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

[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

[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]

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[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

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(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

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[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-

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[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.