suffers damage, this will also affect its shareholders, causing a drop in value of the shareholding. Such a diminution is called 'reflective loss' since it generally mirrors, in percentage, the loss suffered by the legal entity. Accordingly, any matter affecting the corporation also hits the value of the shares.

There is, therefore, an interplay between the legal sphere of the corporation and that of its *associés*. After all, they cannot but be seen as the ultimate beneficiaries of the operations carried out by the enterprise, as well as those who will ultimately bear the consequences if the business fails. From this perspective, the corporation is the legal vehicle through which shareholders pursue their economic objectives. Be that as it may, the interrelationship between the shareholders and their corporation shall not be confused with an overlap of their legal positions.

As pointed out by Zachary Douglas, indeed: "[e]very legal system that recognises a limited liability company *as an independent legal entity* [(*i.e.*, a corporation)] 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, it is not the shareholder who is the victim of conversion or a theft; it is the company".[14]

The precondition for all this being true is one: corporations are entrusted with a separate legal personality under municipal law.[15] They are indeed recog-

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[13] This is, indeed, one of the definitions endorsed by national legislations, domestic courts and scholarship: A. DE GREGORIO, *Delle società e delle associazioni commerciali*, Torino, 1938, p. 492; House of Lords, *Bradbury v. English Sewing Cotton Co*, [1923] AC 744, at 767: "A share is, therefore, a fractional part of the capital. [...] It forms [...] a separate right of property. The capital is the property of the corporation. The share, although it is a fraction of the capital, is the property of the corporator. [...] But, nevertheless, the share is a property in a fractional part of the capital". In this sense, Cambridge Dictionary, 'Share', available at www.dictionary.cambridge.org: "one of the equal parts that the ownership of a company is divided into, and that can be bought by members of the public". As for other possible, often cumulative, definitions, see, *ex multis*, B. VISENTINI, 'Azioni di società', in *Enciclopedia del diritto*, vol. IV, 1959, pp. 967-1003, at 967; A. EL-MASRY, N. KAMAL, 'Shareholder Rights', in S.O. IDOWU, N. CAPALDI, L. ZU, A. DAS GUPTA (eds), *Encyclopedia of Corporate Social Responsibility*, Berlin, 2013, pp. 2127-2136.

[14] Z. DOUGLAS, *The International Law of Investment Claims*, Cambridge, 2009, para. 749 (*italics added*).

[15] V. VANDEKERCKHOVE, *Piercing the Corporate Veil*, Alphen aan den Rijn, 2007, p. 3: "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". See also V.A.J. KURKI, *A Theory of Legal Personhood*, Oxford, 2019, p. 1: "the orthodox definition of legal personhood [...] equates X's legal personhood with X's holding of legal rights and/or duties"; J.S. BEAUDRY, 'Legal Per-

nized as 'juridical persons' ('legal entities' or '*personnes morales*'), that is to say as autonomous right-holders and duty-bearers.[16] As a consequence, a distinction must be drawn between the rights and duties of the corporation and those pertaining to its shareholders.

With regard to the latter, it is worth recalling that individuals *qua* shareholders own an intangible economic asset. In this sense, they enjoy the typical rights deriving from ownership.[17] Furthermore, because of this entitlement, corporate law provides them with a bundle of rights which are strictly related to the enterprise itself.[18] They generally include the right to vote on matters of corporate control (such as the appointment or dismissal of directors or the approval and distribution of dividends), the right to take part to general meetings, the right to inspect books and records, the right to any declared dividend, as well as the right to take part in a final distribution of corporate assets in case of liquidation.[19]

In other words, domestic law affords shareholders with all the prerogatives to participate in the management of the corporation and to enjoy the proceeds, if any. Against this background, it is easy to ascertain what can be done in case of violation. Be the wrongdoer a private third party, a State or a person who is directly involved in the management of the enterprise, the *associés* will have the possibility to bring a lawsuit against the offender in order to protect his own rights and, eventually, recover the loss suffered if a violation is found.

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sonality', in J.M. SMITS, J. HUSA, C. VALCKE, M. NARCISO (eds), *Elgar Encyclopedia of Comparative Law*, Cheltanham/Northampton, 2023, pp. 483-490, at 483.

[16] R. DAVID, 'Rapport général', in S. BASTID ET AL. (eds), *La personnalité morale et ses limites: études de droit comparé et de droit international public*, cit., pp. 3-25; M. BASILE, A. FALZEA, 'Persona giuridica (dir. priv.)', in *Enciclopedia del diritto*, vol. XXXIII, 1983, pp. 234-276.

[17] In this sense, High Court of Australia, *Peters' American Delicacy Co Ltd v. Heath*, (1939) 61 CLR 457, at 503-504: "Primarily a share in a company is a piece of property conferring rights in relation to distributions of income and of capital"; Court of Civil Appeals of Texas, *Sandor Petroleum Corp. v. Williams*, 321 S.W.2d 614 (1959), at 617: "Generally speaking, corporate shares of stock are property which may be freely sold and delivered". See also E. SCHANZE, 'Mediated property: money, corporate shares, and property analogues', cit., p. 110: "The deeper reason for treating a share as property, in my view, is threefold"; J.-P. ROBÉ, *Property, Power and Politics. Why We Need to Rethink the World Power System*, Bristol, 2020, p. 233: "The corporation fully owns its assets; and the shareholders fully own their shares. As a matter of principle, the shareholders can do as they please with their shares: give them, sell them, loan them and so on. They *own* them: they are the decision-makers as a matter of principle towards them".

[18] The terms 'company law' and 'corporate law' are often used indistinguishably: in this sense, see A. CAHN, D.C. DONALD, *Comparative Company Law. Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA*, 2nd edition, Cambridge, 2018, p. 9; C. GERNER-BEUERLE, M.A. SCHILLING, *Comparative Company Law*, Oxford, 2019, pp. 3-7. To avoid confusion, this study, however, only uses corporate law to refer to the regulation of corporations (*infra*, Chapter 1, footnote 3) in domestic legal orders.

[19] A. CHARMAN, J. DU TOIT, *Shareholder Actions*, 2nd edition, London, 2017, p. 157 ff.; V. JOFFE ET AL., *Minority Shareholders: Law, Practice, and Procedure*, 6th edition, Oxford, 2018, p. 123 ss.; R. HOLLINGTON, *Hollington on Shareholders' Rights*, 9th edition, London, 2020, *passim*.

Far more complex is, instead, the regime concerning the rights of the corporation and, notably, the interplay between such rights and the position of the shareholders. Bestowed with legal personality, corporations 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 injuries from them. Any of the mentioned activities will, positively or negatively, affect the value of the corporation and, as a consequence, that of the shares. In these relationships, though, the legal entity will be the right holder or duty bearer.[20] But there is more.

The establishment of a corporation does not only mean giving rise to an autonomous holder of rights and duties; it also means, for the shareholders, to create a barrier between their patrimony and the assets of the entity.[21] Such legal construction is also known as the 'corporate veil', insulating the shareholders from corporate debts. In other words, shareholders will be 'hidden' behind the corporate veil, the shield of the corporation, which allows them not to be directly involved in the daily management of the business, while also making it easier to diversify their investments.[22]

Needless to say, patrimonial autonomy is one of the most important features of corporations in domestic legal orders. Indeed, it assures that shareholders are not liable beyond the value of their shares. In other words, whenever a person decides to invest his money in a corporation by acquiring shares, he will know at the outset the economic risks he may get into. Indeed, to the extent that a corporation enjoys patrimonial autonomy, if it gets sued, defaults on a loan, or declares bankruptcy, creditors are not entitled to bring a claim against the shareholders and their personal assets.[23]

[20] This is true as a general rule, without prejudice to a different contractual agreement between the shareholders themselves, or between the shareholders and the corporation. In this respect, see A. CHARMAN, J. DU TOIT, *Shareholder Actions*, cit.; R. HOLLINGTON, *Hollington on Shareholders' Rights*, cit. See, in this sense, Court of Appeal, *Broadcasting Investment Group Ltd v. Smith*, [2021] EWCA Civ 912.

[21] R. KRAAKMAN ET AL., *The Anatomy of Corporate Law. A Comparative and Functional Approach*, 3rd edition, Oxford, 2017, p. 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".

[22] *Ibid.*, p. 9: "Limited liability shields the firm's owners – the shareholders – from creditors' claims. Importantly, this facilitates diversification. […] Limited liability […] 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".

[23] P.L. DAVIES, S. WORTHINGTON, *Gower and Davies' Principles of Modern Company Law*, 9th edition, London, 2012, p. 40: "When, therefore, obligations are incurred on behalf of a limited company [*i.e.*, a corporation], the company is liable and not the members […]. [I]n the typical case of a company limited by shares with fully paid shares in issue, no further liability will arise for

The autonomy of a juridical person *vis-à-vis* its shareholders has also traditionally been deemed to produce another relevant effect, strictly connected to the protection of corporate rights. Under domestic law, whenever a corporation is injured by an unlawful act, it is up – and, as a general rule, solely – to the latter to bring a lawsuit in order to obtain reparation. In short, shareholders cannot claim for the rights of the corporation.

Nonetheless, the fact that it is the corporation which suffers damage does not exclude, as mentioned above, that the interests of shareholders will not be similarly affected. Quite the opposite, any wrong against the enterprise will arguably cause a decrease in the value of the shares, a reflective loss. In such a case, one might wonder how shareholders will then recover from the loss endured. In light of what has been said until now, the answer would seem quite straightforward: the corporation will sue the wrongdoer for compensation. If the action is successful, the shareholders will indirectly recover the loss suffered. As owners of a percentage of the capital, indeed, the recovery made by the enterprise will raise the value of their shareholding, thus restoring the situation as it was before the wrongful act occurred.[24] This can be easily considered the physiological course of action.

However, shareholders might well decide to sue the wrongdoer in order to recover the loss they indirectly endured as a result of the damage suffered by the corporation: that is to say, to claim the reflective loss. This scenario is rather problematic. While it is true that neither the ownership nor the participation rights of shareholders are affected, their 'dual' legal position comes back into play. After all, they are not only the owners of their shares, they also have an economic interest in the enterprise. As pointed out above, indeed, shareholders are the ultimate beneficiaries of the commercial activities and they bear the consequences if the business runs out.

The fact that the corporation is an autonomous right-holder and duty-bearer does not trump the existing interrelationship between its rights and the economic interests of shareholders. Quite the opposite, the capability of a corporation to hold rights and obligations does not *per se* prevent shareholders from

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the member in the absence of specific statutory provision to the contrary, which provisions are rare". However, domestic legal orders provide for a bunch of exceptions to the rule. See C. GERNER-BEUERLE, M.A. SCHILLING, *Comparative Company Law*, cit., p. 815: "In accordance with the general methods of comparative law, 'exceptions to limited liability' must be understood in a broad and functional sense. […] [I]t is every remedy resulting in the liability of shareholders and/or managers to contribute to the losses suffered by the company and/or its creditors that goes beyond what they agreed to invest when they became involved in the corporate enterprise". See also C.A. WITTING, 'The basis of shareholder liability for corporate wrongs', in H.S. BIRKMOSE, K. SERGAKIS, *Enforcing Shareholders' Duties*, Cheltenham, 2019, pp. 191-212.

[24] A. CHARMAN, J. DU TOIT, *Shareholder Actions*, cit., p. 186: "The economic interests of shareholders will be served by the company's replenishment of its assets on a successful recovery, by benefiting from one or more of an improved share price or value, the payment of dividends, or the declaration of enhanced dividends".

bringing claims against those acts that, by hitting the enterprise, cause a drop in value of their shares.[25] Indeed, it is reasonable to say that the share drop in value is a consequence of the conduct carried out by the offender: to put it differently, a causal link can be established between the wrongdoing against the corporation and the reflective loss.[26]

Leaving aside the technicalities, it is foreseeable that the claim for reflective loss brought by the shareholders will be dismissed. In all likelihood, the judge will find that the subject entitled to recover for the loss (the so-called 'proper plaintiff') is actually the corporation. Again, this does not mean that the economic interests of the shareholders have not been affected. However, domestic legal orders have established that, as a general rule, it is up to the corporation to recover such damage. In our view, as it will be demonstrated afterwards, such a choice is based on compelling legal policy reasons.

At the same time, one has to question what happens if the physiological course of action is not followed. From this point of view, it is necessary to delve into the issue of the remedies a shareholder might resort to if the corporation does not vindicate its rights. At first glance, this hypothesis might sound weird. One would probably be surprised to hear that a person who has suffered damage does not claim reparation. However, there could be different circumstances that hinder the corporation from doing so: a conflict of interest between the legal representative and the corporation itself, the involvement of controlling shareholders in the wrongful act, or even a policy-driven free choice of the directors not to pursue litigation.[27]

In such circumstances, the problematic nature of the legal personality conferred to juridical persons comes to the fore, once again, with all its force. Shareholders, indeed, have an economic interest in the business of the corporate entity. Accordingly, whenever corporations are hindered or refrain from vindicating their rights, national legal orders might provide the *associés* with instruments to recover the reflective loss incurred.

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[25] M.J. STERLING, 'The Theory and Policy of Shareholder Actions in Tort', in *Modern Law Review*, 1987, pp. 468-491, at 474.

[26] See, *ex multis*: M. CASSOTTANA, 'Sulla nozione di «danno diretto» e sui rapporti tra l'art. 2395 e l'art. 1223 c.c.', in *Giurisprudenza commerciale*, 1983, vol. II, pp. 530-542, at 537; H. DE WULF, 'Direct shareholder suits for damages based on reflective losses', cit., p. 1545; V. PINTO, *La tutela risarcitoria dell'azionista fra «danno diretto» e «danno riflesso»*, Pisa, 2012, pp. 58-60.

[27] A. REISBERG, *Derivative Actions and Corporate Governance*, Oxford, 2007, p. 18, who argues that the purpose of derivative suits is to "to ensure that the company is not improperly prevented from averting or remedying a wrong done by a self-interested board, or by majority shareholders acting improperly ('in fraud on the minority')"; V. JOFFE ET AL., *Minority Shareholders: Law, Practice, and Procedure*, cit., p. 37; A.K. KOH, S.S. TANG, 'Direct and derivative shareholder suits: towards a functional and practical taxonomy', in A. AFSHARIPOUR, M. GELTER (eds), *Comparative Corporate Governance*, Cheltenham/Northampton, 2021, pp. 431-453.

3. The *Barcelona Traction* Case and the Transposition of Domestic Rules to the International Legal System

If it is true that, under domestic law, a distinction is firmly drawn between the legal position of the corporation and that of its shareholders, one cannot but wonder what happens when they appear on the stage of the international legal order. The question is how international law looks at the relationship between corporations and their shareholders. Needless to say, the main issue revolves around the relevance of the legal personality.

In this respect, it must be ascertained whether the separateness of corporate rights from those of the shareholders, as a construct of municipal law, is upheld for the purposes of international law as well. If so, this might affect the standing of shareholders when they seek redress before international courts and tribunals for damage. In a nutshell, all these problems concern the extent to which domestic rules have been, or can be, transposed on the international legal plane.[28]

Put it differently, when facing institutions that are firmly rooted in domestic legal orders, does international law accept and incorporate them, thus making a *renvoi* to municipal law? If the answer is in the negative, one can wonder to what extent international law autonomously frames its own rules. Providing an answer to such a broad question falls out of the scope of the present research, which is limited to the claims of shareholders. After all, there is room to argue that there is no one-size-fits-all answer: depending on the specific circumstances of the case, there might be arguments in support of, or against, adherence to domestic law.

As far as the protection of corporations and their shareholders is concerned, those arguments pertain to the evolving structure of international law, the unique needs of conducting business internationally, as well as policy considerations. All in all, it comes to a choice between privileging the protection of the ultimate beneficiaries of corporate business (*i.e.*, shareholders) and maintaining the separate legal personality of the corporation, which might be warranted by legal policy concerns.[29]

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[28] A reference to the transposition of domestic rules into the international legal order, as far as the protection of corporations and their shareholders is concerned, can be found in C. DE VISSCHER, 'De la protection diplomatique des actionnaires d'une société conte l'État sous la législation duquel cette société s'est constituée', in *Revue de droit international et de législation comparée*, 1934, pp. 624-651, at 651, footnote 35; G. BATTAGLINI, *La protezione diplomatica delle società*, cit., p. 7; C. DE VISSCHER, 'La notion de référence (renvoi) au droit interne dans la protection diplomatique des actionnaires de sociétés anonymes', in *Revue belge de droit international*, 1971, pp. 1-6, at 2.

[29] This issue has been often characterized as a choice to be made between form and substance or, rather, between legal formalism and economic realism. See, in this sense, the Separate Opinion of Vice-President Wellington Koo in ICJ, *Barcelona Traction, Light and Power Company, Limited*

Having said that, any proper analysis concerning how international law approaches the legal personality conferred under municipal law upon corporations cannot but start from the seminal ruling rendered, on 5 February 1970, by the International Court of Justice (ICJ) in the *Barcelona Traction* case.[30]

The dispute, to be further discussed in Chapter 2, concerned certain measures undertaken by the Spanish Government against the Barcelona Traction, an enterprise incorporated in Canada which made and supplied, through different subsidiaries, electric power to Catalonia. Against this background, the Belgian Government commenced proceedings on behalf of its nationals, who were the controlling shareholders of the Barcelona Traction, claiming compensation for the drop in value of the shares (*i.e.*, the reflective loss) caused by the allegedly expropriatory measures taken by the respondent State against the corporation. Spain, on its part, argued that the claim was inadmissible because the applicant State lacked *locus standi* to intervene on behalf of its nationals.[31]

In order to analyse the objection raised by the Spanish Government, the ICJ moved from the need to "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

(Belgium v. Spain) (New Application: 1962) (hereinafter *Barcelona Traction*), Judgment, 24 July 1964, in *ICJ Reports 1964*, p. 6 ff., at 62-63: "International law, being primarily based upon the general principles of law and justice, is unfettered by technicalities and formalistic considerations which are often given importance in municipal law. […] It is the reality which counts more than the appearance. It is the equitable interest which matters rather than the legal interest. In other words *it is the substance which carried weight on the international plane rather than the form*" (*italics added*). See, also, D. MÜLLER, *La protection de l'actionnaire en droit international*, cit., p. 3: "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*" (*italics added*).

[30] ICJ, *Barcelona Traction*, Judgment, 5 February 1970, in *ICJ Reports 1970*, p. 3 ff. For a first appraisal of the decision and its impact on shareholder claims in international law, see, *ex multis*: I.A. LAIRD, 'A Community of Destiny: The Barcelona Traction Case and the Development of Shareholder Rights to Bring Investment Claims', in T. WEILER (ed.), *International Investment Law and Arbitration. Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, London, 2005, pp. 77-96; B. JURATOWITCH, 'Diplomatic Protection of Shareholders', in *British Yearbook of International Law*, 2011, pp. 281-323. For further analysis, see, *infra*, Chapter 2, Section 3.

[31] A. DEL VECCHIO, 'International Courts and Tribunals, Standing', in *Max Planck Encyclopaedia 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"; G. 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".

of Belgium been violated on account of its nationals' having suffered infringement of their rights as shareholders in a Company not of Belgian nationality?"[32]

Put it otherwise, the judges in The Hague had to identify a rule concerning the relationship between the legal personality of the corporation and that of its shareholders in the international legal order. Against this background, the ICJ concluded that "international law [had] to recognize the corporate entity as an institution created by States in a domain […] within their domestic jurisdiction".[33] Therefore, the separation between the rights of the corporation and those of its shareholders had also to be maintained on the international plane.

In this respect, the Court highlighted how the mere fact that a wrong done to a corporation (*i.e.*, the Barcelona Traction) also causes an economic prejudice to its shareholders (*i.e.*, the Belgian nationals) is insufficient to allow both to commence proceedings: indeed, "whenever a shareholder's interests are harmed by an act done to the company, 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*".[34]

In the context of the law of diplomatic protection,[35] this meant that Belgium was not entitled to start proceedings on behalf of its nationals as only their interests had been aggrieved, not their rights. In this sense, only the national State of the corporation, that is to say Canada, had standing to bring a claim for the damage endured by the Barcelona Traction.

On the other hand, in clarifying the scope of diplomatic protection *vis-à-vis* the shareholders, the Court confirmed what was already well-established in the international practice, case law and literature: "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 […] 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".[36] The same holds true, one should add, for the very ownership of the

[32] ICJ, *Barcelona Traction*, Judgment, 5 February 1970, cit., para. 35.

[33] *Ibid*., para. 38.

[34] *Ibid*., para. 44 (*italics added*).

[35] M. SHAW, *International Law*, 8th edition, Cambridge, 2017, p. 613: "Diplomatic protection includes, in a broad sense, consular action, negotiation, mediation, *judicial and arbitral proceedings*, reprisals, a retort, severance of diplomatic relations, and economic pressures" (*italics added*). On diplomatic protection see, *ex multis*, S. BARIATTI, 'Protezione diplomatica', in *Digesto delle discipline pubblicistiche*, vol. XII, Torino, 1997, pp. 144-150 and the references therein provided; C.F. AMERASINGHE, *Diplomatic Protection*, Oxford, 2008; J. DUGARD, 'Diplomatic Protection', in *Max Planck Encyclopedia of Public International Law*, 2009.

[36] L. CAFLISCH, 'The Protection of Corporate Investments Abroad in the Light of the Barcelona Traction Case', in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)/ Heidelberg Journal of International Law*, 1971, pp. 162-196, at 181. In this sense, see also: J.B.

shares, despite being worth mentioning that this protection is afforded to the individual *qua* owner, rather than as a shareholder.

The ICJ, thus, provided an apparently clear-cut answer to the main question: by recognizing the separate legal personality of the corporation, international law adheres to the distinction between the rights of the former and those of its shareholders. In doing so, as a general rule, 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 seek redress for an injury suffered by their corporation. As convincingly pointed out by Abby Cohen Smutny, the case concerning the *Barcelona Traction* is significant inasmuch as it indicated that "the same limitations that exist […] under municipal law governing the company and its shareholders will [also] apply on the international level".[37]

This did not mean, however, that the shareholders in a foreign corporation would be always precluded from recovering reflective losses. The judges in The Hague were indeed well aware that, under the domestic law of several States, some exceptions to the general rule were provided for.[38] Accordingly, the ICJ identified certain circumstances under which the national State of the shareholders would also be 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 this respect, the ICJ concluded that the recovery of reflective losses through diplomatic protection could be deemed admissible when: *i*) the injured corporation ceased to exist; or *ii*) the national State of the corporation does not have the capacity to act on behalf of the enterprise. However, the judges left unanswered the question as to whether the disregard of the legal personality could also be justified on the basis of equitable considerations and, notably, whenever the corporation possesses the nationality of the very alleged wrongdoing State.[39]

Much could be said with regard to the making of the rule and its exceptions by the ICJ. Suffice it to mention that the very rationale of the decision has been harshly debated and criticized right from the beginning. After all, the centrality of the the *Barcelona Traction* judgment cannot be overlooked. More than forty

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MOORE, *A Digest of International Law*, vol. VI, Washington, 1906, pp. 644-651; P. DE VISSCHER, 'La protection diplomatique des personnes morales', cit., pp. 463-464; J.-P. DE HOCHEPIED, *La protection diplomatique des sociétés et des actionnaires*, cit., p. 145.

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

[38] The idea of resorting to an analogy with municipal law so as to carve out possible exceptions was already advanced by J.M. JONES, 'Claims on Behalf of Nationals Who are Shareholders in Foreign Companies', cit., pp. 232-237.

[39] ICJ, *Barcelona Traction*, Judgment, 5 February 1970, cit.

years later, the arbitral tribunal in the case of *CMS v. Argentina*, in confronting with such a milestone, stressed that: "Barcelona Traction […] marks the beginning of a fundamental change of the applicable concepts under international law and State practice".[40] The same goes for the arbitral tribunal in *Suez v. Argentina*, which felt the need to state that: "*Barcelona Traction* is not controlling in the present case".[41]

That being said, a few preliminary considerations can be made to highlight some pivotal issues which will be analyzed in the course of this book.

First, as far as the transposition of domestic rules to the international legal system is concerned, the reasoning of the Court offered much food for thought. The very starting point is to be identified in the statement according to which "[i]n this field [*i.e.*, economic relations] international law is called upon to recognize institutions of municipal law that have an important and extensive role in the international field".[42] In doing so, the judges were aware of the tricky issue they were confronted with. Indeed, one could have read this statement as casting some doubts on the primacy of international law over national law,[43] thus overturning a cornerstone of the international legal order.

It is not by chance, in this regard, that the ICJ deemed it appropriate to stress how the recognition of fundamental institutions of municipal law "does [not] 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".[44]

In other words, there is no prevalence of domestic law, to the extent that there is no conflict. After all, if 'domestic jurisdiction' is interpreted as meaning "areas or subject-matters or merely issues not limited or governed by international law",[45] it is precisely the latter that leaves room for municipal law. This

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[40] *CMS Gas Transmission Company v. The Republic of Argentina* (hereinafter, *CMS v. Argentina*), ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, para. 45.

[41] *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, para. 49.

[42] ICJ, *Barcelona Traction*, Judgment, 5 February 1970, cit., para. 38.

[43] In this sense, see the Separate Opinion of Judge Gros in ICJ, *Barcelona Traction*, Judgment, 5 February 1970, cit., para. 9: "the renvoi to municipal law leads eventually, in the present case, to the establishment of a superiority of municipal over international law which is a veritable negation of the latter".

[44] ICJ, *Barcelona Traction*, Judgment, 5 February 1970, cit., para. 38 (*italics added*).

[45] K.S. ZIEGLER, 'Domaine réservé', in *Max Planck Encyclopedia of Public International Law*, 2010, para. 2. See, also, PCIJ, *Nationality Decrees Issued in Tunis and Morocco*, Advisory Opinion, 7 February 1923, in *PCIJ Series B – No. 2*, p. 23: "The words 'solely within the domestic jurisdiction' seem rather to contemplate certain matters which, though they may very closely concern the interest of more than one State, are not, in principle, regulated by international law".

approach is particularly apparent in the Court stressing 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*".[46]

To sum it up: if international law does not establish its own rules, reference shall thus be made to municipal law so as to regulate the nature of, and the interplay between, the rights of the corporation and those of the shareholders. This is a sound reasoning. Interestingly, in identifying the applicable law to the dispute, the ICJ deemed it unnecessary to examine all the numerous "forms of legal entity provided for by the municipal laws of States",[47] since it was only concerned with a limited liability company.

The Court, thus, proceeded to highlight the main features of a corporation, focusing on its separate legal personality and the firm distinction of its rights from those of the shareholders. From this point of view, it is arguable that the judges in The Hague resorted to general principles *in foro domestico*,[48] whose main function is precisely that of filling the *lacunae* of the international legal order.[49]

In this regard, however, a question can be raised as to whether there was a *lacuna* to be filled: indeed, it has been authoritatively argued that, in resorting to domestic law, the Court overlooked the existing rules of international law, as established in the case law of claims commissions and arbitral tribunals.[50] A practice, it was said, that favored the effective protection of shareholders over an alleged formalistic approach to the legal personality of corporations.[51]

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[46] ICJ, *Barcelona Traction*, Judgment, 5 February 1970, cit., para. 38 (*italics added*).

[47] *Ibid*., para. 40.

[48] ILC, 'First Report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur', A/CN.4/7325, April 2019, para. 189, supporting a distinction between "general principles of law derived from national legal systems and general principles of law formed within the international legal system". In this sense, see, *ex multis*: G. GAJA, 'General Principles of Law', in *Max Planck Encyclopedia of International Law*, 2020; E. CANNIZZARO, *Diritto internazionale*, 5th edition, Torino 2020, pp. 132-143; X. SHAO, 'What We Talk about When We Talk about General Principles of Law', in *Chinese Journal of International Law*, 2021, pp. 219-255; I. SAUNDERS, *General Principles as a Source of International Law. Article 38(1)(c) of the Statute of the International Court of Justice*, Oxford/London/New York/New Delhi/Sydney, 2021, *passim*.

[49] H. THIRLWAY, *The Sources of International Law*, 2nd edition, Oxford, 2019. In this sense, see also: H. LAUTERPACHT, *The Function of Law in the International Community*, Oxford, 1933, p. 115-118; O. SCHACHTER, 'International Law in Theory and Practice', in *Collected Courses of The Hague Academy of International Law*, vol. 178, 1982, pp. 9-395, at 77-78; C.T. KOTUBY JR., L.A. SOBOTA, *General Principles of Law and International Due Process. Principles and Norms Applicable in Transnational Disputes*, New York, 2017, p. 2; Y. WANG, 'The Origins and Operation of the General Principles of Law as Gap Fillers', in *Journal of International Dispute Settlement*, 2022, pp. 560-582, at 560.

[50] For an analysis of the case law see, *infra*, Chapter 2, Section 2.

[51] In this sense, see R.B. LILLICH, 'Two Perspectives on the *Barcelona Traction* Case: The Ri-

A second consideration can start with the words of Christoph Schreuer, according to whom "[u]pon a superficial reading one might reach the conclusion that Barcelona Traction is authority for the general proposition that shareholders as such enjoy no protection under international law".[52] However, it is worth recalling that the *Barcelona Traction* case was decided under the general international law of diplomatic protection, as it stood in 1970. A couple of points shall be raised to this effect.

On the one hand, this means that States are free to derogate from these rules and provide shareholders with a broader protection, including an independent right (to claim) in respect of a damage suffered by the corporation.[53] The ICJ, after all, already considered such a scenario when pointing out that "States ever more frequently provide for such protection [...] either by means of special instruments or within the framework of wider economic arrangements".[54] An analysis aiming at being comprehensive shall thus necessarily deepen those treaty regimes that have emerged and consolidated in the last decades.

On the other hand, this means that what might have been the general rule identified in the *Barcelona Traction* case could not be the law anymore. In other words, subsequent practice might have changed – or even reversed – the international rules concerning the protection of corporations and their shareholders as established by the ICJ. Attention shall thus be paid to all the developments occurred since 1970.

4. The Emergence of Treaty Regimes Affording Protection to Shareholders: International Human Rights and Investment Law

More than fifty years have passed since the *Barcelona Traction* judgment was rendered. A time during which the world has greatly changed, followed by the law. This is particularly true with regard to the international community and international law. Among all the changes concerning the international legal order,

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gidity of Barcelona', in *American Journal of International Law*, 1971, pp. 522-532, at 524; N.S. RODLEY, 'Corporate Nationality and the Diplomatic Protection of Multinational Enterprises: The Barcelona Traction Case', in *Indiana Law Journal*, 1971, pp. 70-86, at 78. For further references to this effect, see, *infra*, Chapter 2, Section 3.2, footnote 91.

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

[53] As is well known, indeed, States are free to derogate from general international law by entering into treaty agreements, the only exception being *jus cogens*: in this sense, see, *ex multis*: M. SHAW, *International Law*, cit., pp. 91-95; E. CANNIZZARO, *Diritto internazionale*, cit., p 233; B. CONFORTI, M. IOVANE, *Diritto internazionale*, cit., pp. 197-199.

[54] ICJ, *Barcelona Traction*, Judgment, 5 February 1970, cit., para. 90 (*italics added*).

the paradigmatic shift in conceiving the status and role of the individual is rather meaningful.[55]

Traditionally, under international law, individuals did not possess any right or duty. Quite the opposite, they were rather perceived as objects. As a consequence, they could not commence proceedings before international adjudicatory bodies.[56] If the conduct of a State affected foreign individuals, they had to rely on their State of nationality exercising diplomatic protection. In this respect, in 1924, the Permanent Court of International Justice (PCIJ) famously argued that "by taking up the case of one of its subjects […], a state is in reality asserting its own right, the right to ensure, in the person of its subjects, respect for the rules of international law".[57]

Since the aftermath of World War II, instead, "individuals have increasingly gained specific rights, sometimes followed by a secondary right to vindicate these primary rights through individual application in cases of violations".[58] Put it otherwise, under international law, substantive rights ensuring protection are bestowed upon the individuals, coupled with procedural ones to commence proceedings before international adjudicatory bodies. This phenomenon has experienced a rapid acceleration since the 1960s, driven by human rights first and, more recently, by international investment law.[59]

Against such a background, one might wonder to what extent human rights treaties have specifically contributed to the protection of shareholders in the international legal order.[60] The whole question generally revolves around a handful of relevant norms. Notably, the protection of private property and the re-

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[55] In this sense, see, *ex multis*: T. MERON, *The Humanitazion of International Law*, Leiden/Boston, 2006; K. PARLETT, *The Individual in the International Legal System. Continuity and Change in International Law*, Cambridge, 2010; A. PETERS, T. SPARKS (eds), *The Individual in International Law. History and Theory*, Oxford, 2024.

[56] S. GORSKI, 'Individuals in International Law', in *Max Planck Encyclopaedia of Public International Law*, 2013; C. FOCARELLI, *La persona umana nel diritto internazionale*, Bologna, 2013, pp. 16-17.

[57] PCIJ, *Mavrommatis Palestine Concessions Case (Greece v. United Kingdom)*, Judgment, 30 August 1924, in *PCIJ Series A – No. 2*, p. 12.

[58] S. GORSKI, 'Individuals in International Law', cit., para. 20. See also F. ORREGO VICUÑA, 'Claims, International', in *Max Planck Encyclopaedia of Public International Law*, 2010.

[59] International investment law is one of the areas traditionally encompassed in international economic law, together with international monetary and trade law. As for a definition of international economic law, see M. HERDEGEN, 'International Economic Law', in *Max Planck Encyclopedia of Public International Law*, 2020, para. 1. See also P. PICONE, 'Diritto internazionale dell'economia e costituzione economica dell'ordinamento internazionale', in P. PICONE, G. SACERDOTI (a cura di), *Diritto internazionale dell'economia*, Milano, 1982, pp. 32-35.

[60] J.G. KU, 'The Limits of Corporate Rights Under International Law', in *Chicago Journal of International Law*, 2012, pp. 729-754; R. MCMENAMIN, M. WAIBEL, 'Shareholder Protection in Human Rights and Investment Law', in *Austrian Review of International and European Law*, forthcoming, available at www.papers.ssrn.com. For further references, see, *infra*, Chapter 3.

quirement that the person concerned by the petition must be a 'victim', namely that he has suffered a violation of his own rights by the respondent State.

Looking at regional instruments of human rights protection, the right to property is enshrined,[61] *inter alia*, in both the European Convention on Human Rights (ECHR)[62] and the American Convention on Human Rights (ACHR).[63] To the extent that both tangible and intangible goods have been generally considered as protected property,[64] shareholders *qua* owners of the shares benefit from the protection of the treaty. In other words, an expropriation of, or an interference with, shares can be assessed against the norm ensuring the safeguard of property rights under the relevant treaty.

However, in order for a complaint to be heard, the person concerned – which, depending on the treaty regime, must or can be the applicant[65] – has to be the victim of a violation of the conventional rights. Looking at the case law of monitoring bodies, the word victim means, in a nutshell, "the person directly affected by the act or omission which is in issue",[66] or "a person […] actually affected"[67] by the conduct at stake.[68] Similarly, it has been argued that monitoring bodies are not concerned with issues that "has not yet affected the guaranteed rights and freedoms of specific individuals".[69]

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[61] On the right to property under international law, see, *ex multis*: R.L. BINDSCHEDLER, 'La protection de la propriété privée en droit internazional pubic', in *Collected Courses of The Hague Academy of International Law*, vol. 90, 1956, pp. 174-306; J.E. ALVAREZ, 'The Human Right to Property', in *University of Miami Law Review*, 2018, pp. 580-705; KRIEBAUM U., 'Property, Right to', in C. BINDER, M. NOWAK, J.A. HOFBAUER, P. JANIG (eds), *Elgar Encyclopedia of Human Rights*, Northampton, 2022, pp. 88-95.

[62] Convention for the Protection of Human Rights and Fundamental Freedoms, signed 4 November 1950, entered into force 3 September 1953.

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

[64] U. KRIEBAUM, A. REINISCH, 'Property, Right to, International Protection', in *Max Planck Encyclopedia of Public International Law*, 2019, para. 35.

[65] See A. GATTINI, 'Actio Popularis', in *Max Planck Encyclopedia of International Procedural Law*, 2019, especially paras 32-56; V.P. TZEVELEKOS, 'Standing: European Court of Human Rights (ECtHR)', in *Max Planck Encyclopedia of International Procedural Law*, 2019; S. JOSEPH, 'Committees: Human Rights Bodies', in *Max Planck Encyclopedia of International Procedural Law*, 2019, para. 38.

[66] ECtHR, *Eckle v. Germany*, App. No. 8130/78, Judgment, 15 July 1982, para. 66.

[67] HRC, *Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius*, Comm. No. 35/1978, Decision, 9 April 1981, para. 9.2.

[68] See also S. JOSEPH, M. CASTAN, *The International Covenant on Civil and Political Rights. Cases, Materials, and Commentary*, 3rd edition, Oxford, 2013, p. 71: "a petitioner may claim to be a victim only if he or she is personally affected by the act or omission which is at issue".

[69] IACtHR, *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)*, Advisory Opinion OC-14/94, 9 December 1994, para. 49.

In light of the foregoing, the main question concerning the subject matter of this study is apparent: to what extent, if any, are admissible the applications in which a shareholder claims compensation for measures targeting the corporation in which he holds shares? To put it otherwise, it is a matter of ascertaining whether shareholders are entitled to claim the reflective loss suffered as a result of a direct loss caused to the corporation.

While, needless to say, this problem mainly arises with regard to the right to property, it is by no means the only legal situation in which the interplay between the (rights of the) corporations and (those of) the shareholders might actually come out. The same holds true even with regard to those treaties that do not enshrine the right to property, if corporations cannot claim to be the victims since they are not deemed capable of holding human rights, or in all the cases in which the right to property has not been invoked by the applicant. The question is thus a more general one. Indeed, it has to be investigated whether human rights treaty systems uphold the municipal law distinction between the legal personality of a corporation and that of its shareholders. If so, then the admissibility of exceptions to this effect shall be ascertained too.

Alongside international human rights law, another field has emerged and expanded, rapidly moving from being considered an "exotic and highly specialized knowledge"[70] to eventually becoming one of the key domains of the international legal order. The reference is, of course, to international investment law.[71] The (nowadays, contested) rationale lying at the roots of this field is that reducing barriers and restrictions to foreign capital promotes the economic development of the economic system.

To attract foreign investments, therefore, States conclude international investment agreements (IIAs) whereby they establish certain common rules to comply with in respect of investment made by nationals of each State in the territory of the other. On a par with what has been said on international human rights law, these treaties have both a substantive and a procedural dimension.[72]

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[70] ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission, finalized by Mr. Martti Koskenniemi', A/CN.4/L.682, 13 April 2006, para. 8.

[71] For a historical account of the development and establishment of international investment law, see K. MILES, *The Origins of International Investment Law. Empire, Environment and the Safeguarding of Capital*, Cambridge, 2013; J. PAUWELYN, 'Rational Design or Accidental Evolution? The Emergence of International Investment Law', in Z. DOUGLAS, J. PAUWELYN, J.E. VIÑUALES (eds), *The Foundations of International Investment Law. Bringing Theory into Practice*, Oxford, 2014, pp. 10-43; M.R. MAURO, *Diritto internazionale dell'economia. Teoria e prassi delle relazioni economiche internazionali*, Napoli, 2019, p. 323 ff.; Y. RADI, *Rules and Practices of International Investment Law and Arbitration*, Cambridge, 2020, pp. 3-20.

[72] For an overview of the substantive standards of investment protection, see A. NEWCOMBE, L. PARADELL, *Law and Practice of Investment Treaties. Standards of Treatment*, Alphen aan den Rijn, 2009; C. MCLACHLAN, L. SHORE, M. WEINIGER, *International Investment Arbitration. Sub-*

As far as the procedural dimension is concerned, the most relevant feature of IIAs consists in that they typically provide for investor-State dispute settlement (ISDS) procedures, through which foreign investors may directly commence proceedings against the host State for the alleged violations of their rights.

Following a path similar to that of international human rights law, private individuals and entities have thus become emancipated from the protection of their national States. Notably, diplomatic protection has been replaced by a mechanism that allows a foreign investor to start arbitral proceedings directly against the host State, in the event he alleges that the latter committed a wrongful act: the so-called investor-State arbitration.[73]

From this perspective, it is apparent how the possibility for investors to personally vindicate their rights against the host state cannot but represent a historical turning point, compared to the diplomatic protection regime which requires the national State of the injured person to 'espouse' his claim.[74]

This had a tremendous effect on the protection of shareholders. Indeed, if a State decides to expropriate the shares held by foreign investors, they will be entitled – if there is any applicable investment treaty – to start proceedings before an arbitral tribunal to claim for compensation. The same holds true if their right to manage the corporation or to attend general meetings have been interfered with. In other words, shareholders *qua* investors have been entrusted with a direct remedy against the wrongdoing State when their rights are infringed upon.

The establishment of a mechanism to settle disputes between the investor and the host State, however, does not represent the only remarkable novelty brought by international investment law with regard to shareholder claims. As pointed out by Gabriel Bottini, indeed, "[i]nvestment arbitration has witnessed the consolidation of the idea that shareholders are entitled to bring claims […] for measures affecting the company in which they hold shares".[75]

As a matter of fact, from the decision on jurisdiction in *CMS v. Argentina* onwards,[76] arbitral tribunals have consistently admitted shareholder claims for reflective loss, thus running against domestic corporate law and the settled case

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stantive Principles, 2nd edition, Oxford, 2017; A. REINISCH, S.W. SCHILL (eds), *Investment Protection Standards and the Rule of Law*, Oxford, 2023.

[73] Among the vast literature on the topic of investor-State arbitration and, more generally, the judicial settlement of investment disputes, see: B. SABHI, N. RUBINS, D. WALLACE JR., *Investor-State Arbitration*, 2nd edition, Oxford, 2019, pp. 47-74; R. DOLZER, U. KRIEBAUM, C. SCHREUER, *Principles of International Investment Law*, 3rd edition, Oxford, 2022, p. 334 ff.

[74] See, *ex multis*, I.F.I. SHIHATA, 'Towards a Greater Depoliticazion of Investment Disputes: The Roles of ICSID and MIGA', in *ICSID Review*, 1986, pp. 1-25; G. SACERDOTI, 'Le società e le imprese nel diritto internazionale: dalla dipendenza dallo Stato nazionale a diretti destinatari di obblighi e responsabilità internazionali', in *Diritto del commercio internazionale*, 2013, pp. 109-122.

[75] G. BOTTINI, *Admissibility of Shareholder Claims under Investment Treaties*, cit., p. 154.

[76] *CMS v. Argentina*, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, cit.

law of the ICJ.[77] In other words, under the umbrella of IIAs, shareholders *qua* investors are not only entitled to commence proceedings if their rights attached to shares have been violated by the host State, but also to bring a claim in order to recover the drop in value of their shares following an offense against the corporation.

This should not come as a surprise. The fact that a certain course of action might be ruled out under general 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. Even more, it has been argued that the proliferation of BITs from the 1970s onwards could be explained, at least partly, as a response to the *Barcelona Traction* judgment in that it limited the protection of shareholders.[78]

However, it is fundamental not to jump to conclusions: the fact that States may derogate to one or more rule(s) does not necessarily mean that they have done so. In this respect, taking into account the well-established tendency to accept shareholder claims for reflective loss on the basis of a case-by-case basis, it is all the more necessary to appraise the admissibility of these claims from a theoretical point of view, while also paying attention to the possible far-reaching implications of such an approach, which goes straight in the opposite way of corporate law.

5. The Purpose and Scope of this Book

In light of these considerations, it is not surprising that legal scholars have devoted much attention to shareholder claims in international law, though often adopting different points of view. At a closer look, it is nevertheless possible to identify three main strands of scholarship, which basically coincide with the fundamental developments pointed out in the previous sections.

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[77] For an appraisal of the case law of investment tribunals, see, *ex multis*: VALASEK M.J., DUMBERRY P., 'Developments in the Legal Standing of Shareholders and Holding Corporations in Investor-State Disputes', in *ICSID Review*, 2011, pp. 34-75; A. SURAWEERA, 'Shareholder Claims for Reflective Loss in Investor-State Dispute Settlement: Proposing Reform Options for States', in *ICSID Review*, 2023, pp. 595-624. For further references, see, *infra*, Chapter 4, Section 1, footnote 1.

[78] M. SORNARAJAH, 'State Responsibility and Bilateral Investment Treaties', in *Journal of World Trade Law*, 1986, pp. 79-98; P. PETERS, 'Some Serendipitous Findings in BITs: the Barcelona Traction case and the reach of Bilateral Investment Treaties', in E. DENTERS, N. SCHRIJVER (eds), *Reflections on International Law from the Low Countries in Honour of Paul de Waart*, The Hague/Boston/London, 1998, pp. 27-47; M.R. MAURO, 'Investimenti stranieri', in *Enciclopedia del diritto*, vol. IV, Milano, 2011, pp. 628-665, at 649; M. SHAW, *International Law*, cit., p. 619, footnote 247.

The first stage might be said to range from the end of the 1800s to the 1970 judgment of the ICJ in the case of *Barcelona Traction*. During this time, international law scholars had to confront a fragmented practice, comprising lump-sum agreements, decisions rendered by claims commissions, and arbitral awards. This offered a great opportunity to produce thought-provoking and foundational pieces of scholarship,[79] which aimed at identifying the rules to ensure the effective protection of both corporations and their shareholders under international law.

The second stage spans from 1970 to the end of the 1990s. Despite the vigorous debate sparked by the rulings of the ICJ, the theme lost its centrality in scholarship. After all, the *Barcelona Traction* decision had apparently settled the interplay between the rights of the corporation and those of the shareholders in the international legal order.

The judgment in the case of the *Elettronica Sicula*,[80] concerning the protection of a group of US shareholders in an Italian corporation, rendered by a Chamber of the ICJ in 1989, opened the door to a new discussion as to whether the judges in The Hague had actually decided in accordance with, or had instead overruled the principles established in, the *Barcelona Traction* judgment.[81] However, the debate remained mainly confined to commenting the decisions of the Court, with few scholars willing to undertake wide-ranging and theoretical works.[82]

The third stage corresponds to the renewed uncertainty concerning shareholder claims in international law in the wake of the case law of human rights monitoring bodies and investment tribunals. This has brought again the topic under the spotlight, with a flourishing of doctrinal contributions deemed to systematize the rule and its exceptions.

Notably, in the last few years, there has been an increasing attention to the general admissibility of reflective loss claims in investment arbitration, as evi-

[79] P. DE VISSCHER, 'La protection diplomatique des personnes morales', cit.; J.-P. DE HOCHEPIED, *La protection diplomatique des sociétés et des actionnaires*, cit.; L. CAFLISCH, *La Protection de Sociétés Commerciales et des Intérêts Indirects en Droit International Public*, cit.

[80] ICJ, *Case concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment, 20 July 1989, in *ICJ Reports 1989*, p. 15 ff. For a first appraisal, see P. TOMKA, 'Elettronica Sicula Case', in *Max Planck Encyclopedia of Public International Law*, 2007; F.A. MANN, 'Foreign Investment in the International Court of Justice: The *ELSI* Case', in *American Journal of International Law*, 1992, pp. 92-102.

[81] In this sense, see S.D. MURPHY, 'The *ELSI* Case: An Investment Dispute at the International Court of Justice' in *Yale Journal of International Law*, 1991, pp. 391-452; S.A. KUBIATOWSKI, 'The Case of *Elettronica Sicula S.p.A*: Toward Greater Protection of Shareholders' Rights in Foreign Investments', in *Columbia Journal of Transnational Law*, 1997, pp. 215-244.

[82] See, for instance, M. DIEZ DE VELASCO, 'La protection diplomatique des sociétés et des actionnaires', cit.; FRANCIONI F., *Imprese multinazionali, protezione diplomatica e responsabilità internazionale*, cit.

denced by the two thorough studies authored by Gabriel Bottini and Lukas Vanhonnaeker, which are devoted to the protection of shareholders under investment treaties.[83] Within this context, the majority of the works adopts a sector-based approach,[84] sometimes lacking a deeper reflection on the legal standing of shareholders under international law. The issue, indeed, is not confined to a specific branch of the international legal order,[85] especially if one considers the growing reliance investors show on human rights courts as a venue to protect their rights,[86] as well as the increasing trend of cross-referencing.[87]

Against such a background, this study aims to provide a comprehensive and up-to-date analysis of shareholder claims in the international legal order, addressing cross-cutting issues so as to distil the main rules governing the subject matter. Three main arguments lie at its very heart.

First, this book maintains that the ICJ correctly identified the separate legal personality of the corporation, and the prohibition of shareholder claims for reflective loss, as a general principle commonly applied *in foro domestico*. In this regard, it further contends that, in municipal legal systems, this rule is based upon compelling reasons of legal policy, rather than on a mandatory interpretation of the law.

Second, it firmly maintains the need to uphold, as a general rule, the municipal law distinction between the rights of the corporation and those of its share-

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[83] G. BOTTINI, *Admissibility of Shareholder Claims under Investment Treaties*, cit.; L. VANHONNAEKER, *Shareholders' Claims for Reflective Loss in International Investment Law*, cit.

[84] D. BENTOLILA, 'Shareholders' Action to Claim for Indirect Damages in ICSID Arbitration', in *Trade, Law and Development*, 2010, pp. 87-144; J. CHAISSE, L.Z. LI, 'Shareholder Protection Reloaded. Redesigning the Matrix of Shareholder Claims for Reflective Loss', in *Stanford Journal of International Law*, 2016, pp. 51-94; M.A. CLODFELTER, J.D. KLINGER, 'Reflective Loss and Its Limits under International Investment Law', in C.L. BEHARRY (ed.), *Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration*, Leiden/Boston, 2018, pp. 57-80; R. REN, 'Shareholder reflective loss: a bogeyman in investment treaty arbitration?', in *Arbitration International*, 2023, pp. 425-444.

[85] For a notable study to this effect, see D. MÜLLER, *La protection de l'actionnaire en droit international*, cit.

[86] On the risks related to the increasing litigation of investment disputes before human rights monitoring bodies, see T. GAZZINI, A. PIETROBON, 'Parallel Proceedings Concerning Investment and Human Rights Claims', in R. BUCHAN, D. FRANCHINI, N. TSAGOURIAS (eds), *The Changing Character of International Dispute Settlement. Challenges and Prospects*, Cambridge, 2023, pp. 45-75. For a critical analysis, see U. KRIEBAUM, 'Is the European Court of Human Rights an Alternative to Investor-State Arbitration?', in P.-M. DUPUY, E.-U. PETERSMANN, F. FRANCIONI (eds), *Human Rights in International Investment Law and Arbitration*, Oxford, 2009, pp. 219-245, at 222-228.

[87] See, *ex multis*, S. STEININGER, 'What's Human Rights Got To Do With It? An Empirical Analysis of Human Rights References in Investment Arbitration', in *Leiden Journal of International Law*, 2017, pp. 33-58; J.E. ALVAREZ, 'The Use (and Misuse) of European Human Rights Law in Investor-State Dispute Settlement', in F. FERRARI (ed.), *The Impact of EU Law on International Commercial Arbitration*, New York, 2017, pp. 519-648.

holders on the international legal plane as well. In this respect, it critically reviews the case law of international courts and tribunals, human rights monitoring bodies, and investment arbitral tribunals to point out the risks enshrined in an unprincipled admissibility of reflective loss claims under international law.

Third, it argues that exceptions to the general rule are not only admissible, but also necessary, whenever they ensure the effective protection of other interests which are deemed worthy of protection. In this regard, however, it contends that, while convergence across the international legal order is desirable to guarantee coherence and legal certainty, there is no need for uniformity to the extent that different exceptions might prove effective in the respective fields.

To ground our study on solid foundations, Chapter 1 provides a comparative analysis of domestic legal orders so as to demonstrate that, in municipal law, a common approach to shareholder claims can be found. Notably, it will be established that, as a general rule, corporate law, in endorsing a clear-cut distinction between the rights of the corporations and those of the *associés*, only allows the former to start proceedings to recover from damages suffered.

Contrariwise, an individual shareholder cannot bring a claim, even though his economic interests have been affected by the wrong. Accordingly, shareholders are entitled to judicial remedies only in the face of measures affecting their own direct rights: a consistent, yet not monolithic, rule prohibiting reflective loss claims can thus be found in corporate law.

At the same time, attention will be paid to those institutions established to ensure that, whenever the injured corporation is unable or unwilling to vindicate its rights, shareholders are not deprived of any remedy: some exceptions to the 'no reflective loss' rule, as well as derivative actions, serve precisely this purpose.

Building upon these findings, Chapter 2 will be devoted to analyzing shareholder claims in general international law. After having reviewed the case law of arbitral tribunals and claims commissions until the mid-1900s, the analysis will first revolve around the judgment in the *Barcelona Traction* case.

In this regard, it will be contended that the ICJ correctly transposed the set of rules concerning the municipal institution of corporation into the international legal order, to the extent that the general principle well serves the purposes of international law. The developments occurred after the *Barcelona Traction* judgment will also be considered, pointing out that the Court has been incapable of entering into a judicial dialogue with other international courts and tribunals, as clearly depicted in the *Diallo* case.[88]

On the other hand, particular attention will be paid to the solutions put forward by the International Law Commission in its 2006 Articles on Diplomatic

[88] ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment, 24 May 2007, in *ICJ Reports 2007*, p. 582 ff.

Protection, for having the latter attempted to achieve – in discharging both its codification and progressive development functions – a fair balance as far as the protection of shareholders in international law is concerned. In this respect, however, it will be demonstrated that the attempt was only partly successful.

Having ascertained the relationship between municipal systems and general international law, Chapters 3 and 4 will respectively delve into the protection of shareholders in international human rights and investment law, in order to shed some light on the reasons that have led to the divergence of these rules from those established under domestic law.

To this end, Chapter 3 carefully reviews the decisions rendered by human rights monitoring bodies in order to draw insights as to how they approach the municipal institution of the corporation and its separate legal personality. In this regard, it will be demonstrated that international human rights law tends to adhere to the solutions adopted in municipal and general international law. Therefore, the distinction between the rights of the corporation and those of the shareholders is generally upheld.

What will be found missing, instead, is a deeper reflection on the rationales behind the recognition of such a distinction, this being particularly true for both the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR). As a consequence, these monitoring bodies have shown inconsistencies in the application of the relevant tests in order to allow a reflective loss claim to be brought.

At the same time, it will be demonstrated that the lack of an appropriate analysis of the reasons why reflective loss claims should (or should not) be barred has led to the establishment of some exceptions whose rationales openly clash with those used to uphold the prohibition as a general rule. To the extent that this conundrum risks severely undermining, over the course of time, the effective protection of both corporations and their shareholders, the need for a principled approach will be claimed as the only possible solution.

The starting point of Chapter 4 is a factual observation: in the field of international investment law, shareholder claims for reflective loss have been generally allowed. Even more, they probably represent the most common kind of lawsuits. What is prohibited under corporate law and general international law has arguably attained the status of a general rule in this field.

Moving from this assumption, an attempt will be made to uncover the reasons that led to such a legal overturn. To this end, the notion of shareholder *qua* 'investor' and shareholding *qua* 'investment' in IIAs will be examined, paying attention to the often-uncertain treaty language concerning reflective loss claims.

Then, Chapter 4 will critically assess the reasoning whereby arbitral tribunals have generally found reflective loss claims to be admissible, pointing out how they have often overlooked the compelling reasons according to which, under domestic and general international law, shareholders are not entitled to bring a lawsuit to recover for damages suffered by the corporation in which they own shares: parallel and multiple proceedings, overcompensation, prejudice to creditors, and distortion of corporate governance.

From this perspective, Chapter 4 then addresses the current ungovernability of shareholder claims in investment arbitration, by identifying different cases in which the blanket permission to start proceedings to recover reflective losses has exposed the current regime to increasing criticism. In light of the foregoing, Chapter 4 examines the existing instruments to try to deal with the current limitations of shareholder claims in investment arbitration, while also considering the increasingly discussed treaty-drafting solutions.

Finally, in the General Conclusions, some considerations on current and future perspectives on shareholder claims in international law are made, so as to coherently organize the principles that have been distilled throughout the whole study.

Chapter One

Setting the Scene: Shareholder Claims in Domestic Law

SUMMARY: 1. The Need to Look at Municipal Law: An Introduction. – 2. First Things First: Corporations in Municipal Legal Orders. – 3. The Protection of Shareholders *vis-à-vis* Measures Affecting Their Own Rights. – 4. The Protection of Shareholders *vis-à-vis* Measures Infringing Upon the Corporation. – 4.1. The 'No Reflective Loss' Principle: A Rather Coherent Approach in Municipal Law. – 4.1.1. A Survey of Civil Law Countries. – 4.1.2. A Survey of Common Law Countries. – 4.1.3. Making Order of the Arguments: Why Are Reflective Loss Claims Barred? A Critical Appraisal. – 4.1.4. Confirming the Policy Approach to Reflective Loss Claims: Some Exceptions in Municipal Law. – 4.2. Derivative Actions in Municipal Law: A Corporate-Oriented Solution. – 4.2.1. A Survey of Civil Law Countries. – 4.2.2. A Survey of Common Law Countries. – 4.2.3. Assessment: The Inexistence of a General Model and the Limited Scope of Derivative Actions. – 5. Brief Comparative Remarks on the Protection of Shareholders in Municipal Legal Systems.

1. The Need to Look at Municipal Law: An Introduction

In the *Barcelona Traction* judgment, the "municipal law of corporations […] became the basis for the [International Court of Justice's] fabrication of its international law rule governing shareholder claims".[1] Indeed, in finding that, under general international law, a State is not entitled to act in diplomatic protection of its nationals who own shares in a corporation whenever the lamented acts are directed against the latter, the Court resorted to the rules of domestic corporate law to frame the legal relationship between the shareholders and the enterprise. Notably, the Court drew a clear distinction between the rights of the corporation and those of the shareholders as such, arguing that only when, and to the extent that, the latter are directly injured, their State of nationality is entitled to act in diplomatic protection.

[1] R.B. LILLICH, 'Two Perspectives on the *Barcelona Traction* Case: The Rigidity of Barcelona', cit., p. 524.

As anticipated in the Introduction, this study contends that the ICJ properly identified the separate legal personality of corporations – implying a separation between the rights of the latter and those of the shareholders – as a general principle *in foro domestico*. This is a rule of domestic law or, *rectius*, a set of interrelated rules that are founded upon compelling legal policy grounds, as will be contended in this Chapter. After all, it is not by chance that the same considerations have also guided the reasoning of the ICJ when transposing these rules to the international legal system, as Chapter 2 will demonstrate afterward.

In order to ground the analysis on solid foundations, a comparative survey of domestic legal systems will be carried out to ascertain which are the common rules of corporate law concerning shareholders. In this respect, a *caveat* is much required: an in-depth examination of all the domestic institutions concerning the complex relationship between corporations and their shareholders falls out of the scope of this inquiry. To this effect, there are indeed excellent works that are capable of offering a complete overview of comparative corporate law, some of them focusing on shareholders.[2]

The present review has a less ambitious aim: to ascertain the existing rules on the protection of shareholders, while identifying their legal policy foundations. It is contended, indeed, that a clear understanding of how corporate law addresses these issues represents the starting point to scrutinize the rules of international law, testing both the correctness of the transposition made by the ICJ as well as the rationale of any possible departure from the rules established in municipal legal systems.

To this effect, the analysis will proceed as follows. First of all, an attempt to identify a shared notion of corporation in municipal legal orders will be made (Section 2). This can be considered a necessary, despite insufficient, precondition to any fruitful examination of the treatment of shareholders in the international legal order. Indeed, if the answer were negative, no international rule having a general scope could be formed to regulate such a multi-faceted phenomenon.

Having ascertained that such a shared notion can well be identified throughout several municipal legal orders, Section 3 will then be devoted to understanding the legal remedies shareholders might resort to when their rights *qua* shareholders are infringed upon. In this respect, a survey will be carried out to identify those legal situations that domestic corporate law considers 'personal' or 'direct' rights of the shareholders, as well the existing actions at their disposal when such rights are violated.

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[2] P. MÄNTYSAARI, *Comparative Corporate Governance. Shareholders as a Rule-maker*, Berlin/New York, 2005; M. ANDENAS, F. WOOLDRIDGE, *European Comparative Company Law*, Cambridge, 2009; A. CAHN, D.C. DONALD, *Comparative Company Law. Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA*, 2nd edition, Cambridge/New York, 2014; R. KRAAKMAN ET AL., *The Anatomy of Corporate Law. A Comparative and Functional Approach*, cit.; A. AFSHARIPOUR, M. GELTER (eds), *Comparative Corporate Governance*, cit.

Then, Section 4 will dwell upon the core issue of this study, that is to say the legal standing of shareholders in respect of measures affecting the corporation in which they own shares. By employing a comparative approach, it will be ascertained to what extent the commonplace that a general prohibition to recover reflective loss can be found in municipal legal orders is actually true (Section 4.1). More importantly, a critical review of national legislation, case law and doctrine will be undertaken in order to properly ascertain the grounds underpinning such a consistent prohibition.

Having reached the conclusion that, as a general rule, shareholders cannot start proceedings to personally seek redress for an injury suffered by their corporation, the analysis will consider the availability of alternative legal remedies to ensure that their economic interest within the enterprise is nonetheless safeguarded. Notably, the focus will be on derivative actions, namely a claim brought by shareholders on behalf of their corporation as a consequence of an actual or potential loss to the latter (Section 4.2). In this respect, it will be demonstrated that a general model of derivative actions can hardly be found, since municipal legal systems greatly vary as far as the scope of such actions and their requirements are concerned.

Section 5 will finally offer some comparative remarks on the protection and legal standing of shareholders in domestic corporate law, by summarizing the main findings of this inquiry.

2. First Things First: Corporations in Municipal Legal Orders

Any analysis concerning the relationship between the shareholders and the corporation, with a view to distilling the principles governing their respective entitlements, would be of little relevance if a common model of business organization could not be identified within the multiplicity of municipal legal regimes. Different organizations, different rules governing them.

Even more, the analysis would be meaningless for the purposes of international law: as a matter of fact, the international legal order would have to confront itself with such a variety of business organizations that no single rule – be it general or conventional in nature – could govern the subject matter of this book, that is to say the protection of shareholders and their legal standing to claim. After all, the international legal order would not face a single phenomenon, but rather a plethora of phenomena; each of them with its own peculiarities. Against this background, the first question to be answered thus concerns whether, throughout the existing domestic legal orders, there is any shared notion upon which a comparative analysis can be effectively based.

Of course, to say that there is only one type of business organization all around the world would be misleading. At a first glance, it is indeed undeniable that each domestic legal system has its own types. Suffice it to mention: the British partnership, public limited company, and limited liability company; the German *Aktiengesellschaft* and *Gesellschaft mit beschränkter Haftung*; the American publicly traded company, limited liability company, and partnership; the French *société en nom collectif*, *société par actions*, *société anonyme*, *société à responsabilité limitée*; the Italian *società in nome collettivo*, *società per azioni*, *società a responsabilità limitata*, and so on.

