Introduction

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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*