However, on closer inspection, they can be generally distinguished in two macro-categories: 'partnerships' and 'corporations', the latter being also known as 'companies with share capital' or 'companies limited by shares'.[3]

Despite this being only one of the many possible classifications,[4] such a distinction has the merit of grasping a foundational element: "[t]he term 'corporation', etymologically, refers to the process of turning a collectivity into a corpus, a word used in Roman law to signify a legally recognized collectivity. Thus, 'corporation' connotes the separation and emancipation of a body corporate from its individual members; it emphasizes the paradox of unity arising out of plurality. By contrast, 'partnership' [...] emphasizes the human membership of

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[3] A. CAHN, D.C. DONALD, *Comparative Company Law. Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA*, cit., p. 105 ff. Other authors, depending on the jurisdiction(s) concerned, prefer a distinction between 'companies' and 'partnerships', with corporation being often used as a synonym for company. In this sense, see P.L. DAVIES, S. WORTHINGTON, *Gower and Davies' Principles of Modern Company Law*, cit., p. 4: "English law provides two main types of organisation for those who wish to associate in order to carry on business for gain: partnerships and companies. Historically, the word 'company' was colloquially applied to both, but the modern lawyer regards companies and company law as distinct from partnerships and partnership law"; J.-P. ROBÉ, *Property, Power and Politics. Why We Need to Rethink the World Power System*, cit., p. 13: "corporations (companies, in English)". However, it has been pointed that, depending on the context, the two might have a different meaning: "the term *company* is also sometimes used as a synonym of *corporation*. English 'company law', for example, is functionally equivalent to US 'corporate law'. American lawyers operating in the UK would not be misunderstood if they were to say *corporation* instead of *company*. But while they are sometimes used interchangeably, the two terms come from different sources and sometimes [...] have different meanings" (S. DEAKIN, D. GINDIS, G.M. HODGSON, 'What is a firm? A reply to Jean-Philippe Robé', in *Journal of Institutional Economics*, 2021, pp. 861-871, at 863-864). Therefore, in order to avoid confusion, this book generally avoids the word company, except for citations and/or to identify a specific kind of business organization.

[4] Business organizations can also be classified on the basis of their size (e.g., micro, small, medium-sized, and large), number of members (e.g., private and public), control (e.g., holding and subsidiary), ownership (e.g., government or state-owned and non-government or private). See, for instance, P.L. DAVIES, S. WORTHINGTON, *Gower and Davies' Principles of Modern Company Law*, cit., pp. 14-33; R.R. DRURY, 'Private Companies in Europe and the European Private Company', in J.A. MCCAHERY, T. RAAIJMAKERS, E.P.M. VERMEULEN (eds), *The Governance of Close Corporations and Partnerships: US and European Perspectives*, Oxford, 2004, pp. 375-398; M. TREBILCOCK, 'State-Owned Enterprises', in A. MARCIANO, G.B. RAMELLOPP (eds), *Encyclopedia of Law and Economics*, New York, 2020, pp. 1-11, at 1: "State-owned enterprises are enterprises owned or controlled by government that produce or provide goods or services to the public, often potentially in competition with private enterprises".

a group and the personal relationships among the individual group members. The essential criterion of differentiation is the degree of independence of the group as such from its individual members".[5]

This means that, in a corporation, the capital element prevails over the personal element. The shareholder, thus, weighs for the share of capital subscribed, while in a partnership the partner puts at the disposal of the entity his personal endowments. In other words, in a corporation a plurality of persons can be singled out on the basis of the wealth they convey to the entity, while in a partnership the same can be done on the basis of the personal skills they offer. This is not, however, the only connotative aspect. The distinction between partnerships and corporations, indeed, also "plays out in respect of both the internal governance structure and the external liability structure to varying degrees",[6] depending on the domestic legal system considered.

In all the business organizations falling under the category of partnership, "the personal contributions of each participant in terms of skills, knowledge and wealth provide the *raison d'être* for the horizontal pooling of resources and for the existence of the partnership".[7] Accordingly, the very identity of the partners is relevant, since the contribution can be said, generally, to be non-fungible. Such a situation has a consequence on both the governance structure and the external liability rules.

As far as the former is concerned, partners hold a wide bundle of control rights, not to mention the power to terminate the partnership by mere withdrawal. They generally manage the day-to-day business, ensuring its smooth running. This can be understood in light of the "close personal relationships between the partners, based on mutual trust and confidence".[8] However, as a consequence, partnerships are always at risk, since their termination may be easily triggered, for instance in case of death of one of the partners.

Moving to external liability, as a general rule, partners are fully liable for the obligations of their organization: in case of default, therefore, creditors may attach both partnership assets and the personal ones of its partners.[9] This is linked to, despite not being entirely dependent upon, the lack of a formal separateness between the wealth of the partnership and those of the partners. This does not mean that limited liability is always precluded. Quite the opposite, there are nowadays multinational professional partnerships, such as top law or account-

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[5] C. GERNER-BEUERLE, M.A. SCHILLING, *Comparative Company Law*, cit., p. 8.

[6] *Ibid.*

[7] *Ibid.*, p. 26.

[8] *Ibid.*

[9] A. CAHN, D.C. DONALD, *Comparative Company Law. Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA*, cit., p. 107: "Thus, the basic concept of a partnership is that of an agreement between the partners governing the *joint management* of assets *jointly owned* by the partners, in which partners are *jointly liable* for obligations incurred".

ing firms, that are organized under a limited liability regime: the so-called 'limited liability partnership'. Nonetheless, "the archetypical partnership is [still] a small or medium-sized venture with a limited number of partners who all significantly contribute to the day to day running of the business and who are personally liable for the partnership's debts".[10]

Contrariwise, all business organizations falling under the category of corporation are generally made up of a large number of members, contributing with their money and having little to no personal ties. Accordingly, the very identity of the shareholders is mostly irrelevant, since the capitals provided can well be said fungible. That explains why their economic interest is enshrined in shares, which – as a general rule – can be transferred, purchased and sold on the market. At the same time, because of the number and the possible sudden change of identity of shareholders, the corporation is governed through a centralized management, which generally follows a board structure.

Moreover, unlike partnerships, corporations enjoy a wide degree of independence from individual members: they indeed possess a separate legal personality, while also remaining unaffected by the withdrawal or the death of any shareholder. As far as external liability is concerned, the shareholders are not liable for the obligations contracted by their corporation, thus risking only the capital they initially conferred by acquiring shares. All in all, these elements have strongly contributed to the success of corporations as the preferred vehicle for large-scale business, at national level or, even more, in case of multinational enterprises operating in several countries.

As briefly pointed out in the Introduction, it is precisely of this second category, corporations, that this study is concerned. Therein, a first definition was provided, which can now be expanded in light of our brief analysis. By corporation, it is meant an entity with the following characteristics: *i*) possessing a legal personality, distinct from that of its shareholders, and thus able to autonomously acquire rights and obligations on its own; *ii*) providing for limited liability of shareholders, who can therefore invest their money knowing at the outset the risks involved; *iii*) being constituted of transferable shares; and *iv*) being governed by a centralized management, generally structured as a board.

3. The Protection of Shareholders *vis-à-vis* Measures Affecting Their Own Rights

When it comes to the protection of shareholders, the legal personality conferred on corporations under municipal law plays a pivotal role in shaping the

[10] C. GERNER-BEUERLE, M.A. SCHILLING, *Comparative Company Law*, cit., pp. 26-27.

rules and principles governing the matter. To the extent that juridical persons are right-holders and duty-bearers on their own, a distinction shall be drawn indeed between the entitlements of the corporation and those of its shareholders.

With regard to the latter, one shall recall that they do not only enjoy the typical property rights as owners of an intangible economic asset (*i.e.*, the shares), but they also possess, *qua associés*, a bundle of rights attached to shares. In a nutshell, corporate law bestows all the prerogatives necessary to participate in the management of the corporation and to enjoy the proceeds, if any. While much has been written on the remedies available to shareholders when such direct or personal rights are aggrieved, the subject is still surrounded by uncertainty. To this effect, in 2018, a group of leading authors openly claimed that "[t]here is no comprehensive definition of what constitutes a personal right of a [shareholder], or of the circumstances in which he may bring a personal claim to protect that right".[11]

This is true whatever the domestic legal order is considered, although to a different degree. At the outset, shareholder personal rights can be defined as those protected interests that, under the applicable domestic law, are vested in the shareholders themselves, to the exclusion of the corporation and other stakeholders, such as directors, employees or creditors. In other words, it is a matter of those "rights enjoyed by shareholders in respect of their status as members as well as the property rights attaching to their shares".[12]

Since these rights are owned by shareholders as such, they should not pose any major problem, at least concerning their protection. Indeed, "they do not depend on the shareholder seeking to enforce rights belonging to the company".[13] Therefore, when judicial enforcement or compensation is claimed, shareholders should not face any possible limitation. Unfortunately, this is not the case.

While theoretically clear, the lack of a "single definition",[14] the inconsistencies in the interpretation of the requirements to commence proceedings before domestic courts, procedural hurdles, as well as possible overlaps between the rights of the shareholders and those of the corporation,[15] might actually hinder

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[11] V. JOFFE ET AL., *Minority Shareholders: Law, Practice, and Procedure*, cit., p. 124.

[12] A.J. BOYLE, *Minority Shareholders' Remedies*, Cambridge, 2002, p. 51.

[13] A. CHARMAN, J. DU TOIT, *Shareholder Actions*, cit., p. 157.

[14] *Ibid.*

[15] For instance, a shareholder may possess a personal claim when both the latter and its corporation were parties to a contract with a third party which violated the contractual obligations. In such a circumstance, there is need to disentangle the direct loss suffered by the shareholder *qua* contracting party and the reflective loss suffered *qua* shareholders: S. SHEIKH, *Company Law Handbook: The Fundamentals*, London, 2022, p. 233. See Supreme Court of Indiana, *Sacks v. American Fletcher National Bank and Trust Co.*, 258 Ind 189 (1972); Court of Errors and Appeals of New Jersey, *Fleming v. Reed*, 77 NJL 563, 72 A 299 (1909); Court of Appeal, *Heron International Ltd v. Lord Grade*, [1983] BCLC 244. See also Court of Appeal, *Howard (RP) Ltd & Richard Alan Witchell v. Woodman Matthews and Co*, [1983] BCLC 117. A brief analysis of the differ-

shareholders from bringing 'personal claims', which can be defined as follows: "[w]hen someone is injured by the acts of another and asks a court to stop the wrongdoer from continuing the injurious action or to force the wrongdoer to compensate for damages suffered, we speak of a *direct* or a *personal* action. The plaintiff directly defends his own rights under, say, contract or tort law".[16]

This does not mean, however, that a comparative analysis cannot shed some light on the nature and extent of these rights, as well as on the different remedies afforded for their protection. To begin with, it can be said that domestic legislation provides shareholders with a variety of personal rights, which can be classified in four main categories: "economic rights, control rights, information rights, and litigation rights".[17]

Economic rights, on their part, grant shareholders the chance to gain economic profit from the corporation, which can be easily identified as the main reason why they have invested in the enterprise. Needless to say, the right to receive dividends is chief. As a general rule, shareholders do not possess a right to force corporations to declare dividends, unless a contractual provision to this effect can be found.[18] However, as soon as dividends are declared in accordance with the relevant procedure,[19] shareholders acquire a right to payment *vis-à-vis* their corporation.[20] In such a case, shareholders will be entitled to enforce the

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ent causes of action in the latter case is provided in V. JOFFE ET AL., *Minority Shareholders: Law, Practice, and Procedure*, cit., p. 194. As far as possible difficulties arising from the need to distinguish between the rights of the shareholders and those of the corporation, A. CHARMAN, J. DU TOIT, *Shareholder Actions*, cit., p. 121: "It may be possible to bring what, at first sight, appears to be a claim vested in the company as a claim for a breach of a personal right. For instance, in *Re Sherborne Park Residents Co Ltd*, Hoffmann J regarded a shareholder's challenge to the exercise of powers in breach of fiduciary duty by directors, to cause a company to issue new shares, as primarily a personal claim based on a breach of the articles of association rather than a breach of fiduciary duty".

[16] A. CAHN, D.C. DONALD, *Comparative Company Law. Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA*, cit., p. 745.

[17] J. VELASCO, 'The Fundamental Rights of the Shareholder', in *University of California Law Review*, 2006, pp. 407-467, at 413. See also the classification offered in K.J. HOPT, 'Comparative corporate governance: the state of the art and international regulation', in A.M. FLECKNER, K.J. HOPT, *Comparative Corporate Governance. A Functional and International Analysis*, Cambridge, 2013, pp. 3-102, at 65-68.

[18] D. MILMAN, *The Company Share*, Cheltenham, 2018, p. 113.

[19] The procedure will vary depending upon both the jurisdiction and the kind of corporation concerned. See R. KRAAKMAN ET AL., *The Anatomy of Corporate Law. A Comparative and Functional Approach*, cit., p. 57: "Almost all jurisdictions require shareholders to approve some corporate actions, whether upon a board proposal or even a shareholder's. Traditionally, U.S. law mandates shareholder ratification for a relatively narrow range of fundamental decisions (in short: charter amendment and mergers), while our other core jurisdictions grant shareholders a broader range of decision rights, including certain routine but important matters. For example, they require the general shareholders' meeting to approve dividend distributions".

[20] See Georgia Supreme Court, *Albany Fertilizer & Farm Improvement Co. v. Arnold*, 103 Ga

payment of dividends; that is so say, they have a personal claim.[21] On the other hand, shareholders hold the right to sell shares, which are freely transferable items of property, as a general rule.[22] If the power to dispose of their shares is affected, shareholders will have a personal action to vindicate it, generally against the directors or, eventually, other shareholders.

In the previous Section, it was said that all corporation-kind organizations are governed through a centralized management. Accordingly, shareholders do not manage the daily business activities. However, this does not mean that they are depleted of any decision-making power. Control rights, indeed, ensure that shareholders retain a form of monitoring over the enterprise. Notably, corporate law provides them with the right to vote on some matters concerning the legal entity and its business.[23]

In this respect, the most important one relates to the appointment and, if needed, the dismissal of directors. Moreover, the *associés* can be called to vote in matters of mergers, acquisitions, as well as bylaws amendments.[24] On the other hand, the calling of a general meeting, where these (and other) fundamental issues concerning the corporation are discussed and eventually voted, is a prerogative of the directors. However, most domestic legal orders recognize that shareholders have the power to require a general meeting to be held.[25]

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145 (1897): "it is undoubtedly true that a dividend properly declared by the directors of a corporation can not subsequently be revoked; and that persons who are shareholders at the time the dividend is declared have a legal claim against the company for the payment of the amount of the dividend; and that after profits have been set apart and appropriated to the payment of the dividends, they belong to the shareholders and can not be recalled, even though the company should suffer losses and become insolvent before the dividend is actually paid"; Corte d'Appello di Milano, Judgment No. 3644, 25 March 1986: "il diritto soggettivo del socio alla distribuzione del dividendo […] sorge non in conseguenza di una qualsiasi eccedenza dell'attivo patrimoniale sul passivo della gestione, ma per effetto della deliberazione assembleare mediante la quale si dispone la distribuzione ai soci di tutto o parte delle somme risultanti dal rendiconto attivo".

[21] V. JOFFE ET AL., *Minority Shareholders: Law, Practice, and Procedure*, cit., p. 128.

[22] However, see J. VELASCO, 'The Fundamental Rights of the Shareholder', cit., p. 415: "The law does allow for some restrictions on the right to sell shares. To the extent that the corporation is closely held, the law may impose some fiduciary duties on a shareholder. […] The law also allows the impositions of certain burdens on the shareholder right to sell shares. For example, shareholders may enter into contracts limiting their ability to sell shares."

[23] J. VELASCO, 'Taking Shareholder Rights Seriously', in *University of California Law Review*, 2007, pp. 605-682, at 610: "Corporate law clearly grants shareholders the right to vote in the election of directors and on certain fundamental transactions"; D. MILMAN, *The Company Share*, cit., p. 117 ff.

[24] J. VELASCO, 'The Fundamental Rights of the Shareholder', cit., pp. 416-420; A. AFSHARIPOUR, 'Reevaluating Shareholder Voting Rights in M&A Transactions', in *Oklahoma Law Review*, 2017, pp. 127-158. R. KRAAKMAN ET AL., *The Anatomy of Corporate Law. A Comparative and Functional Approach*, cit., p. 37.

[25] A. CAHN, D.C. DONALD, *Comparative Company Law. Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA*, cit., p. 680 ff.

In other words, depending on the rules established under the relevant domestic legal system, when a certain amount of the shareholders requests the directors to do so, the latter are obliged to call a general meeting. If the directors fail to do so, municipal law generally offers alternative routes in order to have the meeting held. Two methods are, by far, the most common. On the one hand, some domestic legal orders provide that the same shareholders who have requested the meeting may proceed to call it.[26] On the other hand, it might be up to the competent domestic court to convey the meeting if the refusal by the directors is considered to be without a reason.[27]

As far as information rights are concerned, shareholders are entitled to be informed about the economic conditions and the affairs of the corporation.[28] Needless to say, the corresponding duty falls upon the directors, who might be held responsible if they fail to properly discharge such a function. Indeed, information rights are essential for the shareholders in ensuring that they can take mindful decisions regarding their investment. Moreover, subject to certain limitations, shareholders have the right to review the books and records of the corporation.[29] If access to such records is denied, a shareholder is entitled to bring a personal action to oblige the directors to allow the inspection.

Finally, shareholders have the right to resort to domestic courts in order to seek judicial enforcement, or compensation for violations, of their rights. Such a right is instrumental in nature, inasmuch as it ensures that shareholders can effectively exercise all the rights attached to the shares they own.[30] The most straightforward way is by bringing a personal claim, as explained above.

Of course, there is more. Some common law legal systems provide for representative or class claims pursuant to which, "[w]here a number of shareholders have a similar personal grievance against the company, one or more of them may bring proceedings on behalf of all of them".[31] While this kind of action has clear advantages in terms of result, it is nonetheless characterized by hurdles; notably, a so-called 'class certification' is required, so as to allow the claimant to bring the case on behalf of all the others.[32]

In civil law jurisdictions, instead, "the functional equivalent to the American

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[26] A. CHARMAN, J. DU TOIT, *Shareholder Actions*, cit., p. 170.

[27] For instance, this is the case within the Austrian and French legal orders.

[28] For an overview of information rights, see, *ex multis*, A. CAHN, D.C. DONALD, *Comparative Company Law. Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA*, cit., pp. 640-679.

[29] V. JOFFE ET AL., *Minority Shareholders: Law, Practice, and Procedure*, cit., pp. 225-232.

[30] J. VELASCO, 'The Fundamental Rights of the Shareholder', cit., pp. 426-427.

[31] V. JOFFE ET AL., *Minority Shareholders: Law, Practice, and Procedure*, cit., p. 156.

[32] M. GELTER, 'Mapping types of shareholder lawsuits across jurisdictions', in S. GRIFFITH, J. ERICKSON, D.H. WEBBER, V. WINSHIP (eds), *Research Handbook on Representative Shareholder Litigation*, 2018, pp. 459-481, at 463.

direct class action suit is often a lawsuit seeking to rescind or nullify decisions".[33] This is the case in Italy, where, under Article 2377 of the Italian Civil Code, shareholders representing a certain percentage of the voting shares are entitled to challenge any resolution taken by the general meeting before the competent court.

4. The Protection of Shareholders *vis-à-vis* Measures Infringing Upon the Corporation

Having ascertained the regime concerning the protection of shareholders whenever their rights *qua associés* are injured, one has to consider the rules according to which they might be entitled to redress in the event that the rights of their corporation are infringed upon. In other words, the issue concerns the existence of legal instruments through which shareholders can safeguard their economic interests within the business of the legal entity.

As explained above, to the extent that a share represents a fraction of the capital of the corporation, a wrong to the latter, in causing a reduction of its wealth, will also cause a decrease in the value of the shares. Such a decrease is generally known as 'reflective loss', since the share drop in value reflects, in a percentage, the damage suffered by the corporation. Against this background, it must be tested under which circumstances an action to recover reflective losses might successfully be brought under domestic law.

Any corporate trained lawyer would swiftly answer that, as a general rule, a shareholder "cannot maintain an action against a third party, either for a breach of contract between such third party and the corporation of which he is a stockholder, or for an injury to the corporation or its property".[34] All these wrongs, indeed, have to be redressed by the juridical person acting in its own name. The 'no reflective loss' principle would indeed bar any action brought by a shareholder in his own name. It does not matter that the damage he has undergone is a consequence of the wrong suffered by the corporation.

As the Court of Appeal of England and Wales famously ruled in *Prudential Assurance*: "[w]hen the shareholder acquires a share he accepts the fact that the

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[33] *Ibid.* For an overview of civil law jurisdiction, see P.-H. CONAC, L. ENRIQUES, M. GELTER, 'Constraining Dominant Shareholders' Self-Dealing: The Legal Framework in France, Germany, and Italy', in *European Company and Financial Law Review*, 2007, pp. 491-528; S. DE DIER, 'Friends with Benefits?! A Comparative View on Legal Standing to Challenge Board Decisions', in *European Company and Financial Law Review*, 2013, pp. 461-505; M.I. SÁEZ, D. RIAÑO, 'Corporate Governance and the Shareholders' Meeting: Voting and Litigation', in *European Business Organization Law Review*, 2013, pp. 343-399.

[34] Supreme Court of Washington, *Ninneman v. Fox*, 43 Wash 43 (1906), at 45.

value of his investment follows the fortunes of the company and that he can only exercise his influence over the fortunes of the company by the exercise of his voting rights in general meeting".[35]

There are, nonetheless, several issues to be addressed. First of all, one might question whether domestic legal orders really prohibit reflective loss claims and, more importantly, which are the deep roots of such a prohibition. After all, if shareholders are nothing but the ultimate beneficiaries of the economic activities carried out by the enterprise, the reason why they cannot recover reflective losses might not be apparent. In this sense, it can be said that, one way or another, shareholders will eventually get their money back from the wrongdoer, either directly or through the corporation. If so, why even bother?

Second, one might be tempted to argue that, were such a prohibition be confirmed, the 'no reflective loss' principle, like any other general rule, should also have its own exceptions. To the extent that such exceptions might actually be workable under domestic corporate law, they can be transposed, adopted or taken into account to address the same issues under international law. An analysis, in this respect, would not be *futile*.

Finally, one may wonder whether corporate law provides for any alternative route that shareholders can follow when the rights of their corporation are infringed upon to vindicate the wrongs and, indirectly, recover the reflective loss they suffered in the form of a drop in the value of the shares. All these questions require to proceed in order.

4.1. The 'No Reflective Loss' Principle: A Rather Coherent Approach in Municipal Law

In domestic legal systems, corporate law "establish[es] a general bar to shareholders' claims for reflective loss with only very limited exceptions".[36] 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, to what extent, and on which grounds, shareholders are precluded from recovering a reduction in the value of their shares stemming from a harm caused to the corporation.

4.1.1. A Survey of Civil Law Countries

Starting with civil law jurisdictions, the prohibition of reflective loss claims might be found among the well-established fundamental principles of corporate

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[35] Court of Appeal, *Prudential Assurance Co Ltd v. Newman Industries Ltd (No 2)*, [1982] Ch 204, at 224.

[36] L. VANHONNAEKER, *Shareholders' Claims for Reflective Loss in International Investment Law*, cit., p. 54.

law in Argentina,[37] Belgium,[38] Colombia,[39] France, Germany, Greece,[40] Italy, Spain,[41] as well as the Netherlands.[42] Moreover, a similar approach can also be found – despite some uncertainties surrounding the rule – in Japan[43] and Korea,[44] while the Czech Republic stands out for having expressly introduced (despite without proper regulation) reflective loss claims, following the reform of the Czech Civil Code in 2012.[45] Against this background, a closer analysis seems appropriate to highlight the rationale according to which domestic legal orders have excluded that shareholders might recover the reflective losses suffered as a consequence of a wrong against their corporation.

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[37] Cámara Nacional de Apelaciones en lo Comercial, Case COM 26023/2010, Judgment, 12 February 2019: "En esa inteligencia se han expedido unánimemente las restantes Salas de esta Cámara Nacional de Apelaciones en lo Comercial, al decir que, a diferencia de la acción social de responsabilidad, la acción individual sólo atañe a los daños personales sufridos por el accionista, careciendo éste de legitimación cuando se trata de un daño que sufre en forma indirecta a raíz de un perjuicio padecido por la sociedad".

[38] S. DE DIER, 'Friends with Benefits?! A Comparative View on Legal Standing to Challenge Board Decisions', cit.; D. WILLERMAIN, 'L'absence de préjudice réparable des actionnaires en cas d'atteinte au patrimoine social', in *Revue de Droit Commercial Belge*, 2013, 876-880.

[39] Superintendencia de Sociedades, *Carlos Hakim Daccach v. Jorge Hakim Tawil and others*, Judgment No. 800-52, 8 June 2016: "En este sentido, los asociados oprimidos no podrían solicitar una indemnización a título personal con base en el daño irrogado al patrimonio social, puesto que se trataría de perjuicios indirectos, cuya reclamación es inviable en nuestro sistema". This rule has been reaffirmed in Superintendencia de Sociedades, *Fundación Perjin and Caribbean Food Company A&M S.A. v. Luis Antonio Sánchez Sánchez*, Judgment No. 2019-01-086268, 29 March 2019. See also J. SUESCÚN MELO, *Derecho privado. Estudios de derecho civil y comercial contemporáneo*, Vol. II, Bogotà, 1996, pp. 318-322.

[40] G. ZOURIDAKIS, *Shareholder Protection Reconsidered. Derivative Action in the UK, Germany and Greece*, cit.; G. ZOURIDAKIS, 'Introducing Derivative Actions in the Greek Law on Public Limited Companies: Issues of Legal Standing and Lessons from the German and UK Experience', in *International Company and Commercial Law Review*, 2015, pp. 271-283.

[41] Tribunal Supremo (Sala de lo Civil), Judgment No. 396, 20 June 2013: "For this reason, doctrine and jurisprudence have excluded the possibility for the shareholder, by means of a personal claim, to demand directors to pay compensation for the damages that are reflexively produced on his patrimony as a consequence of the damage caused directly to the company. In order for Article 135 […] to be applicable, the existence of a direct damage to the shareholders or third parties is required". This principle has been reaffirmed in Tribunal Supremo (Sala de lo Civil), Judgment No. 385, 13 February 2019.

[42] B.J. DE JONG, 'Shareholders' Claims for Reflective Loss: A Comparative Legal Analysis', in *European Business Organization Law Review*, 2013, pp. 97-118. See Hoge Raad, *Poot v. ABP*, 2 December 1994, NJ 1995/288.

[43] S. KAWASHIMA, S. SAKURAI, 'Shareholder Derivative Litigation in Japan: Law, Practice, and Suggested Reforms', in *Stanford Journal of International Law*, 1997, pp. 9-60. See also H. ODA, *Japanese Law*, 4th edition, 2021, Oxford, p. 227 ff.

[44] I.Y.J. CHO, 'Directors' Third Party Liability: The Peculiar Case of Korea', in *Australian Journal of Asian Law*, 2017, pp. 239-257.

[45] L. LASÁK, 'Reflective Loss Regulation: A Czech Anomaly', in *European Business Organization Law Review*, 2018, pp. 161-182; L. LASÁK, *Commercial and Economic Law in the Czech Republic*, Alphen aan den Rijn, 2020, para. 81.

In France, for instance, the Court of Cassation ruled out – in different cases – the possibility for a shareholder to claim a reflective loss stating that: "the depreciation of the corporate shares resulting from criminal acts of its directors does not constitute a loss proper to each shareholder but a damage suffered by the company itself".[46] That is because "[the damage] is nothing but the corollary of that caused to the company, [and] had no personal nature".[47]

In this regard, it has been argued that: "[a]insi, 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".[48]

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 corporation.[49] Such an interpretation finds full confirmation in Article 1843-5 of the French Civil Code, which – in regulating the action against the directors of the corporation – provides that: "[i]n addition to the claim for compensation for the *loss personally suffered*",[50] shareholders are entitled to bring derivative actions on behalf of the corporation.

This principle has been recently reaffirmed by the Court of Cassation in its judgment of 17 May 2023, according to which: "[t]he shareholders of a corporation that has been the victim of mismanagement of corporate assets, who are not acting on behalf of the corporation but in their personal capacity, are entitled to bring a civil lawsuit if they can demonstrate that they have suffered a personal loss, distinct from the loss suffered by the corporation, as a direct result of the offence. […] The judgment [of the Court of Appeal of Nancy] held that this offence and the other offences committed in the management of a corporation caused personal and direct damage only to the corporation itself and

[46] Cour de Cassation (Chambre criminelle), Judgment No. 97-80.664, 13 December 2000 [author's translation].

[47] Cour de Cassation (Chambre commerciale, financière et économique), Judgment No. 97-10.886, 15 January 2002 [author's translation].

[48] R. TEFFO, 'Réflexions sur le fondement de la reconnaissance du préjudice individuel de l'associé', in *Revue des sociétés*, 2019, pp. 237-245, para. 4. See also, G.-A. LIKILLIMBA, 'Le préjudice individuel et/ou collectif en droit des groupements', in *Revue trimestrielle de droit commercial et de droit économique*, 2009, pp. 1-59.

[49] P. MERLE, A. FAUCHON, *Droit commercial. Sociétés commerciales*, 19th edition, Paris, 2016, para. 461: "le préjudice doit être personnel, indépendant de celui qui a pu être subi par la société".

[50] French Civil Code, Article 1843-5, available at www.legifrance.gouv.fr (*italics added*).

not to each shareholder, so that the shareholders could not be compensated individually for the indirect damage suffered as a result of the impoverishment of the corporation".[51]

A similar position is adopted under German corporate law: Articles 117(1) and 317(1) of the German Stock Corporation Act have been convincingly interpreted as excluding claims for reflective loss by shareholders.[52] If one looks at the two provisions, indeed, they provide for liability towards the corporation of any person or controlling enterprise causing damage to the legal entity.[53]

At the same time, however, both the provisions establish that the wrongdoer will also be liable to the shareholders if – but only to the extent that – his actions have caused them an additional loss, which shall be independent from the one suffered by the corporation itself. In other words, the two provisions identify the *personne morale* as the only subject entitled to recover the damages suffered; that is because, *ex* Articles 117 and 317 respectively, the offender "shall be liable to the company" or "to [the] controlled company". Alongside this 'general' liability towards the corporation, the Corporation Act also enshrines a more discrete provision concerning the compensation of additional damages directly caused to the shareholders in their own rights.

The prohibition of claims for reflective loss has been also recognized by the German Federal Supreme Court in different judgments. In a decision dated 10 November 1986, the Court overtly identified Article 117 as the provision preventing shareholders to sue a wrongdoer for reflective losses, pointing out that: "[i]n all these cases, according to the plaintiff's submission, the damage directly incurred by IMS [*i.e.*, the corporation] 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

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[51] Cour de Cassation (Chambre criminelle), Judgment No. 22-83.762, 17 May 2023, paras 22 and 24 [author's translation].

[52] German Stock Corporation Act, available at www.gesetze-im-internet.de.

[53] *Ibid.*, 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*" (*italics added*); 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*" (*italics added*).

would not show that the plaintiff had suffered any recoverable damage; the loss in value of the shares would only reflect the damage to IMS".[54]

Having said that, the same Court then proceeded to highlight what it considered a problematic aspect of possibly allowing reflective loss claims: "[t]he 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".[55] In this respect, the Court concluded that: "[t]he legislator perceived the conflict that could arise between the claim of the shareholder and that of the company when it regulated the obligation to pay compensation for those who use their influence to the detriment of company; [the legislator] 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".[56]

Again, in *Girmes*, which can be considered the leading case as far as the non-recoverability of reflective loss in the German legal order is concerned, the Federal Supreme Court stressed that the damage claimed by the applicant "is seen in the literature as an indirect damage affecting the claimant, which is only a 'reflex' of the damage incurred by the stock company. For this reason, the plaintiff is not entitled to claim compensation for damages [...] These considerations are correct in principle: If a corporation suffers damage, the consequence is that the intrinsic value of the shares can be reduced by the amount of the damage. If the individual shareholder suffers a loss in this way, this is merely a 'reflex' of the loss incurred by the stock company. In this respect, the shareholder is in principle not entitled to claim compensation by payment into his private asset. […] It is irrelevant whether or not the corporation is entitled to its own claim for damages against the damaging party. The principle of capital maintenance and the earmarking of […] assets has the consequence that the shareholder can only claim compensation for damage to the company's assets by payment to the company".[57]

The prohibition of reflective loss claims is firmly established in Italy too.[58] Despite no explicit provision can be found to this effect, indeed, the lack of any entitlement of shareholders to claim compensation for a drop in value of the shares as a consequence of a wrong against the corporation can be deduced, *a contrario*, from certain rules concerning the protection of corporate rights. The

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[54] Bundesgerichtshof, II ZR 140/85, Judgment, 10 November 1986 [author's translation].

[55] *Ibid*. [author's translation].

[56] *Ibid*. [author's translation].

[57] Bundesgerichtshof, II ZR 205/94, Judgment, 20 March 1995 [author's translation] (*italics added*).

[58] F. SUDIERO, *La tutela risarcitoria del socio tra danno diretto e danno riflesso*, Torino, 2020, pp. 26-29.

analysis cannot but start with Articles 2393 and 2395 of the Italian Civil Code.[59]

According to paragraph 1 of the former, "an action for liability of the directors [of the corporation] is brought pursuant to a resolution of the meeting".[60] The latter then provides that "the provisions of the preceding articles [– *i.e.*, those concerning the liability of directors towards the corporation –] do not affect the right to compensation for damages of an individual member [*i.e.*, a shareholder] or third person who has been *directly injured* as a result of malice, fraud, or negligence of the directors".[61] By reading the two Articles in conjunction, it is possible to outline the rule concerning the liability of directors *vis-à-vis* the corporation and its shareholders: in all the cases in which their negligent or intentional acts harm the rights of the legal entity, it is the latter that shall commence proceedings in order to seek for reparation. Of course, any eventual compensation will be due to the corporation itself.

However, if the conduct of the directors infringes upon the rights of the shareholders or third parties, they are entitled to start proceedings to recover the damages suffered, in addition to those eventually endured by the corporation. In other words, a personal claim can be brought. In such a case, any payment will be due to the shareholders, or the third parties, affected by the wrong.[62] The most complex issue, of course, attains to the criteria to identify what has been called 'direct harm'.[63] In this respect, doctrine has traditionally argued that a direct harm is done when a damage is caused to the individual wealth of the shareholders or third parties, leaving unaffected corporate rights as such.[64]

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[59] Italian Civil Code, available at www.gazzettaufficiale.it.

[60] Italian Civil Code, Article 2393, as translated in M. BELTRAMO, G.E. LONGO, J.H. MERRYMAN, *The Italian Civil Code and Complementary Legislation*, vol. II, New York, 1991, p. 100.

[61] Italian Civil Code, Article 2395, as translated in M. BELTRAMO, G.E. LONGO, J.H. MERRYMAN, *The Italian Civil Code and Complementary Legislation*, cit., p. 100 (*italics added*).

[62] G. CIAN, A. TRABUCCHI, *Commentario breve al codice civile*, 14th edition, Milano-Padova, 2022, Articles 2393 and 2395.

[63] F. BONELLI, 'La responsabilità degli amministratori', in G.E. COLOMBO, G.B. PORTALE, *Trattato delle società per azioni*, vol. IV, Torino, 1991, pp. 323-458, at 446: "in concreto non è sempre facile accertare se l'atto colposo o doloso dell'amministratore abbia danneggiato direttamente o solo indirettamente il socio o il terzo. Molte controversie, forse il maggior numero in questa materia, riguardano proprio questo accertamento. Il conflitto di interessi che ne sta alla base è evidente: il socio o il terzo hanno interesse ad estendere l'ambito di applicazione dell'azione individuale, alla quale sono legittimati, e pertanto hanno interesse a sostenere nelle singole fattispecie che l'atto illegittimo dell'amministratore li ha direttamente danneggiati; opposto, è, evidentemente, l'interesse dell'amministratore convenuto con l'azione individuale di responsabilità".

[64] V. PINTO, *La tutela risarcitoria dell'azionista fra «danno diretto» e «danno riflesso»*, cit., p. 11: "Invero, è pacifico, quantomeno in linea di principio, che per 'danno diretto' debba intendersi il pregiudizio arrecato dagli amministratori al patrimonio *individuale* dei soci o dei terzi nella 'neutralità' del patrimonio sociale. […] [C]on riguardo alla posizione dell'azionista si ritiene che il requisito del 'danno diretto' assolva alla funzione di segnare il discrimine fra due distinte pretese: una pretesa risarcitoria *sociale*, che sorge in conseguenza di un danno prodottosi 'direttamente'

This rule, which only concerns the liability of directors *vis-à-vis* the corporation and its shareholders, has been convincingly considered an expression of a broader principle concerning the protection of shareholders, thus extending its scope of application to damages eventually caused by third parties (*i.e.*, all those subjects which do not fall within the organizational structure of the corporation). Indeed, "appare [...] certo che la negazione della legittimazione dell'azionista a pretendere *in proprio* il risarcimento del 'danno riflesso' debba valere anche per il pregiudizio subito dal socio in ragione di illeciti riferibili a un *terzo*: un tale principio deve ritenersi operante anche là dove il danneggiante sia un soggetto che [...] non possa collocarsi all'interno dell'organizzazione in posizione di titolare di un organo o, se si vuole, di un ufficio privato".[65]

In this respect, the Italian Court of Cassation has repeatedly confirmed that Article 2395 is nothing but a specific application of a more general rule.[66] In greater detail, the Court has recognized "the exclusive entitlement of the corporation to claim compensation against the third party who by his own wrongful act has infringed upon the business and assets of the legal entity. Such an injury will tend to affect, to some extent, the economic interests of the shareholder, arising from his shareholding in the company, including a possible decrease in the value of his shares [...]. However, this is a mere reflection of the damage suffered by the corporation, which cannot be qualified as a direct and immediate consequence of the wrongful act, but rather as a *de facto* consequence, legally irrelevant".[67]

4.1.2. A Survey of Common Law Countries

Moving to common law jurisdictions, prior works have clearly shown that the prohibition of reflective loss claims might well be considered to form part of the fundamental principles of corporate law in Australia,[68]

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nel patrimonio della società e solo di 'riflesso' nel patrimonio del socio, ed è pertanto attratta nella sfera collettiva ai sensi degli artt. 2393 e 2393 *bis* c.c.; e una pretesa risarcitoria *individuale*, che sorge col prodursi di un danno rispetto al quale il patrimonio dell'ente sia rimasto 'indifferente', ed è conseguentemente attratta nella sfera personale dell'azionista ai sensi dell'art. 2393 c.c.".

[65] *Ibid.*, p. 11.

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

[67] Cassazione Civile, Sezioni Unite, Judgment No. 27346, 24 December 2009 (*italics added*). For a comment to the judgment, see A. FOTTICCHIA, 'Osservazioni in tema di illecito del terzo e danno riflesso nelle società di capitali', in *Giurisprudenza commerciale*, 2011, pp. 359-372; V. PINTO, 'Illecito del terzo, danno riflesso e legittimazione dell'azionista', in *Banca borsa e titoli di credito*, 2011, pp. 138-159.

[68] See High Court of Australia, *Gould v. Vaggelas*, (1985) 157 CLR 215; Supreme Court of Queensland (Court of Appeal), *Thomas v. D'Arcy*, 2005 QCA 68. See, also, OECD, 'Shareholder Claims for Reflective Loss in Investment State Dispute Settlement: A "Component-by-Component" Approach to Reform Proposals', December 2021, para. 14. For a critical view, see R. SCRUBY, 'Reflective Loss and the Policy of the Law', in *Australian Bar Review*, 2022, pp. 225-263.

Canada,[69] Cyprus,[70] Hong Kong, New Zealand,[71] Singapore,[72] South Africa,[73] the United Kingdom, and the United States of America.

The non-recoverability of reflective loss can be said to be firmly rooted in the United Kingdom,[74] despite some uncertainties related to its scope of application.[75] The rule, first sketched out in the famous *Foss v. Harbottle* judgment,[76] was then fully formulated in *Prudential Assurance v. Newman Industries*.

There, 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 dividend, because such a 'loss' is merely a reflection of the loss suffered by the company. The shareholder

[69] See Supreme Court of Canada, *Brunette v. Legault Joly Thiffault, s.e.n.c.r.l.*, [2018] 3 SCR 481; Court of Appeal (Ontario), *Meditrust HealthCare Inc v. Shoppers Drug Mart*, (2002) 61 OR (3rd) 786.

[70] G. ZOURIDAKIS, T. PAPADOPOULOS, 'A comparative analysis of derivative action in Cypriot company law: Comparison with English company law and the prospect of statutory reform', in *Maastricht Journal of European and Comparative Law*, 2022, pp. 62-84.

[71] Court of Appeal of New Zealand, *Christensen v. Scott*, [1996] 1 NZLR 273. See also New Zealand Companies Act 1993, s 169(2): "An action may not be brought […] to recover any loss in the form of a reduction in the value of shares in the company or a failure of the shares to increase in value by reason only of a loss suffered, or a gain forgone, by the company".

[72] P. KOH, 'The Shareholder's Personal Claim. Allowing Recovery for Reflective Losses', in *Singapore Academy of Law Journal*, 2011, pp. 863-889; A.K. KOH, 'Reconstructing the Reflective Loss Principle', in *Journal of Corporate Law Studies*, 2016, pp. 373-401. See Court of Appeal of Singapore, *Townsing v. Jenton Overseas Investment Pty Ltd*, [2007] SGCA 13.

[73] J.S. MCLENNAN, 'Companies, Shareholders and "Reflective Losses"', in *South African Mercantile Law Journal*, 2005, pp. 195-201; B.M. MUPANGAVANHU, 'Diminution in Share Value and Third-Party Claims for Pure Economic Loss: The Question of Director Liability to Shareholders', in *South African Mercantile Law Journal*, 2019, pp. 107-128. See High Court of South Africa, *De Bruyn v Steinhoff International Holdings N.V. and Others*, [2020] ZAGPJHC 145; Supreme Court of Appeal, *Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis and Others*, [2020] ZASCA 83.

[74] C. MITCHELL, 'Shareholders' Claims for Reflective Loss', in *The Law Quarterly Review*, 2004, pp. 457-479; V. KORZUN, 'Shareholder Claims for Reflective Loss: How International Investment Law Changes Corporate Law and Governance', in *University of Pennsylvania Journal of International Law*, 2018, pp. 189-254, at 204-206; B.J. DE JONG, 'Shareholders' Claims for Reflective Loss: A Comparative Legal Analysis', cit., p. 105 ff.; A. CHARMAN, J. DU TOIT, *Shareholder Actions*, cit., p. 187 ff.

[75] E. FERRAN, 'Litigation by Shareholders and Reflective Loss', in *Cambridge Law Journal*, 2001, pp. 245-247; G. 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*, 2003, pp. 137-152, *passim*; C. MITCHELL, 'Shareholders' Claims for Reflective Loss', cit., *passim*.

[76] Court of Chancery, *Foss v. Harbottle*, 2 Hare 461 (1843). For an overview of the case see A. SPOTORNO, '*Why Is the Rule in* Foss v. Harbottle *Such an Important One?*', in *Business Law Review*, 2018, pp. 190-197.

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".[77]

Such a rule was then firmly endorsed by the House of Lords in the, until recently, leading case on the subject matter, *Johnson v. Goore, Wood & Co.*,[78] in which it was confirmed that a shareholder is not allowed to commence proceedings so as to recover reflective losses.

There, Lord Millet clearly highlighted the rationale behind the principle, 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".[79]

A similar position as far as reflective losses are concerned is adopted in the United States of America.[80] In *Sutter v. General Petroleum Corporation*, the California Supreme Court found that a shareholder "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".[81]

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[77] Court of Appeal, *Prudential Assurance Co. Ltd. v. Newman Industries Ltd. and Others (No 2)*, cit. For a comment to the case, see M.J. STERLING, 'The Theory and Policy of Shareholder Actions in Tort', cit., pp. 468-491.

[78] House of Lords, *Johnson v. Gore, Wood & Co.*, [2000] UKHL 65.

[79] *Ibid.*

[80] P. KOH, 'The Shareholder's Personal Claim. Allowing Recovery for Reflective Losses', cit., paras 33-35; V. KORZUN, 'Shareholder Claims for Reflective Loss: How International Investment Law Changes Corporate Law and Governance', cit., pp. 201-204.

[81] California Supreme Court, *Sutter v. General Petroleum Corp.*, 28 Cal.2d 525 (1946). See also US District Court for the Southern District of Texas, *FDIC v. Howse*, 802 F. Supp. 1554 (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

A clear reasoning on the prohibition of reflective loss claims by shareholders was provided in *Alford v. Frontier Enterprises* by the 1st Circuit of the United States Court of Appeals, according to which the claimant was "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 [shareholder] 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".[82]

To put it in another way, a shareholder cannot take advantage of the limited liability regime afforded by its corporation in order to safeguard his own wealth while, at the same time, requiring domestic courts to ignore the corporate veil for the purpose of directly recovering the share drop in value resulting from the injury suffered by the corporation. Indeed, such a course of action would basically mean to allow the shareholder to benefit from or disregard the corporate veil to his own liking, thus putting at risk the capital maintenance and the interest of third parties in the assets of the corporation.

Again, 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".[83] The Court identified two main rationales behind such a prohibition: on the one hand, judicial economy, inasmuch as the corporation, by commencing proceedings in its own name, if successful, will automatically increase the value of all the shares, thus avoiding a multiplicity of claims brought individually by the shareholders;[84] on the other hand, the protection of all the creditors of the corporation, who would practically see the shareholders preferred to them, were reflective loss claims admissible.[85]

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personal damages caused solely by wrong done to the corporation. [...] Only a corporation, not its shareholders, can complain of injuries sustained by a corporation".

[82] US Court of Appeals – First Circuit, *Alford v. Frontier Enter., Inc.*, 599 F.2d 483 (1979).

[83] US Court of Appeals – Fifth Circuit, *Gaubert v. U.S.*, 885 F.2d 1284 (1989).

[84] *Ibid.*, para. 32: "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".

[85] *Ibid.*: "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

This rule has been recently restated by the Court of Appeals for the Federal Circuit in *Starr v. United States*.[86] In this case, Starr International Company, one of the largest shareholders of the American International Group, commenced proceeding against the Government of the United States of America arguing that the action of the Federal Reserve Bank of New York in the context of the 2008 financial crisis amounted to an illegal exaction. While concluding that the first instance court had correctly deemed the course of action of US authorities unlawful, the Court of Appeals refused to decide on the merits, concluding that: "the shareholders […] lack standing to pursue the equity-acquisition claims directly, as those claims belong exclusively to AIG [*i.e.*, the corporation]".[87]

The same approach is also adopted in Hong Kong,[88] where domestic courts have consistently denied the legal standing of shareholders to recover reflective losses. In *Landune International v. Cheung Chung Leung*, the High Court was called to decide on "whether [the Judge of first instance] was right to hold that the Company did not have a […] cross-claim against the Petitioner because the Company's loss was a reflective loss".[89] In concluding that the claimant could not sue the defendant in order to directly recover the damages sustained by the corporation, the Court affirmed that the 'no reflective loss' 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".[90]

Similarly, in *Waddington v. Chan Chun Hoo*,[91] the Court of Final Appeal, in rejecting the request of a parent corporation to recover damages incurred by the subsidiary, stated that: "[a]ny 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*".[92]

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the corporate structure and effectively preference themselves at the expense of the other persons with a superior financial interest in the corporation".

[86] US Court of Appeals – Federal Circuit, *Starr International Company, Inc. v. United States*, 856 F.3d 953 (2017).

[87] *Ibid.*

[88] R. CHEUNG, 'The No Reflective Loss Principle: A View from Hong Kong', in *International Company and Commercial Law Review*, 2009, pp. 223-229; S.H. GOO, 'Multiple Derivative Action and Common Law Derivative Action Revisited: A Tale of Two Jurisdictions', in *Journal of Corporate Law Studies*, 2010, pp. 255-264; J. CHAISSE, L.Z. LI, 'Shareholder Protection Reloaded. Redesigning the Matrix of Shareholder Claims for Reflective Loss', cit., *passim*.

[89] Hong Kong Court of Appeal, *Landune International Ltd v. Cheung Chung Leung Richard*, [2006] HKCA 5, para. 18.

[90] *Ibid.*, para. 19.

[91] Hong Kong Court of Final Appeal, *Waddington Ltd v. Chan Chun Hoo Thomas and others*, [2008] (FACV 15/2007).

[92] *Ibid.*, cit., para. 74. Such a prohibition was recently and finally reiterated in Hong Kong

4.1.3. Making Order of the Arguments: Why Are Reflective Loss Claims Barred? A Critical Appraisal

In the last Section, an apparently straightforward conclusion has been reached as far as the protection of shareholders in respect of measures affecting the corporation is concerned: domestic legal systems, as a general rule, prohibit the shareholder from recovering the resulting share drop in value. The analysis, however, cannot be deemed to have answered to all the relevant questions.

Notably, the rationale – or, possibly, the rationales – according to which municipal law has generally affirmed the 'no reflective loss' principle shall be further investigated. Indeed, while some insights can certainly be gained from all the pieces of legislation and judgments discussed above, there is much need to figure out the reason why the economic interests shareholders possess within the assets and business of their enterprise does not accrue to the status of protected rights under corporate law. To this effect, it is necessary to make order of the arguments that both jurisprudence and doctrine have traditionally advanced in furtherance of such rule.

On a close inspection, they can all be situated into three main strands, which deny that shareholders possess an independent right in respect of an injury suffered by the corporation, and thus might claim to recover reflective losses, on the basis of: *i*) the lack of a causal link between the wrongful act and the share drop in value; *ii*) the legal personality of the corporation, separate from that of the shareholders; or *iii*) the existence of compelling legal policy grounds proper to the corporate law system.

Moving from the first, there is a traditional approach that affirms the non-recoverability of reflective losses, and thus the prohibition to commence proceedings to this effect, as a direct consequence of the requirement of a causal link, to be fulfilled in all torts or contractual wrongs.[93] In other words, the prohibition of reflective loss claims would find its roots in one of the fundamental criteria of the law of civil responsibility. To the extent that the share drop in value suffered by shareholders is not directly caused by the conduct of the wrongdoer, but it is actually only a mere reflection of the loss suffered by the corporation (that is, the one being caused by the wrong), reflective loss claims would be barred. To sum it up, from this perspective, reflective loss would not represent a damage *stricto sensu*.

Against such a position, two counter-arguments can be employed, so as to demonstrate its possible fallacy.[94] To begin with, the very idea according to

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Court of First Instance, *Power Securities Company Limited v. Sin Kwok Lam and others*, [2019] HKCFI 2920.

[93] See V. PINTO, *La tutela risarcitoria dell'azionista fra «danno diretto» e «danno riflesso»*, cit., p. 58 and the references therein provided.

[94] J. LEE SUET LIN, 'Barring Recovery for Diminution in Value of Shares on the Reflective Loss

which the reflective loss would not be recoverable due to the lack of a causal link seems an overly formalistic approach.[95] There are no doubts that shares are owned by shareholders, thus forming part of their wealth. Similarly, one can hardly deny that the drop in value of the shares factually stems from the conduct of the tortfeasor.[96] In this respect, scholarship disagrees on whether there is only a single, legally relevant, damage having consequences on the assets of different subjects (the corporation and the shareholders),[97] or rather the unlawful course of action does simultaneously cause a damage to both the assets of the *personne morale* (directly) and the properties of the shareholders (indirectly).[98] Whatever the point of view one adopts, it is however unclear why the damage would be caused by the wrong if it is the corporation to seek reparation, while the loss would not be caused by the tortfeasor if compensation is instead sought by the shareholders.

On the other hand, if one were to accept that the prohibition follows from the lack of a causal link, this would mean that, whenever municipal law recognizes possible exceptions to the no reflective loss principle, they do not only derogate to the rule itself, but also to the requirement of a causal link. Put it otherwise, this would mean that domestic legal orders allow a person to claim for compensation against another person despite a nexus between the damage suffered by the former and the conduct of the latter being missing. Such an approach cannot be accepted light-heartedly, given the repercussions it would have on the

Principle', in *Cambridge Law Journal*, 2007, pp. 537-558, at 557; C. MITCHELL, 'Shareholders' Claims for Reflective Loss', cit., p. 469; M.J. STERLING, 'The Theory and Policy of Shareholder Actions in Tort', cit., *passim*.

[95] Supreme Court, *Sevilleja v. Marex Financial Ltd*, [2020] UKSC 31: "As Lord Hutton observed in Johnson at p 54, causation does not provide a satisfactory explanation. One difficulty is that the failure of the company to sue the wrongdoer, or its decision to settle with him for less than the full value of its claim, may be the result of its impecuniosity, caused by the defendant's wrongdoing. In those circumstances, the company's failure to recover its loss can hardly be regarded as interposing a *novus actus interveniens* between the defendant's wrongdoing and the shareholder's loss".

[96] H. DE WULF, 'Direct shareholder suits for damages based on reflective losses', cit., p. 1545.

[97] M. LIBERTINI, G. SCOGNAMIGLIO, 'Illecito del terzo e legittimazione del socio all'azione risarcitoria', in *Rivista di diritto privato*, 2002, pp. 405-416, at 409: "l'autore dell'illecito non possa essere comunque condannato a risarcire due volte il medesimo danno"; V. PINTO, *La tutela risarcitoria dell'azionista fra «danno diretto» e «danno riflesso»*, cit., p. 59: "In effetti, ove si consideri che il «danno riflesso», sia che lo si guardi *a latere socii* sia che lo si guardi *a latere societatis*, rappresenta in ogni caso un *unico* danno, non può sostenersi che il pregiudizio sia conseguenza «immediata e diretta» del comportamento degli amministratori solo se destinataria del risarcimento è la società e non lo sia, invece, se beneficiario del risarcimento è il socio. In altri termini, nella misura in cui il «danno riflesso» dell'azionista non è un pregiudizio giuridicamente diverso da quello immediatamente prodottosi nel patrimonio sociale, il nesso eziologico fra comportamento illecito e danno […] non può venire meno quando la *Zielrichtung* della compensazione sia deviata a vantaggio del socio".

[98] H. DE WULF, 'Direct shareholder suits for damages based on reflective losses', cit., p. 1545. who comes to the same conclusion (*i.e.*, the reflective loss being caused by the wrongful act), while disagreeing on the identity of the damage caused.

entire law of civil responsibility. Indeed, given the role played by causation in the system of civil responsibility, it seems appropriate to consider other possible theories that do not require a derogation to such a pivotal role.

A second well-established approach to the prohibition of reflective loss claims founds the latter on the legal personality enjoyed by corporations and, notably, on the corporate veil, which ensures the separation between the wealth of the shareholders and that of the corporation.[99] According to this, the no reflective loss rule would be the 'other side of the coin'. Since corporations enjoy a separate personality, they are the exclusive right-holders and duty-bearers in all their legal relationships. As a logical consequence, therefore, shareholders are not entitled to any form of remedy against wrongs affecting the assets of the enterprise in which they own shares. This would be confirmed by their limited liability in respect of obligations contracted by the legal entity.[100] In this sense, to the extent that the personal wealth of the shareholders cannot be seized for debts of the corporation, the same shareholders would not be entitled to claim for reparation for a wrong directed against the corporate business.

Against such an approach, two arguments shall be advanced to counter the assumption that the non-recoverability of reflective loss is a corollary of the legal personality. On the one hand, this construction has been criticized for overestimating the relevance of legal personality for the purposes of the law of civil responsibility.[101] To conclude that the no reflective loss rule is a direct and neces-

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[99] A. VIGHI, *I diritti individuali degli azionisti*, Parma, 1902, p. 178. In this sense, Cassazione Civile, Judgment No. 2087, 14 February 2012, par. 3: "the thesis according to which the shareholder is entitled to bring an action against third parties that have caused damage to the corporation […] is at odds with the fundamental principle under which, to the extent that corporations […] have a separate legal personality […], there is a clear separation between the corporate assets and those of the shareholders".

[100] For a historical account of the relationship between legal personality and limited liability, see R. HARRIS, 'A new understanding of the history of limited liability: an invitation for theoretical reframing', in *Journal of Institutional Economics*, 2020, pp. 643-664, at 650: "What may have misled some scholars are the manifestations of the separate legal personality of the corporation. The implication of the legal personality attribute of the corporation was that the corporation formed asset partitioning, in the sense of owning assets and governing them. But without debt finance, without a procedure for dissolving insolvent corporations, without the legal ability to determine whether shareholders would bear liability in insolvency, owner shielding was a non-issue and limited liability in the modern sense could not yet exist. In this era in which the legal personality attribute created asset partitioning, the level of liability of shareholders could not be tuned. The conflict of interest and related agency problem between creditors and equity investors was not yet created. The distinction between adjusting and non-adjusting creditors was not yet formed. One could not yet envision a liability bearing shareholder or a veil piercing that would subject shareholders to liability towards creditors".

[101] V. PINTO, *La tutela risarcitoria dell'azionista fra «danno diretto» e «danno riflesso»*, cit.; M.J. STERLING, 'The Theory and Policy of Shareholder Actions in Tort', cit. In this sense, see also H. DE WULF, 'Direct shareholder suits for damages based on reflective losses', cit., p. 1546, according to whom: "Legal personality is a technique invented to facilitate groups of people and/or assets to intervene in legal life […] and means only that an organisation or set of assets is recognized as a

sary effect of the entity being a *personne morale* would indeed actually mean to derive, from legal personality, normative consequences (*i.e.*, the prohibition) other than those provided by the law itself (*i.e.*, the limited liability).[102]

On the other hand, to conclude that the prohibition is nothing but a necessary consequence of the fact that the corporation acquires rights and obligations in its own name would mean to deny reparation being awarded to shareholders in any possible circumstances. Once again, no exceptions should be admitted. Otherwise, one would come to the conclusion that any derogation to the prohibition of reflective loss claims imply that shareholders are recovering a damage they should not be entitled to.[103]

In this author's view, therefore, the foundation of the prohibition cannot be said to lie in the legal personality of the corporation, which recognizes the latter as possessing its own entitlements, without nevertheless regulating their interplay with the legal position of the shareholders. To this effect, it has been convincingly pointed out how "the fact that a company acquires rights and obligations in its own right as an independent person does not necessarily prevent individuals from acquiring a cause of action in respect of rights which they have from the same series of acts which give the company a cause of action".[104]

As a matter of principle, therefore, there is no reason excluding that the drop in value, considered through the lens of the property rights that shareholders enjoy as owners of their shares (*i.e.*, an intangible economic asset), cannot be recovered on par with the damage suffered by the corporation itself.[105]

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legal subject just like a natural person. […] Legal personality does *not* entail, though, that if damage is inflicted on the assets of the legal person, this cannot at the same time constitute distinct damage to the assets of the members of the legal person". While agreeing on the need not to overestimate legal personality, the present author does not share however the conclusion that the prohibition to recover reflective loss constitutes a limitation of a personal right of the shareholders (*Ibid.*, p. 1157).

[102] J. LEE SUET LIN, 'Barring Recovery for Diminution in Value of Shares on the Reflective Loss Principle', cit., p. 553: "A share may be regarded as a right of participation in the company on the terms of its memorandum and articles or a form of claim on the company's profits and capital. The concept of corporate personality does not necessarily lead to the conclusion that only the company may recover depletion of its assets caused by the wrongdoer's breach of duty and the shareholder may not bring a personal action to recover diminution in the value of his shares even though the wrongdoer owes him a duty".

[103] However, *cfr.* H. DE WULF, 'Direct shareholder suits for damages based on reflective losses', cit., p. 1546: "Allowing [shareholders] to sue for damages is not allowing them to exercise claims belonging to the legal person because the assets of the legal person were damaged; it simply means that one allows members to sue because they personally suffered damage, even though the legal person also suffered damage through the same negligent act".

[104] M.J. STERLING, 'The Theory and Policy of Shareholder Actions in Tort', cit., p. 474.

[105] Z. DOUGLAS, *The International Law of Investment Claims*, cit., p. 717: "A shareholder's relationship to the company has proprietary elements and shares as an item of property have a marketable value distinct from the assets of the company. If damage is caused to that property by a third party, then the shareholder has in this sense suffered a personal loss. In short, *there is no ab-*

Coming to the third and last approach, it is argued that the prohibition of reflective loss claims is firmly rooted in legal policy. Accordingly, it is neither "because the law does not recognise the [reflective] loss as a real loss"[106] nor because the legal personality of the corporation precludes shareholders from acquiring a cause of action in respect of a drop in value of the shares. It is because there are legal policy reasons to this effect. In other words, even if nothing would theoretically prevent a reflective loss from being recovered – that is to say, no legal obstacle in principle can be found –, the prohibition is the result of a free choice of municipal legal orders. A choice, it will be demonstrated, that is based on solid grounds. Let's proceed to identify and spell out them.

The first concern that goes against attributing shareholders a right in respect of an injury against the corporation and, thus, permission to bring claims for reflective loss is that of double recovery. Multiple overlapping claims brought by the legal entity and its *associés*, or by different *associés*, could easily bring to a situation where compensation is awarded more than once for the same damage.[107] At the same time, to recognize reflective loss as being recoverable could also mean that the tortfeasor will be subjected to multiple claims for the same act, a situation that could easily amount to an abuse.[108]

Another concern related to the possibility for shareholders to pursue reflective loss claims is the alteration of the regular governance of the corporation in which they own shares.[109] While it is true that, from the outside, an enterprise appears as a monolith, it is worth recalling that the corporation might be actually composed of dozens, if not hundreds, of shareholders. This is the reason why day-by-day activities are managed by directors.

Among the decisions they are entrusted with, there are those concerning litigation. From this perspective, it is apparent that allowing shareholders to bring reflective loss claims actually "undermines centralized management by giving […] shareholders the ability to second-guess management on questions of when to litigate, when to settle, and how much to settle for".[110] The directors are thus

solute doctrinal imperative to characterise the cause of action as vesting in the company and the company alone, but the 'scope and consequences' of any right vesting in the shareholders must be carefully assessed due to the problems previously enumerated; namely the potential for multiplicity of actions and double recovery and prejudice to the creditors of the company" (*italics added*).

106 Hong Kong Court of Final Appeal, *Waddington Ltd v. Chan Chun Hoo Thomas and others*, cit., para. 74.

107 J. LEE SUET LIN, 'Barring Recovery for Diminution in Value of Shares on the Reflective Loss Principle', cit.

108 H. DE WULF, 'Direct shareholder suits for damages based on reflective losses', cit., p. 1551.

109 D. GAUKRODGER, 'Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law', in *OECD Working Papers on International Investment*, 2014/02, pp. 1-33.

110 J. ARATO, K. CLAUSSEN, J. LEE, G. ZARRA, 'Reforming Shareholder Claims in Investor-State Dispute Settlement', in *Journal of International Dispute Settlement*, 2023, pp. 242-258, pp. 6-7.

deprived of one of their main functions,[111] inasmuch as they hardly control anymore the litigation of the *personne morale*.[112] Moreover, the "uncertainties associated with shareholder claims may complicate settlement negotiations",[113] to the extent that, whatever the agreement reached with the legal entity, shareholders might commence proceedings for the same course of action.

The final concern aims at the protection of corporate creditors.[114] Where a legal entity becomes insolvent as result of a wrongdoing, the creditors would take advantage of a claim brought by the corporation, since any recovery enlarges the pool of assets available for satisfaction of debts. Contrariwise, if the shareholders were allowed to sue for reflective losses, this might affect a corporate claim, since the tortfeasor, as a matter of principle, cannot be requested to pay damages twice for the same act.[115]

From this point of view, reflective loss claims not only possibly alter the

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[111] See F.A. 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*, 1985, pp. 265-309.

[112] US Court of Appeals – First Circuit, *In Re Dein Host, Inc., Debtor. Joseph D. Pignato v. Dein Host, Inc.*, 835 F.2d 402 (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". See also Court of Appeal of Singapore, *Miao Weiguo v. Tendcare Medical Group Holdings Pte Ltd (formerly known as Tian Jian Hua Xia Medical Group Holdings Pte Ltd) (in judicial management) and another*, [2021] SGCA 116, para. 202: "The reflective loss principle also ensures that the corporate management principle is maintained. To allow shareholders to claim for diminution in the value of their shareholdings or in the distributions from a company would undermine the corporate management principle as it would prevent the company from dealing with the wrongs done to it in the manner that it deems fit".

[113] GAUKRODGER D., 'Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency', in *OECD Working Papers on International Investment*, 2013/03, pp. 1-60, at 33, available at www.oecd.org.

[114] K.J. HOPT, 'Comparative corporate governance: the state of the art and international regulation', cit., pp. 28-63, notably 28-29. See also P. DAVIES, *Introduction to Company Law*, 3rd edition, Oxford, 2020, pp. 279-280: "The rule can be defended on grounds of creditor protection (but less plausibly if the company has distributable reserves)".

[115] In this sense, despite discussing the different hypothesis in which the shareholder has sold its shares before the corporation actually brought its claim, see: M. LIBERTINI, G. SCOGNAMIGLIO, 'Illecito del terzo e legittimazione del socio all'azione risarcitoria', cit., p. 415: "Ora, la premessa – già ricordata – è quella secondo cui il danneggiante non può esser costretto a risarcire il danno più di una volta, né condannato ad un risarcimento maggiore del danno effettivamente inferto. Il corollario è che il risarcimento eventualmente conseguito dall'ex-socio deve essere sottratto a quello che sia eventualmente, in un momento successivo, attribuito alla società, avendo pure questa – in ipotesi – azionato la pretesa risarcitoria che le spettava. Allora, ammettere la disaggregazione del danno in capo all'ex-socio […] significa accettare che la pretesa risarcitoria della società sia commisurata all'intero danno subito *meno* il risarcimento già accordato a colui che ne è uscito".

ranking of claims in case of insolvency,[116] when creditors are preferred to the shareholders, but might also actually deprive the former of any chance to see corporate debts somehow repaid. Indeed, in accordance with domestic law, creditors 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 corporate veil, which generally shields shareholders from being sued for those legal relationships concerning the corporation. Such considerations could even encourage shareholders in pursuing reflective loss claims in order to maximize their gain when liquidation or bankruptcy of the juridical person is foreseeable.

Against this background, in this author's view, the third approach is the one to be preferred. First, it effectively explains why reflective loss claims are prohibited, affirming such a rule on crystal-clear policy grounds. As pointed out by Paul Davies, indeed, "[t]his is not just a rule against double recovery": quite the opposite, the non-recoverability of reflective losses also avoids multiple proceedings, upholds corporate governance and ensures protection of creditors.[117] In other words, the rule upholds various interests which can easily be said to deserve protection.

Second, this approach does not risk creating a clash with pivotal rules of the law of civil responsibility, nor it derives any normative consequence from legal personality which is not provided for by the law. Quite the opposite, by identifying concrete policy concerns, it allows approaching the prohibition of reflective loss with a certain degree of flexibility, when required. Indeed, if a sacrifice might be required to shareholders, so as to ensure the well-functioning of the corporation and the protection of the rights of third parties, one can argue that exceptions to such a rule can well be accepted when different needs have to be ensured.

4.1.4. Confirming the Policy Approach to Reflective Loss Claims: Some Exceptions in Municipal Law

To confirm the approach according to which the prohibition of reflective loss claims is firmly rooted in legal policy, rather than in a dogmatic interpretation of the rules concerning the law of civil responsibility, a look at some exceptions in municipal law can prove decisive. Notably, it is a matter of understanding under which circumstances and, more importantly, according to what ra-

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[116] J. ARATO, 'The Elastic Corporate Form in International Law', in *Virginia Journal of International Law*, 2022, pp. 383-428, at 403: "The central policy concern is that direct shareholder recovery for reflective loss undermines entity shielding, and thus separate legal personality. It enables shareholders to siphon off recovery rightly belonging to the injured company (eroding liquidation protection) and thereby jump ahead of creditors and other shareholders (circumventing creditor priority)".

[117] P. DAVIES, *Introduction to Company Law*, cit., p. 280.

tionales domestic systems allow shareholders to bring an action in their own name to seek compensation for the drop in value of their shares.

An interesting case to this effect can be located within the Italian legal order, in which the general prohibition of reflective loss has not only been traditionally upheld, but it has also sometimes been grounded in the lack of a causal link or in the legal personality of corporations. However, a relatively new provision of the Civil Code seems running against such a construction.

Under Article 2497, as amended in 2003, those legal entities "which, in carrying out direction and coordination activities of [other] companies, act in their own entrepreneurial interest or in the interest of another in violation of principles of correct corporate and entrepreneurial management of such companies, are directly liable towards the shareholders of the latter, for the prejudice caused to the profitability and *the value of the shares*".[118]

In other words, whenever a parent corporation – in exercising its power to direct and coordinate – acts in contravention of the interests of its subsidiary, it can be sued by the shareholders of the latter for the damage caused to the value of their shares.[119] In such a case, therefore, shareholders are entitled to claim for reflective loss. No doubts indeed can be raised to this effect: "il pregiudizio alla redditività e al valore della partecipazione sociale ex art. 2497[1], c.c. è un danno riflesso, che transita cioè per il patrimonio della dominate".[120]

Therefore, the fundamental requirement for an action under Article 2497 to be brought is that the parent corporation has caused a damage to the assets of the subsidiary, not to the shareholders of the latter. Facing such a scenario, one cannot but wonder the rationale behind such a provision. In this author's view, it is a quite apparent one. Indeed, to the extent that the subsidiary is under the control of the parent corporation, to maintain the prohibition of reflective loss claims would arguably deprive the shareholders of the former of any chance to obtain reparation for the share drop in value.

This is so for two main reasons: *i*) the parent corporation could exert its control over the subsidiary so as to avoid any action to be brought directly by the latter; and *ii*) even if a claim were brought and successful, reparation would still be paid to the subsidiary, which is and remains under the control of the parent

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118 Italian Civil Code, Article 2497 [*italics added*].

119 For a critical analysis, see A. BADINI CONFALONIERI, R. VENTURA, 'Art. 2497', in G. COTTINO, G. BONFANTE, O. CAGNASSO, P. MONTALENTI (eds), *Il nuovo diritto societario*, vol. III, Bologna, 2004, pp. 2150-2184; P. DAL SOGLIO, 'Art. 2497', in A. MAFFEI ALBERTI (ed.), *Il nuovo diritto delle società*, vol. III, Padova, 2005, pp. 2302-2354; N. RONDINONE, 'Gruppi di società. Direzione e coordinamento', in V. DONATIVI, *Trattato delle società*, vol. III, Torino, 2022, pp. 1342-1466, at 1389-1411.

120 L. BENEDETTI, 'Responsabilità da etero-direzione abusiva della capogruppo. Natura contrattuale o aquiliana? Eventuale carattere sussidiario?', in *Giurisprudenza commerciale*, 2013, pp. 507-547, at 546.

corporation. Accordingly, the general rule whereby shareholders do not possess an independent right in the business of the enterprise in which they own shares, thus being exclusively up to the corporation to bring a claim, would possibly result in a situation where the loss cannot *de facto* be recovered by anyone.

Therefore, the exception enshrined in Article 2497 of the Italian Civil Code, in derogating the rule on the non-recoverability of reflective loss, ensures that shareholders are not left without any remedy against the wrongful action affecting (directly) their corporation and (indirectly) their economic interests within the latter. In doing so, it is contended that Article 2497 confirms the policy-oriented nature of the prohibition to recover reflective loss, opening to different solutions when different needs are deemed to deserve protection.

Another jurisdiction deserving close scrutiny is the United Kingdom, whose case law concerning the scope of the no reflective loss rule as well as the admissibility of exceptions to that is particularly astonishing. In effect, despite the continuous restatement of such a prohibition, which has been thus considered well-settled in the British legal order, its outer limits are rather unclear.

Suffice it to mention that the very nature of the rule – a substantive provision of corporate law, not a procedural one – has been clarified by the Supreme Court only in 2020.[121] Against this background, any attempt to precisely single out the exceptions and their functioning might result in a rather unfruitful review of contradictory decisions. What matters for the purposes of our analysis, however, is bringing under the spotlight the rationale behind them, so as to identify the approach followed by judges in the United Kingdom.

Such a long story of exceptions probably commences with *Giles v. Rhind*, in 2002.[122] There, the Court of Appeal of England and Wales came to the conclusion that the prohibition of reflective loss claims could not be deemed to preclude a shareholder from commencing proceedings, in his own name, against the tortfeasor whenever, as a consequence of the wrongful act of the latter, the corporation was factually or legally unable to vindicate its rights.

The rationale behind such a decision was clearly spell out: "The policy consideration to which […] Lord Millet is referring in that passage [in *Johnson v Gore*] is the need to avoid situation in which the wrongdoer cannot safely compromise the company's claim without feat that he may be met with a further claim by the shareholder in respect of the company's loss. […] Similar considerations apply where the company's claim is settled by the directors. […] If that is a correct analysis […] the passage presents no difficulty in the case where the company has not settled its claim, but has been forced to abandon it by reason of impecuniosity attributable to the wrong which has been done to it. In such a case the policy considerations to which Lord Millet referred are not engaged.

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[121] Supreme Court, *Sevilleja v. Marex Financial Ltd*, cit.

[122] Court of Appeal, *Giles v. Rhind*, [2003] 2 WLR 237.

And it is difficult to see any other consideration of policy which should lead to the conclusion that a shareholder […] who has suffered loss by reason of a wrong which, itself, has prevented the company from pursuing its remedy should be denied any remedy at all".[123]

Accordingly, the claim for reflective losses brought by the shareholder against the director, which had violated his duties towards the corporation, was found admissible since there was no risk of double compensation, multiple proceedings or double jeopardy. At the same time, instead, there was a strong need to ensure an interest worthy of protection – *i.e.*, not to leave shareholders without any remedy in a circumstance where the corporation could not vindicate its own rights – to be pursued. Despite the exception was then overruled by the Supreme Court in *Sevilleja v. Marex*,[124] to the extent that a recent decision of the High Court of England and Wales called it "dead for all intents and purposes",[125] the decision is still of high value to understand the foundation of the rule in legal policy considerations and, as a consequence, the policy-oriented approach of British judges to the exceptions.

At the same time, one shall not overlook the whole discussion concerning the extension of the prohibition to subjects other than the shareholders, such as creditors and employees. In *Gardner v. Parker*,[126] the Court of Appeal ruled that the non-recoverability of reflective loss also affected creditors and employees, who could not commence proceedings for any damage they suffered as a consequence of a wrong against the corporation. Put it otherwise, a creditor or employee – who could not receive payments from a corporation due to the a wrong suffered by the latter – was not entitled to start proceedings against the tortfeasor. The underlying reason was the need to avoid double recovery and the chance to recover the reflective loss through the corporation, had the latter autonomously enforced its rights. Once again, it was a matter of policy grounds.

The scope of the prohibition so as to include creditors was also challenged in *Sevilleja v. Marex*, in which the Supreme Court dismissed the line of arguments followed by several tribunals ever since *Gardner v. Parker*. The highest British court, indeed, came to the conclusion that the rule did not apply to creditors since they are not "members of the company and so cannot be said to have entered into organisational obligations which restrict their capacity to recover overlapping losses".[127] As far as shareholders are concerned, the majority in-

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[123] *Ibid*.

[124] Supreme Court, *Sevilleja v. Marex Financial Ltd*, cit.

[125] High Court, *Breeze & Wilson v. Chief Constable of Norfolk*, [2022] EWHC 942 (QB).

[126] Court of Appeal, *Gardner v. Parker*, [2004] 2 BCLC 554.

[127] P. DAVIES, 'Reflecting on "Sevilleja v Marex Financial", in *Oxford Business Law Blog*, 5 August 2020, available at blogs.law.ox.ac.uk.

stead concluded that the "goal of protecting the autonomy of the company"[128] was the key to address the issue.

At a first glance, this might appear an argument based on the assumption that the no reflective loss rule is a corollary of the legal personality bestowed upon corporations.[129] This is not the case, in our view. Indeed, the majority went on by explaining that the autonomy rationale concerned the protection of corporate creditors, the need to avoid double recovery, and the need to safeguard the control powers of the board of directors.[130] The fact that the no reflective loss rule is grounded upon legal policy grounds, rather than a dogmatic approach to corporate legal personality, is then confirmed by the Supreme Court, which stressed how shareholders, facing the autonomy of corporations, may resort to other instruments, such as derivative actions, while the same does not hold true in respect of creditors.[131]

4.2. Derivative Actions in Municipal Law: A Corporate-Oriented Solution

If it is true that, as a general rule, claims for reflective loss are prohibited in domestic legal orders, subject to few and narrow exceptions, one cannot but wonder whether corporate law provides for instruments through which the shareholders can enforce claims, in their own name, on behalf of the corporation in which they own shares.

To put it differently, the question attains to the existence of a legal tool pursuant to which shareholders are entitled to personally start proceedings to redress any prejudicial situation for their corporation or, even more, recover damages that the legal person might have suffered. In such a way, shareholders would then be granted the possibility of asserting the rights of the enterprise, indirectly protecting their own economic interests in its business.[132] In short, the question shall be answered in the affirmative.

Precisely to this end, indeed, an increasing number of domestic legal orders have introduced, within their corporate law, the derivative action. This is a remedy pursuant to which, whenever a wrong affects the corporation, "a (group of minority) shareholder(s) (otherwise barred from litigating directly in their own

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[128] *Ibid*.

[129] For a critical appraisal of this theory, *supra*, Section 4.1.3.

[130] J. HARDMAN, '*Sevilleja v Marex Financial Ltd*: Reflective Loss and the Autonomy of Company Law', in *Modern Law Review*, 2022, pp. 232-246.

[131] Supreme Court, *Sevilleja v. Marex Financial Ltd*, cit.

[132] A.M. SCARLETT, 'Shareholder Derivative Litigation's Historical and Normative Foundations', in *Buffalo Law Review*, 2013, pp. 832-908; A. VAN AAKEN, 'Shareholder Suits as a Technique of Internalization and Control of Management. A Functional and Comparative Analysis', in *Rabel Journal of Comparative and International Private Law*, 2004, pp. 288-327.

name and on their own behalf, by virtue of the no reflective loss principle and the principle that only the company may litigate its claims through its competent organs […]) may be allowed to seek remedy on behalf of the company".[133]

In this respect, the first issue concerns the reason why such an instrument might be necessary at all. Indeed, one would expect that a corporation which has incurred in a prejudicial situation or has suffered damage will commence proceedings to assert its rights. Nonetheless, there might be several reasons why the *personne morale* refrains from doing so: *i*) a conflict of interests between the board of directors and the corporation itself, were the damages be caused by a wrong of the same people managing the business; *ii*) the involvement of controlling shareholders in the wrong that infringed upon the legal entity, the so-called 'fraud on the minority'; or *iii*) a policy-driven free choice of the directors not to pursue litigation, deemed it risky, worthless or detrimental to the best interests of the corporation.

The second issue then regards the result that shareholders might pursue through these instruments. On the one hand, derivative actions can be used so as to claim compensation on behalf of the corporation for any damage the latter suffered. They can thus consist of monetary claims. From this point of view, they represent a powerful tool in the hands of shareholders to ensure their economic interests within the business of the enterprise. Indeed, it has been said that derivative action "confer *a right on shareholders to protect the value of their shares* by giving them a right to sue and recover on behalf of the company".[134] On the other hand, derivative action may also provide a way to rescind decisions, whether they run against the interests of the corporation or are aimed at damaging the minority shareholders.

The third issue finally concerns the scope of application of derivative actions, which have been traditionally conceived as instrument to 'externalize' internal conflicts among different stakeholders. In a nutshell, they mainly consist of judicial remedies through which a stakeholder, such as a group of shareholders, may be entitled to bring claims against those who are directly involved in the governance of the legal persons: corporate officers, board members or directors. It is far from being obvious, instead, that a derivative action can be brought against third parties, who are external to the structure of the enterprise.

Against this background, it is thus necessary to carry out a comparative analysis, taking into account both civil and common law jurisdictions, in order to ascertain to what extent, against whom, and on which grounds, domestic legal orders permit shareholders to bring a derivative action on behalf of the corporation in which they own shares.

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[133] G. ZOURIDAKIS, 'Introducing Derivative Actions in the Greek Law on Public Limited Companies: Issues of Legal Standing and Lessons from the German and UK Experience', cit., p. 272.

[134] High Court, *Konamaneni v. Rolls Royce Industrial Power (India) Ltd* [2002] 1 W.L.R. 1269, p. 1284 (*italics added*).

4.2.1. A Survey of Civil Law Countries

Starting with civil law jurisdictions, "countries have historically been divided as to whether they even provided for a derivative suit in the narrow sense".[135] Indeed, while France and Switzerland provide that a derivative suit can be brought individually by any shareholder on behalf of the corporation, the situation is quite different if one looks at Austria, Belgium, Germany, Italy and Spain, where enforcement has been traditionally conceived as a collective right of shareholders.[136]

Under this collective approach, only if the majority blocked a lawsuit, a minority that reaches a certain (variable) percentage is then entitled to bring the claim on behalf of the corporation.[137] Some jurisdictions, eventually, do not provide for such a mechanism: Greece and the Netherlands stand out as a clear example to this effect, despite the latter being well-known as a corporate friendly legal order.

If one looks at Italy, for instance, derivative actions were first introduced in 1998, although only for those corporations listed on the stock market. Such a mechanism was then extended to all the *società per azioni* in 2003. In this respect, Article 2393-*bis* of the Civil Code provides that shareholders who represent at least 20 percent 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 the already mentioned Article 2393 – which regulates the action brought by the legal entity itself (*i.e.*, by resolution of the general meeting) against its own directors –,[139] it is possible to ascertain that, if the claim is successful, compensation is to be paid to the corporation 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 must be directed to the corporation.

Until recently, in Germany, no derivative action could "be exerted by share-

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[135] M. GELTER, 'Mapping types of shareholder lawsuits across jurisdictions', cit., p. 462.

[136] *Ibid.*

[137] M. GELTER, 'Why Do Shareholder Derivative Suits Remain Rare in Continental Europe?', in *Brooklyn Journal of International Law*, 2012, pp. 843-892, at 881 ff.

[138] Italian Civil Code, Article 2393-bis: "The liability action against the directors can be exercised by the shareholders who represent at least one-fifth of the share capital […]" [author's translation]. On this topic, see, *ex multis*, D. LATELLA, *L'azione sociale di responsabilità esercitata dalla minoranza*, Torino, 2007.

[139] Italian Civil Code, Article 2393, as translated in M. BELTRAMO, G.E. LONGO, J.H. MERRYMAN, *The Italian Civil Code and Complementary Legislation*, vol. II, New York, 1991, p. 100: "an action for liability of the directors [of the corporation] is brought pursuant to a resolution of the meeting".

holders as such, not even if organised in qualified groups: [any action] could only be exerted by the company, possibly, following the minority's stimulus".[140] According to Section 147 of the German Stock Corporation Act, indeed, a qualified minority of shareholders was only entitled to ask the competent court to appoint a special representative of the corporation in order to pursue a claim against the board of directors. Following the 2005 reform, shareholders are now allowed, for the very first time, to individually bring a derivative suite so as to enforce, in their own name, the rights of the corporation.

To this effect, Section 148 provides that the shareholders "whose shares of stock, in the aggregate, are at least equivalent to one hundredth of the share capital or to a stake in same of 100,000 euros, at the point in time at which the petition is filed, may file a petition for leave to assert, in their own name, the company's claims to compensation".[141] However, in order to proceed with such an action, the judge will be required to ascertain whether: *i*) the shareholders had acquired their shares before the violation took place or become known; *ii*) the shareholders have compelled the corporation to act in its own name to obtain redress; *iii*) there are reasonable grounds to believe that the corporation have suffered damage due to the conduct of the board members; and *iv*) there is no conflict between the best interest of the legal person and the assertion of the claim. Only if these strict requirements are complied with, the competent judge will allow the derivative action to be brought.

Moving to France, the already mentioned Article 225-252 of the Code of Commerce provides that "shareholders may either individually, or acting as a group [...], bring an action for liability on behalf of the company against its directors or managing director".[142] The remedy provided, therefore, is a proper derivative action that can be commenced by both an individual shareholder and a group of shareholders which satisfy a certain percentage of the share capital as established pursuant to a Decree of the Conseil d'État, so as to ascertain the representativeness of the class. Of course, were the claim successful, any compensation awarded will be paid to the corporation.[143] To this effect, it is explicitly provided that the claimants are entitled to sue "for compensation for the full amount of the damage suffered by the company".[144]

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[140] D. LATELLA, 'The Shareholder Derivative Suits: Disfunction and Remedies against a "Paradoxical" Inactivity', in *Corporate Ownership & Control*, 2010, pp. 297-303.

[141] German Stock Corporation Act, cit., Section 148.

[142] French Code of Commerce, Article 225-252, available at www.legifrance.gouv.fr [author's translation]. This provision applies to the *sociétés anonymes*, while the same is provided for the *sociétés à responsabilité limitée* under Article 223-22.

[143] For an overview of the French regime see M. GELTER, 'Why Do Shareholder Derivative Suits Remain Rare in Continental Europe?', in *Brooklyn Journal of International Law*, 2012, pp.843-892, at 854.

[144] French Code of Commerce, cit., Articles 223-22 and 225-252 [author's translation].

A more restrictive approach is adopted in the Spanish legal system. Under Article 239 of the Ley de Sociedades de Capital,[145] any shareholders or group of them who possess a shareholding sufficient to request the call of a general meeting is entitled to bring a derivative action on behalf of the corporation.

However, to the extent that, as a general rule, it up to the legal entity itself to commence proceedings against the directors for their breach of duties (the *acción social de responsabilidad*, *ex* Article 238), shareholders can proceed with a derivative action only whether: *i*) the directors refuse to call the general meeting required by shareholders to proceed under Article 238; *ii*) the *acción social de responsabilidad* is not exerted within thirty days following the deliberation of the general meeting to this effect; or *iii*) the proposal is rejected by the general meeting.

4.2.2. A Survey of Common Law Countries

Moving to common law jurisdictions, unlike what has been said concerning civil law countries, they traditionally provide for a derivative suit in the narrow sense, that is to say an action through which shareholders are individually entitled to seek remedy on behalf of their corporation.

As far as England, Wales and Northern Ireland are concerned, for instance, Section 260 of the English Companies Act 2006 defines a derivative claim as 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 the company". According to the same provision, a member of a corporation (including a shareholder)[146] is entitled to bring a derivative claim "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*". Such a cause of action, however, "may be against the director or another person (or both)".

The question thus concerns the proper scope of application of derivative actions, namely whether a derivative action can be brought against third parties. According to case law and scholarship, the answer should be generally in the negative.[147] Indeed, to be considered admissible, derivative claims against third

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[145] Spanish Law on Corporations, available at www.boe.es.

[146] English Companies Act 2006, available at www.legislation.gov.uk, Section 260(5)(c): "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". On derivative actions in English corporate law see, *ex multis*: C.A. PAUL, 'Derivative Actions under English and German Corporate Law– Shareholder Participation between the Tension Filled Areas of Corporate Governance and Malicious Shareholder Interference', in *European Company and Financial Law Review*, pp. 81-115, especially 87-92; V. JOFFE ET AL., *Minority Shareholders: Law, Practice, and Procedure*, cit., p. 47-56.

[147] V. JOFFE ET AL., *Minority Shareholders: Law, Practice, and Procedure*, cit., p. 52.

parties require that the damages suffered by the corporation arise from an act or omission also involving violation by directors of their duties.[148]

In other words, derivative actions against third parties can be brought only to the extent that the latter took advantage of a breach of duty by directors, such as a transfer of money or other properties with the knowledge that this insisted upon a breach of duty by the directors.

That is because, according to the recommendations issued by the Law Commission, to "allow shareholders to have involvement in whether claims should be brought against third parties in our view goes too far in encouraging excessive shareholder interference with management decisions".[149] It would allow, that is to say, a second guessing by shareholders of the conduct of the board of directors, the decisions of which must be considered in the interests of the corporation. Therefore, under the English Companies Act, shareholders cannot assert a cause of action which the corporation has itself failed to assert against a third party, if the wrong did not arose from a violation of the fiduciary duties falling under those managing the corporation. As a general rule, therefore, derivative claims can only be resorted to against those who are, *de iure* or *de facto*,[150] involved in the governance of the corporation.

A far more flexible approach can be found, instead, in Australia, where the matter of derivative actions is regulated in Part 2F.1A of the 2001 Corporations Act.[151] According to Section 236, "[a] person may bring proceedings on behalf of a company […] if: (a) the person is: (i) a member, former member, or person entitled to be registered as a member, of the company or of a related body corporate; or (ii) an officer or former officer of the company; and (b) the person is acting with leave granted under section 237".

Section 237(2), then, provides for the requirements to be met in order for a person, including a shareholder, to be granted the leave, namely: *i*) it is probable that the corporation will not start proceedings in its own name; *ii*) the applicant is acting in good faith; *iii*) the action is in the best interests of the corporation; *iv*) a serious question is at stake; *v*) the person informed the corporation of the intention to bring a derivative action or, if this was not done, there were good reasons to this effect.

As far as derivative actions against third parties, Section 237(3) then provides for a rebuttable presumption that the action is not "in the best interests of the

[148] *Ibid.*

[149] Law Commission Report, *Shareholder Remedies* [No 246], para. 6.30.

[150] English Companies Act 2006, cit., Section 260(5)(b): "a shadow director is treated as a director".

[151] Corporations Act 2001, available at www.legislation.gov.au. For an overview of derivative actions under the Australian corporate law, see D.A. DEMOTT, 'Shareholder Litigation in Australia and the United States', in *Sydney Law Review*, 1987, pp. 259-305; V. JOFFE ET AL., *Minority Shareholders: Law, Practice, and Procedure*, cit., p. 52.

company if the company has decided not to bring those proceedings and the directors made that decision reasonably and in good faith".[152] Accordingly, whenever a derivative action is to be brought against a third party, the applicant (*i.e.*, the shareholder) will have to face a further procedural hurdle in demonstrating that to vindicate the rights of the corporations is actually in the very interests of the latter, since the presumption runs in the opposite direction.

Similarly, in the legal system of the United States,[153] 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.[154] 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".[155] In other words, a derivative claim can be employed also to commence proceedings against third parties who are not involved in the corporate governance.

This does not mean, however, that the regulation is not very strict. Quite the opposite, the Rules of Civil Procedure enshrine a series of requirements that must be met in order to bring a derivative suit. First, it is prohibited to pursue the action whether "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".[156] Furthermore, *ex* Rule 23.1(b), such an action requires the applicant to submit an affidavit stating that, *inter alia*, 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.[157]

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[152] V. JOFFE ET AL., *Minority Shareholders: Law, Practice, and Procedure*, cit., p. 53, footnote 104.

[153] R. ROMANO, 'The Shareholder Suit: Litigation without Foundation?', in *Journal of Law, Economics, & Organization*, 1991, pp. 55-87; A. OQUENDO, 'Six Degrees of Separation: From Derivative Suits to Shareholder Class Actions', in *Wake Forest Law Review*, 2013, pp. 643-672.

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

[155] Federal Rules of Civil Procedure, last amended in 2020, available at www.uscourts.gov.

[156] *Ibid.*, Rule 23.1(a).

[157] According to M. GELTER, 'Mapping types of shareholder lawsuits across jurisdictions', cit., p. 461 the so-called 'demand requirement', *i.e.* the need for the shareholders to request the board to bring the claim before being able to pursue a derivative claim on behalf of the corporation, "is only waived if the board is conflicted in a way that would render demand futile".

4.2.3. Assessment: The Inexistence of a General Model and the Limited Scope of Derivative Actions

From the analysis carried out above, some comparative remarks can be drawn on derivative actions. First of all, it shall be registered that an increasing number of domestic legal orders, nowadays, provides for instruments through which shareholders can commence proceedings so as to vindicate the rights of the corporation, whenever the latter has failed to do so.[158]

This being true, it is nonetheless apparent that civil and common law jurisdictions have rather a different approach to derivative actions: indeed, while the former traditionally require shareholders to act as a group or a class, the latter consider such actions to be a right pertaining to each and any shareholder as such, irrespective of any percentage of shares he might own. While some civil law countries have embraced a transformation, moving from a collective to an individual approach towards derivative actions, the differences still outnumber the similarities.

Second, a general model of derivative actions cannot be identified in domestic corporate law. The requirements, the entitlement and the remedies sought are far too different to meaningfully bring them all under a common denominator. Therefore, although these remedies can all be seen as different *species* of the same *genus*, each domestic legal order does require an autonomous analysis.

Last, but not least, the very limited scope of derivative actions shall be pointed out. With some noteworthy exceptions, indeed, shareholders are generally entitled only to sue those who are involved in the governance of the corporation, such as directors or members of the board. This is not surprising, after all, since these remedies have been traditionally conceived and designed to allow what can be called an externalization of internal conflicts among the different stakeholders of a corporation. This means, however, that derivative actions can hardly be used to pursue claims against third parties in those circumstances in which the directors deemed it appropriate not do so. Even when this is possible, after all, the strict requirements often adopted to this effect actually narrow the chances to successfully resort to such legal instruments.

5. Brief Comparative Remarks on the Protection of Shareholders in Municipal Legal Systems

In the present Chapter, the question as to whether, why, and to what extent

[158] X. Li, *A Comparative Study of Shareholders' Derivative Actions*, Deventer, 2007, p. 304: "Although derivative actions are unlikely to play similar roles in practice in any of these countries [- *i.e.*, England, the United States and Germany] even after the reforms, this trend at least shows that it is commonly recognized that derivative actions should play an important, albeit limited role".

shareholder claims are allowed in domestic legal orders has been addressed. To this end, corporate law of numerous States has been – although to a different degree of detail – considered to offer a comprehensive, yet targeted, overview of both common and civil law jurisdictions. Against this background, it has been possible to draw some conclusions, which will drive the analysis concerning the international legal order. They can be summarized as follows.

First, despite the different types of companies existing all around the world, a common model has been identified for the purposes of this study: that of the corporation. This preliminary finding was required to properly proceed with the review. Indeed, any assessment of the relationship between the *personne morale* and its shareholders would have been useless if a common model could not be identified within the multiplicity of municipal legal orders. Even more, the possible findings would have been of little relevance to test the rules of international law, which would have been called to address a plethora of phenomena, each of them with its own peculiarities.

Second, whenever the rights enjoyed by shareholders *qua associés* or those property rights connected to the ownership of shares are infringed upon, domestic legal orders provide for different judicial remedies through which such rights can be vindicated, these being known as *direct* or *personal actions* or *claims*. In such circumstances, the shareholder will thus be entitled to commence proceedings on his own behalf.

Third, in most domestic legal orders, a general rule that forbids shareholders from personally recovering a loss that is reflective of the damage suffered by the corporation can be found. Accordingly, all these wrongs affecting the corporate business and assets shall be vindicated by the legal entity itself, which will have to act in its own name against the wrongdoer, be the latter a member of the board of directors, a stakeholder, or a third party.

Fourth, to justify such a prohibition, jurisprudence and doctrine have advanced different theories. Ranging from the lack of a causal link to the logical consequence of the corporate legal personality, the one found to be the most convincing argues that the 'no reflective loss' principle is based on legal policy reasons. In other words, such a prohibition can be seen neither as following the rules of causation nor as a corollary of the legal personality bestowed upon corporations. The prohibition is instead required to ensure the proper functioning of corporations as well as the protection of the different subjects involved by ensuring capital maintenance and creditor protection, avoiding risks of double recovery and double jeopardy, safeguarding corporate governance, and preventing several procedures in which shareholders claim for the same damage with possible conflicting outcomes.

Fifth, to the extent that the prohibition to claim for reflective loss is based on legal policy reasons, rather than on a dogmatic interpretation of the rules concerning the law of civil responsibility, exceptions to such a rule can well be found whenever they pursue an interest which is deemed to be worthy of protection. In this respect, the analysis of recent trends under municipal law has confirmed that, although to a different degree, domestic systems have indeed identified some circumstances under which shareholders are entitled to claim reflective loss damages.

Finally, several national legal systems – to cope with hypotheses of corporate governance malfunction or conflict of interest – provide for derivative actions through which shareholders can bring a claim on behalf of their corporation to assert a cause of action when the latter has failed to do so. In such a way, shareholders are granted the possibility of asserting the rights of the legal entity, thus indirectly protecting their economic interests within the corporate business.

Nevertheless, it has been pointed out that, generally, shareholders are entitled to resort to derivative actions only against corporate officers, board members, or directors: in other words, derivative suits have a limited scope of application since they concern those who are involved in the governance of the enterprise. Only to a limited extent derivative actions can be used to assert a claim against third parties, such as the government, state-owned entities, other companies, or private individuals who might have injured it. More importantly, no general model of derivative actions could be singled out, inasmuch as domestic systems greatly differ as far as the scope and the requirements of such actions are concerned.

Chapter Two

Shareholder Claims under General International Law: The Relevance of Domestic Law

SUMMARY: 1. Introduction. – 2. The Early Case Law on Shareholder Claims in the International Legal Order. – 3. The *Barcelona Traction* Case: Establishing the Rule under General International Law. – 3.1. … and its Exceptions. – 3.2. The Transposition of Domestic Rules to the International Legal System. – 3.3. The Distinction between Direct Rights and Interests of the Shareholders: A Reasoned Approach? – 4. The *Elettronica Sicula S.p.A.* Case: Anything More Than a Treaty Issue? – 4.1. Against the Narrative which Excludes the Relevance of the *ELSI* Judgment for the Determination of General International Law. – 4.2. Some Insights on What States Can and Cannot Do *vis-à-vis* Shareholder Protection. – 5. The 2006 ILC Articles on Diplomatic Protection: Between Codification and Progressive Development of International Law. – 6. The *Diallo* Case: Confirming the *Barcelona Traction* Rule. – 6.1. The Treatment of Investment Arbitration Case Law before the International Court of Justice. – 6.2. A Critical Appraisal of the Rule Restatement by the International Court of Justice in Light of the Articles on Diplomatic Protection. – 7. Shareholder Claims under General International Law: Some Conclusive Remarks.

1. Introduction

As far as the protection of shareholders is concerned, the comparative analysis has demonstrated that municipal legal systems tend to speak with one voice: under corporate law, a clear distinction is drawn between the legal personality of the corporation, possessing its own rights and duties, and the legal sphere of the shareholders, who are not entitled, as a general rule, to claim for damages suffered by the legal entity in which they own shares.

Against this background, one cannot but wonder what happens whenever juridical persons, and their *associés*, appear on the stage of the international legal order. Put it otherwise, how does international law protect corporations and, notably, their shareholders?

Inevitably, the whole issue revolves around the way in which the relationship between the rights of the corporation and those of its shareholders is framed in the international legal order. Indeed, the extent to which shareholders are entitled to claim for damages under international law is clearly dependent upon the way in which the economic interest they have in the business of the corporation is deemed worthy of protection together with, but also – and most importantly – independently from the rights enjoyed by the legal person.

Having said that, any orderly analysis concerning shareholder claims cannot but move from general international law and, notably, the institution through which the protection of injured persons has been traditionally secured: diplomatic protection. In the international legal order, indeed, a State incurs in responsibility whenever its wrongful act or omission causes an injury to an alien, be it the latter a natural or a legal person. In this respect, diplomatic protection is nothing but "the procedure employed by the State of nationality of the injured person to secure protection of that person, and to obtain reparation for the internationally wrongful act inflicted".[1]

This has been traditionally based on the *fictio iuris* that "an injury to a national abroad constituted an injury to his national State itself".[2] In order for a State to espouse a claim on behalf of its national, two conditions are to be met by the relevant natural or legal person. Notably, the latter must: *i*) have exhausted local remedies so as to give a chance to the alleged responsible State to redress the injury on its own;[3] and *ii*) possess – at the time of both the injury and the claim – the nationality of the State seeking to act in protection.[4]

It goes without saying that the extent to which shareholders are entitled to claim for damages – *i.e.*, have legal standing to sue – is strictly interrelated with the issue concerning the legal standing of their corporations. Transposing this consideration in the field of diplomatic protection, it can be said that the extent to which the national State of the shareholders is entitled to claim on behalf of the latter is a question that shall be analyzed by having due regard to the entitlement of the national State of the corporation to commence proceedings in the name of the legal entity.

Despite the two issues have been often considered together in scholarship, it

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[1] J. DUGARD, 'Diplomatic Protection', cit., para. 1.

[2] C.F. AMERASINGHE, *Diplomatic Protection*, cit., pp. 21-22.

[3] The ICJ recognized the need to exhaust local remedies as a "a well-established rule of customary international law" in *Interhandel Case (Switzeland v. United States of America)*, Preliminary Objections, Judgment, 21 March 1959, in *ICJ Reports 1959*, p. 6, at 27. Among the vast literature on the topic, see: A.A. CANÇADO TRINDADE, *The Application of the Rule of Exhaustion of Local Remedies in International Law*, Cambridge, 1983; C.F. AMERASINGHE, *Local Remedies in International Law*, 2nd edition, Cambridge, 2004; R. PISILLO MAZZESCHI, *Esaurimento dei ricorsi interni e diritti umani*, Torino, 2004.

[4] For an overview, see J. DUGARD, 'Continuous Nationality', in *Max Planck Encyclopedia of Public International Law*, 2008 and the references therein provided.

is important not to overlap them. Therefore, before actually delving into the analysis, there is much need to disentangle them.

On the one hand, the main problem in the exercise of diplomatic protection on behalf of corporate entities pertains to determining their nationality.[5] This is rather a fundamental question, inasmuch as only the national State is entitled to espouse the claim of the injured person. In this respect, the main test which has established itself in the practice of international courts and tribunals is that of 'incorporation'.[6] Put it otherwise, a corporation has the nationality of the State under the law of which it has been established. As a consequence, it is up to the latter to exercise diplomatic protection on behalf of the legal entity, precluding other States – at least as a rule – from doing the same.

Nonetheless, this test has been criticized for not taking into account the reality of economic operations, thus promoting formalism over justice. According to other authors, a different test shall be applied, namely either that of the principal place of business or that of control. Under the latter, a corporation would have the nationality of the State of (the majority of) shareholders controlling the legal entity.[7] In this case, therefore, shareholders are considered so as to identify the relevant nationality of the corporation. They are not, nonetheless, considered for the purposes of the protection of their own rights or economic interests, not directly at least. Indeed, the national State of the corporation will always act on behalf of the latter, not on behalf of the *associés*. The shareholders, therefore, only stand out – it could be said – as a constitutive feature of the corporation, the rights of which are vindicated.

Contrariwise, for the purposes of our analysis, what actually matters the most is to identify under which circumstances the national State of the shareholders is entitled to bring a claim under general international law on behalf of the *associés* of the corporation. In this regard, the question is two-fold.

First of all, it is necessary to ascertain whether the national State can exercise diplomatic protection whenever those direct rights shareholders enjoy under domestic corporate law are affected by the conduct of the allegedly wrongdoer State. The answer to this is quite straightforward: under a well-established rule of general international law, States can bring proceedings and, more generally, resort to diplomatic efforts so as to afford protection to their nationals – either natural or legal persons – in all the cases in which their direct rights have been

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[5] See P. ACCONCI, *Il collegamento tra Stato e società in materia di investimenti stranieri*, Padova, 2002; P. ACCONCI, '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*, 2004, pp. 139-176; P.T. MUCHLINSKI, 'Corporations in International Law', cit., paras 18-24; A. YILMAZ VASTARDIS, *The Nationality of Corporate Investors under International Investment Law*, Oxford, 2020.

[6] M. SHAW, *International Law*, cit., p. 617; J. CRAWFORD, *Brownlie's Principles of Public International Law*, cit., p. 679.

[7] P.T. MUCHLINSKI, 'Corporations in International Law', cit., para. 18.

infringed upon. The practice of international courts and tribunals proves it without a doubt.[8]

Second, one has to understand whether the national State can exercise diplomatic protection on behalf of the shareholders whenever the rights of the corporation in which they hold shares have been affected. In a nutshell, it consists of assessing if reflective loss claims – which are generally prohibited under domestic legal systems – are instead admissible under general international law.

To this effect, the analysis will proceed as follows. First, in Section 2, the early case law concerning shareholder claims in international law will be reviewed to ascertain whether any rule of general international law could be said to have had emerged when, in 1970, the ICJ ruled on the subject matter. Indeed, while anyone can easily claim to be familiar with the *Barcelona Traction* case, what came before is sometimes neglected.

Having ascertained that the international practice concerning the standing of shareholders to claim for damages suffered by the corporation in which they hold shares was too fragmented so as to distil a rule of general international law, Section 3 will then be devoted to the analysis of the *Barcelona Traction* case. For this purpose, the reasoning of the ICJ in the making of the rule and its exception will be thoroughly scrutinized.

Notably, the choice of the Court to resort to general principles *in foro domestico* will be evaluated to assess whether they represented the most appropriate way to deal with the matter. In this regard, it will be demonstrated that the question did not concern whether the rules of municipal law apply as such to international claims. Contrariwise, it actually regarded the extent to which corporate law norms "provide a good analogy in dealing with the problem of claims under international law in respect of injuries"[9] suffered by corporations and, as a consequence, by the shareholders.

In this respect, the existence of elements supporting such an analogy will be questioned. However, this will not be the end of the analysis. As long as the rules established under municipal law can be applied by analogy in respect of international claims, one cannot but wonder whether "the *exceptions* to the rule in municipal law afford an equally good analogy for *exceptions* to the rule in international law".[10] After all, it seems reasonable to claim that, if domestic law acknowledges some exceptions to the general rule, the same might also be true for the purposes of international law. Some critical remarks will be made in this respect, demonstrating that the ICJ operated what has been convincingly called an "incomplete loan from domestic law".[11]

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[8] See, *infra*, Sections 3 and 6 of this Chapter.

[9] J.M. JONES, 'Claims on Behalf of Nationals Who are Shareholders in Foreign Companies', cit., p. 234.

[10] *Ibid.*, p. 235.

[11] B. JURATOWITCH, 'Diplomatic Protection of Shareholders', cit., p. 293.

Then, Section 4 will scrutinize the judgment of the ICJ in the case *Elettronica Sicula S.p.A.*, the relevance of which for the purpose of establishing the rules of general international law has been much debated. In this respect, it will be contended that, despite its shaky reasoning, the *ELSI* judgment shall be considered in determining the status of shareholder claims under international law. Indeed, while possibly ensuring wider protection of the shareholders, the ruling actually embraced the arguments sketched by the Court in the *Barcelona Traction* case.

Leaving temporarily aside the case law of international courts and tribunals, Section 5 will delve into the works of the International Law Commission (ILC) which, in 2006, finally approved its Articles on Diplomatic Protection (ADP).[12] By employing the lenses of the codification and progressive development of international law,[13] the contribution of the ADP to the clarification of the rules on shareholder claims under general international law will be assessed. In this regard, the result can be said to be only partly satisfactory: indeed, while it paved the way for a more balanced approach to the protection of shareholders, it is doubtful whether the ILC reached workable solutions for the purpose of contemporary international economic relations.

In Section 6, the analysis will focus on the *Diallo* case, decided by the ICJ only a few months later the approval of ADP. As argued by Ben Juratowitch, the dispute represented a chance for "renewed consideration of a topic that had already been much traversed: diplomatic protection of shareholders".[14] In this respect, the judges in The Hague were called to perform a dual task: on the one hand, to test the solutions adopted by the ILC; on the other hand, to assess the contribution of investment arbitration to the development of the rules on shareholder claims. Unfortunately, it will be contended that the Court failed to do so by avoiding to openly confront with the ADP, while also hastily dismissing the relevance of investment law practice for the development of general international law.

Finally, Section 7 will offer some concluding remarks on shareholder claims under general international law, by summarizing the main findings of the analy-

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[12] International Law Commission, 'Draft Articles on Diplomatic Protection', 2006, in *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10*, UN Doc. A/61/10.

[13] Other authors have questioned the extent to which the ADP contributed to the development of international law: E. MILANO, 'Diplomatic Protection and Human Rights Before the International Court of Justice: Re-fashioning Tradition?', in *Netherlands Yearbook of International Law*, 2004, pp. 85-142, especially section 2; A. PELLET, 'Le projet d'articles de la C.D.I. sur la protection diplomatique: une codification pour (presque) rien', in M. KOHEN (ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law. Liber amicorum Lucius Caflisch*, Leiden, 2007, pp. 1133-1155; L. PANELLA, 'Il Progetto di articoli della Commissione di diritto internazionale sulla protezione diplomatica: codificazione e sviluppo progressivo del diritto internazionale', in *Rivista della cooperazione giuridica internazionale*, 2008, pp. 54-83.

[14] B. JURATOWITCH, 'Diplomatic Protection of Shareholders', cit., p. 282.

sis. In doing so, it will also provide for some perspectives *de iure condendo*, having due regard to the shortcomings of the law as it stands under the *Diallo* judgment.

2. The Early Case Law on Shareholder Claims in the International Legal Order

As early as the late nineteenth century, the question as to whether shareholders could be entitled to personally claim for damages suffered by the corporation in which they own shares was already at the forefront of the international legal order. Despite having received less attention than it would have deserved, the early practice of international adjudicatory bodies is worth of a close scrutiny. This is fundamental to bring clarity as to whether any rule of general international law had emerged when the *Barcelona Traction* was adjudicated in 1970.

Any analysis to this effect shall commence by giving due consideration to what is generally considered and cited as being one of the most authoritative precedents concerning shareholder claims for reflective loss in international law: the *Delagoa Bay Railway* arbitration.[15]

There, the Governments of the United Kingdom and the United States jointly exercised protection on behalf of an American shareholder in an English corporation, which was in turn the sole shareholder of a Portuguese corporation, against the Government of Portugal. The dispute arose out of a concession agreement concluded in 1883 between Mr. MacMurdo, an American citizen, and Portugal for the construction and operation of a railway in the then latter's colony of Mozambique.

Under the terms of the concession, Mr. MacMurdo had the right to operate the infrastructure for 99 years, while Portugal was entitled to buy the concession after 35 years.[16] A year later, the concessionaire restructured his investment by

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[15] *Delagoa Bay Railway (Great Britain and United States v. Portugal)* (hereinafter *Delagoa Bay Railway*), Award, 29 March 1900, reported in H. LA FONTAINE, *Pasicrisie internationale*, Berne, 1902, pp. 398-410.

[16] For a detail review of the award and an analysis of its relevance for the purposes of international investment disputes, see J.I. MOREIRA, 'The Delagoa Railway Arbitration Case: The Geo-Politics of Investment Arbitration in the Late 19th Century', in *Transnational Dispute Management*, 2016, pp. 1-12. Despite more than a century has passed since the award was rendered, arbitral tribunals still consider it relevant. In this sense, see *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, para. 298. See also the analysis in A. SANTA MARIA, 'La tutela dei soci nel diritto internazionale', cit.; P. DE VISSCHER, 'La protection diplomatique des personnes morales', cit.; D. MÜLLER, *La protection de l'actionnaire en droit international*, cit.; G. BOTTINI, *Admissibility of Shareholder Claims under Investment Treaties*, cit.: all confirming the relevance of the

transferring the concession to a legal vehicle incorporated in Portugal, whose shares were then assigned to a British corporation in which Mr. MacMurdo owned the majority shareholding.

When the construction had still to be commenced, the first problems arose: notably, because of a dispute concerning the boundaries with the neighboring State, Portugal unilaterally imposed a further length of the railway of around 10.000 kilometers. As a result, in 1889, the railway had still to be finished when the colonial Government, by decree, revoked the concession and seized the infrastructure, alleging that the corporation had breached its obligations.[17]

Both the United States – as the State of nationality of Mr. MacMurdo – and the United Kingdom – as the State of nationality of the British corporation to which the shares had been transferred – lamented that the action of Portugal constituted a violation of the rights of their nationals. Therefore, they requested the matter to be solved by arbitration, upon which the three parties agreed.

In 1900, the arbitral tribunal rendered its award, finding that the termination of the concession contract and the seizure of the property pertaining to the Portuguese corporation constituted an internationally wrongful act, ordering the respondent State to pay reparation in favor of the British legal entity controlled by Mr. MacMurdo. In a nutshell, the reflective loss caused by the wrongful act had to be compensated. A closer look to the reasoning of the tribunal is necessary.

The award, indeed, made it clear that "la seule personne qui, *en droit strict*, aurait qualité pour se porter demanderesse vis-à-vis du gouvernement portugais est la Compagnie concessionnaire du chemin de fer; car c'est elle seule qui était en relations contractuelles avec l'Etat défendeur et c'est elle qui a été dépossédée par la rescision".[18] The British corporation, instead, was deemed to have standing only to the extent that the respondent State had waived its right to raise an objection on the matter. Accordingly, the arbitral tribunal "doit prendre acte de ce que les parties ont convenu, d'un commun accord, de lui substituer la Delagoa Bay Company".[19]

Put it otherwise, the reflective loss claim brought by the British and the US Governments on behalf of their nationals was heard by the arbitral tribunal since the respondent State had actually agreed to this effect.[20] If this were not

award for the purposes of understanding the relationship between domestic corporate rules on the protection of shareholders and those established under international law.

[17] For a more detailed overview of the events leading to the dispute, see G.I. HERNÁNDEZ, 'Delagoa Bay Railway Arbitration', in *Max Planck Encyclopedia of Public International Law*, 2017.

[18] *Delagoa Bay Railway*, Award, cit. (*italics added*), reported in H. LA FONTAINE, *Pasicrisie internationale*, cit., p. 409.

[19] *Ibid*.

[20] G.I. HERNÁNDEZ, 'Delagoa Bay Railway Arbitration', in *Max Planck Encyclopedia of Public International Law*, 2017, para. 9: "The tribunal's reasoning is still relevant from a contemporary perspective and made some interesting contributions to the law of the diplomatic protection of

the case, one can assume that the arbitral tribunal would have refused to do so, since the wrong had affected the rights of the Portuguese corporation, not those of its shareholders as such. The decision on the *ius standi* was therefore not based on general international law, but rather on the trilateral treaty as *lex specialis*. Accordingly, it has been convincingly argued that "the award does not constitute a recognition of the legitimacy under international law of the action [...] on behalf of shareholders".[21]

Moreover, while determining the compensation to be paid, the tribunal had to confront with a further obstacle, namely the protection of creditors under national law, which – as a general rule – enjoy priority in respect of shareholders. In this respect, the tribunal came to the conclusion that "le montant alloue par le présent jugement ne peut-il être attribué à la Compagnie anglaise qu'à la condition que celle-ci l'affecte au paiement de ces créanciers obligataires gagistes, et autres s'il y a lieu, selon leur rang".[22] In doing so, the tribunal thus proved to be fully aware of the consequences stemming from claims for reflective losses, deeming it appropriate to allow recovery by the shareholders under the condition that all creditors were previously satisfied.

A second case which is often considered as supporting the existence of a right of the national State to act on behalf of its shareholders for damages suffered by the corporation is the *El Triunfo* arbitration.[23] There, the Government of the United States exercised protection on behalf of a group of US nationals – who were the majority shareholders in a corporation established under Salvadorean law – against El Salvador.

The facts of the case can be summarized as follows: a group of corporate directors seized control of the El Triunfo Company, filing a petition of bankruptcy in complete disregard of the will of those officers representing the majority American shareholders. As a reaction, the latter called a general meeting, to restore the rights of the corporation and appoint new directors.[24] In the meanwhile, however, the Salvadorean Government revoked the concession granted to the corporation in 1894, thus "rendering impossible the plenary exercise of

corporations in international law. Portugal's consent to the arbitral proceedings, for example, allowed the tribunal to look beyond the assignment of the concession to a Portuguese company, and permit the espousal of claims by the United States and Great Britain on behalf of their nationals, a principle which to this day remains relevant". See also R.J. GRAVING, 'Shareholder Claims against Cuba', Part I, in *American Bar Association Journal*, 1962, pp. 226-229, at 228.

[21] E. JIMENEZ DE ARECHAGA, 'Diplomatic Protection of Shareholders in International Law', cit., p. 84. See also, in this sense, M. DIEZ DE VELASCO, 'La protection diplomatique des sociétés et des actionnaires', cit., p. 137.

[22] *Delagoa Bay Railway*, Award, cit. (*italics added*), reported in H. LA FONTAINE, *Pasicrisie internationale*, cit., p. 409.

[23] *Claim of the Salvador Commercial Company ("El Triunfo Company")* (hereinafter *El Triunfo*), Award, 8 May 1902, in *Reports of International Arbitration Awards*, vol. XV, pp. 467-479.

[24] *Ibid.*, p. 476.

the powers of the corporation",[25] which ultimately went bankrupt.

Against this background, the shareholders invoked the protection of the US Government, which manifested its willingness to arbitrate the matter with the host State. The Salvadorean Government, however, objected to such a request, arguing that the United States had no *ius standi* on behalf of their national shareholders, inasmuch as the corporation to which the concession had been granted possessed Salvadorean nationality. However, in December 1901, the disputing States finally entered into an arbitration agreement.[26]

A few months later, on 8 May 1902, the arbitral tribunal established to settle the case rendered its award, finding that El Salvador had violated international law and thus had to make full reparation. Interestingly, the arbitrators did not provide any analysis of the legal standing of the US Government. Indeed, they deemed unnecessary to discuss the "question of the right of the United States under international law to make reclamation for these shareholders in the El Triunfo Company, a domestic corporation of Salvador, for the reason that the question of such right is fully settled by the conclusions reached in the frequently cited and well-understood Delagoa Bay Railway arbitration".[27]

In other words, diplomatic protection of shareholders for measures affecting the local corporation in which they own shares – and, thus, the recoverability of reflective loss – was considered well-established following the award in the *Delagoa Bay Railway* case. In light of what has been said above, however, the reasoning of the arbitral tribunal is rather controversial, if not overtly wrong.[28] The *Delagoa Bay Railway* tribunal, indeed, come to the conclusion that the claim

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[25] Memorandum of the United States of America, in *Foreign Relations of the United States*, 1902, p. 846.

[26] Protocol of an Agreement between the Secretary of State of the United States of America and the Envoy Extraordinary and Minister Plenipotentiary of the Republic of Salvador for submission to arbitration of the claims against the Republic of Salvador of the Salvador Commercial Company and other citizens of the United States, stockholders in the corporations styled "El Triunfo Company, Limited" who have not acquired their stock from citizens of Salvador or others not citizens of the United States since the date of the filing of the Memorial of the Salvador Commercial Company, signed 19 December 1901, entered into force 24 February 1902, in *Treaty Series 400*, pp. 499-502.

[27] *El Triunfo*, Award, cit., p. 479.

[28] For a critical view, see J.H. RALSTON, *The Law and Procedure of International Tribunals,* Stanford, 1926, p. 151: "Although it is perfectly apparent from the foregoing, considered more at large in connection with the correspondence, that the question of the respective nationalities of corporations and stockholders was never designed to be considered, and is ignored in the [*Delagoa Bay Railway*] award, nevertheless in the Salvador Commercial case where the claimant was an American corporation […] the majority of the commission said: 'We have not discussed the question […] for the reason that the question of such right is fully settled by the conclusions reached in the […] Delagoa Bay Railway arbitration'". See also A. BAGGE, 'Intervention on the Ground of Damage Caused to Nationals, with Particular Reference to Exhaustion of Local Remedies and the Rights of Shareholders', in *British Yearbook of International Law*, 1958, pp. 162-175, at 173; G. BOTTINI, *Admissibility of Shareholder Claims under Investment Treaties*, cit., p. 98.

could be heard only because the disputing States had agreed to replace the injured corporation by the shareholders. From this point of view, therefore, the matter was not fully settled and, if so, certainly not in favor of the shareholders.

As for the relevance of the *El Triunfo* award to ascertain the (in)existence of a rule under general international law allowing the national State of the shareholders to bring a claim for damages suffered by the corporation, this has been questioned. Various authors have indeed argued that the case did not concern the standing of the shareholders for measures against the corporation, but rather a "conspiracy to defeat the interests of the majority of the incorporators".[29]

Notably, Eduardo Jiménez de Aréchaga contended that the contested measures "directly aimed at the shareholders as such",[30] since the Salvadorean Government infringed upon their own rights "to assemble and elect a new board of directors to replace the unfaithful ones".[31] Accordingly, the US Government would have exercised diplomatic protection to vindicate the direct rights of its shareholders, not to claim compensation for the drop in value of the shares following the wrong against the corporation.[32]

The third often invoked precedent supporting the standing of the national State of the shareholders to claim reflective loss is the *Alsop* award.[33] Only a closer scrutiny of the whole affair, however, fully reveals the real implications of the case. In 1894, the claim was first brought before a claims commission established for the purpose of solving a series of disputes between Chile and the United States. The Commission however refused to hear the claim finding that

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[29] J.M. JONES, 'Claims on Behalf of Nationals Who are Shareholders in Foreign Companies', cit., p. 249.

[30] E. JIMENEZ DE ARECHAGA, 'Diplomatic Protection of Shareholders in International Law', cit., p. 86

[31] *Ibid.*

[32] This position might be said to find support within the reasoning of the arbitration tribunal in *Claim of the Salvador Commercial Company ("El Triunfo Company")*, Award, cit., p. 476: "If the Government of Salvador had not intervened to destroy the franchise and concession of El Triunfo Company, and thus despoiled the American shareholders of their interests in that enterprise, an appeal might have been, as it was evidently intended to be, made to the courts of Salvador for relief from the bankruptcy proceedings. The first step to that end would be the turning out of the conspiring directors and the instalment of a proper directory by the supreme authority of the corporation, the shareholders' meeting. *But by the executive decrees, rather than by the bankruptcy proceedings, the property rights of the American citizens involved were irrevocably destroyed.* Seeking redress through a called meeting of the shareholders of the company, the moment the call was issued, and it appeared that the proper remedy was to be sought by the corporation itself, showing that the proceedings by its alleged representative directors for bankruptcy were fraudulent, and that the bankruptcy court had been imposed upon by their conspiracy, in fraud of the incorporators, whom they falsely pretended to represent, that moment *the Government of Salvador came to the aid of the conspirators and by executive act destroyed the only thing of value worth retrieving through the courts.*" (*italics added*)

[33] *The Alsop Claim (Chile, United States)*, Award, 5 July 1911, in *Reports of International Arbitral Awards*, vo. XI, pp. 349-375.

the injured entity, Alsop & Co., had no *locus standi* inasmuch as it has been incorporated under the law of Chile, thus possessing the nationality of the alleged wrongdoer State.[34]

When, a few years later, the United States made a new effort to have the claim adjudicated, Chile offered arbitration under the condition that the tribunal would have first to decide on the legal standing of the US Government. Following long negotiations, the dispute was finally entrusted to the King of Great Britain, Edward VII, "as an 'amiable compositeur' [who] shall determine what amount, if any, is […] equitably due".[35] In other words, the arbitrator was granted the power to settle the case not on the basis of the law, but rather on considerations of equity,[36] as reflected by his appointment as an *amiable compositeur*.

The specific function vested in the King of Great Britain is particularly apparent when he was called upon to rule on the objection raised by Chile as far as the legal standing of the shareholders was concerned. In this respect, indeed, the award highlights that "as the firm was registered in Chile and is a Chilean company, their grievances can not properly be the subject to a diplomatic claim".[37] Nonetheless, such a conclusion was deemed "inconsistent with the terms of reference […] and would practically exclude the possibility of any real decision on the equities of the claim put forward".[38] Therefore, the objection was rejected and the claim of the shareholders declared admissible.

Nonetheless, the relevance of the decision for the purposes of this study is questionable. While it is true that shareholder claims for reflective loss were heard, it must not be overlooked that such a result "was achieved by granting the arbitrator the power to decide, not on the basis of law, but of equity and as an *amiable compositeur*".[39] In this sense, the case can hardly be said to prove

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[34] G.H. HACKWORTH, *Digest of International Law*, vol. V, 1943, p. 829: "The claim was dismissed under article 1 of the convention, for want of jurisdiction, on the ground that the partnership […] was, under the civil law of Chile, 'an entity – a juridical person' distinct from the members considered individually, and that the organization being a Chilean society was a 'citizen of Chile'". See also E. JIMENEZ DE ARECHAGA, 'Diplomatic Protection of Shareholders in International Law', cit., pp. 87-88.

[35] *Protocol of Submission between Chile and the United States of America*, signed 1 December 1909, pp. 187-188, available at www.history.state.gov.

[36] M. DIEZ DE VELASCO, 'La protection diplomatique des sociétés et des actionnaires', cit., p. 137: "Le protocole d'arbitrage confiait au roi d'Angleterre le soin *de déterminer en équité l'indemnité* qui revenait aux réclamants. Néanmoins le Gouvernement chilien posa de nouveau l'exception de la nationalité chilienne de la société" (*italics added*).

[37] *The Alsop Claim (Chile, United States)*, Award, cit., p. 359.

[38] *Ibid.*, p. 360.

[39] E. JIMENEZ DE ARECHAGA, 'Diplomatic Protection of Shareholders in International Law', cit., pp. 88-89. This is confirmed by the diplomatic negotiations concerning the *Romano-Americana Arbitration*, in *Foreign Relations of the United States*, 1928, p. 972: "The Romano-

that, under general international law, the national State of the shareholders is entitled to exercise diplomatic protection for a wrongful act affecting the corporation in which its nationals hold shares.[40]

Some insights on whether and, if so, to what extent international law provided standing for shareholders can also be drawn by examining the case law of mixed claim commissions, established for the purposes of deciding "a multitude of claims which arose after internal disturbances or international conflicts during which aliens suffered damages".[41] Their case law, as it will be demonstrated, is rather fragmented and incoherent.

In *Kunhardt*,[42] the United States-Venezuela Claims Commission was called to rule on a claim brought by Kunhardt & Co., a US co-partnership, for the annulment of a concession owned by a Venezuelan corporation, the Compañia Anônima Trasportes en Encontrados, in which the applicant held around 75 percent of the shareholding. Since the relevant treaty did not provide any rule on shareholder claims, the Commission had to move from an analysis of the relationship between corporations and their shareholders to decide the dispute.

Interestingly, both the Venezuelan and the US commissioners ruled out the claim, despite advancing different arguments. The former stressed that shareholders are not co-owners of corporate assets, being only entitled to share in the profits of the enterprise or, eventually, to take ownership of proportional parts of such assets in case of dissolution or liquidation of the corporation.[43] Accordingly, Kunhardt & Co., *qua* shareholder, had no *ius standi* before the Commission to claim reparation for the damage suffered by the local corporation.

On the other hand, the US commissioner, while agreeing that "the property of a corporation *in esse* belongs not to the stockholders individually or collectively, but to the corporation itself",[44] nonetheless pointed out how "it is a principle of law universally recognized that, upon dissolution, the interests of the several stockholders become equitable rights to proportionate shares of the cor-

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Americana Company was a Roumanian Company, and the contention of the British Government was that the claim lay, if at all, against the Roumanian Government. It was only in so far as the United States Government claimed against the Roumanian Government that the precedents it cited were relevant". See, in this regard, J.M. JONES, 'Claims on Behalf of Nationals Who are Shareholders in Foreign Companies', cit., pp. 239-241.

[40] Other cases are often cited in support of this proposition: *Ziat-Ben Kiram*, *Ruden*, *Affaire Cerruti (Colombie, Italie)*. However, all these cases actually concerned partnerships rather than corporations.

[41] R. DOLZER, 'Mixed Claims Commissions', in *Max Planck Encyclopedia of Public International Law*, 2011, para. 1.

[42] *Kunhardt & Co. Case*, Opinion of the Commission, 17 February 1903, in *Reports of International Arbitration Awards*, pp. 171-180.

[43] *Ibid.*, p. 179.

[44] *Ibid.*, p. 175.

porate property after the payment of the debts".[45] Therefore, inasmuch as the Venezuela corporation had been dissolved following the withdrawal of the concession, Kunhardt & Co. had the right to claim, in proportion to its shareholding, the before the Commission.

However, any entitlement to a proportionate share of the property of the corporation was subordinated to the orderly payment of all corporate debtors. In this respect, since no evidence of the amount of the debts had been produced, "an essential element of proof to determine the actual measure of the claimant's loss"[46] was lacking. Being it impossible to ascertain the reflective loss suffered by the shareholders, the claim had therefore to be disallowed.

A preclusion for the national State of the shareholders to claim for damages suffered by the corporation is also affirmed in the case *Baasch and Romer*, decided by the Netherlands-Venezuela Claims Commission.[47] The claimants were the successors and liquidators of two entities, which held shares in a Venezuelan corporation whose plant had been destroyed by the Government of Venezuela.

The Commission firmly dismissed the claim concerning the corporation, stating that "[Luz Electrica de Barquisimeto Company] is a Venezuelan corporation created and existing under and by virtue of Venezuelan law and has its domicile in Venezuela. This Mixed Commission has no jurisdiction over the claim. *It is the corporation whose property was injured*. It may have a rightful claim before Venezuelan courts, but it has no standing here. The shareholders being Dutch does not affect the question. The nationality of the corporation is the sole matter to be considered. This claim is therefore dismissed without prejudice".[48]

There is some confusion in these lines. In deciding the matter, indeed, the commissioners seem to overlap the question concerning the nationality of the corporation ("the nationality of the corporation is the sole matter") [49] with the one concerning whether shareholders could sue to recover the losses suffered by the legal entity in which they held shares ("it is the corporation whose property was injured").[50] Nonetheless, despite only in a single line, it is apparent that the Commission drew a firm distinction between the rights of the corporation and

[45] *Ibid.*

[46] *Ibid.*, 176. For a critical appraisal of the reasoning employed by the Commission to reject the claims, see A. SANTA MARIA, 'La tutela dei soci nel diritto internazionale', cit., pp. 1115-1117. A rather different, yet critical, consideration of the decision rendered by the Commission is provided in J.M. JONES, 'Claims on Behalf of Nationals Who are Shareholders in Foreign Companies', cit., p. 247 ff.

[47] *Baasch and Römer Case*, Opinion of the Commission, 28 February 1903, in *Reports of International Arbitration Awards*, 1903, Vol. X, pp. 723-727.

[48] *Ibid.*, p. 726.

[49] *Ibid.*

[50] *Ibid.*

those of the shareholders, thus supporting the idea that the latter cannot sue for damages suffered by the former.[51]

The approach of the Commission is, after all, confirmed by the decision on shareholder claims. Indeed, the "umpire holds for the purposes of this case that the two firms being extinct the claims may be allowed in proportion to the stated interest of the Dutch members thereof".[52] As much as in *Kunhardt*, therefore, an exception was found applicable against the general prohibition since "no inequity or injustice is […] done".[53] Remarkably, in coming to such a conclusion, the Commission stressed that its own ruling implied "a technical mistake [to be] made".[54] In this author's view the 'technical mistake' to which the Commission was referring is clear enough: to disregard the legal personality of the two extinct entities so as to allow the claim to be brought by the shareholders.

While none of the treaties establishing Venezuelan Commissions contained provisions on shareholder claims, those concerning Mexican Commissions did actually provide for "special provision[s] on claims […] by national of the parties for losses suffered by corporation in which they had an interest".[55]

For instance, under Article 3 of the Convention between Great Britain and Mexico, the "Commission shall deal with all claims against Mexico […] for losses or damages suffered by British subjects […], by reason of losses or damages suffered by any partnership, company or association in which British subjects […] have or have had an interest exceeding fifty per cent of the total capital of such partnership, company or association, and acquired prior to the time when the damages or losses were sustained".[56]

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[51] In this sense, G. BOTTINI, *Admissibility of Shareholder Claims under Investment Treaties*, cit., p. 101.

[52] *Baasch and Römer Case*, Opinion of the Commission, cit., p. 727.

[53] *Ibid.*

[54] *Ibid.*

[55] G. BOTTINI, *Admissibility of Shareholder Claims under Investment Treaties*, cit., p. 103. For an appraisal of the case law of the Mexican Claims Commissions see E.M. BORCHARD, 'International Pecuniary Claims against Mexico', in *Yale Law Journal*, 1917, pp. 339-348; A.H. FELLER, *The Mexican Claims Commissions 1923-1934. A Study in the Law and Procedure of International Tribunals*, New York, 1935, *passim*, especially pp. 117-121 on shareholder claims.

[56] Convention between Great Britain and the United Mexican States, signed 19 November 1926, entered into force 8 March 1928, in *Reports of International Arbitration Awards*, vol. V, pp. 7-10, at 8. See also Article 3 of the Convention between France and the United Mexican States, signed 25 September 1924, entered into force 29 December 1924, in *Reports of International Arbitration Awards*, vol. V, pp. 313-316, at 314: "La commission connaîtra de toutes les réclamations contre le Mexique à raison […] des pertes ou dommages causés aux intérêts de Français ou de protégés français dans des sociétés, compagnies, associations ou autres groupements d'intérêts, pourvu que l'intérêt du lésé, dès avant l'époque du dommage ou de la perte, soit supérieur à 50 p. 100 du capital total de la société ou association dont il fait partie, et qu'en outre, ledit lésé présente à la commission une cession consentie à son profit, de la proportion qui lui revient dans les droits à indemnité dont peut se prévaloir ladite société ou association".

Accordingly, reflective loss claims by British shareholders for damages suffered through a wrongful act against a Mexican corporation were heard. This was possible, however, only under the condition of an allotment to the claimant by the corporation of his proportion of the loss suffered, to avoid risks of double compensation. In this respect, in *Frederick Adams and Charles Thomas Blackmore*, the commission stressed that for the purposes of safeguarding "the respondent Government against [double compensation], the Convention stipulates that the joint interest be reduced, by means of an allotment, by the proportional part of the losses, for which British partners or shareholders claim".[57]

A similar provision allowing reflective loss claims was also enshrined in the Convention between the United States and Panama, whose Article 1 provided that: "all claims for losses or damages suffered by citizens of either country, by reason of losses or damages suffered by any corporation, company, association or partnership, in which such citizens have or have had, a substantial and bona fide interest, provided an allotment to the claimant by the corporation, company, association or partnership, of his proportion of the loss or damage suffered is presented by the claimant to the Commission [...] shall be submitted to a Commission consisting of three members for decision in accordance with the principles of international law, justice and equity".[58]

Similarly, in 1926, the Reparation Commission established pursuant to the Treaty of Versailles of 1919 concluded, in the *Deutsche Amerikanische* case, that shareholders were entitled to claim for losses suffered by their corporation only due to a treaty provision. As a general rule, the tribunal found that "neither the shareholders nor their creditors have any right to the corporate assets other than to receive, during the existence of the company, a share of the profits, the distribution of which has been decided by a majority of the shareholders, and, after its winding up, a proportional share of the assets".[59]

In this respect, the Commission concluded for the irrelevance of the fact that the claimant was the sole shareholder, thus holding all the shares of the corporation. Indeed, while this situation might result in the shareholder fully controlling the legal entity, "it does not in any way diminish the rights and powers of the directors or make the property and assets his, as distinct from the corporation's".[60]

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[57] *Frederick Adams and Charles Thomas Blackmore (Great Britain) v. United Mexican States*, Decision of the Commission, 3 July 1931, in *Reports of International Arbitration Award*, pp. 216-217, at 217.

[58] Claims Convention between the United States of America and Panama, signed 28 July 1926, entered into force 3 October 1931, in *Reports of International Arbitration Awards*, vol. VI, p. 301.

[59] *The Deutsche Amerikanische Petroleum Gesellschaft oil tankers (USA, Reparation Commission)*, Award, 5 August 1926, in *Reports of International Arbitration Awards*, vol. II, pp. 777-795, at 787.

[60] *Ibid.*, p. 788.

The same holds all the truer if the shareholder holds the vast majority, but not the entirety, of the shares. To put it otherwise, the size of the shareholding was irrelevant for the purpose of the relationship between the rights of the corporation and those of the shareholders: an argument, it will be shown in Chapter 3,[61] that has instead found its way in the case law of human rights monitoring bodies.

What comes out from this analysis is a rather fragmented and incoherent practice concerning the *ius standi* (of the national State) of the shareholders for damages suffered by the corporation in which they own shares.[62] Even if reflective loss claims were deemed admissible in some circumstances, it is apparent that the tribunals did so on the basis of a specific agreement of the parties to this effect. In this sense, it is not possible to identify a rule supporting the admissibility of reflective loss claims. Quite the opposite, even the *Delagoa Bay Railway* and *El Triunfo* arbitrations – generally cited among the most authoritative precedents to this effect – actually prove that the rule generally prohibits the intervention of the national State of the shareholders, at least whenever the corporation is still properly functioning.

Moreover, it must be pointed out that, whenever reflective loss claims were allowed under the relevant treaty, the adjudicatory bodies proved themselves to be well aware of the risks stemming from such practice. In this respect, they repeatedly acknowledged the need to preserve the orderliness and coherence of both municipal and international institutions, by avoiding double compensation and parallel proceedings. Similarly, both case law and contemporary scholarship recalled the need to ensure that corporate creditors were not deprived of any possible chance to recover their money. Such a concern did bring to creative solutions, with adjudicatory bodies awarding compensation to shareholders under the condition that creditors were fully and primarily satisfied before any distribution of the sum could be carried out.[63]

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[61] See, *infra*, Chapter 3, Sections 2.3 and 3.3.

[62] M. DIEZ DE VELASCO, 'La protection diplomatique des sociétés et des actionnaires', cit., p. 91: "La pratique conventionnelle relative à la protection diplomatique des actionnaires dont nous avons exposé les grandes lignes dans ce chapitre n'offre ni l'uniformité ni la généralité minimales pour qu'on puisse estimer que nous nous trouvons devant la manifestation d'application d'une norme générale de droit international. Les réclamations présentées en faveur des actionnaires de sociétés étrangères qui ont été admises par des tribunaux d'arbitrage ou par des commissions mixtes de réclamations le furent sur la base des instruments internationaux qui établissaient la compétence de ces organismes. Dans les textes des décisions il y a des indices suffisants pour estimer qu'il s'agit d'une solution découlant des normes particulières applicables au cas étudié et que la solution ne serait pas la même si l'on avait dû appliquer les normes internationales de caractère général".

[63] This need was also stressed in scholarship, when discussing the standing of shareholders for damages suffered by the corporation under *ad hoc* provisions such as those in Mexican Claim Commissions. See A.H. FELLER, *The Mexican Claims Commissions 1923-1934. A Study in the Law and Procedure of International Tribunals*, cit., pp. 118-122.

3. The *Barcelona Traction* Case: Establishing the Rule under General International Law

The first opportunity for the ICJ to deal with shareholder claims in international law arose out of an application filed by the Government of Belgium on behalf of its national *associés* in the Barcelona Traction Limited Company, following a series of allegedly wrongful measures taken by the Government of Spain against the corporation.

The facts of the case are known to everyone: the Barcelona Traction was established in 1911, as a holding incorporated and headquartered in Toronto, Canada. The corporation, through a group of subsidiaries, provide electric service in Spain. In the aftermath of World War I, most of the shareholding was acquired by Belgian natural and juridical persons. Afterward, Barcelona Traction issued several series of bonds, most of which in sterling.[64]

However, in the 1940s, the Spanish authorities denied the transfer of the foreign currency necessary for servicing the bonds; as a consequence, the corporation was unable to repay its debts. Despite all the negotiations, a solution was not found and the entity was declared bankrupt by Spanish judges: following the decree to this effect, all its assets and shares in subsidiaries were seized and sold. Against this background, Belgium started proceedings before the ICJ against the Spanish Government, contending that all the above-mentioned measures were in breach of international law and, thus, required "reparation for the consequential damage suffered by Belgian nationals, natural and juristic persons, shareholders in Barcelona Traction".[65]

As already pointed out in the Introduction, however, the ICJ refused to entertain the dispute finding that Belgium had no legal standing to bring a claim in favor of its 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 corporation when the lamented acts were directed by a third State against the entity, rather than against the shareholders as such.[66]

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.[67] In this re-

[64] For a more detailed exposition of the relevant facts, see S. WITTICH, 'Barcelona Traction Case', in *Max Planck Encyclopedia of Public International Law*, 2007; F. FONTANELLI, G. BIANCO, 'Barcelona Traction Share', in J. HOHMANN, D. JOYCE (eds), *International Law's Objects*, Oxford, 2018, pp. 141-150.

[65] ICJ, *Barcelona Traction*, Judgment, 5 February 1970, cit., para. 25,

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

[67] A similar argument had been already advanced by P. DE VISSCHER, 'La protection diploma-

spect, it is relevant to point out that, in its judgment on the preliminary objections rendered in 1964, the ICJ had already clarified that the question as to whether Belgium possessed *locus standi* was actually strictly interrelated to the existence of substantive rights held by the shareholders.

Using the words of the Court, the issue concerned "whether international law 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".[68] In a nutshell, the ICJ had to ascertain the interplay between the corporation and its shareholders on the international legal plane.

Interestingly, for the purpose of our study, in framing such relationship, the Court argued that: "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".[69]

Moving from these considerations, the Court adopted the municipal law clear-cut distinction between the rights of the corporation and the direct rights of its shareholders.[70] As far as the relationship between the rights of the entity

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tique des personnes morales', 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 posséde 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*" (*italics added*).

[68] ICJ, *Barcelona Traction,* Judgment, 24 July 1964, cit., p. 44.

[69] ICJ, *Barcelona Traction*, Judgment, 5 February 1970, cit., para. 38.

[70] L. CAFLISCH, 'The Protection of Corporate Investments Abroad in the Light of the Barcelona Traction Case', cit., p. 170.

and legal position of the shareholders, the Court reasoned in the terms of economic 'interests', which might be well impaired by a wrongful act against the corporation without this meaning, however, that the *associés* have a right to claim for compensation.

According to the Court, indeed, such a distinction impacts upon the law of state responsibility and diplomatic protection. In greater detail, it is only when a wrongful act is directed against the direct rights of a shareholder that the latter can be said negatively affected on the substantive level. As a consequence, the national State will be entitled to invoke the international responsibility of the injuring State.[71] That is because only an infringement upon rights involves responsibility and, thus, an obligation to make reparation.[72]

Contrariwise, if the conduct of the State only affects the economic interests of the shareholders (inasmuch as the wrongful act is only directed against the rights of the corporation), their national State will not be entitled to act in diplomatic protection since such a course of action will not involve the responsibility of the wrongdoer *vis-à-vis* the shareholders.[73] Therefore, whenever a shareholder suffers a drop in value of his shares as a consequence of a wrongful act against the corporation, "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".[74]

3.1. … and its Exceptions

Having said that, the Court then moved to consider whether the general rule prohibiting the national State of the shareholders to claim reflective losses provided for some exceptions to proceed with the "lifting of the corporate veil" or, in other words, the "disregard of the legal entity".[75]

Once again, the judges looked at municipal law. In this respect, they found that being such a process exceptionally admitted in domestic legal systems, the same could also be true in principle with regard to the international legal order.

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[71] This possibility was already well-established under general international law. In this sense, see G. PERRIN, H. MAIRE DE RIEDMATTEN, 'La protection diplomatique des sociétés commerciales et des actionnaires de droit international public', in *Revue juridique et politique, indépendance et coopération*, 1978, pp. 387-404, at 395: "Avant l'arrêt de la Barcelona Traction, il était admis que, lorsqu'un acte illicite portait atteinte aux droits propres des actionnaires d'une société de capitaux, leur Etat national pouvait épouser leur cause, par exemple en cas de confiscation par l'Etat dont la société est nationale d'actions détenues par des étrangers".

[72] ICJ, *Barcelona Traction*, Judgment, 5 February 1970, cit., para. 46.

[73] *Ibid.*

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

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

The question thus concerned the identification of possible special circumstances "which justify the lifting of the veil in the interest of shareholders",[76] possibly allowing reflective loss claims being pursued by the national State of the *associés*.

Against this background, the ICJ considered two main hypotheses in which such a course of action could be admitted. The first concerned the treatment of enemy and allied property, both during and following World War I and II, in peace treaties and other relevant international instruments. In this respect, the Court was at ease in excluding the relevance of these rules for the purpose of the *Barcelona Traction* case, pointing out that their rationale was that of carrying out economic warfare, while ensuring the protection of allied property.[77]

The second hypothesis regarded the treatment of foreign property in case of nationalization. Once again, the ICJ excluded such an area from the determination of general international law, to the extent that the arrangements providing for compensation were deemed *sui generis* in nature. In a nutshell, the Court "considered these two specific areas as containing *leges speciales* providing no guidance in the present case".[78]

Similarly, in just a few lines, the judges in The Hague dismissed the early case law of arbitral tribunals and claims commissions invoked by the parties, stressing that the alleged exceptions therein recognized were actually based upon the specific terms of the instruments establishing the jurisdiction of the concerned adjudicatory body.[79] Accordingly, all the awards and decisions could not be used in order to generalize these exceptions beyond the circumstances of the specific cases. Again, it considered such practice an issue of *lex specialis*.

Having ascertained that the none of the abovementioned exceptions could be deemed applicable, the ICJ questioned whether other special circumstances allowing the disapplication of the general rule could be identified.[80] In this respect, the Court pointed out that the piercing of the corporate veil in favor of the shareholders could be justified whenever: *i*) the injured corporation ceased to exist; or *ii*) the State of nationality of the corporation did not have the capacity to act on behalf of the legal entity. In the case at hand, however, the ICJ excluded that the shareholders and their corporation actually fell in one of the two situations.

As far as the first exception is concerned, the Court recognized that the Barcelona Traction had been entirely paralyzed following the declaration of bankruptcy. Nonetheless, the relevant fact to be considered was that the corporation

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

[77] In this sense, while discussing the rules on the protection of corporations, A. GIANELLI, 'La protezione diplomatica di società dopo la sentenza concernente la Barcelona Traction', cit., p. 769.

[78] S. WITTICH, 'Barcelona Traction Case', cit., para. 12.

[79] ICJ, *Barcelona Traction*, Judgment, 5 February 1970, cit., para. 63.

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

still existed as a legal entity.[81] In other words, to the extent that the corporation is still *de iure* capable of vindicating its own rights *vis-à-vis* the wrongdoing State, shareholders are not entitled to protection.

As for the second exception, the Court concluded that – being the Barcelona Traction incorporated in Canada – the only State entitled to act had to be identified in the Canadian one. In this regard, the fact that Canada had ceased to act on behalf of the legal entity, 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.[82]

Finally, the Court engaged with the argument of the Belgian Government according to which the disregard of the legal personality of the corporation had to be admitted on the basis of equitable considerations. In this regard, the ICJ referred to the theory allowing the national State of the shareholders to act in diplomatic protection whenever the injured corporation possesses the nationality of the alleged tortfeasor State. Nonetheless, inasmuch as the present case did not involve this specific situation, the Court "did not examine the validity of that theory".[83]

Similarly, the ICJ considered whether, on the basis of equity considerations, the national State of the shareholders should be entitled to claim whenever the general rule cannot be applied.[84] However, the Court proved aware of the possible far reaching practical effects of such an approach. Indeed, moving from the assumption that any shareholder should be able to take advantage of diplomatic protection,[85] the ICJ refused to establish a minimum threshold of shareholding enabling the national State to act. If so, however, a State would be entitled to exercise diplomatic protection on behalf of a national shareholder irrespective of whether he holds one or all the shares in the corporation.

In this respect, the Court convincingly pointed out that a general admissibility, under the law diplomatic protection, of shareholder claims for reflective loss could easily "create an atmosphere of confusion and insecurity in international economic relations".[86] Indeed, a general permission would open the floodgates of multiple and competing diplomatic claims.[87] As it will be argued

[81] *Ibid.*, para. 66. For a critical view of this finding, see I. SEIDL-HOHENVELDERN, *Corporations in and under International Law*, Cambridge, 1987, p. 9: "One may well wonder whether at the time of the judgment of the I.C.J., the Barcelona Traction Company was not practically defunct. The efforts of the Court to find signs of life in the company's appear rather artificial".

[82] J. DUGARD, 'Diplomatic Protection', cit.

[83] S. WITTICH, 'Barcelona Traction Case', cit., para. 17.

[84] ICJ, *Barcelona Traction*, Judgment, 5 February 1970, cit., para. 93.

[85] *Ibid.*, para. 94.

[86] *Ibid.*, para. 96 (*italics added*).

[87] I. SEIDL-HOHENVELDERN, *Corporations in and under International Law*, cit., p. 8: "Lifting the corporate veil would be quite inappropriate in the area of diplomatic protection. In theory,

in Chapter 4, this was a rather prophetic statement, considering the current ungovernability of shareholder claims for reflective loss under international investment law.

As much anticipated, to the extent that any exception was deemed applicable, the Court, by 15 votes to 1, rejected the Belgian claim due to the lack of *locus standi* on behalf of its national shareholders.

3.2. The Transposition of Domestic Rules to the International Legal System

It is very difficult to provide a critical appraisal of a case, *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 due account an institution of domestic law, or criticizing the judges in The Hague for their (alleged) formalism and lack of flexibility.[88] Against this background, this Section is not aimed at 're-judging' the case,[89] but rather at shedding some light on certain issues which are relevant for the overall analysis concerning the protection of shareholders under international law.

Needless to say, there is an elephant in the room: the often-criticized choice of the Court which has been accused of having "unnecessarily limited its inquiry to principles of municipal law, rather than fashioning a new rule for shareholder claims based on international law".[90] This is often coupled with a criticism for having the judges in The Hague merely disregarded "the existing and unsettled international case law which recognized in some instances the right of share-

the outcome should be the same whether it is the State or the shareholders who receive diplomatic protection. In view of the fact that shareholders from many countries may each own a percentage of the shares of the corporation – a percentage moreover which may vary from day to day – such a rule would hardly be practicable". *Contra*, see G. PERRIN, H. MAIRE DE RIEDMATTEN, 'La protection diplomatique des sociétés commerciales et des actionnaires de droit international public', cit., p. 404: "Quant aux complications éventuelles dues à la multiplicité des réclamations, elles ne sont guère à craindre et pourraient être résolues par des accords entre les Etats requérants."

[88] A. MIAJA DE LA MUELA, *Aportación de la sentencia del tribunal de La Haya en el caso Barcelona Traction (5 de febrero de 1970) a la jurisprudencia internacional*, Valladolid, 1970; G. SACERDOTI, 'Barcelona Traction Revisited: Foreign-Owned and Controlled Companies in International Law', in Y. DINSTEIN, M. TABORY, *International Law at a Time of Perplexity. Essays in Honour of Shabtai Rosenne*, Dordrecht/Boston/London, 1989, pp. 699-716.

[89] L.J. LEE, '*Barcelona Traction* in the 21st Century: Revisiting its Customary and Policy Underpinnings 35 Years Later, in *Stanford Journal of International Law*, 2006, pp. 237-289; S. EL BOUDOUHI, 'Barcelona Traction Re-Imagined: The ICJ as a World Court for Foreign Investment Cases?', in I. VENZKE, K.J. HELLER (eds), *Contingency in International Law. On the Possibility of Different Legal Histories*, Oxford, 2021, pp. 406-425.

[90] S.A. KUBIATOWSKI, 'The Case of *Elettronica Sicula S.p.A*: Toward Greater Protection of Shareholders' Rights in Foreign Investments', cit., p. 225.

holders to benefit from the diplomatic protection of their home State".[91] In doing so, therefore, the Court would have ignored the early case law of *ad hoc* arbitral tribunals and claims commissions, which – despite their decisions being based on treaty provisions – could have provided an allegedly more international friendly rule on the protection of shareholders.

In our view, it is necessary to tackle the problem following a step-by-step approach, which can be summarized as it follows. First, was there any customary rule to be applied in order to decide the case at stake? If the answer is in the negative, was the Court right in resorting to general principles commonly applied *in foro domestico* so as to identify a proper rule to address the issues? If so, did the Court follow the appropriate steps to this end, both from a methodological and argumentative point of view?

Moving from the first question, that is to say, whether a customary rule to be applied by the ICJ had already emerged, the answer seems to be in the negative. As highlighted in Section 2, indeed, the existing practice on the matter fell short of being sufficiently consistent to fulfil the criterion of 'generality' which is required to establish a rule of customary international law.[92] The same holds true if one considers the subjective element or *opinio juris*.

As regards the former, treaty arrangements – in the words used by the ILC in its recently approved Draft conclusions on the identification of customary international law – raise the well-known issue as to whether the repetition of a certain provision "attests to the existence of a corresponding rule of customary international law (or has given rise to it)"[93] or rather shows the contrary, "in the sense

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[91] L. VANHONNAEKER, *Shareholders' Claims for Reflective Loss in International Investment Law*, cit. In this sense, see: H. CLAY, 'Recent Developments in the Protection of American Shareholders' Interests in Foreign Corporations', in *Georgetown Law Journal*, 1956, pp. 1-19, at 13; R.B. LILLICH, 'The Rigidity of the Barcelona Traction Case', in *American Journal of International Law*, cit., p. 524; N.S. RODLEY, 'Corporate Nationality and the Diplomatic Protection of Multinational Enterprises: The Barcelona Traction Case', cit., p. 78. In this sense, see also R.J. GRAVING, 'Shareholder Claims against Cuba', Part II, in *American Bar Association Journal*, 1962, pp. 335-338, at 335: "the pattern of recent settlements reveals to what extent international practice has now accepted the standing of direct and indirect shareholders to advance international claims. To be borne in mind is that American shareholder claims against Cuba may be based on a direct interest in a Cuban corporation, on an interest in a third-country corporation which operated in Cuba through a branch, or on an interest in a third-country corporation which operated in Cuba through a Cuban subsidiary". A similar stance can be found in 'Corporation – Shareholder Suit – Belgian Nationality of Shareholders in Canadian Corporation Held Insufficient to Give Belgium Standing to Sue on Behalf of Those Shareholders in the International Court of Justice', in *New York University Journal of International Law and Politics*, 1970, pp. 391-403, at 394-395, footnote 25.

[92] In this sense, M. DIEZ DE VELASCO, 'La protection diplomatique des sociétés et des actionnaires', cit., p. 91.

[93] ILC, 'Draft conclusions on identification of customary international law, with commentaries', in *Yearbook of the International Law Commission*, 2018, vol. II, pp. 89-113, at 107 (Conclusion 11, Commentary, para.8).

that States enter into treaties because of the absence of any rule or in order to derogate from an existing but different rule of customary international law".[94]

Therefore, while it is true that "a recurrence of treaties laying down a similar rule may produce a principle of customary international law to the same effect",[95] one shall not ignore that the repetition of a rule in treaty law does not *per se* mean that such a rule has acquired the status of customary international law.[96] This is all the truer if, as it is in the concerned case, the treaty practice is not by itself consistent in providing for a certain rule.

After all, the analysis of diplomatic practice and negotiations seem to confirm that the protection by the national State of shareholders for a wrongful act against the corporation in which they own shares was discussed and, sometimes, agreed upon only as a derogation from the general approach followed.[97] In this sense, therefore, *opinio juris* seems shaky too.

From this perspective, it is then the early case law of international *ad hoc* tribunals and claims commissions, as examined in Section 2, to prove decisive. In different circumstances, indeed, the adjudicatory bodies rejected reflective loss claims pointing out how they conflicted with the rule according to which it is up to the (national State of the) corporation – and only to the latter – to vindicate a wrong infringing upon the rights of the legal entity.

Moreover, even when allowing a reflective loss claim, arbitral tribunals and claims commissions often stressed that such an outcome was based on a specific arrangement between the parties. Be it the entitlement of the adjudicatory body to settle the dispute on equitable considerations, the choice not to raise an objection, or even equitable considerations of justice, there was an agreement to derogate from the general rule which would have prevented the (national State of the) shareholders to do so. All in all, the practice was so fragmented that no customary rule could be reconstrued by looking at it.[98] Eventu-

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[94] *Ibid.*

[95] J.G. STARKE, 'Treaties as a "Source" of International Law', in *British Yearbook of International Law*, 1946, p. 344; A. D'AMATO, 'Treaties as a Source of General Rules of International Law', in *Harvard International Law Journal*, 1962, pp. 1-43.

[96] ILC, 'Draft conclusions on identification of customary international law, with commentaries', Conclusion n. 11.

[97] M. DIEZ DE VELASCO, 'La protection diplomatique des sociétés et des actionnaires', cit., pp. 140-141 and 144-145; L. CAFLISCH, 'The Protection of Corporate Investments Abroad in the Light of the Barcelona Traction Case', cit. See also M. SHAW, *International Law*, cit., p. 638.

[98] M. DIEZ DE VELASCO, C. ESCOBAR HERNÁNDEZ, *Instituciones de Derecho internacional público*, 18th edition, Madrid, 2013, p. 933: "Un estudio superficial de la práctica diplomática y de la jurisprudencia arbitral nos podría llevar a la conclusión de que al protección diplomática de los accionistas de una Sociedad extranjera pudiera estar admitida en el D.I. Un estudio más profundo nos pone de manifiesto lo siguiente: [...] Existe, efectivamente, una jurisprudencia arbitral favorable a reparar los daños causados a socios accionistas de sociedades extranjeras a petición del Estado nacional distinto al de la sociedad; pero lo que es aún más cierto es que de dichos prece-

ally, even if one were to find the practice to be sufficient coherent for the purpose, one could almost come to the unexpected conclusion that a general prohibition of reflective loss claims had consolidated itself at the time *Barcelona Traction* was decided.

If one were to find, as it is herein contended, that no customary rule had actually emerged at the relevant time, the question then concerns whether the ICJ appropriately resorted to general principles *in foro domestico* in order to identify a rule to regulate the legal standing of shareholders under general international law.[99] Against this background, one has to recall that "the general principles of law found their way into the Statute of the Permanent Court [of International Justice]", the predecessor of the contemporary ICJ, "as a reserve source to provide a basis for a decision in the event that neither relevant treaties nor customary law did so".[100]

Thereby, the provision inserted in Article 38(1)(c) of the Statute of the ICJ refers to general norms which fill "the gap that might be uncovered in international law and solve this problem which is known legally as *non liquet*".[101] Fac-

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dentes no es pueden extraer consecuencias a la ligera sobre la protección de accionistas, ya que obedecieron a circunstancias especiales y se solucionaron a través de unos compromisos arbitrales en los que el propio Estado reclamado accedía al ejercicio de la acción judicial por diversas causas".

[99] Some authors have expressed doubts that the International Court of Justice, in referring to the "rules generally accepted by municipal legal systems" was actually resorting to general principles *in foro domestico*. In this sense, see H. THIRLWAY, 'Concepts, Principles, Rules and Analogies: International and Municipal Legal Reasoning', in *Collected Courses of The Hague Academy of International Law*, vol. 294, 2002, p. 279: "However, the Court in that case *was not* […] *seeking a general principle of law, nor was it arguing by analogy*: on the contrary, it explained that in order to decide the case it had to apply directly rules of municipal law 24, as a result of a sort of renvoi from international law; but municipal law in that sense must be a specific system of national law, not a sort of lowest common denominator" (*italics added*); P.-M. DUPUY, 'International Law and Domestic (Municipal) Law', in *Max Planck Encyclopedia of Public International Law*, 2011, para. 37: "These 'rules generally accepted by municipal legal systems' are certainly not identical in nature with the 'general principles of law recognised by civilised nations' referred to in Art. 38(1) (c) ICJ Statute […] as a source of international law. The whole discussion of the problem of references to municipal law would not have been necessary if ultimately a source of international law would have to be applied". In a more dubitative way, see L. CAFLISCH, 'The Protection of Corporate Investments Abroad in the Light of the Barcelona Traction Case', cit., p. 172: "This would seem to suggest that the rules in question are in the nature of general principles of law recognized by civilised nations (Article 38 (1) (c) of the Courts Statute)". There seems to be no doubt, in this respect, in the works of the Special Rapporteur on general principles of law, Marcelo Vázquez-Bermúdez: "In the Barcelona Traction case, in contrast, the Court considered that applying general principles of law was appropriate since the law on diplomatic protection did not address the specific issue of the relationship between companies and shareholders, noting in particular that 'international law ha[d] not established its own rules' on the matter" (International Law Commission, 'Third Report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur', 18 April 2022, A/CN.4/753, para. 39 ff).

[100] H. THIRLWAY, *The Sources of International Law*, cit., pp. 125-126.

[101] M. SHAW, *International Law*, cit., p. 73.

ing a scenario in which customary international law had not established any rule to address the intricated relationship between corporations and shareholders, resort to general principles *in foro domestico* does not only appears as a possibility, but rather a mandatory solution and the most appropriate way for the Court to tackle the issue.

Once ascertained that the judges in The Hague were right in having recourse to the third and last source enshrined in Article 38, some clarifications on the nature and the methodology for the identification of general principles *in foro domestico* are required.

As far as the nature of general principles commonly applied in domestic legal systems, it is fundamental to highlight that they are a "source directe du droit international".[102] In other words, in settling a dispute relying upon them, the ICJ, as well as any other international court or tribunal, is not applying a source of law external from the international legal order.[103] Quite the opposite, the adjudicatory body is applying a source which is indeed modelled upon and derived from domestic legal systems, but yet retains its nature of international law: "rules of municipal law which have been accepted and incorporated into international law and practice".[104]

This inevitably brings the question concerning the appropriate methodology for identifying a general principle *in foro domestico*. In this respect, "la méthode de base du raisonnement est l'analogie".[105] In greater detail, in order to "determine the existence and content of a general principle of law derived from national legal systems, it is necessary to ascertain: (a) the existence of a principle common to the various legal systems of the world; and (b) its transposition to the international legal system".[106] While the first step is to be carried out by way

[102] M. FORTEAU, A. MIRON, A. PELLET, *Droit international public*, 9th edition, Paris, 2022, p. 270. See also: M. SHAW, *International Law*, cit., p. 73; O. CORTEN, *Méthodologie du droit international public*, Bruxelles, 2009, p. 186; C. FOCARELLI, *Diritto internazionale*, 5th edition, Milano, 2019, pp. 148-151. The question as to whether general principles of law can be considered as an autonomous source of international law is clearly formulated and discussed in P. DE VISCCHER, 'Cours général de droit international public', in in *Collected Courses of The Hague Academy of International Law*, vol. 136, 1972, pp. 7-202, at 112-120.

[103] In this respect, see the recent work by D. GRECO, 'Su natura e limiti della trasposizione di principi comuni 'in foro domestico' nell'ordinamento internazionale', in *Rivista di diritto internazionale*, 2023, pp. 297-339 and the abundant references therein provided. See also M. DE ANDRADE, 'The Two-Step Methodology for the Identification of General Principles of Law', in *International & Comparative Law Quarterly*, 2022, pp. 983-1005.

[104] J.M. JONES, 'Claims on Behalf of Nationals Who are Shareholders in Foreign Companies', cit., p. 232.

[105] M. FORTEAU, A. MIRON, A. PELLET, *Droit international public*, cit., p. 429. See also A. VERDROSS, 'Les principes généraux du droit dans la jurisprudence internationale', in *Collected Courses of The Hague Academy of International Law*, vol. 52, 1935, pp. 195-251, at 205.

[106] ILC, 'General principles of law. Draft conclusions provisionally adopted by the Drafting Committee on first reading', 12 May 2023, A/CN.4/L.982, Draft conclusion 4. See also ILC, 'Second report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur', 9 April

of a comparative analysis, being necessary – but sufficient – "qu'un principe interne soit vérifié dans la plupart des systèmes juridiques, non pas tous",[107] it is actually the second step that requires further attention.

Indeed, it has been pointed out that "[t]ous les principes communs aux systèmes juridiques nationaux ne sont pas applicables dans l'ordre international. Encore faut-il qu'ils soient «transportables» […]. Seuls le sont ceux qui sont compatible avec les caractères fondamentaux de l'ordre international; ce qui oblige le juge ou l'arbitre international à un examen cas par cas".[108]

To make the domestic law analogy properly working, therefore, it must be ascertained that the general principle is compatible with the international legal order.[109] If the latter condition is not met, then the general principle – despite being "common to the principal legal systems of the world"[110] – will not provide any international rule to regulate the subject matter of the specific case. In this respect, it has been stated that "il ne s'agit pas d'une analogie aveugle, il faut constamment tenir compte des différences de structures entre le droit interne et le droit international".[111]

Against this background, it is finally possible to assess the reasoning of the ICJ in the *Barcelona Traction* judgment with regard to the rule on the protection of shareholders under general international law. The first step of the identification does not pose major, if any, problem. As ascertained in Chapter 2, indeed, there are no doubts that the general prohibition for shareholders to claim for reflective losses can be said to be well-established within the principal legal systems of the world, having due regard within the analysis not only to the civil and common law distinction,[112] but also to geographical representation.[113]

2020, A/CN.4/741, para. 19: "the identification […] is generally considered to consist of a two-step analysis: first, determining the existence of a principle common to the principal legal systems of the world; second, ascertaining the transposition of that principle to the international legal system".

[107] M. Forteau, A. Miron, A. Pellet, *Droit international public*, cit., p. 429.

[108] *Ibid.*

[109] ILC, 'General principles of law. Draft conclusions provisionally adopted by the Drafting Committee on first reading', cit., Draft conclusion 7. On the way through which this ascertainment shall be carried out, see D. Greco, 'Su natura e limiti della trasposizione di principi comuni 'in foro domestico' nell'ordinamento internazionale', cit.

[110] ILC, 'Second report on general principles of law by Marcelo Vázquez-Bermúdez', cit., para. 19.

[111] M. Forteau, A. Miron, A. Pellet, *Droit international public*, cit., p. 429.

[112] ILC, 'Second report on general principles of law by Marcelo Vázquez-Bermúdez', cit., para. 25 ff.

[113] ILA, 'Report of the Study Group on the use of domestic law principles in the development of international law', Report of the Seventy-Eighth Conference, Sydney (2018), pp. 1170–1242, at para. 214. See also ILC, 'General principles of law. Draft conclusions provisionally adopted by the Drafting Committee on first reading', cit., Draft conclusion 5(2): "The comparative analysis must be wide and representative, including the different regions of the world".

The second step does require a more in-depth assessment. It is indeed a matter of understanding whether the common principle identified through the comparative analysis carried out above can be transposed within the international legal order, having due regard to the different structure of the latter.[114] There seems no hurdle as for the requirement not to conflict with fundamental principles of international law, to be interpreted as the "principles on which, in the international legal system, the positive law regulating the matter is based".[115]

Hypothetically, were the exercise of diplomatic protection precluded on behalf of legal entity, thus being possible for States only to act in favor of natural persons, the general principle of corporate law prohibiting reflective loss claims could hardly be said to be compatible with the fundamental principles of international law. Otherwise, it would produce, as a consequence, a situation where no reparation for a wrong against a corporation would be possible: neither on their behalf, nor through an action brought on behalf of the shareholders.

At the same time, it is interesting to question whether the general principle could be said to provide a rule fitting the purposes of the international legal order. Needless to say, this is the most problematic question, which has attained the interest of doctrine more than any other one.

In its dissenting opinion attached to the judgment, Judge Riphagen found that "[t]he considerations which determine the choice of a particular system of municipal private law with respect to what the Court has called 'the nature and interrelation' of 'the rights of the corporate entity and its shareholders' are completely foreign to the problems which are the concern of the rules of public international law relating to responsibility for the treatment of aliens".[116]

Similarly, Rosalyn Higgins stressed that the application of municipal law was based on the erroneous assumption "that the functions of international law are the same as those of municipal law".[117] Again, Kubiatowski concluded that "[t]he Court was in no way obligated to apply municipal law without any modification merely because customary international law was unclear on the subject of shareholder claims. Quite the contrary, the Court's duty is to fill the gaps in international law, and modify existing bodies of law where necessary".[118]

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[114] ILC, 'General principles of law. Draft conclusions provisionally adopted by the Drafting Committee on first reading', cit., Draft conclusion 6.

[115] ICJ, *North Sea Continental Shelf Cases (Germany/Denmark; Germany/Netherlands)*, Common Rejoinder Submitted by the Governments of Denmark and The Netherlands, 30 August 1968, in *ICJ Pleadings, Oral Arguments, Documents* 1968, vol. I, p. 453 ff., par. 117.

[116] ICJ, *Barcelona Traction*, Judgment, 5 February 1970, cit., Dissenting Opinion of Judge Riphagen, para. 3.

[117] R. HIGGINS, 'Aspects of the Case Concerning the Barcelona Traction, Light and Power Company, Ltd.', in *Virginia Journal of International Law*, 1971, pp. 327-343, at 331.

[118] S.A. KUBIATOWSKI, 'The Case of *Elettronica Sicula S.p.A*: Toward Greater Protection of Shareholders' Rights in Foreign Investments', cit.

According to them, therefore, the municipal law analogy fell short of providing a rule fitting the purposes of international law. Even more, they found the Court to have misinterpreted its functions, by considering itself bound to apply a rule derived from domestic systems allegedly on the basis of the reasoning that "because a municipal law creation, a company, is concerned, municipal law necessarily has to be applied where there presently are gaps in international law".[119] Both the contentions, in our view, can be dispelled.

Starting by whether the Court necessarily had to apply domestic law inasmuch as corporations are a creature of municipal law, the often-incriminated sentence is the following one: "[i]n this field international law is called upon to recognize institutions of municipal law that have an important and extensive role in the international field".[120] No doubts, this is an unfortunate excerpt, which has brought someone to cast some doubts on the prevalence of international law over national law.[121]

It is our contention that this is not what actually happened: neither the Court considered itself bound to apply domestic law as such, nor the relationship between the international and domestic legal orders was overturned. This is rather an argumentative, more than a methodological, misstep. As already pointed out, the ICJ did not merely apply municipal law, but rather identified a general principle *in foro domestico* – once again, an autonomous and direct source of international law – to be applicable. In doing so, the judges in The Hague did not but followed the path enshrined in Article 38(1)(c).

In this respect, the criticism that the Court has a duty to fill the *lacunae* of the international legal order by "modify[ing] existing bodies of law where necessary"[122] does not hit the mark: while it is undeniable that the ICJ has been an important vehicle for the development of international law, this is not its main function, which is rather to decide disputes on the basis of international law as it currently stands: *de iure condito*, therefore, not *de iure condendo*.

Coming to the criticism on the unsuitability of the municipal law analogy to the extent that the functions of international law are different,[123] this can also be confuted. Indeed, while the Court put emphasis on "the consistency of its findings with the approach adopted in municipal law ascertained by a comparative

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[119] R. HIGGINS, 'Aspects of the Case Concerning the Barcelona Traction, Light and Power Company, Ltd.', cit., p. 331.

[120] ICJ, *Barcelona Traction*, Judgment, 5 February 1970, cit., para. 38.

[121] *Ibid*., Separate Opinion of Judge Gros, cit.

[122] S.A. KUBIATOWSKI, 'The Case of *Elettronica Sicula S.p.A*: Toward Greater Protection of Shareholders' Rights in Foreign Investments', cit.

[123] R. HIGGINS, 'Aspects of the Case Concerning the Barcelona Traction, Light and Power Company, Ltd.', cit., p. 331, pointing out that "municipal law is directed to different ends than public international law".

approach of the same issue",[124] it also much stressed that the general prohibition of reflective loss claims did actually serve the purposes of international law. This has been clearly spelled out by Jimenez de Arechaga in 1965, according to whom the municipal law rationale underlying the prohibition of reflective loss claims could be also applied in the international legal order.[125]

It is not by chance that Mervyn Jones, back in 1949, already commented that "[t]he reasons which support [the prohibition] are equally valid in the international sphere. If a state of which the corporation is not a national could normally take up a claim in respect of an injury to the corporation merely because there are shareholders who are nationals of that state, and who have suffered loss, the results would be just as chaotic on the international plane as they would be under municipal law if any group of shareholders were allowed to sue in any case where the company has sustained damage".[126]

In other words, if all the States whose nationals are shareholders in a third country corporation were entitled to exercise protection on behalf of their respective citizens, this would inevitably entail a plethora of parallel and uncoordinated proceedings, thus bringing in the international legal arena what "municipal law has avoided by means of the principle of legal personality and with the obligation to canalize all corporate action through social organs".[127]

From this point of view, therefore, the rule was not transposed on the international legal plane by merely looking at the exigencies and functions of municipal legal orders. Quite the opposite, the ICJ transposed this rule precisely because it was able to fulfil some important own needs of international law.

3.3. The Distinction between Direct Rights and Interests of the Shareholders: A Reasoned Approach?

Having ascertained that the ICJ appropriately resorted to general principles commonly applied in domestic legal orders, identifying a rule suitable for the exigencies and functions of the international legal order, it now has to be examined the way in which the relevant domestic rule was translated into the language of international law as a result of the analogy.

At the same time, it must be considered whether, in shaping the general prin-

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

[125] E. JIMENEZ DE ARECHAGA, 'Diplomatic Protection of Shareholders in International Law', cit., p. 76.

[126] J.M. JONES, 'Claims on Behalf of Nationals Who are Shareholders in Foreign Companies', cit., p. 234.

[127] E. JIMENEZ DE ARECHAGA, 'Diplomatic Protection of Shareholders in International Law', cit., p. 76.

ciple *in foro domestico*, the judges in The Hague took into consideration possible exceptions to the rule recognized in domestic legal systems. Put it differently, "[i]t will, therefore be relevant to inquire whether, under municipal law, these rules are subject to any exception, for, if the municipal rule is applicable in international law, the municipal exception may also provide a useful analogy".[128]

Moving from the first issue, namely how the rule was concretely transposed into the international legal order, the Court affirmed a fundamental distinction between the direct rights and the interests of the shareholders. According to this, shareholders have *locus standi* to claim compensation for damages arising from any infringement of their rights. Contrariwise, they have none when the contested measures impact upon the corporation in which they own shares, thus indirectly prejudicing their economic interest in the way of a drop in value of their participation in the legal entity.

The relevant excerpt of the judgment reads as follows: "[n]otwithstanding the separate corporate personality, a wrong done to the company frequently causes prejudice to its shareholders. But the mere fact that damage is sustained by both company and shareholder does not imply that both are entitled to claim compensation [...] In such cases, no doubt, the interests of the aggrieved are affected, but not their rights. Thus whenever a shareholder's interests are harmed by an act done to the company, 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".[129]

At first glance, this might well appear as a crystal clear and functioning criterion. Rights are protected by ensuring legal standing to (the national State of) shareholders, while economic interests within the corporation are deemed not worthy of protection – at least, as a rule – thus providing that only (the national State of) legal entities are entitled to commence proceedings. In this sense, it has been pointed out that "the indispensable legal basis of any valid international claim is the injury to a right and not the mere prejudice to an interest which has not yet crystallized into an actual right".[130]

While it is undisputed that an international claim requires an injury to a right, the reasoning employed by the ICJ is not entirely convincing. What really matters is to understand when an interest does attain to the level of a right.[131] Zachary Douglas, in this respect, has convincingly stressed how the mere recognition of a "distinction between the company's rights and the shareholder's in-

[128] J.M. JONES, 'Claims on Behalf of Nationals Who are Shareholders in Foreign Companies', cit., p. 232.

[129] ICJ, *Barcelona Traction*, Judgment, 5 February 1970, cit., para. 44.

[130] E. JIMENEZ DE ARECHAGA, 'Diplomatic Protection of Shareholders in International Law', cit., p. 74.

[131] O. SCHACHTER, 'International Law in Theory and Practice', cit., pp. 193-194.

terests is not to resolve the problem of demarcation".[132] There is nothing that can be said to be a right *per se*. This holds true for both municipal systems and the international legal order.

After all, a right is nothing but an interest which has been deemed worthy of protection under the law. It is a function proper of the law to identify those interests that might reach the threshold of a right. When this is the case, then the right-holder enjoys protection, both substantive and possibly procedural. However, this is rather a consequence, not a prerequisite. In saying that the rights shareholders possess *qua associés* can be vindicated by their State of nationality, while this is not the case for the economic interest they possess in the corporations, the ICJ seems inverting the order of the problem. Using again the words of Zachary Douglas, "[a]t the point of departure for undertaking this task is the imperative of faithfully transposing the concept of a shareholding in municipal law to the international plane".[133]

In order to do so, the Court should have investigated more in-depth the reasons why shareholders, in municipal corporate law, are entitled to bring personal actions to vindicate their direct rights *qua associés*, but are generally prohibited from doing so to with regard to any wrong infringing upon the corporation in which they own shares. If one were to identify the approach followed by the judges in The Hague to the prohibition of reflective loss, it would probably conclude that the latter was founded on the separate legal personality enjoyed by corporations and, even more, on the corporate veil, which ensures the separation between the patrimony of shareholders and that of their corporation.

The overestimation of the legal personality as the foundation for the refusal to grant shareholders with a standing to claim for damages indirectly suffered because of a wrongful act against the corporation has been already criticized in Chapter 2. Contrariwise, it has been contended that shareholders are prohibited from commencing proceedings to this effect because of a policy choice, which is based on compelling legal policy reasons.

The distinction between non-protected and protected interests, which can be called mere interests and rights respectively, should have been drawn having due regard not to the separate legal personality as a formal institution of domestic law, but rather to these policy grounds. In criticizing the possibility to transplant the rules on the standing of shareholders as enshrined in municipal systems, Mervyn Jones concluded that such "rule is the product of a series of legislative and judicial policy choices over a long period of time".[134]

This cannot be denied. Quite the opposite, in Chapter 2 it has been con-

[132] Z. DOUGLAS, *The International Law of Investment Claims*, cit., p. 419.

[133] *Ibid.*, p. 419.

[134] J.M. JONES, 'Claims on Behalf of Nationals Who are Shareholders in Foreign Companies', cit., p. 309.

tended that the rule is effectively the product of legal policy choices, not the only possible result of a mandatory interpretation of the rules. In a nutshell, the Court came to the right conclusion, yet through an uncertain path.

While this may appear a purely theoretical and academic question, it has instead a rather profound impact on the way in which the rule and, most importantly, possible exceptions to the latter operate. As far as the general rule is concerned, its operativity shall be ensured in – but also limited to – all those circumstances in which a claim brought by the shareholders for the share drop in value following a wrong against their corporation would affect those objectives pursued under the policy choices: risks of double compensation, parallel and multiple proceedings, possible prejudices for creditors and other stakeholders, as well as alteration of the normal corporate governance. This brings the analysis to the final step, that is to say, the identification by the ICJ of the (emerging) exceptions to the no reflective loss principle.

The proper foundation of the general prohibition takes indeed a fundamental role when it comes to ascertain the circumstances under which an exception shall be admitted, so as to fulfil other objectives that are deemed to be worthy of protection by the relevant legal order.

If the foundation is not precisely spelled out, the consequence might be that of transposing the rule without bringing into the receiving system (*i.e.*, the international legal order) the exceptions to attenuate the rule. In doing so, the functions of international law must be considered.[135]

This position finds an echo in the separate opinion attached by Judge Fitzmaurice to the judgment in *Barcelona Traction*, according to whom it is necessary "to bear in mind that conditions in the international field are some-times very different from what they are in the domestic, and that rules which these latter conditions fully justify may be less capable of vindication if strictly applied when transposed onto the international level. Neglect of this precaution may result in an opposite distortion, – namely that qualifications or mitigations of the rule, provided for on the internal plane, may fail to be adequately reflected on the international, – leading to a resulting situation of paradox, anomaly and injustice".[136]

Moving from the approach that the foundation of the no reflective loss principle is to be found in the separate legal personality entails – for the purposes of diplomatic protection – that the exceptions are carved out around the circumstances in which the *personne morale* loses this feature.

[135] I. SEIDL-HOHENVELDERN, *Corporations in and under International Law*, cit., p. 2: "As will later appear, such an *en bloc* acceptance of these private law sources into public international law may encounter certain difficulties. Some such rules, more or less generally accepted by municipal legal systems, operate with concepts such as the existence of the corporate veil and the centralization of all rights and duties of the members of a juristic person at a single place. These concepts may conflict with other existing rules of international law".

[136] ICJ, *Barcelona Traction*, Judgment, 5 February 1970, cit., Separate Opinion of Judge Fitzmaurice, para. 5.

It is not by chance that Jimenez de Arechaga concluded that: "[s]ince the debarring of diplomatic protection on behalf of [share]holders results from the principle of legal personality of corporations and from their capacity to act on behalf of all [share]holders, it follow that such a restriction disappears as soon as, and only when, the corporation loses its legal rights to protect itself and, in so doing, to protect equally all its [share]holders".[137] There is, however, much more.

To the extent that the foundation is to be identified with the abovementioned policy choices, it is also to them that one has to look when identifying the exceptions to the rule. This does not mean to deny the relevance of the separate legal personality of corporations. It rather means not to look at the reflective loss principle by (only) using the lenses of the legal personality possessed by *personnes morale*s.

Having said that, the question attains as to the methodology the ICJ should have employed for the purposes of identifying these exceptions. The most obvious path would be that of transposing them from domestic legal orders. After all, if the no reflective loss rule is a general principle *in foro domestico*, it would be reasonable to imagine that the exceptions can be established through the same source of international law. Unfortunately, this is not the case.

Despite several authors have contended that domestic legal orders do have common exceptions, the analysis carried out in Chapter 2 has proved this to be not entirely true. The municipal law analogy can thus hardly be of help to identify the cases in which the rule shall make a step back. That is because an 'exception commonly applied in domestic systems' seems actually missing.

It is precisely in this sense that the policy reasons shall be of help in shaping the exceptions under international law. What can be derived from domestic legal systems is rather the recognition of the need to have exceptions attenuating the otherwise too rigid rule. Since the functions of international law might be – depending on the circumstances – different from those of domestic law, the Court should have taken into account the peculiarities of the international legal order when identifying possible exceptions.

This does not mean to recognize any form of judicial law making to the judges in The Hague. After all, the very formula of general principles of law recognized by national legal systems was agreed upon inasmuch as it made clear that adjudicatory bodies were called to apply what was already law, not to craft the most appropriate rules for the solution of the case at stake.

The Court was thus called with a task beyond its strength. Precisely in this regard Lucius Caflisch stressed that "an eminent author [– namely, De Visscher –] has characterized the Court's decision as 'narrow', and narrow it is. It is true that parts of it are open to criticism. However, the Court being bound by its

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[137] E. JIMENEZ DE ARECHAGA, 'Diplomatic Protection of Shareholders in International Law', cit., p. 80.

Statute to apply the existing rules of international law, it is difficult to see how it could have reached a different conclusion".[138]

In this respect, the Court struggled in identifying possible exceptions, thus resorting to the fragmented practice existing at the time to come to the conclusions – although as a *dictum* – that only two exceptions could be deemed as theoretically available. In doing so, it paved the way for future developments.

4. The *Elettronica Sicula S.p.A.* Case: Anything More Than a Treaty Issue?

Nineteen years after the judgment rendered in the *Barcelona Traction* case, a Chamber of the ICJ was called to decide another dispute concerning the protection of shareholders under international law.

In the case of the *Elettronica Sicula S.p.A.*,[139] the United States of America commenced proceedings against Italy, arguing that the respondent State had breached its international obligations under the Treaty of Friendship, Commerce and Navigation (FCN) between Italy and the United States,[140] as well as the Supplementary Agreement concluded on 26 September 1951.[141]

The facts of the case can be summarized as follows: Elettronica Sicula S.p.A. was an Italian corporation whose shareholding was entirely owned by two American corporations, Raytheon Company (Raytheon) and Machlett Laboratories Incorporated (Machlett). Despite the Italian corporation was operating profit, no distribution could be carried out inasmuch as debt and losses were higher. Accordingly, the American shareholders were planning its closure and liquidation, which was deliberated on 28 March 1968.[142]

A few days later, however, the Mayor of Palermo ordered the requisition of

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[138] L. CAFLISCH, 'The Protection of Corporate Investments Abroad in the Light of the Barcelona Traction Case', cit., p. 196.

[139] ICJ, *Case concerning Elettronica Sicula S.p.A. (United States of America v. Italy)*, Judgment, 20 July 1989, cit. For an analysis of the case, see B. 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*, 1990, pp. 897-948; S.D. MURPHY, 'The *ELSI* Case: An Investment Dispute at the International Court of Justice', cit.; I. SEIDL-HOHENVELDERN, 'Elsi and Badger. The Two Raytheon Cases", in *Rivista di diritto internazionale privato e processuale*, 1990, pp. 261-276.

[140] 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.

[141] 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.

[142] P. TOMKA, 'Elettronica Sicula Case', cit., para. 2.

the plant and its related assets justifying his decision on grounds of public order, since the financial crisis of the corporation could have had a significant impact on the local economy. While appealing the order before the Prefect of Palermo – which however rendered its decision more than a year later, on 22 August 1969 –, the Italian corporation filed a petition for bankruptcy before the Tribunal of Palermo, asserting that it lacked the funds necessary to carry on its business activities due to the alleged unlawful requisition.[143]

In May 1968 a decree of bankruptcy was issued and, following several unsuccessful auctions, all the assets of the corporation were purchased by a State-controlled entity for a price far less than the book value. The liquidators of the corporation appointed by the Tribunal sued Italian authorities before domestic courts, claiming for the damage suffered due to the requisition. After five years of litigation, the Italian Court of Cassation awarded compensation resulting from the unlawful six-month dispossession of the plant and its related equipment, dismissing however the claim concerning their alleged decrease in value.[144] The sum was used to pay creditors of the corporation, without being any surplus to be distributed to the former American shareholders.

Dissatisfied with the outcome of domestic litigation, the United States brought several claims under the FCN Treaty, requesting full compensation for the damages suffered by Raytheon and Machlett based on the treatment of the corporation in which they owned shares. 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".[145]

However, the Italian government raised several objections to the admissibility of the application: first, by denying that "Raytheon and Machlett, as covered US companies, but as shareholders in ELSI, had a protected legal right that could form the basis of the claim";[146] second, by contending that the two corporations had not exhausted local remedies as required under international law. Moreover, as for the merits, Italy denied any violation of the FCN.

Before delving into the analysis, it is necessary to deal with an objection often advanced when discussing the *ELSI* case, according to which despite the decision being "cited as an important [one] regarding the nature of protections afforded to shareholders in international law for injuries suffered by the compa-

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[143] ICJ, *Case concerning Elettronica Sicula S.p.A. (United States of America v. Italy)*, Judgment, cit., paras 27-33.

[144] P. TOMKA, 'Elettronica Sicula Case', cit., para. 7.

[145] ICJ, *Case concerning Elettronica Sicula S.p.A. (United States of America v. Italy)*, Counter-Memorial of Italy, 16 November 1967, in *ICJ Pleadings, Oral Arguments, Documents*, vol. II, p. 44.

[146] A. COHEN SMUTNY, 'Claims of Shareholders in International Investment Law', cit., p. 369.

ny",[147] it did not actually concern any claim under general international law, unlike the above-mentioned ruling in the *Barcelona Traction* case.

Facing such an observation, one could be tempted to simply dismiss the relevance of the case for the purposes of our analysis, at least at this stage. Since the claims were presented under an FCN treaty, there could be a good argument for dealing with the *ELSI* case in the Chapter devoted to international investment law. After all, it has been convincingly argued that FCN treaties are the predecessors of modern BITs, at least as far as the protection of investments is concerned.[148] Nonetheless, in this author's view, there are even better reasons to proceed herein with its assessment.

This is not only because the adjudicatory body called to settle the issue was the ICJ, which less than twenty years before had first affirmed the rules under general international law. Moreover, the fact that the claims brought by the US aimed at vindicating a violation of treaty obligations does not exclude the relevance of the case for the purposes of diplomatic protection under customary international law: to this effect, suffice to mention the observation by John Dugard, according to whom "although the Chamber of the Court was there dealing with the interpretation of a treaty and not customary international law, it had overlooked Barcelona Traction when it had allowed the United States of America to exercise diplomatic protection on behalf of two American companies which had held all the shares in an Italian company".[149]

Having said that, it shall be pointed out that the objection concerning the exhaustion of local remedies 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".[150]

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".[151] In doing so, however, the judges in The Hague did not dwell upon the possibility for the applicant State to start proceedings on behalf

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[147] *Ibid.*

[148] M. JACOB, 'Investments, Bilateral Treaties', in *Max Planck Encyclopedia of Public International Law*, para. 10: "The earliest BITs were initiated after World War II by Western European States […]. Although related in purpose to modern treaties of friendship, commerce and navigation ('FCN treaties'), these novel legal instruments differed from FCN treaties in various respects. For one, they focused exclusively on investment protection".

[149] ILC, 'Fourth report on diplomatic protection, by Mr. John Dugard', Special Rapporteur, UN Doc. A/CN.4/530.

[150] ICJ, *Case concerning Elettronica Sicula S.p.A. (United States of America v. Italy)*, Judgment, cit., p. 63.

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

of shareholders and "took for granted that the United States was entitled to protect the US shareholders in the Italian corporation".[152]

Put it otherwise, the ICJ did not provide any reasoning as to the reasons why it deemed the national State of the shareholders to have legal standing.

4.1. Against the Narrative which Excludes the Relevance of the *ELSI* Judgment for the Determination of General International Law

Different interpretative readings have been offered in doctrine as far as the *ELSI* case is concerned. First of all, according to some authors, the Chamber of the ICJ contradicted the decision in *Barcelona Traction*, by allowing the United States to claim on behalf of two corporations *qua* shareholders in an Italian corporation that has suffered the wrongful act of the respondent State.[153] On the other hand, others claim that the decision is simply irrelevant for the purpose of reconstructing the general international law applicable to shareholder claims, inasmuch as the case was decided under treaty law, *i.e.*, the FCN between Italy and the US.[154] Finally, part of the doctrine argues that actually the judgment confirms the ruling rendered in *Barcelona Traction*.[155]

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

[153] E.C. SCHLEMMER, 'Investment, Investor, Nationality, and Shareholders', in P.T. MUCHLINSKI, F. ORTINO, C. SCHREUER (eds), *The Oxford Handbook of International Investment Law*, Oxford, 2008, pp. 49-88, at 81-82: "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 […]. *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". (*italics added*)

[154] A. COHEN SMUTNY, 'Claims of Shareholders in International Investment Law', cit., p. 372: "The *ELSI* case thus 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"; G. BOTTINI, *Admissibility of Shareholder Claims under Investment Treaties*, cit., pp. 139-140: "it is not clear why the *ELSI* case would have reflected a change in the general international law principles recognized in *Barcelona Traction* given that the chamber's decision hinged on the interpretation of specific provisions of a [FCN]".

[155] G. BOTTINI, *Admissibility of Shareholder Claims under Investment Treaties*, cit., p. 139: "A better explanation is that the claim in *ELSI* involved shareholder rights under *Barcelona Traction's* exposition of the law […]. The US's case was premised on a breach of shareholders' [direct] rights and was thus consistent with *Barcelona Traction*"; C.J. TAMS, A. TZANAKOPOULOS, '*Barcelona Traction* at 40: The ICJ as an Agent of Legal Development', in *Leiden Journal of International Law*, 2010, pp. 781-800, at 790: "In the ELSI case, a chamber of the Court affirmed the central

Facing such a variety of opinions, it is contended that all the approaches are correct to the extent that, despite none of them being individually able to fully explain the significance of the *ELSI* judgment, all together well describe the scope of the decision. In a nutshell, in this author's view, it is possible to come to the conclusion that not only the judgment did contribute to clarify the general international law applicable to the subject matter, but that in ensuring wider protection to shareholders it actually embraced the reasoning of the *Barcelona Traction* decision.

First, the judgment is useful in reconstruing general international law, inasmuch as it does not question the correctness of the ruling in the *Barcelona Traction* case. Interestingly, there is actually no mention of *Barcelona Traction* at all. In this respect, one cannot but agree with Stephen Kubiatowski, according to whom: "while the Court had no intention of disturbing the holding of *Barcelona Traction*, it was also unwilling to use the holding in *Barcelona Traction* to limit the Treaty's scope".[156]

The Court indeed addressed each treaty provision without discussion or reference to the rule affirmed in the *Barcelona Traction* case, thus providing no answer to the objection entered by Italy, according to which the FCN Treaty had not provided US shareholders with broader rights than those afforded under Italian corporate law or general international law, as authoritatively affirmed by the ICJ in 1970. The decision in *Barcelona Traction* thus stands there, immovable. In doing so, the judgment can be said to confirm the general rule on the protection of shareholders established in *Barcelona Traction*: reflective loss claims are generally inadmissible. If this were not the case, *i.e.*, if the Chamber of the ICJ had intended to depart from the general rule established in *Barcelona*, one would have expected the judges in The Hague to spell out the *revirement*.

Second, it shall not be under noticed that the main contention put forward by the United States actually concerned the fact that the two US corporations "were deprived of their right to manage the liquidation of ELSI in an orderly fashion".[157] Put it otherwise, there might be room to debate that the primary claim brought by the US did not actually concern reflective loss, but rather the direct rights of the American shareholders in the ELSI S.p.A.[158] Accordingly,

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message of Barcelona Traction, even though it accepted, exceptionally, a claim of 'protection by substitution' on the basis of a special bilateral treaty regime".

[156] S.A. KUBIATOWSKI, 'The Case of *Elettronica Sicula S.p.A*: Toward Greater Protection of Shareholders' Rights in Foreign Investments', cit., p. 234.

[157] L. VANHONNAEKER, *Shareholders' Claims for Reflective Loss in International Investment Law*, cit.

[158] *Contra*, Judge Oda who lamented that the Chamber "had overlooked the problem of the jus standi of the United States to bring claims on behalf of Raytheon and Machlett that were in essence claims regarding an injury to ELSI and thus contradicted the Court's judgment in the Barcelona Traction case". See International Court of Justice, *Case concerning Elettronica Sicula S.p.A. (United States of America v. Italy)*, Judgment, cit., Separate Opinion of Judge Oda, p. 83 ff.

the claim could have been deemed plainly admissible, even if seen through the lenses of the rule established by the Court in *Barcelona Traction* under general international law. While the daily operations of a corporation are entrusted with the board of directors, indeed, Chapter 1 has pointed out that shareholders maintain fundamental control rights over the legal entity.

Finally, even if one were to conclude that FCN did not provide further rights for the benefits of the US shareholders, it could yet be claimed that, after all, the Chamber did actually decide the issue in accordance with the exception envisaged by the ICJ in the *Barcelona Traction* ruling. Indeed, despite excluding its applicability, the Court in 1970 left unanswered the question as to whether the national State of the shareholders is entitled to act in diplomatic protection whenever the corporation has the nationality of the alleged wrongdoer State.

As authoritatively pointed out by the Special Rapporteur on Diplomatic Protection a few years later, indeed, "[i]n the ELSI case, a Chamber of the Court had allowed the United States to protect American shareholders in an Italian company which had been incorporated and registered in Italy and had been injured by the Italian Government. The Chamber had not dealt with the issue in that case, *but it had clearly been present in the minds of some of the judges*".[159]

4.2. Some Insights on What States Can and Cannot Do *vis-à-vis* Shareholder Protection

In light of what has been said, it is doubtful whether the *ELSI* judgment, in interpreting the substantive provisions of the FCN treaty, granted to the shareholders a wider protection than the one recognized to them under general international law, as enshrined in *Barcelona Traction*.

According to an author, indeed, the violation committed by the Italian Government actually concerned the damage caused to the plant of ELSI: a course of action infringing upon the rights of the corporation, but leaving unaffected those of its American shareholders. From this point of view, therefore, the objection raised by Italy with regard to the legal standing of the US Government was well-founded.[160]

The Chamber of the ICJ decided not to address whether the US had *ius standi* to claim on behalf of the corporation, stressing however that "there may be doubts whether the word 'property' in Article V, paragraph 1, extends, in the case of shareholders, beyond the shares themselves, to the company or its

[159] ILC, 'Fourth report on diplomatic protection, by Mr. John Dugard, Special Rapporteur', UN Doc. A/CN.4/530, 13 March 2003.

[160] Z. Douglas, *The International Law of Investment Claims*, cit., pp. 412-413.

assets".[161] The Chamber, instead deemed it appropriate to dismiss the claim on the merits finding that no violation had been committed by Italy.

In doing so, however, it inverted the proper order: if there were no *ius standi*, the issue should not have been addressed in the merits at all. In any case, such a protection could be said to find certain support in the treaty wording. Therefore, this confirms that States are free to offer shareholders a wider protection, provided that they agree to do so in a treaty.

Moreover, the US claim also concerned whether the alleged requisition of the assets of the corporation did actually amount to a violation of the rights of the American shareholders. As pointed out by Abby Cohen Smutny, by looking at "the court's opinion as to the previous claim, the answer here too might have been in the negative. The FCN Treaty, however, included a supplemental protocol that modified this particular Article of the treaty to extend those particular protections to interests 'held directly or indirectly', which the court considered was important".[162]

Italy challenged the interpretation put forward by the United States, according to whom the provision could actually be read as altering the rights of shareholders under international or municipal law. Again, the Chamber did not address the objection, inasmuch as it found the that the acts of the host State could not be seen in any way as a taking. This is not the right approach, as already argued above, since it would have been better to clarify the point. However, there is strong support in the treaty language to the effect that shareholders had been granted further protection.

For different reasons, the *ELSI* case cannot be deemed to provide an answer as to the status of general international law, in force at that time, concerning the protection of shareholders when the wrongful act is directed against the corporation in which they own shares. There are more things unsaid, than arguments well developed. There are more exceptions that could have been ruled to be applicable, than those that were really found so.

5. The 2006 ILC Articles on Diplomatic Protection: Between Codification and Progressive Development of International Law

While the ICJ was hardly struggling with the proper framing of a rule and its exceptions under general international law on the legal standing of the national State of the shareholders to bring claims based on the treatment of the corpora-

[161] ICJ, *Case concerning Elettronica Sicula S.p.A. (United States of America v. Italy)*, Judgment, cit., para. 106.

[162] A. COHEN SMUTNY, 'Claims of Shareholders in International Investment Law', cit., p. 371.

tions, the topic came under the attention of another authoritative organ of the United Nations: the ILC.[163]

Since its inception, indeed, the ILC had identified the institution of diplomatic protection as a topic deserving further consideration.[164] Originally included within the broader framework of the project which led to the 2001 Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), it was only in 1996 that the Commission deemed it appropriate to study the rules of diplomatic protection as an autonomous topic for codification and progressive development of international law, which was first entrusted to Mohamed Bennouna and then, following the latter's election to the International Criminal Tribunal for the former Yugoslavia, to John Dugard as Special Rapporteur.

Among the different rules that were discussed and inserted in the later Articles on Diplomatic Protection (ADP), ranging from the nationality of claims to the precondition of previous exhaustion of local remedies, from the identity of the holder of the right to the relationship of these rules with other actions or procedures aimed at securing redress against an internationally wrongful act, Chapter 3 dealt with those concerning the exercise of diplomatic protection on behalf of corporations and, for the purposes of our analysis, their shareholders.

Under Article 12, it was stated that "[t]o the extent that an internationally wrongful act of a State causes direct injury to the rights of shareholders as such, as distinct from those of the corporation itself, the State of nationality of any such shareholders is entitled to exercise diplomatic protection is respect of its nationals".[165] In this respect, there is nothing new under the sun: quite the opposite, the ILC followed in the ICJ's footsteps. In doing so, however, it did "not seek to provide an exhaustive list of the rights of shareholders, although the Court in *Barcelona Traction* listed the most obvious one".[166]

More interestingly, the ILC had also to deal with a rather "more important

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[163] For an overview of the contribution of the ILC ADP to the protection of individuals, see D. RUSSO, 'The Injured Individual's Right to Compensation in the Law on Diplomatic Protection', in *Rivista di diritto internazionale*, 2016, pp. 725-748 for all the references to the work of the ILC on Diplomatic protection; P. PUSTORINO, 'Recenti sviluppi in tema di protezione diplomatica', in *Rivista di diritto internazionale*, 2006, pp. 68-104.

[164] This is clearly explained in J. CRAWFORD, *State Responsibility. The General Part*, Cambridge, 2013. See also L. MOLA, 'Protezione diplomatica', in C. PANZERA, A. RAUTI (eds), *Dizionario dei diritti degli stranieri*, Napoli, 2020, pp. 542-563, at 544: "È noto che i primi lavori della Commissione di diritto internazionale (CDI, l'organo ausiliario dell'Assemblea generale delle Nazioni Unite preposto allo sviluppo progressivo ed alla codificazione del diritto internazionale) sulla responsabilità internazionale degli Stati s'incentravano proprio sulla responsabilità per «i danni arrecati agli stranieri», inoltrandosi in un tentativo, in seguito abbandonato, di ricostruire le norme sostanziali in materia di tratta– mento e contemplando in parte anche le regole sulla protezione diplomatica".

[165] ILC, 'Draft Articles on Diplomatic Protection', cit., Article 12.

[166] J. CRAWFORD, 'The ILC's Articles on Diplomatic Protection', in *South African Yearbook of International Law*, 2006, pp. 1-37, at 39.

question",[167] namely under which circumstances a claim can be brought by a State on behalf of its nationals who are shareholders in the corporation which suffered the injury. In this respect, Article 11 provides that "[t]he State of nationality of the shareholders in a corporation *shall not be entitled to exercise diplomatic protection* on behalf of such shareholders in the case of an injury to the corporation unless: (a) The corporation has ceased to exist according to the law of the State of incorporation for a reason unrelated to the injury or; (b) The corporation had, at the time of the injury, the nationality of the State alleged to be responsible for causing injury, and incorporation under the law of the latter State was required by it as a precondition for doing business there".[168]

Much can be said with regard to this provision. By using the lenses of the codification, on the one hand, and the progressive development, on the other one, of international law, it is possible to try to ascertain where the ILC situated itself as far as the protection of shareholders under general international law is concerned.[169]

As a starting point, it can easily be said that the ILC moved from the same premise of the ICJ, just siding with the latter as far as the identification of a general rule to be followed in matters of shareholder claims. As a general rule, indeed, the State of nationality of the shareholders are prohibited from exercising diplomatic protection whenever the injury was caused to the corporation itself.

In other words, according to the ILC, shareholder claims for reflective loss are to be considered as generally barred. Using the wording of the Commentary to the ADP, indeed, the "most fundamental principle of the diplomatic protection of corporations is that a corporation is to be protected by the State of nationality of the corporation and not by the State or States of nationality of the shareholders".[170]

Having said that, the Commission decided to try "to give effect to the two so-called 'exception' adumbrated by the Court in *Barcelona Traction*",[171] namely the case in which the legal entity had ceased to exist as such and the case of the national State of the corporation being under the impossibility to take action on behalf of the legal entity. Both the formulations adopted in 2006 require further analysis.

Under Article 11, letter (a), the national State of shareholders is entitled to

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[167] *Ibid.*

[168] ILC, 'Draft Articles on Diplomatic Protection', cit., Article 11.

[169] K. PARLETT, 'Diplomatic Protection and the International Court of Justice', in C.J. TAMS, J. SLOAN (eds), *The Development of International Law by the International Court of Justice*, Oxford, 2013, pp. 87-106, especially at 99-103.

[170] ILC, 'Draft Articles on Diplomatic Protection', cit., Commentary to Article 11, para. 1.

[171] J. CRAWFORD, 'The International Law Commission's Articles on Diplomatic Protection Revisited', in T. MALUWA, M. DU PLESSIS, D. TLADI (eds), *The Pursuit of a Brave New World in International Law*, Leiden, 2017, pp. 135-171.

act on their behalf for an injury suffered by the corporation when the latter ceased to exist according to the law under which it was incorporated for a reason unrelated to the injury. At a first glance, there is no doubt that the exception under Article 11, letter (a), could find support in both the early case law of *ad hoc* arbitral tribunals and claims commissions – as reviewed in Section 3.2 – and the (up to then) jurisprudence of the ICJ (although as a *dicta*) assessing general international law. Nonetheless, one cannot but question why the operativity of this provision was limited to those cases where the corporation had "ceased to exist […] for a reason unrelated to the injury".

The Commentary adopted by the ILC together with the ADP might be enlightening in this regard, so as to understand the very *ratio* of this provision. According to para. 7, "[t]he final phrase 'for a reason unrelated to the injury' aims to ensure that the State of nationality of the shareholders will not be permitted to bring proceedings in respect of the injury to the corporation that is the cause the corporation's demise. […] The State of nationality of the shareholders will therefore only be able to exercise diplomatic protection in respect of shareholders who have suffered as a result of injuries sustained by the corporation unrelated to the injury that might have given rise to the demise of the corporation. The purpose of this qualification is to limit the circumstances in which the State of nationality of the shareholders may intervene on behalf of such shareholders for injury to the corporation".[172]

Such a provision must be read, however, in conjunction with Article 10 that, in providing for the well-established rule of the continuous nationality as a prerequisite for exercising diplomatic protection also on behalf of a corporations reads that "A State in entitled to exercise diplomatic protection is respect of a corporation that was a national of that State […] continuously from the date of injury to the date of the official presentation of the claim".[173] Nonetheless, "a State continues to be entitled to exercise diplomatic protection in respect of a corporation which was its national at the date of injury and which, as the result of the injury, has ceased to exist according to the law of the State of incorporation".[174]

According to the Commentary, if were not for such a provision, there would be no protection affordable, neither to the corporation itself nor to the shareholders. Indeed, on the one hand, if one were to conclude that, by ceasing to exist, the corporation no longer possesses any nationality, this would result in preventing any State from exercising diplomatic protection in respect to the legal entity. On the other hand, however, a State "could not avail itself of the nationality of the shareholders in order to bring such a claim, as it could not show that

[172] ILC, Draft Articles on Diplomatic Protection, cit., Commentary to Article 11, para. 7.

[173] ILC, Draft Articles on Diplomatic Protection, cit., Article 10.

[174] *Ibid*.

it had the necessary interest at the time the injury occurred to the corporation".[175]

What can be said with regard to such a choice? To begin with, one may argue that it aims at avoiding multiplicity of parallel claims brought by all the possible States of nationality of shareholders. By doing so, there will be only one State entitled to act in diplomatic protection on behalf of the corporation, thus claiming for all the damages suffered by the latter. Probably, this could also be deemed to be beneficial for creditors and other stakeholders of the extinct corporation, inasmuch as they might try to recover *pro quota* by the State in which the legal entity was incorporated. A State, this is important to stress, that has recovered on behalf of the corporation itself, not on behalf of the shareholders. A similar path for creditors and other stakeholders would appear far more complex if the injury suffered by the corporation were recovered by the national State of the shareholders in the form of reflective loss damages.

Yet, such a provision might result being highly problematic. First, as pointed out by James Crawford, the provision "fail[ed] to allow for protection in the case where it is most needed".[176] A criticism echoed, after all, by Alain Pellet.[177] In this respect, indeed, the practice of international litigation has indeed demonstrated that, frequently, the basis of claims by shareholders is actually the very unlawful winding up of the corporation. Paradoxically, for a State, it could be deemed to be more convenient to entirely wind up a corporation, since this would preclude any action in favor of the shareholders.

Second, if the corporation is controlled or entirely owned by foreign shareholders, the State of nationality could not be really interested in pursuing a claim that would not be beneficial for its own nationals, but rather for nationals of a different State. In such a circumstance, therefore, the result of the draft Article would precisely be that of depriving shareholders of the protection of their national State when the host State is nothing but responsible for the very dissolution of the corporation as a *de iure* legal entity, and the State of nationality of the latter is unwilling to pursue litigation that would result in favor of aliens.

There seems to be no support for such an under-inclusive exception. This is probably to be considered an attempt to ensure the progressive development of international law, as much as the rule may appear sound or not. Nonetheless, it is important to point out that no practice could be cited in support and does not seem to exist.

Moving to the second exception to the general prohibition, under Article 11, letter (b), the national State of shareholders is entitled to act on their behalf for an

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[175] ILC, Draft Articles on Diplomatic Protection, cit., Commentary to Article 10, para. 6.

[176] J. CRAWFORD, 'The International Law Commission's Articles on Diplomatic Protection Revisited', cit., p. 160.

[177] A. PELLET, 'Le projet d'articles de la C.D.I. sur la protection diplomatique: une codification pour (presque) rien', cit.

injury suffered by the corporation when the latter has the nationality of the alleged responsible State and incorporation within that State was required as a precondition for carrying out business in its territory. Once again, it could be said that the Commission tried to achieve codification of the existing rules of general international law, while also pushing forward their progressive development.

As much as the exception under letter (a), the thesis according to which shareholders could be entitled to benefit from protection of their State of nationality whenever the corporation in which they own shares possesses the nationality of the wrongdoer State is well-established in the practice of international courts and tribunals. Despite only as a *dictum*, this was also discussed in the *Barcelona Traction* case and, implicitly, not excluded – and, to some extent, supported – by the judgment in *ELSI*.

At the same time, however, the Commission deemed appropriate to limit the operativity of such an exception only for cases where local incorporation was required by the host State. In this respect, it has been questioned "why there should be a general exception for cases where local incorporation is required by law",[178] to the extent that this might be based on valid regulatory purposes to protect strategic sectors. Moreover, being provided under the law, this is something investors shall be aware of, thus balancing the consequences of the required local vehicle to channel their investment at the time they take to decision to convey capitals in that State.

At the same time, this means that whenever there is no requirement of local incorporation, shareholders are entirely left without any remedy. Such a limit may produce a vicious result. As pointed out by an author, indeed, when investors acquire a majority or even controlling interest in a local corporation, "the state itself may take actions intended to reap the enterprise's economic rewards without regard for incidental harms to foreign investors".[179] In such a scenario – *i.e.*, aliens acquiring shares in a locally incorporated entity – shareholders are at the mercy of the State.

In light of the foregoing, some remarks can be drawn as far as the contribution of the works of the International Law Commission to the ascertainment of the customary rules on diplomatic protection.

First of all, it is interesting to point out how, in identifying and construing the relevant rules, the Commission and the Special Rapporteur paid much attention to the early case law of international courts and tribunals; something that the ICJ has been often accused of not having properly done in *Barcelona Traction*, while crafting the general rule and its exceptions.

Second, by using the binomial 'codification' and 'progressive development' of

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[178] J. CRAWFORD, 'The International Law Commission's Articles on Diplomatic Protection Revisited', cit.

[179] S.A. KUBIATOWSKI, 'The Case of *Elettronica Sicula S.p.A*: Toward Greater Protection of Shareholders' Rights in Foreign Investments', cit., p. 216.

international law, it is possible to single out the areas where the Commission deemed it appropriate only to state the law as it were, and those where it considered necessary to promote the development, thus acting *de lege ferenda*. In this respect, it is interesting to point out how the progressive development of international law concerned the exceptions, while the general rule was left untouched.

Finally, one has to single out the attempt to strike a balance between the need to ensure that shareholders are not left without any form of protection under general international law but, at the same time, to avoid chaos that would be ignited in the system if reflective loss claims were generally admissible or the exceptions to the general prohibition were too broad. The result, far from being optimal, tried to give substance to the *Barcelona Traction*, taking also into account the evolved reality of international economic relations.

In this respect, the exception under Article 11, letter (b), seems suitable: otherwise, by imposing incorporation of a subsidiary in order to do business in its own territory, a State would also shield itself from any possible international claim. Needless to say, the rule left a possible *de facto* requirement of local incorporation subject to interpretation, as to whether is covered or not by the exception. A topic, it will be seen, relevant in *Diallo*. Contrariwise, the exception under Article 11, letter (a), is far from being suitable, possibly leaving foreign shareholders controlling a corporation without any form of redress whenever the host State winds up the legal entity.[180]

6. The *Diallo* Case: Confirming the *Barcelona Traction* Rule

Forty years after the decision in the case of *Barcelona Traction*, the ICJ had to deal for a second time with the protection of shareholders under general international law and, thus, had the chance to confirm or overrule the principles laid down in its 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 treatment of a Guinean national, Mr. Diallo, by the Democratic Republic of Congo (DRC), formerly Zaire.[181]

[180] J. CRAWFORD, 'The ILC's Articles on Diplomatic Protection', in *South African Yearbook of International Law*, 2006, pp. 1-37.

[181] For an analysis of the case, see S. DORIGO, 'Sulla protezione diplomatica degli azionisti: il caso *Diallo* di fronte alla Corte Internazionale di Giustizia', in *Rivista di diritto internazionale*, 2007, pp. 705-737; A. 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; K. SCHMALENBACK, 'Ahmadou Sadio Diallo Case (Republic of Guinea v Democratic Republic of the Congo)', in *Max Planck Encyclopedia of Public International Law*, 2019.

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".[182]

In this respect, Guinea argued that the DRC had committed several violations of international law, namely: *i*) the arbitrary arrest and expulsion of Mr. Diallo, who was also subjected to inhuman and degrading treatment; *ii*) the disregard of the obligations established under the 1963 Vienna Convention on Consular Relations; *iii*) the deprivation of the rights of Mr. Diallo to manage his corporations; *iv*) the infringement upon the ownership rights of Mr. Diallo with regard to his corporations; *v*) the impossibility for either Mr. Diallo or his corporations to purse litigation to recover the debts owed to them.[183]

The respondent State challenged the admissibility of the case, arguing that: *i*) neither Mr Diallo nor his corporations 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".[184]

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.

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* in Africom-Zaire and Africontainers-Zaire; and *iii*) the very "rights of those companies, by substitution" (*i.e.*, a reflective loss claim).[185] 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 corporations, 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 corporation and those of its shareholders.

While the corporation is the only entitled to bring a claim in order to vindi-

[182] ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment, 24 May 2007, cit., para. 15.

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

[184] *Ibid.*

[185] *Ibid.*, para. 31.

cate 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".[186] 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".[187] 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".[188]

6.1. The Treatment of Investment Arbitration Case Law before the International Court of Justice

In coming to such conclusion, the Court (albeit superficially) took into account international investment agreements as well as investment arbitration jurisprudence in order to ascertain whether the rules concerning shareholder claims for reflective loss had actually changed. Sadly enough, the Court merely ruled out the relevance of such agreements by stating that: "[t]he 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 be-

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

[187] L. VANHONNAEKER, *Shareholders' Claims for Reflective Loss in International Investment Law*, cit., p. 75.

[188] ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment, 24 May 2007, cit., para. 89.

tween a company and the State allegedly responsible for the prejudice to it […]".[189]

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*".[190] From this point of view, therefore, the Court restated that, as a rule under general international law, shareholders have no standing to bring a claim against measures affecting the rights of the corporation unless a specific instrument provides otherwise.[191]

In this regard, one cannot but agree with those authors who have identified as a weakness of the reasoning of the Court its choice to dismiss the case law of investment tribunals, thus dismissing the rules and practice of international investment law as the mere product of *special legal regimes*. This is rather untenable, both from a legal and a policy standpoint.

As far as policy is concerned, 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. Instead, by ignoring the case law of investment arbitration, the Court might well have encouraged investment tribunals to deem the jurisprudence of the Court as irrelevant in such field.

As it will be demonstrated in Chapter 4, the Court has been paid with the same coin to this effect. This may have the unfortunate consequence of further isolating the Court from dealing with investment disputes, making shareholders – one of the most relevant categories of investors in contemporary litigation – aware that they shall not expect much from protection by their national States in judicial proceedings in The Hague.

Moving to legal considerations, by rejecting Guinea's argument whereby investment arbitration practice would be symptomatic of the existence of an exception – or, possibly, a new rule – allowing shareholders' states to exercise diplomatic protection, the ICJ seems to adhere to the idea whereby international investment law would be special in nature. Accordingly, this would mean, on the one hand, that rules of general international law are excluded in its administration; and, on the other hand, that investment treaties, and the practice they

[189] *Ibid.*, para. 90 (*italics added*). For a critical analysis of this argument and its effects on the system, see F.M. PALOMBINO, G. MINERVINI, 'Apropos of the External Precedent: Judicial Cross-Pollination Between Investment Tribunals and International Courts', in A. GOURGOURINIS (ed.), *Transnational Actors in International Investment Law*, special issue of the *European Yearbook of International Economic Law*, Cham, 2021, pp. 133-150, *passim*.

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

[191] A. VERMEER-KÜNZLI, '*Diallo* and the Draft Articles: The Application of the Draft Articles on Diplomatic Protection in the *Ahmadou Sadio Diallo* Case', in *Leiden Journal of International Law*, 2007, pp. 941-954.

generate, would not contribute to the progressive development of general international law. A perspective of this kind is quite questionable. Indeed, as observed by Campbell McLachlan the relationship between BITs and general international law proves symbiotic: "the content of the treaty obligation may be informed by general international law. In turn, the promulgation of the treaty obligation, and its application by arbitral tribunals, may inform the progressive development of general international law".[192]

6.2 A Critical Appraisal of the Rule Restatement by the International Court of Justice in Light of the Articles on Diplomatic Protection

If one were to briefly present the outcome of the *Diallo* judgment on the legal standing of shareholders under diplomatic protection, it would be difficult not to agree that "[t]he Court's restrictive interpretation of shareholders' rights and of the effects of a *de facto* obligation of incorporation means that the foreign investment of the kind managed by Mr Diallo has not much to expect from diplomatic protection".[193] To say it in other words, shareholders must be aware that, under general international law, they cannot much expect to enforce a claim for the drop in value of their shares before the ICJ.

In its decision, indeed, the Court did not only confirm its narrow approach to shareholder claims adopted in *Barcelona Traction*, but also did not really seize the opportunity to offer a much-needed view on the works of the ILC, which had adopted the ADP just a year before.

The exception under Article 11(a), according to which the national State of the shareholders can act in diplomatic protection if the corporation has ceased to exist for a reason unrelated to the injury, was clearly irrelevant as far as the claims brought by Guinea on behalf of Mr. Diallo are concerned. Both Africom-Zaire and Africontainers-Zaire, indeed, still existed under the applicable domestic law of the DRC at the relevant time.

On the other hand, the ICJ had the chance to say something on the exception under Article 11(b), pursuant to which the national State is entitled to act if the corporation has the nationality of the allegedly wrongdoer State. As it was said in the preceding Section, the requirement of incorporation being required under the law of the host State as a precondition for carrying out business activities in its own territory cannot be deemed to find any support in the previous case law of international adjudicatory bodies.

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[192] C. McLachlan, 'Investment Treaties and General International Law', in *International and Comparative Law Quarterly*, 2008, pp. 361-401.

[193] A. Vermeer-Künzli, 'Diallo: Between Diplomatic Protection and Human Rights', in *Journal of International Dispute Settlement*, 2013, pp. 487-500, at 500.

All the paths were thus open in front of the Court. On the one hand, the ICJ could have dismissed the exception as formulated by the ILC, thus paving the way for "broader exception of diplomatic protection 'by substitution' that would apply where the corporation is incorporated in the State alleged to be responsible for causing injury".[194] On the other hand, the Court could have rejected its own broader exception, as formulated in the *Barcelona Traction* judgment, while endorsing the narrower one enshrined in the ADP. An interpretation that, despite being problematic in its scope of application, would still offer some remedies to shareholders.

In this respect, while it is true that such an endorsement would have been done as an *obiter dictum*, inasmuch as the facts of the case did not fall within the scope of this exception, to the extent that the incorporation was not required by Congolese domestic law, such a standpoint would have arguably strongly contributed to the development of international law in the direction foreseen by the ILC. Instead, the Court opted for the less intrusive approach, concluding that whether general international law did contain such an exception was a matter not to be addressed, since the putative exception could not have been applied in any way. In doing so, therefore, the Court "left the customary status of article 11(b) open".[195]

At the same time, it must be pointed out that the Court might have found the exception applicable: indeed, the judges in The Hague considered that its scope of application had to be limited to a *de iure* requirement, without considering the path left open (and, possibly, unexplored) by the ILC on *de facto* requirement of local incorporation. In this sense, it has been pointed out that "the Court […] dismissed the argument on forced incorporation with surprising ease. This is very unfortunate, not necessarily because of the outcome but because of the lack of underlying reasoning, since as it stands the decision fails to provide any clarity on this issue".[196]

At the same time, it must be registered some possible confusion with regard to the distinction between the rules to determine the nationality of corporations and those concerning whether it is permissible to pierce the corporate veil and protect the shareholders for damage suffered by the legal entity in which they own shares. This can be possibly attributed to the wording 'protection by substitution'.[197] This is apparent in the statement by Vermeer-Künzli, according to

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[194] J. CRAWFORD, 'The International Law Commission's Articles on Diplomatic Protection Revisited', cit.

[195] *Ibid.*, p. 159.

[196] A. VERMEER-KÜNZLI, '*Diallo* and the Draft Articles: The Application of the Draft Articles on Diplomatic Protection in the *Ahmadou Sadio Diallo* Case', cit., p. 949.

[197] J. LEE, 'International Investment Issues Examined in Other International Adjudicatory Bodies: Guidance from ICJ's Observation?', in J. CHAISSE, L. CHOUKROUNE, D. JUSOH (eds), *Handbook of International Investment Law and Policy*, Singapore, 2021, pp. 807-823, at 816.

whom the "question to be answered [was] thus whether the facts underlying the dispute between [Guinea] and the DRC *warrant the application of the exceptions to the general prohibition of the protection of non-nationals*".[198]

In this regard, it is important to recall the distinction between the question concerning the rules to be applied so as to determine the nationality of corporations and the one as to whether it is permissible to pierce the corporate veil and, if so, under which circumstances. In effect, despite both may call into play the relevance of shareholders for the purposes of bringing an international claim, they actually answer different questions: the first concerns the identification of the State of nationality that might act with an international claim on behalf of the corporation itself; instead, the second provides with the circumstances under which, irrespective of the national State of the legal entity, shareholders can enjoy the protection from their own State of nationality.

7. Shareholder Claims under General International Law: Some Conclusive Remarks

In the present Chapter, the question as to whether, why, and to what extent – under general international law – international claims can be brought to ensure the protection of shareholders has been ascertained. Since no doubts can be cast as to whether shareholders are entitled to do so in case of violation of their direct rights, the analysis has been focusing on the *locus standi* (of the national State) in case of a wrong affecting the corporation.

In this respect, the early case law of arbitral tribunals and claims commissions, the jurisprudence of the ICJ, and the works of the ILC have been scrutinized, so as to ascertain the law as it currently stands, pointing out the critical issues affecting the protection of shareholders. To this effect, some conclusions on general international law can finally be drawn.

First, in transposing to the international legal system the domestic rule on the prohibition to bring reflective loss claims, the ICJ has been harshly criticized, inasmuch as "[t]he borrowing from domestic law is incomplete and blunt". Accordingly, "[t]he result is that in customary international law shareholders are vulnerable to being left without protection when the company in which they own shares is injured […] whereas in the domestic law systems from which the rule is said to come, there are coordinate rules and exception to alleviate such vulnerability".[199] This is difficult to deny.

[198] A. VERMEER-KÜNZLI, '*Diallo* and the Draft Articles: The Application of the Draft Articles on Diplomatic Protection in the *Ahmadou Sadio Diallo* Case', cit., p. 948.

[199] B. JURATOWITCH, 'Diplomatic Protection of Shareholders', cit., p. 307.

While there are good reasons that brought the Court to uphold the distinction between the rights of the corporation and the legal sphere of the shareholders, thus allowing only the State of nationality of the latter to exercise diplomatic protection, the need to ensure the protection of those who invest in shares of the corporation can hardly be neglected. In this regard, the development of international law, as it will be shown in the following Chapters, has furthered the need to provide workable exceptions to the rule. It is not by chance, after all, that in their joint dissenting opinion attached to the merits judgment in *Diallo*,[200] Judges Al-Khasawneh and Yusuf criticized the approach of the majority for not adequately protecting the shareholders despite the developments in the fields of international human rights and investment law to this effect.[201]

Second, there is a need to afford shareholders with legal standing to claim damages for an injury to their corporation whenever the application of the general prohibition would leave them without any protection. This is particularly apparent if the corporation is a national of the allegedly wrongdoing State inasmuch as there would be no other possible remedy for them under general international law. In such a circumstance, there is a strong presumption in favor of lifting the corporate veil.

As pointed out in the previous Chapter, indeed, the separation between the rights of the corporations and those of its shareholders is based on cogent policy reasons, yet not mandatory interpretation of the rule of civil responsibility. Nonetheless, also in such a case, one shall not forget the competing interests striving in favor of the no reflective loss rule. In this respect, the proposal of the ILC is commendable, to the extent that it affords a right to shareholders to claim for damages suffered by a wrong to their corporation only when the incorporation was required, either *de iure* or *de facto*. This is the reason why it is particularly unfortunate that the ICJ came to the conclusion it came in *Diallo*, thus hindering the progressive development of international law as aimed by the ILC.

Third, there is much need to clarify how does the exhaustion of local remedies actually works in the case of claims brought by shareholders for the diminution of share value as a result of an unlawful act targeting their corporation. Indeed, this is an often-overlooked topic, which deserves further attention in scholarship. As a foundational rule of international claims, it must be ascertained how it interacts with the impossibility for shareholders to resort to domestic courts and tribunals to vindicate their economic interests that, on the in-

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[200] ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment, 30 November 2010, in *ICJ Reports 2010*, p. 639.

[201] Joint Dissenting Opinion of Judges Al-Khasawneh and Yusuf in ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment, 30 November 2010, cit.

ternational legal plane, might be protected by way of exceptions.

Moving forward, a brief consideration concerns the relevance of the rules so identified outside the field of international claims under general international law. As pointed out by Zachary Douglas "[t]o the extent […] that the International Court was concerned with the manner in which the legal institution of a shareholding should be transposed onto the international plane, its judgments demand very careful consideration, because that is precisely the issue that confronts the investment treaty regime as well".[202]

This is particularly true when the relevant international instrument does not provide any clear answer to the relationship between shareholders and their corporation. In this respect, suffice it to mention the decision rendered by the Iran-US Claims Tribunal in *Harza v. Iran*.[203] In interpreting the provision of the institutive agreement, the Tribunal concluded that: "[a]s the Article in context is ambiguous and as it constitutes an exception to the normal rule of international law that shareholders may not bring the claims of the corporation (as opposed to claims relating to their ownership rights), it should be construed narrowly".[204]

To support this contention, the Claims Tribunal referred to Article 31(3)(c) of the Vienna Convention on the Law of Treaties, providing for the well-known principle of systemic integration within the international legal system. The extent to which the rules of general international law concerning the protection of shareholders have been taken into account by international courts and tribunals when interpreting the relevant human rights or investment treaties will be analyzed in the next Chapters.

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[202] Z. DOUGLAS, *The International Law of Investment Claims*, cit., p. 401.

[203] Iran-US Claims Tribunal, *Harza v. Iran*, Case 232-97-2, Award, 2 May 1986.

[204] *Ibid*., para. 28(b).f.

Chapter Three

Shareholder Claims in International Human Rights Law: Domestic Law Is Still There

SUMMARY: 1. Introduction. – 2. The Protection of Shareholders under the European Convention on Human Rights. – 2.1. The Relevant Framework: Article 34 of the European Convention on Human Rights and Article 1 of Protocol No. 1. – 2.2. The Protection of Shareholders against Measures Affecting Their Direct Rights. – 2.3. The Protection of Shareholders against Measures Infringing Upon Their Corporations. – 2.3.1. The *Agrotexim* Case: The Making of the Rule concerning Reflective Loss. – 2.3.2. Piercing the Corporate Veil before the Strasbourg Court: Carving out the Exceptions. – 2.3.3. The Rule and its Exceptions: A Clash of Rationales. – 3. The Protection of Shareholders under the American Convention on Human Rights. – 3.1. The Relevant Framework: Articles 1 and 21 of the American Convention on Human Rights. – 3.2. The Protection of Shareholders against Measures Affecting Their Direct Rights. – 3.3. The Protection of Shareholders against Measures Infringing Upon Their Corporations. – 3.3.1. A Critical Appraisal of the Case Law of Inter-American Monitoring Bodies: Establishing the General Rule. – 3.3.2. … and its Exceptions: A Rather Cherry-Picking Approach? – 3.3.3. *Granier v. Venezuela*: Testing the Rule and its Exceptions. – 3.3.4. The Lack of Any Consistent Test to Allow Identification Claims: Some Remarks on the Inter-American System. – 4. The Protection of Shareholders under the International Covenant on Civil and Political Rights. – 4.1. A Complex Legal Framework: Juridical Persons as non-Right Holders and the Lack of Any Entitlement to the Protection of Private Property. – 4.2. The Protection of Shareholders in Matters of Other Rights: Some Possible Insights as to the Relationship with Their Corporations. – 4.3. The Admissibility of Identification Claims in the Practice of the Human Rights Committee. – 5. The Protection of Shareholders in International Human Rights Law: Conclusive Remarks.

1. Introduction

In the previous Chapter, it has been ascertained that, under general international law, the municipal law distinction between the legal personality of the corporation and the legal sphere of its shareholders is upheld.

Accordingly, as a general rule, shareholders are not entitled to bring a claim when the rights of their corporation are infringed upon, since the share drop in value is nothing but a consequence of a violation solely suffered by the *personne morale*. This means that, in the context of diplomatic protection, States have no *ius standi* to commence proceedings on behalf of their national shareholders when the alleged wrongful measures concern the corporation.

Against this background, it is therefore all the more necessary to understand whether shareholders enjoy a different level of protection in specific fields of international law. Any analysis to this effect cannot but start from international human rights law, whose treaty regimes increasingly grant natural and legal persons the ability to bring complaints against the alleged wrongdoer State before judicial or quasi-judicial international bodies. From this point of view, therefore, individuals have emancipated themselves from the protection of their national State. In doing so, one moves away from an eminently inter-State perspective, adopting an individually-centric one.

Against this background, the question arises as to whether the different treaty regimes abide by the traditional distinction between the rights of corporation and those of its shareholders as established in domestic and general international law or rather opts for a less rigid approach.

To answer such a question, thus ascertaining to what degree human rights treaties have contributed to the protection of shareholders in the international legal order, the case law of the respective monitoring bodies will be examined. In doing so, the focus will be on the rationale of the different decisions, so as to identify a general rule as well as possible exceptions.

In carrying out such an analysis, however, instead of following a traditional approach that would require to move from the universal to the regional level of human rights protection, we will start from the regional treaty systems, whose monitoring bodies have dealt with claims of shareholders more than any other judicial or quasi-judicial body.

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

2.1. The Relevant Framework: Article 34 of the European Convention on Human Rights 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 ECHR,[1] it is first necessary to identify the relevant treaty provisions.[2]

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[1] For an overview of the European system for the protection of human rights, see, *ex multis*: S.

As with any application brought before the ECtHR, shareholders must satisfy the requirements enshrined in Article 34 of the Convention, according to which: "the [ECtHR] 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".[3]

In this regard, the Court has consistently held that, in order for a complaint to be admissible under Article 34,[4] two different conditions must be satisfied by the petitioner: it shall fall in one of the three categories mentioned (*i.e.*, natural persons, non-governmental organizations, groups of individuals), and it must be able to prove the has suffered a violation of the conventional rights.[5]

As for the first requirement, suffice it to mention that while individuals *qua* shareholders fulfil it as natural persons,[6] corporations *qua* shareholders are as-

BARTOLE, P. DE SENA, V. ZAGREBELSKY (a cura di), *Commentario breve alla Convenzione europea dei diritti dell'uomo*, Padova, 2012; J. VELU, R. ERGEC, *La Convention européene des droits de l'homme*, 2nd edition, Bruxelles, 2014; P. VAN DIJK, G.J.H.VAN HOOF, A.B. VAN RIJN, L. ZWAAK (eds), *Theory and Practice of the European Convention on Human Rights*, 5th edition, Cambridge/Antwerp/Portland, 2018; S. SCHIEDERMAIR, A. SCHWARZ, D. STEIGER (eds), *Theory and Practice of the European Convention on Human Rights*, Baden Baden/Oxford, 2022; M.E. VILLIGER, *Handbook on the European Convention on Human Rights*, Leiden/Boston, 2023; J. GERARDS, *General Principles of the European Convention on Human Rights*, Cambridge/New York, 2023.

[2] Among the literature on the topic of shareholder claims under the European Convention on Human Rights, see: M. EMBERLAND, 'The Corporate Veil in the Case Law of the European Court of Human Rights', in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)/Heidelberg Journal of International Law*, 2003, pp. 945-969; M. EMBERLAND, *The Human Rights of Companies*, Oxford, 2006; L. WILDHABER, I. WILDHABER, 'Recent Case Law on the Protection of Property in the European Convention on Human Rights', in C. BINDER, U. KRIEBAUM, A. REINISCH, S. WITTICH (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, cit., pp. 657-677; C. TOMUSCHAT, 'The European Court of Human Rights and Investment Protection', in C. BINDER, U. KRIEBAUM, A. REINISCH, S. WITTICH (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, cit., pp. 636-656; S. TISHLER, 'A New Approach to Shareholder Standing before the European Court of Human Rights', in *Duke Journal of Comparative and International Law*, 2014, pp. 259-287; VIŠEKRUNA A., 'Protection of Rights of Companies Before the European Court of Human Rights', in DUIĆ D., PETRASEVIĆ T. (eds), *Procedural Aspects of EU Law*, Osijek, 2017, pp. 111-126; A. KULIC, 'Corporate Human Rights?', in *European Journal of International Law*, 2021, pp. 537-569; R. MCMENAMIN, M. WAIBEL, 'Shareholder Protection in Human Rights and Investment Law', in *Austrian Review of International and European Law*, forthcoming, pp. 1-20, available at www.papers.ssrn.com.

[3] Convention for the Protection of Human Rights and Fundamental Freedoms, cit., Article 34.

[4] For an overview of the various conditions of admissibility, see D.J. HARRIS, M. O'BOYLE, E.P. BATES, C.M. BUCKLEY, *Harris, O'Boyle and Warbrick. Law of the European Convention on Human Rights*, 4th edition, 2019, pp. 47-107; M.E. VILLIGER, *Handbook on the European Convention on Human Rights*, cit., pp. 31-41.

[5] ECtHR, *Gorraiz Lizarraga and Others v. Spain,* App. No. 62543/00, Judgment, 27 April 2004, para. 35.

[6] W. SCHABAS, *The European Convention on Human Rights: A Commentary*, Oxford, 2015, p. 736.

cribed within the category of non-governmental organizations.[7] Under the ECHR, no reasonable doubt can be cast, indeed, as to the entitlement of legal persons to be right-holders and to bring a claim.[8]

Far more complex with regard to shareholders (either natural or legal persons) 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*".[9] Borrowing the words of Marius Emberland, for the purposes of our analysis, therefore: "solutions adopted in municipal law concerning shareholders' ability to protest against measures that directly concern their company rather than themselves, or, for that matter, the very construct of separate legal personality, which is inherently municipal, do not necessarily control the Court's perception of 'victimhood'".[10]

According to the settled case law of the ECtHR, to be a victim the applicant must have been directly affected by the complained act or omission.[11] As a general rule, therefore, an applicant is not entitled to bring proceedings in

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[7] P. PUSTORINO, *Lezioni di tutela internazionale dei diritti umani*, 2nd edition, Bari, 2020, p. 52. See also M. EMBERLAND, 'Protection Against Unwarranted Searches and Seizures of Corporate Premises Under Article 8 of the European Convention on Human Rights: The *Colas Est SA v. France* Approach', in *Michigan Journal of International Law*, 2003, pp. 77-116, at 82-83.

[8] W. SCHABAS, *The European Convention on Human Rights: A Commentary*, cit., 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". On the question of corporations as holders of human rights and, thus, as possible victims of violations, see: M.A. ADDO, 'The Corporation as a Victim of Human Rights Violations', in M.A. ADDO (ed.), *Human Rights Standards and the Responsibility of Transnational of Corporations*, The Hague, 1999, pp. 187-196; W.H.A.M. VAN DEN MUIJSENBERGH, S. REZAI, 'Corporations and the European Convention on Human Rights', in *Global Business & Development Law Journal*, 2012, pp. 43-68; T. ISIKSEL, 'The Rights of Man and the Rights of the Man-Made: Corporations and Human Rights', in *Human Rights Quarterly*, 2016, pp. 294-349; A. SCOLNICOV, 'Human rights and derivative rights. The European Convention on Human Rights and the rights of corporations', in T. KAHANA, A. SCOLNICOV (eds), *Boundaries of State, Boundaries of Rights. Human Rights, Private Actors, and Positive Obligations*, Cambridge, 2016, pp. 194-214.

[9] W. SCHABAS, *The European Convention on Human Rights: A Commentary*, cit., p. 738.

[10] M. EMBERLAND, *The Human Rights of Companies. Exploring the Structure of ECHR Protection*, Oxford, 2006, p. 68.

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

Strasbourg for injuries affecting other persons.[12]

From this perspective, it becomes evident that – if recognized by the Court – the municipal concept of a separate legal personality conferred upon corporations would represent an almost insurmountable hurdle for shareholders to bring reflective loss claims. Indeed, proceedings brought by shareholders for a drop in the value of their shares resulting from a measure directed against the corporation would hardly satisfy the requirement of the applicant being 'directly affected'.

The relevant substantive provision as far as shareholder claim within the conventional system is Article 1 of Protocol No. 1 of the ECHR, enshrining the right to property.[13] According to paragraph 1 of the latter, "[e]very 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".[14] This provision has been interpreted on many occasions by both the ECtHR and the former European Commission of Human Rights (ECommHR) with regard to the protection of shareholders.[15]

In this respect, it has been convincingly argued that shareholders may appear before the Court in two different situations: first, they might bring proceedings against measures affecting their direct rights, that is to say the rights they hold

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

[13] Among the vast literature on the right to property within the system of the European Convention on Human Rights, see L. CONDORELLI, 'La proprietà nella Convenzione europea dei diritti dell'uomo', in *Rivista di diritto internazionale*, 1970, pp. 175-232; L. CONDORELLI, 'Premier Protocole Additionnel, Article 1', in L.-E. PETTITI, E. DECAUX, P.H. IMBERT (dir.), *La Convention européenne des droits de l'homme – Commentaire article par article*, Paris, 1995, pp. 971-997; L. SERMET, *The European Convention on Human Rights and Property Rights*, Strasbourg, 1998; N. COLACINO, *La protezione del diritto di proprietà nel sistema della Convenzione europea dei diritti dell'uomo*, Roma, 2007; C. BIRSAN, 'La protection du droit de propriété: développements récents de la jurisprudence de la Cour européenne des droits de l'homme', in L. CAFLISCH, H.J. CALLEWAERT, R. LIDELL, P. MAHONEY, M. VILLIGER (eds), *Human Rights – Strasbourg Views: Liber Amicorum Luzius Wildhaber*, Kehl/Strasbourg, 2007, pp. 5-23; U. KRIEBAUM, 'Nationality and the Protection of Property under the European Convention on Human Rights', in I. BUFFARD, J. CRAWFORD, A. PELLET, S. WITTICH (eds), *International Law between Universalism and Fragmentation. Festschrift in Honour of Gerhard Hafner*, Leiden, 2009, pp. 649-666; M.L. PADELLETTI, 'art. 1 Prot. 1', in S. BARTOLE, P. DE SENA, V. ZAGREBELSKY (a cura di), *Commentario breve alla Convenzione europea dei diritti dell'uomo*, cit., pp. 791-813; R. RUOPPO, *La proprietà nel diritto internazionale*, Napoli, 2022, pp. 113-161.

[14] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed 20 March 1952, entered into force 18 May 1954.

[15] As is well known, until the entry into force of Protocol No. 11 to the ECHR (Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, signed 11 May 1994, entered into force 1 November 1998), individuals had no direct access to the ECtHR, but had to apply to the European Commission of Human Rights. For an overview, see M. DE SALVIA, 'European Commission of Human Rights (ECommHR)', in *Max Planck Encyclopedia of International Procedural Law*, 2022.

qua associés of the corporation; second, they can claim protection for a drop in value of their shares following a wrongful act against the legal entity.[16]

2.2. The Protection of Shareholders against Measures Affecting Their Direct Rights

As regards to the first hypothesis, this is by far the least contentious. Notably, the Court has never had any difficulty in finding that shares – as a fraction of the corporate capital – constitute a possession for the purpose of Article 1 of Protocol No. 1, and thus deserve protection against deprivation or other intrusive forms of interference by national authorities.[17] In such circumstances, shareholders will have no trouble in complaining that they are the victims of a violation of the Convention: they are, indeed, the ones who are entitled to peaceful enjoyment of shares, not the corporation. Therefore, there are no doubts that measures aimed at expropriating the shares or otherwise interfering with the proprietary rights attached to them might be said to directly affect shareholders.

In greater detail, in the case of *Bramelid and Malmström v. Sweden*,[18] the then ECommHR found that a share: "is a complex thing: certifying that the holder possesses a share in the company, […] it also constitutes, as it were, an indirect claim on company assets. In the present case, there is no doubt that the NK shares 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".[19]

This finding was later confirmed by the Court in the case of *Olczak v. Poland*,[20] where it ruled that the measures taken by the National Bank of Poland concerning the Lublin First Commercial Bank ('Lublin Bank') could be assessed under Article 1 of Protocol No. 1. Indeed, following the decision to increase the share capital of the Lublin Bank, the shareholding of the applicant in the corporation was reduced from 45 to less than 0,5 percent. Against this background, the ECtHR found that the applicant had "undeniably lost his property as

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[16] M. EMBERLAND, *The Human Rights of Companies. Exploring the Structure of ECHR Protection*, cit., p. 69.

[17] VAN DEN BROEK P., 'The Protection of Property Rights under the European Convention on Human Rights', in *Legal Issues of European Integration*, 1986, pp. 52-90, at 67; C. GRABENWARTER, *European Convention on Human Rights: Commentary*, London, 2015, pp. 368-369.

[18] ECommHR, *Bramelid and Malmström v. Sweden*, App. Nos 8588/79 and 8589/79, Decision on Admissibility, 12 October 1982.

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

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

a result of these measures",[21] thus being entitled to claim victim status. However, in the merits, the application was rejected inasmuch as the Strasbourg judges did not find the measures to be disproportionate to its legitimate purpose.[22]

Furthermore, the monitoring bodies of the ECHR have proved themselves to be aware that, under domestic law, the ownership of shares entails all the prerogatives to participate in the management of the corporation and to enjoy the proceeds. In this respect, the Court has unvaryingly recognized protection under Article 1 of Protocol No. 1 to such "corresponding rights",[23] namely: "voting rights",[24] "the right to influence the company",[25] and "the right to a share to the company's assets in the event of its being wound up".[26] While it is undeniable that these rights are linked to the corporate entity, they exclusively belong to the shareholders. Therefore, the latter are the only ones entitled to start proceedings in Strasbourg if these rights are affected.

In *Sovtransavto Holding v. Ukraine*,[27] for instance, the Court noted that the repeated increases in the Sovtransavto-Lugansk share capital, originally controlled by the applicant shareholder through a 49 percent of the stocks, affected "its ability to run the company and control its assets".[28] In this respect, the monitoring body of the ECHR found Ukraine to be responsible of a violation of Article 1 of Protocol No. 1 since the proceedings commenced by the shareholder before national courts were conducted in an unfair manner, thus having a direct impact on the corporate shareholder right to the peaceful enjoyment of its possessions.[29]

Similarly, in *Pafitis and Others v. Greece*, the Court ruled that the undue delay of the Greek judiciary to settle a dispute concerning the shareholder right to vote at the general meeting of a bank, which had decided to increase the capital stock, did actually constitute a violation of the rights enshrined in the Convention.[30]

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[21] *Ibid.*, para. 61.

[22] On the principle of proportionality, see, *ex multis*: E. CANNIZZARO, *Il principio della proporzionalità nell'ordinamento internazionale*, Milano, 2000; E. CRAWFORD, 'Proportionality', in *Max Planck Encyclopedia of Public International Law*, 2011; F.M. PALOMBINO, *Fair and Equitable Treatment and the Fabric of General Principles*, The Hague/Berlin, 2018, pp. 123-133.

[23] ECtHR, *Tadeusz Olczak v. Poland*, Decision on Admissibility, 7 November 2002, cit., para. 60.

[24] ECommHR, *Bramelid and Malmström v. Sweden*, Decision on Admissibility, 12 October 1982, cit., para. 1(b).

[25] ECommHR, *Company S. and T. v. Sweden*, App. No. 11189/84, Decision, 11 December 1986, para. 2.

[26] ECtHR, *Tadeusz Olczak v. Poland*, Decision on Admissibility, 7 November 2002, cit., para. 60.

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

[28] *Ibid.*, para. 92.

[29] *Ibid.*, para. 97.

[30] ECtHR, *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

2.3. The Protection of Shareholders against Measures Infringing Upon Their Corporations

Moving to the second and most problematic hypothesis, in which shareholders claim protection for matters that concern their economic interests in the corporation whose shares they own, the ECtHR has adopted what has been called a "restrictive approach".[31]

In line with the decision of the ICJ in the case of *Barcelona Traction*, indeed, the Court has traditionally upheld the municipal distinction between the rights of the corporation and those of its shareholders, who also, but only, have a financial interest in the enterprise. Therefore, whenever a measure directed against the corporation harms the interests of the shareholders, it is the former which can argue to be the victim and, thus, entitled to act.[32]

That is because an act which only infringes upon the rights of a corporation 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, as pointed out in the previous Section, the responsibility of the State towards the shareholders will arise if, and to the extent that, the contested measures infringe upon their direct rights.

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*).

[31] U. KRIEBAUM, C. SCHREUER, 'The Concept of Property in Human Rights Law and International Investment Law, in S. BREITENMOSER (ed.), *Human Rights, Democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber*, Zürich/Baden-Baden, 2007, pp. 743-762, at 753. As pointed out by P. DE SENA, 'Economic and Non-Economic Values in the Case Law of the European Court of Human Rights', in P.-M. DUPUY, E.-U. PETERSMANN, F. FRANCIONI (eds), *Human Rights in International Investment Law and Arbitration*, Oxford, 2009, 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 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'".

[32] D.J. HARRIS, M. O'BOYLE, E.P. BATES, C.M. BUCKLEY, *Harris, O'Boyle and Warbrick. Law of the European Convention on Human Rights*, cit., p. 93.

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

The seminal case in this respect is to be identified with the ECtHR's ruling in *Agrotexim and Others v. Greece*. The facts can be summarized as follows: the applicants were six corporation, jointly holding almost 52 percent of the shares in Karolos Fix Brewery. Since the corporation 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 and one in representation of the corporate directors.

During the procedure, the Karolos Fix Brewery tried to sell its two factory plants in Athens to a private buyer. However, according to the claimants, such an operation failed since local authorities publicly declared their intention to use the relevant area for public purposes. Following these events, the shareholders commenced proceedings in Strasbourg lamenting that such a course of action did amount to a *de facto* expropriation of corporate assets.[33]

Eventually, by a majority of eight out of nine votes, the Court dismissed the claim, finding that the complaint submitted by the shareholders did not concern their rights, but rather the alleged violation of the right to the peaceful enjoyment of its possessions enjoyed by the corporation in which they owned shares. In doing so, the Strasbourg judges endorsed the municipal law distinction between the rights of the corporation and those of the shareholders.[34]

According to the ECtHR, indeed, the claim was inadmissible inasmuch as the applicants did not complain of a violation of their rights *qua associés*, such as the right to vote. Instead, 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". [35] In a nutshell, the shareholders were claiming reflective loss by asking the Court to recognize them as victims, although indirectly, of the violation suffered by the corporation.

In this regard, the ECtHR stressed that to entertain such a claim would be tantamount to "accept that where a violation of a company's rights protected by

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

[34] T. Isiksel, 'Corporate Human Rights Claims Under the ECHR', in *Georgetown Journal of Law & Public Policy*, 2019, pp. 979-1005, at 996: "As the Court has acknowledged in [various] decisions, the separate legal identity of the corporation matters. At the very least, it means that a corporate complainant cannot normally avail itself of the personal rights of the people who associate under its auspices. We can go further: the fact that certain individual purposes require a corporate vehicle (i.e. an association with a legal identity and capacities separate from the individuals who compose it) reinforces the veil between the rights of these people and the corporation through which they transact".

[35] ECtHR, *Agrotexim v. Greece*, Judgment, 24 October 1995, cit., para. 62 (*italics added*).

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".[36] Such a criterion – which the Court deemed to be "unacceptable"[37] – would determine a general admissibility of corporate veil piercing, thus overthrowing the general rule recognized in domestic legal systems. From this perspective, instead, the Court clearly stressed that the disregarding of the separate legal personality of the corporation is a course of action to be admitted only in exceptional circumstances, as it will be demonstrated in the next Section.

The rule laid down by the Court in the *Agrotexim* judgment has been consistently reiterated in its subsequent jurisprudence. In *Tommi Tapani Anttila v. Finland*, for instance, the Court found that: "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 […], *the disregarding of a company's legal personality can be justified only in exceptional circumstances*".[38]

Similarly, in the recent case of *Albert and Others v. Hungary*,[39] the Grand Chamber of the ECtHR found it crucial – in all the cases commenced by shareholders – to draw a firm distinction between such complaints that concern measures affecting their rights *qua* shareholders and those concerning acts directed against the corporation in which they hold shares.

As far as the first category is concerned, that is to say complaints concerning shareholder's direct rights, the Court stressed that they did not pose any major problem. Indeed, this kind of claims does not challenge the distinction between the rights of the corporation and those of its shareholders. In this sense, the

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[36] See the decision of the European Commission on Human Rights in the (first phase of the) same case (ECommHR, *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 M. EMBERLAND, 'The Corporate Veil in the Case Law of the European Court of Human Rights', in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)/Heidelberg Journal of International Law*, 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".

[37] ECtHR, *Agrotexim v. Greece*, Judgment, 24 October 1995, cit., para. 64: "However, in its report the Commission seems to accept that where a violation of a company's rights protected by Article 1 of Protocol No. 1 (results in a fall in the value of its shares, there is automatically an infringement of the shareholders' rights under that Article. The Court considers that such an affirmation seeks to establish a criterion – and in the Court's view an unacceptable one – for according shareholders *locus standi* to complain of a violation of their company's rights under Article 1 of Protocol No. 1".

[38] ECtHR, *Tommi Tapani Anttila v. Finland*, App. No. 16248/10, Decision on the Admissibility, 19 November 2013, para. 24 (*emphasis added*).

[39] ECtHR, *Albert and Others v. Hungary* [GC], App. No. 5294/14, Judgment, 7 July 2020, para. 121.

corporate legal personality is intact, being required no 'piercing of the veil'.[40]

Contrariwise, as for the second category, the ECtHR reaffirmed the general principle according to which the shareholders cannot be considered as victims, pursuant to Article 34 of the Convention, of those acts and measures affecting their corporation.[41] Indeed, in such a circumstance, they cannot "be able to show that [they were] 'directly affected' by the measure complained of".[42]

Accordingly, it is safe to conclude that, as a matter of principle, the Court will not entertain a claim brought by the shareholders for damage arising from an adverse action by the respondent State against a corporation in which they own shares, since the drop in value is a mere reflection of the damage suffered by the *personne morale*.

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

In the *Agrotexim* judgment, the Court laid down the general rule according to which shareholders are not entitled to protection against measures directly affecting the rights of their corporation and, as such, only 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 targeting their corporations could have possibly resulted in a deprivation of conventional protection also in those cases where they might deserve it.

That is the main reason why – once again, in accordance with general international law as well as corporate law – the ECtHR conceded that so-called 'identification claims'[43] are permitted in "exceptional circumstances".[44] The jurisprudence of the Court has then identified and developed two main hypotheses that allow a shareholder to claim for reflective loss: *i*) the impossibility for the corporation to commence proceedings in Strasbourg by filing an application in its own name; and *ii*) the case in which the corporation can be said so closely identifiable with its shareholders that any distinction between them would appear artificial.[45]

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[40] *Ibid.*, para. 123.

[41] *Ibid.*, para. 124.

[42] *Ibid.*, para. 121.

[43] E. 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 www.ssrn.com, p. 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".

[44] ECtHR, *Agrotexim v. Greece*, Judgment, 24 October 1995, cit., para. 66.

[45] Z. Douglas, *The International Law of Investment Claims*, cit., 444-445; B.J. de Jong, 'Shareholders' Claims for Reflective Loss: A Comparative Legal Analysis', cit., pp. 102-105; D.

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 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".[46]

In other words, a shareholder is entitled to bring an action before the Court for a measure taken against corporation in which he owns shares whenever the injured entity finds itself in a *de facto* impossibility to seek relief. An exception already well-established in the practice of the then ECommHR.[47] Some examples might prove effective to explain its functioning.

In *G.J. v. Luxembourg*, for instance, the applicant shareholder brought a claim before the Court lamenting that the way in which corporate liquidators had carried out the proceedings constituted a violation of his conventional rights.[48] Even if the Court agreed with the Government that the relevant liquidation proceedings concerned the corporation rather than the shareholder, the Strasbourg judges 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*".[49]

On closer inspection, one can argue that the impossibility to which the Court was referring consisted in a *de facto* impossibility: indeed, there was nothing at the time formally preventing the legal representative to commence proceedings before the Strasbourg Court. Nevertheless, inasmuch as the claim should have

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MÜLLER, *La protection de l'actionnaire en droit international*, cit., p. 137 ff. and 270 ff.; L. VANHONNAEKER, *Shareholders' Claims for Reflective Loss in International Investment Law*, cit., pp. 86-91; M.E. VILLIGER, *Handbook on the European Convention on Human Rights*, cit., p. 43.

[46] ECtHR, *Agrotexim v. Greece*, Judgment, 24 October 1995, cit., para. 66.

[47] C. SCHWAIGHOFER, 'Legal Persons, Organisations, Shareholders as Applicants (Article 25 of the Convention)', in M. DE SALVIA, M.E. VILLIGER (eds), *The Birth of European Human Rights Law. Liber Amicorum Carle Aage Nørgard*, Baden-Baden, 1998, pp. 321-331.

[48] ECtHR, *G.J. v. Luxembourg*, App. No. 21156/93, Judgment, 26 October 2000. The case shall be pointed out not only inasmuch as it confirmed the exception affirmed in the *Agrotexim* case, but also to the extent that the claim concerned a violation of Article 6(1) of the ECHR. Accordingly, the decision of the ECtHR confirmed the relevance of corporate legal personality also for those proceedings not concerning an alleged violation of the right to property *ex* Article 1 of Protocol No. 1. See M. EMBERLAND, 'The Corporate Veil in the Case Law of the European Court of Human Rights', cit., pp. 950-951.

[49] *Ibid.*, para. 24 (*emphasis added*).

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 corporation was not realistically able to do so. That is because the liquidators of the corporation *qua* legal representatives should have acted against the very State which, respectively, appointed them or of which they represented an organ.

Similarly, in the case *International Bank for Commerce and Development AD and Others v. Bulgaria*,[50] the Court allowed a group of shareholders to bring a reflective loss claim in respect of a series of measures taken by Bulgarian authorities against their bank, finding a violation of different conventional rights. Notably, the Court admitted the 'identification claim' inasmuch as national authorities, by appointing special administrators to run the bank, had made it impossible for the latter to directly bring a claim before the Court.

Alongside the *de facto* impossibility for the corporation to lodge a complaint because of a conflict of interests, the Strasbourg judges have also heard shareholder claims for reflective loss whenever the juridical person ceased to exist and was thus *de iure* precluded from starting proceedings by itself.

In *Capital Bank AD v. Bulgaria*,[51] for instance, 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 produce a perverse effect.

Indeed, the Strasbourg judges stressed that a decision of inadmissibility "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".[52] To put it otherwise, the Court refused to strictly adhere to the prohibition of reflective loss claims so as to ensure the protection of other compelling interests. A flexible approach confirming, in this author's view, the need to recognize the foundation of the general rule in compelling reasons of legal policy, thus being susceptible of exceptions if needed.[53]

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[50] ECtHR, *Case of International Bank for Commerce and Development AD and Others v. Bulgaria*, App. No. 7031/05, Judgment, 2 June 2016.

[51] ECtHR, *Capital Bank AD v. Bulgaria*, App. No. 49429/99, Judgment, 24 November 2005.

[52] *Ibid.*, para. 80. In this sense, see also ECtHR, *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".

[53] ECtHR, *Capital Bank AD v. Bulgaria*, Judgment, 24 November 2005, cit., para. 80: "This is-

Moving to the second hypothesis – *i.e.*, the impossibility to genuinely draw a distinction between the corporation and the shareholders – the seminal case is *Pine Valley and Others v. Ireland*,[54] in which the Court endorsed the previous case law of the ECommHR to this effect.[55]

The complaint concerned allegations of unjustified control by the Irish Government over the assets of Pine Valley, a subsidiary corporation almost entirely owned by Mr. Healy through his Healy Holding. Even if the contested measures did directly affect neither the former nor the latter, 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 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".[56]

In other words, the Court proved willing to disregard the separate legal personality of the corporation for the purpose of Article 34 in so far as the entity was nothing but the 'vehicle' through which the shareholder pursued its business activity.[57] From this perspective, one can argue that the 'vehicle' approach uses the control of the corporate entity by the applicant as a reason for piercing the corporate veil, thus authorizing the shareholder to pursue a reflective loss claim.

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sue 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". See also ECtHR, *OAO Neftyanaya Kompaniya Yukos v. Russia*, App. No. 14902/04, Admissibility Decision, 29 January 2009, para. 443.

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

[55] ECommHR, *X v. Austria*, App. No. 1706/62, Decision, 4 October 1966; ECommHR, *Yarrow Plc. v. United Kingdom*, App. No. 7266/81, Decision, 28 January 1983, p. 185: "The Commission has previously held in two cases that a shareholder was entitled to claim to be the "victim" of measures directed against a company. […] However, the Commission recalls that in both these cases the individual concerned held a substantial majority shareholding in the company. In effect both applicants were carrying on their own business through the medium of the company and both applicants had a direct personal interest in the subject-matter of the complaint. […] The circumstances of the present case are not, in the Commission's view, comparable to the two cases referred to". See VAN DEN BROEK P., 'The Protection of Property Rights under the European Convention on Human Rights', cit., p. 66.

[56] *Ibid.*, para. 42.

[57] U. KRIEBAUM, 'Is the European Court of Human Rights an Alternative to Investor-State Arbitration?', in P.-M. DUPUY, E.-U. PETERSMANN, F. FRANCIONI (eds), *Human Rights in International Investment Law and Arbitration*, cit., 219-245, at 227: "In some cases, claims by majority shareholders were admitted on the ground that the claimants had carried out their own business through the medium of the companies and were hence directly affected. The fact that it was not their share– holding as such that was affected, but rights of the company which in turn led to a loss in the value of the shares, did not affect the standing of these shareholders".

Against this background, it is interesting to point out that the rule laid down in the *Agrotexim* case 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 an enterprise would be unable to bring a claim before it. No explicit reference was made to this second exception, however, even if the Commission had already decided some cases in this sense.

That a shareholder is allowed to bring a claim whenever the corporation is the mere vehicle for his investment has been 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 (an individual) was the sole shareholder of the second (the corporation) – 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 [under] Article 34 of the Convention".[58]

Finally, it is relevant to point out that, on several occasions, the Court has relied on a combination of both the exceptions to allow shareholder claims for reflective loss. In the already mentioned *G.J. v. Luxembourg*, for instance, the ECtHR came to their conclusion as to the admissibility of the application not only relying upon the *de facto* impossibility for the enterprise to personally bring the claim, but also considering that the 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*".[59]

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]".[60]

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[58] ECtHR, *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.

[59] ECtHR, *GJ v. Luxembourg*, Judgment, 26 October 2000, cit., para. 147.

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

2.3.3. 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 ICJ under general international law – the distinction between the rights of the corporation and those of the shareholders.

In doing so, the Court has thus developed a case law which, in dealing with reflective loss claims, clearly echoes that of domestic courts and the ICJ: a prohibition to sue the wrongdoer for damage caused to the corporation, as a general rule; the piercing of corporate veil to bring an identification claim, as an exception. If it is true that the ECtHR has followed a path already traced, it is nonetheless interesting to look at the reasons given by them to justify such approach. In this way, it is finally possible 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 affirmed in the *Agrotexim* case, three groups of justifications have been employed by the Court to deny the admissibility of shareholder claims for reflective loss, namely: *i*) the possible difficulties in determining who is entitled to represent the interests of the corporation in Strasbourg; *ii*) the application of the rule requiring the applicant to exhaust local remedies before actually bringing a claim before Strasbourg judges; *iii*) a reference to the solution generally adopted under national and international law.[61] A closer look at them might prove useful.

As far as the first justification is concerned, the Court pointed out that, within a corporation, it is absolutely conceivable that "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" might arise.[62] Needless to say, such disagreements can become even more serious if the corporation is facing bankruptcy or liquidation, inasmuch as the any compensation to be recovered shall be use to satisfy the claims of the creditors.

From this point of view, the admissibility of reflective loss claims would "run the risk of creating – in view of these competing interests – difficulties in determining who is entitled to apply to Strasbourg institutions".[63] In other words, such an approach would possibly bring into the system of the ECHR what the ICJ in the *Barcelona Traction* judgment defined as an "atmosphere of confusion and insecurity".[64]

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[61] M. EMBERLAND, *The Human Rights of Companies. Exploring the Structure of ECHR Protection*, cit., pp. 80-89.

[62] ECtHR, *Agrotexim v. Greece*, Judgment, 24 October 1995, cit., para. 65.

[63] *Ibid*.

[64] In this respect, see M. Emberland, *The Human Rights of Companies. Exploring the Structure*

Concerning the second rationale, the Court stressed how the admissibility of reflective loss claims could interfere with the requirement of previous exhaustion of local remedies. Indeed, since the shareholders, under domestic law, cannot commence proceedings for a damage suffered by the corporation, it would "be unreasonable to require them to do so before complaining of such an act or omission before the Convention institutions".[65] At the same time, however, such a burden could not be place on the corporation "because the shareholders are of course not empowered to take such proceedings on behalf of 'their' company."[66]

In short, the Court feared that, in cases of reflective loss claims, the rule of previous exhaustion of local remedies would have resulted in either an overburden on the applicant or, if the burden is on the corporation itself, in a *de facto* impossibility to comply with it, since shareholders arguably resort to identification claims only if their legal entities 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*.[67] 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.[68]

Moving to the exceptions, it is easy to see that the two hypotheses affirmed in the case law of the Court are inherently different from one another. On the one hand, indeed, the *de iure* or *de facto* impossibility exception is aimed at granting the shareholders with a remedy on the international plane when they would not have any other one viable, thus satisfying a demand for material justice.

On the other hand, instead, the 'vehicle exception' is well accepted even if the corporation could act by itself, thus looking at the economic realities behind the business operations. In light of this relevant difference, one may wonder whether the rationale according to which Strasbourg monitoring bodies have allowed identification claims convey a common approach to the problem. Once again, the case law of the Court is insightful, albeit not conclusive, in this respect.

Regarding the 'impossibility exception', it seems possible to identify two

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of ECHR Protection, cit., p. 957, where the author refers to a possible "unwanted disintegration of the right of application in corporate matters".

[65] ECtHR, *Agrotexim v. Greece*, Judgment, 24 October 1995, cit., para. 65.

[66] *Ibid.*

[67] *Ibid.*, para. 66.

[68] M. FOROWICZ, *The Reception of International Law in the European Court of Human Rights*, Oxford, 2010, p. 84: "The Court noted that in the majority of legal systems shareholders do not normally have the right to bring an action for damages in respect of an act or an omission that was prejudicial to their company. […] The Court also found that this principle had been confirmed with regard to the diplomatic protection of companies and cited in support the ICJ Barcelona Traction case".

main reasons which have led the Court to allow reflective loss claims when the corporation is precluded from commencing proceedings on its own.

First, the absence of "difficulties in determining who is entitled to apply to the Strasbourg institutions",[69] and thus no risk of competing (parallel or subsequent) claims being brought before the Court.[70] Indeed, to the extent that the legal representative is unable or unwilling to take legal action against the respondent State (*de facto* impossibility) or the corporation itself ceased to exist as a juristic person (*de iure* impossibility), there is less risk of having different proceedings in matters related to the corporate entity. Moreover, to the extent that the proper functioning of the corporation is altered, one could argue that one of the main policy reasons identified in Chapter 1 as supporting the prohibition of reflective loss claims is no longer applicable.

Second, the need to ensure the effectiveness of the rights granted by the Convention stands out, implicitly or explicitly,[71] in the Court's reasoning. This is apparent when considering the *de iure* impossibility: in these circumstances, 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".[72] Indeed, it would suffice for national authorities to strip off the corporation of its legal personality in order to take shelter from any lawsuit before the monitoring bodies, thus putting at risk the very effectiveness of the ECHR *vis-à-vis* legal persons.

Moving to the 'vehicle exception', the consistent jurisprudence of Strasbourg monitoring bodies has found that a sole – if not even a dominant – shareholder can bring an action for damages in respect of an act that was prejudicial to his

[69] ECtHR, *Agrotexim v. Greece*, Judgment, 24 October 1995, cit., para. 65.

[70] T. ALLEN, *Property and The Human Rights Act 1998*, Oxford, 2005, p. 84; M. EMBERLAND, *The Human Rights of Companies. Exploring the Structure of ECHR Protection*, cit., p. 97. This problem, perhaps, shall not be confused with the risk of parallel proceedings being brought before other international courts and tribunals. In this respect, the *Yukos* saga is exemplificative. See S. 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*, 2015, pp. 387-409; N. VAJIĆ, V. PAK, 'Avoiding Plurality of International Proceedings in the European Court of Human Rights', in R. WOLFRUM, M. SERSIĆ, T. SOSIĆ (eds), *Contemporary Developments in International Law. Essays in Honour of Budislav Vukas*, Leiden/Boston, 2016, pp. 614-635; B.O. GIUPPONI, 'Disentangling Human Rights and Investors' Rights in International Adjudication: The Legacy of the Yukos Cases', in *Willamette Journal of International Law and Dispute Resolution*, 2017, pp. 127-168; T. GAZZINI, A. PIETROBON, 'Parallel Proceedings Concerning Investment and Human Rights Claims', cit., pp. 60-73.

[71] M. EMBERLAND, *The Human Rights of Companies. Exploring the Structure of ECHR Protection*, 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".

[72] F. DE LONDRAS, K. DZEHTSIAROU, *Great Debates on the European Convention on Human Rights*, London, 2018, p. 58.

corporation 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".[73]

Put it another way, there is no risk of interfering with the physiological functioning of corporate management, inasmuch as there is a factual overlap between the figure of the shareholder and that of the directors. Indeed, having the former a complete control of the corporation, he can appoint and dismiss the corporate managers at his own will.

Such a rationale was clearly spelled out by the ECtHR 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".[74]

Furthermore, it is relevant to stress that in the *Pine Valley* decision the Court allowed Mr. Haley and its holding to bring a claim, together with the injured corporation, 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".[75] In other words, the Strasbourg judges concluded that the sole or dominant ownership of a corporation justifies the piercing of the corporate veil in favor of the shareholder. At a closer look, this rationale might be said to rest upon the willingness of the Court to disregard the municipal construction of the separate legal personality by privileging the economic reality of doing business.

In *Camberrow v. Bulgaria*, for instance, the judges stressed that the "applicant held a substantial shareholding of 98 percent 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".[76]

The jurisprudence resulting from the applications of the general rule and its exceptions is however far from being crystal clear. Quite the opposite, Sarah

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

[74] ECtHR, *Ankarcrona v. Sweden*, Decision on Admissibility, 27 June 2000, cit., para. 1.

[75] ECtHR, *Pine Valley Developments Ltd and Others v. Ireland*, Judgment, 29 November 1991, cit., para. 42.

[76] ECtHR, *Camberrow MM5 AD v. Bulgaria*, Decision on the Admissibility, 1 April 2004, cit., para. 1 (*emphasis added*).

Tishler has convincingly highlighted the "Court's inconsistencies in applying the test".[77] Although the inconsistency of the case law might well be problematic, what matters the most for the purpose of our analysis is the possible clash among the different rationales invoked by the Strasbourg institutions in laying down the prohibition and carving out its exceptions.

Needless to say, the 'vehicle exception' appears particularly problematic, if one accepts – as this author does – that the corporate veil represents an essential feature of the corporation, ensuring its attractiveness as the main instrument for both national and international investments. From this point of view, therefore, the fact that a corporation is entirely owned or controlled by a shareholder does not justify the disregard of its separate legal personality.

Even more, one could well argue that such an exception seems of limited use, since the shareholder will be able to bring a claim through the very corporation he owns or controls. Whether this is not possible because of governmental interference – as it were in *G.J. v. Luxembourg* – it is then the 'impossibility exception' which is at stake. After all, a similar approach would find support in domestic corporate law, according to which neither sole ownership nor dominant control can entail the lifting of the corporate veil in the interest of the shareholder, but rather might imply the disregard of the separate legal personality of the corporation where it is ascertained that the sole or dominant shareholder took unduly advantage of the limited liability regime.[78]

Yet it is true that, in such cases, there is scarce risk of competing claims, and the interests of creditors as well as of other stakeholders are often granted by the joint participation of the corporation to the proceedings, as it happened in the *Pine Valley* case.[79] Furthermore, the ECtHR 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 the interests at stake can be well-balanced, although a careful case-by-case approach is required so as to avoid that an apparently harmless – and, in this author's view, useless – exception becomes a potential risk for the corporation and other stakeholders.

Quite the opposite, the 'impossibility exception' seems of the utmost importance so as to ensure an effective protection of human rights. This is particularly true in those cases where the corporation 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 possi-

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[77] S. TISHLER, 'A New Approach to Shareholder Standing before the European Court of Human Rights', cit., p. 276.

[78] See, *supra*, Chapter 1.

[79] In this respect, it is interesting to point out that an author has affirmed that the ECtHR has established a form of derivative claim in its jurisprudence: M. KAY, S. SIME, D. FRENCH (eds), *Blackstone's Civil Practice 2013. The Commentary*, 2nd edition, London, 2012, p. 265.

bility to go to the Court",[80] this would arguably expose the rights of juridical persons to serious risk. In such circumstances, to simply dismiss any claim would offer State parties an easy way out from their international responsibility, encouraging them – as already pointed out above – to strip off corporations of their legal personality in order to avoid proceedings in Strasbourg.[81]

At the same time, one has to question the very making of the general prohibition to bring identification claims. In the *Agrotexim* judgment, the ECtHR 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 governance. This is a relevant concern, inasmuch as litigation management is certainly one of the directors' main prerogatives.[82]

Furthermore, the Strasbourg judges, on more than an occasion, have pointed out that the distinction between the rights of the corporation and those of the shareholders, with all the already mentioned consequences, is firmly grounded in municipal law. This gives 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.[83] Be that as it may, what is important to highlight for the purpose of our analysis is that conventional institutions have consistently 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 affirmed by the ICJ with regard to general international law. While the legal basis to take into account these rules has not been pointed out by the Court, their relevance in interpreting the ECHR as far as the *locus standi* of the shareholders can well be founded on Article 31(3)(c) of the Vienna Convention on the Law of Treaties.[84]

Such an approach is nonetheless not without its critics: while giving due considerations to the jurisprudence of the ICJ, the Court contrariwise has generally

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[80] M. EMBERLAND, *The Human Rights of Companies. Exploring the Structure of ECHR Protection*, cit. p. 97.

[81] F. DE LONDRAS, K. DZEHTSIAROU, *Great Debates on the European Convention on Human Rights*, cit., p. 58

[82] See, *supra*, Chapter 1.

[83] See P. MAHONEY, 'The Comparative Method in Judgments of the European Court of Human Rights: Reference back to National Law', in G. CANIVET, M. ANDENAS, D. FAIRGRIEVE, *Comparative Law before the Courts*, London, 2004, pp. 135-150; D. PEAT, *Comparative Reasoning in International Courts and Tribunals*, Cambridge, 2019, especially pp. 140-177 covering the use of the consensus doctrine by the ECtHR.

[84] Vienna Convention on the Law of Treaties, signed 23 May 1969, entered into force 27 January 1980. With regard to systemic interpretation, see, *ex multis*: C. MCLACHLAN, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention', in *International & Comparative Law Quarterly*, 2005, pp. 279-320; M.E. VILLIGER, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Leiden, 2009, pp. 432-434; P. MERKOURIS, *Article 31(3)(c) VCLT and the Principle of Systemic Integration. Normative Shadows in Plato's Cave*, Leiden, 2015.

omitted any reference to the case law of investment tribunals. To this effect, Judge Pinto de Albuquerque – in his dissenting opinion attached to the Fourth 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".[85]

The dissenting Judge stressed that a recognition of a shareholder independent right to bring a claim before the Court 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".[86]

While the position of Judge Pinto de Albuquerque is debatable inasmuch as his references to investment cases concerning 'reflective loss claims' was 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 ever 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 may appear a bit 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.[87]

By way of conclusion, the analysis carried out in this Section has provided us with a clear overview of the approach adopted in Strasbourg with regard to shareholder claims for reflective loss. Despite certain peculiarities, it seems reasonable to argue that, all in all, the ECtHR stands with domestic courts and the ICJ with regard to the non-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 arguments adopted to justify them. Such arguments, indeed, are clearly shaped by the same considerations of legal policy identified in Chapter 1. The only difference can be found in the 'vehicle exception', whose rationale might be said to clash with the general approach of the Court.

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

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

[87] On the relationship between the ECtHR and Investor-State Arbitration, see U. KRIEBAUM, 'Is the European Court of Human Rights an Alternative to Investor-State Arbitration?', cit.; C. TOMUSCHAT, 'The European Court of Human Rights and Investment Protection', cit.; R. RUOPPO, 'Common Features of the Right to Property and International Investments: Evidence from the Use of ECtHR Case law in Investment Tribunals' Decisions', in *Italian Review of International and Comparative Law*, 2022, pp. 347-369.

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

3.1. The Relevant Framework: Articles 1 and 21 of the American Convention on Human Rights

Moving to the Inter-American system for the protection of human rights,[88] the starting point for the analysis is represented by Article 21 of the ACHR, 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".

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 right-holders under the American Convention and, thus, can benefit from the treaty regime of human rights protection has been debated at great length.[89]

Indeed, 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", Article 1 of the ACHR clarifies that "[f]or the purposes of this Convention, 'person' means every human being".

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[88] For an overview of the Inter-American system of human rights, see, *ex multis*: T. BUERGENTHAL, 'The Inter-American System for the Protection of Human Rights', in T. MERON (ed.), *Human Rights in International Law: Legal and Policy Issues*, Oxford, 1984, pp. 440-493; D.J. HARRIS, S. LIVINGSTONE (eds), *The Inter-American System of Human Rights*, Oxford, 1998; H. TIGROUDJA, I.K. PANOUSSIS, *La Cour interaméricaine des droits de l'homme: analyse de la jurisprudence consultative et contentieuse*, Bruxelles, 2003; A. DI STASI, *Il sistema americano dei diritti umani. Circolazione e mutamento di una* international legal tradition, Torino, 2004; D. RODRÍGUEZ-PINZÓN, C. MARTIN, 'The Inter-American Human Rights System: Selected Examples of its Supervisory Work', in S. JOSEPH, A. MCBETH (eds), *Research Handbook on International Human Rights Law*, Cheltenham, 2010, pp. 353-387; L. BURGORGUE-LARSEN, A. ÚBEDA DE TORRES, *The Inter-American Court of Human Rights: Case Law and Commentary*, Oxford, 2011; J.M. PASQUALUCCI, *The Practice and Procedure of the Inter-American Court of Human Rights*, Cambridge, 2012; J. CAVALLARO ET AL., *Doctrine, Practice, and Advocacy in the Inter-American Human Rights System*, New York, 2019; L. HENNEBEL, H. TIGROUDJA, *The American Convention on Human Rights. A Commentary*, Oxford, 2022.

[89] See L. BURGORGUE-LARSEN, A. ÚBEDA DE TORRES, *The Inter-American Court of Human Rights: Case Law and Commentary*, cit., pp. 111-112; L. HENNEBEL, H. TIGROUDJA, *The American Convention on Human Rights. A Commentary*, cit., p. 88; G.L. NEUMAN, B. DUHAIME, 'American Convention on Human Rights (1969)', in *Max Planck Encyclopedia of Public International Law*, 2024, para. 9.

Precisely by starting from the wording of Article 1, the established practice of both the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR) has excluded that juridical persons hold human rights under the Convention.[90]

Such a conclusion has been recently reaffirmed by the Court in its advisory opinion OC-22/16, in which it stated 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".[91]

Therefore, the IACHR and the IACtHR have consistently denied any *locus standi* to juridical persons, refraining from upholding and exercising jurisdiction for applications alleging violations of their rights.[92] Despite it might not be immediately obvious, the exclusion of juridical persons from the entitlement to human rights under the American Convention has an impact on how the latter affords protection to the rights of shareholders.

As it will be illustrated, indeed, both the IACHR and IACtHR – just like the ICJ and the ECtHR – have traditionally uphold the distinction between the legal construction of the corporation, endowed with a separate legal personality under municipal law, and its shareholders. Accordingly, a line shall be drawn between measures affecting the rights of individuals *qua* shareholders, for which reparation can be claimed in case of violation, and those impacting upon the corporation in which they hold shares.[93]

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[90] IACtHR, *Cantos v. Argentina*, Judgment, 7 September 2001, para. 29; IACtHR, *Usón Ramírez v. Venezuela*, Judgment, 20 November 2009, para. 45; IACtHR, *Granier et al. (Radio Caracas Televisión) v. Venezuela*, Judgment, 22 June 2015, para. 19.

[91] IACtHR, *Titularidad de derechos de las personas jurídicas en el Sistema Interamericano de Derechos Humanos*, Advisory Opinion OC-22/16, 26 February 2016, para. 70 (author's translation). For a critical assessment of the methodological and normative approach of the Court in the advisory opinion, see L.D. DABROWSKI, 'Entitlement of Legal Entities to Hold Rights under the Inter-American Human Rights Protection System', in *International Community Law Review*, 2019, pp. 449-462.

[92] D. RODRÍGUEZ-PINZÓN, C. MARTIN, 'The Inter-American Human Rights System: Selected Examples of its Supervisory Work', cit., p. 358.

[93] IACtHR, *Perozo et al. v. Venezuela*, 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 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".

In the latter case, indeed, juridical persons will have no entitlement to protection and, thus, no remedy to resort to. This opens the question as to whether any alternative safeguard is provided: notably, bearing in mind that shareholders are the ultimate beneficiaries of the corporate business as well as those who bear the consequences in case of bankruptcy, one cannot but wonder about the provision of instruments to protect their economic interests in the juridical persons. In a nutshell, this requires to understand to what extent the exclusion of juridical persons from any entitlement to human rights interacts with shareholder claims for reflective losses.

3.2. The Protection of Shareholders against Measures Affecting Their Direct Rights

Starting with the protection of shareholders *vis-à-vis* measures infringing upon their direct rights, one has to notice that the Inter-American monitoring bodies, since their early practice on the matter, have consistently affirmed that shares qualify as property assets under the Convention.

In the case *Awas Tingni v. Nicaragua*, the IACtHR defined property 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 movable and immovable, corporeal and incorporeal elements and any other intangible object capable of having value".[94] Moving from such a broad concept,[95] it is thus unsurprising that the Court has been at ease in recognizing that a participation in the share capital of a corporation can be evaluated and forms part of owner's patrimony, thus constituting a property over which the shareholder has the right to use and enjoyment.[96]

Therefore, an individual *qua* shareholder has *locus standi* to claim reparations whenever the measures adopted by the respondent State infringed upon his right to peaceful enjoyment of their property.[97]

In *Carlos Martinez Riguero*, for instance, the IACHR concluded that Nicaragua, in confiscating – without due compensations – the shares the applicant owned in the Empresa Cereales de Centroamérica S.A. (CERSA) as well as the

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[94] IACtHR, *The Mayagna (SUMO) Awas Tingni Community v. Nicaragua*, Judgment, 31 August 2001 9, para. 144;

[95] R. RUOPPO, *La proprietà nel diritto internazionale*, cit., p. 162.

[96] IACtHR, *Ivcher Bronstein v. Peru*, Judgment, 6 February 2001, paras 122-123.

[97] P. NIKKEN, 'Balancing of Human Rights and Investment Law in the Inter-American System of Human Rights', in P.-M. DUPUY, E.-U. PETERSMANN, F. FRANCIONI (eds), *Human Rights in International Investment Law and Arbitration*, Oxford, 2009, 246-272, at 257: "according to the inter-American practice, the shareholder of a corporation is not excluded from international protection with regard to the property of his shares".

dividends he earned on them, had infringed upon the right to property of Mr. Riguero under Article 21 of the Convention.[98]

Similarly, in *Carvallo Quintana v. Argentina*, the Commission stressed that the need to draw a distinction between the legal personality of corporations and the legal sphere of natural persons "does not mean that the rights of individuals with respect to their private property as shareholders in a corporation are excluded from the protection of the Convention."[99] Quite the opposite, the IACHR stressed that such a distinction precisely serve the purpose of ensuring protection to the rights of an individual, whenever they are at issue. In this respect, therefore, it recalled that the "*investment of a shareholder in the capital assets of a corporation is part of that individual's property*, and susceptible to valuation and protection in principle under the American Convention".[100]

At the same time, the monitoring bodies of the American Convention have also recognized that shareholders are entitled to commence proceedings so as to vindicate the rights they enjoy *qua associés*. This was clearly affirmed in *Ivcher Bronstein v. Peru*, when the IACtHR was called to ascertain whether the fact that the applicant was deprived of his nationality for the purpose of seizing control of the TV channel whose shares he owned constituted, *inter alia*, a violation of the right to property under Article 21 of the American Convention.[101]

To this effect, the Court recalled that the ICJ had "made a distinction between the rights of a company's shareholders from those of the company itself, indicating that domestic legislation grants shareholders specific direct rights".[102] Among the latter, the Inter-American Court included the right to any declared dividends, the right to take part to and vote in general meetings as well as that of "receiving part of the assets of the company when selling their shares [*sic*!]".[103]

Against this backdrop, the Court reviewed all the measures adopted by Peruvian authorities against Mr. Ivcher Bronstein, finding that they prevented the applicant from managing the corporation and guiding its business activity, from taking part and thus voting in general meetings, from receiving any declared dividends, as well as from selling or otherwise transferring his shareholding. From this point of view, the IACtHR then concluded that these measures "obstructed Mr. Ivcher's use and enjoyment of [his direct] rights",[104] thus unlawful-

[98] IACHR, *Carlos Martinez Riguero v. Nicaragua*, Case No. 7788, Decision, 27 March 1987.

[99] IACHR, *Carvallo Quintana v. Argentina*, Case No. 11.859, Decision, 14 June 2001.

[100] *Ibid.*, para. 56 (*italics added*).

[101] IACtHR, *Ivcher Bronstein v. Peru*, Judgment, 6 February 2001, cit.

[102] *Ibid.*

[103] *Ibid.* Since no shareholder right to receive part of the assets of a corporation when selling his shares can be found in domestic law, the latter should probably be understood as a right to share in the corporate assets upon voluntary or involuntary dissolution of the corporation.

[104] *Ibid.*

ly interfering with the enjoyment of his right to property under Article 21 of the American Convention.

3.3. The Protection of Shareholders against Measures Infringing Upon Their Corporations

Whether and to what extent shareholders are entitled to bring an application before the Inter-American monitoring bodies for matters that concern their economic interests in the corporation whose shares they own is, by far, the most contentious hypothesis. As pointed out in the former Section, indeed, both the IACHR and the IACtHR have adhered to the municipal distinction between the rights of the corporation and those of its shareholders. The impact of such an approach can be particularly burdensome if seen against the backdrop of the American Convention.

Unlike the regime established under the ECHR, indeed, corporations and other juridical persons do not enjoy substantive and procedural rights within the Inter-American system. This means, therefore, that the (indirect) protection possibly accrued to the shareholders might well represent the only viable option to ensure the safeguard of the corporate business activities against the interference of State parties. That notwithstanding, the case law of the Inter-American monitoring bodies has, in principle, adopted the opposite stance.

3.3.1. A Critical Appraisal of the Case Law of Inter-American Monitoring Bodies: Establishing the General Rule

In *Banco de Lima Shareholders v. Peru*,[105] one of the first cases dealing with the matter, the Inter-American Commission was called to ascertain whether the threat of the Peruvian Government to expropriate all the shares of Peruvian Banks held by private individuals, without due compensation or any respect for the due process of law, as well as other interferences with the shareholding constituted a violation of the right to property under Article 21 of the American Convention.

Relying upon the distinction between the entitlement to conventional rights by natural persons and the lack thereof as for the corporation, the IACHR stressed that its competence was limited to "vindicate the rights of an individual whose property is confiscated, [without being] empowered with jurisdiction over the rights of juridical beings, such as corporations or […] banking institutions".[106] As a consequence, the monitoring body declared *ratione personae* in-

[105] IACHR, *Banco de Lima Shareholders v. Peru*, Case No. 10.169, Decision, 22 February 1991.

[106] *Ibid.*, Considerations, para. 2.

admissible the petition brought by the shareholders, finding that their complaint did not actually concern their "individual property rights",[107] but rather "the collective rights of the company, the Banco de Lima, and that this case is not within the jurisdiction of the Inter-American Commission on Human Rights."[108]

As can be easily imagined, the ruling was received with criticism.[109] Notably, an author stressed how, "[w]ith the stroke of a pen, and without analyzing the provisions of the American Convention upon which it was relying to dismiss the complaint, the Commission left the shareholders without a remedy and at the mercy of high local tribunals utterly controlled by President García's party".[110]

According to Victor Marroquín-Merino, indeed, inasmuch as shareholders had received, in November 1987, a notice of commencement of expropriation proceedings, the claim did not concern measures affecting the rights of the Banco de Lima, but rather measures infringing upon the property assets (*i.e.*, the shares) of individuals, who had thus *locus standi* for the purposes of the American Convention. In this sense, this early decision testifies the challenges of ensuring proper protection of business activities in a system that, leaving juridical persons without protection, actually ends up channeling all claims through shareholders.

A few years later, the decision of the Commission in *Bendeck-COHDINSA v. Honduras* well exemplified the approach of the Inter-American monitoring bodies to the protection of shareholders.[111] In such a case, the applicant, Mr. Bendeck, lamented that the Government of Honduras had violated his property rights in failing to comply with the terms of the public bidding through which the Compañía Hondureña de Inversiones (COHDINSA) had been awarded an area rich of forest resources.

In particular, Mr Bendeck argued to have suffered a human rights violation in his capacity of majority shareholder in COHDINSA, inasmuch as the amend-

[107] *Ibid.*, Considerations, para. 3.

[108] *Ibid.*

[109] See D. RODRÍGUEZ-PINZÓN, 'The Victim Requirement, the Fourth Instance Formula and the Notion of Person in the Individual Complaint Procedure of the Inter-American Human Rights System', in *ILSA Journal of International & Comparative Law*, 2001, pp. 369-383, at 382: "In many instances, property rights by human beings are exercised through juridical persons […]. The company performs, in practice, as a representative of the individual interests of the shareholder. So it would be desirable for the Commission to re-think this approach, because the current jurisprudence may be limiting inappropriately the right to private property of persons under the Convention".

[110] V. MARROQUÍN-MERINO, '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*, 1991, p. 249.

[111] IACHR, *Bendeck-COHDINSA v. Honduras*, Petition [no number], Decision, 27 September 1999.

ment of the terms following the bid – which excluded the forest resources from being awarded – did actually constitute an infringement upon his right to enjoy property without interference. Interestingly, the Commission, while concluding that it had jurisdiction *ratione personae* to hear the claim by the applicant, excluded that the latter could be considered a victim for the purpose of the American Convention inasmuch as this only "grants its protection to physical or natural persons".[112]

This clarification was deemed fundamental to decide the case under scrutiny, "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 remedies were sought and exhausted by COHDINSA*, in its capacity as a legal person".[113] Accordingly, the Commission declared the petition brought by Mr. Bendeck inadmissible on *ratione personae* grounds.

The distinction between the legal personality of the corporation and the rights of the shareholders lied also at the heart of the judgment rendered by the IACtHR in the case of *Perozo et al. v. Venezuela*.[114] Therein, the applicants – a group of individuals linked to Globovisión, an opposition TV station – lodged a petition lamenting that, *inter alia*, the Government of Venezuela, by instigating and failing to prevent acts of violence carried out by private actors resulting in damages to the property of the TV network, had violated Article 21 of the American Convention. While finding that the applicants had been capable of establishing that, on more than one occasion, the property of Globovisión had been harmed, "the damage was caused to the premises and assets of […] a company or legal entity",[115] without demonstrating that "the damage to such assets was translated into an abridgement of the rights of Mr. Ravell and Zuloaga, *in their capacity as shareholders of the company*".[116] Therefore, the Court concluded that no violation of the right to property of the alleged victims had been proven: as a consequence, it dismissed the claim in this respect.

To sum up the case law taken into account so far: on the one hand, the Inter-American monitoring bodies have consistently declined to exercise jurisdiction for applications concerning alleged violations of property rights of legal per-

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[112] *Ibid.*, para. 17.

[113] *Ibid.*, para. 18.

[114] IACtHR, *Perozo et al. v. Venezuela*, Judgment, 28 January 2009, cit.

[115] *Ibid.*, para. 402.

[116] *Ibid.* (*italics added*).

sons;[117] on the other hand, precisely relying upon the fact that juridical persons lack any entitlement to conventional rights under the ACHR, both the IACHR and the IACtHR have refused to allow shareholder claims for reflective loss, even when the latter were brought by natural persons. On a general note, indeed, those proceedings have been deemed as concerning the protection of the rights of corporations.

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".[118] In other words, as a general rule, claims by natural persons "that have their basis in the juridical situation or rights of [a corporation], including those addressed in the series of legal actions instituted on behalf of the [corporation] before the [State party's] judiciary" have been barred as being inadmissible.[119]

It is not by chance, therefore, that the few scholars who have taken into consideration the stance of the Inter-American monitoring bodies *vis-à-vis* shareholder claim for reflective loss have generally concluded that they are not admitted.[120] This would mean that, within the Inter-American system, whenever a measure is directed against the corporation, no form of redress is available: indeed, neither the legal entity (to which no rights are vested in) nor the shareholders (whose rights have not been affected) will be entitled to commence proceedings before the relevant monitoring bodies.

3.3.2. … and its Exceptions: A Rather Cherry-Picking Approach?

The issue is, however, more complex than it may appear at a first glance.[121]

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[117] For a critical appraisal, see L. TIMMERS, 'The protection against expropriations in Venezuela: a right to property in theory?', in F. BAETENS (ed.), *Investment Law within International Law*, Cambridge, 2013, pp. 129-163, at 153-154.

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

[119] IACHR, *Carvallo Quintana v. Argentina*, Decision, 14 June 2001, cit., para. 61.

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

[121] As pointed out by L. LIXINSKI, 'Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law', in *European Journal of International Law*, 2010, pp. 585-604, at 599: "The protection of investors' rights is yet another area in which the Inter-American Court has expanded its jurisdiction, and it has done so through an interpretation of the right to property. It has, however, been a more timid expansion, in the sense that a more conservative interpretation of a procedural requirement (consistent with the case law of the Court in general, and not exclusive to investors' rights cases) does not allow for companies to appear before the organs of the Inter-American system, only individuals. But the

This is well represented by the statement of the IACtHR in the case of *Cantos v. Argentina*: "although the figure of legal entities has not been expressly recognized by the American Convention, as it is in [...] 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*".[122] After all, only a couple of months before, in the abovementioned case of *Carvallo Quintana v. Argentina*, the Commission had already pointed out how "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*".[123]

The wording of both phrases seems to keep the door open for identification claims (*i.e.*, reflective loss claims) as long as shareholders are capable of demonstrating that either "there is no domestic distinction between the rights of a company and the rights of its owner"[124] or the injury caused to the legal entity did produce a 'direct effect' on their own rights.

From this perspective, one might argue that, on a par with the ECtHR, the Inter-American monitoring bodies have thus carved out an exception from the general prohibition of reflective loss claims. If so, this means that shareholders are entitled to bring an action for damages in respect of an act that was prejudicial to their corporation whenever there is an interplay, if not an overlap, between their own rights and those of the entity in which they own shares.[125] Hence, a more in-depth analysis is required to try to understand the rationale behind these exceptions.

Taking the move from the already mentioned judgment in *Cantos v. Argentina*, the Inter-American Court was there confronted with multiple allegations by Mr. Cantos, the owner of a large business group made up of almost ten corporations. According to the application, Argentinean authorities carried out "a series

right to property, as interpreted by the Court, has generally been protected in favour of the investors as natural persons".

[122] IACtHR, *Cantos v. Argentina*, Judgment, 7 September 2001, cit.

[123] IACHR, *Carvallo Quintana v. Argentina*, Decision, 14 June 2001, cit., para. 54 (*emphasis added*). See also IACHR, *Carlos Arturo Betancourt Estrada and Others v. Colombia*, Case No. 12.780, Decision on Admissibility, 23 October 2010, paras 28-29; *Families Beloning to the Balquicet Agricultural Workers Cooperative (COTRAGROBLAN) v. Colombia*, Case No. 873-06, Decision on Admissibility, 2 November 2011, paras 43-45.

[124] L. HENNEBEL, H. TIGROUDJA, *The American Convention on Human Rights. A Commentary*, cit., p. 639.

[125] In this sense one should probably read the statement by T.M. ANTKOWIAK, A. GONZA, *The American Convention on Human Rights. Essential Rights*, Oxford, 2017, p. 268, according to whom: "[c]orporations 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".

of searches in the administrative offices of Mr. Canto's companies",[126] during which "all the accounting documentation, company books and records, receipts and supporting documents of payments by those companies to third parties and suppliers, as well as numerous shares and securities were seized, without being inventoried".[127]

Due to these actions, the group was unable to properly conduct its own business activities, thus suffering severe financial losses. Moreover, Mr. Canto was also repeatedly detained incommunicado, while also being targeted with more than fifteen charges for fraud and forgery, all subsequently dismissed. Against this backdrop, he commenced proceedings before the Court, alleging that, *inter alia*, his rights to privacy, property, fair trial and judicial protection had been violated by Argentinean authorities during what could be described as a campaign of harassment.

For the purpose of our analysis, particular attention must be paid, needless to say, to the reasoning of the Court with regard to the right to property. In this respect, the respondent State contended that no violation of Article 21 of the Convention could be found since all the contested measures concerned a legal entity, which were not entitled to human rights within the Inter-American treaty regime. A position that was also advanced before the IACHR during the first phase of the proceedings.[128]

In contrast to what might have been expected, the Court however disagreed with such a position, pointing out what it considered the unreasonable results this approach would entail: "if a landowner acquires a harvesting machine to work his fields and the Government confiscates it, he would be protected by Article 21. But if, instead of a landowner, it was a case of two poor farmers who formed a company to buy the same harvester and the Government confiscated it, they would not be able to invoke the American Convention because the harvester in question would be owned by a company. Now, if these same farmers, instead of constituting a company, bought the harvester in co-ownership, the Convention could protect them because, according to a principle that goes back to Roman law, co-ownership does not constitute a legal entity".[129]

In this context, the Court reasoned that "the rights and obligations attributed to companies become rights and obligations for the individuals who comprise them or who act in their name or representation".[130] Accordingly, even if legal entities are not right-holders under the ACHR, individuals are entitled to resort to the monitoring bodies so as to protect their fundamental rights which

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[126] IACtHR, *Cantos v. Argentina*, Judgment, 7 September 2001, cit., para. 2.

[127] *Ibid.*

[128] Report of the American Commission in *Cantos v. Argentina*.

[129] IACtHR, *Cantos v. Argentina*, Judgment, 7 September 2001, cit., para. 25.

[130] *Ibid.*, para. 27.

are "encompassed in a legal figure or fiction created by the same system of law".[131]

This would be possible, however, only when specific circumstances are fulfilled, which were left unsettled. Indeed, the Court neither offered any proper justification to explain its conclusion – except for the unreasonable results the application of the corporate veil would have produced –, nor provided for criteria to identify the circumstances whereby the rights and obligations of a corporation can be considered to be those of the individual shareholders. In the case at stake, the (allegedly, specific) circumstance was deemed to be found in the fact that Mr. Cantos had exhausted all the available administrative and legal remedies both in his own name and on behalf of the group of corporations. Therefore, the Court was entitled to proceed to hear the claims at the merits stage.[132]

More recently, in *Alvarez and Iñiguez v. Ecuador*, the IACtHR – which was called to review the proceedings against the 50 percent 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 corporation, its subsequent mismanagement and the failure of the Ecuadorian Government to return several movables belonging to the corporation itself, constituted a violation of the rights of the shareholders.[133]

Notably, as far as the failure by the respondent State to return property belonging to the corporation is concerned, the Inter-American 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".[134]

The Court, however, did not enter into a clear reasoning as to the requirements in order to find that a damage to the corporation (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: "[t]he 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

[131] *Ibid.*, para. 27.

[132] *Ibid.*, para. 30.

[133] IACtHR, *Chaparro Álvarez and Lapo Iñiguez v. Ecuador*, Judgment, 21 November 2007, para. 209.

[134] *Ibid.* (*emphasis added*).

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".[135]

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 corporation considerably decreased, one could even argue that the Court was implicitly admitting all reflective loss claims, thus overruling its consistent case law on 'non identification'. It is not by chance, after all, that an author has highlighted that "it seems clear that a shareholder should couch his or her complaint in terms of loss to the value of shares".[136]

Nevertheless, the more plausible explanation seems to be 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 corporation had such an impact on the enjoyment (*i.e.*, the value) of the shares that the shareholder could be considered directly damaged by them.

From this point of view, the rationale behind such an exception 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, yet indirectly, deprived of the value of shares without being able to vindicate his own rights.

3.3.3. *Granier v. Venezuela*: Testing the Rule and its Exceptions

The chance to test the extent to which the distinction between the rights of the corporation and those of its shareholders had consolidated in a clear prohibition of reflective loss claims and, more importantly, in a coherent set of exceptions came, a few years later, in the case *Granier v. Venezuela*.[137]

The facts of this, as it will be seen, controversial decision can be summarized as follows: the TV station Radio Caracas Television (RCTV), which often transmitted news coverage and opinion programs critical of the national Government led by Hugo Chavez, was accused of inciting a *coup d'etat* and, more generally, of supporting terrorism, while also contributing to the destabilization of the Venezuelan Government. On the basis of these accusations, the Government decided not to renew the license of RCTV, occupied its video production studio, and seized all the equipment used for the business.

[135] *Ibid.,* para. 228 (*emphasis added*).

[136] J.M. PASQUALUCCI, *The Practice and Procedure of the Inter-American Court of Human Rights*, cit., p. 136.

[137] IACtHR, *Granier et al. (Radio Caracas Televisión) v. Venezuela*, Judgment, 22 June 2015, cit.

According to the applicants, all these conducts of the respondent State infringed upon the rights of the individual shareholders to freedom of expression, equality, judicial guarantees, judicial protection and property. By contrast the Government of Venezuela argued that the case had to be dismissed inasmuch as the application rather concerned the alleged violations of the rights of a legal person, thus falling outside the jurisdiction of the IACtHR. Facing such an argument, the Court recalled its case law on the subject matter, stressing the still valid distinction between the (non-protected) rights of juridical persons and those (protected) of human beings.

In this regard, the Inter-American judges came to the conclusion that "the alleged violations […] [were] alleged to affect the shareholders and workers as natural persons",[138] thus dismissing the objection to jurisdiction raised by Venezuela. At the same time, the Court pointed out that such approach did not preclude, and actually required, a careful analysis as to how "the exercise of the allegedly infringed rights by natural persons through a legal person would be carried out",[139] on what could be called a right-by-right basis.

As far as the right to property was concerned, the Court recalled the well-established distinction between the direct rights of the shareholders and those of the corporation in which they own shares, highlighting the need to clearly prove "the harm caused to their rights" so as to ascertain a violation. In light of this, the Court deemed it necessary to ascertain whether the direct rights of the shareholders suffered any damage which could be distinguished from any alleged harm to the assets of the corporation. To this effect, the IACtHR proceeded in its analysis "based on the arguments of the parties concerning: (i) the non-renewal of the RCTV concession for the use of the electromagnetic spectrum; (ii) the interim measures imposed by the Constitutional Chamber of the Supreme Court of Justice on RCTV's assets, and (iii) the possible effects on the value of the shares owned by the RCTV partners".[140]

For the purposes of our analysis, it is actually the third issue which deserves the closest scrutiny. The Court was, indeed, asked to rule on the drop in value of the shares as a consequence of the measures infringing upon (the assets of) the corporation, that is to say a reflective loss claim. This is all the more apparent if one looks at the arguments put forward by the applicants, who "were not referring to the rights of the shareholder who plays an active role in the activities of the company" – *i.e.*, the direct rights of the shareholder *qua associés* – "but rather […] to the harm suffered by shareholders' property, *particularly the value of the shares*."[141]

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[138] *Ibid.* para. 22.

[139] *Ibid.* para. 22.

[140] *Ibid.* para. 339.

[141] *Ibid.* para. 330.

Having the Inter-American monitoring body excluded “any limitation to the management rights of the shareholders”,[142] the analysis moved to consider the reflective loss claim brought by the *associés* to ensure protection of their economic interests within the corporation.

While highlighting that a similar approach had been taken in both *Cantos v. Argentina* and *Alvarez and Iñiguez v. Ecuador*,[143] the Court dismissed the claim in the merits finding that “the harm caused to the right to property of the presumed victims has not been proved because, in order to establish the harm, first it was necessary to prove harm to the companies of which they are direct shareholders and the way in which this could have had repercussions on each of the legal entities that, in turn, formed part of the widespread company structure, until reaching the shares or trust of which the presumed victims are direct owners”.[144]

In other words, the applicants failed to prove that the loss suffered by the corporation (RCTV) had actually climbed up the corporate chain of subsidiaries till reaching the holding corporation in which the applicants owned a majority shareholding.[145]

Against such a conclusion, Judge Eduardo Ferrer Mac-Gregor Poisot authored a partially dissenting opinion, criticizing the finding of non-violation reached by the majority. Notably, in calling the Court to read Article 21 together with Article 13 on the freedom of expression,[146] the dissenting Judge claimed that “the harm to the value of the shares – which are owned by the shareholders, victims in this case – is evident, owing to the closure of RCTV; the determination of the quantum of the share depreciation is a different matter”.[147]

According to him, therefore, the matter did not concern the proof of the harm *per se*, but rather the appropriate methodology that the Court should have applied in order to ascertain the quantum of the reflective loss suffered by shareholders.

Even more interestingly, Judge Mac-Gregor Poisot moved a wider criticism to the case law of both the IACHR and IACtHR with regard to the piercing of

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[142] *Ibid.* para. 354.

[143] IACtHR, *Chaparro Álvarez and Lapo Iñiguez v. Ecuador*, Judgment, 21 November 2007, cit.; IACtHR, *Cantos v. Argentina*, Judgment, 7 September 2001, cit.

[144] *Ibid.* para. 358.

[145] P. D’ACUNTI, ‘Private property rights from an international human rights law perspective. The black sheeps of human rights?’, in *Ius Inkarri. Revista de la Facultad de Derecho y Ciencia Política*, 2023, pp. 257-299, at 284: “The Inter-American Court held in the case of *Granier and others (Radio Caracas Televisión) vs. Venezuela* that this particular affectation had not taken place, because due to the complex structure of the company, direct damage to the shareholders was not demonstrated”.

[146] IACtHR, *Granier et al. (Radio Caracas Televisión) v. Venezuela*, Judgment, 22 June 2015, cit., Partially Dissenting Opinion of Judge Mac-Gregor Poisot, para. 14.

[147] *Ibid.* para. 16.

corporate veil. Despite referring to the right to freedom of expression (a right that he would have read, however, in conjunction with Article 21), this might be said to refer to all rights in discussing the overarching relationship between legal entities and natural persons.

In greater detail, the dissenting Judge proceeded to analyze the case law of the ECtHR, highlighting how the latter has elaborated some exceptions to the general prohibition of reflective loss claim or identification claims. In this respect, he noted how the "solutions for the consideration of the shareholders of companies or undertakings as victims of human rights violations owing to State acts that are contrary to the European Convention, but which are addressed against the company or undertaking, are the answer that the European Court has provided to a situation that, *prima facie*, should not have arisen under the European system since legal persons enjoy *ius standi* before that Court".[148]

If so, therefore, he saw a good reason to import the same criteria within the Inter-American case law, where corporations have no entitlement to substantive or procedural protection. That is because, under the ACHR, "the only remedy the shareholders have is to resort, on an individual basis, to the organs for the protection of human rights of the inter-American system".[149]

3.3.4. The Lack of Any Consistent Test to Allow Identification Claims: Some Remarks on the Inter-American System

The history of the protection of shareholder rights and interests in the Inter-American system can well be said to be a troubled one. This was already apparent in one of the first cases dealing with the subject matter in the early 1990's and has been confirmed by the latest judgment rendered by the Court in *Granier v. Venezuela*. It is not by chance, after all, that such a ruling has been defined, by Ludovic Hennebel and Hélène Tigroudja, two learned authors, as one "illustrat[ing] that the issue remains highly controversial between judges of the Court".[150]

In this respect, the case law the case law of the monitoring bodies has excluded that juridical persons possess substantive or procedural rights under the American Convention, to the extent that such a stance can well be said to be written in the stone. Legal persons, therefore, have no *locus standi* before the IACHR and the IACtHR. Contrariwise, much confusion surrounds the question as to whether shareholders are entitled to bring, in their own name, a claim against any State party whose measures impact upon the corporation in which they own shares.

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[148] *Ibid.* para. 43.

[149] *Ibid.* para. 44.

[150] L. HENNEBEL, H. TIGROUDJA, *The American Convention on Human Rights. A Commentary*, cit., p. 639.

The analysis carried out above seems to mandate an answer in the affirmative, albeit doubtful: indeed, the recent case law of both the IACHR and the IACtHR has recognized that, when special circumstances recur, shareholders can bring an identification claim, thus commencing proceedings for damages suffered by or, *rectius*, through the corporation.[151]

To this effect, two main exceptions seem to have been recognized: on the one hand, shareholders can resort to the Inter-American system to ensure protection of their fundamental rights when they have been exercised through or encompassed in a corporation, despite the fact that the latter enjoys no protection;[152] on the other hand, shareholders can bring a claim when they are able to prove that the measures infringing upon the corporation did actually produce a direct effect on their own rights.

Despite the different rulings dealing with both the exceptions, it is quite clear that the monitoring bodies have failed to establish any consistent test so as to allow identification claims. Some more remarks are thus needed in this sense.

Starting with the first strand of case law, namely that the rights of individuals have been exercised through or encompassed in a corporation, such an exception seems possibly suitable only for non-patrimonial rights, such as the right to freedom of expression. Indeed, as pointed out in Chapter 2, the need to draw a distinction between the rights of the corporations and those of its shareholders shall not be founded upon the legal personality of the former.

There are, instead, policy reason which requires to uphold such a distinction, such as the need to secure the protection of the rights of creditors, to avoid parallel or multiple proceedings, and to ensure the proper function of the corporate management structure.

At the same time, it was pointed out that the existence of other competing – and, in this author's view, compelling – interests might well justify a derogation to the rule. In the Inter-American system, the lack of entitlement to human rights in favor of corporations can thus be considered as a strong argument to allow shareholders to claim violation of non-patrimonial rights exercised through the juridical persons. Similarly, there is neither a risk of parallel or multiple proceedings, nor the need to uphold the rights of creditors, inasmuch as the violation does not concern the wealth of the corporation.

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[151] In this sense, see D. RODRÍGUEZ-PINZÓN, C. MARTIN, 'The Inter-American Human Rights System: Selected Examples of its Supervisory Work', cit., p. 358, according to whom: "[h]owever, under certain circumstances, it is possible to allege that human rights are violated when certain government measures are directed against a legal entity", citing in footnote the case of *Carvallo Quintana v. Argentina*.

[152] P. NIKKEN, 'Balancing of Human Rights and Investment Law in the Inter-American System of Human Rights', cit., p. 256: "Article 1.2 only limits the protection of the Convention to human beings, but it should not be understood that the Convention denies that some individual rights are exercised through juridical persons and, sometimes, only through them".

The issue is different if such an exception is considered through the prism of the right to property. In this scenario, indeed, to allow reflective loss claims on the basis that the rights of individuals have been exercised through or encompassed in a corporation would actually mean that reflective losses are generally recoverable. The purpose of establishing a corporation is precisely that of managing the economic interests of shareholders through a different legal entity. Moreover, the abovementioned cogent policy reasons do all apply, particularly with regard to the protection of creditors and other stakeholders who have economic interests in the corporate business activity.

Moving to the second exception, namely the possibility for shareholders to bring a claim when the measures directed against the corporation did produce a direct effect on their own rights, its foundations seem much shaky. Under which test should this exception be ascertained? The current case law of monitoring bodies provides scarce, if any, clue to this effect.

If strictly interpreted, such an exception would actually add little more to the protection of shareholders. Indeed, to the extent that their direct rights are already protected, there would be no reasons to exclude a protection when the measures formally target the corporation, yet affect the own rights of the shareholders. In our view, the "direct effect on shareholders' rights" should be probably understood as meaning that the measures produce effects of such a magnitude on the rights of shareholders that they cannot be left unaddressed. Nonetheless, once again, a clear test should be established to this effect.

4. The Protection of Shareholders under the International Covenant on Civil and Political Rights

4.1 A Complex Legal Framework: Juridical Persons as non-Right Holders and the Lack of Any Entitlement to the Protection of Private Property

While the analysis concerning the protection of shareholders in the American system might come out as problematic inasmuch as juridical persons are not entitled to human rights, thus demanding a further argumentative effort from the monitoring bodies whenever a measure against the corporation impairs the interests of the shareholders, the issue is even more complicated if one considers the system of universal protection set out in the International Covenant on Civil and Political Rights (ICCPR).[153] Within the latter, indeed, the hurdle is two-fold.

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[153] International Covenant on Civil and Political Rights, signed 16 December 1996, entered into force 23 March 1976. Among the vast literature covering the topic, see: S. JOSEPH, M. CASTAN, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 3rd edition, Oxford, 2013; P.M. TAYLOR, *A Commentary on the International Covenant on Civil and*

First of all, in accordance with Article 1 of the Optional Protocol,[154] all petitions must be submitted by individuals who claim to be victims of a violation of one or more substantive provisions enshrined in the ICCPR. As famously affirmed by the Human Rights Committee (HRC) in the case of *Mauritian Women v. Mauritius*, indeed, a "person can only claim to be a victim in the sense of article 1 of the Optional Protocol if he or she is actually affected. It is a matter of degree how concretely this requirement should be taken".[155]

In this respect, following the ECHR system and unlike the Inter-American one, "no individual can in the abstract, by way of an *actio popularis*, challenge a law or practice claimed to be contrary to the Covenant."[156] In other words, an applicant is entitled to submit a complaint before the HRC only if he claims to have been directly affected by the alleged wrongful act or the omission of the respondent State. Having ascertained the required coincidence of victim and plaintiff for the purposes of filing a petition before the Committee, the question then moves to the identification of the beneficiaries of the rights enshrined within the Covenant. In this regard, the universal system follows the approach of the ACHR in recognizing that "the beneficiaries of the rights recognized by the Covenant are individuals".[157] Natural persons, therefore, are the only right holders under the ICCPR.

Interestingly, the Committee has clarified that "although […] the Covenant does not mention the rights of legal persons […], many of the rights recognized by the Covenant, such as the freedom to manifest one's religion or belief (article 18), the freedom of association (article 22) or the rights of members of minorities (article 27), may be enjoyed in community with others".[158] For the purposes of submitting an application, however, the Committee has stressed that the limitation imposed by the Optional Protocol, under which only communications

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Political Rights. The UN Human Rights Committee's Monitoring of ICCPR Rights, Cambridge/New York, 2020; W.A. SCHABAS, *U.N. International Covenant on Civil and Political Rights. Nowak's CCPR Commentary*, 3rd edition, Kehl, 2019; C. TOMUSCHAT, 'International Covenant on Civil and Political Rights (1966)', in *Max Planck Encyclopedia of Public International Law*, 2019 and the references therein provided.

[154] Optional Protocol to the International Covenant on Civil and Political Rights, signed 16 December 1996, entered into force 23 March 1976.

[155] HRC, *Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius*, Decision, 9 April 1981, cit.

[156] *Ibid.*, para 9.2. For general works on this subject, see, *ex multis*, P.R. GHANDI, *The Human Rights Committee and the Right of Individual Communication: Law and Practice*, London, 1998; A.M. DE ZAYAS, 'The Procedures and Case Law of the United Nations Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights', in C. JIMÉNEZ PIERNAS (ed.), *The Legal Practice in International Law and European Community Law*, Leiden, 2007, pp. 255-300.

[157] HRC, 'General Comment 31. The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', UN Doc. CCPR/C/21/Rev.1/Add. 13, 29 March 2004, para. 9.

[158] *Ibid.*

submitted by individuals can be heard, "does not prevent such individuals from *claiming that actions or omissions that concern legal persons […] amount to a violation of their own rights*".[159]

The second hurdle with regard to the protection of shareholders within the ICCPR system is represented by what has been called the "Cold War's omission",[160] namely the failure to secure the protection of property rights within the main treaties on human rights: the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Two main reasons have been identified in scholarship to explain such a gap: on the one hand, the then Soviet Union and all its allies were afraid that the establishment of a universal right to property could eventually threaten the viability of the communist economic system;[161] on the other hand, newly independent States were interested in unequivocally affirming their sovereignty over natural resources, thus being unwilling to set forth a provision that might actually narrow their power to carry out expropriations.[162] Be that as it may, this actually means that, under the Covenant, there is no entitlement to the protection of private property.

4.2. The Protection of Shareholders in Matters of Other Rights: Some Possible Insights as to the Relationship with their Corporations

In such a scenario, therefore, the question concerns whether any relevant insight can be drawn for the purposes of our analysis from the practice of the HRC, the body of independent experts established to monitor the implementation of the ICCPR by its State parties under Optional Protocol 1. After all, the exclusion of the right to property can bring one to believe that the very protection of shareholders is actually mooted. Indeed, it is precisely under the scope of this human right that, traditionally, shareholders have achieved protection of their entitlements, both those concerning the ownership of the shares and those related to the administration of their corporations, which is strictly interrelated to the possession of shares.

While it is undeniable that the lack of any right to the enjoyment of private property considerably reduces the relevance of the practice of the HRC to understand the protection of shareholders in international law, its significance can

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159 *Ibid.* (*italics added*).

160 J.E. ALVAREZ, 'The Human Right to Property', in *University of Miami Law Review*, 2018, pp. 580-705.

161 J.G. SPRANKLING, 'The Global Right to Property', in *Columbia Journal of Transnational Law*, 2014, pp. 464-505, at 469-471.

162 T.R.G. VAN BANNING, *The Human Right to Property*, Antwerpen/Oxford, 2002, p. 48.

and shall not be entirely ruled out. In effect, by looking at the extent to which individuals *qua* shareholders can benefit from the safeguard of the HRC in the matter of other rights, one can deepen the relationship between (the rights of the) shareholders and (those of) their corporation within the regime established by the ICCPR. In its turn, this can represent a further tile of the broader mosaic depicted in our analysis.

As a starting point, the distinction between corporate rights and shareholder ones has been accepted by the HRC as well. In *Mohamed v. Barbados*,[163] the Committee was called to ascertain whether Mr. Mohamed, the sole shareholder of a food enterprise, could claim to be a victim of a breach of the right to access to court, enshrined in Article 14 of the ICCPR, with regard to a dispute between his corporation and a third party.

The facts of the case can be summarized as follows: S. Food Ltd had commenced civil proceedings against another corporation for an alleged breach of contract. Nonetheless, because of severe financial difficulties, the national judge ordered S. Foods Ltd to pay security for costs of the proceedings, so as to avoid that the third party would not recover the costs, should the case be dismissed. To the extent that the corporation was unable to pay, the case did not proceed further. Against this background, Mr. Mohamed lodged a complaint before the HRC, arguing that the conduct of the national judge "effectively barred [the corporation] from having its case heard".[164]

The Committee came to the conclusion that "[t]he author is essentially claiming […] violations of rights of his company. Notwithstanding that he is the sole shareholder, the company has its own legal personality".[165] To this effect, the Committee also pointed out that all the domestic procedures "referred to in the present case were in fact brought in the name of the company, and not of the author".[166] As a consequence, the communication was deemed inadmissible under Article 1 of the Optional Protocol on *ratione personae* grounds.

Similarly, in *Lamagna v. Australia*, the HRC had to consider whether the decision of the Australian Government to revoke statutory subsidies given to the Villa Magna Nursing Care Centre could be deemed to have infringed upon the rights of the applicant, who owned the medical facility through her limited liability company, the Lamagna Enterprises Pty Ltd.

The facts of the communication can be summarized as follows: under the Australian public subsidy scheme, nursing homes received a certain amount of

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[163] HRC, *Sharif Mohamed v. Barbados*, Comm. No. 502/1992, Decision, 31 March 1994.

[164] M. EMBERLAND, 'The Corporate Veil in the Jurisprudence of the Human Rights Committee and the Interamerican Court and Commission of Human Rights', in *Human Rights Law Review*, 2004, pp. 257-275, at 266.

[165] HRC, *Sharif Mohamed v. Barbados*, Decision, 31 March 1994, cit., para. 6.2.

[166] *Ibid*.

money per day for each patient who received care in their facilities. In the early 1990s, following an investigation, it was found out that Villa Magna had benefitted from an overpayment of subsidies in the past years; as a consequence, local authorities decided to recover the sum on the future payments to be made in favor of the corporation.

Facing such a scenario, Ms. Lamagna contested the legality of the decision to withdraw the subsidies, inasmuch as she had purchased the nursing home only in 1991, after having specifically asked the local authority to disclose all pertinent information. Having taken several domestic legal actions against the Australian Government, the applicant commenced proceedings before the HRC, alleging that "the facts [...] [were] unfair, unreasonable and unjust treatment constituting a discrimination and consequently a violation of the Covenant",[167] despite not invoking any specific provision of the Covenant.

The Australian Government contended that the communication was to be declared inadmissible to the extent that Ms. Lamagna had neither suffered any violation of her rights within the meaning of the Covenant nor provided any legal basis for the claim. As far as the first objection is concerned, the HRC noted that "the author has submitted the communication claiming to be a victim of a violation of her rights under the Covenant, to be treated justly and fairly, because a governmental department denied her information which it later used against her. However, the author who purchased the nursing as an enterprise is *essentially claiming before the Committee violations of the rights of her company, which has its own legal personality*".[168]

Once again, this was deemed to be confirmed by the fact that all domestic proceedings were brought before national courts in the name of the enterprise, rather than in that of Ms. Lamagna. The Committee, therefore, found the communication to be *ratione personae* inadmissible.

More recently, in *Mariategui v. Argentina*,[169] the owners of the Mariategui Sociedad Anónima Comercial Industrial Minera Agropecuaria Constructora ('Mariategui Sociedad Anónima') presented a communication before the Committee, arguing that the State party had infringed upon their rights to access to and equal treatment before tribunals (Article 14(1) ICCPR) as well as the right to have a decision rendered without undue delay (Article 26 ICCPR).

Notably, they alleged that, over the past thirty-five years, Argentinean authorities breached several contracts they had entered with the corporation, being so heavily indebted to the latter that the Mariategui Sociedad Anónima represented the largest private creditor of the respondent State. According to the claimants, the failure to pay off debt as well as the denial of justice caused by the

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[167] *Ibid.*, para. 3.

[168] *Ibid.*, para. 6.2.

[169] HRC, *Mariategui v. Argentina*, Comm. No. 1371/2005, Decision, 26 July 2005.

useless three decades long litigation before national courts did not only constitute a violation of the rights of the corporation, but also entailed a violation of their individual rights *qua* shareholders.

In this respect, the Committee "note[d] that the authors have submitted the communication claiming to be victims of violations of their rights [...], 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".[170] Nonetheless, the petition had to be rejected, inasmuch as the applicants were actually claiming the violation of rights pertaining to a corporation, and thus to an entity possessing a separate legal personality, rather than to them as natural persons.[171] Accordingly, having recalled its own practice to this effect, the Committee dismissed the communication as being *ratione personae* inadmissible under Article 1 of the Optional Protocol.

4.3. The Admissibility of Identification Claims in the Practice of the Human Rights Committee

In *Singer v. Canada*,[172] the applicant, Mr. Allan Singer, was the sole shareholder of a corporation operating in Quebec a stationery and printing business activity, mainly dedicated to an anglophone clientele. However, he had to confront with the Charter of French Language, a law that, *inter alia*, prohibited outdoor advertising in any other language than French: due to this provision, indeed, he received several requests by local authorities to "replace commercial advertisements in English outside his store by advertisements in French".[173]

Mr. Singer challenged all the measures before domestic courts, claiming that the prohibition to use English for commercial purposes actually constituted a discrimination against him. At first, he was successful in the proceedings brought before the Supreme Court of Canada, which declared many provisions in the Charter of French Language unconstitutional. Nonetheless, a few days later, the Quebecois legislature passed a new law aiming precisely at circumventing the decision of the judiciary.

Facing such a situation, Mr. Singer brought a complaint before the HRC, lamenting that Canada had discriminated him on the basis of language. The respondent State asked to Committee to declare the case inadmissible on *ratione personae* grounds, inasmuch as the applicant had lodged a communication not concerning an alleged violation of his own rights, but rather of those pertaining

[170] *Ibid.*, para 4.3.

[171] *Ibid.*

[172] HRC, *Singer v. Canada*, Comm. No. 455/1991, Decision, 26 July 1994.

[173] *Ibid.* para 2.1.

to his corporation, which had no *locus standi* under Article 1 of the Optional Protocol.

As convincingly pointed out by Marius Emberland, "as Mr Singer and [his company] were arguably two different persons, it was conceivable that the HRC would agree with Canada's contention that the petition should be dismissed."[174] Instead, the Committee did not follow the expected path, but chose to dismiss any possible relevance of the corporate veil.

Interestingly, however, the Committee did not carry out its reasoning on the basis of an 'identification claim', walking a route similar to that of the ECtHR and the Inter-American monitoring bodies. Quite the opposite, the Committee considered that the measures should be intended as directly affecting the rights of the shareholder, Mr. Singer, in saying that: "the Covenant rights which are at issue in the present communication, and in particular the right of freedom of expression, are by their nature inalienably linked to the person. The author has the freedom to impart information concerning his business in the language of his choice". Put it otherwise, the Committee considered "that the author himself, and *not only his company*, has been personally affected by the contested provisions".[175]

In the case of *Zamora v. Venezuela*,[176] the HRC had a chance to reconsider its well-established approach on the scope of shareholder claims under the ICCPR treaty regime. The facts of the case are rather complex, but they can be summarized as it follows: in May 2012, Mr. Zamora, a shareholder in the Venezuelan enterprise Econoinvest Casa de Bolsa, of which he was also the director, commenced proceedings before the Committee, alleging that a series of actions taken the Government of Venezuela did amount to a violation of various Articles of the ICCPR.

Notably, he lamented that "the administration and liquidation proceedings [concerning the company Econoinvest] violated his right to a fair and public hearing."[177] That is because, during the whole procedure which brought to the liquidation of his corporation, he had neither the chance to participate in a hearing nor was permitted to bring claims and evidence. Moreover, Mr. Zamora contested that the very decision to place the corporation under administration and, later, liquidation lacked a proper reasoning; a claim he brought before national judges who improperly dismissed it, allegedly due to their lack of impartiality and independence.

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[174] M. EMBERLAND, 'The Corporate Veil in the Jurisprudence of the Human Rights Committee and the Interamerican Court and Commission of Human Rights', p. 268.

[175] HRC, *Singer v. Canada*, Decision, 26 July 1994, cit., para. 11.2.

[176] HRC, *Gabriel Osío Zamora v. Venezuela*, Comm. No. 2203/2012, Decision on merits, 7 November 2017.

[177] *Ibid.*, para. 3.1.

Against this background, it is clear that the Committee was called to ascertain whether the contested measures only affected the corporation or rather also concerned the rights of the shareholder. Surprisingly enough, the respondent State did not raise any argument to this effect, thus patently not contesting the *locus standi* of Mr. Zamora.

Having considered all the relevant elements, the HRC concluded that "the author is acting in a personal capacity and not as a representative of Econoinvest; that he claims violations of his individual rights under the Covenant, violations that were the direct consequence of the placement under administration and liquidation of Econoinvest; and that, with regard to the allegations brought before the Committee, he submitted an appeal for annulment and a request for interim protection to the domestic courts on his own behalf."[178]

In other words, the HRC found that, despite the actions of the Venezuelan authorities did concern Econoinvest, a legal person without *locus standi* under the ICCPR, Mr. Zamora was actually complaining for a violation of his own rights, thus making the case admissible.

As far as this finding is concerned, a Member of the HRC, Mr. Olivier de Frouville, appended a dissenting opinion, which is enlightening to properly locate this decision within the broader framework of the protection of shareholders under international law. While noting that the Committee had construed the measures as directly impacting upon the rights of the shareholders, he pointed out that the decision did not significantly differ from *Sharif Mohamed v. Barbados*, *Lamagna v. Australia*, or *Mariategui v. Argentina*.[179]

From this point of view, the dissenting Member stressed that the Committee had actually misinterpreted its own practice, opening the door to the idea that "shareholders could somehow take the company's place in defending its rights when it is no longer able to do so itself, for example in the event of liquidation".[180]

This would be problematic, inasmuch as the Committee has been always cautious in dealing with the corporate veil, adhering to the traditional view that a violation of the rights of an enterprise cannot be said to involve *per se* the violation of the rights of the latter's shareholders.[181] Notably, he pointed out that the all the contested measures, such as the procedural irregularities, the lack of impartiality as well as the failure to render a decision within a reasonable time effectively infringed upon the rights of the corporation, but Mr. Zamora did not successfully prove that they were also prejudicial to his own individual rights.[182]

[178] *Ibid.*, para 8.3.

[179] HRC, *Gabriel Osío Zamora v. Venezuela*, Decision on merits, 7 November 2017, cit., Partially Dissenting Opinion of Committee Member Olivier de Frouville, paras 3-4.

[180] para. 6.

[181] *Ibid.*

[182] *Ibid.*, para. 7.

In this respect, he identified the main issue as to whether the practice of the Committee *vis-à-vis* shareholder claims for reflective loss should evolve following the developments in regional systems of human rights protection should evolve or not, in particular in the light of law and practice in the regional systems.[183] According to the Committee Member, the answer should be negative, in the sense that the distinction between the rights of the corporation and the interests of shareholders should be upheld, as ruled by the International Court of Justice in *Barcelona Traction*.

To put it otherwise, it was said that "a shareholder should have locus standi before the Committee only if he or she is claiming a violation of his or her own rights under the Covenant, and not a violation of the company's rights, even if such a violation were to have a negative impact on his or her interests as a shareholder".[184]

5. The Protection of Shareholders in International Human Rights Law: Conclusive Remarks

In this Chapter, the question as to how shareholders are protected in the field of international human rights law has been addressed. To this end, the case law of the main monitoring bodies established under universal and regional treaties have been scrutinized. Against this background, it is finally possible to draw some overall conclusions, which can be summarized as follows.

First, human rights monitoring bodies consistently uphold the distinction between the rights of the corporation and the those of the shareholders. In doing so, therefore, they tend to adhere to the scheme of qualification adopted under municipal and general international law.

This means that, whenever the conduct of a State infringed upon the rights enjoyed by shareholders *qua associés* or those property rights embodied in the possession of shares, direct or personal claims can be brought to vindicate such rights by the shareholders themselves. On the other hand, such a distinction entails that, as a general rule, whenever the contested measures affect the corporation, it is solely for the latter to bring a claim, in its own name, against the wrongdoer, in order to vindicate these wrongs. Shareholders, instead, are not entitled to commence proceedings before monitoring bodies to ask compensation for reflective losses endured, to the extent that the latter only regards their economic interests and not their own rights.

Second, this general prohibition of reflective loss claims is subject to some exceptions, under which the piercing of the corporate veil in favor of the share-

[183] *Ibid*., para. 9.

[184] *Ibid*., para. 10.

holders is allowed. In this respect, the case law of human rights monitoring bodies has proved to be fragmented and hardly frameable in a coherent system. This does not come as a surprise if one considers that monitoring bodies have proceeded to identify – and are still doing so – the hypothesis of permissible 'identification claims' on a case-by-case approach. Accordingly, rather than elaborating a clear theoretical framework through which approaching any application, human rights bodies have often carved out an exception so as to fulfil the need of material justice of the specific applicant in the case at stake.

Inevitably, this led to inter-systemic divergence, rather than convergence, among treaty regimes. At the same time, the very fact that different treaties provide for different entitlements – suffice it to mention that juridical persons are not conferred human rights under the American Convention, while the ICCPR does not enshrine the right to property – has further fueled the development of different strands of case law on the protection of shareholders for reflective loss.

Third, to justify the general prohibition of reflective loss claims as well as its possible – yet different – exceptions, monitoring bodies have advanced various arguments. In this regard, one might wonder whether a common rationale can be found in the reasoning of the relevant judicial and quasi-judicial bodies.

As far as the prohibition is concerned, the answer seems to be in the affirmative, thanks to a fruitful judicial dialogue. Two main elements have been consistently relied upon so as to explain this general rule: on the one hand, the need to uphold the approach common to domestic legal systems, where corporations find their origin; on the other hand, the existence of such a rule under customary international law, as authoritatively established and reaffirmed in numerous occasions by the ICJ. In addition to them, each system has found its own additional rationales, ranging from the need to ensure the viability of the system (ECtHR), to the fact that corporations do not hold rights under the relevant treaty (IACtHR and HRC).

Moving to the exceptional circumstances under which the piercing of the corporate veil can be sustained, any conclusion to this effect is made more difficult by the case-by-case approach characterizing the case law.

Nonetheless, on a closer inspection, a common, fundamental concern behind all the exceptions seems detectable: to grant shareholders a form of protection when, otherwise, their position would be seriously damaged without any other remedy being available. Be it a *de iure* or *de facto* impossibility for the corporation to commence proceedings on its own, or a legal bar for the corporation to bring a claim against a violation that seriously impacts upon the shareholders, human rights monitoring bodies have proved themselves to be willing to derogate the general prohibition against reflective loss claims whenever the exceptions fulfil a specific interest, which is deemed worthy of protection.

Nonetheless, although to a different extent, all human rights monitoring bodies have proved themselves to be incoherent in the application of the exceptions to the general prohibition of reflective loss or identification claims. In this respect, the identification of accurate criteria to be applied is much needed, so as to ensure the predictability of the decisions and, more generally, the legal certainty of the rules.

Chapter Four

Shareholder Claims in International Investment Law: The Loss of Relevance of Domestic Law

SUMMARY: 1. Introduction. – 2. The Loose Structure of International Investment Law: Brief Remarks. – 3. The Legal Standing of Shareholders in International Investment Law. – 3.1. Shares as Protected Investments under International Investment Agreements. – 3.2. Indirect Investments under International Investment Agreements. – 3.3. Shareholders *qua* Protected Investors under International Investment Agreements. – 4. Shareholder Claims for Reflective Loss as the General Rule in International Investment Arbitration. – 4.1. International Investment Agreements on Reflective Loss Claims. – 4.2. The Case Law of Investment Tribunals on Reflective Loss Claims. – 4.3. Shareholder Claims for Reflective Loss in Investment Jurisprudence: A Critical Appraisal. – 5. The Current Ungovernability of Shareholder Claims for Reflective Loss in International Investment Arbitration. – 5.1. The *CME/Lauder*, *CMS/Total* and *Blusun/Eskosol* Sagas: Parallel Proceedings and Conflicting Outcomes. – 5.2. *Kappes and Kappes v. Guatemala*: Derivative or Reflective Loss Claims? The Choice Is Up to the Investors. – 5.3. Indirect Investments and the Exponential Multiplication of Claims. – 6. The International Law Tools to Address the Conundrum of Shareholder Claims for Reflective Loss: An Attempt to Leave the System Unchanged. – 7. Treaty-Drafting Solutions to Reshape Shareholder Claims in Investment Arbitration: A Possible Way Forward. – 8. Rethinking the Protection of Shareholders in International Investment Law: Conclusive Remarks.

1. Introduction

In the preceding Chapters, it has been ascertained that, under both general international and human rights law, the municipal distinction between the rights of the corporation and the direct rights of the shareholders is upheld. International courts, tribunals and monitoring bodies considered above, despite sometimes resorting to different arguments, have generally adhered to the scheme of interpretation put forward in corporate law. In this respect, it is important to recall that the permissibility of reflective loss claims, under both domestic and international law, is strictly related to the entitlement of substantive rights by the shareholders.

The question, therefore, is whether international investment law provides shareholders with a separate and independent right in respect of a damage suffered by the corporation in which they own shares. In a nutshell, does investment treaties consider the economic interest of the shareholders as a non-protected interest or rather as a protected right? It is, indeed, precisely from this perspective that one can properly understand the kind of protection shareholders enjoy under investment law.[1]

The problem is, once again, two-fold. First of all, it is necessary to determine whether shareholders are entitled to resort to investment arbitration whenever their direct rights are affected by the conduct of the allegedly wrongdoer State. The answer to this is quite straightforward, on a par with what has been said in Chapter 2 and 3. There is no doubt, indeed, that investors may commence arbitral proceedings when their direct rights accruing from the ownership of shares are infringed upon: be it the right to vote in general meetings, the right to appoint directors or the very right to property of shares, the answer will be affirmative.

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[1] Among the vast literature on the topic of shareholder claims in international investment law and arbitration see: S.A. ALEXANDROV, '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*, 2005, pp. 19-59; C. SCHREUER, 'Shareholder Protection in International Investment Law', cit.; F. ORREGO VICUÑA, 'The Protection of Shareholders under International Law: Making State Responsibility more Accessible', in RAGAZZI M. (ed.), *International Responsibility Today. Essays in Memory of Oscar Schachter*, 2005, pp. 161-170; G. BOTTINI, 'Indirect Claims under the ICSID Convention', in *University of Pennsylvania Journal of International Law*, 2008, pp. 563-639; A. KOUTOGLIDOU, 'Multiple Party Investment Dispute Resolution: Who are the Proper Parties?', in Permanent Court of Arbitration (ed.), *Multiple Party Actions in International Arbitration*, Oxford/New York, 2009, pp. 255-280; HANOTIAU B., 'Multiple Parties and Multiple Contracts in International Arbitration', in Permanent Court of Arbitration (ed.), *Multiple Party Actions in International Arbitration*, Oxford/New York, 2009, pp. 35-68; P. DUMBERRY, 'The Legal Standing of Shareholders Before Arbitral Tribunals: Has Any Rule of Customary International Law Crystallised?', in *Michigan State Journal of International Law*, 2010, pp. 353-374; R. COLDWELL, 'The Limited Protection of Corporations and Shareholders at International Law', in *International Trade and Business Law Review*, 2011, pp. 358-375; M. WAIBEL, 'Coordinating Adjudication Processes', in Z. DOUGLAS, J. PAUWELYN, J.E. VIÑUALES (eds), *The Foundations of International Investment Law. Bringing Theory into Practice*, cit., pp. 499-530; Z. DOUGLAS, *Cinq problématiques d'actualité en droit des investissements*, Paris, 2015; DEMIRKOL E.C., 'Admissibility of Claims for Reflective Loss Raised by the Shareholders in Local Companies in Investment Treaty Arbitration', in *ICSID Review*, 2015, pp. 391-413; M.A. CLODFELTER, J.D. KLINGER, 'Reflective Loss and Its Limits under International Investment Law', cit.; L. ILIE, 'Shareholders' Claims in Investment Treaty Arbitration: No Piece of Cake!', in *Revista Romana de Arbitraj / Romanian Arbitration Journal*, 2019, pp. 13-27; P.M. PROTOPSALTIS, 'Shareholders' Injury and Compensation in Investor-State Arbitration', in P. PAZARTZIS, P. MERKOURIS (eds), *Permutations of Responsibility in International Law*, Leiden, 2019, pp. 185-216; J. ARATO, 'The Private Law Critique of International Investment Law', in *American Journal of International Law*, 2019, pp. 1-53; G. BOTTINI, *Admissibility of Shareholder Claims under Investment Treaties*, cit.; L. VANHONNAEKER, *Shareholders' Claims for Reflective Loss in International Investment Law*, cit.; B. WUENSCHMANN, 'Toward Higher Coherence in Shareholder Claims for Reflective Losses', in J. CHAISSE, L. CHOUKROUNE, S. JUSOH (eds), *Handbook of International Investment Law and Policy*, Singapore, 2021, pp. 1033-1061.

As far as shareholder claims for reflective loss are concerned, Markus Burgstaller has well pointed out that the practice of investment arbitration "points towards the way of disregarding the corporate form and of looking for the true investor".[2] To put it another way, what is prohibited under domestic, general international and human rights law is instead permissible in investment law. Under IIAs, as generally interpreted by arbitral tribunals, shareholders can thus commence proceedings against a State whenever the rights of their corporation are infringed upon: the investment treaties, indeed, would attribute to them an autonomous cause of action to claim for damages resulting from an unlawful treatment of the legal entity in which they own shares.

The general rule has thus been superseded by what, until now, this study has considered the exception. Interestingly, both investment tribunals and part of the scholarship contend that the extensive practice of investment arbitration would produce its effects well beyond the field of international investment law. According to them, indeed, the very rule of customary international law would have actually changed its content: from a general prohibition to bring reflective loss claims to their general and rather unrestricted admissibility.

Against this background, one cannot but wonder how the overturn of prohibition of reflective loss claims has actually taken place, having due regard to the policy concerns that, under both municipal and international law, seem to hold up the need to clearly separate the rights of the shareholders from those of their corporation.

2. The Loose Structure of International Investment Law: Brief Remarks

The current international investment law framework is made up of around 3.000 IIAs concluded since 1959, when Germany and Pakistan adopted the first modern bilateral investment treaty (BIT).[3] As already pointed out in the Intro-

[2] M. BURGSTALLER, 'Nationality of Corporate Investors and International Claims against the Investor's Own State', in *Journal of World Investment & Trade*, 2006, pp. 857-881, at 859.

[3] M.R. MAURO, *Gli accordi bilaterali sulla promozione e la protezione degli investimenti*, Torino, 2003, p. 20. See also R. DOLZER, U. KRIEBAUM, C. SCHREUER, *Principles of International Investment Law*, cit., p. 9 ff.; F. BASSAN, *Corso di diritto internazionale dell'economia e dei mercati*, Torino, 2024, pp. 68-82. According to P. PICONE, A. LIGUSTRO, *Diritto dell'Organizzazione mondiale del commercio*, Padova, 2002, at 222: "Sul piano del diritto internazionale, la disciplina degli investimenti è affidata ad un complesso assai articolato di fonti normative (diritto internazionale generale, accordi bilaterali e multilaterali, contratti tra Stati e stranieri e così via)". In the same vein, E. SAVARESE, *La nozione di giurisdizione nel sistema ICSID*, Napoli, 2012, p. 29: "L'investimento straniero [...] rimane soggetto alla molteplice e contestuale incidenza di più livelli di regolamentazione giuridica è, per così dire, "incastrato" tra diritto internazionale, legislazione interna e disciplina dettata da autonomi contratti". On the sources of international investment law, see, *e pluribus*: C. SCHREUER, 'Investments, International Protection', in *Max Planck Encyclopedia of Public*

duction, these treaties aim at promoting the flow of foreign capitals 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".[4] Amongst the IIAs, BITs constitute the main source in contemporary international investment law.[5]

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).[6] The provisions concerning dispute settlement are of the utmost importance: indeed, they allow foreign investors to directly bring a claim against the host State, in the event that the latter has allegedly breached one or more of the standards of treatment prescribed by the treaty.

Accordingly, any natural or legal person who qualifies as an investor under an IIA can bring his claim before an arbitral tribunal "even in the absence of an *ad hoc* contractual commitment to arbitrate between the investor and the host state":[7] this being known as 'arbitration without privity'.[8]

From this point of view, it is apparent why the possibility for any investor to directly seek remedies and to vindicate their rights *vis-à-vis* the host-State has represented an historical turning point. Indeed, if compared to the regime of diplomatic protection, which requires the national State of the investor to 'espouse' his claim in order to solve the dispute through an inter-State procedure, investment arbitration ensures that investors shall not rely anymore on the political will of their States.[9]

On the other hand, to the extent that the exercise of diplomatic protection could seriously impact upon inter-State relations, with developing countries

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International Law, 2013; M. SORNARAJAH, *The International Law on Foreign Investment*, 4th edition, Cambridge, 2017, pp. 204-323; M.R. MAURO, *Diritto internazionale dell'economia. Teoria e prassi delle relazioni economiche internazionali*, cit., Chapter VI.

[4] R. DOLZER, U. KRIEBAUM, C. SCHREUER, *Principles of International Investment Law*, cit., p. 29.

[5] *Ibid*., p. 13; According to P. PICONE, A. LIGUSTRO, *Diritto dell'Organizzazione mondiale del commercio*, cit., p. 22: "Data la limitata regolamentazione offerta dal diritto internazionale generale, di grande rilievo si rivelano gli *accordi bilaterali* sugli investimenti che, pur regolando i soli rapporti reciproci tra due Stati, si propongono generalmente di regolare contemporaneamente tutti e tre gli aspetti […] (ammissione, trattamento e protezione degli investimenti)". For a comprehensive analysis of the contribution of BITs to the development and establishment of international investment law, see M.R. MAURO, *Gli accordi bilaterali sulla promozione e la protezione degli investimenti*, cit., *passim*.

[6] R. DOLZER, U. KRIEBAUM, C. SCHREUER, *Principles of International Investment Law*, cit., pp. 16-17; C. MCLACHLAN, L. SHORE, M. WEINIGER, *International Investment Arbitration. Substantive Principles*, 2nd edition, Oxford, 2017, paras 2.09-2.38; M.R. MAURO, *Gli accordi bilaterali sulla promozione e la protezione degli investimenti*, cit., pp. 22-23.

[7] G. ZARRA, 'The Issue of Incoherence in Investment Arbitration: Is There Need for a Systemic Reform?', in *Chinese Journal of International Law*, 2018, pp. 137-185, at 138.

[8] J. PAULSSON, 'Arbitration Without Privity', in *ICSID Review*, 1995, pp. 232-257, at 233.

[9] C. SCHREUER, 'Investment Disputes', cit., para. 3.

greatly "resent[ing] pressure from capital exporting countries whether it is exercised bilaterally or in multilateral forums",[10] it has been convincingly contended that one of the main reasons which led to the development of the current investor-State dispute settlement (ISDS) regime was the willingness of States to depoliticize investments disputes.[11]

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 the International Centre for Settlement of Investment Disputes (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.[12]

A final note, in this respect, concerns the role of the arbitrators. While it is well known that, in international law, there is no rule of binding precedent, previous decisions of international courts and tribunals have certainly played, and are still playing, a substantial role in shaping the rules. This is particularly true with regard to international investment law, within which arbitral tribunals have played a fundamental role in shaping the often broadly worded and vague rules contained in IIAs,[13] thus contributing to the establishment of what has been called "a relatively uniform, treaty-overarching regime for international investment relations".[14]

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[10] *Ibid.*

[11] In this sense, see, *ex multis*: U. KRIEBAUM, 'Evaluating Social Benefits and Costs of Investment Treaties: Depoliticization of Investment Disputes', in *ICSID Review*, 2017, pp. 14-28, at 17-18.

[12] R. DOLZER, U. KRIEBAUM, C. SCHREUER, *Principles of International Investment Law*, cit., p. 399.

[13] Among the vast literature on the subject, see: A. BJORKLUND, 'Investment Treaty Arbitral Decisions as Jurisprudence Constante', in *Transnational Dispute Management Journal*, 2010, pp. 265-280; G. GUILLAME, 'The Use of Precedents by International Judges and Arbitrators', in *Journal of International Dispute Settlement*, 2011, pp. 5-23; P.M. NORTON, 'The Role of Precedent in the Development of International Investment Law', in *ICSID Review*, 2018, pp. 280-301; I.M. TEN CATE, 'The Costs of Consistency: Precedent in Investment Treaty Arbitration', *Columbia Journal of Transnational Law*, 2013, pp. 418-478; G. GUILLAME, 'The Use of Precedents by International Judges and Arbitrators', in *Journal of International Dispute Settlement*, 2011, pp. 5-23.

[14] S. SCHILL, 'The Jurisprudence of Investment Treaty Tribunals Between Public Good and Common Concern', in T. TREVES, F. SEATZU, S. TREVISANUT (eds), *Foreign Investment, International Law and Common Concerns*, Oxon/New York, 2014, pp. 9-24, at 10. For a comprehensive analysis of the systemic features of international investment law, see S. DI BENEDETTO, *International Investment Law and the Environment*, Cheltenham, 2013, pp. 22-53.

3. The Legal Standing of Shareholders in International Investment Law

Moving now to the subject-matter of the present Chapter – *i.e.*, the legal standing of shareholders in international investment law and arbitration –, the analysis cannot but start with IIAs, 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 what kind of economic transactions (*ratione materiae*) as well as what kind of natural or juridical persons (*ratione personarum*) are entitled to benefit from the substantive provisions therein enshrined.

The analysis of these provisions is pivotal for the purpose of understanding the extent to which shareholders enjoy the protection of IIAs. As pointed out by Lukas Vanhonnaeker, "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".[15] 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 compellingly 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".[16] 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 to ascertain whether, in international investment law: *i*) shares qualify as protected investments; and *ii*) shareholders qualify as protected investors.

3.1. Shares as Protected Investments under International Investment Agreements

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".[17] That is because such notion not only circumscribes the scope of application of the relevant treaty, but also constitutes a "*sine qua non* condition for the jurisdiction of the [investment-treaty] tribunal to be established".[18] To put it another way, for a tribunal to "en-

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[15] L. VANHONNAEKER, *Shareholders' Claims for Reflective Loss in International Investment Law*, cit., p. 93.

[16] A. DE NANTEUIL, *International Investment Law*, Cheltenham, 2020, para. 5.062.

[17] L. REED, Z. SCANLON, D. ATANASOVA, 'Protected Investment', in *Max Planck Encyclopedia of International Procedural Law*, 2018.

[18] A. DE NANTEUIL, *International Investment Law*, cit., para. 5.062.

tertain [the] case and render a decision that is binding on the parties",[19] it must be ascertained that the dispute concerns a protected investment.

Despite 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 is based on the idea that the term 'investment' must be understood as having an intrinsic meaning, thus being independent from the notion endorsed under the relevant IIA. It is not by chance that this approach has been mainly developed by ICSID tribunals: under Article 25 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention),[20] indeed, it is provided that a tribunal only has jurisdiction on disputes arising directly out of an investment. Accordingly, the definition of investment upon which the contracting States have agreed upon in the IIA is not, *per se*, decisive to answer the question as to whether a certain dispute involves an investment for the purpose of the ICSID Convention.

Indeed, the settled case law of arbitral tribunals has affirmed the objective nature of the term 'investment' under Article 25 of the ICSID Convention. In this sense, the State parties to an IIA may well agree on a more precise or restrictive definition in the treaty, but they are prohibited from submitting a dispute to an ICSID tribunal that is not related to an investment. To this effect, the arbitral tribunal in *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic* stressed that a two-fold test should be resorted to in order to ascertain its own jurisdiction "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".[21]

Contrariwise, under the subjective approach, States are allowed to freely de-

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[19] S. ROSENNE, 'International Courts and Tribunals, Jurisdiction and Admissibility of Inter-State Applications', in *Max Planck Encyclopedia of Public International Law*, 2006.

[20] Convention on the Settlement of Investment Disputes be- tween States and Nationals of Other States, signed 18 March 1965, entered into force 14 October 1996.

[21] *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 notion of investment see R. DOLZER, U. KRIEBAUM, C. SCHREUER, *Principles of International Investment Law*, cit., p. 82 ff.; C. MCLACHLAN, L. SHORE, M. WEINIGER, *International Investment Arbitration. Substantive Principles*, cit., p. 217 ff.; M.R. MAURO, *Gli accordi bilaterali sulla promozione e la protezione degli investimenti*, pp. 31-52; F. SEATZU, 'La nozione di investimento estero nel sistema dell'ICSID', in VV.AA., *Studi in onore di Carmine Punzi*, Torino, 2008, pp. 1393-1407; G. CARDUCCI, 'Defining «Investment» in Public and Private International Law and the Scope of ICSID, NAFTA and Energy Charter Treaty Investment Arbitration', in A. LIGUSTRO, G. SACERDOTI (a cura di), *Problemi e tendenze del Diritto internazionale dell'economia.* Liber amicorum *in onore di Paolo Picone*, Napoli, 2011, pp. 649-673. For an overview of cases adopting an objective approach to the issue of the definition of investments see S.W. SCHILL, C. SCHREUER, A. SINCLAIR, 'Article 25', in S.W. SCHILL (ed.), *Schreuer's Commentary on the ICSID Convention*, Cambridge, pp. 80-538.

termine the definition of an investment for the purposes of their IIAs on a case-by-case basis.[22]

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 definition of 'investment'. Rather, different tribunals have formulated different tests to ascertain the existence of an investment. To date, the most important and used one remains 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.[23]

In addition to the above, to be considered protected by an IIA, an investment 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)".[24] 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 lying at the very heart of the dispute is included within the scope of application of the relevant IIA. For the purposes of investment treaties, two types of definitions can be found: *i*) the enterprise-based definition, and *ii*) the asset-based definition.[25]

With regard to the first, an investment generally comprises the establishment or acquisition of a business enterprise, as well as shares that provide the investor with an economic interest within an enterprise. This is the case of the Morocco-Nigeria BIT, whose Article 1 provides that investment "means an enterprise within the territory of one State established, acquired, expanded or operated, in good faith, by an investor of the other State in accordance with law of the

[22] 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.

[23] *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.

[24] L. REED, Z. SCANLON, D. ATANASOVA, 'Protected Investment', cit., para. 49.

[25] *Ibid.*, para. 3. However, according to L. VANHONNAEKER, *Shareholders' Claims for Reflective Loss in International Investment Law*, 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".

Party in whose territory the investment is made taken together with the asset of the enterprise".[26] The same approach is enshrined in the 2021 Canada Model BIT, under which an "investment means: (i) an enterprise, (ii) a share, stock or other form of equity participation in an enterprise, (iii) a bond, debenture or other debt instrument of an enterprise, (iv)a loan to an enterprise, (v) an interest in an enterprise […], (vii) an interest arising from the commitment of capital or other resources in the territory of a Party to economic activity in that territory".[27]

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 – thus non-exhaustive – list of examples,[28] sometimes coupled with the identification of certain characteristics that the assets must possess as well.[29]

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[26] 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. See also Article 2 of the Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Republic of India, signed 25 January 2020, not in force.

[27] Canada Model BIT (2021), Article 1. See also Article 1 of the Agreement for the Promotion and Protection of Investment between the Government of the Republic of Austria and the Government of the Kyrgyz Republic, signed 22 April 2016, entered into force 1 October 2017.

[28] In this sense, see K. NADAKAVUKAREN SCHEFER, *International Investment Law: Text, Cases and Materials*, 2nd edition, Northampton, 2013, p. 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".

[29] The provision of such characteristics an investment must possess can be considered as an emerging trend in international investment law. In this respect, C. MCLACHLAN, L. SHORE, M. WEINIGER, *International Investment Arbitration. Substantive Principles*, 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 A. DE NANTEUIL, *International Investment Law*, 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 November 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 Agreement between the Government of the State of Israel and The Government of the United Arab Emirates

For instance, the 2012 United States Model BIT enshrines, in Article 1, the following definition of investment which shall possess: "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".[30]

Similarly, Article 2 of the 2022 Italy Model BIT provides that by investment it is meant "every kind of asset that has the characteristics of an investment, including such characteristics as a certain duration, the commitment of capital or other resources, the assumption of risk, or the expectation of gain or profit".[31]

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 accidental. 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".[32] By doing so, therefore, the open-ended asset-based definition ensures an ever-growing protection to investors and investments.[33]

However, some IIAs have increasingly adopted a more limited definition of investment by either excluding some specific types of assets from the open-ended definition provided,[34] or by agreeing on a closed list of assets qualifying as investments.[35]

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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.

[30] United States Model BIT (2012).

[31] Italy Model BIT (2022).

[32] J. SALACUSE, *The Law of Investment Treaties*, 5th edition, Oxford, 2015, p. 177. To this effect, K. YANNACA-SMALL, 'The Meaning of "Investment" in Investment Treaty Arbitration', in K. YANNACA-SMALL (ed.), *Arbitration Under International Investment Agreements. A Guide to the Key Issues*, 2nd edition, Oxford, 2018, pp. 266-301, at 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".

[33] J. SALACUSE, *The Law of Investment Treaties*, cit., p. 177.

[34] For instance, some investment treaties exclude portfolio investments: Agreement between the Government of the Republic of Turkey and the Government of the Kingdom of Cambodia

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".[36] This is true irrespective of the enterprise-based or asset-based definition adopted by the relevant treaty.

As shown above, both the US and Italy include shares within their exemplificatory list of forms of investment. Likewise, the EU Model Clauses for BITs 2023 provide that the notion of investment encompasses "shares, stocks and other forms of equity participation in an enterprise".[37] 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",[38] 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.[39]

The same holds true if one looks at the investment agreements concluded by

on the Reciprocal Promotion and Protection of Investments, signed 21 October 2018, not yet into force; 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.

[35] Agreement between the Government of the United Arab Emirates and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments, signed 19 January 2016, entered into force 25 January 2018; Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments, signed 19 January 2016, entered into force 30 August 2017.

[36] G. BOTTINI, *Admissibility of Shareholder Claims under Investment Treaties*, cit., p. 161. Similarly, J. BAUMGARTNER, *Treaty Shopping in International Investment Law*, Oxford, 2016, p. 141: "This being said, it seems safe to say that shareholding qualifies in virtually any investment treaty as protected investment, resolving, as it does, the a.m. Barcelona Traction problematic".

[37] Annotations to the Model Clauses for negotiation or re-negotiation of Member States' Bilateral Investment Agreements with third countries (EU Model BIT 2023).

[38] 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 investissement*s*, signed 31 October 2010, entered into force 24 August 2016 (*italics added*).

[39] 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 (*italics added*). For other references, see L. VANHONNAEKER, *Shareholders' Claims for Reflective Loss in International Investment Law*, cit., pp. 95-97.

Azerbaijan,[40] Brazil,[41] Canada,[42] Mali,[43] Russia,[44] and Switzerland.[45]

As far as multilateral IIAs are concerned, Article 1 of the Energy Charter Treaty (ECT) 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".[46] Similarly, the United States-Mexico-Canada Agreement provides that "shares, stock and other forms of equity participation in an enterprise" are encompassed under the definition of investment.[47] Last, but not least, the agreements concluded by the EU include shares as investments as well.[48]

[40] 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.

[41] 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, cit.

[42] 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.

[43] See Article 1 of the Accord entre le Gouvernement du Royaume du Maroc et le Gouvernement de la République 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.

[44] 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.

[45] 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.

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

[47] Agreement between the United States of America, the United Mexican States, and Canada, signed 30 November 2018, entered into force 1 July 2020.

[48] Article 1.2 of the Investment Protection Agreement between the European Union and its

3.2. Indirect Investments under International Investment Agreements

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, to be discussed in the following Section.

The criterion to ascertain whether the investment comes from a protected investor is embodied in the notions of 'ownership'[49] and 'control'[50] 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".[51]

In analyzing such a link, what has been argued above becomes particularly apparent: the notions of investor and investment are interlaced to the extent that their distinction and separate analysis might seem somewhat 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 such (either less, a protected one) if 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 purpose of the present analysis, the perspective of the investment will be adopted: far from being a random choice, this aims at putting under the spotlight one of the main issues related to the link, *i.e.* 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.

Member States, of the one part, and the Republic of Singapore, of the other part, signed 15 October 2018, not yet into force; 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.

[49] UNCTAD, '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'".

[50] *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".

[51] L. REED, Z. SCANLON, D. ATANASOVA, 'Protected Investment', cit., para. 50.

In this respect, the Tribunal in *Siemens v. Argentina* pointed out that the "arguments on 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".[52]

The first hypothesis concerns the theme of this Section: 'indirect' meaning that a shareholder *qua* investor within a corporation controls its investment through another corporation. That is to say, a corporate chain. The second hypothesis, instead, is nothing but the very topic of this book, that is shareholder claims for reflective loss. In order to avoid any confusion, no further references to reflective loss as necessarily implying an indirect investment will be made. As it will be argued, 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.

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. For instance, the 2008 UK Model BIT,[53] the 2008 Germany Model BIT,[54] the 2012 US Model BIT,[55] the 2016 Czech Republic BIT,[56] the 2017 Colombia Model BIT,[57] the 2019 Belgium-Luxembourg Economic Union (BLEU) Model BIT,[58] and the 2019 Slovakia Model BIT[59] all provide 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,[60] Article 1139 of the former North American Free Trade

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

[53] United Kingdom Model BIT (2008), Article 1: "'investment' means every kind of asset, owned or controlled directly or indirectly".

[54] Germany Model BIT (2008), Article 1: "the term 'investments' comprises every kind of asset which is directly or indirectly invested by investors of one Contracting State in the territory of the other Contracting State".

[55] United States Model BIT (2012), Article 1: "'investment' means every asset that an investor owns or controls, directly or indirectly".

[56] Czech Republic Model BIT (2016), Article 1: "the term "investment" shall comprise every kind of asset owned or controlled, directly or indirectly".

[57] Colombia Model BIT (2017), Section devoted to definitions: "Covered Investment means, an investment: […] c. directly or indirectly owned or effectively controlled by an investor of the other Party".

[58] BLEU Model BIT (2019), Article 2: "the term 'investment' shall mean every kind of asset that an investor owns or controls, directly or indirectly".

[59] Slovakia Model BIT (2019), Article 1: "the term 'investment' means the following kinds of asset that an investor owns or controls, directly or indirectly,".

[60] Energy Charter Treaty, cit., Article 1

Agreement (NAFTA),[61] Article 14(1) of the USMCA,[62] Article 9(1) of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP),[63] Article 8.1 of the 2016 Canada-EU Comprehensive Economic and Trade Agreement,[64] and Article 9.29 of the 2018 Central America – Republic of Korea Free Trade Agreement (FTA).[65] 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*.[66] The facts can be summarized as it follows: in 1999, two Argentinean subsidiaries of the Azurix Corp., a US corporation, 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 vehicle was intended to use the latter as a concessionaire. Soon after the granting of the concession in exchange of a canon amounting to several millions of Argentinean pesos, however, the relationship between the local corporations and the authorities started to deteriorate. On 19 September 2001, Azurix, the parent corporation, filed a request for arbitration with ICSID alleging the violation of several articles of the Argentina-US BIT.[67]

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

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

[62] Agreement between the United States of America, the United Mexican States, and Canada, cit.

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

[64] Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union, signed 30 October 2016, not yet into force. See also Free Trade Agreement between the European Union and New Zealand, signed 9 July 2023, entered into force 1 May 2024. The question concerning indirect investments within the EU was recently discussed by the Court of Justice of the European Union in *Xella Magyarország*, C-106/22, Judgment, 13 July 2023.

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

[66] For brief analysis of the legal issues discussed by the arbitral tribunal, see B. 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; B. 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.

[67] 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.

Treaty and could be party to an ICSID procedure".[68] In other words, the Argentinean government recognized that – in accordance with Article 1(1)(a) of the Argentina-US BIT[69] – 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 its decision on jurisdiction, the arbitral tribunal came to the following conclusion as far as the scope of the Argentina-US BIT is concerned: "[p]rovided 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*".[70]

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".[71]

This is rather a significant statement on the part of the tribunal. That is not so much because the tribunal came to the conclusion that covered investments were protected inasmuch as the link between the latter and the investor could be either direct or indirect, but rather because the arbitrators considered the contractual rights held by the local corporation as the investment made by the foreign investors. In doing so, therefore, they pierced the corporate veil of the local vehicle, as if their rights pertained to the US corporation.

If no doubts can be raised as to whether indirect investments are protected whenever the relevant treaty provides to this effect, one cannot but wonder if the protection of indirect investments is to be granted when the treaty is silent on the required link. In this respect, arbitral tribunals have generally found "the protection of indirect investment to be implied in the *broad asset-based* definition of investment".[72]

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

[69] Treaty between the United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment, cit.: "(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 [...]" (*italics added*).

[70] *Azurix Corp. v. The Argentine Republic*, Decision on Jurisdiction, cit., para. 63 (*italics added*).

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

[72] L. REED, Z. SCANLON, D. ATANASOVA, 'Protected Investment', cit., para. 54 (*italics added*).

One of the first cases in which an arbitral tribunal came to the conclusion that a silent BIT was to be interpreted as protecting indirect investments is *Sedelmayer v. Russia*.[73] In this 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.[74] 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* shareholder of the US-incorporated entity (SGC International) that had in turn invested in Russia through the setting up of a local joint-stock company together with a Soviet shareholder,[75] the respondent State contested that the claimant could qualify as 'investor' since 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".[76] From this point of view, therefore, the local corporation was nothing but the vehicle through which the applicant had invested his money in the territory of the host State.

The arbitrators then wondered "whether an individual who makes his investments through a company might be regarded as an investor [...] under the Treaty. This question concerns the general issue to what extent the 'theory of control' may be applied".[77] 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*

In favour of such a solution J.A. BISCHOFF, R. HAPP, 'Ratione Materiae', in M. BUGENBERG, J. GRIEBEL, S. HOBE, A. REINISCH (eds), *International Investment Law. A Handbook*, München/Oxford/Baden-Baden, 2015, pp. 495-544, at 531. *Contra*, Z. DOUGLAS, *The International Law of Investment Claims*, cit., p. 311; D. MÜLLER, *La protection de l'actionnaire en droit international*, cit.

[73] *Franz Sedelmayer v. Russian Federation*, SCC, Award, 7 July 1998.

[74] 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.

[75] *Franz Sedelmayer v. Russian Federation*, Award, cit., Section I.

[76] *Ibid.*, p. 57.

[77] *Ibid.*

facto investor".[78] In light of the foregoing, the Tribunal concluded that Mr. Sedelmayer had to be considered as an investor under the Germany-Russia BIT "even with respect to investments formally made by SGC International or the other companies".[79]

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 has convincingly argued that the real difficulty the arbitrators had to face did not much concern the notion of investor *per se* inasmuch as Mr. Seldmayer, being a German national, clearly fulfilled the requirement of nationality in order to be considered as an investor of one of the Contracting parties.[80] Contrariwise, the difficulty actually regarded the fact that the relevant BIT did not provide an answer as to whether "it covered indirect investments made by an investor through [a legal entity of] another country".[81]

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".[82] 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 only 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 protected 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. Once again, 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: that is to say, an indirect investor.

A more recent case in which the protection of indirect investments was discussed is the already mentioned *Siemens v. Argentina*.[83] The facts of the case can

[78] *Ibid.*, pp. 57-58.

[79] *Ibid.*, p. 58.

[80] See, *infra*, Section 4.3.

[81] J. BAUMGARTNER, *Treaty Shopping in International Investment Law*, cit., p. 145.

[82] *Ibid.*

[83] For brief analysis of the legal issues discussed by the arbitral tribunal, see R. HAPP, N. 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; O.C. EJIMS, 'Siemens AG v Argentina, Award and Separate Opinion, ICSID Case No ARB/02/8, IIC 227

be summarized as 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 vehicle in order to be able to take part in the process. Accordingly, Siemens established – through one of its subsidiaries, Siemens Nixdort Informationssysteme – a local corporation, Siemens IT Services (SITIS). SITIS took part in the bidding process and won the contract, which was signed in October 1998 and later approved. In order to allow SITIS to duly carry out its contractual obligations, Siemens proceeded to make the required investments through a contribution of capitals. However, a new Government came to power in Argentina: at first, in 2000, it suspended the contract alleging technical problems; then, in May 2001, it decided to terminate the contract.

In 2003, Siemens, the parent corporation, filed a request for arbitration with ICSID alleging the violation of several articles of the Germany-Argentina BIT.[84] 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".[85]

Contrariwise, Siemens contended that such a direct relationship was not required since: *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: "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. […] One of the categories consists of 'shares, rights of participation in companies and other types of participation in companies'. The plain meaning of this 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".[86]

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

(2007), 6th February 2007, United Nations [UN]; World Bank; International Centre for Settlement of Investment Disputes [ICSID]', in *Investment Claims*, 2008.

[84] Tratado entre la República Federal de Alemania y la República Argentina sobre Promoción y Protección Recíproca de Inversiones, signed 9 April 1991, entered into force 8 November 1993.

[85] *Siemens A.G. v. The Argentine Republic*, Decision on Jurisdiction, cit., para. 123.

[86] *Ibid.*, para. 137.

applicability only to direct investments, nor carved out of its scope the 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 the contrary is found, has been confirmed by abundant subsequent case law.[87] 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".[88]

This was the case in *Berschader and Berschader v. Russia*.[89] The facts can be summarized as it follows: the two claimants, Belgian nationals, were the sole shareholders of the Russian-incorporated vehicle Berschader International S.A. (BISA), mainly engaged in the construction business. Their corporation, following a bidding procedure, won the tender to build new court facilities in Moscow, Russia. According to the claimants, however, national authorities failed to pay BISA upon the completion of the construction, as it had been established pursuant to the contract. As a consequence, their Belgian corporation was placed in bankruptcy. Following these events, the two shareholders started proceedings under the 1989 Belgium/Luxembourg-Russia BIT.[90]

The respondent State challenged the jurisdiction of the arbitral tribunal by, *inter alia*, contesting that the claimants actually held 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

[87] 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.

[88] L. REED, Z. SCANLON, D. ATANASOVA, 'Protected Investment', cit., para. 54. See also J. BAUMGARTNER, *Treaty Shopping in International Investment Law*, cit., pp. 145-147.

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

[90] Accord entre les Gouvernements du Royaume de Belgique et du Grand-duché de Luxembourg et le Gouvernement 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.

tribunal, therefore, had to consider whether and, if so, to what extent, the BIT offered protection to indirect investments.[91]

In doing so, it is interesting to point out that the tribunal carefully distinguished – on a par with what it has been contended 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*".[92]

The Tribunal then moved to consider whether the indirect investment made by the two Belgian nationals through a corporation established 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: a claim could have been brought by the Belgian corporation itself if it had not gone bankrupt. 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 the provisions of the Treaty".[93]

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. Instead, 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".[94]

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[91] *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, Award, cit., para. 124 ff.

[92] *Ibid.*, para. 127 (*italics added*).

[93] *Ibid.*, para. 143.

[94] *Ibid.*, para. 150.

A similar reasoning was developed by the arbitral tribunal in *HICEE v. Slovakia*.[95] In this case, the claimant – a corporation established under the laws of the Kingdom of the Netherlands – started proceedings on the basis of the 1991 Netherlands-Slovakia BIT,[96] arguing that the measures taken by the respondent State adversely affected its interests in two Slovakian corporation, 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*".[97]

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"[98] – or those indirect investments "channelled through an intermediary entity in a third state".[99] Against this background, the Tribunal dwelled upon the corporate structure of the claimant. 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 qualified as a direct investment made by the claimant.[100]

However, the Tribunal excluded that the claimant's indirect investment in the two local corporation through its Slovak holding could be deemed protected inasmuch as the particular wording of the clause explicitly 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".[101]

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[95] *HICEE B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2009-11, Partial Award, 23 May 2011.

[96] 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.

[97] *Ibid*. (italics added).

[98] *HICEE B.V. v. The Slovak Republic*, Partial Award, cit., para. 48.

[99] *Ibid*., para. 49.

[100] *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]".

[101] *Ibid*., para. 147.

As a way of conclusion, therefore, it is reasonable to argue that – under the construction generally endorsed by arbitral tribunals – an investment may well be structured through several layers (of subsidiaries),[102] without this resulting in a loss of protection under the relevant IIA. This is true with regard to those treaties which explicitly provide for indirect investments to fall within their scope of application. The same holds true for all the investment agreements which are silent in this respect: the case law 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 layer,[103] a parent corporation 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 channeled through several layers of intermediaries possessing different nationalities and still the parent corporation will be entitled to claim protection under the BIT insofar as it proves ownership or control of the relevant vehicle(s).

From this perspective, therefore, a general rule concerning the protection of indirect investments can be deemed to have emerged 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.

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[102] J. BAUMGARTNER, *Treaty Shopping in International Investment Law*, cit., pp. 142-145; C. MCLACHLAN, L. SHORE, M. WEINIGER, *International Investment Arbitration. Substantive Principles*, cit., paras 6.138-6.154; J. SALACUSE, *The Law of Investment Treaties*, cit., pp. 242-245.

[103] It is relevant to point out that, in *Camuzzi International S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Objection to Jurisdiction, 11 May 2005, paras 41-43, the Tribunal came to the conclusion that control over the investment could also be deemed established collectively: "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". According to L. REED, Z. SCANLON, D. ATANASOVA, 'Protected Investment', 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".

3.3. Shareholders *qua* Protected Investors under International Investment Agreements

Having ascertained that shares, as well as indirect shareholding, generally qualify as investments under IIAs, 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 question of jurisdiction *ratione personarum* in investment-treaty arbitration.[104]

All IIAs 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".[105] 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.[106] 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".[107] As far as the conferral of nationality to an individual is concerned, the general rule is still the one identified, in 1923, by the PCIJ in its *Nationality Decrees* advisory opinion, according to which: "questions of nationality are [...] in principle within [the] reserved domain [of States]";[108] thus implying that, as a general rule, each State is free to

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[104] On the notion of 'investor' in international investment law, see E.C. SCHLEMMER, 'Investment, Investor, Nationality, and Shareholders', cit., pp. 69-86; L.F. REED, J.E. DAVIS, 'Who Is a Protected Investor', in M. BUGENBERG, J. GRIEBEL, S. HOBE, A. REINISCH (eds), *International Investment Law. A Handbook*, cit., pp. 614-637; M. PERKAMS, 'Protection for Legal Persons', in M. BUGENBERG, J. GRIEBEL, S. HOBE, A. REINISCH (eds), *International Investment Law. A Handbook*, cit., pp. 638-652; M. SORNARAJAH, *The International Law on Foreign Investment*, cit., pp. 379-388; A. DE NANTEUIL, *International Investment Law*, cit., paras 5.062-5.106.

[105] E.C. SCHLEMMER, 'Investment, Investor, Nationality, and Shareholders', cit., p. 69.

[106] *Ibid.*

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

[108] PCIJ, *Nationality Decrees Issued in Tunis and Morocco*, Advisory Opinion, 7 February 1923, cit., p. 24.

determine who are its own nationals.[109] Accordingly, "the nationality of an individual [will be] determined primarily by the law of the country whose nationality is at issue".[110]

Far more complex is, instead, the question of nationality of juridical persons.[111] Indeed, a corporate entity can be attributed nationality on the basis of "the place of incorporation, or the effective seat of management or principal place of business" or a combination thereof,[112] depending on the specific wording adopted by the relevant IIA.[113]

A vast majority of treaties adopts the incorporation criterion. Article 1 of the ECT, as an instance, defines an investor as "a company or other organization organized in accordance with the law applicable in that Contracting Party".[114] The Argentina-United States BIT describes "an enterprise of a Party" as "an enterprise constituted or organized under the law of a Party".[115] Similarly, Article 1 of the Brazil Model BIT defines enterprise as "any entity constituted or organized under applicable law".[116]

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 *personne morale*.[117] The issue as to whether a tribunal should do so has been vigorously debated in so-called 'round-tripping cases' – that is to say, "when an investor national of the host State owns or controls a corporate

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[109] J. CRAWFORD, *Brownlie's Principles of Public International Law*, cit., p. 495. On the nationality of individuals see, J. BAUMGARTNER, *Treaty Shopping in International Investment Law*, cit., pp. 93-99.

[110] R. DOLZER, U. KRIEBAUM, C. SCHREUER, *Principles of International Investment Law*, cit., p. 60.

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

[112] E.C. SCHLEMMER, 'Investment, Investor, Nationality, and Shareholders', cit., p. 75.

[113] 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".

[114] Energy Charter Treaty, cit.

[115] Treaty between the United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment, cit.

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

[117] For an analysis of the most relevant cases, see R. DOLZER, U. KRIEBAUM, C. SCHREUER, *Principles of International Investment Law*, cit., pp. 63-64; J. BAUMGARTNER, *Treaty Shopping in International Investment Law*, cit., pp. 101-111.

entity incorporated in another country that has concluded an IIA with the host State",[118] an hypothesis well represented in two famous cases: *Tokios Tokelés v. Ukraine*,[119] and *Yukos Universal Ltd. v. Russia*.[120]

In such circumstances, States have – always unsuccessfully – argued that these corporations shall be denied protection as investors inasmuch as they would not really represent the interests of foreigners, but rather would represent only a way for nationals of the host State to benefit from the substantive and procedural guarantees enshrined in the treaty. A similar outcome, after all, has been generally reached whenever States tried to argue in favor of identifying the 'real investors' in those cases concerning the so-called 'mailbox' or 'shell companies'– *i.e.*, those corporations with no substantial business activity in the State of incorporation, which, being owned or controlled by nationals of another State, have been arguably established for taxation or treaty shopping purposes,[121] a hypothesis well represented in *ADC v. Hungary*.[122]

Other treaties, for the purposes of nationality, refer instead to the seat or principal seat of business of the corporation. For instance, the Argentina-Germany BIT of 1991 refers to corporation as a legal person "having its seat in the territory of one of the Contracting Parties".[123] 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".[124]

Precisely with the aim of avoiding uncontrolled treaty shopping, recent treaties increasingly "go beyond formal requirements such as incorporation or seat",[125] or combine them with more substantial ones, requiring an economic bond "between the corporate investor and the state whose nationality it claims".[126] 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

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[118] J. BAUMGARTNER, *Treaty Shopping in International Investment Law*, cit., p. 102.

[119] *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004.

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

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

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

[123] Tratado entre la República Federal de Alemania y la República Argentina sobre Promoción y Protección Recíproca de Inversiones, cit.

[124] 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.

[125] R. DOLZER, U. KRIEBAUM, C. SCHREUER, *Principles of International Investment Law*, cit., p. 65.

[126] *Ibid*.

genuine economic activity of the *personne morale* in the territory of the concerned State.[127]

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".[128] 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".[129] Even more, Article 17.1 of the 2023 Canada-Ukraine Free Trade Agreement includes within its scope of protection not only legal persons "constituted or organized under the law of that Party and that has substantial business activities in the territory of that Party", but also those corporations which are incorporated and "directly or indirectly owned or controlled by" a natural or legal person possessing its nationality.[130]

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 corporation *qua* shareholder satisfies the requisite nationality for the purposes of the relevant IIA and possesses an investment – *i.e.*, the shares –, there are no doubts that the shareholder is to be considered 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 he is entitled to enjoy substantive protection under the relevant investment treaty as well as, from the procedural point of view, to bring a claim against the host State before an investment arbitration tribunal. Yet, it does not tell us what a shareholder *qua* investor is entitled to claim before the same tribunal. To put it 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, general international law and human rights treaty systems – or whether he can recover for the damages caused to the corporation in which he owns shares, that is to say a reflective loss claim.

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[127] For an interesting 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, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction, 21 October 2005.

[128] 2019 BLEU Model BIT.

[129] Comprehensive Trade and Economic Agreement between Canada and the European Union, signed 30 October 2016, not yet into force.

[130] Canada-Ukraine Modernized Free Trade Agreement, signed 22 September 2023, not yet into force.

Second, one can experience difficulty in identifying all the individuals or corporations that, inasmuch as shareholders, might qualify as protected investors. This is particularly apparent if one recalls the notion of indirect investment. As pointed out above, indeed, indirect shareholding – namely, the situation in which the investor is not the immediate shareholder of the corporation but rather owns the relevant shares only indirectly, through the intermediary of another legal entity – will surely qualify as an investment whenever the treaty explicitly provides to this effect or, according to the case law of investment tribunals, the treaty is silent on the issue.

If one further considers that multinational corporations, with their multilayered corporate structure, increasingly act as the main actor of the global economy, such a phenomenon cannot but exponentially increase. Against this background, it is apparent that there could be a bulk of claimants and different treaties involved in respect of the same measure taken by the host State.

4. Shareholder Claims for Reflective Loss as the General Rule in International Investment Arbitration

It has been authoritatively said that "[p]erhaps the single greatest misconception that has plagued the investment treaty jurisprudence to date concerns the problem of claims by shareholders".[131]

The analysis carried out in the previous Section, indeed, has only demonstrated that investment tribunals have jurisdiction – *ratione personarum* and *ratione materiae* – over a shareholder possessing both the relevant nationality under the investment treaty and a bunch of shares in a corporation established under the law of the host or, less often, a third State.

To say that a shareholder *qua* foreign investor is entitled to start proceedings before an arbitral tribunal inasmuch as he owns a protected investment does not answer, however, the question as to what a shareholder might be able to claim before that tribunal. Indeed, as pointed out by Mark Clodfelter and Joseph Klingler, the fact that a BIT "specifically provides that shareholders are investors and as such are entitled to have recourse to international arbitration to protect their [shareholding] 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*".[132]

In this respect, the questions posed by the ICJ in *Barcelona Traction* is, *muta-*

[131] Z. DOUGLAS, *The International Law of Investment Claims*, cit., p. 398.

[132] M.A. CLODFELTER, J.D. KLINGER, 'Reflective Loss and Its Limits under International Investment Law', cit., p. 62 (*italics added*).

tis mutandis, still a relevant starting point: "[i]t can be asked whether [*international investment law*] 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".[133]

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 do so properly[134] –, the answer is clear. 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".[135]

In other words, 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.[136]

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. Then, it will examine the reasoning on the basis of which investment tribunals have generally allowed shareholders to bring reflective loss claims. Finally, a critical assessment will be provided.

4.1. International Investment Agreements on Reflective Loss Claims

In his already mentioned book on shareholder claims for reflective loss in investment arbitration, Lukas Vanhonnaeker has correctly pointed out that, for the purpose of our analysis, two different kinds of IIAs can be identified: *i*) IIAs that explicitly address the question concerning the standing of shareholders; and *ii*) IIAs that are silent on the issue at hand.[137]

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 shareholder claims and those which only address the question with regard to specific

[133] ICJ, *Barcelona Traction*, Judgment, 24 July 1964, cit., p. 44.

[134] M.A. CLODFELTER, J.D. KLINGER, 'Reflective Loss and Its Limits under International Investment Law', cit., *passim*.

[135] Z. DOUGLAS, *The International Law of Investment Claims*, cit., p. 402.

[136] M. PAPARINSKIS, '*Barcelona Traction*: A Friend of Investment Protection Law', in *Baltic Yearbook of International Law*, 2008, pp. 105-133, at 119. See also the analysis in S.P. SUBEDI, *International Investment Law. Reconciling Policy and Principle*, 4th edition, Oxford, 2020, pp. 169-172.

[137] L. VANHONNAEKER, *Shareholders' Claims for Reflective Loss in International Investment Law*, cit., pp. 98-102.

provisions. A general provision on reflective loss claim is hard, if not almost impossible, to be found in investment treaties.

For instance, Article 9.12 of the Australia-China FTA on investment arbitration establishes 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 […]".[138]

This provision is then accompanied by a footnote, clarifying that "[f]or 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".[139] 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 have standing to submit only a claim for direct loss or damage to their own legal interest as investors".[140]

While there are very few treaties containing what could be said a general provision on the (in)admissibility of reflective loss claims, some of them do actually enshrine a discrete provision limited to one or a group of standards of treatment. Some treaties, for instance, address the protection of shareholders in their expropriation clauses. The Energy Charter Treaty falls within this group. Article 13(3) ECT, indeed, has been said to clarify the scope of the expropriation provision providing that "[f]or 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".[141]

[138] Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China, signed 17 June 2015, entered into force 20 December 2015.

[139] *Ibid.* (*italics added*). A similar provision, however, cannot be found in recent IIAs entered by China, such as the Free Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Nicaragua, signed 31 August 2023, entered into force 1 January 2024.

[140] 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.

[141] Energy Charter Treaty, cit.

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".[142] This provision is interesting inasmuch as it offers some insights on the system of protection set up by the treaty.

First, one cannot but argue that the provision implicitly declares the admissibility of reflective claims under the ECT: indeed, unless one is able to find a different and more convincing interpretation of Article 13(3) – something that this author is unable to do[143] –, a reflective loss claim does represent the only way through which a shareholder could be entitled to ask for compensation *vis-à-vis* a measure affecting the assets of a corporation in which he owns shares. No reasonable doubts can be raised to this effect.

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 ECT 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, yet 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 "[w]here 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".[144]

Other investment agreements have been said to be even more precise in clarifying the scope of application of the provision on expropriation by explicitly referring to indirect shareholders.[145] Article 5(5) of the BLEU-Liberia BIT, in this regard, stands out for the clarity of its drafting: "Where nationals or companies of one Contracting Party 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

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[142] M. PERKAMS, 'Piercing the Corporate Veil in International Investment Agreements. The Issue of Indirect Shareholder Claims Reloaded', in A. REINISCH, C. KNAHR, *International investment law in context*, Utrecht, 2008, pp. 93-114, at 110.

[143] L. VANHONNAEKER, *Shareholders' Claims for Reflective Loss in International Investment Law*, cit., p. 100.

[144] 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.

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

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".[146]

Under Article 5(5), therefore, a Belgian, Luxembourg or Liberian investor would be entitled to seek compensation for an expropriatory measure taken against a corporation if he is a shareholder in a third State corporation which, in turn, is a shareholder of the damaged entity. The same holds true with regard to Article 4(5) of the BLEU-Cameroon BIT.[147]

With respect to the second category of IIAs, which are those silent on the issue as to whether shareholders are entitled to claim reflective losses, it is apparent that a solution cannot but be found through interpretation. This means that it is up to arbitral tribunals to properly construe the relevant treaty provisions. To this effect, the following section will be devoted to analyze the case law of investment arbitration.

4.2. The Case Law of Investment Tribunals on Reflective Loss Claims

In order to understand the general admissibility of reflective loss claims in international investment law it is all the more necessary to look at the case law of arbitral tribunals. Indeed, to the extent that most of IIAs are rather silent on their admissibility, it is only by looking at the reasoning employed by arbitrators that one can possibly acquire a clear understanding as to how the view that shareholders are entitled to bring reflective loss claims has been consolidating. 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.[148] The claim brought by the shareholders concerned 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. The respondent State did not challenge the standing 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. Bilat-

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[146] 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.

[147] 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.

[148] *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990.

eral 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 Treaty ("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".[149]

To the extent that the investment consisted in shares, the tribunal clarified that "the Treaty protection provides no direct coverage with regard to Serendib's physical assets as such […], or to intangible assets of Serendib if any […]".[150] 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".[151]

To 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 against the local vehicle. Nevertheless, to the extent that the shares held by the investor were not quoted in a stock market at the time he suffered the injury, the tribunal considered the value of all the assets of the local corporation 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",[152] following a deduction of the debts of the latter.

The first decision that explicitly dealt with the admissibility of reflective loss claims brought by the shareholders was rendered by the arbitral tribunal in *CMS v. Argentina*.[153] The facts can be summarized as it 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 1980s, Argentina implemented a series of measures. Among them, Argentina decided to disconnect the value of the Argentinian peso from that of the US dollar. This led to a devaluation of the local currency and

[149] *Ibid.* para. 95 (*italics added*).

[150] *Ibid.*

[151] *Ibid.*

[152] G. BOTTINI, *Admissibility of Shareholder Claims under Investment Treaties*, cit., p. 156.

[153] *CMS Gas Transmission Company v. The Republic of Argentina*, Decision of the Tribunal on Objections to Jurisdiction, cit. For an analysis of this case, see B. 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, United Nations [UN]; World Bank; International Centre for Settlement of Investment Disputes [ICSID]', in *Investment Claims*, 2008; B. 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.

to a neat decrease in value of foreign investments, which had been mostly made on the basis of this link between the currencies.

As a consequence, indeed, TGN – together with other gas transportation corporations – 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 arbitration, claiming that these measures constituted a breach of several standards of treatment enshrined in the United States-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 corporation. In particular, Argentina contested the admissibility of the claim inasmuch as the rights allegedly infringed upon were held by TGN, not by CMS.[154]

Furthermore, the respondent State pointed out that the claimant was merely a minority shareholder in TGN, thus further denying any possible entitlement to bring the claim. In this respect, the Argentinean Government 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*".[155]

Contrariwise, the claimant argued that it was not claiming for the rights pertaining to the local vehicle, but rather for its own rights associated with the investment made in the corporation, namely, the shares. According to such a construction, CMS thus qualified as a foreign investor under the United States-Argentina BIT and its participation as a shareholder in TGN was the foreign investment protected under the treaty. In the view of the claimant, therefore, "the claims being asserted under the BIT [...] [were] direct and not indirect [*recte*, reflective]".[156]

Against this background, the Tribunal carried out an analysis of the protection of shareholders under international law. As far as shareholder rights under general international law, the arbitrators dismissed the rules established by the ICJ in *Barcelona Traction*, arguing that the case only concerned with the exercise of diplomatic protection in favor of a corporation possessing the nationality of a third State. Moreover, while the ICJ had denied the *locus standi* of Belgium

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[154] *CMS Gas Transmission Company v. The Republic of Argentina*, Decision of the Tribunal on Objections to Jurisdiction, cit.

[155] *Ibid.*, paras 37-38 (*italics added*).

[156] *Ibid.*, para. 40.

on the basis of general international law, it had left the door open for a protection being conferred under treaty law.

In light of these considerations, therefore, the tribunal concluded that the *Barcelona Traction* judgment was "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".[157]

Even more, the Tribunal argued that recent State practice concerning the protection of shareholders – be they majority or minority, whether controlling or not – had actually shifted towards a different direction. Indeed, the arbitrators pointed out that despite such a shift was the result of 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".[158]

In other words, the Tribunal – despite not coming *expressis verbis* to such a conclusion – came close to arguing 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".[159]

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 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]".[160]

In doing so, however, the Tribunal 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, be-

[157] *Ibid.*, paras 45.
[158] *Ibid.*, para. 48.
[159] *Ibid.*, para. 48.
[160] *Ibid.,* para. 65.

ing TGN the corporation directly affected by the measures.[161]

The Decision on Jurisdiction rendered in *Suez v. Argentina* is a pivotal ruling 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 general international law is, as such, inapplicable under IIAs.[162]

The facts of the case echo those of several other cases concerning the Argentinean economic crisis: the claimants – a group of corporations incorporated in France, Spain and the United Kingdom – were shareholders of Aguas Argentinas S.A., a local vehicle 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.[163]

Once again, the respondent State challenged the jurisdiction of the arbitral tribunal arguing that, inasmuch as the alleged injury was caused to the corporation, the shareholders had no right to start proceedings. Only the legal entity could 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 enabling the shareholders to commence ICSID proceedings so as to their treaty rights enforced.[164]

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 the reflective loss following the unlawful treatment of the corporation in which he holds shares. That was because "[n]either 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 [*recte*, reflective]. This distinction, present in domestic corporate law of many countries, does not exist in any of the treaties applicable to this case".[165]

On a par with the abovementioned decision in *CMS v. Argentina*, the Tribunal dismissed in 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,

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[161] Z. DOUGLAS, *The International Law of Investment Claims*, cit., pp. 431-435.

[162] *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.

[163] See R. HAPP, N. 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.

[164] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, Decision on Jurisdiction, cit., para. 49.

[165] *Ibid.*, para 49.

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. […] The applicable international law on investment […] found in the relevant BITs is much more specific and far reaching than was the case in 1970".[166]

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 corporation.

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 corporation in which he owns shares through its subsidiaries, is *Postova Banka v. Greece*.[167] 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 Greek sovereign debt restructuring of 2012, 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 corporation, the Greek Government argued that the ICSID tribunal could not hear the case on different grounds.

Notably, for 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 the impairment of corporate 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 investment",[168] that is to say the very ownership of Greek Bonds through Postova Banka.

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 corporation 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

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[166] *Ibid.*, para. 50.

[167] *Poštová Banka, A.S. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015.

[168] *Ibid.*, para. 246.

corporation whose 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).[169]

This interpretation 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".[170]

Nevertheless, the relevant (indirect) investment for the impairment of which Cemex was seeking relief was actually its indirect shareholding in a locally incorporated Venezuelan entity that had been nationalized by the respondent State.[171] 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 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".[172]

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 a claim for the drop in value of his shares following an injury suffered by the corporation.[173] On the other hand, however, the arbitrators found that no case could be identified

[169] In support of this position, see M.A. CLODFELTER, J.D. KLINGER, 'Reflective Loss and Its Limits under International Investment Law', 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.

[170] *Cemex v. Venezuela*, Decision on Jurisdiction, cit., para. 156.

[171] *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'" (*italics added*).

[172] *Postova Banka v. Greece*, Decision on Jurisdiction, cit., para. 246.

[173] *Ibid.*, para. 232: "the effects that the measures taken against the company's assets have on the value of the claimant's shares in such company".

in support of the contention that a shareholder is entitled to start proceedings in order to vindicate the rights of the corporation itself.

Accordingly, the Tribunal denied jurisdiction over the direct claims advanced by Istrokapital coming to the conclusion that while a shareholder is entitled to claim for reflective loss, he has no "no standing to pursue claims directly over the assets of the local company, as he or she has no legal right to such assets".[174]

4.3. Shareholder Claims for Reflective Loss in Investment Jurisprudence: A Critical Appraisal

In the preceding 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".[175]

Such a more or less implicit validation is very 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 necessarily carried out.

The first concerns the relationship between international investment law, in particular IIAs, and the rules of general international law concerning diplomatic protection of the shareholders. Indeed, it has been ascertained that – whenever facing an objection by the respondent State based on the relevance of the *Barcelona Traction* case – arbitral tribunals have summarily dismissed the case and the whole jurisprudence of the ICJ 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

[174] *Ibid.,* para. 245. See also J. CHAISSE, L.Z. LI, 'Shareholder Protection Reloaded. Redesigning the Matrix of Shareholder Claims for Reflective Loss', cit., p. 74.

[175] J. CHAISSE, L.Z. LI, 'Shareholder Protection Reloaded. Redesigning the Matrix of Shareholder Claims for Reflective Loss', cit., p. 63.

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".[176]

Two objections can be moved against such a contention. On the one hand, the fact that an IIA qualifies shares as investments and shareholders as investors does not provide 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, "[t]he 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 form the object of an investment treaty claim. These are entirely distinct issues. […] [T]he 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".[177]

On the other hand, to simply dismiss the rules set out in the 1970 judgment of *Barcelona Traction* because it concerned diplomatic protection actually overlooks, as argued by Mark Clodfelter and Joseph Klingler, the fact that the decision on the ICJ was actually predicated on the *substantive rights* held – or, *recte*, not held – by the shareholders.[178] Accordingly, while the decision addressed the *locus standi* of the national State, the conclusions of the ICJ were actually based on the fact that shareholders lack, under general international law, a substantive entitlement to those rights which were at stake.

The second 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 *locus standi* as far as a wrong against the corporation goes.[179]

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[176] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, Decision on Jurisdiction, cit., para. 50 (*italics added*).

[177] Z. DOUGLAS, *The International Law of Investment Claims*, cit., p. 62.

[178] M.A. CLODFELTER, J.D. KLINGER, 'Reflective Loss and Its Limits under International Investment Law', cit., p. 64.

[179] 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 ir-

Such an argument appears to be predicated on the erroneous view according to which, inasmuch as treaties can derogate from general international law, there is a presumption as to the fact that any treaty does so. If it is true that the State parties to a treaty are entitled to do so, this does not mean, however, that they intended to do so.

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 upon corporations 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".[180] Accordingly, any wrong against a corporation does not – and should not – amount to a wrong against its shareholders unless a specific treaty provision to this effect is found.[181]

Moreover, the approach taken by arbitral tribunals seems actually overlooking that any treaty, in accordance with Article 31(3)(c) VCLT, is to be interpreted by taking into account "any relevant rules of international law applicable in the relations between the parties".[182] 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".[183]

This brings us to the third consideration, which finally concerns whether IIAs do really afford shareholders with an autonomous right to claim for damages suffered by the corporation in which they own shares. In this respect, inasmuch as arbitral tribunals have almost unanimously found so, one could argue that to identify the keystone of such an approach is more a theoretical rather than a practical exercise. In this author's view, this is not entirely true.

As it will be pointed out in the next Section, reflective loss claims are increasingly threatening the legitimacy of investor-State dispute settlement as a reliable mechanism to solve dispute. Needless to say, the ungovernability of shareholder claims is far from being the only concern. However, it strongly contributes to the perception of a system which favors economic concerns (*i.e.*, investors) over public policy ones. It shall not come as a surprise, therefore, that reflective loss

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relevant, because the very concept of a 'derivative' claim is alien to the Treaty or the ICSID Convention".

[180] M. SASSON, *Substantive Law in Investment Treaty Arbitration. The Unsettled Relationship between International Law and Municipal Law*, 2nd edition, Alphen aan den Rijn, 2017, p. 193.

[181] *Ibid.*

[182] Vienna Convention on the Law of Treaties, cit.

[183] M.A. CLODFELTER, J.D. KLINGER, 'Reflective Loss and Its Limits under International Investment Law', cit., p. 65.

claims are often discussed as one of the most pressing issues to be addressed in the course of the ISDS reform.[184]

Leaving aside those treaties explicitly providing for the recoverability of reflective loss, a crucial element in favor of the admissibility of reflective loss claims under IIAs can possibly be identified with indirect investments. As pointed out by Daniel Müller, through the recognition of a protection to indirect investments, IIAs do actually attribute a right to shareholders on the assets and, more generally, on the legal position of the corporations in which they own shares. Indeed, by qualifying as a protected investment what, under domestic law and general international law, is considered a mere economic interest in the rights of another subjects, IIAs detach the protection of investors from the separate legal personality of the corporation.[185]

What is more problematic, in this author's view, is however the increasing permissive interpretation adopted by tribunals *vis-à-vis* indirect investments, irrespective of any proper language to this effect. This approach is coupled with the argument that a refusal to allow reflective loss claims 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 not be] subject to Treaty claims by a foreign investor because its investment is merely constituted of shares in that local company".[186]

5. The Current Ungovernability of Shareholder Claims for Reflective Loss in International Investment Arbitration

If, on the one hand, one might argue that the blanket admissibility of reflective loss claims in international investment law made the fortune of the system inasmuch as most of the cases are actually commenced by shareholders for the drop in value of the shares they own in a corporation, it is increasingly apparent that such an approach by investment tribunals puts at risk the legitimacy and, thus, the viability of investor-State arbitration as a reliable mechanism to solve disputes.

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[184] On the current reform process of ISDS, see: J. ARATO, K. CLAUSSEN, M. LANGFORD, 'The Investor-State Dispute Settlement Reform Process: Design, Dilemmas and Discontents', in *Journal of International Dispute Settlement*, 2023, pp. 127-133.

[185] D. MÜLLER, *La protection de l'actionnaire en droit international*, cit., p. 407 ff.

[186] *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.

In this respect, indeed, it is not by chance that the management of reflective loss claims, and the reform of ISDS to this effect, is one of the main topics discussed in different multilateral frameworks, such as the United Nations Commission on International Trade Law (UNCITRAL),[187] the Organisation for Economic Cooperation and Development (OECD),[188] the World Bank, and the EU.[189] 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.

5.1. The *CME/Lauder, CMS/Total* and *Blusun/Eskosol* Sagas: Parallel Proceedings and Conflicting Outcomes

A first example is the well-known *CME/Lauder* saga,[190] on which hundreds of pages have been written.[191] 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 corporation 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. Albeit 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

[187] UNCITRAL, Working Group III, Investor-State Dispute Settlement Reform, all the documents are available at www.uncitral.un.org/en/working_groups/3/investor-state.

[188] OECD, 'The Impact of Investment Treaties on Companies, Shareholders and Creditors', in *OECD Business and Finance Outlook 2016* (OECD 2016), pp. 223-253. See also, YANNACA-SMALL K., 'Improving the System of Investor-State Dispute Settlement', *OECD Working Papers on International Investment*, 2006, available at www.oecd.org.

[189] 'Comments made by the European Union and its Member States in this document are without prejudice to the position that the European Union and its Member States may take in light of the discussions in Working Group III', A/CN.9/WG.III/WP.231, 26 July 2023.

[190] *Ronald S. Lauder v. Czech Republic*, UNCITRAL (1976), Final Award, 3 September 2001; *CME Czech Republic B.V. (The Netherlands) v. Czech Republic*, UNCITRAL (1976), Final Award, 14 March 2003.

[191] B. KLEIN, 'How to Avoid Conflicting Awards. The Lauder and CME Cases', in *Journal of World Investment & Trade*, 2004, pp. 19-22 ff.; A. 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 I. BUFFARD, J. CRAWFORD, A. PELLET, S. WITTICH (eds), *International Law between Universalism and Fragmentation. Festschrift in Honour of Gerhard Hafner*, Leiden, 2006, pp. 107-126; ZARRA G., *Parallel Proceedings in Investment Arbitration*, Torino/The Hague, 2016, p. 60 ff.

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.[192]

Similarly, in the proceedings started by the minority shareholders of the Argentinean company TGN, the arbitral tribunals – in the *CMS* and *Total* cases – reached opposite conclusions on the alleged violation of the fair and equitable treatment, despite the fact that all the claims arose from a participation of the claimants in the same corporation and concerned the same measures taken by the host State. That was so even if the *Total* Tribunal, in deciding the case, made reference to the decision already rendered by the other Tribunal in the *CMS* case.[193]

Again, multiple proceedings and (possible) conflicting outcomes did represent a matter of discussion in two cases under the ECT concerning Italy's measures on renewable energy: *Blusun v. Italy* and *Eskosol S.p.A. v. Italy*.[194]

The facts of the litigation are rather interesting. In 2014, Blusun *qua* Belgian majority shareholders of Eskosol commenced litigation under the ECT contesting the legitimacy of the measures adopted by the Respondent State. Interestingly, "Eskosol attempted to file a non-party submission in that arbitration, asserting that Blusun had usurped its claim and sought damages owed to Eskosol alone. Blusun's abusive claim would *prejudice the rights of Eskosol, its creditors and its minority (non-Belgian) shareholders*, since Blusun showed no intention to channel any potential gain to Eskosol".[195]

The request by Eskosol was firmly rejected by the tribunal. However, the claim failed on the merits. In 2015, Eskosol commenced ICSID proceedings, requesting compensation for the same alleged violations vindicated by Blusun. The tribunal rejected all the procedural defenses raised by Italy: *res judicata* and abuse of rights. Eventually, the claim – similarly to the one brought by the Belgian majority shareholders – failed on the merits in 2020.

These three cases well testify some of the risks posed by a generalized authorization for shareholders to pursue reflective loss claims, that is to say 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. In other words, the fact that the consequences of a specific course of

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[192] C. SCHREUER, 'Multiple Proceedings', in A. GATTINI, A. TANZI, F. FONTANELLI, *General Principles of Law and International Investment Arbitration*, Leiden, 2018, 152-167, at 157: "This pair of arbitrations is regarded as one of the more embarrassing episodes in the history of arbitration".

[193] *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Award, 27 November 2013; *CMS v. Argentine Republic*, ICSID Case ARB/01/8, Award, 12 May 2005.

[194] *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Final Award, 27 December 2016; *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Award, 4 September 2020.

[195] F. FONTANELLI, 'Foreign control and ICSID jurisdiction on Energy Charter Treaty Claims of Local Companies: The Eskosol Case', in *EJIL:Talk!*, 12 June 2017, available at www.ejiltalk.org.

action taken by the host State have been already litigated between the corporation or its shareholders and the government does not impede other shareholders to start 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.

5.2. *Kappes and Kappes v. Guatemala*: Derivative or Reflective Loss Claims? The Choice Is Up to the Investors

Another interesting case which shall be considered to address the consequences of such a general admissibility is *Kappes and Kappes v. Guatemala*.[196] 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.[197]

According to Article 10.16 of the Free Trade Agreement between Central America, the Dominican Republic and the United States of America (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 […] that the respondent has breached […] an obligation […] and (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach" or "(*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 […] that the respondent has breached […] an obligation […] and (ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach".[198]

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 he controls or owns a corporation, on behalf of the latter. Accordingly, the investor can either commence proceedings *qua* shareholder – which, accordingly to the *jurisprudence constante* of investment tribunals, means that it can claim for reflective losses –

[196] *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.

[197] See also *Mason Capital L.P. (U.S.A.) 2. Mason Management LLC (U.S.A.) v. Republic of Korea* (hereinafter *Mason Capital v. Korea*), PCA Case No. 2018-55, Award, 11 April 2024.

[198] Free Trade Agreement between Central America, the Dominican Republic and the United States of America, signed 5 August 2004, entered into force 1 March 2006.

or vindicate the asserted violation through a derivative claim, thus channelling any possible compensation via the corporation. Against such a background, in *Kappes and Kappes*, the issue concerned whether a majority 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 corporation for the latter's 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 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 corporation. 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 corporation.

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.[199]

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 corporation. 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.[200]

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[199] Partial dissenting opinion rendered by arbitrator Zachary Douglas in *W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala,* Decision on the Respondent's Preliminary Objection, cit., 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)".

[200] The debate concerning the admissibility of reflective loss claims under the DR-CAFTA came out recently in *The Lopez-Goyne Family Trust and others v. Republic of Nicaragua*, ICSID Case No. ARB/17/44, Award, 1 March 2023. There, the arbitral tribunal found no need to decide on the matter inasmuch as it found that the shareholder had actually suffered a direct loss.

5.3. Indirect Investments and the Exponential Multiplication of Claims

Everything that has been said is even more apparent if one considers the interrelationship between shareholding and indirect investment. In this respect, indeed, one shall recall that, under the case law of investment tribunals, "[t]here is also no prohibition against indirect shareholders in a chain of corporate ownership bringing such claims on behalf of subsidiaries or investments in which they only hold an indirect interest".[201]

To better explain the effects of such an approach, let's imagine a complex – yet far from unlikely – corporate chain structure. At the apex, corporations A and B, both established under the law of the United States, possessing respectively the 35 and the 16 percent of the shares of corporation C, incorporated in the UK. In turn, the UK corporation owns 100 percent of the shares of corporation D, established under the law of Belgium. The latter has invested in Argentina, creating a local vehicle holding the necessary licence to operate the economic activities.

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, either corporation A or B (US) could start proceedings for an alleged breach by the host-State against the local vehicle (Argentinean). Despite the fact that, taken individually, they do not own or control the Local vehicle, they could nevertheless start proceedings together against the respondent State. That is because they qualify as investors under the Argentina-US BIT and they do indirectly 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 corporation qualifies as an investor and indirectly owns the investment through another legal entity, 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.

Yet, this could not be the end. Indeed, in accordance with Article 25(2)(b) of the ICSID Convention, the local vehicle – despite being incorporated in Argen-

[201] A. SURAWEERA, 'Shareholder Claims for Reflective Loss in Investor-State Dispute Settlement: Proposing Reform Options for States', cit., p. 598.

tina – 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. Needless to say, multiple overlapping claims brought by the corporation 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".[202]

6. The International Law Tools to Address the Conundrum of Shareholder Claims for Reflective Loss: An Attempt to Leave the System Unchanged

In the previous Section, the current ungovernability of the claims of shareholders in international investment arbitration as a direct consequence of the subversion of the rule against recovery of reflective loss has been demonstrated. Leaving now aside the question as to whether the broad and often vague treaty language adopted in BITs and other multilateral investment treaties can really be said to allow claims for reflective loss as a general rule, there are far less doubts as to whether such an approach is risky for the viability and legitimacy of the system.

Throughout this book, it has been contended that there are compelling legal policy reasons militating against the admissibility of shareholder claims for reflective loss under international law. Against such a background, in this author's view, there is much need to sort through the existing options for addressing reflective loss claims. To this effect, the analysis will start with due considerations of the existing tools that could be employed to tackle the issue under investment treaty law as it currently stands, thus leaving the system unchanged. However, it will be demonstrated that they represent a palliative, rather than a proper cure, since all these tools can, in turn, only address one or a few of the main issues

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[202] J. ARATO, K. CLAUSSEN, J. LEE, G. ZARRA, 'Reforming Shareholder Claims in Investor-State Dispute Settlement', cit., p. 247. See also G. BOTTINI, *Admissibility of Shareholder Claims under Investment Treaties*, cit., pp. 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 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".

arising from reflective loss proceedings commenced by shareholders, without properly catching and solving them all.

A first interpretative tool that has received much attention in scholarship 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.[203] 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.[204] A specific sub-category of the abuse of right doctrine is the notion of abuse of process, which "consists of the use of procedural instruments or rights by one or more parties for purposes that are alien to those for which the procedural rights were established".[205]

The status of the abuse of right doctrine under international law has long been questioned, since the possibility to sanction an otherwise legitimate exercise of a right only for its end purpose has always been considered problematic. Nevertheless, the doctrine seems to have been recognized, despite its unstable theoretical foundations,[206] also by investment arbitral tribunals.[207] Traditionally, 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, it is important to mention the two awards rendered in the *Ampal v. Egypt* and *Orascom v. Algeria* cases.

In *Ampal*, the tribunal pointed out that "[i]t is possible, as a jurisdictional

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[203] C. BROWN, 'The Relevance of the Doctrine of Abuse of Process in International Adjudication', in *Transnational Dispute Management*, 2011, pp. 1-12; E. DE BRABANDERE, ''Good Faith', 'Abuse of Process' and the Initiation of Investment Treaty Claims', in *Journal of International Dispute Settlement*, 2012, pp. 609-636; J. RICHTER, 'The two problem pillars of multiple proceedings in investment arbitration: why the abuse of process doctrine is a necessary remedy and requires focus in UNCITRAL's ISDS reform', in *Journal of International Dispute Settlement*, 2023, pp. 407-424.

[204] B.O. ILLUYOMADE, 'Scope and Content of a Complaint of Abuse of Right in International Law', in *Harvard International Law Journal*, 1975, pp. 47-92; M. BYERS, 'Abuse of Rights: An Old Principle, A New Age', in *McGill Law Journal*, 2002, 389-431; A. KISS, 'Abuse of Rights', in *Max Planck Encyclopedia of Public International Law*, 2006.

[205] R. KOLB, 'General Principles of Procedural Law', in A. ZIMMERMANN, C.J. TAMS, K. OELLERS-FRAHM, C. TOMUSCHAT (eds), *The Statute of the International Court of Justice. A Commentary*, 3rd edition, Oxford/New York, 2019, pp. 963-1006, at para. 49. For recognition in international jurisprudence, see ICJ, *Case Concerning the Arbitral Award of 31 July 1989 (Guinea Bissau v. Senegal)*, Judgment, 12 November 1991, in *ICJ Reports 1991*, para. 27; ICJ, *Case Concerning Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Judgment, 26 June 1992, in *ICJ Reports 1992*, para. 38.

[206] See, M. FORTEAU, 'General Principles of International Procedural Law', in *Max Planck Encyclopedia of International Procedural Law*, 2018, para. 36; C. CERETTELLI, 'Abuse of Process: An Impossible Dialogue Between ICJ and ICSID Tribunals?', in *Journal of International Dispute Settlement*, 2020, pp. 47-68.

[207] GAILLARD E., 'Abuse of Process in International Arbitration', in *ICSID Review*, 2017, pp. 17-37. See also P. DUMBERRY, 'The Emergence of the Concept of "General Principle of International Law" in Investment Arbitration Case Law', in *Journal of International Dispute Settlement*, 2020, pp. 194-216, at 211-213, referring to the doctrine of abuse of rights as a general principle of international law fully recognized within the realm of investment arbitration.

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".[208] This 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 the same investment".[209]

Despite the fact that, in the view of arbitrators, such a situation would not be a desirable one, yet it cannot be considered *per se* abusive; this is particularly true when it is actually the respondent State which refused to consolidate the different proceedings commenced by the Claimants. In deciding the specific dispute, however, the tribunal found that parallel proceedings started by shareholders and their corporation 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".[210]

A few months later, the arbitral tribunal in *Orascom v. Algeria* dismissed a reflective loss claim as inadmissible pointing out that "[i]f 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 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. […] Thus, where multiple treaties offer entities in a verti-

[208] *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.

[209] *Ibid.*

[210] *Ibid.*, para. 331.

cal 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".[211]

As the *Orascom* tribunal was the first to ever use the doctrine of abuse of right to manage parallel proceedings stemming from the general admissibility of reflective loss claims, some commentators applauded the outcome of the decision by defining it "a break in the clouds".[212] From this point of view, therefore, the doctrine of abuse of process might be useful in preventing a parent or holding corporation, as well as shareholders, from subsequently try to pursue another arbitration in order to relitigate the same dispute before another tribunal.

A second tool investment tribunals might resort to as a way of mitigating the distortive effects of reflective loss claims is the doctrine of *res judicata*, according to which a "final adjudication by a court or arbitral tribunal is conclusive"[213] and, thus, the dispute cannot be relitigated before any other judicial institution. 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'.[214]

The traditional approach to *res judicata* was clearly spelled out by Judge Dionisio Anzilotti in his dissenting opinion attached to the judgment of the PCIJ in the *Interpretation of Judgments Nos 7 and 8 (Chorzów Factory)*: "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 identification, *persona*, *petitum*, *causa petendi*, for it is clear that the particular case covers both the object and the grounds of the claim".[215]

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[211] *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria,* Award, cit., para. 543. For an analytical comment see G. LAMPO, 'Considerazioni sull'applicazione dell'abuso del processo nell'arbitration 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*, 2018, pp. 1017-1036. See also the considerations on abuse of rights by S. 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*, 2015, pp. 387-409.

[212] KYRIAKOU P.A., 'Mitigating the Risks Entailed in Shareholders' Claims for Reflective Loss: Suggestions for Investment Treaty Reform', in *Journal of World Investment & Trade*, 2018, pp. 693-721, at 711.

[213] W.S. DODGE, 'Res iudicata', in *Max Planck Encyclopedia of Public International Law*, 2006, para. 1.

[214] H. WEHLAND, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration*, Oxford, 2013, pp. 127 and 185 ff.; E. GAILLARD, 'Parallel Proceedings: Investment Arbitration', in *Max Planck Encyclopedia of International Procedural Law*, 2019; G. ZARRA, *Parallel Proceedings in Investment Arbitration*, cit., *passim*; T. GAZZINI, A. PIETROBON, 'Parallel Proceedings Concerning Investment and Human Rights Claims', cit., pp. 45-75.

[215] PCIJ, *Interpretation of Judgments Nos. 7 and 8 (Germany v. Poland)*, Judgment, 18 October 1927, in *PCIJ Series A – No 13*. See also *Trail Smelter Arbitration (US v. Canada)*, Award, 11 March 1941; *Guyana Boundary Arbitration (Brazil v. Great Britain)*, Award, 6 June 1904.

In other words, according to prevailing scholarship and jurisprudence, the doctrine of *res judicata* requires a degree of identity between claims – *petitum* and *causa petendi* – as well as parties. 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".[216]

A clear example of such an approach can be identified with the already mentioned *Lauder/CME* case. 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*.[217]

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 investment treaties. 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 flexible approach which pays due regard to the "economic reality of doing business internationally".[218] An example of this approach has been argued by Giovanni Zarra, according to whom the three-fold requirement of the identity 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

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[216] G. ZARRA, *Parallel Proceedings in Investment Arbitration*, cit., p. 140 (*italics added*).

[217] A. 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', cit.

[218] L. VANHONNAEKER, *Shareholders' Claims for Reflective Loss in International Investment Law*, cit., p. 353. See, in this regard, the considerations by A. LIGUSTRO, 'Conflitti di giurisdizione e «dialogo tra corti» internazionali nella prospettiva dell'Organizzazione Mondiale del commercio', in A. LIGUSTRO, G. SACERDOTI (a cura di), *Problemi e tendenze del Diritto internazionale dell'economia.* Liber amicorum *in onore di Paolo Picone*, cit., pp. 551-574, at 552-553.

the substantive rules to be applied in order to settle the dispute; and *iii*) "identity of the practical results which the claimants aim to reach" rather than "from the limited perspective of the rule which is allegedly violated".[219]

While these tools might prove to be useful in avoiding parallel or multiple proceedings brought by investors and, to a more limited extent, reducing the instances of double compensation, they appear unsuitable to address other concerns, namely the impairment of corporate governance and the protection of third parties. Indeed, resorting to *res judicata* is unsuitable to impede that minority shareholders can first pursue 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 corporation will start proceedings in order to recover the damages suffered by a subsidiary, leaving the creditors of the latter deprived of any asset upon which they may satisfy their credits.

7. Treaty-Drafting Solutions to Reshape Shareholder Claims in Investment Arbitration: A Possible Way Forward

While the interpretative tools existing under international law might well represent a first-hand approach to address the shortcomings of a general admissibility of reflective loss claims in investment arbitration, "given the *ad hoc* structure of ISDS, such solutions are at best irregular, inconsistent, and incomplete".[220] It is not by chance that, in the last few years, several voices have emerged asking for treaty-drafting solution to properly reshape the rules on the claims of shareholders. Indeed, it has been contended that the IIAs' "provisions in their current form are insufficient to exclude [shareholders' reflective loss] claims, and that more explicitly treaty language is needed".[221]

To this effect, many proposals have been advanced, each presenting its own characteristics. Some of them are currently under discussion in important multilateral fora, including the OECD and the UNCITRAL. The two most recent proposals coming from the two institutions deserve careful scrutiny and, in this author's view, should be read one against the other to the extent that they share some common features, but – at the same time – diverge on other pivotal issues.

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[219] G. ZARRA, *Parallel Proceedings in Investment Arbitration*, cit., p. 142 ff.

[220] J. ARATO, K. CLAUSSEN, J. LEE, G. ZARRA, 'Reforming Shareholder Claims in Investor-State Dispute Settlement', cit., p. 244.

[221] A. SURAWEERA, 'Shareholder Claims for Reflective Loss in Investor-State Dispute Settlement: Proposing Reform Options for States', cit., p. 597.

Starting from the OECD proposal,[222] this would entail a general bar on shareholders' claims for reflective losses, thus bringing (back) into the investment law system the prohibition found in domestic law and general international law. Under Article XX(1) and (2) of the Draft model text, indeed, a shareholder "claiming on its own behalf shall only have standing to claim for Direct Loss" which shall "be separate and distinct from any alleged injury to the company in which it holds shares".[223] Accordingly, a diminution in the value of a shareholding or in distributions as a consequence of the loss suffered by the corporation shall not be recoverable.

Article XX(3) then provides for some clarifications: on the one hand, it is established that if the relevant treaty covers indirect shareholding, the requirements for a 'direct loss' to be found are to be applied as well; on the other hand, it is specifically provided that the inclusion of shares *qua* protected investment "has no effect on the requirement for Direct loss". Finally, Article XX(3)(b) recalls that even if the shareholder is able, through its shareholding, to control the corporation, this does not mean he own the assets of the commercial enterprise: put it otherwise, a majority or even sole shareholder has an "insufficient interest in company assets for standing to claim Reflective Loss".[224]

While the prohibition to claim reflective loss is firmly clinched, some exceptions are also provided so as to ensure the effectiveness of the protection of shareholders, whenever the "bright line"[225] general rule might result in both the corporation and its shareholders being left without any form of redress. Reflective loss claims are indeed admissible whether: *i*) the host State directly and whole expropriate the assets of the corporation in which the shareholder owns shares; *ii*) in the absence of any remedy to be pursued by the corporation under the relevant IIA, the shareholder sought a remedy on behalf of the legal entity in the domestic regime of the host State but suffered a denial of justice; *iii*) lacking, in the applicable IIA, any remedy to be pursued by the corporation, the shareholder demonstrated that the legal entity autonomously sought a remedy in the domestic regime of the host State but suffered a denial of justice.

Moving to the UNCITRAL proposal,[226] which lies at the heart of the activi-

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[222] OECD, 'Shareholder Claims for Reflective Loss in Investment State Dispute Settlement: A "Component-by-Component" Approach to Reform Proposals', cit. See also D. GAUKRODGER, K. GORDON, 'Inter-Governmental Evaluation of Investor-State Dispute Settlement: Recent Work at the OECD-Hosted Freedom of Investment Roundtable', in J.E. KALICKI, A. JOUBIN-BRET (eds), *Reshaping the Investor-State Dispute Settlement System. Journeys for the 21st Century*, Leiden/Boston, 2015, pp. 597-620.

[223] OECD, 'Shareholder Claims for Reflective Loss in Investment State Dispute Settlement: A "Component-by-Component" Approach to Reform Proposals', cit., p. 17.

[224] *Ibid.*

[225] *Ibid.*, p. 22.

[226] UNCITRAL, 'Possible reform of investor-State dispute settlement (ISDS). Draft provisions on procedural and cross-cutting issues', A/CN.9/WG.III/WP.231, 26 July 2023.

ties of the Working Group III, this is made up of three main parts. Under Article 10(1), claims for reflective loss claims are prohibited, being provided that a shareholder is entitled to commence proceedings only for direct loss, which are defined as a damage "separate and distinct from any alleged loss or damage to the enterprise in which the shareholder holds shares". As a further clarification, it is then reiterated that a direct loss can include neither the diminution in the value of the shareholding nor the lack of distribution of dividends which are caused by the wrongful act of the host State against the commercial enterprise.

Interestingly, no exceptions to the rule as such are provided. Under Article 10(2), indeed, shareholders are bestowed with the possibility to commence derivative actions, but only in limited circumstances, namely when: *i*) all the assets of the enterprise have been "directly and wholly expropriated" by the host State; or *ii*) the corporation resorted to the domestic remedies available in the jurisdiction of the host State to contest the alleged unlawful measures and, within this context, suffered a treatment "akin to a denial of justice under customary international law". If shareholders resort to a derivative action, then any compensation he might eventually receive must be paid, in accordance with Article 10(3), to the corporation, rather than to the claimants themselves.

Having outlined the relevant features of the two main proposals advanced in the ongoing negotiations, it is possible to critically assess them. Needless to say, they share a fundamental concern, namely that of definitively closing the door to shareholder claims for reflective loss in international investment law. In this way, the investment treaty regime would move from always recognizing for the shareholders an independent right or protected interest in the assets of the corporation to almost denying such a stance in any circumstance. If so, the rule would have thus come full circle. Interestingly, all the clarifications provided in both proposals aim to address all the arguments that investment case law and scholars have often resorted to so as to explain the general admissibility of reflective loss claims. In this respect, therefore, the OECD and the UNCITRAL walk the same path. This is not surprising, after all, if one considers that the most recent document released by UNCITRAL in January 2024 explicitly acknowledged that the proposal is grounded on the joint effort with the OECD.

However, the two proposals completely diverge as far as the approach to the exceptions is concerned. On the one hand, indeed, the UNCITRAL proposal only provides for a derivative action which, as pointed out in Chapter 1, cannot be considered a proper exception. Indeed, through a derivative action, the shareholder brings a claim on behalf of the corporation, thus vindicating the rights of the legal entity rather than his own. On the other hand, the OECD proposal enshrines some true exceptions to the prohibition of reflective loss claims, by allowing them in limited circumstances.

Despite endorsing two different paths, it is contended that the proposals share a common feature also in this respect. Both, indeed, grant shareholders with a right to claim for damages suffered by the corporation in very limited circumstances, to the extent that the effectiveness of these exceptions is to be questioned. Indeed, only whether the assets of the corporation are wholly expropriated or the legal entity suffers a denial of justice the shareholders will be entitled to commence proceedings before an arbitral tribunal. In all the other circumstances, shareholders might be left empty-handed. Suffice it to mention the case in which shareholders have invested in a local vehicle by entering a joint venture with the authorities of the host State.

In such a scenario, shareholders would probably be left with no remedies, at least under the UNCITRAL proposal. Indeed, a derivative action could be brought by the shareholders only in case the corporation itself previously exhausted local remedies, having suffered a denial of justice. This seems all the harder to conceive whether the joint venture is controlled by a state-owned enterprise, which might not be interest in litigating the matter. Similarly, were the corporation be disrupted (yet not expropriated of its assets) by the wrongful conduct of the host State, a mechanism entirely based on derivative actions might prove ineffective to redress the damage suffered.

In this regard, it must be questioned whether a system entirely based on derivative loss claims might prove effective, as also advanced by some authors.[227] In Chapter 1, it has been demonstrated that derivative actions in domestic legal systems are generally provided so as to externalize internal conflicts among shareholders and directors. Instead, only few jurisdictions allow derivative claims against third parties. Therefore, there are no general and well-established model to look at, so as to sketch one to be used in investment arbitration. The experience of NAFTA or DR-CAFTA treaties might be useful, yet not decisive, in light of what has been said above.

Against this background, the proposal advanced within the context of the OECD seems to offer a more viable path to be followed. Indeed, in allowing reflective loss claims whenever, in the absence of any remedy to be pursued by the corporation under the relevant IIA, the shareholder sought a remedy on behalf of the legal entity before the courts of the host State but suffered a denial of justice, this exception seems wide enough to address our concerns. For instance, in the abovementioned scenario of a joint venture with the authorities of the host State, foreign shareholders might be able to claim independently from their corporation.

[227] A. SURAWEERA, 'Shareholder Claims for Reflective Loss in Investor-State Dispute Settlement: Proposing Reform Options for States', cit.; J. D'AGOSTINO, 'Rescuing International Investment Arbitration: Introducing Derivative Actions, Class Actions, and Compulsory Joinder', in *Virginia Law Review*, 2012, pp. 177-229.

8. Rethinking the Protection of Shareholders in International Investment Law: Conclusive Remarks

There are no easy solutions to complex legal issues. This is all the more so when the problem to be addressed is deeply rooted within the system, as the protection of shareholders against reflective losses is within that of investment arbitration. Despite no unanimity has been reached with regard to the need to reform shareholder claims in investment law and, even less, on the way forward to eventually do so, there seems to be an increasing trend in recognizing that the current system requires a rapid response to ensure its legitimacy and viability.

In this author's view, this entails rethinking the rules on reflective loss claims, due to all the above-mentioned issues. To this effect, the starting point cannot but be the establishment of a general prohibition against shareholder claim for reflective loss, acknowledging the soundness of the legal policy grounds that have brought to such a convergence within domestic legal orders. At the same time, in order to ensure the effectiveness of international protection to foreign investments, exceptions to the rule must be carved out. In this respect, in Section 7, it has been contended that a dispute settlement mechanism entirely based on derivative claims cannot properly secure the economic interests of shareholders whenever, *inter alia*, the corporation in which they own shares is disrupted by the wrongful act of the host State or the foreign investor carries out its business transactions in a joint venture with local authorities.

However, it is undeniable that there are several theoretical and practical hurdles to overcome in order to reform shareholders' claims. They shall be singled out not lessen the chances of achieving the objective, but rather to open a fruitful (academic) discussion on how to deal with them.

First, despite an apparently pervasive dissatisfaction with the current regulation, States have not yet adopted concrete measures to address the issue. While they have loudly manifested their opposition to reflective loss claims in the context of investment arbitrations[228] and multilateral fora of discussion,[229] there has been no clear indication in the negotiations of new international investment

[228] See, *ex multis*: *Bilcon of Delaware et al v. Government of Canada*, PCA Case No. 2009-04, Submission of the United States of America, 29 December 2017; *Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Respondent's Preliminary Objections under Article 10.20.5 of CAFTA-DR, cit.; *Koch Industries, Inc. and Koch Supply & Trading, LP v. Government of Canada*, ICSID Case No. ARB/20/52, Government of Canada – Rejoinder Memorial on Jurisdiction and the Merits, 30 September 2022; *Mason Capital v. Korea*, PCA Case No. 2018-55, Decision on Respondent's Preliminary Objections, 22 December 2019.

[229] See, for instance, the numerous comments and feedback provided by States and international organizations to the works of the UNCITRAL Working Group III, available at www.uncitral.un.org/en/working_groups/3/investor-state.

treaties. Indeed, to the present author's knowledge, any of the recently adopted bilateral or multilateral investment treaties contain an explicit prohibition of reflective loss claims.

The European Union (EU), for instance, has increasingly inserted provisions on derivative claims. However, in Section 6.2, it has been demonstrated how these provisions, if not combined with an explicit exclusion of reflective loss claims, are not capable of achieving the expected result. The inactivity of the States in this regard is quite frankly surprising, casting several doubts on the outcome of the works within the OECD and, more importantly, the UNCITRAL.

Second, even if a consensus on the matter were to emerge among States, it is far from clear how a general prohibition of reflective loss claims could be achieved, considering the over three thousand bilateral and multilateral investment treaties in force. To this effect, some authors have contended that the possibility to stipulate a multilateral treaty similar to the 2014 United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, the so-called 'Mauritius Convention', could be explored. This approach, based on an opt-in system, would circumvent the problem of amending one by one the existing IIAs, while also offering States the required flexibility in terms of time. Each State, indeed, would be free to ratify the convention at their own pace. At the same time, once ratified, the 'convention on reflective loss claims' would produce effect vis-à-vis all the bilateral and multilateral investment treaties to which that State is a party, as long as the other contracting Party/ies have ratified it too. Nonetheless, the feasibility of such a convention is entirely dependent upon a sufficient number of States agreeing on the proper regulation of reflective loss claims. Political willingness to do so, therefore, might not be sufficient, were States unable to agree on the substantive provisions to be adopted.

Third, the general prohibition to bring reflective loss claims inevitably requires a completely new approach to the protection of foreign investments in international investment law. As pointed out in Section 6, the extensive protection of shareholders has been decisive in the establishment of investor-State arbitration as an efficient and successful means of dispute settlement. From this point of view, one cannot properly foresee the effects of a clean state. At the same time, the extent to which the protection of indirect investments can be said to be fully compatible with the prohibition to bring reflective loss claims is rather from being clear. Quite the opposite, while the interaction between these two foundation elements of international investment law and arbitration has been often considered and pointed out, the extent to which the former can survive within the latter has not received attention in scholarship. Further research, in this sense, seems thus all the more urgent.

General Conclusions

The separate legal personality of corporations is a highly complex construction of domestic law. Back to the end of the 19^{th} century, a leading British scholar, Francis Beaufort Palmer, pointed out that: "the distinction – a distinction, the importance of which it is impossible to exaggerate – between the company as a body corporate, and the [...] shareholders of that body [...] lies at the root of many of the most perplexing questions that beset company law".[1]

Accordingly, the distinction must be "firmly grasped"[2] and, in this author's view, carefully managed, to the extent that any failure to this effect entails risks not only for the corporation itself, but also for its shareholders, directors, employees, creditors and other stakeholders.

This holds true for the international legal order as well. In this regard, learned doctrine and the case law of international adjudicatory bodies have shown that international law, both general and particular, is still struggling with accurately understanding and addressing the *personnes morales*.[3]

Among all the issues, it is possibly the interplay between (the rights of) the corporations and (the legal sphere of) the shareholders that poses the major problems to cope with. After all, while shareholders co-own neither the corporation nor, more importantly, its assets,[4] it shall not be overlooked that their investment – *i.e.*, the shares – follows the fortunes of the enterprise.

This is particularly apparent when the matter at stake concerns allegedly wrongful measures directed against the corporation which, in turn, produce a drop in value of the shares, that is to say a reflective loss. In such a scenario, the

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[1] F.B. PALMER, *Company Law: A Practical Handbook for Lawyers & Business Man. Based on Lectures Delivered in the Inner Temple Hall at the Request of the Council of Legal Education*, London, 1898, p. 37.

[2] *Ibid.*

[3] On the need to critically approach the legal construction of the corporation in the international legal order, see F. JOHNS, 'Theorizing the Corporation in International Law', in A. ORFORD, F. HOFFMANN (eds), The Oxford Handbook of the Theory of International Law, Oxford, 2016, pp. 635-654.

[4] For an explanation as to why shareholders cannot be said to own the corporation in which they own shares, see, *ex multis*: R. GRANTHAM, 'The Doctrinal Basis of the Rights of Company Shareholders', in *Cambridge Law Journal*, 1998, pp. 554-588; P. IRELAND, 'Company Law and the Myth of Shareholder Ownership', in *Modern Law Review*, 1999, pp. 32-57.

question first arises as to whether international law confers upon the shareholders an independent right with regard to a damage suffered by the corporation in which they hold shares.

Indeed, it is only by answering this "antecedent question"[5] on the scope of substantive rights, that any analysis concerning shareholder claims before international adjudicatory bodies could be meaningfully carried out. To this effect, an investigation on the international legal regime of shareholding has been undertaken by employing the lens of municipal law.

Against such a background, this study has demonstrated that the international legal order is still searching for a balance. The very trajectory of international law is illustrative of the ongoing process. In the *Barcelona Traction* case, the ICJ turned to municipal law to identify a general principle in *foro domestico* to address a subject matter for which international law had yet to develop its own rules.[6]

In this regard, it has been contended that the Court operated an incomplete borrowing when it transposed the municipal law substantive allocation of rights between corporations and shareholders to the international legal system. Indeed, while correctly ascertaining that, as a general rule, shareholders have no autonomous right in respect of a damage suffered by the corporation, the judges in The Hague failed to properly identify those exceptions that are generally provided in domestic systems, despite being often different one from another.

Hence, this caused the rigidity of the rule identified by the ICJ on the prohibition of reflective loss claims, which was said to possibly resulting in a "situation of paradox, anomaly and injustice".[7] However, the *Barcelona Traction* judgment was only the starting point of the journey of shareholder claims in the contemporary international legal order.

Less than forty years later, indeed, the Court had again the chance to assess the status of the shareholders under general international law. Even more, the *Diallo* case represented an opportunity to test the rules on shareholder claims in light of the ILC ADP and the case law of investment tribunals. While the latter pushed forward a broader protection of the shareholders, the judges in The Hague remained firmly entrenched in the same position adopted in the *Barcelona Traction* judgment.

Moving to a different field, the analysis has demonstrated that the ongoing quest to find a balance is quite apparent also in human rights treaty law, whose monitoring bodies have positioned themselves close to the ICJ while endorsing a certain margin of flexibility to ensure the effective protection of other competing interests.

[5] ICJ, *Barcelona Traction,* Judgment, 24 July 1964, cit., p. 45.

[6] ICJ, *Barcelona Traction*, Judgment, 5 February 1970, cit., para. 38.

[7] ICJ, *Barcelona Traction*, Judgment, 5 February 1970, Separate Opinion of Judge Fitzmaurice, cit.

From this point of view, it has been contended that their approach to shareholder claims neither merely transposes the rule as it stands in municipal legal systems, nor it vindicates a full autonomy from the latter. It is rather unsurprising, therefore, that the most recent decisions on the protection of shareholders rendered by both the ECtHR and the IACtHR show a rule refining or exception-making process that is still ongoing at the present time.

As far as the former is concerned, in the case of *Albert and Others v. Hungary*,[8] the Grand Chamber, while holding firm the rule against shareholder claims for reflective loss, actually resorted to a far from crystal-clear reasoning which might end up in an overexpansion of the exceptions currently established within the system of the ECHR.

On the other hand, in *Granier v. Venezuela*,[9] the Inter-American Court is apparently experimenting new solutions for ensuring the effective protection of human rights after having long denied that shareholders were entitled, under the ACHR, to any protection for measures directed against the corporation in which they own shares.

The end point of this trajectory is international investment law and arbitration, a field in which the international legal order has firmly claimed its autonomy from municipal systems and, more importantly, from the solutions therein enshrined. There, the shareholders are not considered anymore *qua* shareholders, but they have become to all effects investors.

A thorough assessment of the case law of arbitral tribunals has led to the conclusion that the prohibition to bring reflective loss claims – established under both general international law and international human rights treaty regimes – not only is inapplicable within the realm of investment law, but rather the general admissibility of them has become well established as a rule.

This means that the investment treaty regime confers shareholders an unqualified independent right (to commence proceedings) with regard to any wrongful act affecting the corporation in which they own shares: borrowing the words of Zachary Douglas, this is true "to any extent and in all circumstances".[10] Be the investor a direct or indirect, majority or minority, controlling or non-controlling shareholder, he will nonetheless be entitled to protection.

This complete turnaround, however, has not achieved any balance at all. If the rule elaborated by the ICJ in the *Barcelona Traction* judgment, and later confirmed in the case of *Ahmadou Sadio Diallo*, was too rigid, the conflation, or identification, of the rights of the shareholders with those of the corporations can be said to be too flexible, if not completely anarchic.

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[8] ECtHR, *Albert and Others v. Hungary* [GC], Judgment, 7 July 2020, cit.

[9] IACtHR, *Granier et al. (Radio Caracas Televisión) v. Venezuela*, Judgment, 22 June 2015, cit.

[10] Z. DOUGLAS, *The International Law of Investment Claims*, cit., p. 402.

From this perspective, therefore, neither the ICJ – as the most authoritative interpreter of the rules of general international law – nor human rights monitoring bodies and investment arbitral tribunals have been capable of working out the required balance with regards to shareholder claims, within their respective fields. From this perspective, the analysis has returned a rather incoherent framework, with few fixed points.

Facing such a scenario, one could easily be taken from utter despair. Up to date, it is clear enough that international law has not been able to reach an effective and workable solution concerning shareholder claims. Even worse, different solutions have been adopted under general international law and treaties, with the latter being even more fragmented in different regimes.

That being said, it was not the purpose of this study to reconcile the conflicting strands of case law of international courts and tribunals, as if it were a matter of piecing together a jigsaw puzzle. After all, when confronting with the latter, one is called to assemble the irregularly shaped interlocking pieces so as to produce a complete, yet predetermined, picture. This means that the pieces of the puzzle cannot but be assembled in one way. This is not the case as far as the interplay between the rights of the corporation and legal sphere of the shareholders is concerned.

Indeed, one of the foundational ideas behind this book is that, under corporate law, the prohibition to claim for reflective loss is not based on any mandatory interpretation of the law – and, notably, the rules concerning the separate legal personality or the law of civil responsibility –, but rather on compelling reasons of legal policy. These include the protection of creditors and other stakeholders of the corporation, the avoidance of parallel proceedings and double recovering and the safeguarding of corporate governance.

Accordingly, exceptions are admissible and to some extent even necessary, whenever they pursue a different interest which is deemed worthy of protection. There is no predetermined image to look at. The rule and its exceptions are not written in the stone. To a certain extent, it can be said that the general prohibition of reflective loss claims is open to contestation whenever its rigidity might produce an unfair outcome or cause prejudice to other competing interests.

The same holds true, it is contended, for the purposes of the international legal order: there is no formal and fixed solution concerning the protection of shareholders that must be adhered to. In this author's view, a balance must be achieved having due consideration of those compelling reasons of legal policy that underpin the general rule under domestic corporate law. This does not mean making international law dependent on the solutions adopted in municipal legal systems, but rather taking cognizance of the reasons why States from all over the world have arrived at a certain, almost identical, result.

In this respect, there is a good reason to practice some not naïve optimism. This lies in the fact that different actors of the international community have manifested some discontent for the *status quo* and are currently pushing the law into different directions, which might come to finally converge across the different relevant fields of the international legal order.

In this study, the need to uphold, within the realm of international law, the distinction between the rights of the corporation and those of the shareholders has been firmly maintained. Despite all the criticism moved against the *Barcelona Traction* judgment, the concerns that brought the judges in The Hague to maintain the domestic law approach to the relationship between a corporation and its shareholders have found confirmation of their soundness when looking at the practice of investment tribunals.

This does not mean, however, that the exceptions as they stood at the time, and as they were later confirmed in the *Diallo* case, are suitable to address the need of current international economic relations. By refusing to enter into a dialogue with investment case law, the ICJ failed to take into account hundreds of decisions pointing towards a different substantive approach to the relationship between *personnes morales* and their shareholders. A fruitful 'judicial dialogue'[11] between international courts and tribunals is all the more necessary for the purpose of elaborating a solution for a common concern.[12]

To this effect, it is interesting to highlight how the different actors involved are indeed pushing toward a more balanced approach. The ILC and the academic community have offered critical studies to pave the way for such an approach towards shareholder claims under general international law.

While firmly maintaining the rule against reflective loss, indeed, they have explored several possible ways to make the protection of shareholders more effective, carving out exceptions that try to consider the risks associated with reflective loss claims without closing all avenues for shareholders to obtain redress independently from their corporation.

At the same time, in a bold – yet, until now, unsuccessful – attempt to govern the anarchy of international investment law, both the UNCITRAL and the OECD are trying to finally (re-)establish the general rule of 'no reflective loss' claims, having due regard to the needs of international investments. As pointed out in Chapter 4, the approach of investment treaties and tribunals is so rooted within such system that radical surgery might be needed to this effect.

Nonetheless, in looking for a solution, it is fundamental not to overestimate the need of coherence across different fields of international law. Or, perhaps,

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[11] A. MÜLLER, H.E. KJOS, 'Introduction', in A. MÜLLER, H.E. KJOS (eds), *Judicial Dialogue and Human Rights*, Cambridge, 2017, pp. 1-24, at 12: "Judicial dialogue is understood as the use of external judicial decisions by courts as an element of influence (even if very limited) in interpretation and application of the law. External judicial decisions include judicial decisions of foreign national and international courts, as well as of quasi-judicial UN human rights treaty bodies".

[12] Judicial dialogue has been considered an essential tool to achieve a greater integration of international law by L. PASQUET, 'De-Fragmentation Techniques', in *Max Planck Encyclopedia of International Procedural Law*, 2018, paras 61-67.

one shall not confuse coherence with uniformity. As far as shareholder claims for reflective loss are concerned, a perfect match – and thus uniformity – might not be possible or even necessary. Even more, it could come out as dangerous. Indeed, the different fields of international law serve and meet different purposes.

In this author's view, were the rule against reflective loss restored, the exceptions would have to be designed having in mind that what might work under international investment treaties might not prove effective in international human rights law, and vice versa. This should not be surprising. After all, they often operate according to different rules or upon different assumptions. In this respect, an example might prove more effective than a theoretical discussion.

Taking into consideration the alleged exception under general international law according to which a reflective loss claim might be admitted when the injured corporation holds the nationality of the wrongdoer State, its rationale is quite apparent. To the extent that, under the traditional inter-State dispute settlement procedure (*i.e.*, diplomatic protection) a State can only espouse the claim of its nationals, this exception aims at providing foreign shareholders with a protection since the locally incorporated enterprise cannot benefit from any.

However, if one were eager to apply the same exception under international human rights law, this would prove of limited use. Both at the universal and regional levels, indeed, there is nothing prohibiting a natural or legal person from claiming against the State of nationality. The exception, in other words, would not add anything to the protection of shareholders.

The greatest challenge forward, therefore, does lie in ensuring flexible solutions for each of the fields considered in this study. In this respect, the research is, perhaps, not yet concluded.

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